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TABLE OF CONTENT

EDITORIAL

BY JARMILA LAJČÁKOVÁ

All public discussions on the occasion of the 20th anniversary of independent Slovakia's emergence seemed to avoid the issue of the status of national minorities and ethnic groups. We can recall, however, that the establishment of the newly independent state of Slovaks was accompanied by fears of a portion of ethnic Hungarians and Roma. Minorities were concerned with increased assimilation pressure directed against them. Although Slovakia no longer receives regular demarches from international minority and human rights organizations, it has not made any palpable progress towards positive recognition of cultural and ethnic heterogeneity as something that should not be perceived as threat but rather as potential enrichment.

National and ethnic identity in Slovakia matters. If it did not, government would hardly feel such an intense urge to protect it by legislative means (e.g. State Language Act or amendment to State Symbols Act) and would probably not be nervous when some of its citizens decide to apply for another state's citizenship. After all, if ethnicity was not attached any value in Slovakia, qualified Roma would have equal chances to find proper jobs other than teaching assistants or social field workers.

As multiculturalists convincingly argued, ethnic neutrality of the state and state institutions

TEMPORARY EQUALIZING MEASURES: A UNIQUE OPPORTUNITY TO FINALLY PROMOTE ROMA INCLUSION

BY JARMILA LAJČÁKOVÁ

Almost every administration that ruled Slovakia in the past two decades adopted a new extensive strategy to address problems of poor Romani communities; the incumbent administration went as far as calling it a "reform". Regardless of nomenclature, each new administrative apparatus spends most of the first half of its tenure trying to invent the wheel (i.e. testing solutions and measures that have been tried before, successfully or not). Also, each change in government disrupts continuity and plays havoc even with funding of the few tools that have been proven to hamper further marginalization of the Roma (e.g. teaching assistants, social fieldworkers or health care assistants). Any courageous attempt to introduce systemic changes or financially-intense policies is nipped in the bud by individual ministries during the interdepartmental debate procedure. Typically, the cabinet relies on toying with social security system's settings; naturally, cosmetic changes to the system of supporting destitute families are unable to jumpstart the integration process, even if, unlikely, their authors did intend to achieve inclusion of these communities.

ADOPTION OF TEMPORARY EQUALIZING MEASURES IS A UNIQUE CHANCE TO FACILITATE INCLUSION PROCESSES

Despite its rather unfortunate initial decisions related to this issue, the incumbent administration apparently decided not to jump in the same river again. Instead of potentially dangerous political marketing of the so-called Pollák reform;[1] it proposed an amendment to Antidiscrimination Act that seeks to enact temporary equalizing measures (TEM) on the ethnic basis. Elaborated by experts as opposed to politicians, the cabinet-initiated bill on TEM[2] offers substantially more options to catalyze the process of Roma integration than another set of empty phrases or proposals to reduce already insufficient material need benefits even further.

Parliament passed the cabinet's bill as Resolution No. 402/2013 of February 5, 2013; effective April 1, 2013, the amendment allows *"public administration organs or other legal persons to adopt temporary equalization measures aimed at eliminating disadvantages that ensue from racial or ethnic origin, affiliation to a national minority or ethnic group, gender or sex, age or health handicap and ensuring equal opportunities in practice"*.[3]

Most observers and experts that specialize in public policies targeting the Roma certainly appreciated government's willingness to adopt such relatively unambiguous legal definition of

1 For further details on the Pollák reform, please see Jarmila Lajčáková – Elena Gallová Kriglerová: "Newly Introduced Policy towards the Roma: Yet Another Misunderstood Integration?" in *Minority Policy in Slovakia* No. 3/2012, p.1; available at: http://www.cvek.sk/uploaded/files/Mensinova%20politika%203_2012.pdf

2 The bill was approved by Slovak Government Resolution No. 598/2012 of October 31, 2012.

3 According to the bill, temporary equalization measures are "especially measures a) aimed at eliminating social or economic disadvantage, which excessively often befalls members of disadvantaged population groups; b) based on encouraging interest in employment, education, culture, health care and services on the part of disadvantaged population groups' members; c) aimed at restoring equality in access to employment, education, health care and housing, especially through specific training programs targeting members of disadvantaged population groups or disseminating information on such programs or possibilities to apply for jobs or enrol in education system's institutions."

is a myth. Government actively promotes Slovaks' national identity through supporting their language and culture by a variety of tools that range from printing literature or history textbooks, celebrating memorable days or erecting various monuments in public places (e.g. the statue of Svätopluk at the Bratislava Castle). As Alena Chudžíková points out in her article on enforcing State Language Act, the problem is not support of Slovak language and culture as such but rather its excessive intensity. We believe this intensity ensues directly from the feeling of threat allegedly posed by minorities, including immigrants as discussed in an article by Zuzana Števulová. As I argued in past issues of *Minority Policy in Slovakia*, this myth of threat is construed by political elites who aim to score political points. Apparently, the population's resistance to such manipulation has not yet reached the critical mass. Political elites, moreover, control the institution that is crucial to (re)producing the myth – education system.

It would be hypocritical to endorse (overtly or latently) efforts aimed at strengthening the dominant population group's ethnicity while ignoring the fact that affiliation to a minority is often the main reason for discrimination. As the article discussing temporary equalization measures (a pendant of affirmative action in Slovakia) points out, many countries have relatively successfully opted for affirmative action or other forms of positive action as one of the most effective method of remedying social inequalities. Although affirmative action policies are not without its problems, they represent a standard and well-tested tool of creating opportunities for minority members. Ideally, affirmative action transfers a share of power, prestige and prosperity that has been disproportionately accumulated by the dominant population group. A clear legislative regulation and well-thought-out implementation of temporary equalization measures gives the incumbent administration a unique opportunity to make substantial progress in the field of integrating the Romani minority in particular. Instead of pointless and harmful marketing of the recent reform of policies vis-à-vis the Roma for which the new government plenipotentiary for Romani communities apparently lacks capacity as well as authority, it seems more appropriate to spend energy on time-tested solutions, although they are not likely to score political points.

The roots of anti-Hungarianism, anti-Gypsism or xenophobia among teenagers and their parents may be found in education system's failure to promote perception of all people as equal human beings regardless of their complexion, name or mother tongue. That is why we sincerely welcomed the recent verdict issued by the Regional Court in Prešov in the case involving racial segregation at one primary school, which is also examined in this edition.

Dear readers, I hope that the latest edition of our quarterly offers thought-provoking reading that will inspire you to contemplate dissimilarity in a way that is different from notorious phrases about a thousand-year oppression of the Slovak nation.

I wish you a pleasant time.

>>TEMPORARY EQUALIZING MEASURES: A UNIQUE OPPORTUNITY TO FINALLY PROMOTE ROMA INCLUSION

TEM, which is known as *affirmative* or *positive action* in English. Over the past decade, adoption of this measure has been hindered not only by conservative politicians but also by the legally confusing interpretation of the equality principle by the Constitutional Court.[4] In a number of countries, affirmative action measures have been adopted in order to equalize chances to participate on the labour market or in education system for historically disadvantaged population groups such as ethnic or racial minorities or women.

MATERIAL VS. FORMAL EQUALITY

The basic philosophy of TEM is substantive equality, a principle according to which equal treatment may not always imply identical treatment of all people.[5] Equal treatment takes into account individuals' different context, situation in which they are and especially the nature of disadvantages facing them.

For instance, real opportunities of a female job applicant who grew up in a poor Romani settlement are essentially lower compared to those of her female peer who was born to a Slovak family from a nearby village. It is very likely that she was placed in a special school as a child, either because of her ethnicity, her language or her family's very modest standard of living. Compared to her non-Romani peer, she had to expend substantially greater effort on acquiring equal education or qualifications; but even though she has succeeded, there is still a fair chance that personnel officers of the hiring company or organization who assess her job application will be prejudiced. Also, her chances to get the job may be significantly lower due to intense gender stereotypes and expectations related to a different role of the woman in poor Romani communities compared to that of the woman in majority society. The principal ambition of TEM is to equalize this Romani woman's chances to get the job or, better yet, to acquire the necessary education and qualifications or eliminate the negative effects of widespread prejudices even before she arrives to do the job interview.

"The basic philosophy of temporary equalizing measures is substantive equality, a principle according to which equal treatment may not always imply identical treatment of all people. Equal treatment takes into account individuals' different context, situation in which they are and especially the nature of disadvantages facing them."

Substantive equality is different from formal equality, which is blind to existing or past wrongs and disadvantages. TEM may be based on a combination of ethnic, social and gender criteria. They may take on the form of tuitions, scholarships, preferential treatment in admission to secondary schools and universities, programs aimed at supporting creation of new jobs or quotas for disadvantaged population groups in public procurement.

INSPIRING EXPERIENCE FROM ABROAD

Other countries' experience shows that affirmative action measures are effective in helping members of disadvantaged population groups create a middle class. For instance, *The Shape of the River*, one of the most complex studies examined affirmative action measures focused on Afro-American and Caucasian students during and after their stud-

4 For further details on the Constitutional Court's problematic ruling of 2005, please see Jarmila Lajčáková (ed.): *Menšinová politika na Slovensku v roku 2011: Výročná správa* [Minority Policy in Slovakia in 2011: An Annual Report], (Bratislava: CVEK, 2012), pp.59-91.

5 For further details, please see two concepts of equal opportunities and equal outcome, namely *Dočasné vyrovnávacie opatrenia podľa Dohovoru o odstránení všetkých foriem diskriminácie žien* [Temporary Equalization Measures According to the Convention for the Elimination of All Forms of Discrimination against Women], an analysis prepared for Freedom of Choice 2012; available at: http://moznostvolby.files.wordpress.com/2012/09/doc48dasnc3a9-osobitnc3a9-opatrenia-podc4beamedzinc3a1rodnc3a9ho-dohovoru-na-odstrc3a1nenie-vc5a1etkc3bdchforiem-diskriminc3a1cie-c5beien-a-moc5benosti-ich-prijc3admania-na.pdf; and *Dočasné vyrovnávacie opatrenia: Medzinárodný a ústavný rámec s návrhom legislatívnej úpravy* [Temporary Equalization Measures: International and Constitutional Framework and Proposed Legislative Bill], (Bratislava: Milan Šimečka Foundation, 2007); available at: http://www.nadaciamilanasimecku.sk/fileadmin/user_upload/dokumenty/Do__asn___vyrovn__vacie_opatrenia_ANAL__ZA.pdf

ies at select U.S. universities.[6] The findings of the study revealed that racially sensitive admission criteria helped increase the overall share of university graduates of African American origin from 5.4% in 1960 to 15.4% in 1995. The share of African American students graduating from law schools increased from 1% to 7.5% over the same period; the share of medical faculties' African American graduates increased from 2.2% in 1964 to 8.1% in 1995.

According to the authors, affirmative action measures in the field of university education enormously increased representation of African Americans in more lucrative and influential professions, which later significantly helped form the middle class of African Americans.[7] The study also concluded that affirmative action measures had strengthened fairer distribution of prestige and prosperity among different racial groups. The form of affirmative action measures gradually changed from stipulated quotas to so-called softer methods. While applicants for university studies did not automatically receive extra points for their ethnicity, it was one of the factors of their complex evaluation.[8]

Slovakia may also seek inspiration in Romania, another EU member state with a sizeable Romani minority. The country launched pilot projects of affirmative action measures in the field of admission of Roma to secondary schools and universities already in the early 1990s. In 2000, the Ministry of Education issued a decree that guaranteed two places for Romani students in each class of each school around the country; stipulating the concrete number of places was up to the state school inspection.[9]

Within seven years of introducing the policy, the total number of Romani students admitted to such reserved places quintupled. At the time of gathering statistical data, almost half of all secondary school graduates (46%) and vocational school graduates (44%) had a job. This percentage was distorted by the fact that many secondary school graduates continued to study at universities. Among university graduates, the share of those who found a job reached 81%; of them, 42% worked with public institutions and 45% with private corporations.

Of course, the policy of affirmative action measures that significantly catalyzed the process of creating the Romani middle class was not free of problems. A large number of places reserved for Romani students remained vacant. Also, the policy created a disproportion between the number of Romani graduates from humanities and social sciences on the one hand and natural and technical fields of study on the other. Not all university graduates managed to find jobs that corresponded to their qualifications. Last but not least, the survey indicated that while enhanced qualifications of Romani job applicants had improved their access to the labour market, ethnic discrimination is far from being eradicated in this field.

THE STIGMA ARGUMENT

We believe that TEM must be viewed as complementary to a number of other measures and policies aimed at eliminating extreme poverty in marginalized communities, furthering education on human rights and antidiscrimination or effectively combating discrimination on the labour market. We are also convinced it is necessary to address the argument on alleged stigmatization of members of the target group, which is presented relatively frequently by those who oppose adoption of TEM.

The already mentioned study by Bowen and Bok makes no reference whatsoever to stigmatization of African American students that would ensue from the fact that they owed to affirmative action measures for their admission to prestigious universities. The authors argue if that was the case, these graduates' professional careers would compare badly to those of their colleagues who studied at less prestigious universities along with equally qualified Caucasian peers without being privileged during entry examinations; on the contrary, the survey corroborated that African American graduates from prestigious universities had more successful and more lucrative professional careers compared to their colleagues who graduated from less prestigious schools.[10]

"Temporary equalizing measures must be viewed as complementary to a number of other measures and policies aimed at eliminating extreme poverty in marginalized communities, furthering education on human rights and antidiscrimination or effectively combating discrimination on the labour market. It is necessary to address the argument on alleged stigmatization of members of the target group, which is presented relatively frequently by those who oppose adoption of temporary equalizing measures."

On the other hand, one cannot completely rule out the risk of ridicule and stigmatization facing Romani students who benefit from TEM; nevertheless, we believe the dominant population group should disregard this argument when deciding whether the disadvantaged minority should enjoy equal access to prestige, power and prosperity. After all, adoption of TEM is not justified only by the existing scope of discrimination but also by the admission of past wrongs that reach as far as forced assimilation during the reign of Maria Theresa, the Romani holocaust during World War II or forced assimilation during the communist regime, including the appalling practice of forced sterilizations. For these as well as other reasons it is crucial that the type and scope of TEM be approved after thorough consultations with representatives of the concerned minority, elected members of the Committee for National Minorities at the Slovak Government's Office and all civic associations or citizens who show interest in participating.

"The dominant population group should disregard the stigma argument when deciding whether the disadvantaged minority should enjoy equal access to prestige, power and prosperity. After all, adoption of temporary equalizing measures is not justified only by the existing scope of discrimination but also by the admission of past wrongs."

When outlining and enacting the basic scope of TEM, decision-makers and legislators should not forget that these measures do not have to target solely the residents of marginalized Romani communities who besides ethnicity are also disadvantaged by their socio-economic situation. For instance, TEM adopted by faculties and departments of prestigious universities shall be relevant for so-called integrated Roma who have managed to acquire the necessary secondary education. As we have pointed out earlier, the policy of TEM may not inevitably tackle the problems of destitute communities; it is rather important to building a strong middle class of the Roma and its gradually increased participation on distribution of prestige, power and prosperity, which is key to eliminating stigmatization of the Roma as inferior.

6 William G. Bowen – Derek Bok (1998), *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (Princeton University Press: Princeton, New Jersey).

7 *Ibid*, pp. 9-11.

8 Please see *Gratz vs. Bollinger*, 539 U.S.244 (2003).

9 For further details, please see *Analysis of the Impact of Affirmative Action for Roma in High Schools, Vocational Schools and Universities* (Budapest: Roma Education Fund, The Gallup Organisation Romania, 2009).

10 William G. Bowen – Derek Bok (1998), *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (Princeton University Press: Princeton, New Jersey) pp. 263-264.

"The eventual success of temporary equalizing measures in Slovakia depends on institutional support throughout the process of implementation, i.e. during their creation, introduction and monitoring. Temporary equalizing measures provide a solid foundation for pro-active Roma policies and a useful alternative to resorting to cheap repressive populism."

Last but not least, the eventual success of TEM in Slovakia depends on institutional support throughout the process of implementation (i.e. during their creation, introduction and monitoring). Therefore, the amendment to Anti-discrimination Act should also address the much debated issue of transforming the Slovak National Human Rights Centre, which seems the most logical subject to perform these tasks whereas it remains virtually dysfunctional for the time being.

TEM provide a solid foundation for pro-active Roma policies and a useful alternative to resorting to cheap repressive populism. It would be worthwhile incorporating them into action plans envisaged by the *National Strategy for Roma Integration until 2020* that was approved in January 2012 but is rather toothless at this point.[11] After all, long-term voting preferences of Smer-SD indicate that the ruling party does not need populist exploitation of the so-called Roma issue. ■

11 For further details on the strategy, please see Jarmila Lajčáková: "Strategy of Roma Integration Is Not Ideal But Offers Space for Change" in *Minority Policy in Slovakia* No. 1/2012, p.8; available at: http://www.cvek.sk/uploaded/files/2012_04_%20mensinova_2012_01_web.pdf

TOPIC: DESEGREGATION

RULING ON ŠARIŠSKÉ MICHAĽANY STANDS: COURT CONFIRMS SEGREGATION, CALLS FOR INCLUSIVE EDUCATION

"APPELLATE COURT CANNOT RESIST THE FEELING THAT THE MAJORITY POPULATION SEEMS TO JUSTIFY THE NOTION THAT ROMANI CLASSES REPRESENT A NORMAL SOLUTION" [1]

BY JARMILA LAJČÁKOVÁ

When we discussed the verdict issued by a Prešov judge in the case involving segregation of Romani pupils at the primary school with kindergarten in Šarišské Michaľany almost a year ago, we argued that the appellate court would find it extremely difficult to overthrow the original verdict in the case, partly because of the judicature of the European Court of Human Rights (ECHR).[2]

"The Regional Court's senate surpassed even the most optimistic expectations by issuing a very courageous decision addressed to the school as well as entire society. The chairman of the senate found the courage to question the broadly accepted and increasingly popular opinion that it is normal to segregate children in schools."

The Regional Court's senate not only confirmed our legal estimations but surpassed even the most optimistic expectations by issuing a very courageous decision addressed to the school as well as entire society. The chairman of the senate found the courage to question the broadly accepted and increasingly popular opinion that it is normal to segregate children in schools, which is implicitly justified by alleged inferiority of Romani pupils compared to their non-Romani peers. The judge pointed out an aspect that often seems to elude most debates on the so-called Roma issue: respect for human dignity requires that human beings be treated as subjects of the law, as opposed to its objects. In doing so, the judge not only highlighted the school's failure but also suggested the inevitability of furthering inclusive education, which is rooted in the paradigm of respecting human dignity of all children regardless of their complexion, social background or health handicap.

ACCORDING TO THE SCHOOL THE COURT HAD ERRONEOUSLY INTERPRETED THE EVIDENCE

In its appeal of the original verdict, the primary school in Šarišské Michaľany argued that the district court had erroneously interpreted the evidence produced. According to its lawyers, the court should not have taken into account only the findings of a field research carried out by the Centre for Civil and Human Rights, which concluded that most Romani parents agreed with segregated education only because they had become used to it and/or because they feared humiliation and other reprisals against their children. According to the school's appeal, the court should have taken into account a testimony by one Romani mother who had expressed satisfaction with segregated education because her daughter reportedly achieved better grades in the segregated class than in the mixed one. The judge of the district court had evaluated such evidence on alleged informed consent to children's segregation as a proof of the defendant school's "inability to face responsibly

1 Judgement by Regional Court in Prešov in Advisory Bureau for Civil and Human Rights vs. Primary School with Kindergarten in Šarišské Michaľany, Case No. 20 Co 125/2012, 20 Co 126/2012, of October 30, 2012, p.18.

2 Jarmila Lajčáková (2012), "Primary School in Šarišské Michaľany: Accepting Segregation vs. Desegregating", *Minority Policy in Slovakia*, No. 1/2012, pp. 4-6.

problems such as potentially negative relations between Romani and non-Romani children and systematically promote their mutual rapprochement."

The school also protested against the district court judge disregarding its argument that segregation of children from socially disadvantaged environment was necessary to apply individual teaching methods. In concrete terms, these methods included slower pace of education, multiple repetition, algorithmization of education content and optimum coding. Although the school's appeal did not explicitly cite these methods, it made a reference to a testimony by one witness that makes the use of such methods obvious. Finally, the school repeated its argument that segregated classes had not been created on the ethnic principle but on the social one. According to school officials, placing poor children into regular classes might have led to slowing down of so-called better pupils as teachers would not have enough time to address their needs. According to this logic, the education process would be adapted to the 'slower' pupils. Socially disadvantaged children allegedly achieved better results in segregated classes that also contributed to reducing the truancy rate and improving their social habits.

THE JUDGE ARGUES FOR INTRODUCTION OF INCLUSIVE EDUCATION

These arguments were turned down also by the appellate court, which found that the district court had correctly assessed the produced evidence. The appellate court judge examined primarily so-called "practical" reasons for segregated education that were cited by school as well as municipal officials. These reasons included, for instance, preventing conflicts between Romani and non-Romani children or "hindrance" to non-Romani pupils' education by slower Romani ones. According to the judge, these were "purely segregationist arguments that are completely remote from the desirable inclusive approach … arguments that obviously support the very undesirable *status quo* no one in this society is happy about and everybody would love to change while it slowly but with probability bordering on certainty increases tension between Romani and non-Romani population".[3] The judge also pointed out a paradoxical situation in which the municipality and its school pretend to condemn segregation while its victims (i.e. Romani children and their parents) "are expected to accept with exultation that they can be segregated, that they can be 'themselves'".[4]

"The appellate court's judgement cited a testimony by one Romani mother to illustrate the results of long-term humiliation and stigmatization of the Roma as inferior: 'I think the reason [my daughter] did not have any [non-Romani] friends was that she is Roma; no matter if the Roma are neatly dressed or not, they will always be viewed as Roma.'"

The appellate court's judgement cited a testimony by one Romani mother to illustrate the results of long-term humiliation and stigmatization of the Roma as inferior. To a question of whether her daughter who had originally attended a mixed class had any non-Romani friends, the Romani mother responded: "I don't know, I wouldn't say so, although [she] went to school neatly dressed, she did not wear any ragged clothes and she mastered hygienic habits; I think the reason she did not have [non-Romani] friends was that she is Roma; no matter if the Roma are neatly dressed or not, they will always be viewed as Roma."[5]

Perhaps it was similar testimonies that made the appellate court judge take the extra step from establishing violation of the principle of equal treatment to arguing why segregation was wrong. According to him, the school treated Romani pupils "as objects of law, as opposed to its subjects. Instead of lice and squalor, [the school] separates children. The fact that the [practice] concerns children is particularly deplorable."[6] Citing a ruling issued by the Czech Constitutional Court, the judge emphasized respect for human dignity, which prevents treating people as objects. Emphasizing awareness of its potential unpopularity within the academic community, "the appellate court, like the court of the first instance, established ethnic segregation in the light of the principle of equality and protection of human dignity."[7]

HOW TO PROCEED WITH DESEGREGATION?

The appellate court judge relatively extensively elaborated on potential ways to remedy the unlawful state of affairs. While admitting that integration of Romani children was not an easy task, he argued that the school as well as the municipality must strive for it. He pointed out the benefits of inclusive education for society, Romani and non-Romani pupils, as well as for the school, emphasizing that inclusive education was based on a specific approach to each child and respecting his or her personality. The judge pointed out that "dissimilarity of children should be viewed as an opportunity to develop respect for oneself as well as others since it encourages empathy, tolerance, consideration and responsibility".[8]

"The judge pointed out the benefits of inclusive education for society, Romani and non-Romani pupils, as well as for the school, emphasizing that inclusive education was based on a specific approach to each child and respecting his or her personality. Dissimilarity of children should be viewed as an opportunity to develop respect for oneself as well as others."

According to the appellate court, it is not necessary to stipulate the ratio of Romani and non-Romani children in mixed classes; the judge even argued that such a ratio was irrelevant. The placing of children into classes should be a natural process; in other words, the criterion of ethnic affiliation should not play any role. The appellate court judge admitted that the process of desegregation might take several months, which is why it requires collaboration of pedagogues, psychologists and Romani children's parents. At the same time, he urged the government to provide necessary financial assistance to the school. The verdict binds the school to remedy the unlawful state of affairs by the first day of the next academic year.

The judgements issued by the district court judge and the appellate regional court's senate in Prešov inspire hope that the judicial power has responsibly assumed its role to protect fundamental human rights regardless of popularity within the professional community or the general public. Now it is up to the executive power to demonstrate respect for its decisions. ■

3 Judgement by Regional Court in Prešov in Advisory Bureau for Civil and Human Rights vs. Primary School with Kindergarten in Šarišské Michaľany, Case No. 20 Co 125/2012, 20 Co 126/2012, of October 30, 2012, p.12.
4 Ibid, p.13.
5 Ibid, p.17.
6 Ibid, p.13.
7 Ibid, p.20.
8 Ibid, p.14.

WHAT MAY ŠARIŠSKÉ MICHAĽANY VERDICT BRING TO DESEGREGATION IN SLOVAKIA?

BY ELENA GALLOVÁ KRIGLEROVÁ

The primary school with kindergarten in Šarišské Michaľany is by no means an isolated case of segregation. Our surveys as well as those carried out by various other organizations indicate that segregation in different forms has become a substantial institutional tool many schools in Slovakia apply to deal with what they view as a "problem" whereas the real problem is that the country's education system is currently unable to respond to children's educational needs and Romani children are the first victims of this incompetence.

Neither the district court judge nor the regional court's senate could have possibly ruled in any other way as segregated education in Šarišské Michaľany was obvious despite all arguments the school presented in its motion to appeal the verdict. School officials' reluctance to adopt desegregation measures is not surprising. Since they were the ones to resort to segregation in the first place, it would be difficult to expect that they will suddenly and happily begin to further inclusive education.

Nevertheless, the verdict is legally binding and should also apply to other schools, since the appellate court clearly held that interpretation of Antidiscrimination Act or Schooling Act did not allow for segregation of children based on ethnicity. Consequently, the ruling in the case of Šarišské Michaľany primary school should become a precedent that will help tackle the problem throughout Slovakia.

DESEGREGATION IS IMPOSSIBLE WITHOUT INVOLVING A BROADER COMMUNITY

In the process of desegregation it is extremely important that all involved actors become fully aware of this commitment and act together in order to attain the common goal. Without government's support and setting of various systemic mechanisms, desegregation will become a Sisyphean task for local players. Schools do not operate in a vacuum as they form part of broader local communities and mutual ties that often affect their functioning. If relations between municipality's inhabitants are tense and segregation shows also in other areas (e.g. housing), it is very likely that it will be reproduced in the local school.

"In the process of desegregation it is extremely important that all involved actors become fully aware of this commitment and act together in order to attain the common goal. Without government's support and setting of various systemic mechanisms, desegregation will become a Sisyphean task for local players. Schools do not operate in a vacuum as they form part of broader local communities and mutual ties that often affect their functioning."

That is why it is crucial to get entire local communities involved in the process of desegregation. It is important to communicate with all children's parents in order to define the common interest and adopt measures that may lead to inclusive education. Needless to say, this is not an easy task. In a number of municipalities and particularly in Šarišské Michaľany, social tension is so strong that the ruling met with significant resistance among the majority population. Mechanically mixing Romani and non-Romani children without further intervening with mutual relations may escalate this tension even further. Currently available are various methods of working with entire communities (e.g. different forms of mediation and facilitating conflict solution) that may help mitigate tensions and produce consensual solutions; however, all those involved must have a say in order to achieve the common goal.

NEED TO INTRODUCE INCLUSIVE EDUCATION

But perhaps the most important is to change the very nature of education throughout Slovakia. Children do not tend to run away from a school where they feel comfortable. If education system is able to find the form and create structures that respect all children, respond to their needs and provide quality education to them, the goals of inclusive education will be achieved. If outflow of non-Romani children is the 'problem', segregating the Romani ones is hardly the solution. The parents certainly have the right to choose a school for their children; however, if they are unhappy with the local school because it is also attended by Romani children, they must be prepared to bear the costs that ensue from transferring their children to a more remote school. Because of the currently valid system of per capita financing, school officials' fear of losing pupils is understandable; however, a question remains whether they would be equally worried about a potential though highly hypothetical outflow of Romani pupils. Their poorly masked anxiety that the school might become dominated by Romani children speaks volumes of which pupils are preferred and which are not.

"If outflow of non-Romani children is the 'problem', segregating the Romani ones is hardly the solution. A question remains whether they would be equally worried about a potential though highly hypothetical outflow of Romani pupils. Their poorly masked anxiety that the school might become dominated by Romani children speaks volumes of which pupils are preferred and which are not."

Be it as it may, the right to education belongs to all children. If any school aims to attract them, it must strive to become a truly good school. Of course, that will require a great number of systemic changes, particularly in terms of attitude to children, as well as more funds. But a school that intends to help children exercise their right to education must be able to find a way to offer adequate education to all children. The best way is inclusive education that was suggested by the appellate court judge and is actively promoted in the long term by our organization.

After all, references to the principle of inclusive education were made by the Strategy of Roma Integration until 2020 and the recently announced reform introduced by the new government plenipotentiary for Romani communities. Children should be placed into classes at random, in line with the principle that *"every child is gifted at something and therefore there is no reason to select children according to their abilities"*. While physical desegregation is only the first step toward inclusive education, it is an inevitable prerequisite not only to offering them the kind of education they truly need but also to respecting all children in compliance with all fundamental human rights documents Slovakia officially subscribes to.

SLOVAK COURTS: NEW PROTECTORS OF MINORITY RIGHTS?

BY ŠTEFAN IVANCO

Improving the standard of minorities' human rights protection and implementation is a truly complicated task for any non-governmental organization. The reason is that the majority society does not exactly jump for joy every time someone proposes to enhance the standard of minority rights. And when the majority does not jump for joy, those who administer public affairs and carefully listen to the *vox populi* are not exactly enthusiastic either. This is even truer for such an ostracized ethnic minority as the Roma in Slovakia. One could expect that politicians would pay due attention to the standard of 'unpopular' minorities' rights at least in early stages of the electoral cycle, but even then they often lack the infamous 'political will'.

Under these circumstances, activity on the part of courts of justice is immensely invaluable. After all, protection and implementation of minority members' rights has been guaranteed and anchored in international conventions, national constitutions and regular laws for many decades. Courts in various countries demonstrated on a number of occasions that their contribution to bettering the standard of minority rights in the broader social context can be nothing short of essential. Slovakia does not have to be an exception in this respect; therefore, the institution of strategic litigation or strategic lawsuit adjudication is of indisputable importance in the country's legal order.

Strategic litigation is a very traditional way of furthering various population groups' human rights within society. Its emergence was closely connected to the process of developing the international legal framework aimed at protecting and implementing human rights after World War II and the rise of the civil rights movement of the African American population in the United States in the 1950s.

The crux of strategic litigation in the broadest sense of the word is the effort to bring about social changes through application of existing legal means of judicial practice. In other words, its goals are not solely on the level of individuals who demand remedies for inflicted wrongs before courts of justice. These goals are clearly identified in advance and usually have broader social character and/or implications.

Strategic litigation is often used to highlight and remedy previously overlooked violation of human rights, wrong practical interpretation or implementation of concrete legal rules, discrepancy between internal legal rules and international human rights conventions, etc. Strategic litigation usually forms part of a broader campaign to implement human rights, which continues even after the litigation itself has been concluded.

STRATEGIC LITIGATION IN THE CASE OF ŠARIŠSKÉ MICHAĽANY

A typical example of strategic litigation in the field of minority rights' protection and implementation is a recent lawsuit against the primary school in Šarišské Michaľany, which was the historically first litigation in which a Slovak court of justice adjudicated on the issue of racial segregation in education. On the legal level, its ambition was to make the court issue a more detailed specification of racial segregation as one of the forms of racial discrimination in compliance with Antidiscrimination Act. At the same time, it tried to lend concrete content to the formal ban on segregation that forms part of Schooling Act.

In the broader social context, the principal ambition of this litigation was to send an unambiguous signal that the practice of separated education of 'socially disadvantaged' Romani children may have been tolerated in the long term but was nonetheless unlawful and that specific methods and forms of education applied within education system simply must not segregate. Equally importantly, the litigation aimed to demonstrate that segregated education could not possibly ensure full implementation of the constitution-guaranteed right to education and, consequently, intensify the public debate on the need to further inclusive education within the country's education system.

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LEGAL ACTION IN THE PUBLIC INTEREST AS A MEANS OF MINORITY RIGHTS PROTECTION

Since strategic litigation brings new legal issues and/or legal aspects before courts of justice, it also implies significant risks. The success of litigation is directly determined by the quality of courts' decision-making practice and their independence from other constituents of state power. As long as overall peace of domestic courts' decision-making practice is too low, strategic litigation amounts to walking on a very thin ice.

Extremely important in this respect is the European Court of Human Rights, which provides an invaluable safety net in case domestic courts make a mistake. Also, it is impossible to ignore obvious differences between traditional ways of enforcing minorities' rights in courts, particularly in Anglo-American countries, and strategic litigation in the region of post-communist Europe, which is developing rather slowly. In these geographic longitudes, people show much lower confidence in general courts and fail to see them as effective tools of meting out justice.

In this context we should be particularly grateful to Antidiscrimination Act, which provides for initiating a so-called *legal action in the public interest* if fundamental human rights of a sizeable population group are being violated. Under certain circumstances, such legal actions may also be filed by non-governmental organizations, which in this way are free to solicit for enforcement of minority rights even without concrete complainants. Many citizens whose human rights are violated choose not to enforce them in court of justice because they fear various forms of victimization. Without the option to take *public action* provided by Antidiscrimination Act, it would be much more complicated to bring to court the mentioned case of segregating Romani children by the primary school in Šarišské Michaľany.

The future of strategic litigation in the field of protecting and implementing minority rights in Slovakia directly depends on whether our courts are willing and able to bring their decision-making practice in compliance with guaranteed minority rights and accelerate it substantially. Non-governmental organizations' financial and human resources as well as their ability to scout for concerned citizens who are willing to bring concrete cases to courts will also play a crucial role.

Last but not least, it will also depend on tangible changes strategic litigation is able to bring about in the field of minority rights. In any case, strategic litigation has the potential to improve protection and implementation of minority rights in our society and one may only hope that it will play an increasingly important role in the future. ■

SNARES LURKING FOR THE STATE LANGUAGE

BY ALENA CHUDŽÍKOVÁ

In late November 2012, the Ministry of Culture submitted to cabinet deliberations the *Report on the Situation of Using State Language*, which examines the state of affairs in the field of using Slovak language in several basic areas of official contact. The report is important mostly because it tells volumes about the way the incumbent administration intends to construe Slovakia and allegiance to Slovak customs and/or aspirations. According to the report's authors, "the situation in the field of using Slovak language continues to be generally unfavourable"; the reasons for this state of affairs should be sought in the crisis of values and general deviation from "traditional values the Slovak nation professed for centuries … [such as] actively demonstrated patriotism and [willingness] to become involved in defending the causes of nation and national culture."[1]

In our opinion, the report is highly problematic because it refers to vaguely defined threats to even more vaguely defined traditional values the Slovak nation allegedly professed for centuries. These traditional values, which must be protected according to the report's authors, are applied solely to the ethnically defined Slovak nation and thus exclude members of other national minorities and ethnic groups from the political community. The rhetoric used by this rather extensive report reminds one of national-revivalist texts from the mid-19th century and is saturated with fears of national identity's gradual erosion; this erosion is most perceptible in the field of language, which according to the report's authors is the basic tool of instilling patriotic feelings and values into young people.

THREAT OF THE NATION AS THE GUIDING PRINCIPLE

Besides the right to master the state language, the Slovak Constitution also guarantees members of national minorities and ethnic groups the right to education in their native language and the right to use that language in official contact; however, the public debate on protection and implementation of language rights in Slovakia hardly respects the provision on the *right* to master the state language. On the part of the majority nation, we can rather see efforts to protect its language against threats and negative influences, which is clearly perceptible not only in the mentioned report but also in State Language Act itself. On the one hand, the law rather pragmatically identifies the state language to be the general means of communication and the tool of ensuring equality and liberty of all citizens. At the same time, though, it attaches added value to the state language – and solely with respect to the majority Slovak nation – by saying it is the most important characteristic of the Slovak nation, the most precious value of its cultural heritage and the reflection of sovereignty of the Slovak Republic.

"Enacting one language as the only state language may of course be perceived purely instrumentally, as effort to introduce an effective communication tool; however, no language may remain strictly neutral, which may be clearly illustrated by the mentioned section of State Language Act. As soon as government defines one language as the state language, it simultaneously (re) produces hierarchic structures within the state."

Enacting one language as the only state language may of course be perceived purely instrumentally, as effort to introduce an effective communication tool; however, no language may remain strictly neutral, which may be clearly illustrated by the mentioned section of State Language Act. As soon as government defines one language as the state language, it simultaneously (re)produces hierarchic structures within the state, furthers the need for centralization and construes phenomena such as loyalty or national identity.[2] These tendencies should be outweighed by acknowledging the value and importance of other languages; in Slovakia, though, these languages are perceived as a direct threat to the state language. Perhaps that is why State Language Act in Article 1 formally enacts dominance of the state language over other languages that are used on Slovakia's territory. Taking it farther, if Slovak language is the most important characteristic of the Slovak nation, we may assume that the Slovaks are the dominant nation on Slovakia's territory, at least for those who drafted and passed the law.

DO WE HAVE A CLUE OF WHAT THREATENS OUR NATIONAL IDENTITY?

Instead of informing on how the *right* of all citizens to master the state language is being implemented, the report focuses on presenting "alarming" findings on how the state language in various areas of use succumbs to negative influences of the modern time and how little attention is paid by responsible state agencies to protecting its "unchangeable" nature.

The Ministry of Culture has demonstrated its determination to preserve traditional grammatical rules of Slovak language also in public debates on other issues, for instance feminine derivatives of masculine surnames, which according to the Ministry is the "exclusive feature of Slovak language's grammatical system that no law should interfere with and thus warp the rules that are valid in Slovak language."[3] Apparently, some government organs are ready to interpret some women's refusal to use feminine derivatives of masculine surnames as signalization of their formal refusal of Slovak citizenship and/or desire to create ambivalent (gender and national) identities.[4] Hopefully, they are not prepared to go as far as interpreting the refusal to use feminine derivatives of masculine surnames as an explicit wish to renounce Slovak citizenship and consequently the reason to revoke Slovak citizenship from these women.

Be it as it may, such static perception of culture and language as its part is rather problematic. Culture is not an unchangeable set of rules and customs but rather a historically created yet dynamic and variable system of beliefs and practices that is constantly redefined by various economic and political institutions.[5] The change factors also include foreign language influences and the modern world's increasing mobility and interconnection, which the report's authors seem to view as principal threats. According to them, various English or Czech turns of speech disrupt invariable and traditional forms of Slovak language; perhaps unwittingly, they officially

1 The Ministry of Culture of the Slovak Republic (2012), *Správa o stave používania štátneho jazyka* [Report on the Situation of Using State Language], p.3.

2 Kymlicka, Will – Grin, François (2003), "Assessing the Politics of Diversity in Transition Countries" in Daftary, Farimah – Grin, François (eds.) *Nation-Building, Ethnicity and Language Politics in Transition Countries*, (Budapest: ECMI, p.9).

3 Please see http://www.sme.sk/c/6673595/kalinak-chce-dat-zenam-moznost-nepouzivat-ova-madaric-je-proti.html

4 The Ministry of Culture of the Slovak Republic (2012), *Správa o stave používania štátneho jazyka* [Report on the Situation of Using State Language], p.22.

5 Jarmila Lajčáková (2012), "Metóda zdôvodnenia právnych noriem" ['The Method of Justifying Legal Rules'] in Jarmila Lajčáková (ed.) *Menšinová politika na Slovensku v roku 2011. Výročná správa* [Minority Policy in Slovakia in 2011: An Annual Report], (Bratislava: CVEK, p.18).

subscribed to one of the Slovak nations' most traditional values, which the Slovak National Party captured in one of its notorious campaign slogans of "We Don't Want Anybody Else's – We Won't Give Up Ours."[6] Taking this attitude *ad absurdum*, the Report's authors consider teaching of foreign languages also a threat because students with "superficial and unsteady knowledge of pronunciation principles of native Slovak language easily replace them with principles mastered during foreign language studies."[7]

THE MORE LANGUAGES YOU KNOW…

The obligation to have sufficient command of the state language is often presented as a benefit for members of national minorities and a tool of their protection against being isolated in language ghettos. The ability to master several languages is undoubtedly an advantage; however, language ghettoization is only possible if society's overall attitude to other (i.e. non-dominant) languages allows it.[8] On a second thought, could it be that the report's authors point out the danger of "language ghettos" because they are in fact afraid of the Slovaks becoming isolated? After all, the report points out the "increasing pressure on citizens of Slovak nationality to have good command and use of [Hungarian] language when applying for jobs with private businesses" on ethnically mixed territories.[9]

"Language rights of national minorities, for instance the right to state public signs also in minority languages, are often interpreted as an automatic restriction of the majority's right to use the state language. Yet, only 144 out of 512 municipalities that are entitled by law to use Hungarian in official contact actually exercise this right (fully or partially) and only 166 of them use Hungarian as the language of negotiations."

Language rights of national minorities, for instance the right to state public signs *also* in minority languages, are often interpreted as an automatic restriction of the majority's right to use the state language. Yet, according to the *Report on the Situation in Using Languages of National Minorities*,[10] only 144 out of 512 municipalities that are entitled by law to use Hungarian in official contact actually exercise this right (fully or partially) and only 166 of them use Hungarian as the language of negotiations. Annex 1 to this report states that only 159 of these municipalities actively inform about the possibility to use the minority language in official contact.

Another negative phenomenon identified by the Ministry of Culture is that ethnic Hungarian children in kindergartens where Slovak is the language of instruction speak Hungarian among themselves. Even more alarming was the outcome of testing carried out among 4,538 pupils from 208 primary schools with Hungarian as the language of instruction. The testing revealed that "pupils had difficulties especially with proficiency in grammatical structures and knowledge of basic Slovak literary works and genres. In the thematic field of literature, the pupils did not know basic Slovak literary works from the second half of the 19th and the first half of the 20th century, their authors or even basic literary genres". The average success rate of tested pupils reached 53.4%.[11]

But is it fair to blame these knowledge shortcomings to teachers' negligence of teaching Slovak at 'Hungarian' schools? How would 'Slovak' pupils perform in similar testing? Just for the sake of comparison, the average success rate of pupils from schools where Slovak is the language of instruction in Testing 9 (the so-called ninth-grade monitor) from Slovak language and literature was 54.5% in 2012.[12]

Most importantly, are Culture Ministry's fears truly justified? If anyone can speak of threats to language identity at all, it is members of minorities whose language rights are severely restricted by the provisions of State Language Act, which interferes even with areas no government should poke its nose into. For instance, patients and doctors are according to this law allowed to use minority languages only in municipalities that are explicitly listed in a government order.[13] In other words, the basic criterion for providing quality health care is not smooth communication between doctors and their patients but what language they use and where they currently are.[14]

There is an old Slovak proverb that goes "the more languages you know, the more persons you are". Apparently, this proverb has a long way to go before it is truly honoured in Slovakia, at least with respect to languages of autochthonous national minorities, which are attributed a rather sentimental value and are perceived as something minority members may use at home or in private as an expression of their different identity whereas in public they should use "soft and melodious Slovak language". By issuing the report, the Ministry of Culture once again demonstrated its desire to keep dissimilarity behind closed doors. ■

6 Please see http://www.sns.sk/o-nas-2/symbolika-sns/

7 The Ministry of Culture of the Slovak Republic (2012), *Správa o stave používania štátneho jazyka* [Report on the Situation of Using State Language], p.15.

8 Tina Gažovičová (2012), "Menšiny a jazyk v politickom diskurze" ['Minorities and Language in the Political Discourse'] in Jarmila Lajčáková (ed.) *Menšinová politika na Slovensku v roku 2011. Výročná správa* [Minority Policy in Slovakia in 2011: An Annual Report], (Bratislava: CVEK, pp.131-139).

9 The Ministry of Culture of the Slovak Republic (2012), *Správa o stave používania štátneho jazyka* [Report on the Situation of Using State Language], p.25.

10 Please see http://www.rokovania.sk/File.aspx/ViewDocumentHtml/Mater-Dokum-151342?prefixFile=m_

11 The Ministry of Culture of the Slovak Republic (2012), *Správa o stave používania štátneho jazyka* [Report on the Situation of Using State Language], p.17.

12 Please see http://www.nucem.sk/documents//26/testovanie_9_2012/vysledky/T9_2012_vyhodnotenie_pdf.pdf

13 Slovak Government Order that alters and amends Slovak Government Order No. 221/1999, which issues the list of municipalities where citizens of the Slovak Republic belonging to a national minority make up at least 20% of the population.

14 Jarmila Lajčáková (2012), "Minority Language Rights" in Jarmila Lajčáková (ed.) *Menšinová politika na Slovensku v roku 2011. Výročná správa* [Minority Policy in Slovakia in 2011: An Annual Report], (Bratislava: CVEK, p.40).

'IMPROVING' GUARANTEES FOR FOREIGNERS' RIGHTS: NEGLIGENCE OR DESIGN?

BY ZUZANA ŠTEVULOVÁ

During Christmas the media brought information that from now on, asylum seekers and detained migrants must not be legally represented by lawyers of non-governmental organizations who used to do it for free but solely by certified attorneys. With rather ironic timing, the change was introduced by the recent amendment to Advocacy Act, which significantly complicated not only access to legal profession but also to legal aid. The Ministry of Justice claims that excluding non-governmental organizations from representing these often des-

titute foreigners in courts will improve the quality of legal assistance provided to them.[1] But is it so? In the following analysis, we shall examine how this change will affect legal protection of detained migrants and asylum seekers.

ASYLUM PROCEDURES

Asylum applications are processed by the Migration Office of the Ministry of Interior, which decides whether asylum seekers obtain the asylum status or receive subsidiary protection. It does so in administrative action that is attended by individual asylum seekers and their legal representatives, provided that the asylum seeker chooses to appoint one. The asylum procedures are governed by the provisions of Asylum Act[2] and Code of Administrative Procedures.[3] None of these two legal rules *stipulates who may represent participants of administrative action*; in other words, none of them spells out that they must be represented by a certified attorney.

A different situation arises when the asylum seeker objects to the Migration Office's decision and wants to appeal it. In such case, the asylum seeker is required to write a legal remedy against the decision in Slovak and submit it to the court within 30 days of delivering the decision. In the appeal, the asylum seeker must specify and describe the reasons for objecting to the Migration Office's decision. The ensuing procedure takes place before the court of law,[4] which is why it is subject to relatively strict rules. At this point, asylum seekers usually need legal assistance because in most cases *they are unable to write a legal remedy in Slovak by themselves*.

MIGRANT DETENTION PROCEDURES

By detaining migrants, the police decide to restrict their personal freedom for the purpose of their forced return (i.e. deportation from Slovakia's territory), provided these migrants have dwelled on Slovakia's territory without proper authorization (i.e. residence permit). After detention, migrants are placed into special police facilities for detained foreigners where they await deportation. The detention warrant is issued in administrative action, either by the department of alien police or the department of border control.[5] The particulars of decision-making procedures are stipulated by Alien Residence Act.[6] Detained foreigners may also appeal the decision on their detention in court; however, the legal remedy must be filed within 15 days of delivering the decision.

Again, we speak of foreigners who do not have sufficient command of Slovak language and/or adequate knowledge of Slovakia's legal order. At the same time, detention stands for restricting individual's personal freedom for reasons other than perpetrating a criminal offence (i.e. 'merely' for committing a transgression). Since personal freedom is a fundamental human right, any interference with it must comply with conditions spelled out by Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms. One of these conditions is that every individual whose personal freedom has been restricted is guaranteed the right to file a motion to start expedited judicial proceedings in which an applicable court of law must decide on the legality of restricting their personal freedom and order their release if the detention has been illegal. Throughout the procedure, access to qualified legal assistance may determine the appeal's success and facilitate the detainee's release.

CURRENT STATE OF AFFAIRS IN THE FIELD OF PROVIDING LEGAL ASSISTANCE TO ASYLUM SEEKERS AND DETAINED MIGRANTS

Decision-making on asylum or detention procedures is not exclusively an internal matter of the Slovak Republic as the country must also take into account EU legislation. The so-called procedural directive pertaining to the asylum procedure binds Slovakia to guarantee free legal assistance for asylum seekers, at least during the appellation procedure before the court. In 2009, the Legal Aid Centre (Centrum právnej pomoci – CPP) was charged with providing interested asylum seekers with free legal assistance in appellation procedures.

For many years, though, the system of free legal assistance for asylum seekers has worked in a different way as it is provided primarily by non-governmental organizations and financed from the European Refugee Fund.[7] In practice, the CPP provides legal assistance only if non-governmental organizations lack sufficient personnel capacity; as a result, the number of cases tackled by the CPP is very low compared to that tackled by non-governmental organizations. The involved lawyers must perform various time-consuming and financially costly activities that include regular weekly visits to all asylum facilities in Slovakia[8] as well as legal representation in asylum procedures, which includes personal attendance of interviews with asylum seekers that often take several hours to complete.

Non-governmental organizations employ lawyers who either provide legal assistance themselves or cooperate with certified attorneys. Without exception, all these lawyers have many years of experience in the field of asylum law and have represented dozens of asylum seekers in procedures before the Migration Office or courts of law. Over the years, their activity led to a number of groundbreaking verdicts issued by regional courts or the Slovak Supreme Court and their legal counsel helped dozens of foreigners acquire additional protection or asylum status.

All non-governmental organizations that specialize in providing legal assistance to foreigners are members of several specialized legal expert groups that actively deal with asylum and migration issues in Slovakia as well as abroad. It is quite difficult to imagine a legal aid bureau in Slovakia whose expertise in the field of asylum law would be even remotely comparable to that of these non-governmental organizations, their lawyers and cooperating attorneys.

The situation in the field of detention is very similar. Every detained foreigner is placed in one of two police detention centres in Medveďov or Sečovce. The lawyers with non-governmental organizations visit each facility at least once a week to learn about new cases and discuss individual detainees' problems. Then they return to their offices to prepare legal remedies and represent foreigners in courts of law. The issue of detention is also regu-

1 "Cudzincom sa na Slovensku sťaží prístup k právnej pomoci" ['Access to Legal Assistance Will Get Complicated for Foreigners in Slovakia'], *Sme* daily, December 27, 012; available at: http://www.sme.sk/c/6649559/cudzincom-sa-na-slovensku-stazi-pristup-k-pravnej-pomoci.html, 15.1.2013.

2 Law No. 480/2002 on Asylum that alters and amends certain laws.

3 Law No. 67/1973 on Administrative Action (Code of Administrative Procedures).

4 The procedure is governed by Law No. 99/1963 (Civic Court Rule).

5 Both departments report to the Border Control and Alien Registration Office of the Slovak Police Force.

6 Law No. 404/2011 on Residence of Foreigners that alters and amends certain laws.

7 Traditional providers of legal assistance to migrants and asylum seekers in Slovakia are three non-governmental organizations that helped develop the asylum system in Slovakia together with the Migration Office and the Office of the United Nations High Commissioner for Refugees (UNHCR). In alphabetical order, they include the Human Rights League, the Slovak Humanitarian Council and the Society of Goodwill People. Since 2005, these organizations' projects including legal assistance have been financed from the European Fund for Refugees, a national financial facility.

8 These facilities include a detention centre in Humenné and two residential centres in Opatovská Nová Ves and in Rohovce.

lated by EU legislation; particularly important are provisions of the so-called return directive[9], which require member states to guarantee reviewing decisions on detention either *ex offo* or based on motions filed by concerned foreigners.[10] Since Slovakia has not enacted a system of reviewing detention decisions *ex offo*, the procedure may only be launched based on the legal remedy filed by foreigners and/or their legal representatives.

"In 2011, NGO lawyers made 101 visits to both detention facilities, providing legal assistance to 165 foreigners and filing 96 motions with regional courts or the Slovak Supreme Court. Two in three of these motions (64) were successful."

Previously, free legal assistance to detained foreigners was provided only by non-governmental organizations through their networks of lawyers and cooperating attorneys as the CPP's obligation to provide free legal assistance does not pertain to detained foreigners. In 2011 and 2012, both police detention centres were regularly monitored by two lawyers with the Human Rights League and two cooperating attorneys. In 2011, they made 101 visits to both facilities, providing legal assistance to 165 foreigners and filing 96 motions with regional courts or the Slovak Supreme Court. Two in three of these motions (64) were successful. During the process, participating non-governmental organizations have spent significant funds on interpreting as well as retrieving translating information on the human rights situation in migrants' countries of origin, which was subsequently used as evidence.

The non-governmental organizations that specialize in providing legal assistance to foreigners also took an active part in the legislative process, for instance in 2011 when government drafted a new Alien Residence Act or in 2012 when the new law was amended. Based on their practical experience, they helped enact a number of positive changes in the field of detention. In the long term, these non-governmental organizations are also active in researching various asylum and migration issues. In 2011, the Human Rights League published the first legal analysis of the issue of detention, which features an overview of the most relevant court decisions and remains the only such analysis available in Slovakia to date.[11]

MAJOR CHANGES INTRODUCED BY THE AMENDMENT TO ADVOCACY ACT

This system of legal assistance worked until December 31, 2012. The most recent amendment to Advocacy Act that took effect on January 1, 2013,[12] stipulates that asylum seekers and detained foreigners must be represented in courts only by certified attorneys.

The amendment's original wording that was submitted to the interdepartmental debate procedure[13] extended the CPP's powers to include providing free legal assistance in detention procedures. At the same time, the amendment proposed to change the provisions on civic representation[14] so that certified attorneys would become the only persons authorized to represent participants in proceedings on legal remedies filed against administrative organs' decisions.

According to the amendment's original wording, the proposed change would concern proceedings on legal remedies against administrative organs' decisions that are spelled out in the "*third section of the fifth chapter of the Civic Court Rule*". In other words, the amendment originally targeted certain specific proceedings such as hereditary procedures. Interestingly enough, the amendment's version that was submitted to parliament upon completing the interdepartmental debate procedure and obtaining the cabinet's approval refers to proceedings spelled out in "*the third chapter of the fifth section of the Civic Court Rule*", i.e. to provisions that pertain to asylum and detention procedures before courts of law.[15]

At this point it makes no sense speculating on whether this error ensued from negligence or whether it was a design. Much more baffling is that despite proposed changes' envisaged impact on financial and human resources of the existing system of providing legal assistance to asylum seekers and detained foreigners, these changes and their implications were not consulted in advance with actors who work with these issues on an everyday basis. For instance, it remains unclear who will provide additional funds required by transferring the agenda onto certified attorneys as it exceeds financial capacity of non-governmental organizations' legal assistance projects. Even if they had learned about the proposed change during the interdepartmental debate procedure, the portal of legal regulations would have merely informed them that the amendment did not seek to introduce any changes to the existing system of providing legal assistance to asylum seekers and detained foreigners.

The amendment's non-systemic nature was underlined by the fact that at the time of its drafting and adopting the Ministry of Interior, which is responsible for policies with respect to asylum seekers and migrants, issued a call to submit projects to be financed from the European Refugee Fund, a national financial facility that supports provision of legal assistance to asylum seekers. In great detail, the Interior Ministry stipulated requirements regarding the provision of legal assistance by non-governmental organizations effective January 1, 2013, without reflecting the necessity to increase the volume of funds allocated to certified attorneys who will represent clients in asylum procedures. At the same time, the Ministry issued a call to submit projects to be financed from the European Return Fund, a national financial facility that supports provision of legal assistance to detained foreigners; this time, though, the call did not envisage supporting legal assistance, although this activity was specifically spelled out in the Annual Program for 2012 as well as among indicators of the Fund's outputs.

"The changes and their implications were not consulted in advance with actors who work with these issues on an everyday basis. For instance, it remains unclear who will provide additional funds required by transferring the agenda onto certified attorneys as it exceeds financial capacity of non-governmental organizations' legal assistance projects."

Interior Ministry officials argued that legal assistance in the future should be provided by the Legal Aid Centre (CPP). But parliament did not embrace the Interior Ministry's notion and rejected the

9 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

10 Article 15 Paragraphs 2 and 3 of Directive 2008/115/EC.

11 Mittelmannová, Miroslava – Števulová, Zuzana, *Zaistenie a alternatívy k zaisteniu v Slovenskej republike. Národná správa* [Detention and Alternatives to Detention in the Slovak Republic: A National Report], (Bratislava: Liga za ľudské práva, November 2011), ISBN 978-80-971002-1-6.

12 Law No. 586/2003 on Advocacy that alters and amends Law No. 455/1991 on Commercial Activity (Trade Act) as amended.

13 Bill that seeks to alter and amend Law No. 586/2003 on Advocacy that alters and amends Law No. 455/1991 on Commercial Activity (Trade Act), as amended, and certain other laws; published on the Portal of Legal Regulations on July 17, 2012.

14 Article 27 of the Civic Court Rule.

15 A cabinet-initiated bill that seeks to alter and amend Law No. 586/2003 on Advocacy that alters and amends Law No. 455/1991 on Commercial Activity (Trade Act), as amended, and certain other laws; published on the Portal of Legal Regulations on August 22, 2012.

proposal to extend CPP's powers to include detention procedures, arguing that the Centre lacked adequate financial and human resources to administer the agenda. At the same time, the assembly left intact the provision stipulating that foreigners in these procedures must be represented only by certified attorneys.[16]

This led to a peculiar situation. As far as asylum procedures go, government's expenditures allocated to legal assistance to asylum seekers will increase substantially; it remains unclear whether the incumbent administration intends to cover these expenditures from EU structural funds or from the Justice Ministry's budgetary chapter through the Legal Aid Centre. Government's expenditures are likely to increase also because certified attorneys may claim reimbursement of legal charges, a practice lawyers from non-governmental organizations refrained from. It remains to be seen whether and where the government finds such funds in the time of global economic crisis.

"As far as detention procedures are concerned, government failed completely. Since the Ministry of Interior failed to issue a call to submit projects aimed at providing legal assistance to detained foreigners and instead relied on the uncertain outcome of the legislative process (i.e. transferring the power onto the CPP), no one has visited police detention centres to provide legal assistance to detained foreigners since January 1, 2013."

As far as detention procedures are concerned, government failed completely. Since the Ministry of Interior failed to issue a call to submit projects aimed at providing legal assistance to detained foreigners and instead relied on the uncertain outcome of the legislative process (i.e. transferring the power onto the CPP), no one has visited police detention centres to provide legal assistance to detained foreigners since January 1, 2013.

In other words, the Slovak Republic currently provides no legal assistance whatsoever to foreigners detained on its territory. According to our information, all they receive at police detention centres is a list of certified attorneys with telephone numbers. Not only are they required to pay for legal counsel themselves but they are left groping in hopes of stumbling upon some fledgling attorney who will show enough good will to travel to a police detention centre, pay for an interpreter from his own pocket and hope to succeed in court in order to lodge a claim for reimbursement of legal charges. This is hardly the way to improve foreigners' access to legal assistance and "enhance the guarantee of foreigners' rights" as it was presented by the Ministry of Justice.

"The Slovak Republic currently provides no legal assistance whatsoever to foreigners detained on its territory. According to our information, all they receive at police detention centres is a list of certified attorneys with telephone numbers."

On the other hand, we may certainly expect an increase in the total number of foreigners to be placed in police detention centres in months to come. These facilities' utilization rate declined in the long term,[17] owing largely to effective legal assistance detained migrants received from non-governmental organizations. This state of affairs is likely to change soon; at least taxpayers will have no reason to grumble about allocating state budget funds to operate two half-empty facilities.

We may also expect an increase in the total number of complaints objecting to violation of the right to access justice that will be filed by asylum seekers and detained foreigners with the European Court of Human Rights. Many of these complaints stand a fair chance to succeed and thus require more taxpayers' money to be allocated to complainants' financial indemnification.

Given the fact that access to legal assistance has become seriously complicated in general and rendered almost impossible for detained migrants, we must hope that the Ministry of Interior finds a solution to this problem as soon as possible, especially given available funds that may be allocated to providing legal assistance to these people. On January 14, 2013, the Human Rights League wrote an open letter to the Ministry of Interior, urging ministry officials to tackle the situation at hand. ■

16 Article II Paragraph 1 of Law No. 335/2012 that seeks to alter and amend Law No. 586/2003 on Advocacy that alters and amends Law No. 455/1991 on Commercial Activity (Trade Act), as amended, and certain other laws.

17 In the first half of 2012, both facilities together accommodated only 72 foreigners, a substantial decline compared to the same period of 2011 when they sheltered 139 foreigners. The capacity of both facilities is several times greater and the number of police officers present during particular shifts often exceeded the number of inmates.

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