



## **Workshop on the implementation of human rights judgments and decisions against the Czech Republic**

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Faculty of Law, Masaryk University, Brno

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## Presentation of ongoing JUSTIN and HRLIP research

Following the welcoming remarks by Director of the Judicial Studies Institute (JUSTIN) David Kosař, the Workshop was kicked off with presentations on the ongoing research being carried out in the framework of JUSTIN's [Beyond Compliance Research Project](#) and the [Human Rights Law Implementation Project](#) (HRLIP), which Middlesex University is involved in.

The workshop followed the [Chatham House Rule](#) and thus, apart from JUSTIN and HRLIP researchers, neither the identity nor the affiliation of the other speakers and participants are revealed in this report.

### Introduction of JUSTIN and its Beyond Compliance Project

JUSTIN is a research center dedicated to the study of domestic courts, international tribunals and various bodies involved in court administration. JUSTIN opened in September 2016 with the help of the [ERC Starting Grant \(JUDI-ARCH, 2016-2021\)](#), which focuses on the role of judicial councils and other forms of judicial self-government on the domestic as well as supranational levels. JUSTIN's research aims at creating groundbreaking results within the field of inquiry through a series of closely integrated interdisciplinary research projects that study courts and judges from legal, philosophical, political science and sociological perspectives, employing both qualitative and quantitative methods. Research at JUSTIN currently focusses on judicial independence and accountability, public confidence in courts and judges, transparency of the judiciary, and the legitimacy of courts.

JUSTIN also engages with legislative responses to the case law of the European Court of Human Rights (ECtHR or 'the Court') and domestic compliance with judgments and decisions of the ECtHR and UN human rights bodies. Under the [BeCOM \(Beyond Compliance\)](#) research project, supported by the Czech Science Foundation (GA 16-09415S), JUSTIN enquires how the ECtHR and other international human rights bodies influence domestic politics and law in the Czech Republic and Slovakia. These two countries represent, from the compliance point of view, an underresearched group of young Central and Eastern European democracies with similar historical legacies, framework of government, and judicial cultures.

So far, we know surprisingly little about the actual implementation of international human rights case law in the Czech Republic and Slovakia and even less about the repercussions of this case law for the legislature and top courts (the Supreme Court and the Constitutional Court in Slovakia; and the Constitutional Court, the Supreme Court and the Supreme Administrative Court in the Czech Republic). However, such understanding is needed because international human rights case law may alter domestic politics and separation of powers, interpretation of domestic constitutions and even change the way people think about law.

The aim of the project is to analyse the impact of the ECtHR and core UN human rights treaty bodies on Slovakian and Czech top national courts as well as parliaments. This includes, predominantly, an

analysis of references, in decisions of top national courts, to (i) the European Convention on Human Rights (ECHR or ‘the Convention’) and ECtHR case law and (ii) the use and citation of other international human rights treaties and the ‘jurisprudence’ and other relevant documents of selected UN human rights treaty bodies.

The full presentation of the JUSTIN research team is available [here](#).

### **Introduction of the Human Rights Law Implementation Project (HRLIP)**

The [HRLIP](#) is a comparative research project (2015-18) which is tracing the responses of nine states in Europe (Belgium, the Czech Republic and Georgia), Africa (Burkina Faso, Cameroon and Zambia) and the Americas (Canada, Colombia and Guatemala) to selected human rights judgments and decisions issued by (i) regional courts and commissions and (ii) selected UN treaty monitoring bodies.

By, among other activities, creating detailed timelines of the responses to judgments and conducting semi-structured interviews in the respective states and supranational bodies, the HRLIP aims to identify and elucidate the factors which impact upon implementation and compliance in relation to:

- a) **structure**: the institutions and formal mechanisms and procedures of the respective systems;
- b) **capacity**: the ways in which domestic and supranational actors operate within those systems, taking into account issues such as information, expertise, resources and relationships;
- c) **attitudinal factors**: such as different actors’ motivations, interests, incentives and assumptions; and
- d) **case-related factors**: such as the body and judicial formation issuing the ruling; the specificity and prescriptiveness of the ruling; and the type(s) of remedies required to implement it.

Besides, the HRLIP’s methodology allows for elucidating contextual factors that affect implementation (such as the ‘political climate’, changes in government, etc.) and external drivers for change (especially interventions by the EU), thus helping to reveal the complex **dynamic of implementation** in some cases – the way in which political space allowing for implementation opens and closes over time.

The HRLIP is based on a number of premises flowing both from the researchers’ own previous research and the academic literature on compliance – which spans the disciplines of international law, political science and international relations.

- *Firstly*, the HRLIP takes a **disaggregated view of the state**, and seeks to ascertain the respective functions, capacity, interests and motivations of discrete state actors – the executive, judiciary and parliament – and also of non-state actors (i.e. civil society organisations, National Human Rights Institutions, academics, etc.).

- A *second* (and related) premise is to take a **dynamic** and **relational** view of implementation, looking not only at structures and rules but also at relationships of coordination, collaboration, bargaining and oversight between actors at the domestic level, and between domestic and supranational actors. The ‘system’ is thus regarded as made up of the sum total of these relationships.

It follows from this that supranational bodies **facilitate but do not determine** the outcome of implementation. Building upon Karen Alter’s concept of supranational bodies as ‘tipping point’ actors, the HRLIP is analysing, for example, how domestic ‘pro-compliance actors’ may seize upon adverse judgments and the ensuing monitoring process to strengthen leverage for reform.

The full presentation of the HRLIP research team is available [here](#).

## Discussion

The ensuing discussion provided an opportunity for the organisers to elucidate their respective **research methodologies** in greater detail.

Most notably, the JUSTIN team explained that their meso-level analysis would permit them to measure the nature of the case law references contained in the decisions of apex courts, by differentiating between (i) general references to the case law of a supranational human rights court or body; (ii) references to specific cases; (iii) references to a particular part of a given ruling; and (iv) direct quotations from a judgment. They also noted that they (intend to) disaggregate their data in such a way as to permit them to ascertain whether the frequency and nature of references to judgments against the Czech Republic differ from the frequency and nature of references to judgments against other states.

In response to a question about the case-related factors which can be hypothesised to have an impact on implementation, the HRLIP team explained that their research would seek to explore the impact of the novelty of a case on the implementation process – the *D.H.* case being an example of a landmark ruling in which the ECtHR developed the notion of ‘indirect discrimination’. Furthermore, early findings suggest that another case-related factor, namely the presence of dissenting opinions, appears to have only a limited impact on implementation, even though one might expect that criticism featuring in dissenting opinions may be picked up on by certain actors. It was suggested that the extent to which certain case-related factors play out at the domestic level is variable depending on how people receive judgments and in what form; the limited impact of dissenting opinions, for instance, could be explained, in part, by the fact that many stakeholders will not read the judgment in its entirety.

The debate further addressed some of the **methodological challenges** the researchers are facing.

One participant pointed to the risk that the BeCOM project team's data on case law references might be distorted owing to the practice of the Supreme Court to adopt thematic 'standpoints' (e.g. on custody of children) that use ECtHR case law, and which the Court would refer to in subsequent cases, thus only making indirect reference to the ECHR as interpreted by the Strasbourg Court. The BeCom team is, however, working on a method for how to count these indirect references through domestic courts' case law and teach the computer programme to distinguish whether the domestic case was referred to in relation to the previous ECtHR's judgment's finding or for another reason.

The researchers from Middlesex presented ways in which they sought to mitigate the challenge of ensuring a uniform methodological approach when conducting research in a large team working on nine states across three continents. These include the use of a common (generic) interview topic guide (supplemented by much more specific follow-up questions) and a specific software for coding and analysing the research interviews, using a common structure of 'nodes' or keywords (Nvivo). The team strives to ensure that there is a constant iteration from the general to the particular. Given that certain rulings (and certain states) lend themselves better to a particular analysis than others, not every case (or even every state) will feature in every output; instead the HRLIP will be looking at comparability across, for example, two regions on a particular issue, with reference to a sub-set of the cases selected for analysis.

The debate then turned to the **substance** of the two research projects, with one contribution that could be seen as affirming the HRLIP's finding that, notwithstanding the importance of having structures in place to ensure effective coordination among the various actors involved, implementation often hinges on agency, i.e. the proactive engagement of one conscientious actor who is committed to redressing the situation at the origin of the violation finding and guaranteeing non-repetition. Thus, one participant pointed out that a considerable drop in the number of cases referencing ECtHR judgments identified by JUSTIN could be explained, at least partly, by the departure of certain judges from the relevant highest courts.

One of the discussants wondered why the Supreme Court of the Czech Republic and other apex courts sometimes refrain from quoting the Strasbourg Court's case law, even if doing so would support their line of reasoning – as for example in cases relating to the admissibility of evidence obtained by illegal wiretapping. In such cases, the omission of case law references raises the question of whether ECtHR case law was in fact taken into account. The researchers admitted that it was difficult to distinguish between situations where domestic judges were unaware of the case law of supranational adjudicatory bodies, and situations where they were aware of it but chose, for one reason or another, not to refer to it expressly. One of the reasons why apex courts might not cite international case law to give additional force to their argument was said to be the fact that the Constitutional Court is limited to using the grounds invoked by the applicant arguing that the appeal court's decision should be quashed. Moreover, there is no obligation to refer to international case law, provided that any judicial decision is in conformity with the international human rights law standards and principles. At the same time, it was acknowledged that there is still a need to increase the awareness of the highest domestic judges about the case law of the ECtHR.

## Panel 1: Domestic response to supranational human rights judgments

**Hubert Smekal, Assistant Professor, BeCOM (Masaryk University, Brno)**

*In his introductory remarks to the first thematic session, Hubert Smekal used the Grand Chamber judgment in D.H. and Others v. the Czech Republic (concerning discrimination against Roma children in education) as a case study to illustrate which actors and which factors tend to influence the potential of a supranational human rights body to trigger large-scale reform capable of remedying a situation which was found to lead to systemic violations of human rights.<sup>1</sup>*

One can identify a number of reasons why conditions in the Czech Republic were unfavourable to the implementation of the kind of large-scale reform in the education field which was necessary to execute the ECtHR's judgment, among those the following:

- *First, key actors* involved in or affected by the reform process prefer the *status quo*, with opponents of inclusive education including headmasters, teachers, special pedagogues [teachers in special schools for pupils with mild mental disabilities], psychologists, as well as parents of both Roma and non-Roma children. Establishing and maintaining dialogue between the proponents and the opponents of inclusive education has proved difficult. The Ministry of Education is beset by a high fluctuation of staff (resulting in a lack of institutional memory), and has focused on priority areas other than discrimination in education. While some had expected that the Ministry of Foreign Affairs, being concerned about the international reputation of the Czech Republic, would exert pressure over other ministries with a view to pushing for reform, this did not happen.

Relatedly, widespread anti-Roma sentiments among the general population present a challenge to reforming the system of primary education. In these circumstances, it takes a strong personality heading the Ministry of Education to push for change, notwithstanding the prevailing negative attitudes towards Roma and the concept of inclusive education.

- *Second*, the protracted implementation of *D.H. and Others* may be seen as illustrating the importance of **international context**. Some reluctance to implementation stemmed from criticism of the Czech Republic being perceived as having been 'singled out' and condemned by the ECtHR, although similar problems prevailed in other countries as well.
- *Lastly*, the way in which the ECtHR's judgment was framed was not conducive to swift and full implementation, since it did not transpire from it what compliance would look like.

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<sup>1</sup> Mr Smekal's presentation was based on an article he co-authored with Katarína Šipulová: 'DH v Czech Republic Six Years Later: On the Power of an International Human Rights Court to Push through Systemic Change', 32(3) Netherlands Quarterly of Human Rights (2014), pp. 288-321.

**Anne-Katrin Speck, Research Associate, HRLIP (Middlesex University London)**

*Anne-Katrin Speck noted that, like the BeCOM, the HRLIP was based on the premise that states are not unitary actors, but that they are formed of a multitude of actors each with unique interests, capacities and powers, whose interaction shapes the implementation process. She alluded to several generalisable observations from research carried out on Belgium, the Czech Republic and Georgia regarding factors which may impede implementation or delay it.*

Where the implementation of a judgment or decision is protracted or stalled, such implementation difficulties are largely attributable to (a) the state's lack of capacity to remedy the violations found, and (b) factors linked to the judgment or decision itself.

- (a) A state's **capacity** to implement human rights rulings hinges on the ability of all domestic actors, and not solely the executive, to assume their share of responsibility for implementation.
- **Parliaments** appear to be a weak link in many European countries. While the executive in all three states analysed by the HRLIP is required to report regularly to Parliament about the state of implementation of adverse judgments of the ECtHR, executive reporting has to date not proved to trigger any noteworthy parliamentary debate on implementation. There is unused potential for Parliaments to more actively engage in human rights matters, for instance by routinely vetting draft legislation for its compatibility with the European Convention on Human Rights.
  - The level of **civil society** interaction with the Strasbourg and Geneva systems varies across states: whereas a significant number of (well-connected) Georgian NGOs are very active at both the litigation and the implementation stage, the Czech NGO landscape resembles the situation in Belgium, in that only a limited number of NGOs have specific expertise in ECHR-related issues, and there is no routine involvement of civil society in the (monitoring of the) implementation of rulings.
  - Judgments and decisions with implications for the **judiciary** can sometimes be difficult to implement, not least since it may not always transpire clearly from the ruling whether changes in the jurisprudence of domestic courts may suffice, or whether there is a need for legislative or even constitutional amendments to be introduced. Certain challenges are related to the need to uphold judicial independence – some concern has been voiced in all three states that indications given by the executive as to how a specific judgment should be implemented may be perceived as undue encroachment on the role of the judiciary. Besides examples of irritation on the part of members of the judiciary where they were told, by the Ministry of Justice, that their practice is not in conformity with the ECHR and the case law principles developed by the Strasbourg Court, there have, however, also been occasions on which the judiciary welcomed a violation finding from the ECtHR – namely where the latter's

ruling promised to contribute to remedying a situation that the domestic courts had previously held to be unconstitutional or incompatible with the ECHR.

(b) The HRLIP also identified a number of **case-related factors** which tend to hamper implementation of human rights judgments and decisions, among those being the following:

- Rulings that **challenge long-standing attitudes** or social perceptions, thus requiring a change in mind-set (both of political decision-makers as well as of the broader public) in order to eliminate the root causes for the violation and prevent its repetition, pose particular difficulties for implementation. These cases often involve discrimination or ill-treatment of persons belonging to an ‘unpopular group’ such as minorities, defendants in criminal trials, or prisoners. It can be concluded that certain **characteristics of the victims** – and hence the beneficiaries of any reform adopted in the wake of an adverse ruling – increase the **political costs** of implementation. In this scenario, implementation will depend, *inter alia*, on the ability of politicians to ‘sell’ unpopular reforms, for example to improve prison conditions despite fear of being seen as being ‘soft on crime’.
- Conscientious domestic actors have tried to foster implementation by **(re-)framing** the issue at stake in such a way as to gain support from obstructive decision-makers or the general public: e.g., matters relating to immigration detention of children are presented as pertaining, first and foremost, to the rights of children, rather than the rights of persons having travelled to the country for the purposes of seeking asylum.
- While political constraints on politicians who are trying in good faith to improve a situation can be a real impediment to swift and full implementation, the situation is exacerbated where dominant societal sentiments that are unfavourable to implementation (e.g. harmful stereotypes against LGBTI persons, women, religious or other minorities, or persons with mental health problems) are mirrored in the attitudes of those in power.

## Discussion

The ensuing discussion *inter alia* addressed **the role of Parliament as a driver for reform**. It was acknowledged that some actors are opposed to greater parliamentary involvement in the implementation process, since this may complicate coordination, especially in politically sensitive and contentious policy areas. It was further suggested that the secretariat of the Parliament should – just like the research department of the Constitutional Court of the Czech Republic – prepare, on its own motion, thematic reports about the case law of the ECtHR or background notes on the compatibility of draft legislation with the ECHR. Staff could seek to more proactively work with parliamentarians who are members of the Constitutional and Legal Committee. One participant deplored that the creation, in 2013, of a Sub-committee on Legislative Initiatives of the Ombudsman and the ECtHR has not created any considerable momentum for greater parliamentary involvement in human rights matters. On a more positive note, the Committee of Experts on the Execution of Judgments of the European Court of Human Rights (*Kolegium expertů k výkonu rozsudků ESLP*) – a



consultative body established by the Office of the Czech Government Agent in 2015 which is composed of senior focal points of all relevant institutions, including Parliament, was regarded as a useful forum for cooperation and coordination, which has the potential to increase parliamentarians' awareness of human rights law implementation.

Another discussant pointed out that the potential of Parliament for assuming a proactive role in the implementation of judgments depends on how politically controversial a judgment is. Some constituents are critical of the ECtHR being (or becoming) an 'activist' court. Against this backdrop, parliamentarians (as representatives (also) of these critics of the Strasbourg Court) may find it difficult to press the executive to implement innovative or novel rulings that are contested among the public – the *D.H. and Others* judgment being a case in point, as it was perceived by some as singling out the Czech Republic for discriminating against Roma children in the field of education, despite the situation being similar or even worse in other European states.

Recent developments regarding the 'prisoner voting saga' – i.e. the UK Government having crafted a deal that will, without having to pass through Parliament, marginally extend the franchise to around one hundred prisoners at any one time – were discussed as a possible example of **minimalist implementation**. Participants agreed that this may be an interesting case to test various theories of compliance, and notably an approach which integrates rationalist theories and constructivism: to some extent, there is an impulse to comply – that is the constructivist, norm-shaping dimension of international (human rights) law – but the prisoner voting controversy can be seen as suggesting that, within that, there is a tendency to comply as minimally as possible because of cost-benefit factors. More generally, while there may be a presumption against outright non-compliance, as submitted by constructivists, this leaves a lot of space within each judgment for going further than required or even responding in anticipation of an adverse ruling from Strasbourg or Geneva, all the way through to protracted and minimalist implementation.

The remainder of the discussion was dedicated to the **implementation of the case of *D.H. and Others v. the Czech Republic***.

- Several participants recalled that the judgment itself did not prescribe (or even indicate) *how* it should be implemented, or what full implementation would entail. It remains unclear when the Committee of Ministers might or should close the supervision of the execution of *D.H. and Others*. The **Court's lack of guidance** was regarded as a double-edged sword.

On the one hand, discussants recognised that for the ECtHR to leave too narrow a sphere of discretion to the Government for identifying appropriate implementation measures might be harmful to its legitimacy and authority. In the same vein, HRLIP interviewees were reported to have shown 'a high degree of realism', recognising that it would have been difficult for the Court to indicate a blueprint for the reform to be adopted.

On the other hand, the lack of specificity in the Court's judgment, in conjunction with the complexity of the matter at stake, made it impossible for the Office of the Government Agent within the Ministry of Justice to elaborate a clear vision of how the system of primary

education should be reformed. This task was for the Ministry of Education, which initially did not, however, have sufficient expertise to conceptualise potential changes to the educational system.

- This has changed over time and depending on who the Minister of Education was at any given moment – which lends support to the researchers' emphasis on the importance of **agency**. Participants also confirmed that implementation may be fostered by reframing a controversial issue with a view to depoliticising it. In the context of *D.H. and Others*, the vision of inclusive education drew from the UN Convention on the Rights of Persons with Disabilities (CRPD), given that part of the problem stemmed from Roma children often having been (wrongly) diagnosed as having a (mild) mental disability. The Czech Republic's obligations under the CRPD were successfully invoked to help pass inclusive education legislation, while minimising the risk of creating backlash by stressing the benefits this reform was intended to entail for Roma children.
- Further challenges to the implementation of the *D.H. and Others* judgment, as identified by participants, included (i) a lack of coordination among the different ministries and other actors involved; and (iii) the prevalence of a number of misunderstandings – for instance, the notion of 'substandard education' had found its way into the political discourse. This term, perceived as hurtful by special pedagogues, created further friction between the proponents and opponents of inclusive education.
- Lastly, *D.H. and Others* was used to illustrate the impact of 'external factors' on the implementation of human rights judgments and decisions, which could either play out as facilitating or hampering reform.

The ***infringement procedure*** launched by the European Commission was seen to have helped keep the momentum of the inclusive education reform. Although the procedure is related to the Czech Republic's failure to implement the Race Equality Directive, the Commission uses the *D.H.* judgment in its negotiations with the Czech government. It was stressed that this ongoing process helps civil society representatives put pressure on the Ministry of Education to further advance the implementation of the ECtHR's judgment.

One participant ventured that the problem of segregation in schools was eventually 'overshadowed' by the 'migration crisis', which became the major issue in the ***media***. This might have contributed to creating a window of opportunity to move forward with the reform of inclusive education whereas, previously, a large-scale tabloid campaign against inclusive education had created obstacles to reform.

## Panel 2: Relationships between Strasbourg / Geneva and the Czech Republic

Alice Donald opened the panel with observations on the ways of organising national implementation machinery and provided some comparative reflections about Belgium, the Czech Republic and Georgia. She welcomed the creation of the Committee of Experts on the Execution of Judgments of the European Court of Human Rights in the Czech Republic, as an instrument of coordination. She pointed out that this Committee brought together representatives of different ministries, parliamentarians, NGOs as well as academics, and ventured that such diverse membership could facilitate the process of national implementation and allow the Committee of Ministers to communicate with actors other than the government.

Alice Donald also highlighted the trend of integrating domestic responses in the three jurisdictions. In Belgium, the Ministry of Foreign Affairs is in charge of the communications with the UN Treaty Bodies, while the Ministry of Justice is responsible for the communications with the Strasbourg Court. However, there is coordination between the two Ministries, to the extent that there is a thematic spreadsheet integrating responses to different international human rights institutions. In Georgia, the Department of State Representation to International Courts of the Ministry of Justice is in charge of litigation before the Strasbourg Court and UN Human Rights Treaty Bodies as well as issues of implementation. The same is the case with the Czech Republic.

It was pointed out that the absence of institutional memory and continuity can hinder effective implementation. Moreover, it seems that the extent to which those interacting with Strasbourg or Geneva have political clout influences the effectiveness of implementation.

Regarding the potentially important role of NGOs and watchdog/ombudsman type bodies, it is worth noting that there was some untapped potential, in terms of effectively employing Rule 9(2) and making submissions to the Committee of Ministers.

The final key question raised was whether the Committee of Ministers has sufficiently robust information to decide whether to close cases (such as *D.H.*) or not – there is an obvious risk of closing cases prematurely. This then raises the issue of identifying the indicators or benchmarks of success of implementation in case of complex problems.

The ensuing discussion primarily addressed the indicators of success of implementation in the *D.H.* case. The Committee of Ministers has been inquiring about the progress and specifically, the possibility of transfer of children from outside the mainstream to the mainstream schools, in line with the ECtHR judgment. So far, progress in implementation has been limited, partly due to the differences in the level of knowledge and skills of children in and outside mainstream schools. One of the problems of the *D.H.* judgment is that it is not clear as to what is required by way of implementation (for example, what percentage of integration is enough for the Committee of Ministers?). The system of supervision of the execution of Strasbourg judgments is to some extent based on self-assessment by the respondent state, when it submits action plans or action reports,

although this evaluation can subsequently be scrutinised and corrected, by the Secretariat and the Committee of Ministers.

When it comes to indicators of success, the discussants also noted that the proportion of Roma children among the children in special schools (i.e. outside mainstream education) is still rather high (around 30%). Some difficulties remain in obtaining precise information to assess the progress in implementation (largely due to the reluctance of school directors to provide such information).

It was mentioned that the Committee of Ministers may face difficulties in assessing the progress in implementation, especially where successful implementation requires a change in attitudes. The example of the case of *Identoba and Others v. Georgia*, concerning the failure of the Georgian authorities to protect peaceful LGBTI demonstrators from homophobic violence, and which called for the delivery of training to police officers, was invoked. The question is how far the Committee of Ministers can go in terms of qualitative assessment of the measures taken (in this case, assessing the quality of training). Another question is to what extent the Committee of Ministers can or should be prescriptive as regards the *means* of implementation.

Anne-Katrin Speck referred to difficulties in the implementation of the *Gharibashvili* group of cases, addressing the lack of effective investigations into alleged violations the right to life and of the right not to be ill-treated (procedural violations of Articles 2 and 3 ECHR) in Georgia. She noted that one of the reasons for the inadequacy of the implementation measures adopted to date appeared to stem from a reluctance to touch upon the historically strong position of the *prokuratura*, and a corresponding failure to fully address concerns regarding the independence, impartiality and politicisation of the Chief Prosecutor's Office. She also referred to the difficulties in implementing *RTBF v. Belgium*, concerning the temporary injunction preventing the RTBF channel from broadcasting a programme, in violation of Article 10 ECHR. What was interesting about the implementation process was that the government agent solicited comments from academics regarding the need for constitutional or legislative changes to remedy the situation. Not least because of disagreements as to the measures necessary to implement the judgment, the case stayed dormant for a few years, until the Committee of Ministers intervened to try to speed up the process.

A discussion followed about the quality of NGO submissions to the Committee of Ministers, their value and impact. Several participants pointed out that their impact may not immediately be visible, but the Committee of Ministers values and takes into account the information that NGOs provide. Another problem is that NGOs may fail to ask the 'right' questions in the course of implementation. In Georgia, NGOs did not insist on the involvement of the affected communities (for example, women, and LGBTI rights activists) in the planning and implementation of training called for by, for example, the *Identoba* judgment.

The final point addressed was the issue of the relative effectiveness of different enforcement mechanisms. According to one participant, from the perspective of Czech Republic, the (threat of) EU infringement proceedings based on the *D.H.* case generated more leverage (reinforced by financial

incentives) than the enhanced supervision of implementation of the *D.H.* judgment by the Committee of Ministers.

### Panel 3: Attitudes towards the Strasbourg and UN human rights systems

**Katarína Šipulová, PostDoc, JUSTIN (Masaryk University, Brno)**

*The concluding panel opened a round-table discussion on the topic of attitudes towards both the ECHR system and UN human rights treaty bodies in the Czech Republic, Belgium, and Georgia. In her introductory speech, Katarína Šipulová invited the discussants to reflect on the question of how individual institutions and national actors learned to use the ECtHR and UN bodies' case law in their decision making practice. Round table participants raised several important points:*

#### **General attitudes towards the ECtHR**

- In none of the countries were the researchers able to report a generalised reluctance to implement the Strasbourg case law. Although a few problematic sensitive cases can be identified, we cannot talk about a general resistance; individual cases represent more incidental resentment towards the solution proposed by the ECtHR, not an absolute refusal to implement adverse judgments. It is, however, interesting to point out that in the case of *Taxquet v. Belgium*, which was seen as sensitive in that it brought into question the functioning of the jury trial system in Belgium, the authorities took measures exceeding what was strictly required by the judgment – and in advance of a Grand Chamber judgment on the matter.
- Interestingly though, it seems that even within the judiciary, the positions of individual actors differ quite a lot. For some reason, general courts (and supreme courts in particular) seem to be more resistant towards the ECtHR than constitutional courts. To a large extent, this is to be expected. Supreme and general courts do not want to be intentionally ignorant; nevertheless, they face a huge case load and human rights are, contrary to the constitutional courts, not their founding reference framework. Sometimes, the pressure to decide too many cases too quickly prevents the courts from researching ECtHR case law properly and consider other layers of legitimacy they could use in their arguments, rather than only arguments built on national domestic provisions. It was, however, pointed out that situation is generally getting better and supreme courts are nowadays doing much more in order to stay on top of the most recent and established ECtHR's case law. The Czech Supreme Court issues a monthly journal with its own judges commenting on the impact of the latest ECtHR judgments on Czech legal practice and case law. The Belgian Supreme Court typically acts pre-emptively and tries to push through and integrate Strasbourg decisions in advance into its legal practice.

- The situation of Georgia is slightly different and as such, Georgia serves as a good example of a different path of development. Drawing on its geopolitical position, Georgia is very keen to be seen as the 'good guy' in the former Soviet region, and, perhaps most importantly, to distinguish itself from neighbouring Russia. Of course, Georgia knows it does not have the position nor the resources of Russia, and therefore uses its image as a relatively good complier for reputational benefits (an argument supported by several NGOs interviewed by HRLIP).
- Criticism of the ECtHR: at least in the Czech Republic, this phenomenon is very rare. Occasionally, the Strasbourg Court would be criticised for not understanding the peculiarities of the Czech system. However, the real, normative criticism of the ECtHR is almost non-existent in academic literature in the Czech Republic, and even the controversial *D.H.* case did not cause significant anti-ECtHR rhetoric.

### **Comparing the legitimacy, awareness, and knowledge of the Strasbourg and Geneva systems**

- Not so much attention is devoted to UN human rights treaty bodies and the cases of the Human Rights Committee. To some extent, this is understandable due to their different character: UN treaty bodies' decisions (opinions) are not binding, and observation from the Czech practice tells us that domestic courts tend to refer to UN human rights bodies less frequently than to ECtHR.
- That being said, there is no real sense that the UN case law is second ranked compared to the ECtHR. On the contrary, some of the cases dealt with by the OHCHR are very particular and sensitive in their nature, particularly cases related to transitional justice issues (e.g. a restitution case against the Czech Republic). As HRLIP research found out, individual UN human rights cases are unlikely to be the principal drivers of reforms, but may dictate the *scope* of those reforms.
- In some states, the same actors are responsible for the implementation of both ECtHR and UN treaty body cases and the responses of the government agents and other state organs do not appear to differ based on whether the cases come from Strasbourg or Geneva. If the decision touches on a sensitive issue, most government agents see themselves as having to play a role in depoliticising the issue. Some discussants pointed out that possible differences in approach are then based on the subject matter of the decisions, not on the Geneva / Strasbourg distinction. Only in Georgia did some interviewees report to HRLIP researchers that certain domestic actors are more willing to take a case to UN treaty bodies than the ECtHR. Nevertheless, it is important to point out that UN bodies' opinions and decisions are of a different character (meaning they are not binding). Similarly, the reporting system flagging the compliance of states with delivered decisions is strictly monitored under the CoE Committee of Ministers, while the same cannot be said about UN bodies.

- Nevertheless, when it comes to the life of Council of Europe and United Nations human rights regimes in domestic practice, the empirical data for the Czech Republic collected by the BeCOM team shows clearly that domestic courts tend to refer to ECtHR far more often than to OHCHR or other UN treaty bodies. This fact on its own would be understandable based on the robustness of the ECtHR's jurisprudence. Nevertheless the research also shows that the same goes for the differences between the references to the European Convention on Human Rights and both UN human rights covenants (the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights). To some extent, this is due to the complexity and detailed character of the rights regulated by individual instruments; thanks to the ECtHR's case law, the Convention is far more nuanced. Another reason, however, why we cannot see Covenants directly referred to so much, is because in the Czech Republic, the core principles encompassed in the Covenants were already incorporated into the Czech Charter of Human Rights. The courts, particularly being quite strong in 1990s, did not therefore feel any need to further legitimize their interpretation of the Charter by reference to international human rights law.

### **Judicial dialogue**

- Some final thoughts were devoted to the question of judicial dialogue between domestic courts and international human rights bodies. It has been stressed that supreme courts are now in much closer contact with the ECtHR, especially through presidential meetings and discussions.
- It is, however, worth a question whether the implementation of cases against a particular country can enhance or lead to a dialogue. If the courts are expected to implement cases against their own jurisdiction, they are not equal partners to the ECtHR. Nevertheless, there are other options; for example, when courts are engaging with cases against other countries, or debating the transfer of principles used by the ECtHR across European jurisdictions. However, occasions on which domestic judges are willing to engage in such a dialogue are rare; first, they need to interest the judges, by touch upon a topic highly relevant for their own legal order. Secondly, the reactions of the ECtHR to domestic courts' interpretations of its own case law are often unknown, either because the domestic cases do not end up in individual complaints to the ECtHR, or the overall state of awareness of the domestic implementation of the ECtHR's cases is low.
- Finally, it was pointed out that evaluating the approach of individual courts towards the ECtHR might still be problematic. Although some patterns certainly prevail, the attitudes and approaches of individual judges may differ considerably. Some are keen to use as much of the international human rights case law as possible, while others prefer almost exclusively domestic references. That being said, it needs to be taken into account that attitudes might change with individual composition of courts.

## **Annex 1: Case study judgments and decisions against the Czech Republic being analysed in the framework of the HRLIP**

### **UN Human Rights Committee**

***L.P. v. the Czech Republic***, Communication No. 946/2000, Views adopted on 19 August 2002 *Authorities' refusal to act upon court decisions allowing father regular access to his son; violation of Article 17 ICCPR (protection from arbitrary or unlawful interference with one's privacy and family), in conjunction with Article 2.*

### **European Court of Human Rights**

***Bureš v. the Czech Republic***, Appl. No. 37679/08, judgment of 18 October 2012. *Ill-treatment of applicant at a hospital sobering-up centre, in particular by being strapped to a bed for several hours and inadequacy of investigation; substantive and procedural violation of Article 3 (prohibition of inhuman or degrading treatment).*

***D.H. and Others v. the Czech Republic*** [GC], Appl. No. 57325/00, judgment of 13 November 2007. *Discrimination against Roma children in the education system on account of their placement in special schools for children with learning difficulties; violation of Article 14 ECHR (prohibition of discrimination) in conjunction with Article 2 of Protocol No. 1 to the ECHR (right to education).*

***Eremiášová and Pechová v. the Czech Republic***, Appl. No. 23944/04, judgment of 16 February 2012. *Authorities' failure both to safeguard the right to life of the applicants' relative and to conduct an effective investigation into the circumstances surrounding his suicide while in police custody; substantive and procedural violation of Article 2 (right to life).*

***Hartman v. the Czech Republic***, Appl. No. 53341/99, judgment of 10 July 2003. *Excessive length of proceedings in cases concerning recovery of property confiscated under the communist regime; violation of Article 6 (1) (right to a fair trial / right to a hearing within a reasonable time); Article 13 ECHR (right to an effective remedy).*

***Wallová and Walla v. the Czech Republic***, Appl. No. 23848/04, judgment of 26 October 2006. *Taking into care of children from a large family on the sole ground that the family's housing was inadequate; violation of Article 8 ECHR (right to respect for family life).*



## **Annex 2: Workshop Programme**

### **Programme**

**10.00 Registration**

**10.30 Presentation of ongoing research by JUSTIN**

**Presentation of early findings of the HRLIP**

**Discussion and short break**

**11.30 1. Domestic response to supranational human rights judgments**

- Who are the relevant actors and how do they interact?
- Which actors see themselves as having a role in / an obligation to promote implementation (e.g. Parliament? judiciary? civil society?)?
- Who is involved in identifying implementation measures?
- Case-related and other factors: what factors make it more or less difficult to achieve implementation?
- Obstacles / potential for improvement with respect to the domestic 'system' for implementation.

**12.45 Lunch**

**13.45 2. Relationships between Strasbourg / Geneva and the Czech Republic**

- Domestic perspectives on the Committee of Ministers' supervision process
- Domestic perspectives on monitoring the implementation of UN treaty body decisions
- Usefulness of specificity and prescriptiveness, both in the rulings of the European Court of Human Rights and UN treaty bodies and in the instructions/recommendations from the Department for the Execution of Judgments / treaty bodies
- Measuring implementation: with reference to particular cases (in particular those requiring a change in societal attitudes), when should supervision come to an end?

**15.00 Coffee break**

**15.15 3. Attitudes towards the Strasbourg and UN human rights systems**

- Awareness and knowledge of the respective systems
- Awareness of wider debates across Europe about the authority/legitimacy of the Strasbourg and Geneva systems
- What makes the systems legitimate / what are features of a supranational human rights system that would make it be perceived as legitimate?
- Attitudes among political actors
- Existence of any criticism / backlash, and the reaction to any such criticism

**16.30 Wrapping up**