

LEGISLATIVE AND INSTITUTIONAL CHANGES IN THE FIGHT AGAINST EXTREMISM SINCE 2016

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Abstract

After the new government of Róbert Fico in 2016 was designed, fight against extremism became its political priority. This paper deals with legislative and institutional changes in the fight against extremism since the Programme Statement of Fico's government was approved by parliament and thus the new government gained the confidence of its members.

First part of the paper deals with the concept of militant democracy, what is the theoretical basis of the fight against extremism in the Slovak republic. Then it examines the political attitudes of previous governments to fight against extremism since the first adoption of Conception to Combat Extremism in 2007. The last part focus on institutional and legislative changes in the anti-extremist agenda since 2016. We found out that important changes have been done in the Criminal Code and even more in Code of Procedure, what led to reinforcement of personal capacity, education and material equipment of its crucial actors. From this point of view, year 2020 will be crucial, either because of adoption of the new government's programme statement for 2020-2024, as well as the Conception of Combat to Extremism, which will replace the outdated Conception for years 2015-2019.

Keywords: Militant democracy. Extremism. Fight against extremism. Criminal Code. National Criminal Agency.

1 Introduction

We have been witnessing the strategy of combating extremism for a long time. The official strategy of anti-extremism specified in conceptions to combat extremism has been prepared since 2007 and is expected to continue in 2020 by its 4th sequel. However, officials of the Ministry of Interior, responsible for coordinating the governmental fight against extremism, assert in *Report on the fulfillment of tasks from Conception to combat extremism for years 2007 – 2010* [1] that collaborating public authorities should be more proactive and involved in fulfillment of Conception's tasks.

Moreover, experts on extremism and human rights agenda sent critical comments to police, prosecutors and courts when pointed out misconducts or lack of professional competence in criminal proceedings led by law-enforcement authorities. Although politicians have argued with statistics showing low number of extremist crimes, critics say it is just the result of their deficient detection and sanctions.

Since 2016 the fight against extremism has become the priority of government and political parties, although it was not caused by any violent attack of neo-Nazis against ethnic minorities such as the murder of Anastázia Balážová in 2000, which led to intense fighting against extremist groups. This time both political elites and public were shocked by success of Marian Kotleba, politician with extremist past, who was elected President of Banská Bystrica self-governing region in 2013. A few years later, his party Kotleba – People's party Our Slovakia gained 8.04% of votes in the 2016 parliamentary elections (i.e. 14 seats in National Council of the Slovak republic).

The aim of this paper is to map the legislative and institutional changes in the fight against extremism since 2016, when the government joined the intensified fight against extremism, with the aim to "*stop the rise of extremism and the radicalization of parliamentary politics*" [2].

In particular, official government documents will be examined, i.e. programme statements, conceptions to combat extremism, and evaluation reports on the fulfillment of the conceptions' tasks; then data of law enforcement authorities, press releases of ministries and published interviews with leading experts on extremism, radicalization and its prevention.

2 The concept of militant democracy as the basis of the fight against extremism

State policies against anti-democratic forces are a frequent topic of political and academic discourse, particularly in the context of restricting their freedom of expression or assembly. However, governments usually defend the tightening sanctions for attacks on democracy with the right or even the duty to protect democracy from those who want to jeopardize it. This belief is a fundamental principle of the militant democracy's theory and practice.¹

The concept of militant democracy was first developed by German philosopher Karl Löwenstein in the context of experience with the Nazi regime. He was convinced that the aim of fascism was to destroy democracy or its

¹ In academic literature militant democracy is also called defensive, defending, intolerant, etc.

fundamentals (e.g. free political competition, pluralism or the guarantee of fundamental human rights), which forces democratic governments to take political and constitutional measures. Even if democratic means to eliminate fascism are insufficient, it is necessary to use non-democratic ones [3]. Even before the start of World War II he developed the concept of militant democracy and proposed 14 principles or measures that would concentrate power in the hands of the government, take emergency measures and adopt ad hoc legislation to limit the rights of expression, participation and assembly. According to Löwenstein, this is the way to prevent fascist movements from abusing democratic freedoms and undermining democracy [4].

After World War II, according to Capoccia, militant restrictions on rights and freedoms in modern democracies are an important element of the legal systems and domestic politics.

In this context, Slovak author Peter Wilfling affirms that the concept of militant democracy in the legal systems is also expressed in Article 17² of the Convention for the Protection of Human Rights and Fundamental Freedoms³, adopted by the Council of Europe in 1950, whose general purpose is to prevent adherents of totalitarian ideologies to abuse the principles enshrined in the "Convention" [5]. Specifically in case of freedom of expression (including the right to receive and disseminate information), Article 10 (2) states that "*in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*", the exercise of freedom of expression may be lawfully subjected to formalities, conditions, restrictions or penalties.

The exact form, extent and means of militant democracy or state's defense strategy is the subject of academic and lay discussions. Critics rightly point out that if a democratic state opposes ideological enemies too vigorously and offensively, the government will begin to show authoritarian tendencies. Max Steuer, in *Extremes of Freedom of Expression and the Role of Legal Regulation* [6], emphasizes that legal regulation defending democracy may not actually achieve the goal of protecting democracy. He points to the alternative of militant democracy in the form of "law as the facilitator of freedom", which is based on conviction to provide space for the realization of individual's rights and freedoms. In other words, state intervention is legitimate only when individual's freedom or human rights are threatened by other individuals exploiting the same freedoms. On the contrary, it is not legitimate to limit those who could represent anti-democratic forces and threaten democracy as a system. According to critics of militant democracy, we cannot legitimately and efficiently defend democracy as there is no consensus in defining the boundary between tolerated acts or expressions within a democratic space and those that can already be considered as a threat to democracy.⁴

From the perspective of the Slovak legal system, Max Steuer claims that "*after the amendment to the Criminal Code effective from January 2017, legislation in the Slovak Republic has unconditionally shifted to a militant democracy*". From political point of view, the fact is that the militarist-democratic principle has been adopted by anti-extremist policymakers even sooner, what is probably related to the inspiration of Slovak experts in Germany, where militant democracy ("streitbare" or "wehrhafte Demokratie") constitute the basic understanding of democracy for more than 70 years [7]. Authors of *Slovak Conception to Combat Extremism for years 2015-2019* identify militant democracy as a basis for the fight against extremism, arguing with their historical experience with the Nazi and Communist regimes. In their words, enemies of democracy use democratic tools and opportunities for their activities, therefore "*defending democracy and its basic attributes should be as strong and effective as its enemies' will to destroy it*" [8].

3 The Development of Slovak Extremist Scene and Reaction of Governments in Strategic Documents

Until 2009 the fight against extremism was perceived mainly in connection with the activities of some more or less organized extreme right-wing groups, organizing memorial gatherings or participating in sports (mainly football) and cultural (music) events. In the *Report on the Fulfillment of Tasks from the Conception to Combat Extremism for years 2007-2010*, it is noted that one of the hallmarks of extremist crime is "*a group behavior of mostly juveniles or persons close to juvenile age*". The 2006 Programme Statement of Róbert Fico's government proclaimed that the fight against extremism was a priority of the government. It committed to tighten the procedure and not to tolerate "*illegal activities of members and supporters of extremist groups and movements ...*" [9].

Although the authors of the *Conception to Combat Extremism for years 2011-2014* still registered the popularity of unregistered groups, such as National Resistance or Autonomous Nationalists, in 2010 they also warned that

² Article 17 - Prohibition of abuse of rights: „*Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.*“

³ The Convention is signed by 47 member countries of the Council of Europe.

⁴ In Slovak, German or Czech practice, the dissolution of a political party is a dividing issue in this matter. Advocates of militant democracy support this legal regulation, supporters of "law as the facilitator of freedom" do not.

since 2009 extremists had been moving "from confined spaces to streets where organizers have gained the support and sympathy of the population" [10]. *The Report on the Fulfillment of Tasks from Conception to combat extremism for years 2011 –2014 for 2012* [11] even says that "the extremist scene in Slovakia has undergone a visible change from relative anonymity (from the unregistered movement) through civic associations to the political scene". At the same time there is attenuation of weakly organized unregistered groups such as National Resistance or Autonomous Nationalists [12].

However, Slovak public noticed a significant strategic change in the extremist scene only after the election of Marian Kotleba as the President of the Banská Bystrica self-governing region. Even more surprising was the party's success in the 2016 parliamentary elections, with 8.04% of votes and 14 seats in the National Council of the Slovak Republic. The fight against extremism has thus become an important political and public issue and also frequently used political tool for politicians. Although the government of Iveta Radičová in 2010 and also the second government of Róbert Fico in 2012 committed in the government programme statements to promote zero tolerance of extremism and uncompromising struggle against any manifestations of extremism, racism, intolerance, xenophobia, anti-Semitism and aggressive nationalism, abovementioned statements were more or less general declarations about the need of continuity in the fight against extremism. Electoral success of Kotleba's party in 2016 forced the politicians to do more. While in 2012 the government programme statement mentioned the word extremism once, in 2016 it was already 12 times, and the fight against fascism and right-wing extremism has become a cross-cutting theme in several areas, whether education, culture or internal security. The 2016 government programme statement of coalition parties SMER-SD, Most-Híd and Slovak National Party set itself as one of the main objectives "halting the rise of extremism and radicalization of parliamentary politics".⁵

4 Legislative and Institutional Changes in the Anti-Extremist Agenda

The implementation of legislative and institutional changes in the anti-extremist agenda is a practical fulfillment of the government measures set out in the conceptions to combat extremism, "the strategic document on preventing and eliminating radicalization and extremism and the associated anti-social activities endangering fundamental rights and freedoms and democratic rule of law" [13]. On March 18, 2015, the Government adopted the *Conception to Combat Extremism for years 2015-2019*⁶. With some delay the fulfillment of tasks from this Conception will be evaluated and reported in 2020 and simultaneously the new Conception for the next period should be approved.

In the Conception for years 2015-2019, four strategic objectives have been defined with aim to "to prevent radicalization leading to extremism through early intervention and systematic education of individual target groups". Within these strategic goals, 35 tasks have been identified. In this paper we focus on those aimed at implementing of legislative and institutional changes in the area of preventing and eliminating radicalization and extremism. One of them was the task no. 3.6 "Prepare legislative material to amend the Criminal Code and the Code of Criminal Procedure and submit it to the legislative process." On the basis of cooperation between the Ministry of Justice and the Committee on the Prevention and Elimination of Racism, Xenophobia, Anti-Semitism and Other Forms of Intolerance was adopted the *Act No. 316/2016 Coll. on recognition and enforcement of property decisions in criminal proceedings in European Union and on amendments to certain acts* (effective from 1 January 2017), which also amended the Criminal Code and the Code of Criminal Procedure in the provisions related to crimes of extremism.

Besides the introduction of the new offense of apartheid and group discrimination and the extension of the crime of supporting and promoting a movement to suppress fundamental rights and freedoms by establishing such a movement, experience in legal practice has led to a significant change in the definition of extremist material. As the Ministry of Justice states, "for a material to be defined as extremist, it will no longer be necessary for law enforcement authorities to prove its link to incitement to hatred, violence and other unwanted phenomena" [14]. For instance, if an individual disseminates material with extremist content, the law enforcement authorities may classify it as extremist material, whether he/she intended to incite hate or violence or not. Indeed, there have been cases where defendants advocated the possession or dissemination of material containing extremist content by expanding the collection of historical objects or using it for educational and research activities. When they denied allegations of incitement to hatred or violence, it was difficult for law enforcement authorities to prove the opposite. According to the new wording, burden of proof is on the defendant. The need to classify a crime as racially motivated, even if the individual or persons are supposed to belong to a race, nation, nationality, ethnic group, has also arisen from practice. In other words, if someone is

⁵ The fight against extremism become also an important tool in political struggle, since Most- Híd party used it as a political advocacy of cooperation with SMER-SD. Leader of Most – Híd, Béla Bugár, said that if the Most-Híd party did not form a government with SMER-SD, snap election would be held in which extremist forces could gain even higher support of voters.

⁶ The Conception to Combat Extremism for years 2015-2019 continually followed the conception to combat extremism for years 2006-2010 and 2011-2014.

committing an offense against someone in the belief that he is a Jew, it will be considered racially motivated according to the latest amendment, even if the victim is not of Jewish nationality.

Another important legislative change is the adoption of *Act No. 91/2016 Coll. on criminal liability of legal persons*, in the sense of which legal persons (including political parties and movements) will also be liable for crimes of extremism. At last, in accordance with task No. 3.7. *Strengthening the position of victims of extremist crime* of the *Conception to Combat Extremism for years 2015 - 2019* the *Act No. 274/2017 Coll. on victims of crime and on the amendment to certain acts* was adopted. This Act defines the “*victim of a crime committed by violence or threat of violence due to gender, sexual orientation, nationality, racial or ethnicity, religion or faith*” as an “*especially vulnerable person*”. If the victim is granted the status of an especially vulnerable person, the law grants him / her increased attention, consideration, or professional assistance in both criminal and judicial proceedings.

Institutional or organizational changes to prevent and eliminate radicalization and extremism have resonated in public to a greater extent than the amendment of the Criminal Code or the adoption of other laws with the impact on the fight against extremism. Implementation of these changes followed the criticism that law enforcement authorities were not sufficiently investigating and prosecuting crimes of extremism. Critics pointed out the individual failures of law enforcement officers, prosecutors and judges, but also the system shortcoming that does not help actors in their fight against extremism, does not create sufficient personal capacity and does not educate and motivate the existing ones.

However, a fundamental change was brought by the 2016 amendment to the Code of Criminal Procedure (so-called *Žitňanská Amendment to Extremism*), when the jurisdiction to hear and decide on crimes of extremism was shifted from 54 district courts to the Specialized Criminal Court. It also modified the competence of the Special Prosecutor's Office what led to establishment of new department for crimes of extremism with 5 specialized prosecutors. At the same time, the Ministry of Justice of the Slovak Republic extended the system of expert fields by the Social Science and Humanities section, divided into the branches of Political and Religious extremism. Currently, two experts are registered, whose task is “*to cooperate mainly with law enforcement authorities, courts and public authorities in the investigation of extremist offenses*” [15].

In addition to judiciary, changes were also made at the level of security forces. On February 1st 2017, *National Unit for Fighting Terrorism and Extremism* was formed by association of two abolished divisions dealing with the fight against terrorism and the fight against spectator violence. The new unit is subordinated to the *National Criminal Agency of the Presidium of the Police Force*, which associates the highest quality police staff in the country.

The formation of the unit was a politically significant step, presented to the public by the then Prime Minister R. Fico with Minister of Interior, Róbert Kaliňák, and President of the Police Force of the Slovak Republic Tibor Gašpar. At the same time, the press conference was attended by a few dozen members of the newly formed unit in disguise. According to the Ministry of Interior, 100 police officers were to be involved in the fight against extremism and terrorism, unit director Martin Smiško talked about dozens of specialists who are directly involved in extremism agenda and hundreds of National Criminal Agency's cops who are available if necessary [16]. At each of 8 Regional directorates⁷ of the Police Force there are units for fighting extremism and spectator violence who support nationwide activities of *National Unit for Fighting Terrorism and Extremism*. Moreover, in 2017 was established extremist screening center dedicated to the issue of extremism, particularly in cyberspace, what is an actual challenge for law enforcement authorities in their fight against extremism.⁸

Views on the formation of the unit were not uniform. Former director of the Department of Combating Extremism and Terrorism at the Police Presidium, Martin Kubík, argued that the office is hierarchical low-ranking, what may cause delays in the exchange of information and making of legislation [17]. On the contrary, Daniel Milo, an expert on extremism and a former employee at the Ministry of Interior, welcomed the change, mainly highlighting the expertise of the police officers working in the unit. He pointed out that the takeover of extremist crimes by the National Criminal Agency, the Special Prosecutor's Office and the Specialized Criminal Court seems to be a good step. Statistics show that creating of a dedicated team of investigators and operatives

⁷ However, according to Daniel Milo, the police officers of the Regional directorates dealing with extremism and spectator violence no longer form a separate unit since 2014, but are instructed to address this crime in addition to other activities, what reduces their capacity to perform the anti-extremist agenda. Representatives of the Department of Extremism and Spectator Violence at Presidium of the Police Force reported in 2016 that at each Regional Directorate, two police officers from the investigation department and at least four police officers from the operations department were able to combat extremism. They could perform also other tasks in the area of general crime but must not significantly reduce their performance in the field of extremism crimes.

⁸ All these changes are in line with the strategic objective of the *Conception to Combat Extremism for years 2015-2019*, “*to create institutional and staffing capacities for state bodies performing tasks in matters of protection of the constitutional order, internal order and security of the state.*”

within National Criminal Agency has led to the increase of detected extremist crimes. In 2015 only 30 crimes were detected and in 2016 just 58 crimes, but after special unit took over the anti-extremism agenda in 2017, 145 crimes were detected in 2017 and even 159 crimes in 2018. As Daniel Milo rightly points out, the low numbers of detected extremist crimes in past more likely refers to inability or lack of interest of law enforcement authorities to detect such cases [18]. On the contrary, the specialization helped to detect illegal activities of individuals or groups more scrupulously, especially in cyberspace, what is actually the new ground for extremist activities.

5 Conclusion

In this paper, we mapped out the most important legislative and institutional changes in the fight against extremism since 2016, when the new government declared in its Programme Statement a commitment to intensify the fight against extremism.

Among the most important legislative changes belongs the amendment to both the Criminal Code and the Code of Criminal Procedure, which tightened the criminal penalties of extremist crimes and changed the criminal proceedings by shifting the jurisdiction on crimes of extremism from 54 district courts to the Specialized Criminal Court. The competence of the Special Prosecutor's Office was modified, too. A fundamental change was made at the level of the Police Force of the Slovak Republic, when the issue of extremism was taken over by the National Criminal Agency (NAKA), namely by the National Unit for Combating Terrorism and Extremism.

Although the quality of adopted laws and their consistent and effective enforcement is just one of the necessary measures to combat extremism, the legislative and institutional environment creates the necessary framework for the action of other actors (law enforcement agencies, non-governmental organizations, citizens, etc.), while giving the public a signal of the authorities' commitment. From this point of view, year 2020 will be crucial, either because of adoption of the new government's programme statement for 2020-2024, as well as the Conception to Combat Extremism, which will replace the outdated Conception to Combat Extremism for years 2015-2019.

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