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The Constitution of the Republic of Slovenia and the European convention for the protection of human rights and fundamental freedoms: the potential of international standards for domestic development of human rights law

This paper is intended to provide some basic facts concerning the recent constitutional change in Slovenia and the ideas underlying that change and, secondly, a brief consideration of three basic questions pertaining to the regulation and operation of human rights protection in the constitutional system of Slovenia (the principle of equality and non-discrimination, the question of permissible limitations of certain human rights and the basic characteristics of the institutional framework for the implementation of human rights enshrined in the Constitution). It is understood that the questions discussed in the second part of this paper will be thoroughly considered in the papers prepared by other participants who will focus on specifics.

The approach taken in the preparation of this paper is characterized by a relatively high level of generality – its purpose is only to provide a perspective within which the specifics can be more fully understood.

Some general observations

The movements for new constitutionalism in the former socialist states of Central and Eastern Europe had to carry out a task of great historical importance in politically arduous circumstances. Not only did they have to establish permanent constitutional frameworks for democratic states (to replace the previous ones, based on a different paradigm), but they also had to establish a basis for a new legitimacy of entire legal systems and durable constitutional bases for social change, something that will be able to endure social and political pressures and conflicts which are inevitable in that part of Europe. As we shall see later, internationally agreed human rights standards, in their multifaceted role, are relevant to all three aspects of this task.

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Besedilo avtorja objavljamo v angleškem jeziku, da bi tudi tujo družboslovno zainteresirano javnost seznanili z nekaterimi značilnostmi političnega sistema Slovenije.

The practical (political) approaches to this task were different from country to country. Slovenia represents an interesting example (or an exception, perhaps) in these comparisons. The country has been, for the last decades at least, relatively prosperous and its political culture relatively tolerant. Change did not come as a result of revolt against dictatorship (which did not exist) but as a result of longing for more freedom and prosperity. In practical, political terms this longing was expressed by the "magic word" – Europe. Human rights were a necessity, albeit not necessarily the most important part of the longing.

The movement for a new constitution and for a major social and political change started to get off the ground in the middle of the eighties and had two principal »wings«. One of them was primarily concerned with the country's independence and political transformation, while the other concentrated on human rights and formation of civil society, leaving aside, temporarily at least, the question of the political status of Slovenia. The process of transition was rather smooth and, indeed, were it not for the war in July 1991, (and the subsequent independence) it would probably have taken place unnoticed in the "world media".

It would be wrong, however, to conclude that relative smoothness of transition meant a lack of change. Quite to the contrary, the change was very real, both at the level of practical politics and at the level of deeper, contemplative projection of the future. Endeavours at these two levels sometimes overlapped, and they always converged.

Let us illustrate these general remarks with just a few examples.

The first attempt to propose a general alternative to the previous constitutional order was the "writers' constitution" a draft constitution which was presented (in early 1988) by the Writers' Association of Slovenia. The draft was, perhaps, technically imperfect, yet it challenged the entire political system of that time and it exacerbated the dynamics of the dissolution of the system in the most subtle and profound way: it presented itself as a real and plausible alternative.

At the level of specific constitutional changes, the amendments adopted to the Constitution of Slovenia in the Spring of 1988 already showed signs of important change. The constitutional provision on non-discrimination was expanded so as to include prohibition of discrimination on the basis of *political opinion.* Something that had been carefully avoided in the previous system for decades. At the level of abstract projection of the future this was one of the most important changes, expressed in the form of revision of the then existing Constitution.

At the level of practical action, the Spring of 1988 was important for the mobilization of public opinion in support of human rights. Tens of thousands were demonstrating daily in support of "the Ljubljana four" – a group of four journalists accused (in a political trial staged by the Yugoslav Army and carried out by a military tribunal) of illegal handling of military secrets. The split of law into *legality* allegedly advocated (i. e. manipulated) by the military court, and *legitimacy* – vigorously pursued by the already mobilized civil society was apparent to everybody. Furthermore, it is important to understand that the military court which tried civilians acted as a repressive instrument of an undemocratic federal state, a state which was in its essence hostile to the rule of law and human rights. (A further characteristics of that trial was that it was taking place in Serbo-Croatian language, i. e. a language which is a foreign language in Slovenia). It became obvious that the forces of authoritarian rule prevailed in the Yugoslav federation. This "discovery" accelerated the establishment of the necessary link between human rights – oriented part of the civil society with the one focusing on independ-

ence of Slovenia. Indeed, for the vast majority of the people in Slovenia life in a federation where military courts manipulate justice and try civilians seemed a completely unacceptable perspective.

The development in the Spring of 1988 was a turning point in the society at large and, in particular, in the activities concerning human rights. Something that until then had seemed as a matter of academic dispute or constitutional theory became a matter of practical, even existential concern to every individual and to the civil society in general. Since then the movement for a new constitution has matured into a solid fundament for a democratic constitutional order based on human rights. Without such a basis every constitution – irrespective of the quality of drafting – is in danger of being violated or manipulated. An important feature of this maturation was the emergence and subsequent activity of the human rights groups which were created in the Spring of 1988 and which gained momentum in that time (including the Council for Human Rights and Fundamental Freedoms which is organizing the present colloquy). These groups have remained one of the guarantees for the continuity of the processes triggered in 1988 and were important, as a part of a new social reality for the subsequent processes of constitution – making.

The process of actual constitution – making evolved in 1989–1991 in two stages. In started with extensive amendments to the earlier Constitution (in September 1989) and was concluded with the adoption of the new Constitution on 23 December, 1991.

The Council for Human Rights and Fundamental Freedoms was active in both phases of this process and had a series of initiatives. The Council proposed, on 4 April 1989, a new and coherent approach to human rights, an approach which represented a radical departure from the previous system. Thus we proposed changes in the Constitution to the effect that laws cannot limit human rights enshrined in the Constitution itself, except in a few and constitutionally determined instances, and we made a series of proposals concerning a new formulation of political rights (freedom of thought, conscience and religion, freedom of assembly, freedom of association, the provisions concerning elections, the right to own property, the provisions which aimed at strengthening of the independence of judiciary and limitations to the possibility of introducing a state of emergency). In all these matters we took advantage of the existing international standards in the field of human rights. Furthermore, we proposed, on 13 June 1989, an expansion of the competences of the Constitutional Court of Slovenia to the effect that the Court could consider specific human rights violations – under certain procedural conditions (exhaustion of other remedies etc). Most of our proposals were accepted without major hesitation and although not all of our proposals were adopted in the amendments to the Constitution of September 1989 (the one concerning the Constitutional Court was not), they nevertheless paved the way to a comprehensive constitutional change which took place in 1991.

In the process of preparation of the 1991 Constitution the Council played an interesting and important role. The Council prepared a comprehensive draft of provisions concerning human rights, both substantive norms and procedural and institutional aspects. Some of the most interesting aspects of these proposals will be discussed in the subsequent part of this paper. Suffice it to mention here that they include such substantive norms as those related to the right to equality and non-discrimination, the rights of persons belonging to minorities, norms concerning derogation and permissible restrictions of certain human rights, as well as

norms pertaining to the role of judiciary (the principal institutional guarantee for protection of human rights), the constitutional complaint and the Defender of Human Rights (the Ombudsman) as the main novelties in the field of institutions for protection of human rights.

In developing a comprehensive approach to human rights as the main part of the Constitution of the Republic of Slovenia we proceeded from the relevant international standards. The utilization of these standards was an exciting exercise and we learned a great deal about the usefulness of different formulations of rights in international instruments for the purpose of making a constitutional text. More importantly, however, we learned about the development of international standards themselves. Thus the original wording of the European Convention on Human Rights (of 1950) and some of the additional protocols proved to be only of very limited value in the process. It appeared that the International Covenants on Human Rights (adopted within the UN) and, in particular the International Covenant on Civil and Political Rights contain provisions which are formulated in a manner closer to the need of a constitution of me 1990. Moreover, we looked into the most interesting jurisprudence of the European Convention and the Court of Human Rights and we profited from that – both in terms of answers to different substantive issues and as an important encouragement regarding the role of institutions for the application and *expansion of the scope of human rights and fundamental freedoms.*

The experience in constitution – making and the process of learning about the relevance of human rights in the current processes of change in Europe also call for a general reflection upon the role of human rights in the process of development of a common legal foundation of Europe – something that was once in the centre of European legal thinking.[1] It is natural that this question has regained importance in the process leading towards a future Europe which will no longer be divided by profound ideological cleavages that were characterizing the reality of our continent in the past decades.

Let me try to make only one general observation in this regard. The observation is this: In preparing a constitutional framework for the protection of human rights we had the necessary political consensus in the society regarding the direction of change. We also had the necessary drafting skills, which were – as regards the provisions concerning human rights – based largely on the evolution of the relevant international standards. In addition to that, we also had a vision of the place of this change in the broader context of European transformation. We were aware and we continue to be aware that creating a state characterized by rule of law ("Rechtstaat") transcends the concept of legality itself and that the constitution must prevent the danger of the *Rechtsttaat* degenerating into a dictatorial *"Gesetzestaat"*. The constitutional system must be developed in a manner upholding legitimacy of law in all situations, and prevent any kind of recurrence of

[1] It is interesting to read, in the context of the present processes of transformation, the "testament lecture" of Carl Schmitt »Die Lage der europaeischen Rechtswissenschaft (1943/44), in Carl Schmitt, Vefassungsrechtliche Aufsatze aus den Jahren 1924–1954: Materialien zu einer Verfassungslehre, second edition, Duncker & Humbolt, Berlin, 1973, pp. 286 426. The lecture was recently published in English under the title "The Plight of European Jurisprudence", Telos, New York, Number 83, Spring 1990, pp. 35–70. The author pointed out – in time when destruction of Europe was almost total – the importance of the historically rooted European "legal community" for the future (re)unification of Europe. This purely jurisprudential opinion can be expressed much more strongly today – with reference to the empirically ascertainable existence of human rights law as the essential aspect of the European legal tradition shared by the "legal community" (Rechtsstand) of today. This optimistic opinion in favour of the legal profession is probably justified at a meeting like the one for which this paper was prepared.

illegitimate laws which make violations of human rights possible. This is a very old and very profound problem in law and let me, only in passing, recall that the split of law into legitimacy and legality, and the prevalence of the latter, in particular through legal positivism, was one of the main problems of law in Europe. This problem figured very prominently in the work of one of the greatest European jurists, Friedrich Carl von Savigny, who, in his time, emphasized the importance of »historical sources« of law and the need to distance the question of sources of law from the world of enactments.[2] Today it is safe to assert that human rights, which have become accepted as a part of "general principles of law recognized by civilized nations" (the terminology is borrowed from Article 38 of the Statute of the International Court of Justice), have assumed a role of "historical source of law" and that legitimacy has regained, through the international codification and jurisprudence of human rights, a primary role in law in general. During past decades this "historical source" also assumed (through international conventions and through activities of the convention – based supevisory bodies) the strength of "a positive source of law". Human rights law has thus paved the way to the solution of very basic problems of law and its role in society. This approach has been developed with a substantial contribution of legal theorists of past decades and has considerably "alleviated" – "the plight of European jurisprudence". The creative contribution of lawyers as a professional group in recent constitution – making in Central and Eastern Europe is only one facet of this phenomenon.

The revival of legitimacy as the primary element of law has a number of important effects: (a) it paves the way to the removal of the historical split in law into legitimacy and legality, (b) if diminishes the dangers of positivistic illusion about enactment as the only relevant embodiment of law and (c) it shows the direction of reunification of the European legal space, something that existed in earlier historical periods and was abandoned when nationalistic organization of states, legal positivism and exclusive ideologies assumed a dominant role in the European social and political life. The role of jurisprudence ("Rechtswissenschaft") should be duly acknowledged in this context and the most important practical expression of this role, at present, is precisely in constitution – making, a path pursued by the jurisprudence in most countries in Central and Eastern Europe in recent years.

The above remarks require, of course, a note of caution. It is necessary to transcend the limitations posed by the positivistic perception of law and the practical dangers it usually entails (prevalence of legality over legitimacy and degeneration of the Rechtstaat into a Gesetzestaat), but this must be done in a manner that avoids falling into the traps of natural law and the consequent dangers of confusing law with morality or with other philosophic or, worse political assumptions. This is precisely where the international law of human rights, and, more particularly, the standard-setting activity of the Council of Europe play the (most important) major role, particularly in the sense that they provide the sources of law for constitutional enactment, something that is both legal and specific (in the sense of positive law) as well as morally authoritative. In this situation a certain degree of optimism is appropriate and the experience with constitution – making confirms that. However, this optimistic conclusion does not mean that all problems have been solved.

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[2] Savigny's theory of sources of law and, in particular, the concept of "historical source", remained important throughout history, not in the least as the ever present critique of legal positivism and prevalence of the concept of legality. This can be asserted without entering an analysis of coherence and contradictions of Savigny's historical theory of law.

The framework of legitimacy established at the European level is only a framework. From here on the debate on the legal protection of human rights must become specific and focused on the most pertinent issues.

Three basic questions of the human rights law as developed by the Constitution of the Republic of Slovenia

1. One of the most important sets of human rights provisions in every constitution concerns the principle of *equality and non-discrimination.*

The Constitution of Slovenia provides in its Article 14 the following:

"In Slovenia each individual is guaranteed equal human rights and fundamental freedoms, irrespective of national (ethnic) origin, race, sex, religion, political or other belief, material status, birth, education, social status or any other personal circumstance. All are equal before the law."[3]

This general provision is inspired by the approach taken in the International Covenant on Civil and Political Rights and combines, firstly a broad enunciation of the principle of non-discrimination and, secondly the right to equality before the law as a separate, i. e. additional right.

Furthermore, provisions concerning non-discrimination can be found also in Article 16 (exceptional circumstances) which again contains a broad list of grounds on which no discrimination is permitted in the cases of derogations of human rights in exceptional circumstances. This list goes further than the international instruments. It prohibits discrimination on the basis of race, national (ethnic) origin, sex, religion, *political or other belief, material status, birth, education, social status or any other personal circumstance.*[4]

Article 19 provides for the right of everyone who is arrested to be informed, in his mother tongue or in the language he understands, about the reasons for his arrest, while Article 22 provides for the equal protection of the rights of every person in court proceedings and in administrative and other proceedings.

Article 43 guarantees equality of citizens in the right to vote and to be elected, and Article 49, equality of all to access, under equal conditions, to work.

Article 63 prohibits advocacy of ethnic, racial, religious, or other discrimination and incitement of ethnic, racial, religious or other hatred or intolerance.

Article 61 provides for the right of everyone to freely express his national identity and Article 62 the right of everyone to use, in exercise of his rights and duties his own language and script, in a manner determined by law.

Finally Articles 64 and 65 provide for special rights of historically established ethnic communities in Slovenia, the Italian and Hungarian ethnic (national) communities and the Roma community.

The mentioned provisions give rise to the following thought:

The Constitution of Slovenia provides broad protection against all forms of discrimination, and includes a broad formulation of the basic principle as well as the references to equality before the law, to equality and non-discrimination in certain specific contexts (elections, the right to work etc), prohibition of advocacy

[3] Unofficial translation. The world "national" used in the Constitution relates to ethnic characteristics of individuals and groups and not to any aspect of their political organization.

[4] Compare this wording with the non-discrimination provisions of Article 4 of the International Covenant on Civil and Political Rights and with those contained in Article 15 of the European Convention on Human Rights.

of discrimination and incitement of racial and other similar forms of hatred. In addition to this it provides for special rights for certain individuals and groups with a view to achieving their equality in fact. In that the Constitution went considerably further than the international instruments mentioned here, including in particular the European Convention on Human Rights.

A particularly important aspect of equality and non-discrimination is provided in Articles 61–65 which relate to the ethnic aspect of non-discrimination and an attempt to lay down the constitutional conditions for guaranteeing the equality in fact. These provisions are devised to serve a variety of situations, involving people with different needs ranging from first generation immigrants and migrant workers to historically established groups which have developed their cultural and linguistic status over an extended period of time. The underlying rationale for these provisions is this: Equality and non-discrimination and rights in favour of individuals and groups which find themselves in a specific situation. Moreover, the Constitution must recognize the diversity of these situations and permit reasonable distinctions among them, in accordance with the relevant circumstances.

It should be recalled that each of the rights mentioned in Articles 61, 62, 64 and 65 goes beyond the generally very "timid" provisions on special rights in international instruments and, in particular, they go beyond the European Convention on human rights which is silent on this matter. It is also worthy to note that the jurisprudence of the European Commission and Court on Human Rights, which permit differentiation and special rights with a view to establishing equality in fact,[5] have not established clear criteria in these matters.

The most interesting aspect of these constitutional provisions will be related to their actual implementation in practice. The actual value of these provisions largely depends on the application and interpretation as developed by the courts and other bodies and this will be seen in the years to come.

2. *The question of permissible limitations of human rights* is another important general question concerning the constitutional protection of human rights.[6] In this regard the Constitution of Slovenia follows the patterns set by international instruments. Limitations or restrictions are permissible in matters concerning the right to freedom of movement (Article 32), the rights to privacy of home (Article 36) and correspondence (Article 37), and the rights to freedom of assembly and association (Article 42).

It is interesting to note that the right to freedom of expression (Article 39) does not permit any limitations.

Limitations which are permitted by the articles mentioned above are restricted by criteria of *(a) legitimacy* (the grounds for limitations are exhaustively listed in relevant articles of the Constitution, *(b) legality* (limitations must be determined by law) and *(c) necessity,* it being understood that the concept of "necessity" must be interpreted carefully and with due regard to the criterion of proportionality and

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[5] In the *Belgian Linguistic Cases* the European Commission on Human Rights held that a specific territorially based linguistic system of education would not necessarily contravene Article 14 of the European Convention on Human Rights. However, the Commission added that it did not consider it its duty to discuss the legitimacy of different approaches to linguistic regimes. Report of the Commission of 24 June 1965, para 405.

[6] In this paper we do not discuss the questions of permissible derogations of certain human rights which may take place in exceptional circumstances. Suffice it to say that Articles 16 and 92 of the Constitution of Slovenia contain necessary norms which permit and set limits to the imposition of exceptional measures. Those norms are based on careful consideration, carried out in the preparation of the constitution, of Article 4 of the International Covenant on Civil and Political Rights and Article 15 of the European Convention on Human Rights.

democracy. The laws which may provide for such limitations shall not be based on any other grounds than those defined by the constitution and will have to be necessary in terms acceptable in a democratic society.

Here the jurisprudence of the European Court of Human Rights will be of immediate and great help to the legislator – should it be decided that laws providing for limitations are necessary. The drafters of the Constitution were aware of the fact that the notion of "necessary limitation" in terms defined by the European commission and Court on Human Rights relates to a "pressing social need" and gives only a very thin margin of appreciation to the state organs imposing limitations. As the European Court on Human Rights stated in the *Silver case:*

"... (c) the phrase "necessary in a democratic society" means that, to be compatible with the Convention, the interference must, *inter alia,* correspond to a "pressing social need" and be "proportionate to the legitimate aim pursued" ...;

(d) those paragraphs of the Articles of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted ..."[7]

Furthermore, legislation in these matters must be very carefully scrutinized, both in the phase of preparation and in the phase of implementation. The interesting question in this context is how best to apply the doctrine expressed in the quoted judgement in the process of preparation of laws concerning protection of privacy in matters concerning telephone tapping or laws regulating restrictions of freedom of movement. Apparently the problems are different in each of these areas and it appears that the latter (restrictions to freedom of movement of – for example – aliens) is more easily managed by legislative methods while the former (telephone tapping) would require careful control over the actual practice of the government even if the legislation is satisfactory.

It would be very useful if the Council of Europe could provide specific advice on matters like those concerning the need to restrict the margin of appreciation existing in matters of permissible restrictions to certain human rights.

It is clear that a part of the answer to the question mentioned above relates to the actual judicial protection of human rights and all other mechanisms devised for this purpose.

3. With regard to *forums for supervision and implementation of human rights* the Constitution of Slovenia provides for the following arrangements:

Article 15 of the Constitution provides that human rights and fundamental freedoms are being implemented directly on the basis of the Constitution. The only limitations permitted are those expressed in equal rights of others and in the relevant provisions of the Constitution mentioned above. The same Article also guarantees judicial protection of human rights and fundamental freedoms and the right to removal of, and compensation for, damage resulting from a violation of human rights.

Judicial protection of human rights is thus defined by the Constitution as the basic instrument of protection. Naturally, it is important that the Constitution contains the necessary safeguards for the independence of judiciary and other relevant norms concerning the status and organization of the judiciary (Articles 125–134).

In addition to this the competences of the Constitutional Court defined in Article 160 of the Constitution provide for the possibility that the Constitutional Court decides on constitutional complaints in cases of violations of human rights

[7] Judgement of 25 March 1983, A. 61 (1983), pp 37–38.

resulting from individual decisions of different state organs and other decision – making bodies.

Finally, Article 159 provides for informal protection of human rights to be carried out through the institution of the "Protector of the Rights of Citizens" (an Ombudsman).

With respect to the competence of the Constitutional Court to consider individual violations in human rights (another paper is devoted to constitutional complaint and will discuss this competence of the Court in detail) there remain questions concerning criteria and the exact procedure of the Court which may take up individual cases. The Constitution itself does not define these criteria in detail. According to Article 162 of the Constitution, the question of proceedings before the Constitutional Court will be regulated by a special law and it seems that the same Article provides for a certain amount of discretion of the Court in decisions concerning its competence in matters of constitutional complaint.

The Constitutional Court will probably have to insist that other remedies are exhausted prior to initiation of proceedings before the Court. An interesting question in this connection will be how to maximize the effectiveness of *all* remedies available in cases of violations of human rights. The jurisprudence of the Constitutional Court will, hopefully make an important contribution in that regard.

The constitutional framework for the protection of human rights provides for all the basic forms of protecton: the judicial system, the Constitutional Court and the Protector of Human Rights (ombudsman). The actual functioning of these institutions remains a matter for the future. The problems of each require separate consideration. However, one of their common denominators is that each of them will profit from the experience gained in the process of the application of the European Convention on Human Rights.

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