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EVALUATION OF TWO PROPOSED LAWS ON PRIVATISATION OF PUBLIC SOCIAL SERVICES

ABSTRACT

The author compares and evaluates two legislative proposals for the privatisation of public social services, from 1994 and 1998. The evaluation criteria are taken from the legal, economic, and sociological standpoints. From the legal point of view two constitutional principles are relevant: the principle of equality before the law and the principle that human rights have to be determined only by law adopted in parliament and not by the executive regulations of the government. In terms of economic criteria it is relevant whether the legislative proposals consider specifics of activities in the area of social services in connection to mistakes and flaws of the adopted model of the ownership transformation of commercial companies from 1992. Considering legal and economic aspects the author draws the sociological conclusion that privatisation of social services should be based, along with an option of partial buy-outs of social institutions by employees, on the privatisation of activities rather than on the privatisation of material assets of social-service institutions. Further argument in this regard is the need for a change of the role of the state in the future development of social services. Both proposals are weak on all three aspects. The proposal from 1998 is even worse.

Key words: privatisation, equality before the law, participation rights, users, providers, ownership transformation,

First proposed law on the privatisation of public social services

In October 1994 the Government of the Republic of Slovenia drafted the first legislative proposal to regulate the privatisation of institutions involved in social services that are owned by the state. This paper deal with social services related to health care, social care, education and culture. In an assessment of the situation and an explanation

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of the reasons for drafting the law the Government mentioned only that by the adoption of the Law on Social Institutions on April 1, 1991 the Government legally obtained a substantial amount of property. With this ownership transformation act the Government obtained certain rights and obligations to ensure the continuous and effective operation of public social services.¹ As the Law on Social Institutions stipulates that private entities may act as co-founders of social institutions, the Government maintains that “partial or total privatisation of certain social institutions is possible” (Proposed Law on Privatisation of State Property 1994:15).

The Government considered the fact that social institutions are owned by the state and the possibility that these institutions can be privatised as the sole reasons for drafting the law on privatisation of social services. The guidelines for adopting privatisation legislation clearly indicate that the state would take a selective approach towards privatisation within social- service sector. The state would thus permit the privatisation of “particular” institutions, or allow the privatisation of parts where this is “economically and organisationally reasonable, so that continuous and effective operation of public services within the framework of the social services network in the relevant area” would be ensured, despite privatisation (Proposed Law on Privatisation of State Property 1994:15).

It is encouraging that the Government accepted the need for an appropriate equalisation of employees’ rights to internal buy-outs of commercial companies, with the corresponding rights of employees at social institutions. The Government stressed that employees of social institutions should also gain rights to internal buy-outs (the so-called participation rights of economic democracy), which were granted to employees in commercial companies by the Law on Ownership Transformation of Commercial Companies adopted in 1992. The Government ought to find a legislative solution that will respect the constitutional principle of equality before the law (Constitution of the Republic of Slovenia 1991: Art. 14) for employees in commercial companies and in social institutions concerning the participation rights - to the extent that this equalisation is also financially acceptable. The fact is that Law on Ownership Transformation of Commercial Companies constructed a comprehensive system of economic and industrial democracy for the employees of commercial companies and it should be in a respective manner applied also for the employees in the social-service sector.

Yet, on the other hand, a selective approach to privatisation is problematic in terms of the constitutional principle of equality before the law. The first systemic law on ownership transformation of social institutions was the Law on Social Institutions (1991). It changed social ownership of social institutions into state ownership. The Government gave an assurance that it would be a transitional legal arrangement. This means that it is necessary to count the proposed legislation on privatisation of social institutions as part of the systemic legislation. The overall purpose of the systemic legislation should be aimed at regulating the transition from the (old) ownership and status structures seen under the previous constitutional system to new ownership and status relations, that would correspond to certain legal, economic and sociological criteria.

First of all, according to the new constitutional system employees in commercial companies and in social institutions undergoing ownership restructuring have to be in an equal legal position regarding the participation rights, to a extent appropriate to the specifics of both sectors. In contravention of this requirement the proposed arrangement would introduce an approach whereby the existence of employees' rights to internal buy-outs would be ruled upon discretion of the executive branch of government, instead of being institutionalised by a law adopted in the Parliament. The Government here made reference to the fact that the state is the owner of the institutions, and thus has the right of disposal of the property and the right to decide on which social institution to privatise and which to keep under state ownership (Proposed Law on Privatisation of State Property 1994). In my opinion such concept does not satisfy the constitutional principle that only the legislative branch of government may determine human (participation) rights (Constitution of The Republic of Slovenia 1991: Art. 15). Even this solution does not satisfy the principle of equality before the law with regard to the rights of employees to participate in ownership transformation within social institutions, and also with regard to the arrangement of employees' rights to ownership transformation within commercial companies. The proposed legislative arrangement should first regulate an option of partial internal buy-out or allocation of shares for employees at all social institutions, and only then apply a selective approach to the privatisation of social institutions. Only in this case would the aforementioned constitutional principles be satisfied, insofar as this is possible given the specifics of social-service sector in contrast to the sector of commercial activities.

However, the problem with the proposed legislation also lay in the chosen objective of the proposed law: it was not clearly defined. In one sentence the proposer stated that the transfer of assets from the state to the private sector should "also increase the competitiveness and quality of the services" (Proposed Law on Privatisation of State Ownership 1994:16). However, from these words it proceeds that this was not the objective of the proposed law, but merely an anticipated positive result and thus an additional argument in favour of the adoption of the law. The real objective could probably be found in the financial consequences of the law, as the Government wrote that the revenue generated by privatisation would be classed as revenue for the national budget and would be "significantly higher than the costs" incurred by the work of the Privatisation Commission in implementing the law (Proposed Law on Privatisation of State Ownership 1994: 17).

When the Government subsequently formulated a somewhat amended draft of the law it became clearer that the main objective of the proposed legislation, and the reason behind it, was filling the state budget. According to the proposer "the privatisation of state property is closely linked to the national budget", and thus the type and extent of property privatised in a particular year should be stipulated by the budget for that year (Proposed Law on Privatisation of State Property 1995: 52). The proposer classed shares, stakes and material objects administered by social institutions as property. This means that ownership of social institutions was restricted to economic aspects, and gave no

consideration of the specific nature of resources, including the strategic value of factors of production in social-service institutions. The main value of social institutions is not in the form of material assets, but the non-material capital represented by the experts working at these organisations. Thus privatisation in this area cannot be based on the paid transfer of the economic value of social institutions under state ownership to private entities. Given the fulfilment of the principle of equality before the law (through the option of partial internal buy-outs), a reform should be based on the privatisation of activities in the field of social services, rather than on selling financial capital of these institutions. Furthermore, the privatisation reform should bring a change of the role of the state in future development of the social-service sector, which I will discuss in penultimate section.

Despite the Government approving the first draft of the proposed law in October 1994, the law has not (yet) been adopted. In the meantime the Law on Temporary Prohibition of the Privatisation of State Property underwent the process of formulation. The reason for the adoption of this law lay in the stream of “wild privatisation” that was to have unfolded after 1994 (Proposed Law on Temporary Prohibition of the Privatisation of State Property 1995: 2). The law was adopted in April 1995 and contains a very unusual formulation of exceptions to which the law should not apply. The law was amended with some additional exceptions concerning the needs of foreign countries’ diplomatic offices or the needs of state budget for the year 1995 (Amended Law on Temporary Prohibition of the Privatisation of State Property 1995). The formulation of the text of this law brings me to the conclusion that the state ought to implement other mechanisms to prevent “wild privatisation” of state property than the aforementioned law; especially, because the prohibition on trade of state property in the area of social services was regulated already by the Law on Social Institutions in April 1991 (Art. 65).

The content of the overall legislative material for handling the area of privatisation of state property in the area of social services confirms the assessment that the sole purpose of the Law on Privatisation of State Property was to address the problem of the so-called “privatisation gap”. This problem arose because of the chosen model for the ownership transformation of commercial companies in 1992. On the basis of the Law on Ownership Transformation of Commercial Companies, the Government distributed a considerably higher number of privatisation vouchers to citizens as there were companies’ shares available for exchange. The conclusion that the main purpose of the proposed legislation on privatisation of state property in the area of social services sector was to diminish the problem of the “privatisation gap” receives further confirmation from the Law on Provision of Assets to Authorised Investment Companies for the Exchange of Such Assets for Privatisation Vouchers Collected (1996). This law was unusual in that the legislator thereby further undertook that the Republic of Slovenia would, for the purpose of implementing the Law on Ownership Transformation of Commercial Companies and in order to guarantee the full value of all the privatisation vouchers issued, ensure that the value of state property was of sufficient extent to enable

all authorised investment companies to use privatisation vouchers for shares or other assets. A special law, which was to stipulate the type and extent of property required to fulfil these obligations, was to have been adopted by the legislator by 31 January 1997. This referred to the Law on Privatisation of State Property, which has not yet been adopted. The State Secretary for privatisation, Mr. E. Pirkmajer, forecast that the Law on Completion of Ownership Transformation and Privatisation of Property Under the Ownership of the Slovene Development Corporation would be adopted by the end of February 1998. Within three months of the adoption of this law the government was to draw up a list of property for the privatisation gap at authorised investment companies (Pirkmajer 1998).

Comparison of the proposal for privatisation of public social services from 1998 with the proposal from 1994

The main feature of the Proposed Law on Privatisation of State Property from 1998 (hereinafter: the 1998 Proposal) in comparison with the Proposed Law on Privatisation of State Property from 1994 (hereinafter: the 1994 Proposal) is that it focuses solely on the privatisation of organisations in the area of the material infrastructure (natural monopolies) like: telecommunications, energy, transport etc. The reasons for the adoption of the 1998 Proposal do not include the privatisation reform in the social-service sector. For social services it is merely envisaged that the conditions and extent of privatisation will be defined in national privatisation programmes for particular areas of social services. It is also not the objective of the 1998 Proposal to stipulate a deadline for the adoption of a national privatisation programme for any area of social services. This confirms that the proposer of the 1998 Proposal had no interest in privatisation of social services, while as the proposer of the 1994 Proposal the Government did have such an interest.² It should be added that, in addition to the privatisation of social institutions, a whole range of provisions connected with the possibilities for employees, former employees and retired employees to participate in internal buy-outs of companies in the area of material (public) infrastructure were cut.

Other features of the 1998 Proposal with regard to the 1994 Proposal are:

- greater responsibilities and tighter regulations for the Privatisation Commission;
- greater influence on privatisation procedures for the National Assembly at the expense of less influence for the Government;
- tougher standards within privatisation procedures;
- inclusion of two banks in privatisation procedures (“Nova Ljubljanska Banka” and “Nova Kreditna Banka Maribor”);
- involvement of the Court of Auditors in privatisation.

Evaluation of the 1998 proposal

Weaknesses can be identified in the 1998 Proposal from three points of view.

Legal Aspect

From the constitutional point of view, there are still problems with respect for the principle of equality before the law (Constitution of the Republic of Slovenia 1991: Art. 14). The legislator should explore the possibility of reasonably equalising employees' rights to participate in ownership transformation, having taken into consideration the specifics of the social-service sector. This would make it possible that the employees of social institutions share ownership of the social institutions in a manner similar to that allowed for employees in the commercial sector. For some members of the Slovenian Academy of Science and Arts the lack of consideration to the relationship of material and non-material capital in strategic value (to the express advantage of the latter) had the character and dimensions of an unacceptable nationalisation of property (Bajt 1992) and of unjustified discrimination, particularly when comparing the models of privatising commercial companies and social institutions (Bajt 1994; Fin gar 1994). However, it is worth further pointing out the expectation that given the practice of the Constitutional Court (Constitutional Court Ruling 117/II 1993; Constitutional Court Ruling 105/IV, Vol. 2 1995) it would not be possible to prove this infringement of Article 14 of the Constitution of the Republic of Slovenia before the Constitutional Court.³

Economic Aspect

In the same way that the Law on Ownership Transformation of Commercial Companies gave no consideration to expert analysis of the financial situation of Slovenian companies and the nature of social property, so the Proposal 1998 now fails to take into account the economic aspects of this second wave of privatisation. Analysis and suggestions regarding the ownership transformation of companies by economist Ivan Ribnikar showed that the main weakness of commercial companies is excessive indebtedness and a lack of fresh capital (Ribnikar 1990; 1991a; 1991b; 1993) Instead of the concept of capital injection into commercial companies that should apply to the sectors of material (public) infrastructure and social services as well, the Law on Ownership Transformation of Companies and the 1998 Proposal focus on selling capital to private entities; the former focuses mainly on internal buy-outs and, in addition, on the free distribution of vouchers among citizens. Here it needs to be pointed out that internal buy-outs are much better suiting the financial aspects of social institutions as of commercial companies, because activities in the social-service sector are highly professionalised and (in many cases) labour intensive. The adopted model for commercial companies and the proposed model for the privatisation of the material (public) infrastructure are thus both in favour of consumption rather than in favour of increasing

savings. This does not correspond to the needs of modernising and re-structuring of companies, their openness for new investments and adjustment to global competition. Apart from this, the maintenance of the state monopoly on the social-service sector does not correspond to the crisis of the welfare state, which we will have to challenge as part of the integration process in the European Union.

Futhermore, the predictions of prof. I. Ribnikar with regard to the negative consequences of the model chosen for privatising commercial companies have come true, and it is therefore even less understandable that the 1998 Proposal took no account of his warnings that such an approach (of proposed law on the privatisation of state property) would not resolve the problem of the “privatisation gap” (Ribnikar 1996).

Sociological Aspect

The sociological point of view draws the attention of government lawyers and economists to the specific nature of social services. It holds for institutions operating in this area, even more than for commercial companies, that the intellectual and social capital of the employees is a key production factor. This is actually the basic “good will”, which maintains the economic existence and operation of social institutions. If privatisation of social services will be carried only on the basis of the privatisation of financial/material assets (that is very reasonably to expect) the legitimacy of a model that will not consider the participation rights of providers employed (or formerly employed) at these institutions will not be only constitutionally, but also functionally questionable. The privatisation reform within the social-service sector should be based, along with options of partial internal by-outs, on the privatisation of activities in the field of social services and it should bring changes of the role of the state in the relation to the rights of providers and users of social services. The state should gradually withdraw from the function of founding, organising and running of social institutions, but in so doing retain supervision of the provision of services regarding the technical standards, quality and access to social services. Preferably, in future this sort of public supervision may be shared with professional associations and associations of users in the areas in question. The state’s most important role is thus to facilitate, through appropriate regulation, the protection of the legitimate interests and rights of users and providers of services. There is justification in anticipating that the maintenance of state monopoly over social services that the 1998 Proposal supports would have negative consequences for both the protection of the rights and interests of providers and for users of social services. In this connection the following rights and interests are relevant to providers:

- more equal legal treatment for all social service providers (Constitution of the Republic of Slovenia 1991: Art. 14) in accessing the market and obtaining state support, irrespective of their ownership status: legal differentiation is justifiable only on the basis of differences in the expected level of social benefits of the programmes offered, which must be assessed using criteria set in advance by a general legal act;
- expanded possibilities for freedom of choice and pursue of profession and work

(Constitution of the Republic of Slovenia 1991: Art. 49), for entrepreneurial and professional initiatives that on the basis of the Constitutional Court ruling (Constitutional Court Ruling 62/III 1994) are counted as part of the principle of people's general freedom of action regulated in Art. 35 of the Constitution of the Republic of Slovenia;

- greater linkage and balance between labour and capital - between providers of social services and ownership of social institutions; on the part of the providers this would contribute to raising professional autonomy and responsibility and also to social emancipation for experts, which is impossible without property (Rus 1992);
- professionalisation of management in social institutions.

Consideration of the rights and interest of providers listed above when privatising social services would have a greater chance to contribute to the interest and rights of users: greater freedom of choice and higher quality of service, under the condition that the state defines its role in the above described way.

Conclusion

The criticisms of the 1998 Proposal from the three points of view examined in previous section complete the evaluation of the 1998 Proposal. Because in modern parliamentary democracies based on protection of human rights a law or a reform is considered to be legitimate if it can be justifiably expected that it will strengthen or increase the level of protection for human rights (Johnston 1994), it can be concluded that according to material criteria the 1998 Proposal is illegitimate. The Government and National Assembly could further increase the 1998 Proposal's illegitimacy by failing to consider any of the expert criteria, and particularly the expectations and readiness for changes on the part of providers (physicians, teachers, social care workers, artists etc.) as essential actors in the privatisation of public social services.

NOTES

1. Here I need to mention that before the adoption of the overall ownership transformation reform in the new constitutional order of the Republic of Slovenia the capital of commercial companies and institutions within social-service sector was legally considered as "socially owned". I mean that it was neither in the ownership of the state, nor in the ownership of employees or in that of the organisations as legal entities. The legal supposition was that in was in the ownership of all citizens.
2. In the case of the Proposal 1998 it is not the Government, which drafted the law, but a group of representatives of the Social Democratic Party in the National Assembly.
3. For a critical assessment of these Constitutional Court rulings and respect for the principle of equality before the law see: Zalar, B. 1999. *Privatisation and Human Rights* (Privatizacija in lovekove pravice). Znanstvena Knjižnica FDV: Ljubljana.

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