

# One Hundred Issues of Slovenia's Human Rights Journal: The birth of constitutional democracy and the follow-up start of the academic debate on human rights

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*Peter Jambrek*

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Anticipating the publication of the first issue of Dignitas, the new Slovenian Human Rights Journal, the editor<sup>1</sup> and the publisher<sup>2</sup> mailed at in January 1999 to the members of the Editorial Board the following message:

“We proudly announce that the first issue of Dignitas - the Slovenian Human Rights Journal is in print now and will be published at the beginning of March this year<sup>3</sup> at the latest. As you may remember, nearly three years have passed since the inception of the project in May 1995<sup>4</sup>. The delay may be attributed to mainly two factors, lack of seed capital to start the project, and the heavy workload of those editors, who were at that time still judges of the Slovenian Constitutional Court, including the editor of the publication<sup>5</sup>. Things have since changed for the better, at least for the Journal. The publishing house *Nova revija* provided means to start the Journal, and support from the Slovenian Ministry of Science appears probable and stable enough to risk the new venture.

You were kind enough to accept membership in the Advisory Board of the Journal at the time of its initiation. We feel obliged, given the time that has passed since, to ask you again to continue Your commitment. We sincerely hope that you will honor us by

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<sup>1</sup> Peter Jambrek, former President of the Constitutional Court, serving at the time also as justice of the European Court of Human Rights at Strasbourg.

<sup>2</sup> Niko Grafenauer, head of the Slovenian Publishing House *Nova revija*, in Slovenia well known as the dissident intellectuals' journal which triggered Slovenian independence and democracy movement in the late eighties.

<sup>3</sup> That is, in the year 1999.

<sup>4</sup> In May 1995 the Constitutional Court of Slovenia agreed to start publishing the new journal devoted to the law of human rights. At that time its focus was translating and publishing key decisions of the European Court of Human Rights and selected international Constitutional Courts' judgements.

<sup>5</sup> The term of his office at the European Court of Human Rights and at the Constitutional Court of Slovenia ended in 1998.

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reaffirming your membership. Almost everything remains same - the editorial philosophy and design, the Slovenian and the international members of the new Editorial Advisory Board, and the *Nova revija* publishing house.

There are two changes, however, which should be noted: First, the Slovenian Constitutional Court, under whose auspices the project was initiated, agreed to transfer its responsibilities to an independent non-for-profit-institution, i.e. Slovenian Human Rights Institute, which will offer editorial services to the new journal. Secondly, organization of the editorial services was simplified ...

...We thus hope that all members of the former »editorial board« and of the former »advisory board« will now agree to continue serving in advisory capacity to the new Slovenian Human Rights Journal. Upon the condition that all members of the two former bodies will agree to continue serving, the new Editorial Advisory Board will be composed of the following members:

Paul Mahoney, Vincent Berger, Rolv Ryssdal, Jadranko Crnić, Ludwig Adamovitsch, Laszlo Solyom, Sergio Bartole, Franz Matscher, Antonio La Pergola, Helmut Steinberger, Jochen Abr. Frowein, Louis Favoreu, Livio Paladin ( the international members of the Board), and (from Slovenia) Marijan Pavčnik, Drago Demšar, Stanko Ojnik, Dušan Ogrizek, Miroslava Geč Korošec, France Bučar, Peter Jambreč, Mitja Deisinger, Albin Igličar, Arne Mavčič, Anton Perenič, Lovro Šturm, Lojze Ude and Boštjan M. Zupančič\_ (the Slovenian members the Board)...

...It appeared obvious that we dedicated the first issue to the memory of the late president of the European Court to whom we all owe so much, to Mr. Rolv Ryssdal.”

New Journal’s application for funding addressed to the responsible Council of Europe body and the Slovenian Ministry of Justice gave the following explanation of its mission:

“The main purpose of the new law journal is to inform the Slovenian professional readership of the case law and of the scholarly commentaries of the key judgements of the European Court of Human Rights. Its intent is to follow the development of the European case law at a close look, i.e., as soon as possible after the publication of the new judgement. A judgement will be translated and published either in its unabridged form, only partly, or as a summary, depending on the judgement’s importance. In this

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respect the editorial concept of the journal is similar to the concept of the journals published by *N.P. Engel Verlag (Europäische Grundrechte, Human Rights Law Journal, Droits de l'Homme)*, or the Austrian Institute for Human Rights Newsletter...”

Responsibility for publishing of the Journal switched again from the Human Rights Institute to the academia, i.e., to the two private law faculties<sup>6</sup> which in 2008 joined in founding the present day New University. Twenty regular issues of the journal were published over the ten years period from 1999 till 2008/2009, added by a number of thematic issues.

Contents of the journal also expanded from its modest initial aim of publishing key translated European constitutional case law into a journal aiming in addition at scientific explanation of human rights issues: Its editorial policies aim to publish original scientific articles and short case notes on constitutional and international human rights law. It occasionally also publishes concise translations of critical judgments of the European Court of Human Rights of the Council of Europe, especially those regarding the claims of Slovene complainants, legal commentaries on decisions of the European Court of Justice, key documents, studies, opinions, and conclusions of the European Commission for Democracy through Law (Venice Commission), and general information about important events in the area of human rights protection in Slovenia and internationally.

Peter Jambrek left editorial office transfer editorial responsibility to dr. Jernej Letnar Čerňič, another professor at the New University. Under his guidance peer review process was encouraged, publication frequency was increased, while publication malpractice and plagiarism were prevented and discouraged by statement on publication ethics and its implementation in practice.

After the fact-finding introduction to the 100<sup>th</sup> issue of Dignitas, the main and only Slovenian Human Rights journal, it seems crucial to point to the Journal's role in Slovenia's threefold transition from the three main twentieth century European totalitarian<sup>7</sup>

<sup>6</sup>They are the Faculty of Government and European Affairs at Brdo pri Kranju (Slovenia) in collaboration with the European Faculty of Law at Nova Gorica (Slovenia). The journal was and still is published under the auspices of the Slovenian section of the International Commission of Jurists and the Slovenian Comparative Constitutional Law Association.

<sup>7</sup>That is, the political, economic, social and ideological suppression of human rights and fundamental freedoms.

regimes: from its suffering under fascism, national socialism and communism<sup>8</sup>.

## The lagging law teaching in view of the democratic transition

Constitutional and other parts of public law in the communist nations of central and eastern Europe was, until its rebirth<sup>9</sup> in the early 1990s, idiosyncratic, to say the least. It represented a strange mix of totalitarian ideology and the well known *formulae* of European constitutionalism. Slovenia, as one of the six constituent units of the Socialist Federative Republic of Yugoslavia, was a part of this strange legal development, until it began to fall apart in June 1991.<sup>10</sup>

In addition to the federal Constitution, each of the six constituent republics also had its own basic act, a replica of the central one. The ensuing normative order may best be described as a set of intertwined constitutional dictatorships. The system was difficult to understand by a normal legal mind, untrained and inexperienced in the specific legal hypocrisies and inconsistencies developed by the communist pseudo-legal doctrines.

In its 221-page text divided into five parts, the Constitution of the Socialist Republic of Slovenia of 1974<sup>11</sup> also contained a 17-page chapter entitled "Freedoms, Rights, and Duties of Men and Citizens." This chapter was one of the eight chapters in the part on "Social Structure" and consisted of Articles 195-251. These articles regulated less known rights, such as the "inalienable right of each worker to self-management" the "right and duty to participate in social self-defense,"<sup>12</sup> or the "right and duty to maintain and develop physical and mental capacities by means of bodily activities," many constitutional duties, and an impressive number

<sup>8</sup> Major parts of Slovenia were suffering under fascism of Mussolini's Italy after the First World War, under national socialism during the Second World War, and under communism the whole period of the Cold War following the end of the Second World War, that is from 1945 till April 1990 plural parliamentary elections in Slovenia.

<sup>9</sup> For details, see: Council of Europe, *The Rebirth of Democracy: 12 Constitutions of Central and Eastern Europe*, Strasbourg: Council of Europe Press, 1995.

<sup>10</sup> See also: Peter Jambreč, "Constitutional Law Teaching in Slovenia," in Jean-Francois Plaus (ed.), *L'Enseignement du droit constitutionnel*, Brussels: Bruylant (with Institut des Hautes Etudes Europeennes), 2000, 86-94.

<sup>11</sup> Promulgated on 28 February 1974 and superceded by the Constitution of the Republic of Slovenia of 23 December 1991.

<sup>12</sup> I.e., inter alia, to spy on others and to collaborate with the Secret Service.

of social and economic rights of “working people,” and nearly all basic rights and fundamental freedoms recognized by the European Convention and by other well known international instruments.

The wording of most of these classic rights did not include any restrictions or limitations such as those enshrined in the second paragraphs of Articles 8-11 of the European Convention, and of Article 2 of Protocol No. 4 of the same Convention. However, articles on specific “freedoms, rights, and duties” were preceded by general provisions which stated that they could only be implemented “in the mutual solidarity of the people and by the realization of the duties and responsibilities of everyone towards all and of all towards everyone,” and that they may *only* [sic] be restricted by the “equal freedoms and rights of others,” and by “the interests of the socialist community determined by the Constitution.”

The crucial “interests of the socialist community” were regulated in the 24-page “Introductory Part” on “Fundamental Principles.” These included, *inter alia*, the “founding power of the working class,” “social ownership of the means of production,” “socialist self-managerial democracy as a specific manifestation of the dictatorship of the proletariat,” “the revolutionary abolishment of class exploitation,” etc. Human rights and freedoms were also defined as an “inalienable part and manifestation of socialist self-management democratic relationships.”

Chapter X of the Introductory Part of the Fundamental Principles, however, described the role of the League of Communists and of the Socialist Alliance of the Working People in, *inter alia*, the following terms: “The League of Communists, the initiator and organizer of the National Liberation Struggle and of the Socialist Revolution, and the conscious bearer of the endeavors and interests of the working class, became by the law of historic development the organized leading ideological and political force of the working class and of all working people in the construction of socialism [...] it is the main initiator and bearer of political activity for the protection and further development of the socialist revolution and socialist self-management social relationships, and especially for the fostering of the socialist social and democratic consciousness, and is responsible therefore.”

The above quotations may appear a bit tedious and out of time. It may, however, be remembered that in Slovenia less than

thirty-five years ago these same Fundamental Principles were still vigorously defended not only by the then incumbent members of the political nomenclature, but also by the then lecturing professors and constitutional law scholars. Typical occasions at which such constitutional principles were propagated included public rebuttals of dissident constitutional ideas and models, including notions of human rights when distinguished and set aside from the official constitutional ideology.

Furthermore, the above quotations indicate the specific kind of constitutional, administrative, and judicial protection of basic rights in Slovenia, and probably elsewhere in Central and Eastern Europe, before the legal and practical inauguration of democracy and the rule of law. While human rights may have been found in books, their protection from the point of view of an individual potential victim, nevertheless, depended on the two general sets of restrictions:

First, the legally binding interests of the 'socialist community', 'the dictatorship of the proletariat', the 'socialist revolution', or the 'working class', and secondly on the interpretative efforts of the two prime avant-garde organizations – the League of Communists and the Socialist Alliance of the Working People. It may be recalled in this context that the League was not an abstract body acting mainly on the grounds of its statutory principle of 'democratic centralism', or on the grounds of the strict subordination of lower bodies to the supreme ones, headed by the Central Committee and its Secretary General or, later, President.

The constitutional and the derived legal system for the protection of individual human rights, therefore, provided for a general and virtually unlimited justification of restrictions. Their specific 'legitimate aims' were substituted for by the ideological notions of 'socialism', 'revolution', or 'working class'. The 'proportionality' and 'necessity' of interferences or the lack of protection, on the other hand, were, in accordance with the constitutional principles, left to be measured and assessed by the Communist Party officials. Their role was therefore – at least in the former Yugoslavia – fully legitimate. There also existed various operational ways their influence was made practical. Here, however, other kinds of considerations regarding the separation of powers and the independence of the government administration and the judiciary under the former regime enter the discussion.

On a more general administrative and legislative level, large segments of society were excluded from public involvement in the decision process. Intellectuals were branded as being elitist; managers were portrayed as power and privilege seeking. Religious feelings considered reactionary were excluded *a priori* on the grounds of the strictly applied principle of the separation of the church and state. Loyalty to the primordial, local, and ethnic identities was labeled separatist, antisocialist, and counterrevolutionary, while class interests were considered to be represented by the ruling proletarian party. Within the ensuing political vacuum, the ruling party elite was able to manipulate a fictitious consent, in most cases without the need to resort to force, at least towards the end of the life of the system.<sup>13</sup>

Levits observed<sup>14</sup> that in the socialist law family, typically represented by the Soviet legal system, legal norms were interpreted in the case law, by state authorities, and in the legal doctrine mainly by application of the grammatical method. Other methods, such as historical, systematic, and teleological, were not applied due to their specific effect that allowed for an autonomous interpretation of legal norms. In contrast to Western legal systems, where the rule of law fosters the relative independence of legal professions and institutions, the autonomous interpretation of legal norms had a contradictory effect in the system of the socialist law family because it posed a threat to party power' as a manifestation of the free will of the subject applying the law.

It would appear at first sight that the former Slovene<sup>15</sup> constitutional framework of human rights not only allowed for but even required a systematic and teleological interpretation of human rights clauses by means of supreme constitutional principles, which the Constitution itself defined as "the fundamental principles of socialist self-management society and its progress, representing the foundation and perspective for interpretation of the Constitution and of the laws, as well as for the activities of all and everyone."<sup>16</sup> In this sense the former Slovene system

<sup>13</sup> For more on the artificial tranquility of authoritarian rule, see: Peter Jambrek, "Human Rights in a Multiethnic State: The Case of Yugoslavia," in Vojtech Mastny, Jan Zielonka (eds.), *Human Rights and Security*, Boulder: Westview Press, 1991, 177-201.

<sup>14</sup> Egils Levits, "Interpretation of Legal Norms and the Notion of 'Democracy' in Article 1 of Satversne," in *Human Rights in Latvian Legal Theory* (Riga: The Institute of Human Rights of the University of Latvia, 1997).

<sup>15</sup> As a part of the Yugoslav constitutional framework of human rights.

<sup>16</sup> The last, XII, Principle within the Introductory Part of the Constitution of the Socialist Republic of

appears to differ from Soviet legal systems. On the other hand, it required the 'autonomy' of the legal professions and legal institutions only *vis-à-vis* the common-sense and international interpretation of the human rights provisions – in order to subordinate their understanding and application to the extra-legal assessment of the Communist Party. The former Yugoslav system in this respect appears more 'complex' and 'developed' when measured by the yardstick of its faithfulness to the original revolutionary orthodoxy.

During the pre-democratic period university research and teaching of constitutional law closely followed the legal texts. It was devoted to their exegesis, utilized the same 'terminology', and, at least in Slovenia, did not show any signs of critical detachment from the official views and wordings. The pre-1990 textbooks, essays, and research reports appear from the present-day point of view hopelessly useless, written in a pseudo-legal jargon which, if taken seriously, represents an assault on the established language of human rights.

An exception to the above was represented by specialized sectors of the legislature, jurisprudence, and doctrine which evolved in civil, criminal, and administrative law parallel to 'normal' European legal thinking. Such enactments and applications of constitutional human rights provisions were to a certain extent able to ignore other constitutional contexts, and could thereby purify the otherwise obligatory ideological pollution produced by 'constitutional principles'. Such developments, of course, were impossible to begin with in the fields covered by the constitutional norms regulating voting rights, industrial, farming, banking, and insurance property rights, freedom of association, freedom of expression and the press, religious freedom, or involvement in local self-government, the independence of the judiciary, and the principles of the rule of law.

The first serious rupture with the official constitutional system on the general level was represented by the publication of the 'Writers' Constitution' in April 1988. By the end of 1987 a group of lawyers and social scientists, with the moral support of the Association of Slovene Writers, drafted a 'Model Constitution' of Slovenia. The drafters quite simply informed themselves of the



main UN instruments regarding human rights and by and large incorporated human rights provisions from the European Convention into the first part of their constitution. The other part of the 'Constitution', on state organization and the judiciary, reiterated the well known constitutional provisions of European parliamentary democracies, notably those of the Bavarian and German Federal Constitutions.

None of the established lawyers, judges, parliamentarians, or constitutional law professors participated in the project. On the contrary, after its publication, a number of legal authorities criticized the draft from various angles:

The senior professor of constitutional law at the Ljubljana Law Faculty stated that the draft ignored the "communal" and "delegate" systems, "whose roots are in the basic cells of self-government in the community and in associated labor." Both are substituted for by the institutions of representative democracy, *inter alia*, the multiparty system (Strobl, 1988, pp. 17-18) – the critique concluded.

The other senior professor was of the opinion that the criticized draft was too ambitious in trying to eliminate "our present system, the assembly system," while it "offers so casually the concept of the separation of powers with all its consequences" (Kristan, 1988, pp. 40-46).

A junior professor of constitutional law pointed out the fact that the draft represented "an almost total break with the constitutional development of Slovenia, and was therefore almost certainly inapplicable to the positive constitutional order of the Socialist Republic of Slovenia." He also criticized the total break with the established terminology and the introduced model of the division of powers (Grad, 1988, pp. 36-38).

Another junior professor of constitutional law, who chaired the meeting on behalf of the Central Committee of the League of Communists, in his concluding remarks pointed to elements in the draft, which invite "sharp political reaction and negation," invited participants to distinguish "useful" from "harmful" elements, "progressive" from "reactionary," and expressed his personal opinion that the draft would, "if offered as the basis for the elaboration of a new Slovene constitution, require and even provoke negative political qualification" (Ribičič, 1988, pp. 54-59).

But it so happened that the Berlin Wall fell only one and a half years later<sup>17</sup>, that in Slovenia the first free parliamentary elections after the Second World War took place in April 1990, that the coalition of new democratic parties won the elections and formed its own government, and that it started immediately the process of drafting a new Slovene Constitution. Its drafting was entrusted to a group of lawyers led by those who had also drafted the 'Writers' Constitution'. The text from 1988 thus became, contrary to the Party's expectations from only two years before, and after some legal polishing and parliamentary modification, the presently valid Constitution.

After the adoption of the new Slovene Constitution in December 1991, the teaching of constitutional and other branches of public law in Slovenia followed the new text. In 1992 a textbook was published written by several authors (Kaučič, 1992), for the teaching purposes of the basic introductory course at the Law Faculty in Ljubljana. In 1993 and in 1994 three academic authors from the Law Faculty in Maribor published another textbook on Slovene constitutional law, and in 1996 another edition of the basic Ljubljana Law Faculty textbook authored by four Ljubljana-based university professors was published. Several other treatises covering specific topics of the new constitutional law were also authored.

For quite some time the teaching and contents of the respective university textbooks have been restricted to a conceptual interpretation of the basic constitutional text, added partly by analyses and descriptions of comparative and historical contexts. The eighteen and a half years (January 1992 to June 2010) of voluminous Constitutional Court jurisprudence by and large has not yet entered the outlines and reading lists of the university courses on constitutional law. Jurisprudence represented an auxiliary instrument for elucidation of selected topics, but was not yet included as the main subject matter and method of interpretation of the constitutional text. I therefore continue this presentation with a brief discussion of the evolution of Slovene constitutional jurisprudence.

The inauguration of democratic transition in Central and Eastern Europe in the early 1990s was as a rule preceded by grass-

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<sup>17</sup> The quoted discussion took place on 12 May 1988.

roots discontent, the rapid spread of dissident ideas which undermined the legitimacy of the communist system and by mass movements which evolved into opposition political parties. The process led to the first democratic elections<sup>18</sup> followed by legal-institutional reforms. Constitution drafting in most countries represented the first necessary precondition for systemic legal change. Completely new constitutional texts and changes in old constitutions by means of constitutional amendments as a rule were explicitly linked with "the constitutional heritage of Europe<sup>19</sup>," by means of the elaboration of principles such as the rule of law or *Rechtsstaat*, the separation or division of powers, the right to fair trial conducted by an independent judiciary, parliamentary democracy, and basic human rights provisions.

An important safeguard guaranteeing respect, observance, and implementation of the new constitutional provisions was provided by the introduction of constitutional courts entrusted with judicial review of the constitutionality of either legislative and administrative general acts and/or the concrete government acts whereby individual constitutional rights were violated according to *Verfassungsbeschwerde* applicants.

Constitutional reform itself only represented the initial stage of the transition. Early on after the overthrow of communist regimes in 1989, Ralph Dahrendorf commented that it would take six months to reform the political systems, six years to change the economic systems, and sixty years to effect a revolution in the peoples' hearts and minds<sup>20</sup>. The new constitutional courts Central and Eastern Europe thus not only were faced with the difficult task of elaborating general and abstract constitutional provisions. They also had to adjudicate cases where the constitutionality of legislative and other legal acts was challenged with regulated specific processes on institutional and economic transition from dictatorship to democracy.

<sup>18</sup> In Slovenia the first democratic elections to the legislature took place in April 1999, later than elsewhere in Central and Eastern Europe due to the delay caused by the strain produced by the parallel process of the disintegration of the former Yugoslav Federation. The central, Belgrade based power elite curbed the democratic process in the subordinate federal units, mainly by its well founded anticipation of the interaction between the twin processes of national and democratic emancipation.

<sup>19</sup> See the papers presented at the Montpellier Unidem Seminar organized in co-operation with the Faculty of Law and Economics of the University of Montpellier on 22-23 November 1996.

<sup>20</sup> Vojtech Cepl suggested that Dahrendorf probably borrowed the part about hearts and minds from Masaryk, and linked it to Michael Nowack's concept of moral culture. See Vojtěch Cepl, "Transformation of Hearts and Minds in Eastern Europe," paper presented to the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, 4 December 1995.

Separation from the imperial states of Soviet Union and Yugoslavia and the related nation-building gave rise to human rights issues of citizens, foreigners, and ethnic majorities and minorities. New foundations of government called for the articulation of the constitutional principles of democracy, the rule of law and the separation of powers. The new foundations of the economy raised the issues of transition from political control over the economy to the ownership rights of legal entities and natural persons. And retrospective justice triggered cases where the constitutionality of specific processes of restitution, retribution, lustration, affirmative action, and reverse discrimination was challenged.

These issues as a rule are not regulated by constitutions themselves, and only partly by transitional and concluding provisions on the implementation of the basic constitutional text. Such task was and still is *via facti* left to constitutional courts.

The Slovene Constitutional Court is an obvious example. Since 1990 it has repeatedly found itself in the crossfire of the two main competing social and political forces, each one represented by an array of 'their own' lobbies, parties, intellectual circles, media, and economic interests and institutions. One of the two blocks is composed of the various interests rooted in the enduring 'deep structures' of the social system, thus defending the continuity, status quo, and preservation of vested interests, privileges, and positions. The other bloc represents the interests of the large social segments and groups which were victims of systematic and large-scale discrimination under the communist regime, led by new political and intellectual elites.

Each judgment addressing one of the key issues derived from this structural conflict is carefully scrutinized and subject to respective criticisms, which as a rule utilize non-legal arguments. The doctrine of the political question is frequently invoked, mostly in a simplified and barely recognizable form of accusations of the political bias of individual judges of the court as an institution.

Be that as it may, the jurisprudence of the Constitutional Court, neatly edited in one or two heavy volumes per year, represents the only authoritative and legally argued application and interpretation of the Constitution. It represents an obvious and key element to be incorporated into the academic teaching of constitutional rights and freedoms in Slovenia, and probably also elsewhere in Central and Eastern Europe.

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Dignitas, in its one hundred issues during the past one quarter of the century duly reflected the above controversies of legal transition from dictatorship to democracy in the twenty-first century, resting upon half a century of utter neglect of human rights and fundamental freedoms from 1940 – 1990, and upon ten years of starting-up the fragile new order of constitutional democracy during the last decade of the twentieth century.

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