

THE CONSTITUTIONAL FRAMEWORK FOR REGULATION OF THE POSITION OF THE ROMA COMMUNITY IN THE REPUBLIC OF SLOVENIA

In the first part, author questions the need to regulate the matters regarding the Roma Community in the highest legal act, as it was done in the Constitution of the Republic of Slovenia. He believes that the introduction of the collective rights in the Constitution may result as inappropriate in the long-term.

The second part deals with normative analysis of the status of Roma in Slovenia, in which the constitutional framework for protection of the national communities mentioned in the Constitution is presented, and, finally, different constitutional status of the national communities (minorities) is elaborated. Such differentiation exposes the question whether the Romany community is entitled to have its own member of the National Assembly. By using all interpretation techniques it can be concluded that the Romany community at present does not enjoy the same level of positive discrimination as the two other national communities in Slovenia.

Keywords: Romany community, national community, collective rights, right to vote, affirmative action

USTAVNI OKVIR ZA UREJANJE POLOŽAJA ROMSKE SKUPNOSTI V SLOVENIJI

Avtor najprej izpostavi dvom, da je potrebno urejati zadeve v zvezi s položajem romske skupnosti v najvišjem pravnem aktu države, kot je to urejeno z Ustavo Republike Slovenije. Uvedba katerihkoli kolektivnih pravic v pravni akt ustavne narave se bo prej ali slej izkazala kot neprijemna na dolgi rok.

V drugem delu članka se avtor ukvarja z normativno analizo položaja Romov v Repubiki Sloveniji, v okviru katere je predstavljen okvir manjšinskega varstva na ustavni ravni in so prikazani različni ustavno varovani položaji narodnih in etničnih skupnosti v Sloveniji. Takšno razlikovanje izpostavlja dilemo, ali so tudi pripadniki romske skupnosti upravičeni do svojega predstavnika v Državnem zboru. S pomočjo razlagalnih metod avtor sklene, da pravni red kaj takega trenutno ne omogoča.

Ključne besede: Romska skupnost, narodna skupnost, kolektivne pravice, volilna pravica, pozitivna diskriminacija

1. DILEMMA OF COLLECTIVE RIGHTS IN THE CONSTITUTION

If even the most prominent advocates of some kind of collective rights, for example Newman (2004: 127-128), dare to admit that understanding of rights that can be ascribed to groups rather than individuals remains sketchy, there is not much room left to arbitrate on individual and collective rights. Even though, I would like to present my arguments which are in disharmony with the constitutional engineering of collective rights, particularly those of ethnic groups, which have been regularly favored (e.g. Polzer-Srienz 2002: 63). For this purpose, I shall deliberately treat collective rights as equally plausible, original and legitimate measure as individual rights although the former may have some value only if some individual rights pre-exist.

A huge step towards a liberal state set on the rule of law was made with the acceptance of rational discourse in political life. In order to provide the highest possible participation in it, political and legal rights of individuals were promoted more and more extensively. It seems that the process of political emancipation ended with an introduction of numerous legal safeguards in the constitutional orders throughout the world, e.g. free and equal voting, judicial protection against acts of the state. As a result, constitutional orders predominantly base their regulation of human rights and freedoms on a free individual and his/her formal equality with other individuals. The political and legal theory describes such order as the state ruled by law (e.g. Kaučič and Grad 2003: 72-73). Nevertheless, it turned out that certain groups identifiable by various social, national or ethnic denominators were highly limited or practically excluded from participation in the political life. Political perturbations on the eve of the 1920s resulted in the wider formal acknowledgement of collective rights and in emergence of a social state - firstly in the Constitution of the Weimar Republic -, which required a different "political identifier" in comparison with the state ruled by law. The social state therefore uses social characteristics of groups of people in order to guarantee them legal advantages which are not accessible to ordinary "*zoon politikon*". The creation of so called collective (social, educational, family, national communities, ethnic, etc.) rights was imminent. And likewise, the conflict between individual/collective rights apologists.

Abovementioned approaches to regulation in the society are, doubtless, adversary. As Berent (1991: 390) rightly argues, collective rights have been a rather problematic issue within the framework of the liberal tradition. One of the main reasons for this has been the impact of methodological individualism which underlay both Hobbes and the classical liberalism. Contrary to this, some defend cultural pluralism, whereby collective rights would permit each sub-national group to protect its identity and its security as a distinct commu-

nity (Magnet 1986-1987: 170). It seems that a purely theoretical debate between promoters of individual or collective rights would lead to infinite *ad nauseam* argumentation since arguments on both sides rest on different and mainly incompatible values.

Many scholars are not satisfied with sticking only to one end (e.g. Jacobs 1991, Isaac 1992). In order to overcome the classical dispute on individual/collective rights issue, Buchanan (1993: 104) proposes, as some kind of a middle way, to pursue individual rights as safeguards for collective rights.

“The presence of institutions to establish certain familiar *individual* rights for group members can reduce the risks associated with collective rights in the strong sense and make the limitations they impose on individual liberty acceptable. The problems inherent in collective rights in the strong sense ... can be ameliorated if these rights are embedded in a framework of appropriate individual rights. The most important of these individual rights are the rights to freedom of expression, freedom of association and assembly, and the right to participate in political processes (including the right to vote on important issues concerning the exercise of collective rights).

Some additional key factors, however, might preponderate the scale in one direction, at least for certain modes of regulation. Brett (1991: 348-349) sets out an important criterion that perhaps legislation of collective rights could only be justified as a temporary measure, relative to the goal of equalization. Permanence of collective rights contravenes their very purpose of existence. Enduring and continuous legal protection that rests on a premise of promoting interests which are incapable of autonomously promoting themselves would in the end prove that results of such legal protection are actually miserable. This position makes a huge contrast with constitutional orders, which are established with an ideal to be long-lasting and value-based, according to the will of the constituent body, and consequently as much as possible principled. The constituent body tends to mark out the text of a constitution in a manner that would make it more lasting than other legal acts. For this reason, substantial provisions of temporary or individual nature are not suitable for regulation in constitutions (Kaučič and Grad 2003: 21). Since collective rights, especially those intended for political integration of underprivileged national minorities or ethnic groups, should only have a transitional character, provisions of such kind in constitutions should be evaded as much as possible.

2. THE CONSTITUTIONALIZATION OF THE SPECIAL STATUS OF THE ROMA COMMUNITY

The first explicit mention of the Romany community in the Slovene Constitution dates in pre-independence year of 1989 when the Constitutional amendment LXVII of the Constitution of the Socialist Republic of Slovenia came into force. It provided that "... [t]he manner in which special rights of the Romany community are exercised shall be regulated by law". Such provision went hand in hand with the collective character of the decaying socialist era on one hand and with the democratic interests of the independence movement on the other. The same provision became Article 65 of the Constitution of the Republic of Slovenia after the Slovenian independence in 1991. The Constitution additionally deals with the Romany community in an indirect manner as it provides formal protection of all persons, irrespective of their ethnicity (Article 14). Members of the Romany community in Slovenia enjoy all rights according to their status in the Republic of Slovenia like other citizens or aliens, combined with special collective rights of the Romany community. Polzer-Srienz (2002: 64) interprets Article 65 of the Constitution similarly to the Magnet's understanding of collective rights; however, not in the line with the systematization of the Constitution and rather extensively in a way that the Constitution has established collective and individual rights of the Romany community and their members (likewise the Italian and Hungarian national community in the Article 64 of the Constitution). A narrow reading of the Article 65 of the Constitution suggests the opposite, that only certain collective rights are pertinent to the Romany community as a whole and therefore guaranteed as a constitutional right. Yet again it seems that the Buchanan-like teleological interpretation would serve in the interest of all since it would give constitutional character to every legal provision - even those pertinent to individual members of the Romany community -, if it would have a factual safeguarding effect on the Romany community as a whole. We shall later see that the Constitutional Court was not completely successful in its interpretation mainly due to the constraints and preciseness of the electoral law.

3. THE LEGAL ASPECTS OF THE DECISIONS OF THE CONSTITUTIONAL COURT CONCERNING THE ROMANY COMMUNITY

A BRIEF SKETCH OF THE DECISIONS OF THE CONSTITUTIONAL COURT

The Constitutional court has extensively dealt with the status and special rights of the Romany community. Such an interpretation by the Constitutional Court

of the Article 65 of the Constitution is more than welcome if one bears in mind that the National Assembly had not, at that time, passed the law exclusively on matters of the Romany community. All three decisions (U-I-416/98,¹ U-I-315/02,² U-I-345/02³) of the Constitutional Court more or less deal with a matter of the Romany representation in municipality councils.

The first decision U-I-416/98 was a declaratory one. The Constitutional Court said that the Local Self-Government Act (LSGA) was inconsistent with the Constitution due to the fact that the provision of Article 39(5) of LSGA is incomplete (a gap in the law). LSGA did not contain any criteria set in advance on the basis of which municipalities could easily establish the existence of an autochthonous Romany community in their territory, and also other criteria (e.g. organization, the number of members) necessary for exercising this special statutory right within a municipality. LSGA also did not determine a time limit in which municipalities must implement the mentioned statutory provision, or the time-period within which the municipalities must reach a decision in connection with exercising the mentioned statutory provision.

Different positions of the authorities at the state and local communities level that had been involved in a dispute on the first decision of the Constitutional Court have actually led to the following two decisions. The National Assembly has enacted the amendment to the LSGA in a different manner than prescribed in the first decision of the Constitutional Court. Taking into account its steady practice, the Constitutional Court has in the second decision U-I-315/02 once again confirmed that legislature may regulate the exercise of the special rights of the Romany community differently to the decision of the Constitutional Court, save it does so in an effective and non-arbitrary manner and pursuant to the Constitution. The Constitutional Court has for the safety precautions explained what it would consider as an arbitrary regulation. This would be the case if the legislature would impose obligations on the relevant municipalities without determining the existence of the autochthonous Romany community on their territory or where the autochthonous Romany community does not live. The National Assembly stated in the proceedings before the Constitutional Court that it had taken into account findings of the Governmental Office for Nationalities.

The third decision of the Constitutional Court U-I-345/02 was also a declaratory one. Unlike the first two decisions where the Constitutional court reviewed the constitutionality of the Act of the National Assembly, the Constitutional Court had



1 Decision of the Constitutional Court U-I-416/98, 22 March 2001, Official Gazzete RS, No. 28/2001.

2 Decision of the Constitutional Court U-I-315/02, 3 October 2002, Official Gazzete RS, No. 87/2002.

3 Decision of the Constitutional Court U-I-345/02, 14 November 2002, Official Gazzete RS, št. 105/2002.

to review the legality of the Charters of municipalities in the last decision. This was the final decision where the Constitutional Court held that certain Charters of local communities are inconsistent with the LSGA, as they did not determine that Romany community representatives are members of municipality councils.

CONSEQUENCES OF INTRODUCTION OF THE TERM "THE AUTOCHTHONOUS ROMANY COMMUNITY"

The Romany community is guaranteed a special representative, elected among its members, in the municipality councils of those municipalities in which the Romany community autochthonously lives (Article 39(5) of LSGA). LSGA also ensures members of the Romany community a special voting right in addition to the general voting right of which they are already entitled to as Slovenian citizens. The special (active and passive) voting rights of members of the Romany community and their exercise at local elections are regulated by the Local Elections Act. The Constitutional Court has declared double deviation from the Equality Clause as constitutional due to the fact that Article 65 of the Constitution allows the affirmative action.

The discrepancy between the constitutional provision on the Romany community and the special right according to LSGA strikes the eye. The Constitution guarantees special rights solely to the Romany community as whole. On the contrary, LSGA implements the special voting right for members of the autochthonous Romany community only. Such distinction presupposes that a non-autochthonous Romany community also exists.

Does such a discrepancy cause the unconstitutionality of the LSGA? Although the distinction on autochthonous and non-autochthonous community is more or less legitimately criticized, there are some arguments in our case that justify it. First, the Constitution obliges the legislature to enforce the positive discrimination in a manner and to the extent the legislature believes it is necessary and possible. There would be a clear breach of the Constitution in two situations: in the case the legislature would not adopt any provision on the Romany community or the legislature would adopt the Act explicitly providing that the Romany community enjoys no special rights or status. Several provisions dealing with the Romany community in affirmative manner were enacted in various Acts. One could certainly argue that, bearing in mind the evident low social standard of members of the Romany community, the legislature should be more positively oriented to allocate special rights extensively to the Romany community on one hand. On the other hand, it is up to the will of the legislature when and to what extent it shall adopt special provisions of the Romany community or whether it shall discriminate between members of the Romany community. Secondly, discrimination of mem-

bers of Romany community on terms of autochthonous residence may be regarded as a condition for fair and transparent elections since a precise determination of voting rights is the core of every election. Thirdly, affirmative action measures are justified only in cases if identifiable and significant groups with special needs could be determined. Special voting rights of members of the Romany community in areas where practically no members live or they live scattered would lead to unfavourable and disproportionate treatment of majority population. One could certainly argue if the term “autochthonous residence” satisfies the identification and significance criteria as it reflects a historical, not an actual, perception of residing of some minority groups.

Reasoning of the Constitutional Court in U-I-416/98 that the scope of the Article 65 of the Constitution instructs the legislature how to regulate special rights should be questioned for lack of clarity. The Constitutional Court reasons that when the legislature determined the special right of the Romany community it should also had taken care of their exercise in a manner which would ensure the Romany community living in Slovenia the actual exercise of such special rights. Protection of the actual exercise of the proclaimed rights is guaranteed by the Article 2 of the Constitution (“Slovenia is a state governed by the rule of law and a social state”) and not by the Article 65 of the Constitution in our case, *e.g.* nothing significant changes in the perspective of Article 65 if, instead of four, three special rights of the Romany community are provided and actually exercised. It is the rule of law that forbids the situations where the proclaimed rights are not actually exercised, since non-compliance would lead to the legal uncertainty of bearers of these rights.

Article 39(5) of LSGA actually represents “double positive discrimination”. First, members of the Romany community which has been autochthonously settled enjoy special rights that the Romany community as a whole has. And secondly, they enjoy, in contrast to other “non-autochthonous” members of the Romany community, the right to vote a representative in the municipality council. Article 65 of the Constitution gives the legislature a free space to regulate the status and special rights of the Romany community meaning it can also abolish such rights in future.

As already indicated, any special right to a certain sub-national group of individuals interferes with the principle of the equality of the law. Consequently the Constitutional Court should first carry out the test whether the Article 39(5) of LSGA is contrary to the Equality Clause and not *a priori* proceed from the standpoint that Article 39(5) of LSGA is a mere implementation of the Article 65 of the Constitution, as the Constitutional Court actually did in the decision U-I-416/98. It should further review if the legislature had taken into consideration the legitimate aims for a differentiation of members of the autochthonous Romany community

on one hand and the whole electoral body (not the “non-autochthonous” members of the Romany community!) on the other and if the measures for implementation had been in reasonable connection with these aims.

4. THE ROMANY DEPUTY IN THE NATIONAL ASSEMBLY?

The question whether the Romany community is entitled to have their own (special) deputy in the National Assembly is raised now and then. When the first out of three decisions of the Constitutional Court concerning special rights of the Romany community was published some journalists and critical public inquired if there was a specific constitutional basis or any other legal basis for the seat of the Romany deputy in the National Assembly. The first reactions denied the possibility for such a manoeuvre mainly due to the common practice at the previous elections to the National Assembly. The stated reasons were obviously not the legal ones. That is why I would like to present in short some legal arguments that refute the legitimacy of the Romany deputy in the National Assembly: argument of the systematics, argument of the equality before the law and argument of the typical *materia constitutionis*.

The Constitution of the Republic of Slovenia defines the National Assembly as the first state authority in the chapter IV. Article 80 of the Constitution says that the National Assembly is composed of deputies of the citizens of Slovenia and comprises ninety deputies. All deputies are elected by universal, equal, direct and secret voting. One deputy of the Italian and one deputy of the Hungarian national communities shall always be elected to the National Assembly. The electoral system shall be regulated by a law passed by the National Assembly by a two-thirds majority vote of all deputies. The fifth paragraph was added by the Constitutional law amending Article 80 of the Constitution in year 2000. It states that deputies, except for the deputies of the national communities, are elected according to the principle of proportional representation with a four-percent threshold, required for election to the National Assembly, with due consideration that voters have a decisive influence on the allocation of seats to the candidates.

The first argument is the systematical one taking into account that the composition of the National Assembly is defined in the chapter IV concerning organization of the state in contrast to the sole mentioning of the Romany community in the chapter II concerning human rights and fundamental freedoms. The latter chapter deals with a relationship between an individual or a certain group of people on the one hand and the state authorities on the other and definitely not with the status, establishment of or relationships between the main state authorities. It is true that all constitutional provisions should be observed integrally; howe-

ver, the composition of the National Assembly is rounded up in Article 80 of the Constitution. No other constitutional provision deals with it.

The second argument bases on the fact that members of the representative bodies should be elected by equal voting. Slovenia is no exception (Article 80(2) of the Constitution). Equal voting presupposes that every voter has one vote with the same value as other's ones and that no vote shall be privileged (Grad 1996: 51-52). This is considered as the main principle of electoral law; nevertheless, there are exceptions to this rule. For instance, in Italy citizens abroad vote certain number of deputies and senators (number is defined in Articles 56(2) and Article 57(2) of the Constitution of the Republic of Italy) or, second example, members of many national communities in Croatia may vote their representative in the Sabor (Article 15(3) of the Constitution of the Republic of Croatia). The same goes for Slovenia. Out of 90 deputies two deputies are always elected by members of the Italian and Hungarian national communities (Article 80(3) of the Constitution). All mentioned provisions are written in the Constitution. Along with that and that all exceptions should be handled with great scrutiny and in our case stated explicitly in the Constitution, we can conclude that the Romany deputy has not been foreseen in the Slovenian Constitution.

The third argument deals with the typical constitutional matter – *materia constitutionis*. Constitutions in the world mostly comprise of the human rights and fundamental freedoms, organization of the state and constitutional revision procedure (Jovičić 1977: 9-12), let alone that the constitutional practice obviously rejects *numerus clausus* of substantial provisions for the reason that some constitutions narrow and some broaden the typical constitutional matter. As concerns organization of the state, constitutional provisions always thoroughly deal with establishing of the main state authorities. The last argument touches another important issue: voting rights for the main representative body belong to individuals and not collective groups of people, meaning that only explicit notion of the Romany deputy in the Constitution would be an adequate solution for a shift away from the right to equal vote.

There are not many arguments in favour of the Romany deputy, certainly not legal ones. One could definitely agree with the observation that no serious arguments for the discrimination between the Italian and Hungarian national communities and the Romany community exist since the former have been recognized with their own deputy in the National Assembly and the latter not. As this discussion area is limited only to legal analysis, it should be stressed for the sake of clarity, that Article 64 of the Constitution does not allow the discrimination between the Italian and Hungarian national communities; nevertheless it allows discrimination between these two minorities and other less recognized minorities in the Republic of Slovenia. Differentiation could be permitted only for the most

necessary aims and the measures for implementation should be in strict connection with such aims.

CONCLUSION

As one of the few constitutions of the world, the Constitution of the Republic of Slovenia explicitly guarantees certain privileged status or rights to an ethnic group (the Romany community). However praiseworthy that is, it does not suffice to fulfill the objective of such provision. As it was shown above, some even argue that the discrimination by using collective rights is ineffective in the long run. Irrespective of this, the Constitutional Court tried in some decisions to strengthen and assure the voice of *de facto* de-privileged group of the Roma population, albeit results are still not clearly visible at the moment having in mind the recent views of the majority of the Slovenian voting *populus* and their dislike towards some members of the Romany community in the Republic of Slovenia. The Constitutional Court definitely acts as an anti-majoritarian authority due to the fact that it annuls Acts and other decisions of legally and by that legitimately elected representative body at the state or local level. Where the decisions of the representative body and even of the people interfere with the basic standards of modern state (the rule of law, protection of basic human rights and fundamental freedoms) one should carefully stand for the unlimited advocacy of the people's sovereignty.

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