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**MINI-CONFERENCE ON
“THE RULE OF LAW”**

REPORT

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RULE OF LAW AS A PRACTICAL CONCEPT

This presentation concentrates on the principle of a state governed by the rule of law as developed in the case-law of the Slovene Constitutional Court regarding principles that proceed from the principle of a state governed by the rule of law and are not explicitly mentioned in the Slovene Constitution. Therefore, the presentation is more of a "mash-up of some of the greatest hits" of the Slovene Constitutional Court on the topic of a state governed by the rule of law in the recent years.

In order to better understand this case-law, the legal basis must be first presented. The Slovene Constitution determines in Article 2 that „Slovenia is a state governed by the rule of law and a social state.“ The principle of a state governed by the rule of law is thus directly enshrined in the Constitution. Two other legal provisions that often come into play with the principle of rule of law are the third paragraph of Article 15 of the Constitution, regulating the exercise and limitations of human rights, and Article 155 which entails a prohibition of retroactive effect of legal acts. We will see how these principles interact in the presented case-law.

There are three most important principles that were developed from the principle of a state governed by the rule of law in the Slovene constitutional case-law. These are the principle of trust in the law, principle of clarity and precision of norms, and principle of proportionality. Again, these are just those principles which are not explicitly expressed in the Constitution.

Principle of Trust in the Law

With reference to the first principle, the principle of trust in the law, the Constitutional Court held in Decision No. **U-I-188/07**, dated 2 April 2009:

„The principle of trust in the law, as one of the principles of a state governed by the rule of law [...], guarantees individuals that the state will **not arbitrarily worsen their legal position** without a sound reason justified in the prevailing public interest.“

In this case, the Constitutional Court dealt with an amendment to the Code of Obligations which changed the rule so that the amount of default interest henceforth was no longer limited by the amount of due but unpaid default interest; default interest was accrued while a delay was still pending, namely until payment was made. The rule *ne ultra alterum tantum* did not apply to the default interests anymore. The Constitutional Court held that such amendment of the rule on the accrual of default interest is in the general and public interest, because it stimulates the debtors to pay their debts as soon as possible. Therefore, the amended rule did not violate the principle of trust in the law as there was a sound reason for the amendment to the Code of Obligations and the amendment was not arbitrary.

Regarding the claim that the rule was retroactive because it could be applied to existing relationships, the Constitutional Court decided that the amendment did not interfere with legal positions or legal facts which were concluded when the former legal norm applied, as it entered into force and was implemented on the fifteenth day after its publication in the Official Gazette of the Republic of Slovenia.

Principle of Clarity and Precision of Norms

The second principle stemming from the principle of a state governed by a rule of law is the principle of clarity and precision of norms. In Decision No. **U-I-131/04**, dated 21 April 2005, the Constitutional Court held:

"The principle of clarity and precision of regulations, as one of the principles of a state governed by the rule of law, requires that regulations be clear and precise. On the one hand, this is necessary for the **protection of the addressees** of the regulation and, on the other hand, a clear and precise regulation prevents the **arbitrary decision-making** of state bodies."

The case concerned the Sunday opening hours for shops. The Constitutional Court applied this principle on some of the criteria regarding the shops which were exceptionally allowed to be open on Sundays. The criterion of the "total sales area of a shop" was not clear enough and neither the *travaux préparatoires* nor the answer of the National Assembly (i.e. the legislature) in the proceedings contained the reasons why this area was determined at 80 square meters. Since the legislature regulated the area of shops on special locations arbitrarily, this regulation was inconsistent with the principle of a state governed by the rule of law and the Constitutional Court annulled it.

The principle of clarity and precision is of particular importance in criminal cases. In Decision No. **U-I-88/07**, dated 8 January 2009, the Constitutional Court decided that the criminal offence of unlawful storage of firearms or ammunition was inconsistent with the Constitution because the same facts could be qualified either as a criminal offence or as a minor offence. The Constitutional Court held:

„The requirement that a legal rule in criminal law must be precise and clear does not only entail that it is possible to determine its content, but also that it is **identifiable in the system of legal rules** and thus separated from any other rules of a punitive nature. If the elements of a particular criminal offence and a particular minor offence are indistinguishable, such that there were no dividing lines between them, i.e. that a disposition of the criminal offence does not exceed a disposition of the minor offence, this would cause legal uncertainty and enable the state's law enforcement authorities to carry out arbitrary prosecution. Such position would entail an anomy of the legal order which would be contrary to the principles of a state governed by the rule of law [...]"

The principle of clarity and precision can be also invoked when there are two mutually inconsistent laws. In Decision No. **U-I-278/07**, dated 22 October 2009, the Constitutional Court stated that:

„[it] does not have power to decide on the **mutual consistency of two laws**, unless the principles of a state governed by the rule of law are violated by their inconsistency. “

In this case, the first law in question was the law regulating exemptions for employment agreements of theatre actors, allowing the employer more flexibility concerning the fixed-term employment. The applicants claimed such exemptions were contrary to the general regulation of labour law, but the Constitutional Court held that already this general regulation allowed for exemptions. The relation between the two laws is clear: one is a general and the other a special regulation. Therefore, by means of the established methods of interpretation of legal norms (i.e. *lex specialis derogat legi generali*) their meaning can be determined so that there are no anomalies in the legal system which would entail an inconsistency with the principles of a state governed by the rule of law.

The same issue was dealt with also in Decision No. **U-I-303/08**, dated 11 February 2010. The Constitutional Court repeated its previous position and elaborated it in more detail:

„The Constitutional Court does not have jurisdiction to review the **mutual conformity of two laws** unless the principles of a state governed by the rule of law are violated because they are not in mutual conformity. From the principles of a state governed by the rule of law, there namely follows the requirement that the legal order must be consistent and coherent, therefore it may not contain antinomies. Until the mutual inconsistencies can be remedied by applying the

rules of interpretation, their existence does not entail a violation of the principles of a state governed by the rule of law.“

In the case at issue, the application was submitted to the Constitutional Court by an administrative court which gave reasons for two different answers to the question which rule must be applied in a particular litigation the administrative court had to decide. The Constitutional Court held that the issue which interpretation of the law is correct is a matter for the regular courts, in particular as the applicant court did not even claim that one of the possible interpretations was unconstitutional.

Another aspect of this issue was dealt with in Decision No. **U-I-294/07**, dated 2 July 2009. The National Council, the upper house of the Slovene parliament, was feuding with the National Assembly, the lower house, over the management of the state property. It brought the law regulating this matter before the Constitutional Court, which stated:

„One of the principles of a state governed by the rule of law requires that regulations be clear and definite so that the content and purpose of the legal norm can be established. **This does not entail, however, that regulations do not need to be interpreted.** The content of the statutory provisions at issue can be determined by the established methods of interpretation. Thus, the applicant's conclusion that the omission of an explicit annulment of the challenged statutory provision in and of itself also entails its inconsistency with the principles of a state governed by the rule of law is not substantiated.“

In this case, such entailed that a later, special provision (i.e. *lex specialis*) derogated a more general and older rule.

Principle of Proportionality

The Constitutional Court also derived the principle of proportionality from the principle of a state governed by the rule of law and applies it regularly in order to review the constitutionality of an interference with a human right or fundamental freedom. One of the decisions in which it applied the classic proportionality test is Decision No. **U-I-92/07**, dated 15 April 2010:

„A statutory regulation which interferes with a human right is constitutionally admissible only if it is based on a **constitutionally admissible and objectively justified aim**. Moreover, in accordance with the settled constitutional case-law, it has to be reviewed whether the interference, even if it pursues a legitimate aim, is consistent with the principles of a state governed by the rule of law [...], i.e. with the **principle which prohibits excessive state interference** (the general principle of proportionality). A review of whether the interference might be disproportionate is carried out [...] on the basis of the so-called strict test of proportionality. This test comprises a review of three aspects of the interference: (1) whether the interference is **actually necessary (needed)**, (2) whether the reviewed interference is **appropriate for achieving the aim pursued**, (3) whether the **weight of the consequences** of the reviewed interference for the affected human right **is proportional to the value of the aim** pursued or to the benefits which would arise due to the interference (the principle of proportionality in the narrow sense [...]). Only if the interference passes all three aspects of the test is it constitutionally admissible.“

This decision reviewed many aspects of the regulation of religious communities, but the test was applied to the conditions of registration of religious communities. The Constitutional Court held that the state must provide a framework for the acquisition of a legal personality by religious communities that wish to do so. It abrogated the challenged conditions for registration (religious community had to have at least 100 registered adherents with Slovene citizenship or permanent residence in Slovenia and at least 10 years of activities in Slovenia) because they failed the necessity part of the proportionality test. The Constitutional Court decided that other

legislative solutions can be envisaged which, on the one hand, ensure that only some of the religious communities (i.e. registered, older, and larger) enjoy special rights, and on the other hand, allow at the same time all religious communities to acquire an appropriate legal personality irrespective of the number, nationality, or residence of their members and irrespective of the duration of their activity or their recognition in the world.

Other Implications of the Rule of Law

The Constitutional Court referred to the principle of a state governed by the rule of law also in cases where its own decisions were not respected. In Decision No. **U-II-2/09**, dated 15 April 2010, concerning a referendum regarding the salary system in the public sector it held:

„When the Constitutional Court [...] deems a law unconstitutional and requires the National Assembly to remedy such unconstitutionality within a certain period of time, the National Assembly must, in order to remedy such unconstitutionality, adopt a new statutory regulation within the determined period of time. Non-implementation of the decision entails a violation of Article 2 [principle of a state governed by the rule of law] and the second paragraph of Article 3 of the Constitution [principle of separation of powers].“

The Constitutional Court went even further in Decision No. **U-I-114/11**, dated 9 June 2011, which was much debated and criticised by some legal scholars. In a previous decision the Constitutional Court already decided that the National Assembly must establish two municipalities. One of them, in the coastal town of Ankaran, was not established at the time of the next municipal elections. When the petitioners from Ankaran came to the Constitutional Court for the second time, it decided to establish this municipality itself:

„The legislative unresponsiveness of the National Assembly regarding its obligations with reference to Ankaran Municipality, which were imposed on the National Assembly by Constitutional Court Decision No. U-I-137/10, entails a violation of the principles of a state governed by the rule of law [...] and the principle of the separation of powers [...]. By the National Assembly not responding to the Constitutional Court Decision, the petitioners in case No. U-I-137/10 with permanent residency or based in Ankaran were left without effective constitutional protection against the arbitrary conduct of the National Assembly. Thus, in the case at issue such protection had to be ensured by the Constitutional Court.“

Conclusion

From the presented case-law it can be deduced that the Constitutional Court of the Republic of Slovenia applies the principle of a state governed by the rule of law fairly often and in cases regarding diverse topics. It can be seen that this principle is used mainly in situations in which the Slovene Constitution does not explicitly regulate the limits of the legislature's power.