

RESPECT FOR HUMAN RIGHTS – THE FOUNDATION OF A STATE GOVERNED BY THE RULE OF LAW

Mag. Miroslav Mozetič

President of the Constitutional Court of Slovenia

Dear President of the Constitutional Court of the Republic of Kosovo, Professor Enver Hasani, judges of the Constitutional Court, representatives of other constitutional courts, and distinguished guests,

We have gathered here today to solemnly start together a new judicial year of the Constitutional Court of the Republic of Kosovo, so let me first sincerely wish you that the judicial year that lies ahead of you may be successful! May it be successful, not so much in quantity as in quality, may it be successful in protecting human rights and fundamental freedoms.

Dear President, let me take this opportunity to recall the visit of a delegation from your Court to Slovenia this spring. We keep fond memories of your visit and I firmly believe it was fruitful and beneficial to both sides. I am confident that the relations between our two Courts can be even strengthened in the future.

It is certainly an honour, a kind of challenge, but also a responsibility to speak on such occasion, just as it is an honour and challenge to be a judge. However, responsibility comes first. The responsibility to fairly and honourably carry out tasks that we are entrusted with, the responsibility to consistently and impartially implement the oath we took when we started our terms of office.

In Slovenia, much has recently been said about a state governed by the rule of law and the rule of law itself. The situation is probably similar in your country, and in other countries as well, especially in the so-called transitional states, i.e. states that abandoned the totalitarian communist regime and started a transition to a democratic state governed by the rule of law. Everybody is talking about it, from the professional public and politicians to the civil society. In Slovenia, much has been said about the fact that the state governed by the rule of law is not functioning, that it

has been stolen, that we have two different states governed by the rule of law, and that especially the judiciary has failed. In short, that we have been unsuccessful in establishing a state governed by the rule of law.

On this occasion I do not wish to evaluate how successful either the Slovene, or even less, your path towards establishing a democratic state governed by the rule of law has been. Let me recall the Council of Europe Resolution 1096 of 1996 entitled Measures to Dismantle the Heritage of Former Communist Totalitarian Systems, which in my opinion draws attention to the necessity of the transformation and the threat of an unsuccessful transformation; the resolution always comes to my mind when someone speaks of transition. It sets out criteria for assessing the success of the transition from a totalitarian regime into a democratic system based on the respect for human rights and the rule of law.

The Resolution considers that for the countries burdened with a totalitarian heritage (over-centralisation, militarisation, bureaucratisation, monopolisation, over-regulation, collectivism, conformism, formalism, and positivism) it is very difficult, almost impossible to transform into a civilised, liberal state based on the rule of law. This is why the old structures, institutions, and thought patterns need to be overcome. It is not enough just to formally establish a state governed by the rule of law, it is not enough just to repair the façade, it is the content that has to be addressed. The resolution warns of a failed transition, stating: "The dangers of a failed transition process are manifold. At best, oligarchy will reign instead of democracy, corruption instead of the rule of law, and organised crime instead of human rights. At worst, the result could be the "velvet restoration" of a totalitarian regime, if not a violent overthrow of the fledgling democracy."

It is probably not to be disputed that on a formal, institutional level all transitional states managed to transform themselves into democratic states governed by the rule of law.

Let us see how the theory of law defines a state governed by the rule of law and which its elements are. Allow me to cite the book Theory of Law written by the Slovene academic Marijan Pavčnik.¹ "A state governed by the rule of law is a modern state in

¹ Pavčnik, Marijan: Theory of Law, A contribution to the understanding of law, 4th revised and amended edition, GV Založba, 2011, Collection "Pravna obzorja".

which the functioning of the authorities of the state is limited by law and in which fundamental rights are ensured. The state administration and independent judiciary, which adopt individual and implementing acts and which carry out material acts (especially the state administration), are subordinated to the Constitution and laws, which are adopted by the representative body (the national assembly, parliament, legislative assembly, etc.). It is organised as a democratic state based on the principle of the separation of powers (in the sense of the system of checks and balances between the holders of the state power)." (p. 74).

The author continues: "Legality is the central characteristic of a state governed by the rule of law. For a state governed by the rule of law it is characteristic that the constitution, laws, and other formal legal sources treat legal subjects equally (the principle of legal equality) and predictably. [...] In a state governed by the rule of law, the rights and obligations of legal subjects are determined by law, whereby the most important of them are contained, as fundamental rights, in the constitution or some other constitutional act and promulgated by them in a legally habitual manner. Legal remedies, by which legal subjects invoke their rights and achieve that duties are fulfilled, are one of the components of a state governed by the rule of law. The notion of a state governed by the rule of law is very broad. Its principal dimension is the substantive and procedural legal framework in which legal decision-making is to be carried out and within which the authorities of a state are to adopt decisions." (p. 76 and 77).

Pavčnik continues by listing the elements of a state governed by the rule of law according to Herzog. These are the following: the separation of powers, the fundamental rights, the law in the formal sense, adopted by the representative body, the legality of the state administration and judiciary, which also entails that they are bound by the constitution and law, the possibility to impose boundaries on the functioning of the state, which must be measurable and expectable (the sub-elements of this aspect are the principle of legal certainty, the protection of trust in the law, which applies in a limited scope, the prohibition of retroactivity, the principle of clarity in the legislation, and the prohibition of excessiveness, together with the necessity and proportionality of interferences by the state), judicial protection combined with the principles that ensure independent and fair trial, *nullum crimen*

nulla poena sine lege, and the existence of a constitution in the formal sense, which is the "crown" of a state governed by the rule of law (p. 77).

Perhaps you are already wondering why I am telling you all this. In Slovenia, I often refer to the German legal philosopher Kaufmann's thought (message) conveyed in his letter to his grandson Finn, which goes as follows: Dear Finn, it is now your generation that is responsible for a state governed by the rule of law. Yes. Now, it is our generation or better all the generations, our older and other younger generations, that are responsible for a state governed by the rule of law.

Logically, there follows the question of responsibility of constitutional courts or, more specifically, the responsibility of judges of individual constitutional courts to ensure a state governed by the rule of law. Our responsibility is dictated by the position constitutional courts assume in the system of the separation of powers, by the position they assume "in a state based on the respect for human dignity, which is the legal-ethical foundation of our constitutional system, which is based on the concept of constitutional democracy, i.e. on the presumption that authority must be restricted by certain fundamental rights and freedoms humans are entitled to due to their inherent worth" (from Decision of the Constitutional Court of the Republic of Slovenia No. U-I-109/10). Here, I cited the Constitutional Court of the Republic of Slovenia referring to the Slovene constitutional order, but I believe that the same applies to all European constitutional democracies.

Constitutional courts are the guardians of the constitution and the constitutional order. They are the highest, but not the only guardians of constitutionality and guarantors of human rights and fundamental freedoms. They are the interpreters of the constitution. To paraphrase Herzog: A constitution is the crown of a state governed by the rule of law, therefore, constitutional courts are the highest guardians of that crown. In Decision No. U-I-304/96, the Constitutional Court of the Republic of Slovenia stated: "Within the system of the separation of powers, the Constitutional Court has the role of the guardian of constitutionality and legality, namely in relation to all other authorities of the state, local self-government authorities, and bearers of public authority." In Decision No. U-I-114/11 it stated: "Its task is also to interpret the Constitution and to give its provisions a meaning by which the rule of law is ensured, as well as free and democratic social order."

It is essential, however, that by their decisions and interpretations constitutional courts ensure a just state governed by the rule of law, i.e., as already mentioned, a state based on the respect for human dignity and fundamental rights and freedoms derived therefrom that humans are entitled to due to their inherent worth. Each authority (state) must be aware that it does not grant fundamental rights to people. No, the authority must only respect and protect them. Because, as the United Nations Universal Declaration of Human Rights states, "all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." The Preamble to the Universal Declaration states: "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace". Let me cite another legal scholar, Gustav Radbruch, who states in his Five Minutes of Legal Philosophy: "There are principles of law, therefore, that are weightier than any legal enactment, so that a law in conflict with them is devoid of validity. These principles are known as natural law or the law of reason. To be sure, their details remain open to question, but the work of centuries has in fact established a solid core of them, and they have come to enjoy such far-reaching consensus in the so-called declarations of human and civil rights that only the dogmatic sceptic could still entertain doubts about some of them."

There is no doubt that both an unsuccessful transition as well as the economic crisis and the growth of organised (and also international) crime create new challenges for a state governed by the rule of law and thus also for constitutional courts. Many questions, even dilemmas, arise from certain political and other public discussions, and especially from certain measures and solutions that the executive and legislative powers wished to adopt or have adopted already, for example, is true respect for human rights and fundamental freedoms possible only in the time of prosperity, only in the time of stable social and economic circumstances? The following dilemma comes to mind: the greater the security – the more severe interferences with human rights, especially with the right to the freedom of movement and the right to. One may think that social rights are possible only in a welfare state and that the economic crisis demands severe cuts in social rights. Although it is true that all these new challenges require action, it is nonetheless true that on the other hand we must not and cannot accept the thesis that human rights belong only to good, prosperous, and

peaceful times. Therefore, if the statement from the Universal Declaration is true that the respect for human dignity and human rights is the foundation of freedom, justice, and peace, then their violation will sooner or later inevitably lead to dictatorship, absence of freedom, war, and injustice. In other words, it will lead to a totalitarian police state. I am therefore convinced that it is our task and duty to make everything we can to protect human rights and fundamental freedoms.

That is why, dear President of the Constitutional Court of the Republic of Kosovo, Professor Hasani, judges, and other distinguished guests, I would once again like to wish the Constitutional Court of Kosovo every success in carrying out its tasks.

Thank you!