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REPORT

"CONSTITUTIONAL VALUES IN PRACTICE WITH A SPECIAL REFERENCE TO THE SLOVENIAN SYSTEM OUTLINE"

by

Mr Arne Marjan MAVČIČ
Constitutional Court of the Republic of Slovenia

CONSTITUTIONAL VALUES IN PRACTICE WITH A SPECIAL REFERENCE TO THE SLOVENIAN SYSTEM OUTLINE

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Abstract:

In a contemporary State governed by the rule of law, the constitutional review was introduced following the realization that regulations of State bodies can also violate the constitution, and is the highest form of the legal protection of constitutionality as well as of the protection of human rights. Constitutional review is a remedy against anomalies concerning the concentration of powers within other state bodies. In particular, an excess of State legislative activities oppresses individuals within the political system. Constitutional review is a remedy for balancing processes which could lead to State intervention into certain fields of human activity.

Several observers generally praised the progress achieved by Slovene authorities in the field of reforms since its independence in June 1991, notably the adoption of a democratic Constitution in December 1991[1] and its recent amendments to enhance protection of human rights and fundamental freedoms. However, discussing the protection of human rights in Slovenia in details, it is possible to state that various problems are also appearing. It is about time that we learned that a democratic society means much more than just pluralism – the coexistence of people who come from different cultures or subcultures, or have different lifestyles, who tolerate each other to greater or lesser degree.

Therefore, it is necessary to emphasise that it is not enough for the state only to formally guarantee the special rights of certain group of people, but also that it is their duty to enable them to be exercised effectively in everyday life as well.

1. The Character of Social Relations and the Constitutional Review

For the implementation of constitutionality, proper social circumstances and political and legal guarantees (remedies) must be provided[2].

The particular social conditions those are important for the implementation of constitutionality, and which are essential for democratic political systems are as follows:

- Social stability. This involves material stability for the protection of a particular constitutional system against eventual sudden changes which could be caused by social powers that do not favor the present political system.
- Social homogeneity or heterogeneity. This involves the social group composition of society. If the society is more homogeneous concerning social position and social consciousness, there are advantages for implementing constitutionality and legality. Therefore their social structure influences the implementation of constitutionality.
- Social consciousness and public opinion. Consideration of constitutionality and legality is dependent on social consciousness and public opinion and involves the understanding that the constitution and statutes must be considered. Such a democratic consciousness is dependent on the duration of the tradition and existence of democratic institutions.

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[1] *Official Gazette* 1991, nr. 33, 1997, nr. 42, 2000, nr. 66, 2003, nr. 24, 2004, nr. 69, 2006, nr. 68.

[2] See Rupnik, J., Ustavnost, demokracija in politični sistem, Založba Obzorja Maribor 1975, p. 15-150.

The protection of the basic political relations determined by the constitution is guaranteed by the different guarantees or remedies (political and legal) for the protection of constitutionality and legality of a democratic political system. Constitutionality and legality can be exercised only within appropriate social circumstances. There are socio-political and legal remedies that guarantee the implementation of constitutionality and legality.

In a contemporary State governed by the rule of law, the first legal remedies are the judiciary and - on the highest level – the constitutional justice.

2. Some Specialities of the Slovenian Constitutional Review

The Slovenian Constitutional Court acquired the status of an independent institution carrying out the constitutional review in relation to the Legislature characterized by the explicit power to abrogate statutes adopted by the Legislature. The former function of the Constitutional Court before 1991 due to the Principle of the Unity of Powers and the Supremacy of the Parliament, focused on the assessment of the unconstitutionality of a statute, changed after 1991 into an active relationship not only involving the cassation of statute, but also guidance of the Legislature in its legislative activity. However, a concession by the Constitutional Court to the Legislature is still possible in that the Court may not abrogate a disputable statutorial provision, but rather enables the Legislature to reconcile the disputable statutorial regulation with the *Constitution* within a period of time, pursuant to the guidelines of the Constitutional Court in a specific decision (see Article 48 of the *Constitutional Court Act* [3]).

In the period after 1991 the Constitutional Court has played a more important role based on its new extended powers. In the sense of contemporary trends, the Slovenian Constitutional Court has assumed the role of a negative Legislature.[4] In this period of transition the Legislature is not always able to follow developments or to impose standards for all shades of the legal system and its institutions. This results in the so-called interpretative decisions[5] taken by the Court or the appellative decisions or certain declaratory decisions that include certain instructions by the Constitutional Court to the Legislature on how to settle a certain question, or a specific issue (Article 48 of the *Constitutional Court Act*). However, in compliance with the Principle of Judicial Self-Restraint, a clear limit has been imposed on the Slovenian Constitutional Court due to the fact that the Court has actively been creating the legal rule both negatively (*e.g.* by abrogation) and positively (*e.g.* by appellative, interpretative and the declarative decisions), a function theoretically reserved for the Legislature. On the other hand there arises the question whether the Constitutional Court, in deciding on the existence or non-existence of a specific provision, actually creates the law, because it carries out a review of legislative activity. In any case, the Legislature cannot avoid the existence of constitutional case-law in its activity.

3. Human Rights Protection as a Fundamental Constitutional Value

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[3] Official Gazette RS, No. 64/07

[4] The basic difference between the so-called intervention of the Constitutional Court into the field which belongs to the Legislature, and other forms of intervention by which the Constitutional Court would exceed its authorization to be sometimes transformed into a reserve Legislature, would be in fact that the Constitutional Court abrogating a statute only "takes away", but the Legislature may also amplify. On the other hand, the abrogation of statute by a Constitutional Court decision does not create law to a low degree in comparison with writing new statutorial provisions. It may depend on the context where the abrogated legal provision is situated, on the type of provision, but sometimes only on pure coincidence concerning which legislative technique was used by the Legislature, if the Constitutional Court really executes its supposed undisputable function of negative Legislature, or participates in the creation of a new provision. How much space will belong to the Legislature concerning the extraction of determined unconstitutionalities and how much space has to be occupied by the Constitutional Court, may in cases of the highest degree partially depend also on the intensity of the activities of the Legislature (Testen, F., Techniques of the Decision-Making Process of the Constitutional Court in the Abstract Constitutional Review, Legal Journal (*Pravna praksa*), No. 1/99, p. 5).

[5] It is exactly by "interpretation" as a decision-making technique that the Constitutional Court can enter the space which is otherwise reserved for the Legislature. This interpretation entails a technique which is used in Constitutional Court sentences describing the particular contents of a legal norm in an affirmative manner (Testen, F., The Techniques of Constitutional Court Decision-Making Process in the Abstract Constitutional Review, Legal Journal (*Pravna praksa*), No. 1/99, p. 5).

3.1 Basic

The Constitution guarantees each individual equal human rights and fundamental freedoms (Article 14(1), Constitution). It ensures the rights and freedoms that form the basis of a society and a state and that constitute the baseline or starting point for all other legislation.

The Constitution distinguishes two groups of fundamental rights and freedoms: the first group applies to everyone, to each human being (human rights), the second group to citizens only (citizens' rights). Furthermore, under the Constitution human rights and fundamental freedoms are only limited by the rights of others and in those cases for which provision is made in the Constitution (Article 15(3), Constitution).

Like most current constitutions, the Constitution stipulates that the manner in which human rights and fundamental freedoms are exercised may be regulated by law whenever the Constitution so provides or where this is necessary due to the particular nature of an individual right or freedom (Article 15(2), Constitution). The general, basic provisions relating to all human rights and fundamental freedoms are:
- equality before the law (Article 14, Constitution);
- the exercise and limitation of rights (Article 15, Constitution);
- the temporary suspension or restriction of rights (Article 16, Constitution);
- equality in the protection of rights (Article 22, Constitution), and
- the due process of the law (Article 23, Constitution).

The most important constitutional provisions are as follows:
- the provisions on the protection of human rights against possible repressive state interventions as well as against the abuse of power (Article 16, Article 17, Articles 18–31 and Articles 34–38, Constitution);
- the provisions on the protection of economic, social and cultural rights (generally, Part II, Constitution);
- the provisions on ensuring legal and other measures for the effective protection of human rights and freedoms (Article 15, Articles 129–134 and Articles 155–159, Constitution);
- the provisions providing for the constitutional complaint (Article 160, Constitution).

Article 15(1) of the Constitution stipulates that human rights and fundamental freedoms are to be exercised directly on the basis of the Constitution, while paragraph 2 of the same article provides that the exercise of these rights and freedoms may be regulated by law. In conjunction with Article 125 this means that these rights and freedoms are protected in all judicial proceedings before every court. After all other remedies have been exhausted, individuals also have the possibility of filing a constitutional complaint before the Constitutional Court, i.e. the instrument specially intended for the protection of human rights and fundamental freedoms.

Article 125 of the Constitution provides that judges must be independent in the performance of the judicial function and that they are bound by the Constitution and laws. If a court, when adjudicating a case, deems a law it is required to apply to be unconstitutional, it must stay the proceedings and commence review proceedings before the Constitutional Court. The proceedings before the court continue once the Constitutional Court has reached a decision. If a court takes the view that an executive regulation does not comply with the Constitution or the law, it will not or must not apply it – the so-called *exceptio illegalis* (exception of illegality).

3.2 Protection before the Constitutional Court -The Individual as an Applicant before the Constitutional Court

The right to the judicial review of the acts and decisions of all administrative bodies and statutory authorities which affect the rights and legal entitlements of individuals or organizations

is guaranteed (Article 120(3), Constitution; Article 157(1), Constitution).

Proceedings before the Constitutional Court have the nature of proposed proceedings (*juridiccion voluntaria*). In principle, the Constitutional Court cannot itself initiate proceedings; as a rule, the proceedings before the Constitutional Court are based on (restricted to) the corresponding application lodged by a special, duly qualified (privileged) constitutional institution (the so-called legitimate petitioners)[6]. On the other hand, the constitutional review system also allows for a private individual's access to the Constitutional Court (concerning abstract as well as concrete review, based on a constitutional complaint, or on a popular complaint (*actio popularis*) or on other forms of constitutional rights' protection. This involves the so-called subjective constitutional review, the violation of individual rights and the protection of individual rights against the State (in particular against the legislature)[7]. In the countries with a diffuse constitutional review and in some countries with a concentrated constitutional review, the individual citizen is offered the possibility of requesting the constitutional review of statutes, administrative measures or judgments in special proceedings. Only after the complaint has been lodged with the Constitutional Court do proceedings begin. Even then, as a rule, the complainant may withdraw their complaint in order to thereby terminate the respective proceedings.

The individual's standing as complainant before the Constitutional Court has been influenced by extensive interpretation of provisions relating to the constitutional complaint, as well as by ever more extensive interpretation of provisions relating to concrete review. In some systems the individual's access to constitutional courts has become so widespread that it already threatens the functional capacity of the Constitutional Court. Therefore, the legislature is trying to find some way for constitutional courts to eliminate less important or hopeless proceedings (*e.g.* the restriction of abstract reviews by standing requirements). All these proceedings envisage the condition that the complainant must be affected by a certain measure taken by the public authority. With a growth in the number of complaints, efficiency decreases. Nevertheless, citizens should have many opportunities to apply for the protection of their constitutional rights.

Prevailing petitioners before the Slovenian Constitutional Court have been and remain individuals. The current system of constitutional review under the Constitution of 1991 preserved the prior (under the Constitutions of 1963 and 1974) unlimited, individual popular complaint (*actio popularis*), but now restricted by the legal interest to be demonstrated by the petitioner (*actio quasi-popularis*) (Art. 162(2), Constitution; Art. 24, Constitutional Court Act). On the other hand, the newly introduced constitutional complaint increasingly intensified the role of the individual before the Constitutional Court (Arts. 160–162, Constitution; Art. 50, Constitutional Court Act). Since the Slovenian system is a system of concentrated constitutional review, the ordinary courts cannot exercise constitutional review while deciding in concrete (*incidenter*) proceedings. An ordinary court must interrupt the proceedings and refer the law to the Constitutional Court for a review of its constitutionality (Art. 156, Constitution; Art. 23, Constitutional Court Act). The ordinary court may continue the proceedings only after the Constitutional Court has reviewed the constitutionality of the respective law (so the Slovenian model, too, adopted the principle that a law can only be eliminated from the legal system by the Constitutional Court).

4. Problems Concerning the Realisation of Some Constitutional Values in the Slovenian Practice - Some Current Issues Concerning Human Rights Protection

Several international observers generally praised the progress achieved by Slovene authorities

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[6] Articles 23 and 23a of the *Constitutional Court Act*

[7] Articles 24 and 50 of the *Constitutional Court Act*

in the field of reforms since its independence in June 1991, notably the adoption of a democratic Constitution in December 1991[8] and its recent amendments to enhance protection of human rights and fundamental freedoms. Generally speaking, the observers also welcomed the fact that the treaties concerning human rights protection are directly enforceable as part of the domestic legal order and that they have been directly enforced by the Supreme and the Constitutional Courts, and praised several other advances in the area of law and institutional development undertaken by the Slovene Government during the last period.

However, discussing the protection of human rights in Slovenia in details, it is possible to state that various problems continue to recur, and new ones are also appearing. It is about time that we learned that a democratic society means much more than just pluralism – the coexistence of people who come from different cultures or subcultures, or have different lifestyles, who tolerate each other to greater or lesser degree. It means the personal and social choice of two-way relations and cooperation between different social groups and at the same time the rejection of intolerant practices in the everyday and political life of society. It is the striving to achieve an inclusive society which does not marginalise 'others', but tries to take advantage of the wealth of differences in order to achieve a new quality of life.

A lifestyle decision, which is based on tolerance, cannot be conceived of as a matter of a benevolent attitude of the majority groups in society towards minorities; the foundations of tolerance come from a respect for human rights. Tolerance does not simply mean passively "putting up with others and people who are different from yourself", but arises from the conviction that one must consistently respect the rights of people exactly as they are: universally accepted (apply to everyone without exception), inalienable (no-one may take them away from anyone for any reason) and indivisible (it is not possible that we would be entitled to some rights and not to others). The relations mutual: advocacy of human rights is a key element of tolerant behaviour; and without the decision to be tolerant it is impossible to achieve a proper level of respect and the exercising of human rights[9]. Unfortunately, even some international observers are extremely concerned about the continuous public manifestations of hate speech and intolerance by some Slovenian politicians. Several observers call for greater responsibility of politicians and media in this regards and for the full respect of the rights and values laid down in European Convention on Human Rights and other international instruments[10].

This illustrates a problem which is also common in other areas, where rights which are guaranteed by the Constitution or by law can not be exercised in full due to discrepancies between what is declared and what actually exists. Therefore, it is necessary to emphasise that it is not enough for the state only to formally guarantee the special rights of certain group of people, but also that it is their duty to enable them to be exercised effectively in everyday life as well.

The following repeated problems concerning human rights respecting have been recorded during the last period:

4.1 Reasonable Delay in Judicial Proceedings-References to the Slovenian Experiences

4.1.1 International case law and concluding observations of expert committees adopted

[8] *Official Gazette* 1991, nr. 33, 1997, nr. 42, 2000, nr. 66, 2003, nr. 24, 2004, nr. 69, 2006, nr. 68.

[9] HUMAN RIGHTS OMBUDSMAN, Tenth Annual Report 2004, Ljubljana, July 2005; VARUH ČLOVEKOVIH PRAVIC, Enajsto redno poročilo, Ljubljana, junij 2006

[10] Follow-up Report on Slovenia (2003-2005), Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights, Strasbourg, 29 March 2006, CommDH(2006)8, Original version, page 12.

during the period under scrutiny and their follow-up

The Constitution provides for the right to a fair trial, and an independent judiciary generally enforced this right; however, the judicial system was overburdened and, as a result, the judicial process frequently was protracted. In some cases, criminal trials have lasted from 2 to 5 years [11].

The applicant alleged under Article 6 (1) of the Convention [12] that the length of the proceedings before the domestic courts to which he was party was excessive. In substance, he also complained about the lack of an effective domestic remedy in respect of the excessive length of the proceedings (Article 13 of the Convention). In the Court's view, the overall length of the proceedings in the instant case was excessive and failed to meet the "reasonable-time" requirement. In particular, the duration of the proceedings before the first-instance court, which exceeded four years, is not compatible with the standards set by the Court's case-law [13]. Here has accordingly been a breach of Article 6 (1) of the Convention. The applicant complained that the remedies available in Slovenia in length-of-proceedings cases were ineffective. In substance, he relied on Article 13 of the Convention. The Court reiterates that the standards of Article 13 require from a party to the Convention to guarantee a domestic remedy allowing the competent domestic authority to address the substance of the relevant convention complaint and to award appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. In the present case, the Government has failed to establish that an administrative action, a tort claim, a request for supervision or a constitutional appeal can be regarded as effective remedies. For example, when an individual lodges an administrative action alleging a violation of his or her right to a trial within a reasonable time while the proceedings in question are still pending, he or she can reasonably expect the administrative court to deal with the substance of the complaint. However, if the main proceedings end before it has had time to do so, it will dismiss the action. Finally, the Court also concluded that the aggregate of legal remedies in the circumstances of these cases is not an effective remedy. Accordingly, there has been a violation of Article 13 of the Convention [14].

4.1.2 Legislative initiatives, national case law and practices of national authorities

Within their competences, the Government, the courts and other judicial bodies should take additional measures to provide for the enforcement of the right to the trial in the reasonable time, laying great stress on the quality and efficiency of judicial proceedings on all levels of judicial decision making [15].

Repeated complaints about violations of the right to adjudication within a reasonable time frame is an annual constant, and there is nothing new to report this year, although there is constant talk of improvement. Very few courts respect the statutory deadline for scheduling trials in criminal matters. Unfortunately, it is the opinion of the Supreme Court that the two-month statutory deadline pursuant to Article 286 of the Criminal Procedure Act [16] "is not a true statutory deadline, but is a so-called instructional or monitory deadline, which is intended to provide procedural discipline…"!? Frequently there are also violations of the statutory deadlines

[11] State Department 2004 Human Rights Report, Slovenia HRR04

[12] E.g. Zakon ratifikaciji Konvencije o varstvu človekovih pravic in temeljnih svoboščin, Act Ratifying the Convention on Human Rights and Fundamental Freedoms, *Official Gazette - Treaties* 1994, nr. 7

[13] E.g., *A.P. v. Italy* [GC], no. 35265/97, 28 July 1999

[14] Eur. Ct. H.R., Lukenda v. Slovenia judgment of October 2005, *Application no. 23032/02*

[15] Priporočila Državnega zbora Republike Slovenije, št 700-01/93-0019/0042, EPA 293-IV, sprejeta na 10 redni seji dne 27/10-2005 ob obravnavi Desetega rednega letnega poročila Varuha človekovih pravic za leto 2004, obj. Poročevalec DZ, št. 83/05

[16] E.g. Zakon o kazenskem postopku, Criminal Procedure Act, *Official Gazette* 1994, nr. 63, 1998, nr. 49, 1998, nr. 72, 1999, nr. 6, 2000, nr. 66, 2001, nr. 111, 2003, nr. 56, 2003, nr. 116, 2004, nr. 43, 2004, nr. 96

for drawing up court rulings in civil and criminal procedure. Even though the law binds judges to draw up a judgment in writing within 30 days, and within 15 days in detention cases, we observed cases where the defendant waited for adjudication for up to as much as half a year. It is difficult to accept the assertion that statutory provisions do not apply to judges, since it is the judges above all others who must stand as examples to other citizens by obeying the laws. In addition, the majority of complaints lodged with the European Court of Human Rights from Slovenia refer to adjudication within a reasonable time frame, which confirms our findings. Any delay of a court ruling has serious consequences, and this is especially true for social and labor disputes, which further increase the already serious existential problems of the complainant [17].
During the last period, the applicants challenged the delay of judicial proceedings, making the point of the particular stages of proceedings (e.g. waiting for oral hearings, waiting for the written copy of the judgment, waiting for the respective decision on their appeal etc.). Due to such difficulties, by the Act on Changes and Amendments of the Court Act [18] enforced in 2004, the legislator explicitly determined that judges should decide on the rights and duties as well as on charges without unreasonable delay, independently and impartially.

Moreover, in 2004 continued the State endeavoring for changes and amendments in particular organizing and procedural legislation that may contribute to the efficient judicial system. Therefore also Article 72 of the Court Act was changed and amended again by the Act on Changes and Amendments of the Courts Act [19] regulating the supervisory appeal. On the basis of the new regulation, the mentioned appeal became an "arm of the party" who challenges the court's violation of his/her right to the trial in the reasonable time. Under the new regulation, the filing of a supervisory appeal may be founded in case of violation of rules on priority order in resolving cases and /or in case of violation of legally binding deadlines for hearings and issue of judgments [20].

The number of unresolved cases and delays indicates that most Slovenian courts are overloaded. The Human Rights Ombudsman has been permanently calling the attention to the State's duty to provide for the enforcement of the right to the trial in reasonable time in the judicial proceedings before ordinary courts as well as before specialized courts. The Human Rights Ombudsman has been also calling the attention to the duty of judges to respect all competences of their judicial function. Only in this way it is possible to provide for the efficient, impartial and fair judicial proceedings. It is worth mentioning that the two thirds of appeals filed to the European Court for Human Rights refer to the violation of the right to the trial in the reasonable time. Such situation should not be overlooked by the judicial branch of power [21].

The new Labor and Social Courts Act (E.g. Zakon o delovnih in socialnih sodiščih, Labor and Social Courts Act, *Official Gazette* 2004, nr. 2, 2004, nr. 10) enforced on 1 January 2005 introduced some new procedural rules to accelerate the proceedings in labor and social disputes. Among others, the new Act promotes settlements as the most efficient way for resolving cases. More discipline on the part of the parties to the proceedings and a higher level of responsibility in judicial decision making were introduced too [22].

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[17] Human Rights Ombudsman, Annual Report 2004, Ljubljana, May 2005

[18] E.g. Zakon o spremembah in dopolnitvah zakona o sodiščih, Act on Changes and Amendments of the Court Act, *Official Gazette* 2004, nr. 73

[19] E.g. Zakon o spremembah in dopolnitvah zakona o sodiščih, Act on Changes and Amendments of the Courts Act, *Official Gazette* 2004, nr. 73

[20] Human Rights Ombudsman, Annual Report 2004, Ljubljana, May 2005

[21] Human Rights Ombudsman, Annual Report 2004, Ljubljana, May 2005

[22] Human Rights Ombudsman, Annual Report 2004, Ljubljana, May 2005

The Human Rights Ombudsman is aware of endeavoring of several ordinary courts to promote the efficiency of judicial decision making in order to reduce the number of unresolved cases. The settlement was promoted as an alternative method of resolving cases. Additionally, in this way the parties to the proceedings gained higher responsibility. It is also necessary to point out to the project of so called "accelerated civil proceedings" that introduced the principle of the concentrated hearing. Moreover, this project determines more clear and efficient tasks of all parties to the proceedings. However, until the respective legal regulation is changed and amended, the cooperation of parties during the proceedings can be implemented under the Civil Procedure Act in force. Out of legally binding procedural provisions, the parties to the proceedings may be bound during the proceedings only on the basis of their consensus. Among current endeavoring for more efficient proceedings there is worth mentioning the establishment of the so called Family Department for decision making on cases that under the Act on Changes and Amendments of the Marriage and Family Relations Act [23] fall under the competency of county (regional) courts. Such specialized County Court's Family Department should promote the quality and speed of the judicial decision making [24].

The Constitutional Court [25] decided on the constitutionality of the Administrative Dispute Act [26]. The Constitutional Court discussed the issue if the affected persons have an efficient judicial protection of their right to the trial in the reasonable time (based on Article 23 (1) of the Constitution) in the situation of already terminated proceedings where this right was presumably violated. The Constitutional Court decided that the Administrative Dispute Act is not in conformity with the Constitution.

Under the so far existing Constitutional Court's statement, taking into account the legislation in force, the affected person may file an appeal for compensation (based on Article 26 of the Constitution) whenever the proceedings was finally terminated if the person's right to the trial in the reasonable time was presumably violated. It means that such appeal should be judged by the ordinary court in the civil proceedings applying general rules of the compensation law established by the Code of Obligation [27]. On these grounds, the competent court may award to the affected person only a compensation for the pecuniary and non-pecuniary damage, provided that the conditions for the liability for damages are fulfilled. Irrespective of the above position, the Constitutional Court decided that - taking into account the case law of the European Court for Human Rights – it is necessary (in the spirit of the European Convention for Protection of Human Rights and Fundamental Freedoms) to interpret Article 15 (4) of the Constitution of the Republic of Slovenia, that guarantees the judicial protection of human rights and the right to eliminate consequences of their violation, in the way that this provision provides for the request to ensure (Within the scope of the judicial protection of the right to the trial in the reasonable time) the possibility of enforcement of equitable compensation even when the violation over. Accordingly, the criteria established by the European Court for Human Rights shall be applied for evaluation if the reasonable duration of the trial was exceeded.

Because the Administrative Dispute Act, referring to Article 157 (2) of the Constitution and providing for the judicial protection of the right to the trial in the reasonable time, does not contain any special provisions, adapted to the nature of the discussed right that would also

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[23] E.g. Zakon o spremembah in dopolnitvah Zakona o zakonski zvezi in družinskih razmerjih, Act on Changes and Amendments of the Marriage and family Relations Act, *Official Gazette* 2004, nr. 16

[24] Human Rights Ombudsman, Annual Report 2004, Ljubljana, May 2005

[25] (CC (Constitutional Court), nr.U-I-65/05, 22 September 2005, *Official Gazette* 2005, nr. 92)

[26] E.g. Zakon o upravnem sporu, Administrative Dispute Act, *Official Gazette* 1997, nr. 50, 1997, nr. 65, 2000, nr. 70

[27] Obligacijski zakonik, Code of Obligations, *Official Gazette* 2001, nr. 83, 2004, nr. 32

provide for the claiming of a just compensation if the violation of the discussed right is over, the Constitutional Court decided that the Act is not in conformity with Article 15 (4) of the Constitution (in connection with Article 23 (1) of the Constitution).

The Constitutional Court decided only on the issue if the legislation in force provides for the efficient judicial protection of the right to the trial in the reasonable time if the violation is over. However, the Court calls the attention that - in reference to the case-law of the European Court for Human Rights - the reasonable question is also raised about the efficiency of the judicial protection of the discussed right if the proceeding is still in course. As the Constitutional Court stated, in the process of adoption of future legal regulation that will eliminate the unconstitutional provisions declared by the Court's decision, there is also necessary to provide for the appropriate protection of the discussed right if the proceedings is still in course. Additionally, it is necessary to harmonize these issues with the standards adopted by the European Court for Human Rights. Moreover, the basic concern of the State and/or of the all three branches of power is to provide for the efficient enforcement of the judiciary function [28].

4.1.3 Act on Protection of the Right to Trial without Undue Delay

The Act on Protection of the Right to Trial without Undue Delay was adopted on 26 April 2006 and came into force on 27 May 2006[29]; however, due to some new measures and methods it instituted and new powers it conferred upon the judicial branch and the Office of the State Attorney General, it only began to be applied on 1 January 2007.

The Act institutes two categories of legal remedies for the protection of the right to trial without undue delay provided for in Article 23/1 of the Constitution. The first category includes the so-called expedition remedies, namely the supervisory appeal and the motion for a deadline, while the second category incorporates the so-called satisfaction remedies, i.e. the payment of monetary compensation for just satisfaction, the publication of the judgement determining the violation of the right to trial without undue delay and the written statement of the violation of the right to trial without undue delay.

Anyone who considers that the judicial proceedings he or she is a party in have been pending for too long or have been unduly delayed may bring a supervisory appeal before the court hearing the case. The president of that court is in charge of examining the appeal and deciding upon it. If the appeal is rejected or the party does not receive an answer within two months or if the appropriate procedural acts are not performed within the time limits set by the president, the party may proceed with the motion for a deadline. The competence to decide upon such motions is conferred to the president of the higher court in a specific judicial area. He or she may reject the clearly unfounded motions and dismiss those which do not contain all the required elements as well as those lodged after the expiry of the time limit. If the president establishes that the court does not unduly delay the adjudication on the case, he or she rejects the motion by way of decision; if, on the other hand, it is established that the case is unduly delayed, he or she orders the appropriate procedural acts to be performed by the judge deciding the principal case and sets the time limit for their performance.

If the supervisory appeal filed by the party was granted or if the motion for a deadline was lodged, the party may claim just satisfaction which may be given by way of pecuniary compensation for damage caused by a violation of the right to trial without undue delay and the above-mentioned publication of the judgement or a written statement. The Act limits the amount of pecuniary compensation attributable to individuals for violating their right to trial without

[28] CC (Constitutional Court), nr.U-I-65/05, 22 September 2005, *Official Gazette* 2005, nr. 92

[29] Official Gazette RS, No. 49/06

undue delay to 5000 EUR. The criteria to be considered in the determination of the amount of compensation include in particular the complexity of the case, actions of the State and actions of the party as well as the importance of the case for the party. The written statement may be made without monetary compensation if the State Attorneys Office reaches an appropriate agreement with the party whose right has been violated; in cases of serious violations of the right to trial without undue delay, however, the State Attorneys Office may in addition to the written statement also grant pecuniary compensation.

The proceedings to enforce a claim for just satisfaction are instituted by a party by way of a motion for settlement filed with the State Attorneys Office; if a settlement is not reached out of court the party may bring an action for damages before the local court in whose district the plaintiff is a permanent or temporary resident or has registered office. If, considering the damage incurred by the party and all circumstances of the case, the local court decides that just satisfaction for non-pecuniary damage might be afforded merely be establishing a violation of the right, it may issue a declaratory judgement stating that the party's right has been violated. At the request of the party it may also decide to publish the judgement.

4.2 Fight against incitement to racial, ethnic, national or religious discrimination

4.2.1 Erased persons

Many of the 'erased' permanent residents of Slovenia, who were legally residing in Slovenia as citizens of ex-Yugoslavia have after the unlawful erasure still not yet been able to regularize their status. The Government should devote its attention to the issue of 'erased' immediately and to explicitly and publicly recognize the discriminatory nature of the removal from the population registry of the individuals concerned and to ensure that their status of permanent residents is retroactively restored[30].

The Government and the Ministry of Interior should as soon as possible draft the Constitutional Act on the Regulation on Position of Erased Persons[31].

Regularization of status for non-Slovenian former Yugoslav citizens remained an issue. Some Yugoslavs residing in the country at the time of independence did not apply for citizenship in 1991-92 and subsequently found their records were "erased" from the population register. The deletion of these records from the population register has been characterized by some as an administrative decision and by others as an ethnically motivated act. The Constitutional Court [32] ruled unconstitutional portions of a law governing the legal status of former Yugoslav citizens because it does not recognize the full period in which these "erased" persons resided in the country, nor does it provide them the opportunity to apply for permanent residency. The Government had still not completed legislation to resolve the Court's concerns[33].

On the issue of arbitrary deprivation of durable status in Slovenia to persons who should otherwise have access to it by dint of acknowledging their real and effective ties to Slovenia, an issue of particular concern to a number of categories of persons including Roma in Slovenia,

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[30] European Roma Rights Centre and Amnesty International Slovenia Urge Slovene Government to Act on Key Concerns Identified by the Human Rights Committee, Budapest, Ljubljana, 6 September 2005.

[31] Priporočila Državnega zbora Republike Slovenije, št. 700-01/93-01/93-0019/0042, EPA 293-IV, sprejeta na 10. redni seji dne 27/10-2005 ob obravnavi Desetega rednega letnega poročila Varuha človekovih pravic za leto 2004, obj. Poročevalec DZ, št. 83/05.

[32] C.C. (Constitutional Court), nr. U-I-246/02, 3 April 2003, *Official Gazette* 2003, nr. 36

[33] State Department 2004 Human Rights Report, Slovenia HRR04; Follow-up Report on Slovenia, (2003 – 2005), Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights, Strasbourg, 29 March 2006, CommDH(2006)8, Original version.

the Advisory Committee on the Supervision of the Implementation of the Framework Convention for the Protection of National Minorities stated, "the Committee remains concerned about the situation of those persons who have not yet been able to regularize their situation in the State party" and recommended that "the State party should seek to resolve the legal status of all the citizens of the successor States that formed part of the former Socialist Federal Republic of Yugoslavia who are presently living in Slovenia, and should facilitate the acquisition of Slovenian citizenship by all such persons who wish to become citizens of the Republic of Slovenia [34].

Furthermore, the Slovenian Constitutional Court issued several decisions [35] to redress this situation, which it considered in breach of the Constitution and of international standards. Disappointingly, the measures adopted by the authorities did not include all the “erased” and they failed to provide other forms of reparation, including compensation, for the human rights violations suffered by the individuals concerned.

Many of the “erased” lost their jobs and could no longer be employed legally as a consequence of their status as foreigners without a permanent residence permit. The loss of employment often meant losing years of pension contributions and even entitlement to a pension. The removal of the individuals concerned from the registry of permanent residents has therefore had serious negative effects on the individuals’ right to work and social rights, as enshrined in particular in Articles 15 and 34 of the Charter of Fundamental Rights of the European Union.

As a result of their “erasure”, the individuals concerned were also deprived of or given limited access to comprehensive healthcare after 1992, in some cases with serious consequences for their health. The ex officio removal from the registry of permanent residents thus resulted in inequality in the ability to access healthcare, contrary to article 35 of the Charter of Fundamental Rights of the European Union.

Furthermore, some children removed from the registry of permanent residents in 1992, or whose parents were removed from the registry, lost access to secondary education. While Amnesty International notes that no such recent cases have been reported, concerns remain about the ongoing effects of the lost years of education for some of the “erased” and of the delays in the completion of their studies. This situation has therefore had serious negative effects on the individuals’ right to education, as enshrined in Article 14 of the Charter of Fundamental Rights of the European Union.

Therefore, many people are still without a legally regulated status. Many of those who were “erased” in 1992, and who subsequently had their status regulated, are still suffering from the consequences of their “erasure” and have not been granted full reparation. Others were force to leave the country and among those, some find themselves in limbo, being expelled from one country to another[36].

4.2.2 Xenophobia

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[34] Published at the visit of the Council of Europe Advisory Committee on the Supervision of the Implementation of the Framework Convention for the Protection of National Minorities in Slovenia, 4-8 April 2005, Mnenje Svetovalnega odbora Sveta Evrope o uresničevanju Okvirne konvencije za zaščito narodnih manjšin s strani RS, sprejeto 12. septembra 2002**;** Svetovalni odbor je Mnenje sprejel po prejemu Začetnega državnega poročila o izvajanju Okvirne konvencije v Sloveniji leta 2000.

[35] C.C. (Constitutional Court), nr.U-I-295/99, 18 May 2000, *Official Gazette* 2000, nr. 54; nr.U-I-246/02, 3 April 2003, *Official Gazette* 2003, nr. 36; nr.U-II-3/03, 12 December 2003, unpublished; nr.U-II-1/04, 26 February 2004, *Official Gazette* 2004, nr. 25; U-II-3/04, 20 April 2004, *Official Gazette* 2004, nr. 44; nr.U-II-4/04, 17 June 2004, *Official Gazette* 2004, nr. 72; nr. -II-5/04, 8 July 2004, *Official Gazette* 2004, nr. 82; nr.U-I-2/04, 16 June 2005, unpublished.

[36] Amnesty International’s Briefing to the UN Committee on Economic, Social and Cultural Rights", 35th Session, November 2005; Amnesty International's EU Office's letter to the President of the European Commission, nr. b509, 28 November 2005.

There were many legal provisions adopted regulating prohibition of discrimination and/or xenophobia.

Article 63 of the Constitution prohibits "any incitement to national, racial, religious or other discrimination, and the inflaming of national, racial, religious or other hatred and intolerance." Article 300 of the Penal Code of the Republic of Slovenia [37] determines "Stirring up Ethnic, Racial or Religious Hatred, Strife or Intolerance" as a criminal offence.

The Media Act [38] determines in Article 8 that the dissemination of programming that encourages ethnic, racial, religious, sexual or any other inequality, or violence and war, or incites ethnic, racial, religious, sexual or any other hatred and intolerance shall be prohibited." Article 47 of the same Act prohibits advertising which would "incite racial, sexual or ethnic discrimination, religious or political intolerance. The Media penalty in the amount of at least 2,500.000 SIT follows in a case of a violation of any of these two provisions.

The Personal Data Protection Act places the data concerning racial, national or ethnical background, political, religious or philosophical affiliation and sexual life among the "sensitive personal data". [39]

According to the Societies Act[40] a society ceases to exist by law in case it incites to ethnic, racial, religious or other inequality or inflames ethnic, racial, religious or other hatred and intolerance.

The Aliens Act [41] imposes in Article 82/3 an obligation that within their overall operations, national and other authorities, organizations and associations must ensure protection against any type of discrimination against aliens based on racial, religious, national, ethnic or any other type of differentiation. In the Resolution on the Immigration Policy of the Republic of Slovenia [42] it is explicitly stated in the preamble to the chapter "Foundations of the Immigration Policy" that at the creation of the Policy it was considered that the State must respect the fundamental human rights and avoid any ethnic, racial, religious or sexual discrimination. The Resolution on the Migration Policy of the Republic of Slovenia [43] acknowledges among the principles of Slovenian migration policy the Conclusions of the Tampere European Council.

Slovenia is a State Party to the International Convention for the Elimination of All Forms of Racial Discrimination[44]. In 2001, the Government issued a Statement (foreseen by Article 14 of the Convention) that Slovenia recognizes to the Committee on the Elimination of Racial Discrimination competence to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by the Republic of

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[37] E.g. Kazenski zakonik Republike Slovenije, Penal Code of the Republic of Slovenia, *Official Gazette* 1994, nr. 63, 1999, nr. 23, 2004, nr. 40.

[38] E.g. Zakon o medijih, Media Act, *Official Gazette* 2001, nr. 35.

[39] E.g. Zakon o varstvu osebnih podatkov, Personal Data protection Act, *Official Gazette* 2004, nr. 86.

[40] E.g. Zakon o društvih, Societies Act, *Official Gazette* 1995, nr. 60, 1999, nr. 89.

[41] E.g. Zakon o tujcih, Aliens Act, *Official Gazette* 1999, nr. 61, 2002, nr. 87.

[42] E.g. Resolucija o imigracijski politiki Republike Slovenije, Resolution on the Immigration Policy of the Republic of Slovenia, *Official Gazette* 1999, nr. 40.

[43] E.g. Resolucija o migracijski politiki Republike Slovenije, Resolution on the Migration Policy of the Republic of Slovenia, Official Gazette 2002, nr. 106.

[44] E.g. Konvencija o odpravi vseh oblik rasne diskriminacije, International Convention for the Elimination of All Forms of Racial Discrimination, *Official Gazette SFRJ* 1967, nr. 31; Akt o o notifikaciji nasledstva glede konvencij OZN in konvencij, sprejetih v mednarodni organizaciji za atomsko energijo, Act Notifying Succession to Treaties of the United Nations and Treaties Adopted by the International Atomic Energy Organization, *Official Gazette* 1992, nr. 35.

Slovenia of any of the rights set forth in the Convention, with the reservation that the Committee shall not consider any communications unless it has ascertained that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement.

The Implementation of the Principle of Equal Treatment Act [45] is a general act aimed to determine common grounds for the assurance of equal rights of everyone at the exercise of their rights and duties and at the exercise of their fundamental freedoms in any field of social life, in particular in the fields of employment, employment relations, affiliation with unions and interest societies, upbringing and education, social security, access to goods and services and provision of them regardless of their personal circumstances, including the racial or ethnic background and religious or other belief. This act is based on the Directive nr. 2000/43/EC and the Directive nr. 2000/78/EC.

The Principle of Equal Treatment Act also provides for the consideration by the Advocate of the Principle of Equality of informal complaints linked with anti-discrimination rules. The Advocate of the Principle of Equality is a body that investigates complaints regarding alleged breaches of the principle of equal treatment and determines the circumstances in which the Advocate shall transmit a case to the competent inspection service[46].

The Penal Code does not contain a definition of racism, identical to the definition determined by Article 4 of the International Convention for the Elimination of All Forms of Racial Discrimination. Therefore, the acts, described by the aforementioned Convention, must be found in different incriminations contained in the Penal Code. Besides the obvious incrimination, contained in Article 300 of the Penal Code, the incrimination contained in Article 141 ("Violation of the Right to Equality) must also be considered[47]. Whoever, due to differences in respect of nationality, race, color of skin, religion, ethnic roots, gender, language, political or other beliefs, birth status, education, social position or any other circumstance, deprives or restrains another person of any human right or liberty recognized by the international community or laid down by the Constitution or the statute, or grants another person a special privilege or advantage on the basis of such discrimination shall be punished by a fine or sentenced to imprisonment for not more than one year

Article 300 of the Penal Code was amended in 2004 in order to meet the requirements, determined in the Convention on Cyber crime and the Additional Protocol to the Convention on Cyber crime, concerning the Criminalization of Acts of Racist and Xenophobic Nature Committed through Computer Systems[48]. Thus, denial, gross minimization, approval or justification of genocide or crimes against humanity was added to the elements of crime, and Paragraph 3 was amended since confiscation is almost impossible in an information system. Instigating, aiding or abetting to such conduct could be punishable according to Articles 26 to 29 of the Penal Code. In case the crime was committed by means of the media, Articles 30 to 32 of the Penal Code could also apply.

Article 15 (3) of the Constitution determines that human rights and fundamental freedoms shall be limited only by the rights of others and in such cases as are provided by the Constitution.

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[45] E.g. Zakon o uresničevanju načela enakega obravnavanja, Implementation of the Principle of Equal Treatment Act, *Official Gazette* 2004, nr. 50.

[46] Government of the Republic of Slovenia, Office for Equal Opportunities, National report of Slovenia, July 2004.

[47] Source: Bulletin of the National Assembly of the Republic of Slovenia, nr. 93/2003: (*Violation of Right to Equality).*

[48] E.g. Zakon o ratifikaciji Konvencije o kibernetski kriminaliteti in Dodatnega protokola h Konvenciji o kibernetski kriminaliteti, ki obravnava inkriminacijo rasističnih in ksenofobičnih dejanj, storjenih v informacijskih sistemih, Act Ratifying the Convention on Cyber crime and Additional Protocol to the Convention on Cyber crime, concerning the Criminalisation of Acts of Racist and Xenophobic Nature Committed through Computer Systems, *Official Gazette* 2004, nr. 17.

With regard to the principle of proportionality, the freedom of expression may be limited by the prohibition of incitement to discrimination and Intolerance and the prohibition of incitement to violence and war, determined by Article 63 of the Constitution. Human rights can also bi limited on the basis of Article 10 (2) of the European Convention on Human Rights. With regard to the "protection of the reputation or the rights of others", the state may prohibit the dissemination of racist and xenophobic ideas, whereby the state and judiciary act according to the principle of proportionality.

4.2.3 Protection of Gypsies / Roma

The adoption of the new Strategy of Education of Roma in Slovenia and the new measures, which aim at full integration of Roma in the mainstream education, should be welcomed. However, it is regrettable, however, that the new measures have not yet been fully implemented in all the schools. The new Strategy, at present only a concept paper, should be developed into an operational Action Plan as soon as possible with sufficient resources to ensure its effective implementation.

Regarding the several models implemented in some elementary schools, the separation of Roma children from the others in important subjects does not fulfill the criteria of full integration. It also increases the risk of Roma children being taught at a lower standard than the others, which could have serious consequences for the Roma children and their prospects for the future. It is of concern that the model currently implemented represents a step back from the already achieved levels of integration and falls short of the impressive ambitions contained in the national strategy.

It was recommended that the authorities revise the mentioned implementation model and ensure full integration of Roma children in the normal classroom for all the subjects. The model should be revised in consultation with experts on education and Roma representatives. Additional support should be made available to the school, teachers and the Roma pupils and their families[49].

Several efforts were made by the employment services in assisting Roma in gaining employment and accessing public services and recommends that these types of projects are implemented in all the regions where Roma reside, regardless of their status.

Additionally, several efforts have been made in developing the National Action Plan on Social Inclusion for 2004-2006 as well and a new National Action Program for Employment and Social Inclusion of Roma is being drawn up. The projects improving the situation of Roma in different fields, be it housing, employment, or education, should be given a high priority in the allocation of financial resources, as they remain one of the most disadvantaged groups in Slovenian society. It will be important to involve Roma communities in all stages of the cycle, from planning and implementing, to monitoring the impact of the program, also at a local level.

Unfortunately, only piece-meal progress appears to have been made in addressing the housing difficulties faced by many Roma. Information on concrete projects, or results so far, do not seem to be available. The Slovenian authorities should pay particular attention to the local level implementation of the strategy of the Housing Fund of the Republic of Slovenia and to ensure that housing improvement programs are adequately resourced. For the most marginalised groups greater efforts and specific programs are needed to secure their right to adequate housing. The recent Recommendation by the Committee of Ministers of Council of Europe on improving the housing conditions of Roma and Travelers in Europe provides useful and

[49] Follow-up Report on Slovenia, (2003 – 2005), Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights, Strasbourg, 29 March 2006, CommDH(2006)8, Original version.

detailed policy guidance[50].

The Government has not yet managed to tackle very high levels of racial antipathy in Slovenia. These results in a number of systemic abuses, including the deprivation of Slovene citizenship to Roma who should have access to it, arbitrary expulsion from the country, racially segregated schooling arrangements, and a number of extremely substandard slum settlements[51].

With respect particularly to Roma in Slovenia, there are several specific areas of concern: A special issue is the difference in the status between the so-called 'autochthonous' (indigenous) and 'non autochthonous' (new) Roma communities in the State. The State should consider eliminating discrimination on the basis of status within the Roma minority and provide to the whole Roma community a status free of discrimination, and improve its living conditions and enhance its participation in public life. While nothing measures undertaken to improve the living conditions of the Roma community, the Roma community continues to suffer prejudice and discrimination, in particular with regard to access to health services, education and employment, which has a negative impact on the full enjoyment of their rights. The State should take all necessary measures to ensure the practical enjoyment by the Roma of their rights by implementing and reinforcing effective measures to prevent and address discrimination and the serious social and economic situation of the Roma[52].

The Roma minority does not have comparable special rights and protections. The Constitution provides that "the status and special rights of Roma communities living in Slovenia shall be such as are determined by statute." The National Assembly had not enacted laws to establish such rights for the Roma community. A study funded by the European Community estimated that 40 percent of Roma in the country were autochthonous.

Many Roma lived in settlements apart from other communities that lacked basic utilities such as electricity, running water, sanitation, and access to transportation. Roma representatives reported that some local authorities developed segregated substandard housing facilities to which Roma communities were forcibly relocated. Roma representatives also reported that Roma children often attend segregated classes and were selected by authorities in disproportional numbers to attend classes for students with special needs. The Government provided funding for a program to desegregate and expand Roma education by training Roma educational facilitators and create special enrichment programs in public kindergartens. The Government has not developed a bilingual curriculum for Roma on the grounds that there is not a standardized Roma language. However, the Government has funded research into codification of the language. Roma representatives also reported discrimination in employment, which complicated their housing situation, and that Roma were disproportional subject to poverty and unemployment.

In Slovenia, many people of Roma origin are still being denied their basic human rights, after they were unlawfully removed (“erased”) from the country’s registry of permanent residence in 1992. As the UN Committee on Economic, Social and Cultural rights (CESCR) has just concluded: “this situation entails violations of these persons’ economic and social rights to work, social security, health care and education”. In the report Amnesty International had submitted to the CESCR, it found that the practice of “erasing” individuals has disproportionately affected

[50] Follow-up Report on Slovenia, (2003 – 2005), Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights, Strasbourg, 29 March 2006, CommDH(2006)8, Original version.

[51] European Roma Rights Centre and Amnesty International Slovenia Urge Slovene Government to Act on Key Concerns Identified by the Human Rights Committee, Budapest, Ljubljana, 6 September 2005.

[52] European Roma Rights Centre and Amnesty International Slovenia Urge Slovene Government to Act on Key Concerns Identified by the Human Rights Committee, Budapest, Ljubljana, 6 September 2005.

Roma and in general non-ethnic Slovenes, as well as other marginalized people. This constitutes a violation of the principle of non-discrimination enshrined in international and European law, and in particular of Article 21 of the Charter of Fundamental Rights of the European Union. “Erased” members of Roma communities, by virtue of their condition of minority without a “kin-state”, were placed in an even more disadvantaged position than “erased” belonging to other ethnic groups, as they have faced greater difficulties in regulating their status elsewhere in the former Yugoslavia.

The Government should discuss possibilities for adoption of a law regulating special rights of the Roma community and the politics in the fields such as education, housing, social protection and employment[53].

The National Council supports several initiatives for urgent comprehensive regulation of status and special rights of the Roma community in the Republic of Slovenia in accordance with Article 65 of the Constitution of the Republic of Slovenia through system law. Beside such normative regulation it is necessary that the State provide for the sufficient funds for implementation of all adopted and necessary measures. Implementing the already taken measures of positive discrimination on the basis of several special laws and the governmental programs as well as strategies, the competent governmental bodies and local bodies should also consider - beside the Roma’s needs – wishes and needs of the majority population, due to its direct involvement into the Roma issues. In this way potential conflicts between majority population and the Roma would be avoided and the mutual understanding would be established[54].

The Government adopted a plan for providing education for the Roma, which we welcome, but it is still only a partial solution, since there is still no law which would regulate the arrangement of the special rights of the Roma community in a comprehensive and systematic way, nor coordinated policies in all areas: education, residence problems, employment and social security. Many people and all too often politicians as well, see increased police surveillance as the only solution to Roma issues. Owing to years of avoiding the taking of a comprehensive approach, and especially the transferring of the solution of Roma issues to the municipalities where the Roma live, as well as agitation by various politicians, during the last period we have seen increased and more high-profile disputes and the overt expression of intolerance towards the Roma [55].

Accordingly to the Constitutional Court’s decision, several municipal charters [56] are inconsistent with the Local Self-Government Act[57], as they do not determine that also Roma community representatives are members of municipal councils. The municipalities are obliged to remedy the illegality established in the previous item of the disposition in a time limit of forty-five days

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[53] Priporočila Državnega zbora Republike Slovenije, št. 700-01/93-0019/0042, EPA 293-IV, sprejeta na 10. redni seji dne 27/10-2005 ob obravnavi Desetega rednega letnega poročila Varuha človekovih pravic za leto 2004, obj. Poročevalec DZ, št. 83/05.

[54] Državni svet Republike Slovenije, mnenje k Desetemu rednemu poročilu Varuha človekovih pravic za leto 2004, št. 700-01/93-0019/0042, EPA 293-IV, sprejeto na 37. seji, dne 19. 10. 2005.

[55] Human Rights Ombudsman, Annual Report 2004, Ljubljana, May 2005

[56] The Charter of Beltinci Municipality (E.g. Statut Občine Beltinci, Charter of Beltinci Municipality, *Official Gazette* 2000, nr. 46, 2000, nr. 118 and 2001, nr. 67), the Charter of Grosuplje Municipality (E.g. Statut Občine Grosuplje, Charter of Grosuplje Municipality, *Official Gazette* 1999, nr. 42 and 2002, nr. 36), the Charter of Krško Municipality (E.g. Statut Občine Krško, Charter of Krško Municipality, *Official Gazette* 2000, nr. 98), the Charter of Semič Municipality (E.g. Statut Občine Semič, Charter of Semič Municipality, *Official Gazette* 1999, nr. 37, 2001, nr. 67 and 2002, nr. 23), the Charter of Šentjernej Municipality (E.g. Statut Občine Šentjernej, Charter of Šentjernej Municipality, *Official Gazette* 2001, nr. 4), and the Charter of Trebnje Municipality (E.g. Statut Občine Trebnje, Charter of Trebnje Municipality, *Official Gazette* 1995, nr. 50 and 1998, 80).

[57] E.g. Zakon o lokalni samoupravi, Local Self-Government Act, *Official Gazette* 1993, nr. 72, 1994, nr. 57, 1995, nr. 14, 1995, nr. 63, 1997, nr. 26, 1997, nr. 70, 1998, nr. 10, 1998, nr. 74, 2000, nr. 70 and 2002, nr. 51.

from the first session of the newly elected municipal councils. The municipal councils of the municipalities determined in Item 1 of the disposition must call the election of members of municipal councils, the representatives of the Roma community, if for the 2002 regular elections they did not ensure the election of the representatives determined by the charters, pursuant to the provisions of the Local Self-Government Act [58] that apply to premature elections, in a time limit of thirty days after the promulgation of the charters in the Official Gazette of the Republic of Slovenia [59]. Most of affected municipalities responded respectively[60]. However, the Grosuplje Municipality still did not response.[61]

The Bill on the Roman Community proposed by the Deputy Group of the Slovenian National Party was based on Article 65 of the Constitution of the Republic of Slovenia [62] which imposes that the position and rights of the Roma community living in Slovenia shall be regulated by law. The Bill was intended to fill in the legal gape. The Bill determines that the Roma community in the Republic of Slovenia shall not have any special rights and any special position. Thereby the proponent invokes Article 14 of the Constitution of the Republic of Slovenia on equality of anyone before law as well as particular comparable laws of several European countries. Additionally, the proponent believes that it is wrong to use a term Roma in the Republic of Slovenia without considering the basic division to Roma and Sinti. Both groups are treated separately by several European countries. Therefore the proponent of the Bill believes that the wording of Article 65 of the Constitution of the Republic of Slovenia is not appropriate. It uses the term “the Roma” without mentioning “the Sinti”. It is however evident that with reference to their settlement in the Republic of Slovenia the Roma can not be autochthonous citizens because they live on the Slovenian territory for at maximum 50 years[63].

The Constitution imposes on the legislator to provide to the Roma special rights based on the recognition of their particular situation. Unfortunately, there was no evident progress achieved in terms of the regulation of the Roma’s collective rights. Accordingly, such omission of normative regulation and/or such unclear position of the Roma constitutes on of the key system reasons for the tensions, disputes or even ever growing evident expression of intolerance to the Roma. According to the existing partial regulation the local communities should provide for the specific Roma’s rights of particular Roma’s rights. As the State does not sufficient funds for this purpose, local communities are dissatisfied with such situation. They believe that the provision of the specific Roma’s rights constitutes an additional financial burden affecting other local projects. Such situation, however, arouses a negative attitude to the Roma’s special rights and to their community itself. Yet, the settlement of the Roma problems does not mean that

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[58] E.g. Zakon o lokalni samoupravi, Local Self-Government Act, *Official Gazette* 1993, nr. 72, 1994, nr. 57, 1995, nr. 14, 1995, nr. 63, 1997, nr. 26, 1997, nr. 70, 1998, nr. 10, 1998, nr. 74, 2000, nr. 70 and 2002, nr. 51.

[59] E.g. C.C.(Constitutional Court), nr.U-I-345/02, 14 November 2002, *Official Gazette* 2002, nr.105.

[60] Changes of the Charter of Krško Municipality (E.g. Spremembe Statuta Občine Krško, Changes of the Charter of Krško Municipality, *Official Gazette* 2003, nr. 5) that determined one post in the Municipal Council for a member of the Roma Community. Changes and Amendments of the Charter of Belitinci Municipality (E.g. Spremembe in dopolnitve Statuta Občine Beltinci, Changes and Amendments of the Charter of Belitinci Municipality, *Official Gazette* 2003, nr. 11) that determined one post in the Municipal Council for a member of the Roma Community. The Charter of Semič Municipality (E.g. Statut Občine Semič, Charter of Semič Municipality, *Official Gazette* 2003, nr. 24) that determines one post in the Municipal Council for a member of the Roma Community. The Changes and Amendments of the Charter of Šentjernej Municipality (E.g. Spremembe in dopolnitve Statuta Občine Šentjernej, Changes and Amendments of the Charter of Šentjernej Municipality, *Official Gazette of Šentjernej Municipality* 2003, nr. 2) that determined one post in the Municipal Council for one member of the Roma Community. The Šentjernej Municipality also realized the subsequent elections. The Trebnje Municipality already has a Roma representative in the Municipal Council, the respective changes of the Municipal Charter is under preparation.

[61] State Department 2004 Human Rights Report, Slovenia HRR04.

[62](E.g. Ustava Republike Slovenije, Constitution of the Republic of Slovenia, *Official Gazette* 1991, nr. 33, 1997, nr. 42, 2000, nr. 66, 2003, nr. 24, 2004, nr. 69.

[63] Predlog Zakona o romski skupnosti, vložila ga je Poslanska skupina Slovenske nacionalne stranke 3. decembra 2004; Državni zbor predloga ni sprejel.

negative reactions of individual member of this community should be neglected[64].

4.2.4 Protection of religious minorities

While there are no governmental restrictions on the Muslim community's freedom of worship, services commonly are held in private homes under cramped conditions. There are no mosques in the capital of Ljubljana. The lack of a mosque has been due, in part, to a lack of Muslim community organization and to complex legislation and bureaucracy in construction and land regulations. The Muslim community has conceptual plans to build a new facility in Ljubljana. The Ljubljana Municipality Council already selected one of five potential sites that the city previously had identified for the facility and tasked the city's planning department to begin preparing the materials necessary to move ahead with the project. Later, Ljubljana city officials expressed support for the Mosque and the location on which it was to be built. Plans for building the mosque were stalled in part because of discovery that part of the land the city identified as for sale to the Muslim community was subject to a denationalization claim by the Catholic Church. The Church has agreed to forgo its claim if the city will compensate it with another piece of property[65].

The Government should discuss possibility of supervision concerning granting of State funds to the religious communities in the Republic of Slovenia[66].

4.2.5 Protection of linguistic minorities

Some international observers regret the reluctance on the part of the Slovenian Government to strengthen the regime of minority protection and encourage the Slovenian authorities to engage in a constructive dialogue with all minority groups regarding the measures that are necessary to improve the situation of all minorities in Slovenia[67].

The Constitution provides special rights and protections to autochthonous Italian and Hungarian minorities, including the right to use their own national symbols and have bilingual education and the right for each to be represented as a community in Parliament[68]. There are two members of minorities in the 90-seat National Assembly and none in the 40-seat National Council. The Constitution provides the "autochthonous" (indigenous) Italian and Hungarian minorities the right, as a community, to have at least one representative in the Parliament. However, the Constitution and law do not provide any other minority group, autochthonous or otherwise, the right to be represented as a community in Parliament. The U.N. Committee on the Elimination of Racial Discrimination (CERD) already issued a report recommending that the Government take further measures to ensure that all groups of minorities are represented in Parliament[69].

Ethnic Serbs, Croats, Bosnians, Kosovo Albanians, and Roma from Kosovo and Albania were considered "new" minorities; they were not protected by the special constitutional provisions for autochthonous minorities and faced some governmental and societal discrimination[70].

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[64] Human Rights Ombudsman, Annual Report 2004, Ljubljana, May 2005.

[65] Human Rights Ombudsman, Annual Report 2004, Ljubljana, May 2005.

[66] Priporočila Državnega zbora Republike Slovenije, št. 700-01/93-0019/0042, EPA 293-IV, sprejeta na 10. redni seji dne 27/10-2005 ob obravnavi Desetega rednega letnega poročila Varuha človekovih pravic za leto 2004, obj. Poročevalec DZ, št. 83/05).

[67] Follow-up Report on Slovenia, (2003 – 2005), Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights, Strasbourg, 29 March 2006, CommDH(2006)8, Original version.

[68] State Department 2004 Human Rights Report, Slovenia HRR04.

[69] State Department 2004 Human Rights Report, Slovenia HRR04.

[70] State Department 2004 Human Rights Report, Slovenia HRR04.

Concerning the position of other national groups as well as of the German speaking minority and groups of Non-Slovenians from the former Yugoslavia, it would also be possible to include into the implementation of the Framework Convention for the Protection of National Minorities such groups (including non-citizens when appropriate). The Government should discuss this issue with all concerned groups[71].

Pursuant to Article 4 of the Framework Convention for the Protection of National Minorities [72] that grants to minority members the right to equality before law and the equal legal protection, the Advisory Committee encourages the judicial authorities to introduce more efficient legal remedies (especially considering a low number of tried cases by the courts) in order to guarantee compensation for the victims of discrimination[73].

The Government should apply appropriate measures for efficient exercising of the constitutionally and legally determined special rights of the officially recognized national communities in the practice and/or in everyday life[74].

Concerning the Italian and Hungarian minorities, the main issue has been concerning due to the decreasing membership of both minorities between the two censuses. In addition, there is still a problem with the actual possibilities for using the languages of both minorities when dealing with state bodies, mainly due to the employment of civil servants who do not speak the minority languages. This illustrates a problem which is also common in other areas, where rights which are guaranteed by the Constitution or by law can not be exercised in full due to discrepancies between what is declared and what actually exists. Therefore we must again emphasize that it is not enough for the state only to formally guarantee the special rights of both of the constitutionally recognized minorities, but also that it is their duty to enable them to be exercised effectively in everyday life as well[75].

Also, the protection of the collective rights of national minorities not specially defined in the Constitution is not sufficiently regulated. The Ministry of Culture provides financial assistance to various associations, but this is insufficient. The lack of clarity surrounding the definition of the concept of autochthony and the poorly defined competencies of the Government Office for Nationalities further contributes to the lack of arrangement of the status of these minorities. With regard to the fact that some of these minorities in Slovenia are made up of fairly large groups of people, the Government must propose solutions in discussions with representatives of these minorities as soon as possible which will guarantee their continued existence as cultures and nationalities in Slovenia. During the last period, the problem of the ethics of public speech became especially pronounced, frequently underscoring the helplessness of individuals when the media, especially the commercial media, make unjustifiable intrusions into their privacy,

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[71] Published at the visit of the Council of Europe Advisory Committee on the Supervision of the Implementation of the Framework Convention for the Protection of National Minorities in Slovenia, 4-8 April 2005, Mnenje Svetovalnega odbora Sveta Evrope o uresničevanju Okvirne konvencije za zaščito narodnih manjšin s strani RS, sprejeto 12. septembra 2002**;** Svetovalni odbor je Mnenje sprejel po prejemu Začetnega državnega poročila o izvajanju Okvirne konvencije v Sloveniji leta 2000.

[72] E.g. Zakon o ratifikaciji Okvirne konvencije za varstvo narodnih manjšin, Act Ratifying the Framework Convention for the Protection of National Minorities, *Official Gazette-Treaties* 1998, nr. 4.

[73] Published at the visit of the Council of Europe Advisory Committee on the Supervision of the Implementation of the Framework Convention for the Protection of National Minorities in Slovenia, 4-8 April 2005, Mnenje Svetovalnega odbora Sveta Evrope o uresničevanju Okvirne konvencije za zaščito narodnih manjšin s strani RS, sprejeto 12. septembra 2002**;** Svetovalni odbor je Mnenje sprejel po prejemu Začetnega državnega poročila o izvajanju Okvirne konvencije v Sloveniji leta 2000.

[74] Priporočila Državnega zbora Republike Slovenije, št. 700-01/93-0019/0042, EPA 293-IV, sprejeta na 10. redni seji dne 27/10-2005 ob obravnavi Desetega rednega letnega poročila Varuha človekovih pravic za leto 2004, obj. Poročevalec DZ, št. 83/05.

[75] Human Rights Ombudsman, Annual Report 2004, Ljubljana, May 2005.

disclosed their identity or issued false information. We have also seen that legal remedies are often ineffective. The fact that politicians are often the first in line to express intolerance towards various minorities is also especially worrisome[76].

5. Some Views on the Future – Adoption of the European Standards

By following the Strasbourg case-law, the framers of the *Constitution* were able to stipulate the necessary safeguards concerning urgent needs of society which allow only for a narrow margin of discretion on the part of State bodies introducing restrictions of human rights and fundamental freedoms.

The *Statute of the Council of Europe* came into force for Slovenia on 14 May 1993 when Slovenia was surrounded by several conflict zones. However, even in that time the efforts of the State were of positive character: to follow the European standards as much as possible and as faithful as possible. The promotion of the human rights protection was one of the then most important issues. The result of such governmental politics was the accelerated ratification of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (hereinafter *Convention*). The *Convention* was ratified on 31 May 1994. *The Ratification of the Convention Act* (in respect of ratification also of Article 25, Article 46, *Protocol No. 1*, and *Protocols Nos. 4, 6, 7, 9, and 11*) was published on 13 June 1994 [77] and came into force on the fifteenth day following publication. On 28 June 1994 Slovenia formally ratified the *Convention* in Strasbourg by depositing the appropriate instruments with the Secretary General of the Council of Europe. When ratifying the *Convention* Slovenia made no reservations because new legislation had been prepared following international standards and the *Convention*. It is also interesting to note another evidence of the then Slovenian enthusiasm − that Slovenia was the first member state to ratify *Protocol No. 11*. Slovenia recognized the competence of the European Commission and the jurisdiction of European Court of Human Rights under former Articles 25 and 46 of the *Convention* for an indeterminate period. In addition, the Slovenian declarations included a restriction *ratione temporis,* to the effect that the competence of the Commission and the jurisdiction of Court are recognized only for facts arising after the entry into force of the *Convention* and its *Protocols* with respect to Slovenia on 28 June 1994.

During the early period of the Slovenian transition some decisions of the Slovenian Constitutional Court directly referred to the *Convention* even before it became formally binding for Slovenia. [78] There is no doubt that Slovenia has been inspired by the same ideals and

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[76] Human Rights Ombudsman, Annual Report 2004, Ljubljana, May 200.)

[77] *Official Gazette RS*, No 33/94

[78] Decision No. U-I-98/91 of 10 December 1992 (Official Gazette RS, No. 61/92, OdlUS I, 101) The Constitutional Court decided that statutory provisions which allowed administrative organs not to state the reasons for an individual administrative decision made on the basis of discretion and which decreed discretionary decisions in a bylaw are contrary to the legal system of the Republic of Slovenia and cannot be used according to their intention. As one of the reasons for its decision, the Court recalled that Article 13 of the ECHR ensures to everyone an effective legal remedy following the violation of his or her rights and freedoms specified therein. The Court observed that Slovenia had not yet signed and ratified the Convention, but considering its desire to join the Council of Europe it would necessarily have to do so, for which reason it was appropriate that Slovenian legislation be adjusted to meet the criteria of the Convention as soon as possible.

Ruling No. U-I-48/92 of 11 February 1993 (Official Gazette RS, No 12/93, OdlUS II, 15) The Constitutional Court, taking into consideration the case law of the European Court of Human Rights concerning Article 11 of the Convention (freedom of association), decided that obligatory association with a chamber of doctors does not constitute a limitation of the constitutional freedom of association guaranteed under Article 42 of the Slovenian Constitution.

The Constitutional Court based its decision on the case-law of the European Court of Human Rights, which, when considering mandatory membership of the *Ordre des Médecins* (medical association) of Belgium, had taken the position that the Ordre des Médecins was an institution of public law exercising public control over medical practice. As such, the *Ordre* could not be considered to be an 'association' in the sense of Article 11 of the Convention. Mandatory membership of the *Ordre des Médecins* does not entail any restrictions of the right ensured by Article 11 of the said Convention.

Ruling No. U-I-60/92 of 17 June 1993 (OdlUS II, 54) The Constitutional Court, taking into consideration the case-law of the European Court of Human Rights concerning Article 6 of the Convention (the right to a fair trial), Article 2 of Protocol No. 7 (the right of appeal in criminal matters) and Article 13 of the Convention (the right to an effective remedy) decided that the regulation of legal remedies before the courts of associated labour was not contrary to Article 14 (equality before law), Article 15 (the exercise and restriction of rights) Article 22 (the equal protection of rights), nor Article 25 (the right to a legal remedy).

traditions of freedom and rule of law principles as the framers of the *Convention*. While Slovenia is reintroducing and developing the legal culture of human rights after almost half a century of arrears, it cannot be said that it has no tradition concerning the protection of human rights and fundamental freedoms.

The Slovenian Constitutional Court and the whole system of ordinary courts have been enrusing the conformity of domestic legal provisions with the provisions of the *Convention*. In addition, the provisions of the *Convention* complement national constitutional provisions. Beyond that, the case-law of the European Court of Human Rights is also directly applicable in the decision making process of the Constitutional and other courts in Slovenia. Thus the jurisdiction of the European Court of Human Rights and Slovenian national courts overlap in several ways.

Additionally, consideration of Strasbourg case-law is explicitly determined by the Slovenian national law: The decisions of the European Court of Human Rights are to be directly executed by the competent ordinary courts of the Republic of Slovenia (Article 113 of the *Court Act*).

When Slovenija joined to the EU, consequently adopted standards of contemporary EU legal culture in which it has become normal that national courts are influenced by the case-law of the national and (international) regional European courts, thus raising the level of human rights protection.[79] However, a legal rule and its implementation in everyday practice are two different things. Real, half-real, and often only apparent general interests of society may be extraordinarily strong, especially if they incite national socialist, ideological, or political emotions. At such a time people may forget principles which they had followed until recently, but they still demand and efficient functioning of ordinary courts. Judicial and political independence are almost the sole guarantees against the transformation of law into a tool of some or other ideological and political movement based on impatience.

Regarding the EU system of Human Rights protection, the National Assembly on 1 February 2005 ratified the Treaty Establishing a Constitution for Europe and the Final Act[80] . Furthermore, Slovenia considers the development of the common European constitutionalism through the Treaty, especially the promotion of common European standards (based on extended catalogue of human rights) of human rights protection. For Slovenia, the Treaty itself is an important milestone for the European Union as a whole, since its represents a further step in the development of the European Union and underscores the unity of the Member States.

The signing of the Treaty means without any doubt a new big step towards a new regulation of already rather extended European Union. Generally speaking, we can only state that the the Preamble of the Treaty enforces and guarantees all those values and goals which are nowadays as a rule considered in Slovenia and in other member states as fundamental characteristics or principles of the current western democracy, a rule of law and a social state.

Additionally, regarding the Treaty as a *sui generis* document it was also very important the active participation of Slovenia within the treaty as a full member state of the European Union. By such participation the Slovenian national self-confidence has been reinforced. Bearing in mind the Slovenian voluntary decision to enter into the European Union and an opportunity for voluntary secession from the Union explicitly determined by the Treaty (Slovenia retained this right also on the basis of the internationally recognized inalienable right to self-determination, we may look into the future with a considerable feeling of "security" concerning the Slovenian national identity. However, all this may be on the other hand at any time only an illusion or an

[79] Bavcon, L., 1997,note 7 above, pp. 436-437.

[80] E.g. Zakon o ratifikaciji Pogodbe o Ustavi za Evropo s Sklepno listino, Act Ratifying the Treaty Establishing a Constitution for Europe and the Final Act, *Official Gazette* 2005, nr. 15, Mednarodne pogodbe (Treaties) 2005, nr. 1.

outward form.

In one of newest cases decided by the Slovenian Constitutional Court [81] the question of the implementation of the Treaty arised. The petitioner challenged the unconformity of the particular law with the provisions of the Treaty as well. The Constitutional Court stated that the Treaty (including the Charter of Human Rights) was already published in the Official Journal of the European Union as well as in the Official Gazette of the Republic of Slovenia v Uradnem listu RS, however the Treaty is not yet in force and it is not a direct legal source. Therefore the Court decided the case only considering the Slovenian Constitution in force as a legal basis for its decision-making.

There were no special preliminary discussions on the contents of the Lisabon Treaty.

The Slovenian National Assembly ratified on Tuesday the Lisbon Treaty on 29 January 2008, enabling Slovenia to be the second EU country to ratify the document after Hungary [82]. The document, which was endorsed in a 74-to-6 vote, is to ensure efficient operation of the enlarged European Union and strengthen its role in the world.

Monitoring the ratification of the Lisbon Treaty was one of Slovenia's priorities as the EU president during the first half of 2008.

Accordingly, the human rights protection should be expected in any case. Therefore, a special European Union's body – Agency for Human Rights dealing with these issues should was established, however having an independent position (not to be influenced by pragmatic politics). This would be a basis for the promotion of the achieved European standards of this field. The both treties are adopted the complete provisions as well as a modern catalog of human rights and fundamental freedoms, based on the so far created European experiences and standards. Such level of human rights protection determined by the European Union, when reached should be intensively expanded and developed.

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[81] Ruling No. U-I-268/05 of 5 July 2007 (published on the www.us-rs.si).

[82] Representatives of EU Member States, including Prime Minister Janez Janša and Minister of Foreign Affairs Dimitrij Rupel, signed the Lisbon Treaty on 13 December 2007 at a signing ceremony in Lisbon.

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