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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

SPECIFIC PROBLEMS OF HUMAN RIGHTS PROTECTION IN TIMES OF TRANSITION

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INTRODUCTION

The topic I have to speak about today is extremely comprehensive and inexhaustible in the time, allotted to me. Therefore, I shall not be able to deal with all the current problems of human rights protection in times of transition. I shall just touch upon those, that are of vital importance in connection with the performance of the Constitutional Court.

One can observe both - common features and peculiarities in the former Soviet states. The time limit does not allow me to analyse the experience of all the states, that is why I shall tell about the experience of the country I know best of all - Latvia.

I Heritage of the Soviet Conception on Human Rights and its Influence

In times of transition, heritage of the Soviet conception on human rights has essentially influenced and is still influencing different processes.

The notion "human rights" was not a strange conception in the countries of the Soviet block. Just vice versa. The Soviet Union and the Eastern European countries were members of the UN, acceding to the International Instruments on human rights and acknowledging quite a number of other international documents in the sector of human rights. The slogan on human rights had its special niche and interpretation in the mechanism of the Soviet propaganda. I should like to stress several essential moments.

1. Misinterpretation of the Concept of Human Rights

The science of the Soviet law did not interpret the human rights as prevalent, mutually connected and mutually dependent. Social and economic rights were accentuated and to some extent put into practice. At the same time - political rights were either neglected or interpreted in a distorted manner.

The class method, perfected by the science of the Soviet law, developed the approach to human rights not by taking into consideration the formula "what the states comprehend when drafting the principles of the human rights conception", but "how to better interpret them to reach this or that goal". National rights were not examined according to their compliance with international standards, but international standards were adjusted to class principles of the national rights.

2. Attitude to Human Rights as the Declarative Body of Standards

It is characteristic that almost all human rights had been constitutionally declared in the USSR, but mostly just "on paper". For instance, the Constitution, adopted in the Soviet Union in 1936, declared both - the right to personal immunity and the demand, that any arrest was to be authorised by court or the prosecutor. However, almost immediately after adoption of the Constitution- in 1937 and 1938 - any person could be subjected to bloody mass repression and deprived of civil rights.

Theoretically - in words - the USSR supported self-determination of nations, but in practice its armed forces occupied the Baltic States and annexed them to the USSR in 1940. During the

years of occupation, the USSR purposefully carried out policy of genocide against the Latvian nation. Mass deportations and other kinds of reprisals were repeatedly used against the inhabitants. Those, who tried to defend the right of Latvia to independence, were ruthlessly punished.

Even though liberalisation of the absolute power of the totalitarian CPSU bureaucratic system started after Stalin's death, the most part of human rights still remained only "on paper". For example, the 1977 USSR Constitution declared freedom of conviction as well as freedom of expressing one's viewpoint, but in fact any free thought was methodically suppressed.

Still it should be mentioned, that human rights had been constitutionally established during the period of liberalisation of the Soviet regime and that was of some importance. Just because of existence of these constitutional norms, it was possible little by little, legally and without violence to change the model of the state and democratise the society.

It is vitally important to point out that the declarative nature of the rights, established by the Constitution, was implemented by the help of a system where acts of lesser legal force in fact contradicted norms of higher legal force. In practice the real rights of a person were not determined by the Constitution or law, but by instructions, regulations, orders issued by "bosses" and so on. In a word, the principle "Right is the person, who has more rights" was extensively used. Unfortunately, the same principle is quite often made use of at present as well.

Destructive Influence of the Soviet Ideology upon Consciousness of the Individual and the Society

One should acknowledge that the Soviet regime has left disastrous effects on consciousness of an individual as well as on the consciousness of the society.

On the one hand, the Soviet ideology did its utmost to deny the personality and to create an obedient mob, devoid of personality, on the other - it encouraged the cult of personality. All the negations were explained as remnants of the former system. The image of the enemy was systematically created and reminded. In the name of higher ideals, violence against an individual or a group of persons was excused.

Unfortunately, the roots of the above ideology have not been exterminated and very often the same ideology "sprouts" even at present.

II. Influence of the Pre-Soviet heritage

In the states, that were incorporated into the Soviet block shortly before or after the Second World War, side by side with the so-called Soviet heritage there still existed documents and normative papers written by scientists of law and there were people, who had been brought up during the years of democracy. Besides, one could find certain norms of solving issues connected with protection of human rights and, what was of the utmost importance- ideas about a law-based state and democracy were still alive. The Republic of Latvia, before its annexation

to the Soviet Union, was a member of the Union of Nations and had acknowledged several International Instruments, such as,Convention on Slavery (of September 26, 1926), the Paris Treaty of August 27,1928 on Refusal of Wars as a Method of Solving Political Problems of Nations etc.

At the same time, taking into consideration the coup and establishment of the authoritative regime in Latvia in 1934, one should not idealise the heritage on national rights of that period.

Of course, when compared to the occupational regime of the USSR, the regime in Latvia before the occupation was much more democratic and it respected human rights, that is why the society has always tried to idealise the pre-Soviet period and is continuing to do it today. Now and then a thought has been expressed to adopt some of the normative acts of those days, without making any changes in them.

However, conception on human rights has qualitatively developed during the forty years of occupation of Latvia. Thus, the Civil Law of 1937 provided for authority of husband in the family. To rehabilitate a norm like the above in the society of the nineties would be inadmissible. Therefore, when rehabilitating functioning of the Civil Law, relevant changes were introduced in the chapter relating to family rights.

III. Influence of the processes of taking over power

An important factor, when speaking about human rights in the countries of the former Soviet block, is the manner in which the countries, once forcedly incorporated into the Soviet federation, restored their independence.

It has already been mentioned at the conference, that in times when cannons speak, rights keep silent. Of course, in the countries, where restoration of independence was connected with war, human right problems became more acute.

Restoration of independence in the Baltic States was named the ”Singing Revolution.” However, even it demanded victims. We cannot forget January events in Vilnius and Riga. At the same time we have to admit, that the process of taking over power was not connected with mass violence of human rights and victims.

One should not forget mentioning some other features, connected with the “Singing Revolution”. During the period of awakening, a faulty concept was developed in the consciousness of the society: that as soon as the political power was restored, all the problems would be solved and the standard of living in all spheres will be the same as in the Western democratic countries.

Of course, it did not happen. Changing of the economic system resulted in an economic crisis because of objective and subjective reasons . Unemployment increased. Savings, not “swallowed” by inflation, were taken away by the bank crisis. As the result - the living standard of the greatest part of inhabitants went down catastrophically. Under conditions like the above, part of the nation loses belief in the ideals of a democratic and law-based state. At the same time a demand for a strict ruler is expressed and a suggestion to solve social problems of the citizens

at the expense of non- citizens can be heard.

IV. Problems Connected with a Creative Approach to Rights

1. Accession to International Instruments Relating to Human Rights

As I have already pointed out, in many countries, including Latvia,human rights were made use of as a weapon in fight for independence and democratisation of the state . That is why priority of accession to International Instruments, relating to human rights, has been declared.

For example, immediately after adopting the Declaration of Independence of the Republic of Latvia on May 4, 1990, "Declaration on the Accession of the Republic of Latvia to International Instruments Relating to Human Rights" was passed and the Republic of Latvia acceded to 52 different instruments.

On the one hand it helped to develop prestige of human rights and determined the procedure of putting them into practice, but on the other hand the human rights were left on the same declarative level as in Soviet times. The fact of accession does not ensure functioning of the rights. At the time of adoption of the above declaration, most of the 52 International Instruments had neither been translated nor published.

As the Parliament gained its working experience,the process of ratification of International Instruments changed. Rules of Procedure of the Saeima in its new version established exact demands to draft laws, relating to ratification of International Agreements. The law "On International Agreements" establishes that the text of any International Agreement is to be published, when ratifying the Agreement. Besides the Foreign Office was charged with several duties to secure implementation of agreements.

For example, quite a lot of discussions in press took place before adoption of the law by which the Cyma ratified the European Convention on Protection of Human Rights and Freedoms together with Protocols No.1,2,4,7 and 11 on June 4, 1997.

2. Constitutional Consolidation of Human Rights

At our conference much has been said about importance of consolidation of basic rights and freedoms on a constitutional level.

In the nineties the greatest part of the former Soviet states have worked out and adopted new Constitutions, that established norms of human rights.

Thus, for example, the Constitution of the Republic of Poland contains Chapter 2 "The freedoms, rights and obligations of persons and citizens. General principles". At the conference we were able to listen to a detailed report on consolidation of human rights in the Constitution of the Republic of Armenia. I could go on and on, mentioning other examples.

In the Czech Republic the human rights have been consolidated by a particular act, but the

Constitution envisages, that “the Charter of Fundamental Rights and Freedoms shall form part of the judicial power”.

A peculiar situation has developed in Latvia. During the transition period, before the Cyma assembled in July 1993, four Articles of the 1922 Constitution of the Republic of Latvia were considered effective.At that time legislation in the Republic of Latvia was in the hands of the Supreme Council In December 1991 it passed the constitutional law “Rights and obligations of a person and a citizen”. Unfortunately, this law just bears its name as, when adopting it, there was not the required qualified majority. In July 1993, when the 5. Cyma assembled, the performance of the 1922 Constitution (Satversme) of the Republic of Latvia was restored completely. Unfortunately, human rights were not and even today are not drafted. Work on elaboration of a special chapter started just after assembly of the 5. Cyma . It is being continued by the Saeima in power at present. A select committee was formed, the draft project has been elaborated, published and discussed, then revised, but still not submitted to the Cyma. Optimists, and I am one of them, believe, that the 6. Cyma, whose mandate terminates in November 1998, will manage to adopt the law.

The fact, that human rights -as a united, mutually connected body - are constitutionally consolidated, is a very positive step in the development of any country. At the moment the obligation of Latvia is to take that step.

3. Consolidation of Human Rights in Other Normative Acts

However, not only the constitutional level is of importance in the process of consolidation of human rights. An essential task is also substitution of acts, issued during the Soviet period, with normative documents,adequate to a democratic, law-based country.

After restoration of independence in Latvia, creative approach to problems of rights was coming into being very quickly. On the one hand it advanced the process of substituting old and not conformable with the period norms, but on the other hand it resulted in sketchy normative acts and mutual conflicts. Besides, substitution of acts with lower legal force took place much slower than substitution of acts with higher legal force.

During the period of transition the above creative approach was expressed differently.

For example, in sectors, connected with the performance of the Parliament, the government, mass media and public organisations as well as entrepreneurship, new normative acts were rapidly drafted and adopted. At the same time in other sectors - like procedural issues of courts - Codes from the Soviet times, though with some changes and improvement, remained effective for quite some time.

Besides, several normative acts of the pre- Soviet period were slightly modified and considered effective. For example, Civil Law of 1937, Law on Land Registers, Law on Notary Office and other normative acts were declared effective.

Thus, at one and the same time normative acts, worked out at different periods, with different terminology and method are considered effective at present. And that inevitably creates

objective and subjective contradictions and does not favour consolidation of high juridical culture.

V. Importance of the Reform of Judicial Power

Establishment of a democratic and law- based state is an important precondition to ensure functioning of human rights. And that is unimaginable without strong and independent judicial power. Countries of the former Soviet block inherited a judicial system, that did not meet the requirements of a law- based state. That is the reason why the reform was a necessity.

Conception of the court reform in Latvia was established by the law of December 1992 "On Judicial Power". It included the main principles of judicial power, independence of courts and review of cases as well as status of the judge and determined establishment of a new - three level - court system. Besides, legal procedure of appeal and legal constitutional procedure were introduced. As to the latter, the above law established that the Department of Constitutional supervision had to be formed at the Senate of the Supreme Court.

The law "On Judicial Power"indicated status of persons and institutions involved in the process of reviewing cases. Later on, the status of the above persons and institutions was developed and confirmed in "Law on Advocacy", "Law on Prosecutor's Office", "Law on Notary Office", "Law on Land Register" and others.

At the same time, laws and other normative acts envisaged solving conflicts at the court. The amount of cases, to be reviewed at the court increased. But implementation of the reform was a slow and hard process. In fact, the newly-established section of courts- the Regional courts- started functioning only in 1995.

Implementation of the legal constitutional procedure was delayed as well. In spring of 1993 the government submitted the draft of the Constitutional Court Law to the Cyma. Amendments to the law "On Judicial Power", establishing the fact that a separate Constitutional Court, competency of which was established by the Constitutional Court Law, shall exist in Latvia, were elaborated and passed. Unfortunately, the Constitutional Court Law was adopted only in June of 1996. The Constitutional Court commenced its performance in December, 1996.

At the present moment the situation at the courts of Latvia cannot be regarded as satisfactory. The fact has been pointed out even in the document "Agenda 2000". Resume of the above paper stresses that performance of the court system is to be constantly and persistently improved.

Opinion poll shows, that prestige of courts is rather low in Latvia.

At the conference "Judicial Power and Society", that took place in Riga in April, 1997, it was stated that "there are 379 posts for judges in Latvia. Today there are still many vacancies, and it is not very likely that they will be filled up, as the job of a judge is not sufficiently rewarded. The amount of cases to be reviewed continues to grow, prestige of the lawyer's profession among lawyers themselves is not high. About 80% of judges have been changed during the period of the reform. At present one can find judges in courts, whose length of service is just two to three years or even several months. There is no competition among judges, and therefore

there is no possibility of choice." Constant amendments to laws and other normative acts demand continuous and extensive training even for experienced judges, not saying anything about judges with no or small experience. But almost no funds from the national budget are envisaged for educational purposes. The Educational centre of Judges, that is successfully functioning since 1995, mostly carries out its work thanks to the help of international organisations like CAL, UNDPI and others.

Premises and facilities of courts does not meet the requirements of the present time.

I would like to mention problems of independence of the judicial power as well. On the one hand, already as far back as on May,4 1990, the Supreme Council of the Republic of Latvia declared that it acceded to "The Basic Principles of Court Independence" of 29. November,1985. The Satversme (Constitution) of the Republic of Latvia also establishes that "judges are independent and subjected only to law". On the other hand, as I have mentioned, financially the judges are dependent on whims of the executive power, besides, when reviewing certain cases, pressure has been exerted on judges. For instance, a short time ago Latvia witnessed a situation, unthinkable in a country with permanent democratic traditions. After the Regional court, while reviewing a criminal case on act of sabotage and malicious bankruptcy, had changed the means of security of the accused, the Minister of Justice and the Prime Minister made an announcement, characterising the action of the court as unacceptable to the society and pointed out that there was a necessity to review the principle of responsibility of judges. After the announcement, the body of judges resigned and the case will be submitted for review to another body of judges .

Under the above state of affairs, it is problematic to guarantee the right of any individual "to an open review of a case at an independent court, established by an objective law and in due time" and to achieve that "anybody, accused with a criminal offence shall be considered not guilty as long as his offence has not been proved in compliance with the law."

VI. The role of the Constitutional Court in Protection of Human Rights

Very often the role of the Constitutional Court in the sphere of human rights is understood in a narrow sense - only in connection with the review of a constitutional complaint. To my mind, functions of the Constitutional Court are much more extensive. I should like to stress three moments. First of all, the very fact, that the Constitutional Court is functioning in the state, favours observance of rights, including human rights, of higher legal force when working out normative acts with lesser legal force. And it is not important who and how often addresses the Constitutional Court. Most important is the fact that the official or officials who work out any normative act is to take into consideration the possibility that - in the case of non- conformity- the act shall be declared null-and-void .

In fact, the Constitutional Court can be considered a mechanism or a sanction of the principle, that a normative act of lesser legal force is to be in conformity with a normative act of higher legal force. The above refers to international agreements, that the state-in the established procedure- has acknowledged binding as well. For instance, the Constitutional Court Law of the Republic of Latvia in its Article 16, Clause 9 "Cases to be reviewed by the Constitutional Court Law" establishes that the Constitutional Court shall review " compliance of the national legal

norms with the international agreements entered into by Latvia which are not contrary to Satversme (Constitution).

The above is of utmost importance because of the inherited from Soviet times tendency to declare a law, at the same time restricting it by side-stepping acts.

Secondly, the Constitutional Court with its verdict may declare null-and- void acts or their parts, that are not in conformity with a legal norm of higher legal force. It gives the possibility to avert violation of human rights, that could be caused by normative acts of lesser legal force. And again, to my mind, it is not important who initiates a case and whether the submitted application includes the term “human rights, basic rights etc.” The fact that the application does not contain the term “human rights” or that the applicant is not an individual, does not altogether mean that the norms to be reviewed are not connected with human rights.

Besides, in cases, when discrepancy is established and even in cases when it is not, of importance is the whole verdict, especially the part of motivation and not only the resolute part. In a name, when speaking of the development of legal thinking, both - the development of comprehension of human rights, and methods of interpreting legal norms are of importance. For example, the fact that the Constitutional Court of the Republic of Latvia referred to general legal principles in one of its verdicts, resulted in a discussion among scientists and practitioners of law.

Therefore two things are of great importance. Firstly, the proceedings at the Constitutional Court should guarantee to the applicant, and the institution or official who issued the act which is disputed, a possibility to prepare and express a substantiated legal motivation on the respective case and, secondly, the judges, who meet to reach the verdict, should be professionals.

And it is of vital importance, that the demands to the candidate to the post of the judge of the Constitutional Court shall be high, concerning experience and reputation, as well as their possibility and wish to increase their efficiency. To my mind, exchange of thoughts at international workshops widens mental outlook of judges.

One should add, that the Constitutional Court of the Republic of Latvia experiences a particular problem: no institution or official who has the right to submit an application to initiate a case, regarding compliance of this or that normative act to an act with higher legal force - i.e. not less than 20 deputies of the Cyma, the Cyma, the Cabinet of Ministers, the Plenum of the Supreme Court, Prosecutor General, the Council of the State Control, and the State Bureau of Human Rights - for quite some time have not submitted any application to initiate a case .

Thirdly, constitutional complaint is undeniably of great importance in protection of human rights at the Constitutional Court. At present about one half of the Constitutional Courts of the countries of the former Soviet block have the right to review constitutional complaints.

At present, the right to review the above complaints is not in the competence of the Latvian Constitutional Court. Primarily the draft of the Constitutional Court Law envisaged the right of an individual to appeal to the Constitutional Court. But as the Satversme (Constitution) does not have a Chapter on Human Rights, the Parliament decided not to give the right to an individual

to appeal to the Constitutional Court before the Chapter is elaborated. Recently, at different workshops in Latvia, the viewpoint was expressed, that the right of an individual to submit a constitutional complaint should not depend on supplements to Constitution and should be given to individuals immediately. To my mind, the viewpoint has not been well-considered, as the concept "constitutional complaint" itself indicates to rights, consolidated by Constitution.

Thus, the Constitution of the Czech Republic establishes that "The Constitutional Court shall decide about a constitutional complaint against an effective decision or another form of interference by the authorities of public power, affecting the constitutionally guaranteed fundamental rights and freedoms."

Article 93 of the Basic Law for the Federal Republic of Germany establishes that "the Federal Constitutional Court shall rule on constitutional complaints which may be filed by anybody, claiming that one of their basic rights or one of their rights under Paragraph 4 of Article 20 or Articles 33, 38, 101, 103 or 104 has been violated by public authority."

I shall not discuss constitutional complaint more in detail, as reporters before me have touched upon the subject and, no doubt, others are going to discuss the problem as well.

I would like to accentuate one more problem, that is connected with verdicts of Constitutional Courts, especially the ones on human rights.

The Constitutional Court is not a miraculous institution and is not able to amend imperfections of any normative act. If a normative act of lesser legal force restricts some rights and is not in compliance with an act of higher legal force, then the Constitutional Court declares the act of lesser legal force as null-and-void and solves the problem completely. On the other hand, if a norm of lesser legal force that establishes procedure of realisation of this or that right, and if realisation of the right is not possible without the certain procedure but the norm contradicts the norm of higher legal force, the problem cannot be solved simply by declaring the act (norm) null-and-void. It is necessary to ensure that some action of the respective state institution follows and a new and adequate procedure is worked out. But that is the topic to be discussed at the workshop on execution of a verdict next month in Tbilisi, and I shall not enlarge upon it.

CONCLUSION

In conclusion I should like to point out, that no country, even the so-called old democracies cannot state that there are no problems in the sphere of human rights. However, in the states, that are passing over from the totalitarian regime to democratic one, there are really many problems.

To solve these problems, a special system of measures is necessary. One step in the system is the Constitutional Court.

The Constitutional Court is not a magic remedy, but it has its own stable and indispensable place in the system.