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**REPORT**

**“Social Rights, Regulation and Practice in Slovenia”**

**by**

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Between the two world wars, Slovenian legal science was especially influenced by Austrian legal positivism; although the legal-comparative, sociological and axiological methods were important as well. After the Second World War, in some critical periods an apologetic legal positivism (forced by the Stalinist period) gained the upper hand in certain areas. On the other hand, new legal institutes and departments furthered the development of new sciences (criminology, sociology of law, political economy, and public administration). New scientific areas emerged (comparative commercial law, comparative labour law and the law on the European Union). Some legal sciences (like criminal law) have been enriched by additional (sociological, axiological and comparative) methods<sup>1</sup>.

<sup>1</sup> Marijan Pavčnik, *The Transition from Socialist Law and Resurgence of Traditional Law, The Case of Slovenia: The (In)adequacy of Legal Positivism*, Acta Juridica Hungarica 46, Nos 1-2, pp. 13-31 (2005), Akademiai Kiado, Budapest.

The former Slovenian constitutions were only constitutions of a federal unit and not constitutions of a sovereign State.

In the transition from socialism to the new state organisation, an important and even key role was played by the new Constitution of the Republic of Slovenia that was adopted on 28 December 1991. The quality and the essence of the new Constitution are very different from the previous constitutional order of 1974 when Slovenia was still a part of the Socialist Federative Republic of Yugoslavia. In the socialist era the foundations of the system were the right to self-management and **social ownership (of the means of production)**, which were incorporated into a vision of a self-managing society and state that was determined right down to the last detail (which made it totalitarian in a certain sense). Fundamental human rights and freedoms were drowned in this vision.

Fundamental human rights were not the starting point of the system but just an element thereof, the scope of which was precisely measured off in advance. It was characteristic of this system that it accepted the thesis of the pluralism of self-managing interests, yet it was not ready to institutionalise this pluralism legally and politically. Pluralism was acceptable as long as it remained within the system. Once it began to doubt the system and tried to change it, however, it became suspect and even open to criminal prosecution. Thus, it is certainly not accidental that the Communist Party was defined already in the Constitution as the "leading ideological and political force of the working class and of all working people".

The form of the authority of the state corresponded to a directorial (assembly) system (with elements of a parliamentary and even presidential system). It is typical that the system as designed in the constitution did not work and the elements of the principle of the division of powers were more a kind of an ideological ornament than serious institutions. The rules of the "division of powers" only make sense if at the same time cultural, economic and political conditions are also provided that activate this "game" (of the system of checks and balances). The system that was *de jure* and *de facto* dominated by only one political party (Le. the communist party) certainly did not harbour this ambition. And this made the legal form ideological: it offered exactly what its actual designers did not at all want. Nevertheless, the right to self-management, **social property** and the pluralism of self-managing interests made possible numerous particular features of the Yugoslavian order and thus distanced it from the typical countries of "real socialism"<sup>2</sup>.

The transition from socialism to traditional law evidently has taken more time than originally expected. This is especially true of the privatisation of the economy and the denationalisation of once nationalized property. These processes are often legally very demanding and take much time (especially if the complications are dealt with in administrative as well as in court proceedings). It is equally-and possibly even more-important that no durable and firm political blocks (with corresponding political parties) have developed as yet and that a political culture which accepts the values of a state governed by the rule of law and those of a social state (together with the system of checks and balances) is still under development. Major positive changes will only occur when a sufficiently strong socially oriented political group is formed and when also the Constitutional Court has the opportunity to intervene more frequently by means of its decisions. If the Constitutional Court received a greater number of applications, it could react in an appropriate manner because the principle of a social state is one of the most important constitutional principles<sup>3</sup>.

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<sup>2</sup> Marijan Pavčnik, The Transition from Socialist Law and Resurgence of Traditional Law, The Case of Slovenia: The (In)adequacy of Legal Positivism, Acta Juridica Hungarica 46, Nos 1-2, pp. 13-31 (2005), Akademiai Kiado, Budapest.

<sup>3</sup> Marijan Pavčnik, The Transition from Socialist Law and Resurgence of Traditional Law, The Case of Slovenia: The (In)adequacy of Legal Positivism, Acta Juridica Hungarica 46, Nos 1-2, pp. 13-31 (2005), Akademiai Kiado, Budapest.

In terms of its legal status the new *Constitution* also differs from the preceding ones regarding a number of different legal concepts: it imposes different constitutional principles, a changed constitutional concept of human rights, and the Principle of the Separation of Powers. There was an absolute necessity for the transition from a system characterized by the privilege of a certain belief, by the monopoly of a certain political organization, and by such an electoral system that was opposed to the Principle of the Equal Rights of all citizens to participate in the decision-making process on public matters, into a system involving the right to freedom of political organization, to simplified and clear electoral proceedings, without the monopolistic role of any political organization. From the point of view of external relations, Slovenia made a transition from the position of a formally federal, but actually administrative unit of the Yugoslav Federation, into an independent, internationally recognized State. In internal relations it has passed and it still is in the process of transition from the system of real socialism with social ownership to a traditional ownership system. The advantage of this type of transition from the old to the new system was its relative smoothness.

Among the mentioned corresponding international standards of constitutionality, the system in force also recognized constitutional review as the highest form of the protection of human rights and fundamental freedoms<sup>4</sup>. The constitutional rights<sup>5</sup> are specified in the sense of the original provisions that offer to the Constitutional Court the freedom of interpretative functioning. The new *Constitution* is based on the principle that everything not explicitly forbidden is permitted. This applies for the self-organisation of civil institutions and the Constitutional Court is no longer empowered to review the internal acts of independent economic subjects and civil associations. Social and economic relationships<sup>6</sup> are not specified as rights but rather as an obligation of the community to create the corresponding conditions.

## II. *Constitution of 1991*

### 1. General

The *Constitution* was adopted on 23 December 1991. A legitimate basis for the political arrangement was provided by the plebiscite of 1990, the *Fundamental Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia of 25 June 1991* and the new *Constitution*.

The constitutional system is based on the principles that Slovenia is a democratic republic (Article 1 of the *Constitution*), a state governed by the rule of law and a social state<sup>7</sup>.

The Slovenian constitutions before 1991 were only constitutions of a federal unit and not constitutions of a sovereign state. The *Constitution* of the independent Slovenia<sup>8</sup> was adopted on 23 December 1991. With the *Constitutional Law for the Implementation of the Constitution of the Republic of Slovenia*<sup>9</sup>, adopted on 23 Dec 1991 by the National Assembly, Slovenia installed the new constitution. The constitutional system is based on the principles of modern

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<sup>4</sup> Articles 160-167 of the *Constitution*, Article 1 of the *Constitutional Court Act*.

<sup>5</sup> Articles 14-65 of the *Constitution*.

<sup>6</sup> Articles 66-79 of the *Constitution*.

<sup>7</sup> Article 2 of the *Constitution*.

<sup>8</sup> Official Gazette RS, nos. 33/91, 42/97, 66/00, 24/03, 69/04, 68/06.

<sup>9</sup> Official Gazette RS/I, Nos. 1-6/91 and 45/94.

constitutionalism, additionally, the constitutional review was reintroduced<sup>10</sup>.

## **2. Process of Constitutional Adaptation, affecting particular social rights as well**

Prior to the Slovenian integration into the EU, the position prevailed that from the aspect of both constitutional and international law the integration was such an important event that it would be impossible for it to be carried out without constitutional amendments.<sup>11</sup> There were the following amendments to the *Constitution* (regarding also some social rights) adopted mainly due to the Slovenian aspirations for the integration into international associations:

### **2.1 Constitutional Amendment of Para. 2 of Article 68<sup>12</sup>**

Under the former constitutional provision of 1991 foreigners were only entitled to acquire title to property affixed to land under the conditions provided by law<sup>13</sup>. They were not entitled to acquire title to land except by inheritance in circumstances where the reciprocity of such rights of acquisition was recognized<sup>14</sup>. Prior to ratification of *the European Agreement Establishing an Association between the Republic of Slovenia, of the One Part, and the European Communities (hereinafter: Community) and their Member states, Acting within the Framework of the European Union, of the Other Part of 9 June 1996*, it was necessary to adapt the provisions of Article 68 of the *Constitution* to the European Communities standards for the normative regulation of the respective matters<sup>15</sup>. Under this constitutional provision – amended for the first time, foreigners became able to acquire title to property affixed to land under the conditions provided by law or a treaty ratified by the National Assembly, subject to reciprocity.

### **2.2 Constitutional Amendment of Article 80<sup>16</sup>**

Deputies, except for those representing the national communities, are elected according to the principle of proportional representation, with a 4 % threshold being required for election to the National Assembly and with due consideration that voters have a decisive influence on the allocation of seats to the candidates<sup>17</sup> (new Para. 4 of Article 80).

### **2.3 Constitutional Amendment of First Chapter (Article 3a added) and Articles 47 and 68<sup>18</sup>**

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<sup>10</sup> Articles 160 to 167 of the *Constitution*; the *Constitutional Court Act*, Official Gazette RS, Nos. 15/94, 51/07 and consolidated text No. 64/07.

<sup>11</sup> C. Ribičič, Implementing European Standards into the Case-Law of the Constitutional Court of the Republic of Slovenia, *Zeitschrift für öffentliches Recht, Austrian Journal of public and International Law*, 60, 3/2005, p. 413; see also Wedam Lukić Dragica, The Position of the Constitutional Court of the Republic of Slovenia in Relation to European Community Law, Round Table II on "Consequences of Membership in the EU for Constitutional Courts, Vienna, 17 October 2006

<sup>12</sup> Official Gazette RS, No. 42/97.

<sup>13</sup> Para. 1 of Article 68.

<sup>14</sup> Para. 2 of Article 68.

<sup>15</sup> *The Constitutional Law on the Amendment of Article 68 of the Constitution of the Republic of Slovenia*, Official Gazette RS, No. 42/97.

<sup>16</sup> Official Gazette RS, No. 66/00.

<sup>17</sup> New Para. 4 of Article 80.

<sup>18</sup> Official Gazette RS, No. 24/03.

The *Constitution* was considerably amended to enable Slovenia's integration into international organizations, in this case the EU and defence alliances such as NATO<sup>19</sup>. The National Assembly adopted a constitutional act amending Articles 47 and 68 as well.

Whereas before the changes were instituted citizens of the Republic of Slovenia could not be extradited to a foreign country, the new Article 47 enables extradition of Slovenian citizens to other EU member states.

Article 68, which regulates the property rights of foreigners, was amended for the second time since the *Constitution* came into force. The strict conditions for acquiring ownership rights to real estate (inheritance and condition of reciprocity) contained in the first version<sup>20</sup> have been relaxed substantially. Aliens may acquire ownership rights to real estate under conditions provided by law or by a treaty ratified by the National Assembly.

#### **2.4 Constitutional Amendment of Articles 14, 43 and 50<sup>21</sup>**

The last normative change aimed at tackling the under-representation of women in elected representative bodies was the amendment of Article 43 of the *Constitution* on the "right to vote". A new paragraph was added to Article 43 conferring on the law the responsibility for defining measures for promoting equal opportunities for men and women in standing for election to state and local-community bodies. This novelty represents a continuation of the introduction of measures into electoral legislation which facilitate a more balanced participation of women in political decision-making.

**By the same Act some provisions explicitly regulating social rights. The constitutional act amending Para. 1 of Article 14 (regulating the prohibition of discrimination) inserted a general prohibition on discrimination due to a disability. In addition, the constitutional act amending Article 50 of the *Constitution* explicitly inserted among constitutional rights the right to a pension<sup>22</sup>.**

### **III. Social State**

Slovenia is a social state<sup>23</sup> with a market economy adapted to the present circumstances, where human rights and citizens' freedoms, especially social and economic rights, rights of employees to participate in management, the freedom of trade unions, the right to own and inherit property as well as the freedom of movement and institutions of a civil society are respected<sup>24</sup>.

The constitutional system implements the principle of Slovenia as a social state in such a way that also some social and economic rights among the provisions regulating human rights and fundamental freedoms are included. Furthermore, the respective provision<sup>25</sup> could serve as a

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<sup>19</sup> Article 3a.

<sup>20</sup> Official Gazette RS, No. 33/91

<sup>21</sup> Official Gazette RS, No. 69/04.

<sup>22</sup> MAVCIC, Arne. The Republic of Slovenia. V: KORTMANN, C. A. J. M. (ur.), FLEUREN, J. W. A. (ur.), VOERMANS, Wim (ur.), KINDLOVÁ, Miluše. *Constitutional law of 10 EU member state : the 2004 enlargement*. Deventer: Kluwer, 2006, str. X/1-X/60. [COBISS.SI-ID [300287](#)]

<sup>23</sup> Article 2 of the *Constitution*.

<sup>24</sup> The *Declaration on the Sovereignty of the State of the Republic of Slovenia*, Official Gazette RS, No. 1/91.

<sup>25</sup> Article 2 of the *Constitution*.

basis for the regulation of economic and social relations. This basis is clearly stated in the last sentence of Para. 1 of Article 5 of the *Constitution*, which binds the State to assist in the preservation of the natural wealth and cultural heritage and create opportunities for the harmonious development of society and culture in Slovenia<sup>26</sup>. The declaration that the Republic of Slovenia is a social state considers that the property has a social function, bound with some obligations and limitations. In addition, a law shall specify the manner of its acquisition and enjoyment as well as its limits because of the establishment of its social function as well as its general availability<sup>27</sup>.

The Slovenian system in force is similar to some systems which have been partly using models which could be seen as models of equal life possibilities or models of rightful life possibilities. The mentioned models are not limited to starting positions, but they try to reduce the respective differences among people which can threaten their fundamental existential needs. In addition, they shall not be reduced only to material goods, but also oriented to other social goods, with the aim to assure all the people a basic social security during their lifetime. The contents of the mentioned models could be categorically recognized as then essence of the social state, or concerning the economic system, as a social market economy<sup>28</sup>.

#### **IV. The Representation of Social Interests**

Chapter II of the *Constitution* contains all human rights and fundamental freedoms which constitute a civil society and the rule of law. On the other hand, it contains also social guarantees, e.g. the right to social security, health protection and education<sup>29</sup>.

##### **1. National Council**

Besides the National Assembly representing the people through general elections, the National Council was established as a representative body of farmers, tradesmen, independent professionals and non-profit organizations, as well as representatives of local interests<sup>30</sup>. For the performance of the duties of the legislature in which the participation of some special social interests is guaranteed some powers are vested also in the National Council. These are: social, economic, trade, professional and local interests<sup>31</sup>. The National Council is composed of 40 Councilors as follows: four Councilors representing employers, four Councilors representing employees, four Councilors representing farmers, crafts and trades and independent professions, six Councilors representing non-commercial fields and twenty two Councilors representing local interests<sup>32</sup>. This body may propose bills, require a referendum in the course of the legislative process or force the National Assembly to repeat its vote (suspensive veto)<sup>33</sup>, but it has no right to veto legislation. Despite the fact that the National Council is not called a

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<sup>26</sup> See also Articles 70 through 73 of the *Constitution*: National Assets and Natural Resources, The Protection of Land, a Healthy Living Environment, the Protection of the Natural and Cultural Heritage.

<sup>27</sup> Article 67 of the *Constitution*.

<sup>28</sup> Gaspari, M., Enakopravnost kot izvedba načela enakosti, *Podjetje in delo*, No. 1/92, 17. Šinkovec, J., Ustavno sodišče ob uveljavljanju ustavnosti in zakonitosti, *Podjetje in delo*, No. 5-6/93, 410.

<sup>29</sup> Articles 14 through 65.

<sup>30</sup> Article 96 of the *Constitution*.

<sup>31</sup> Para. 1 of Article 96 of the *Constitution*.

<sup>32</sup> Para. 2 of Article 96 of the *Constitution*.

<sup>33</sup> Article 97 of the *Constitution*.

legislative chamber by the *Constitution*, it actually serves this function in terms of its powers in the legislative process.

As a representative body of special social interests, the National Council is elected by individual representative communities of interests<sup>34</sup>.

## 2. Government/Cabinet<sup>35</sup>

The structure of the Government corresponds to the structure of fields, as prescribed by law<sup>36</sup>. The respective fields are also<sup>37</sup> non-commercial activities/social activities: science and technology, health care, schools and sports, culture, labor, family and social matters.

The most important act of the acts passed by the Government concerning the mentioned fields is the so-called *Budgetary Memorandum* by which the Government proposes to the National Assembly among other the basic goals and projects of social policies of the Government as well as the general limits of public finances in general for the next year<sup>38</sup>.

## 3. Administration

Under the provisions of the *Administration Act*, the main functions of the administration could also cover among other general social issues and social development, by appropriate measures taken with the scope of its powers. In addition, the administration may propose measures to the Government and to other bodies of the respective jurisdiction.

## V. System of Protection of Human Rights

### A. National System

The Slovenian constitutional order is based on the protection of human rights and freedoms (the Preamble of the *Constitution*). On its own territory, Slovenia shall protect human rights and fundamental freedoms<sup>39</sup>.

#### 1. Judicial Protection

Human rights and fundamental freedoms shall be protected by judicial protection (e.g. civil law, penal law, constitutional law, administrative law). Moreover, this protection shall include the right to obtain redress for the abuse of such human rights and fundamental freedoms<sup>40</sup>.

##### 1.1. Specialized Courts

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<sup>34</sup> Article 11 of the *National Council Act*.

<sup>35</sup> See also Rupnik, J., Cijan, R., Grafenauer, B., *Ustavno pravo Republike Slovenije*, Posebni del, II. knjiga, Maribor, Univerza v Mariboru, Pravna fakulteta, 1994, 201. See Grad, F., Kaučič, I., Ribičič, C., Kristan, I., *Državna ureditev Slovenije*, Ljubljana, ČZP Uradni list, 1996, 428.

<sup>36</sup> Articles 15 and 16 of the *Administration Act*.

<sup>37</sup> The *Organisation and Areas of Work of Ministries Act*, Articles 2 through 25; the *Government of the Republic of Slovenia Act*, Article 14.

<sup>38</sup> Article 215 of the *Rules of Procedure of the National Assembly*.

<sup>39</sup> Para. 1 of Article 5 of the *Constitution*.

<sup>40</sup> Para. 4 of Article 15 of the *Constitution*.



The specialized courts have jurisdiction only in their respective legal field. Under the *Labor and Social Courts Act*, such courts are as follows:

- Labor Courts: are empowered to decide on individual labor disputes (concerning e.g. gaining employment, termination of employment, economic and other individual rights which are based on employment, among employers and workers concerning inventions and other intellectual property rights, contracts for work and labor, grants etc.) and collective labor disputes (concerning collective agreements, the legality of strikes, the participation of workers in management, the powers of trade unions as regards employment, the representative character of trade unions, etc.).

- Social Courts; the Social Court of first instance is empowered to decide on disputes concerning pension and disability insurance, health insurance, unemployment insurance, as well as family and social support benefits. As regards the mentioned cases the social court is empowered to decide on disputes concerning damage settlements owed to an insured person by an insurance institution, or concerning damage settlements to an insurance institution in connection with an insurance policy. The higher labor and social courts (decided by three judges) shall decide matters relating to complaints against decisions decided by the labor courts and the social court of the first instance.

## 2. Administrative-Penal Protection (Offences)

If no other legal redress is provided, courts of competent jurisdiction shall also be empowered to decide upon the legal validity of individual activities and acts which infringe the constitutional rights of the individual <sup>41</sup>.

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 shall be guaranteed <sup>42</sup>.

## 3. Constitutional Complaint <sup>43</sup>

<sup>41</sup> Para. 2 of Article 157 of the *Constitution*.

<sup>42</sup> Para. 3 of Article 120 of the *Constitution*.

<sup>43</sup> See Mavcic, A., *Slovenian Constitutional Review, Its Position in the World and Its Role in the Transition to a New Democratic System*, Ljubljana, Založba Nova revija, 1995. Mavcic, A., *The Citizen as an Applicant Before the Constitutional Court*, Report on the Seminar organised by the European Commission for Democracy through Law in conjunction with the Constitutional Court of Georgia on Contemporary Problems of Constitutional Justice, Tbilissi, Georgia, 1-3 December 1996, Offprint. Mavcic, A., *The Role of the Slovenian Constitutional Court in Legal Transition*, Report on the Conference on Constitutional Transition, CCT'97, Hong Kong, 29 May - 1 June, 1997, Offprint. Mavcic, A., *Nature and Effects of Decisions of the Slovenian Constitutional Court, The Temporary Order as an Element of the Constitutional Review Procedure*, Report on the *Colloquium ueber Grundfragen der Verfassungsgerichtsbarkeit in Mittel- und Osteuropa, das Max-Planck-Institut fuer auslaendisches oeffentliches Recht und Voelkerrecht*, Heidelberg, 17-18 April, 1997, Offprint. Mavcic, A., *The Protection of Fundamental Rights by the Constitutional Court and the Practice of the Constitutional Court of the Republic of Slovenia*, Report on the Seminar "The Protection of Fundamental Rights by the Constitutional Court", European Commission of the Council of Europe, Brioni, Croatia, 23-25 September 1995, Proceedings, p. 204. Mavcic, A., *The Protection of Fundamental Rights by the Constitutional Court*, Report on the Seminar on the Constitutional Dimension of Judicial Reform and Judicial Organization, Kyrgyz Republic, Bishkek, 17-18 June 1997, Offprint. Mavcic, A., *Constitutional Complaint*, Report on the Seminar organised by the European Commission for Democracy Through Law in conjunction with the Constitutional Court of Latvia, Riga, Latvia, 3-4 July 1997, Offprint; MAVCIC, Arne. Sloveniya Respublikasi konstitusiyah mahkamasinin analitik va beynalxalq amakdashliq idarasinin rahbari. *Azərbaycan Respublikası Konstitusiyası Mahkamasının məlumatı*, 2003, 1, str. 97-106. [COBISS.SI-ID 190207]; MAVCIC, Arne. Sloveniyada konstitusiza şikayati : Sloveniya Respublikasının konstitusiyası mahkamasında beynalxalq alaqular şöbasinin müdiri Arne Mavçičin çıxış. *Azərbaycan Respublikası Konstitusiyası Mahkamasının məlumatı*, 2004, 1, str. 69-71. [COBISS.SI-ID 239359]; MAVCIC, Arne. *La aceptación de un moderno sistema de protección de derechos humanos por la justicia constitucional en Eslovenia*. Revista iberoamericana de derecho procesal constitucional, 2007, no. 7, str. 181-197. [COBISS.SI-ID 305663].

The Constitutional Court decides cases of constitutional complaints alleging violations of human rights and fundamental freedoms<sup>44</sup>. The protection thus embraces all constitutionally guaranteed human rights and fundamental freedoms including those adopted through the international agreements that have become part of the national law through ratification.

Any legal entity or individual may file a constitutional complaint<sup>45</sup>, as may the Ombudsman if directly connected with a particular case he is concerned with<sup>46</sup>, although subject to the agreement of those whose human rights and fundamental freedoms he is protecting in an individual case<sup>47</sup>. The subject-matter of a constitutional complaint is an individual act of a government body, a body of local self-government, or public authority allegedly violating human rights or fundamental freedoms<sup>48</sup>.

The precondition for lodging a constitutional complaint is the prior exhaustion of all possible legal remedies<sup>49</sup>. A constitutional complaint may be lodged within sixty days of the adoption of the individual act<sup>50</sup>.

The decision *in merito* of the Constitutional Court in case of successful complaint may:

- partially or in entirety annul or abrogate the disputed (individual) act or return the case to the body having jurisdiction for retrial<sup>51</sup>;
- annul or abrogate (*ex officio*) unconstitutional regulations or general acts issued for the exercise of public authority if the Constitutional Court finds that the annulled individual act is based on such a regulation or general act<sup>52</sup>;
- in case it annuls or abrogates a disputed individual act it also decides on the disputed human rights or fundamental freedoms if this is necessary to remove the consequences that have already been caused by the annulled or abrogated individual act, or if so required by the nature of the constitutional right or freedom, and if it is possible to so decide on the basis of data in the documentation<sup>53</sup>. Such an order is executed by the body having jurisdiction for the implementation of the respective act which was retroactively abrogated by the Constitutional Court and replaced by the Court's decision on the same. If there is no such body having jurisdiction according to regulations currently in force, the Constitutional Court shall appoint one<sup>54</sup>.

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<sup>44</sup> Item 6 of Para. 1 of Article 160 of the *Constitution*.

<sup>45</sup> Para. 1 of Article 50 of the *Constitutional Court Act*.

<sup>46</sup> Para. 2 of Article 50 of the *Constitutional Court Act*.

<sup>47</sup> Para. 2 of Article 52 of the *Constitutional Court Act*.

<sup>48</sup> Para. 1 of Article 50 of the *Constitutional Court Act*.

<sup>49</sup> Para. 3 of Article 160 of the *Constitution*; Para. 1 of Article 51 of the *Constitutional Court Act*.

<sup>50</sup> Para. 1 of Article 52 of the *Constitutional Court Act*.

<sup>51</sup> Para. 1 of Article 59 of the *Constitutional Court Act*.

<sup>52</sup> Para. 2 of Article 161 of the *Constitution*; Para. 2 of Article 59 of the *Constitutional Court Act*.

<sup>53</sup> Para. 1 of Article 60 of the *Constitutional Court Act*.

<sup>54</sup> Para. 2 of Article 60 of the *Constitutional Court Act*.

#### 4. Ombudsman<sup>55</sup> and NGO's

The Ombudsman is an institution for out of court and informal protection of human rights and fundamental freedoms. According to the *Constitution*, its function is to protect human rights and fundamental freedoms in matters involving state bodies, local government bodies and statutory authorities<sup>56</sup>.

The Ombudsman is empowered to submit proposals, opinions, critiques or recommendations to state bodies, local government bodies and statutory authorities which these bodies are obliged to discuss and answer to within the term determined by the Ombudsman<sup>57</sup>. The Ombudsman may submit initiatives for amendments of laws and other legal acts to the National Assembly and the Government<sup>58</sup>, and provides opinions from the viewpoint of the protection of human rights and fundamental freedoms on the issue dealt with to all other bodies<sup>59</sup>. The Ombudsman may enter any premise and may perform a so-called inspection also in jails and other premises with limited freedom of movement<sup>60</sup>. The Ombudsman is also authorised to discuss broader questions important for the protection of human rights and fundamental freedoms as well as for the legal protection of citizens in the Republic of Slovenia<sup>61</sup>. Under Para. 2 of Article 50 of the *Constitutional Court Act*, the Ombudsman is empowered to lodge a constitutional complaint before the Constitutional Court.

Special ombudsmen may be empowered by law to make determinations on particular subjects<sup>62</sup>.

There were many NGO's established taking care of particular human rights.

#### B. International System

Slovenia is bound by the constitutional provision which determines that laws and other regulations shall comply with generally accepted principles of international law and shall accord with treaties which bind Slovenia from time to time. Proclaimed treaties to which Slovenia adheres shall take immediate effect; that means with ratification and publication they become a part of Slovenian internal legal order<sup>63</sup>.

As a member of the United Nations as well as a member of the Council of Europe and the European Union Slovenia shall take into consideration the corresponding documents which

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<sup>55</sup> See also Trpin, G., Varuh človekovih pravic in temeljnih svoboščin, *Nova ustavna ureditev Slovenije*, Zbornik razprav, Ljubljana, ČZP Uradni list, 1992, 114. See Grad, F., Kaučič, I., Ribičič, C., Kristan, I., *Državna ureditev Slovenije*, Ljubljana, ČZP Uradni list, 1996, 442.

<sup>56</sup> Para. 1 of Article 159 of the *Constitution*.

<sup>57</sup> Article 7 of the *Ombudsman Act*.

<sup>58</sup> Para. 1 of Article 45 of the *Constitutional Court Act*.

<sup>59</sup> Article 25 of the *Ombudsman Act*.

<sup>60</sup> Article 42 of the *Ombudsman Act*.

<sup>61</sup> Para. 2 of Article 9 of the *Ombudsman Act*.

<sup>62</sup> Para. 2 of Article 159 of the *Constitution*; a special ombudsman for rights of patients (health affairs) was already established

<sup>63</sup> Article 8 of the *Constitution*.

impose obligations on States also as regards economic and social rights:

### 1. United Nations

Under Article 8 of the *Constitution* the treaties to which Slovenia adheres shall take immediate effect. The conventions of the UN are the sources of the rights and liberties under the *Notification of Succession to the United Nations Conventions Act*<sup>64</sup>:

- *the Universal Declaration of Human Rights, 10 December 1948,*
- *the International Pact on Economic, Social and Cultural Rights of 19 December 1966.*

### 2. Council of Europe

- *The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 incl. the 11 Protocols*<sup>65</sup>.

Slovenia is signatory to the *European Social Charter*, but the National Assembly refers to it, e. g. also in the *Resolution Concerning the Basis for the Creation of Family Policies in the Republic of Slovenia*<sup>66</sup>.

### 3. European Union

As a member of the European Union, Slovenia became familiar also with the following documents concerning social rights as well:

3.1. *The Declaration on Fundamental Rights and Freedoms of the European Parliament of 12 April 1989,*

3.2. *The Treaty on the Constitution for Europe:*

Generally speaking, the ratification of the *Treaty* was always among the Slovenian priority tasks. In accordance with Article 3.a) of the *Constitution* as well as with Article 75 of the *Foreign Affairs Act*<sup>67</sup>, the *Treaty* was ratified by the National Assembly with a two third majority of votes of all deputies. *The Act Ratifying the Treaty Establishing a Constitution for Europe and the Final Act*<sup>68</sup> was adopted by the National Assembly<sup>69</sup> on 1 February 2005.

3.3. *The Lisbon Treaty*

There were no special preliminary discussions on the contents of the *Lisbon 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<sup>70</sup>. The

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<sup>64</sup> Official Gazette RS – MP, No. 9-55/1992, p. 103 (Official Gazette RS, No. 35/92).

<sup>65</sup> The Slovenian ratification was published in the *Official Gazette RS*, No. 7/94.

<sup>66</sup> Official Gazette RS, No. 40/93.

<sup>67</sup> Official Gazette RS, nos. 45/01, 78/03

<sup>68</sup> Official Gazette RS, no. 15/05, Mednarodne pogodbe (Treaties), no. 1/05.

<sup>69</sup> By 79 yes and 4 noes.

<sup>70</sup> 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.

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* is one of Slovenia's priorities as the EU president during the first half of 2008.

## **VI. Social Rights – General** <sup>71</sup>

The Slovenian constitutional systems before 1991 declared the priority of the social (and economic) rights as an essential part of the former systems. Beside classical political and economic rights also some constitutional rights more typical of the former social systems were declared, e.g. the right to self-government as one of the fundamental human and citizens' rights in the former so-called socialist society. In current constitutional systems in force such as the Slovenian system, we can see the renaissance of classical rights as well as the gradual discontinuation of constitutional regulation of social (and economic) rights to a great extent.

The contents of the constitutional provisions in force concerning part II. Human Rights and Fundamental Freedoms as well as the Part III. Economic and Social Relations, shows that all rights which are a part of a general complex of human rights are there included. The system also includes two international protective measures:

- Article 8 of the *Constitution* which declares that laws and other legislative measures shall comply with generally accepted principles of international law and shall be in accord with international agreements which bind Slovenia from time to time, and
- the provision of Para. 5 of Article 15 of the *Constitution*, which prescribes that it shall not be permissible to restrict any human right or fundamental freedom exercisable by acts which would otherwise be legal in Slovenia, on the basis that this *Constitution* does not recognize that right or freedom or only recognizes it to a limited extent, as arises from some international legal acts concerning human rights.

The most important constitutional provisions are as follows:

- the protection of human rights against different possible repressive interventions of the State as well as against abuse of power <sup>72</sup>;
- the economic, social and cultural rights <sup>73</sup>;
- legal and other mechanisms for efficient human rights protection <sup>74</sup>.

## **VII. Particular Social Rights** <sup>75</sup>

**Under the *Constitution* in force, the social rights expressly guaranteed are as follows:**

- A. The Freedom of Trade Unions**
- B. The Right to Strike**
- C. The Freedom of Work**
- D. The Special Rights of Foreigners Employed in Slovenia**
- E. The Right to Social Security**
- F. The Right to Health Care**
- G. The Rights of the Disabled**
- H. The Rights and Duties of Parents**

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<sup>71</sup> Rupnik, J., Cijan, R., Grafenauer, B., *Ustavno pravo Republike Slovenije*, Posebni del, II. knjiga, Maribor, Univerza v Mariboru, Pravna fakulteta, 1994, 63. Bavcon, L., *Človekove pravice in temeljne svoboščine v novi Ustavi, Nova ustavna ureditev Slovenije*, Zbornik razprav, Ljubljana 1992, str. 42. Cerar, M., et al., *Ustavne določbe o človekovih pravicah in temeljnih svoboščinah, Nova ustavna ureditev Slovenije*, Zbornik razprav, Ljubljana, ČZP Uradni list, 1992, 49.

<sup>72</sup> See Articles 16, 17, 18 through 31, 34 through 38 of the *Constitution*.

<sup>73</sup> In general, the III. Part of the *Constitution*.

<sup>74</sup> Articles 15, 129, 130, 131, 132, 133, 134, 155, 156, 157, 158, 159 of the *Constitution*.

<sup>75</sup> See Ude, L., *Gospodarska in socialna razmerja, Nova ustavna ureditev Slovenije*, Zbornik razprav, Ljubljana, ČZP Uradni list, 1992, 104.

The Slovenian constitutions adopted after World War II contained many social rights. The *Constitution of 1991*, however, is based on the concept that the current *Constitution* shall contain only a minimal number or extent of social rights.

### A. Freedom of Trade Unions

The freedom to establish, operate and join trade unions shall be guaranteed <sup>76</sup>.

Only employees can exercise the above mentioned freedom. On the other hand, trade unions shall not act contrary to the legal order in force. With such a formulation, the *Constitution* wishes to emphasize the Freedom of Trade Unions as an essential element of the economic system. The provision of Article 76 of the *Constitution* is connected to Article 42 of the *Constitution* (the Right of Assembly and Association) <sup>77</sup>.

### B. Right to Strike

Employees have the right to strike <sup>78</sup>. Where required by the public interest, the right to strike may be restricted by law, with due consideration given to the type and nature of activity involved <sup>79</sup>.

Strikes shall be governed by such rules as are valid for legal strikes, i.e. within the scope of regulation by law (the *Strike Act*) and the Strike Rules. The strike may be limited by law, considering the type and nature of a certain field of activity (particular social activities, the economic infrastructure, the police, customs), or where such a restriction is in the public interest (e.g., if the strike can threaten human life, or if it can result in damages in tort) <sup>80</sup>.

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<sup>76</sup> Article 76 of the *Constitution*.

<sup>77</sup> Provisions of articles 2 and 3 of the *Act on Representativeness of Trade Unions* (hereinafter: "the ZRSin") are not in disagreement with article 76 of the Constitution, nor are they in disagreement with *ILO Convention no. 87*. The State has the right to link the recognition of legal personality to the depositing of laws with competent State body. In doing so, it is just not allowed to prescribe such conditions as might indirectly interfere with the right to freely establish a trade union.

The provisions of articles 6 and 10 of the ZRSin are not in disagreement with article 76 of the Constitution and *ILO Convention no. 98* is so far as introducing the institution of representative trade union, to which some special rights are granted by law, and in so far as prescribing that the fulfilling of the conditions set by law with respect to representativeness shall be decided by competent administrative authority. When the relationship of trade unions with employers and the State in matters which apply in general is involved, such solution is justified as makes possible the representation of those trade unions which represent the majority of employees. In this way, it is possible to avoid an excessive number of negotiating or contractual parties, the consideration also of just partial interests in the course of solving issues of general concern, and concrete results are made easier to arrive at.

An actually justified reason exists (has been shown to exist) for determining some special rights "of the most" representative trade unions in the case of cooperation of trade unions with the State and employers in harmonization and settling of issues of general applicability and/or in deciding the questions regarding the economic and social security of all employees - not just of those who are trade union members. No trade union has in this way been deprived of the possibility to act as representative of its members in the enforcing or protection of their economic and social interests and/or in negotiations or the concluding of collective agreements with employers (Decision of the Constitutional Court, No. U-I-57/95 of 5 February 1998, Official Gazette No. 13/98).

<sup>78</sup> Para. 1 of Article 77 of the *Constitution*.

<sup>79</sup> Para. 2 of Article 77 of the *Constitution*.

<sup>80</sup> The Constitutional Court of the Republic of Slovenia, Decision No. U-I-193/93, 7 April 1994, *Official Gazette RS* No. 35/94, *OdIUS III*, 38. The provisions of Article 98. b of the *Internal Affairs Act*, of Article 122. a of the *Punitive Sanctions Enforcement Act*, of Article 35. a of the *Customs Service Act* and of Article 147. a of the *Air*

### C. Freedom of Work

Freedom of work shall be guaranteed <sup>81</sup>. Everyone shall choose his employment freely <sup>82</sup>. Everyone shall have access under equal conditions to any position of employment <sup>83</sup>. Forced labour shall be prohibited <sup>84</sup>.

The above constitutional provision provides the programme principle and at the same time instructs the National Assembly when it decides on economic or other policies of the State.

The present right does not entail a subjective right to a respective position or job <sup>85</sup>. On the other hand, some laws impose concrete duties and obligations on employers and the State (the protection of workers against illegal acts of employers, compulsory social insurance for employees, protection of disabled persons etc.). The freedom of work involves three elements: the free choice of employment, the equal availability of work opportunities under equal conditions to each person, as well as the prohibition of forced labor.

The security of employment means that the state shall create opportunities for employment and

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*Services Act*, which provide for the right to strike and define the role of Trade Unions in organizing a strike, are not in conflict with the *Constitution* and the ratified treaties.

<sup>81</sup> Para. 1 of Article 49 of the *Constitution*.

<sup>82</sup> Para. 1 of Article 49 of the *Constitution*.

<sup>83</sup> Para. 3 of Article 49 of the *Constitution*.

<sup>84</sup> Para 4 of Article 49 of the *Constitution*.

<sup>85</sup> The legislature may determine the reasons for the termination of an employment relation, however, it must not encroach on constitutional rights. The freedom of work, free choice of employment and the accessibility of every work position under equal conditions mean that, also concerning the termination of an employment relation, equal conditions must apply to everyone: i.e. the personal circumstances determined in Para. 1 of Article 14 of the *Constitution* must not be the only criterion for differentiation. For possible differentiation between individual legal subjects to be allowed, a non-arbitrary, i.e. sound and substantiated, reason must be demonstrated (Para. 2 of Article 14 of the *Constitution*).

The challenged regulation, which determines the fulfillment of the conditions for a full old age pension to be a reason for the ex lege termination of an employment relation, does at first sight actually equally apply to all employees. The employment relation of everyone who fulfills the conditions for retirement is equally terminated (providing they are thus retired with social welfare benefits under the mandatory pension insurance system). According to the existing regulation of pension insurance, such a reason entails that an individual employment relation terminates differently as regards sex and, indirectly, age. Sex and age as personal circumstances do not have the same weight regarding the areas of pension insurance and employment relations. The reasons which justify different regulation, following these circumstances, of the conditions for acquiring an old age pension cannot be taken into consideration in the same manner when the conditions for the termination of employment relations are concerned. If the opportunity to retire on the basis of a lower age and a shorter period of work can be an advantage within the framework of pension insurance, the same might entail discrimination as regards the termination of an employment relation.

In accordance with Constitutional Court Decision No. U-I-298/96, dated 11 November 1999, there exist substantiated reasons for prescribing more advantageous conditions for the retirement of women. An advantage means that the individual can obtain something more, sooner, or in some other more advantageous manner, than applies to the general acquisition of certain rights. However, the individual may waive their advantages. If they cannot do this, the advantages are become constraints thus becoming the opposite of their original intention, leading to discrimination against those who cannot exercise their rights under the same conditions as others.

The fulfillment of the conditions for acquiring a full old age pension - indirectly also the reaching of a certain age - does not mean by itself that the individual is no longer capable of performing their work. It only means that a certain extent of social welfare stemming from the mandatory pension insurance system is guaranteed to them (Decision of the Constitutional Court, No. U-I-49/98 of 25 November 1999. Official Gazette RS, No. 101/99).

work, and shall ensure the protection of both by law <sup>86</sup>.

Under the above constitutional provision, the State creates possibilities for employment and work as well as insures the respective legal protection. To recognize the freedom of work (first of all, the freedom of the availability of work) and to insure the respective judicial protection, it would be unreal and would mean the introduction of declaratory provisions into such a legal act as the *Constitution* is. The same is relevant as regards the obligation of the State that it shall create the conditions necessary to enable each citizen to obtain proper housing <sup>87</sup>.

The inspectorate for work carries out the supervisory control of the implementation of laws, other regulations, collective agreements and general acts regulating employment, salaries and other incomes arising from the employment of workers in Slovenia and abroad, workers' participation in management, strikes and safety at work <sup>88</sup>. The inspectorate shall be established as a body (with its organisational units) within the Ministry of Labor <sup>89</sup>. The inspectorate shall provide for the implementation of policies and measures of labor inspection, cooperate with the Ministry of Labor concerning the preparation of regulations in its field of activity <sup>90</sup>. In addition, the inspectorate shall prepare reports on its activity for the parent Ministry <sup>91</sup>. The Government must submit the respective report to the National Assembly. After approval, the report must be sent to the International Labor Office <sup>92</sup>. During the exercising of their duties, the inspectors are empowered to make all respective arrangements <sup>93</sup>.

The right to equitable payment (salary)<sup>94</sup>:

Under the *Employment Relationship Act*, a worker has a right to personal income (payment, salary), in conformity with a respective general act, adjusted in accordance with the collective agreement and law. A law determines the sanction (penalty) for a concrete case if the employer doesn't pay an employee his salary at least once in a month.

Irrespective of the provisions of the collective agreements the worker has the right at least to the minimum wage. The minimum wage is regulated by the *Minimum Wage Act*. Under this law the minimum wage is set for each worker who works full time and fulfills work obligations, it is at least an amount which assures material and social security. Workers who work part time are entitled to receive a proportional share of such personal income.

#### **D. Special Rights of Foreigners Employed in Slovenia**

Aliens employed in Slovenia and members of their families have special rights provided by law

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<sup>86</sup> Article 66 of the *Constitution*.

<sup>87</sup> Article 78 of the *Constitution*.

<sup>88</sup> Article 1 of the *Labor Inspection Act*.

<sup>89</sup> Article 2 of the *Labor Inspection Act*.

<sup>90</sup> Article 3 of the *Labor Inspection Act*.

<sup>91</sup> Para. 1 of Article 5 of the *Labor Inspection Act*.

<sup>92</sup> Para. 2 of Article 5 of the *Labor Inspection Act*.

<sup>93</sup> Articles 12 through 23 of the *Labor Inspection Act*.

<sup>94</sup> See Dobrin, T., *Pravica do primernih delovnih razmer in do primernega plačila v slovenski pravni ureditvi, Uveljavljanje političnih, državljanskih, ekonomskih in socialnih pravic v pravnem sistemu Republike Slovenije*, Zbornik referatov, Ljubljana, Svet za varstvo človekovih pravic in temeljnih svoboščin, 1994, 226.



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## E. Right to Social Security

Citizens have the right to social security under conditions provided by law<sup>96</sup>. The state shall regulate compulsory health, pension, disability and other social insurance, and shall ensure its proper functioning<sup>97</sup>. Special protection in accordance with the law shall be guaranteed to war veterans and victims of war<sup>98</sup>.

Article 50 of the Constitution explicitly inserted among constitutional rights the right to a pension<sup>99</sup>.

The national social security system is based on the principle of national solidarity; this means that each citizen shall contribute from his/her personal income in order to cover dues within the scope of social security. As regards social security, first of all the principles of mutuality and solidarity shall be taken into consideration. The legal system is in the process of being changed and adapted. The legislation stated the following goals<sup>100</sup>:

- first of all the *Constitution* declares of the rights to social security, to health care as well as special protection models for certain individuals included in the fundamental human rights;

- the intention of the new legislation it is to adapt the system of social security to the new social circumstances, first of all to introduce by law the opportunities for additional voluntary insurance as well as for private initiatives concerning health care services, social welfare and child welfare;

- to assure by the new system the possible continuity with the former system of social security as regards the scope of entitled persons as well as the list or extent of available rights;

- the harmonization of the system with current international standards concerning the regulation of social security as well as harmonization with European systems of social welfare;

- that under the prevailing point of view it would be not possible to introduce some short-term extreme change in the system of social security, but only during a certain longer period. By means of a long-term successive introduction of changes, the violation of vested rights and expected rights of individuals can be prevented.

The laws regulating the social insurance preserved the starting point that with the public system offering support benefits (salary continuances and pensions) the lost salary will still be replaced to a great extent. Furthermore, the system provides opportunities for additional voluntary insurance, especially for higher income arising from pension insurance as well as for totally free

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<sup>95</sup> Article 79 of the *Constitution*.

<sup>96</sup> Para. 1 of Article 50 of the *Constitution*.

<sup>97</sup> Para. 2 of Article 50 of the *Constitution*.

<sup>98</sup> Para. 3 of Article 50 of the *Constitution*.

<sup>99</sup> MAVCIC, Arne. The Republic of Slovenia. V: KORTMANN, C. A. J. M. (ur.), FLEUREN, J. W. A. (ur.), VOERMANS, Wim (ur.), KINDLOVÁ, Miluše. *Constitutional law of 10 EU member state : the 2004 enlargement*. Deventer: Kluwer, 2006, str. X/1-X/60. [COBISS.SI-ID [300287](#)]

<sup>100</sup> See Bubnov-Škoberne, A., *Pravica do socialne varnosti in pravica do socialne pomoči, Uveljavljanje političnih, državljskih, ekonomskih in socialnih pravic v pravnem sistemu Republike Slovenije*, Zbornik referatov, Ljubljana, Svet za varstvo človekovih pravic in temeljnih svoboščin, 1994, 202.

health service. For persons without earned incomes or receipts from social insurance, the right to financial assistance within the social welfare system is guaranteed.

The constitutional provisions of Article 50 are very general and instructive. The *Constitution* guarantees the right to social security to all citizens. In addition, it is necessary to consider also the provisions of Article 79 of the *Constitution*, which determines that foreigners employed in Slovenia, together with their family members, shall enjoy such special rights as determined by law. The formulation of Para. 2 of Article 50 of the *Constitution* provides for compulsory and voluntary insurance. On the other hand, under Para. 3 of Article 50 of the *Constitution*, war veterans and civilian casualties of war shall be guaranteed special benefits as provided by law; it concerns especially the regulation of their own rights as regards their social insurance and social welfare<sup>101</sup>.

The right to social security has to be included beside the right to work and the right to adequate payment among these human rights which are the basis for the achievement of two fundamental universally recognized values, human dignity and human economic security<sup>102</sup>.

The new laws by which the constitutional right to social security has been exercised, regulate in the field of the social insurance the following branches: pension and disability insurance, health protection and insurance as well as unemployment insurance (e.g. *Pension and Disabled Persons Insurance Act*, *Employment and Unemployment Insurance Act*).

The laws on security regulate the health care and payments determined by the *Convention of ILA No.102*, which also applies to Slovenia. The particular support benefits (pensions, salary continuances as well as other support benefits) are assessed as a percentage of earlier salaries. These percentages concerning the assessment of support benefits exceed the minimum level as defined by the *Convention of ILA No.102*.

The *Social Welfare Act* defines the system of social services and the institutionalized protection of needy individuals as well as the rights to support benefits from social welfare. The support benefits and services under Article 1 of the *Social Welfare Act* have the character of rights. Some conditions for the acquisition of a right are defined by law, but other conditions are dependent on a discretionary evaluation by an organisation of public power which is empowered to evaluate entitlements.

The protection of child, mother and family is specially regulated by the *Child Welfare Act* and by the *Family Support Benefits Act*. Until the present, the protection of children and the family was oriented first of all to the protection of families' interests with both employed parents as well as families with the lowest incomes. The law guarantees a universal child allowance and a universal parental allowance for parents who are not entitled to receive parental pay benefits. So the law fulfills to a higher degree the rights of individuals and obligations of the State than those under the *European Social Charter*.

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<sup>101</sup> See Končar, P., *Pravica do socialne varnosti, Nova ustavna ureditev Slovenije*, Zbornik razprav, Ljubljana, ČZP Uradni list, 1992, 85.

<sup>102</sup> The Constitutional Court of the Republic of Slovenia, Decision No. U-I-135/92, 30 June 1994, *Official Gazette RS* No. 44/94, *OdlUS III*, 84 decided as follows: The fact that the *Deputies Act* grants to deputies of the National Assembly more favourable opportunities for acquiring and asserting rights arising from old-age insurance is not unconstitutional itself. For such benefits not to be contrary to the constitutional provision concerning Slovenia as a State governed by the Rule of Law and a Social State, they should be based not only on the fact of deputy mandate, but primarily on the specificities and duration of such a mandate; they should be proportionate to these factors and may depart from the rules of the general insurance system only to the degree mentioned, also taking into consideration general social circumstances. The principles according to which Slovenia is a democratic republic and a State governed by the Rule of Law require that proposals concerning special benefits for deputies of the National Assembly have to be justified and accessible to the public, together with the reasons given, throughout the procedure in which such proposals are decided by the National Assembly.

A general characteristic of the new regulation by law of rights within the system of social security is the tendency towards the reduction of rights within the public compulsory system of social insurance as well as the tendency towards the concurrent legalisation of additional private insurance, as well as private initiatives in health care, child welfare and in social welfare. At the same time the rights to social benefits in the field of social welfare have been extending, especially as regards the circle of entitled persons and the right to support benefits in the field of the protection of children and the family<sup>103</sup>.

## F. Right to Health Care

Everyone has the right to health care under conditions provided by law<sup>104</sup>. The rights to health care from public funds shall be provided by law<sup>105</sup>. No one may be compelled to undergo medical treatment except in cases provided by law<sup>106</sup>.

Health care has to be considered as a system of social, collective and individual measures for strengthening, preserving and restoring health. These measures and who health caretakers are, beside each individual, are determined by law. Along with the right to the health care, the *Constitution* adds the right to health insurance, as determined in Article 50 of the *Constitution*. As regards the principle that the right to health care is enjoyed to each person, the *Health Care and Health Insurance Act*<sup>107</sup> determines that the Republic of Slovenia provide from the State budget also the resources for the emergency health care of persons without residence, of foreigners from countries with which Slovenia has not concluded treaties as well as foreigners and Slovenian citizens with permanent residence abroad who are staying in the Republic of Slovenia or who are traveling through Slovenia, but for whom it is not possible to guarantee the respective resources for payment of costs of their health service<sup>108</sup>.

The *Constitution* explicitly refers to the regulation by law of rights arising from health care, which are financed out of public revenue<sup>109</sup>. The obligation to take care of ones own health and

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<sup>103</sup> See Bubnov-Škoberne, A., *Pravica do socialne varnosti in pravica do socialne pomoči, Uveljavljanje političnih, državljanjskih, ekonomskih in socialnih pravic v pravnem sistemu Republike Slovenije*, Zbornik referatov, Ljubljana, Svet za varstvo človekovih pravic in temeljnih svoboščin, 1994, 214.

<sup>104</sup> Para. 1 of Article 51 of the *Constitution*.

<sup>105</sup> Para. 2 of Article 51 of the *Constitution*.

<sup>106</sup> Para. 3 of Article 51 of the *Constitution*.

<sup>107</sup> Article 7.

<sup>108</sup> See Končar, P., *Pravica do zdravstvenega varstva, Nova ustavna ureditev Slovenije*, Zbornik razprav, Ljubljana, ČZP Uradni list, 1992, 86.

<sup>109</sup> The right to social security determined in Para. 1 of Article 50 of the *Constitution* in the broadest sense encompasses all social rights which ensure the individual the possibility of survival and a decent life when they cannot provide such for themselves due to the realization of social risks (e.g., illness, old age, unemployment). Furthermore, the right to health care determined in Para. 1 of Article 51 of the *Constitution* is more concretized, however narrowly connected with the previously mentioned right, from which the state has the obligation to establish a system which enables financial access to all health services to all those who are in need of such, and to ensure the operation of a medical service which is capable of performing the health services needed. The *Constitution* does not determine which measures the state should select for such. Thus, in the area of health insurance, in addition to mandatory health insurance, which, as already mentioned, is determined by the *Constitution*, the state may introduce other types of insurance or combinations of different systems of insurance which ensure individuals certain constitutionally guaranteed rights in the area of health care. This in itself, however, cannot be a subject of constitutional review. Only supplemental health insurance together with mandatory health insurance enable insured persons full coverage of the expenses for medical services. Therefore, the legislature must prescribe a regulation which is necessary for ensuring the mentioned right also for that part of health insurance which is voluntary and carried out as a commercial insurance activity on the free market. In this framework it may determine special conditions for the carrying out of activities which refer to both

the prohibition against threatening the health of others are in Slovenia the object of regulation by law. The *Constitution* determines only that no person shall be compelled to undergo medical treatment except in such cases as are determined by law <sup>110</sup>. The mentioned constitutional provision also guarantees personal integrity of person.

While exercising the above mentioned constitutional right, concerning Article 14 and /or Article 51 of the *Constitution*, it is a question whether each person could have equal right to health care, regardless of their financial circumstances in a concrete case. In addition, Article 51 of the *Constitution* determines that the conditions for the exercising of the right to health care shall be regulated by law. But according to Article 14 of the *Constitution* <sup>111</sup> the law could not regulate such conditions which could entail unequal rights, among others also concerning financial circumstances. The *Health Care and Health Insurance Act*) established the basis for the relatively high level of participation of individuals in the costs of health care concerning some kinds of services or in certain circumstances (medical treatment of non-occupational injuries); but despite some exceptions determined by law, which are not determined in detail, this obligatory participation can prevent an individual who has financial difficulties from exercising the right to health care, because he/she is not able to help pay for the medical treatment costs.

### G. Rights of the Disabled <sup>112</sup>

Disabled persons shall be guaranteed protection and work-training in accordance with the law <sup>113</sup>. Physically or mentally handicapped children and other severely disabled persons have the right to education and training for an active life in society <sup>114</sup>. Such education and training shall be financed from public funds<sup>115</sup>. *The Constitutional Act Amending Para. 1 of Article 14 of the Constitution* (regulating the prohibition of discrimination) inserted a general prohibition on discrimination due to a disability.

The *Constitution* includes in Article 52 the generally implemented term: the disabled, which includes two categories of persons, disabled workers and disabled persons. Among the different rights which by law belong to disabled persons, the *Constitution* determines in Para. 2 and 3 of Article 52 explicitly only the right of mentally and physically handicapped children and other severely disabled persons to education and work-training in order that they may lead an active life in society <sup>116</sup>. The education and work-training shall be financed out of public

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insurance companies and insured persons (Decision No. U-I-277/05 of 9 February 2006, Official Gazette RS, No. 21/06).

<sup>110</sup> Para. 3 of Article 51 of the *Constitution*.

<sup>111</sup> The principle of equality before law.

<sup>112</sup> See Končar, P., Pravice invalidov, *Nova ustavna ureditev Slovenije*, Zbornik razprav, Ljubljana, ČZP Uradni list, 1992, 87.

<sup>113</sup> Para. 1 of Article 52 of the *Constitution*.

<sup>114</sup> Para. 2 of Article 52 of the *Constitution*.

<sup>115</sup> Para. 3 of Article 52 of the *Constitution*.

<sup>116</sup> Although the legislature, in accordance with the *Constitution*, abrogated the obligation of parents to maintain their adult disabled children who do not have sufficient funds for living (Article 123 of the *Marriage and Family Relations Act*, which was amended by the implementation of Article 26 of the *Act Amending the Marriage and Family Relations Act*), but did not at the same time regulate in accordance with the *Constitution* the obligation of the state regarding the social protection of such disabled persons as determined by Article 52 of the *Constitution*, it excessively interfered with the legal position of the discussed group of disabled persons. As a consequence, an unlawful gap in the law occurred in the legal system which the legislature is obliged to fill.

Until the established inconsistency is remedied, the Constitutional Court determined the manner of the

revenue. The special protection of war veterans and civilian casualties of war are guaranteed by the constitutional provision on the right to social security<sup>117</sup>.

## H. Rights and Obligations of Parents

Parents have the right and duty to maintain, educate and raise their children<sup>118</sup>. This right and duty may be revoked or restricted only for such reasons as are provided by law in order to protect the child's interests<sup>119</sup>. Children born out of wedlock have the same rights as children born within it<sup>120</sup>.

The provision of Para. 1 of Article 54 of the *Constitution* provides the constitutional ground for the so-called parental right, which is under law<sup>121</sup> composed of the rights and obligations of parents to maintain, educate, guide as well as to protect the rights and benefits of children<sup>122</sup>.

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implementation of the decision. It decided that in the intervening time parents are obliged to maintain also their adult disabled children who are not capable of independent living due to their disability and who do not have sufficient funds for living, as applied prior to the implementation of Article 26 of *the Act Amending the Marriage and Family Relations Act* (Decision of the Constitutional Court No. U-I-11/07 of 13 December 2007, Official Gazette RS, No. 122/07).

<sup>117</sup> Para. 3 of Article 50 of the *Constitution*.

<sup>118</sup> Para. 1 of Article 54 of the *Constitution*.

<sup>119</sup> Para. 2 of Article 54 of the *Constitution*.

<sup>120</sup> Para. 3 of Article 54 of the *Constitution*.

<sup>121</sup> Para. 2 of Article 4 of the *Marriage and Family Relations Act*.

<sup>122</sup> The provision of Para. 1 of Article 106 of *the Marriage and Family Relations Act* (hereinafter ZZZDR) determines that a parent who does not live with a child has the right to personal contacts with the child, except in cases that a department for social security decided otherwise regarding the best interest of a child. On the basis of Para. 3 of Article 78 and Article 80 of ZZZDR a court decides on the deprivation and limitation of personal contacts in case of divorce or an annulment of marriage. In all other cases a department for social security decides on contacts according to Para. 1 of Article 106 of ZZZDR. At the request of one of the parents, the department for social security also decides on the manner of carrying out the mentioned parent's rights to the contacts with a child, which are prevented by the parent who was entrusted the care for a child. A court decides on the deprivation and limitation of personal contacts on the basis of *the Civil Procedure Act* (hereinafter ZPP) whereas a department for social security decides on the basis of *the Administrative Procedure Act* (hereinafter ZUP). The fact that the provision of Para. 1 of Article 106 of ZZZDR determines the competence of a department for social security to decide on the right of parents to the contacts with a child, it is by itself not inconsistent with the provisions of MEKUOP, as the *Convention* allows that an administrative body decides thereof, however, only if it had the same competence as a court. Departments for social security do not have such competence. The important provisions of the European Convention on the Exercise of Children's Rights, Official Gazette RS-MP, No. 26/99 (hereinafter MEKUOP) which grant the special rights of a child when decided on its contacts with the parents, are not directly applicable. ZUP, applied by departments for social security, does not contain the same provisions as ZPP. Thus, the legislature did not fulfil the obligations which the State engaged by the ratification of MEKUOP. This is the reason why the provision of Para. 1 of Article 106 of ZZZDR is inconsistent with the previously mentioned MEKUOP provisions. Therefore, the Constitutional Court annulled it. For the same reasons the Constitutional Court annulled the provision of Para. 4 of Article 114 of ZZZDR which determined that care of a child (or a scope of carrying out a parental right which is in fact a decision on a care) is decided in some cases by a court according to ZPP, and in some by a department for social security according to ZUP.

In cases when parents, even if they do not live together, wish to have joint responsibility for a child and their agreement is not contrary to the child's interests, a restriction by law of the rights of the parents is not needed. In such a case the legislature is not entitled to interfere with the constitutionally protected rights of parents in accordance with Para. 1 of Article 54 of the *Constitution*, and exclude one of them from carrying out a parental right. The regulation of Para. 1 of Article 105 and Para. 1 of Article 114 and Para. 2 of Article 114 of ZZZDR which does not foresee the possibility of a joint care of children or joint carrying out of a parental right in the case of a separated living of parents, in cases that parents agree thereof and their agreement is to the benefit of a child, restricts the rights of the parents without a justified reason, and is thus inconsistent with Para. 1 of Article 54 of the *Constitution*.

The parental right desists from the child's majority; At that time the obligation of parents to represent the child also desists. Under the *Constitution*, the State could or must intervene in the exercising of the parental right with measures which are carried out by first of all by the social welfare system. Children born out of wedlock shall have the same rights as children born within marriage<sup>123</sup>.

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On the basis of an act on ratification, which is a national law, the provisions of a treaty become a part of the national legal order. This is true in cases when its provisions are directly applicable, i.e. they regulate the rights and obligations of legal entities and natural persons. However, if they are not directly applicable such ratified, published and binding treaties create an international legal obligation for the State according to which the State must adopt adequate legal acts in the national legal order by which it will fulfil this obligation. Therefore, for the review of the consistency of law with a treaty it is important whether an individual provision of the treaty is directly applicable. The courts in the State are addressed to answer this question. In the proceedings of a constitutional review, the Constitutional Court is addressed to answer this question.

The provision of Para. 3 of Article 9 of the *Convention on the Rights of the Child* (hereinafter KOP) is directly applicable, as from the *Convention* it clearly derives the right of a child to maintain personal relations with both parents on a regular basis. At the time of coming into force of this provisions in our legal order, the provision of Para. 1 of Article 106 of ZZZDR was already in force. This means that the provision of Para. 3 of Article 9 of KOP is a subsequent, hierarchically higher (Article 8 of the *Constitution*) provision, which with its coming into force annuls so far applicable possibly different provisions (*lex posterior derogat legi priori*). Thus, the Constitutional Court did not need to review the issue whether, regarding the provision of Para. 1 of Article 56 of the *Constitution*, the provision of Para. 1 of Article 106 of ZZZDR must be interpreted in the above-mentioned manner, as the provision of Para. 3 of Article 9 of KOP which grants this right is unambiguous (Decision of the Constitutional Court No. U-I-312/00 of 23 April 2003, Official Gazette RS, No. 42/03).

<sup>123</sup> See Zupančič, K., Prave in dolžnosti staršev, *Nova ustavna ureditev Slovenije*, Zbornik razprav, , Ljubljana, ČZP Uradni list, 1992, 90.