

Minority Rights and Constitutional Law in the "Post-Modern" State

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Introductory remarks

Most of our contemporaries would no longer dispute that the real role of the constitution and of constitutionalism is to facilitate a productive interaction between reinforcing identity and preserving differences. A number of issues relating to the constitution and constitutionalism grow out of socio-political settings encircled by colliding and competing identities. These identities can be national, regional, linguistic, religious, ethnic, political, generational, class or ideological in character. In order to permit their expression and to harmonise them with the basic principles of constitutionalism, a framework has to be set up for a kind of interplay between identity and difference, a process in which these competing agents and elements combine, diverge, and so forth.

In their most elementary form, the fundamental values of constitutionalism are the *need for checks and balances in government*, the *endorsement of the principle of legality* and the *protection of fundamental rights*. Each of these basic characteristics of constitutionalism seeks its legitimacy in relation to socio-political reality oriented towards the conflicting poles of identity and difference. Although each of these values has a role to play in the interaction between identity and difference, on this occasion stress is placed on the protection of fundamental rights, since the present text focuses exclusively on one group of rights. Bearing in mind the aim and purpose of constitutionalism, the protection of fundamental rights, in the words of **M. Rosenfeld**, also implies the existence of an ongoing tension between identity and difference. Against the background of these rights, the element of difference is to be found between the individual citizen, on the one hand, and the collectivity or the dominant majority, on the other. Without this difference, the individual would not seek protection against the encroachment of state authorities on the area of his fundamental interests. However, the responsibility for the protection of fundamental rights in the broadest sense of the term requires the existence of at least two elements: first, consensus as to which rights are to be regarded as fundamental, and hence provided constitutional protection (this involves identity between the authors of a constitution and those who are subject to that constitution), and, second, the existence of another

type of identity linking all members of the community as subjects of the same constitutional rights. In this manner, the constitutional provision that all persons are entitled to *the same respect and dignity* generates the basis for the identity of individuals who might otherwise consider themselves different in some ways.

The question of identity versus difference is the first to be raised whenever minority rights are concerned, one of the most disputed issues of legal and political theory and practice in the world today. It is the subject of intense scrutiny by international public law, but also by national public law, first of all constitutional law. Controversies exist in both international and constitutional law. A series of unsettled issues still remain in international law, including, amongst others, even the definition of the word "minority". It is, namely, often argued that in the current state of affairs it is impossible to arrive at an internationally acceptable definition of the term. Still, it must be stressed that situations of this kind are not quite unknown to international law, and, once formulated, the application of certain rules is secured by tacit agreement about their subject. This also applies to the identification of the subjects of application of international law concerning minorities. It is precisely in this area, more than anywhere else, that the presence is felt of political considerations, which permit a degree of flexibility in the individualisation of minorities for the purpose of the needed special protection. This also goes for the analysis of the historical evolution of the multilateral system of minority protection, or of the relationship between human rights and minority rights, a controversial issue centring on the meaning and scope of Art. 27 of the *International Charter of Civil and Political Rights*.

However, it needs to be stressed that the question of the rights of minorities and their position within a country's national legislation, i.e. within *constitutional law*, represents a different chapter. Here we are concerned above all with a number of specific questions. First, why and in what way was traditional constitutional law forced to incorporate new rights, among them minority rights, and whether in the classification of constitutional rights minority rights figure as a separate group of standardised rights, and if so, what place do they occupy among the minority rights? The second question to be considered is the way in which the internal legislation, above all

constitutional law, of the "post-modern" state, treats minority rights?

About the transformation of the constitutional paradigm in the "post-modern" state

As opposed to the individualistic concept of rights in the 18th and 19th centuries, originating in **Locke** (all rights are individual, rights come before the state), which did not recognise group rights, the concept of rights which evolved in the 20th century begins to name the group as a means to realise the fundamental goals and wants of individuals. In the early 20th century **J. Ellul** asserts that the concept of individual freedoms should be replaced by group rights if a society is to develop and prosper freely. The acceptance that man is a social being gives rise to a special category of group rights, but these rights have a place only side by side with individual rights.

Two dominant ideologies of the second half of the 20th century, the ideology of democratic liberalism and that of Marxism, have had a large impact on the positioning and proposed solutions to the problem of minority rights as group rights, both at an international level and in domestic policies of the states concerned. In their essence, though, both of these ideologies are hostile to the political reality of ethnic identification, although, for reasons of political strategy, they have often expressed their interest in minority identification and in the political activity this implies. Until recently, Anglo-American and Western European liberal democratic societies provided guarantees for each human right which they considered important enough to be regulated on an individual basis. On the other hand, also until recently, socialist societies attempted to guarantee human rights on a collective basis. Of course, it is easily argued that this difference in emphasis reflected different concepts as to which factor - the individual or the collectivity - was at the centre of the "good state."

About the classification of rights in constitutional documents

The authors of the first constitutions were, as we all know, simple and practical people. The first constitutions rarely contain the phrases so dear to the theoreticians and apologetics of constitutionalism. The expression "fundamental rights", for example is not to be found in the US Constitution. Its first ten amendments comprise in fact guarantees of the following *personal* rights: (1) *freedom of religion, of speech, of the press, of assembly, and of peaceful protest*; (2) *freedom to bear arms for the purpose of setting up a well-trained militia*; (3) *freedom from having soldiers quartered in one's home*; (4) *freedom from search and arrest without probable cause*; (5) *right to be tried by a Grand Jury, except in military cases, and freedom from being twice put in jeop-*

ardy of life or limb or having to be a witness against himself; (6) *the right to a speedy and public trial by an impartial jury and the right to be informed on the accusation, the right to obtain witnesses in one's favour, and to have a counsel for defence*; (7) *the right of trial by jury in civil suits where the value exceeds twenty dollars and the prohibition of re-examination by another court except according to the rules of common law*; (8) *prohibition of excessive fines and cruel punishment*; (9-10) *individuals enjoy other rights which are not enumerated in the Constitution or in the amendments, except those delegated to the Federal Government, or which are reserved for the States, or are prohibited to them.*

The significance of the first ten amendments added to the US Constitution in 1791 is in that they charge the recently established federal state with the duty to respect certain basic rights, while Amendment XIV (passed in 1868) charges the individual federal units with the same obligation. The rights provided for in these amendments were expressed in negative terms: Congress shall make no law abridging the freedom of the press; the right to keep arms shall not be infringed; the right to be secure shall not be violated; no person shall be deprived of life, liberty or property without due process of law; no fact tried by a jury shall be re-examined than according to the rules of the common law.

The French Declaration of the Rights of Man (1789), too, simply enumerates the rights and freedoms: equality before the law (Art. 6), the principle of non-retroactivity of laws (Art. 8), freedom of expression (Art. 11), equality before state authorities (Art. 13), the right to property (Art. 17), etc. In 18th century ideology, which these two documents reflect, freedom is considered an exclusively individual good. In order to achieve this sacred individualism, the French Revolution broke down all the existing groupings (the estates, corporations, congregations). Grown out of the spiritual milieu of classical constitutional law, these and many other documents dealing with the rights of man and the citizen exclusively focus on the individual dimension.

Our century, in turn, brings with it a tendency of socialisation and concretisation of rights and freedoms. Many constitutions are made on this model. Among them is the West German Grundgesetz of 1949, which can be used as an illustration of classification of rights. Individual freedoms continue to exist, applicable when a person is regarded as an isolated individual; but there are also collective freedoms, applicable to, and exercised by, groups. That constitution draws a distinction between freedoms that are ends in themselves (freedom of ideas, freedom of religion, etc.) and freedoms that are merely means to an end (freedom of association, freedom of assembly, etc.). Another distinction that can be made is between traditional freedoms and economic and social rights, which first appeared in modern constitutions after 1919. In the most general sense, the latter freedoms are not protected as strictly as this is done with tradi-

tional freedoms. The authors of the constitution defines the fundamental rights as being inviolable and inalienable, and equally directly applicable and binding for the legislative and for the executive and judiciary branches of government. Their essence must not be restricted (Art. 19/2). All rights are not expressed in absolute terms. The wording of the constitution strives towards a balance in the rights of the individual so as to prevent their use against the "constitutional order or morality". Some of the more recent constitutions seem to strive to constitutionalise these tendencies.

There are countries, on the other hand, where economic freedoms and rights are not incorporated in the constitution, but are efficiently covered by ordinary legislation (e.g. Belgium).

Even the first known constitutional documents on human rights are currently supplemented by this new dimension of socialisation and concretisation. Thus, for example, the simplicity of the French Declaration of the Rights of Man, as the primary source of the rights and liberties of man and the citizen in France, have been enriched by the contents of subsequently passed constitutional documents. As a result, in France today, by the will of the authors of the constitution, fundamental rights derive not only from substantive law, the currently valid 1958 Constitution, but also from the 1789 Declaration, the 1946 Preamble to the Constitution, and from the basic principles recognised by the laws of the Republic. These are rights recognised in a series of acts, primarily dealing with the right to equality, the principles of national sovereignty and democracy, or some other aspects of freedoms (individual freedom, freedom of the press). The distinctions drawn for the purpose of classification include the first category, involving rights inherent in human beings. These rights have their source in the 1789 Declaration (equality, freedom, security, resistance to repression, etc.) The second category comprises those rights which represent specific aspects or consequences of the previously mentioned rights. For instance, the principle of equality has aspects such as the equality of sexes, equality before the law, equality in employment, equality and universality of suffrage, equal access to education, training and culture, equality of conditions for the exercise of freedoms. The principle of freedom has the aspects of freedom of conscience, thought and expression and freedom of the press, as well as freedom of religion, freedom of assembly, association and education; the autonomy of university teachers, trade union freedom, freedom to strike and, of course, individual freedom. This category also encompasses the principle of ownership and the principle of security. The third category of fundamental rights involves the rights with which the constitution endows collectivities, but which require the passing of special regulations to be activated. These are the right to employment, to the participation of employees in collective bargaining, and the right to participate in the management of enterprises, the right

to a family, health protection, material security, to holidays, to leisure time, etc., etc.. The fourth category covers rights which are pivotal for the situation of the individual but also decisive for the character of the state in question. It is the right of territorial collectivities to freedom of government by elected bodies, freedom of self-determination of peoples, respect for pluralism of modes of socio-cultural expression, participation in political bodies, and the right of expression through elections. The last right determines the democratic character of a state. To this can be added the division of powers, the separation of the executive from the judiciary branch of government, etc.

The same can be said of the *Russian Constitution* (1993), where all rights are located in the second chapter, with the statement that they are directly effective. Basically, the list of rights is similar to those found in *Stalin's* constitution of 1936 and *Brezhnev's* constitution of 1977, with certain additional provisions reflecting the new era in the Russian state. These provisions warrant the freedom of private enterprise, private ownership of land, and the right to a fair trial. Interestingly enough, the 1992 *Treaty on the European Union* does not contain a *Bill of Rights*. This circumstance represented from the outset the threat of the supremacy of common legislation, but the opinions of the European Court are gradually forming the stance that the protection of human rights constitutes an integral part of the legal system of the Community. Stress is laid on the significance of the "constitutional traditions" of the member states and on the European Convention on Human Rights (1950).

There is a discernible tendency in contemporary constitutional law wherein the latest changes of international documents dealing with minority rights, whatever our opinion of them, are all focused on pluralistic discourse about the constitution. These changes, as many authors point out, have added to this discourse another important feature, namely, an even more resolute and forthright attitude towards a more comprehensive accommodation of pre-political group differences - ethnic, linguistic, religious. Side by side to the formerly dominant constitutional paradigm, expressed through the slogan: "*Democracy as the promotion of human rights against the background of the welfare state*", the emerging constitutional teleology is offering an alternative syntagm: instead of, or together with, the fundamental values of *Liberty-Equality-Brotherhood*, emphasis is now on *Security-Difference-Solidarity*. In other words, it is the material principles of peace and security, of tolerance and the promotion of differences, and of social justice which are today beginning to legitimise the political symbolism of human rights. All of this is the product of the interventionist nature of the contemporary welfare state, in which enormous efforts have been made to reconcile the various generations of human rights and to evolve a new relationship between the citizen and the

state, but also between the state and the international community. The growth and evolution of international organisations and of the level of organisation in them, the conduct of transnational operations but also the developments at national level, all of these comprise a frame of reference which reflects with ever greater clarity the trend of changing contents of the sovereignty of the "state-nation". Proceeding from the rights defined by international documents, the state today is required to "respect and secure all individuals in its territory and to subject them to its jurisdiction". This task is to be performed regardless of differences in language or religion, or of national or ethnic differences. In other words, when it comes to human rights, the state is to secure a legal and administrative system that will apply to all individuals within its jurisdiction, a system that will allow no differences between the majority and the minorities in the application of these rights. Evidently, then, a series of important issues (economic, social, political) is today determined at supra-state level. The post-modern tendencies, which sometimes over-emphasize the signs of the gradual weakening of the role of the state, and the weight of the demands made by the international community on constitutional law and state authority need not necessarily lead to chaos and anarchy. Anarchy can occur without the state, but the state and its quality can be further evolved and improved through international cooperation, by the acceptance of common standards and solutions to common problems.

About the question of minority rights as collective rights

It is widely accepted that, with the discovery of the state-nation (*l'Etat-Nation*), Europeans have created a machine for the production of minorities. Although it is often heard on the Old Continent that "*Europe finds its identity precisely in its diversity*", the restricted scope of the application of this idea with regard to internal minorities indicates that something is wrong. A good illustration of this ambiguity is the hypocritical attitude toward the legal situation of minorities in France. The chief difficulty in minority protection in France stems, namely, from the circumstance that the existence of minorities is denied in France in order to assert the idea of the "State-Nation". In fact, France is built upon this very idea. Of course, there are communities on French soil which could (and probably will, one day) be considered minorities. Although they are not yet considered as minorities, they have been recognised "*the right to individual difference*". This illustration from France directly poses the question: How to reconcile the denial of the existence of minorities on one's own soil with the reality of a multicultural society? As we know only too well, Croatia has not been spared this dilemma, either, after attaining independence and sovereignty.

International documents have oscillated in their position on the concept of collective rights in general, and of minority rights among them. This is due to the ideological and political implications this notion carries as much as to a whole range of other dilemmas, theoretical as well as practical. Prior to 1941, the international community was favourably disposed towards group rights. This is evidenced in an Advisory Opinion of the Permanent International Court of Justice adopted in 1935:

"The idea behind the Treaty on the protection of minorities is to provide certain elements incorporated in the state, whose population differs from them by race, language or religion, the possibility for peaceful life side by side, friendly cooperation between them, and at the same time the preservation of characteristics which distinguish them from the majority, meeting certain needs of theirs. In the endeavour to reach that aim, two things are considered especially important...

first, ensuring that citizens belonging to racial, religious or linguistic minorities are made equal in every respect with other citizens,

secondly, ensuring to minority elements appropriate means for the preservation of their racial peculiarities, traditions and national characteristics.

These two elements are closely related, so that no genuine equality can exist between the majority and the minority if the latter is deprived of its own institutions, and if it is constantly denied that which constitutes the very essence of its existence as a minority".

After 1945, solutions concerning minority rights as collective rights were the first to undergo an evolution. Despite blockades which prevented the international community from concentrating on the issue of minority rights (minority rule in South Africa, or the assimilational, inward-turned nation-building design of states which emerged from colonial rule, etc.), efforts were made to reinforce minority rights as a concept of international law. This is best shown in the process of drafting of an important and recent UN document about minorities:

The UN Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities (1992). In the course of the work on this document a group emerged who advocated placing the promotion and realisation of minority rights "within a constitutional framework", that is to say, the state in question and its constitutional laws would be practically the only guarantor of minority rights. However, this situation also signified a potentially subordinate position of international law, and of the Declaration as the instrument of this law, in relation to the constitutional law of individual states. For this reason, the phrase that the promotion and realisation of minority rights, like all other rights and freedoms of man, occur "within a constitutional framework" was replaced by the wording "within a democratic framework founded on the rule of law", a wording which

cannot be reasonably interpreted as restricting the objectives of the Declaration. On the contrary, the language of the Declaration asserts the concept of democratic pluralism, a notion which leaves its mark on the entire text of the document. Consequently, the framework of the promotion of rights is democracy and the rule of law, rather than a special constitutional system, which need not honour any of the objectives mentioned in the document. This relationship between democracy, the rule of law, pluralism and minority rights is common to all OSCE instruments, and the UN Declaration also reflects and supports this strong tendency which prevails today in contemporary political thinking and complementary standards in human rights.

Still, the possibility of conflicting interpretations of the individual versus collective dimension of minority rights has not disappeared. This is borne out by the formulations we find, e.g., in Art. 1 of the 1994 Draft Convention which speaks about the protection of "national minorities" but also about the protection of "persons belonging to these minorities". The explanatory remarks accompanying the Proposal for the European Convention for the Protection of Minorities stress also that it is "... necessary to recognise the rights which do not belong only to individual members of minorities but also to minorities as such, since minorities are not merely the sum total of individuals but represent a system of relationships between these individuals. Without the concept of collective rights, minority protection would be thus restricted".

The constitutional documents of the Republic of Croatia and minority rights

In the constitutional documents passed after 1990, the Republic of Croatia has adopted an unquestionably firm stance regarding the protection of human rights. The constitutional guarantees for this are both the principle of equality of citizens in rights and freedoms (Art. 14 of the Constitution) as well as the willingness to respect international law (Art. 134 of the Constitution). The rights of citizens as individuals are supplemented by certain "collective rights belonging to members of certain communities as a whole". The aspect of minority rights as collective rights is particularly emphasised by the adoption in 1992 of a special *Constitutional Law on Human Rights and Freedoms and the Rights of National and Ethnic Communities or Minorities*. However, in spite of the essential "consistency with the principles of parliamentary democracy, the protection of fundamental rights and the rights of minorities, and the rule of law" of this major legal text, "it is not sufficient in itself to warrant the conclusion that the legal system conforms to the principle of the rule of law". However, it is far easier to say: "Let's have diversity in equality" than make this come true. The dramatic circumstances in which Croatia won its independence were definitely not

an ideal framework for the assertion of diversity in equality. Civilising the principle of majority will be one of the most urgent tasks for Croatia. And this will be best reflected, among other things, in the stabilisation of the belief that, for the assertion of the Republic of Croatia as a state based on constitutional democracy, the only "civilised solution" is to "permit 'diversity in equality', that is, having equal citizens and at the same time protecting special groups so as to enable them to preserve their identity, language and culture".

Closing remark

In the Afterword to his book "Proizvodnja ludila" (The Production of Madness), **Thomas S. Szasz** says that the social man fears the Other and strives to destroy him; he needs the Other and, if necessary, he will create him; so that, by disparaging him as evil, he can establish himself as good. Szasz illustrates this thesis by a story from the "Painted Bird" by **Jerzy Kosinsky**, where the painted bird stands as a symbol of the persecuted Other, the Stranger, the Victim:

...One day he trapped a large raven, whose wings he painted red, the breast green, and the tail blue. When a flock of ravens appeared over our hut, Lekh freed the painted bird. As soon as it joined the flock a desperate battle began. The changeling was attacked from all sides. Black, red, green, blue feathers began to drop at our feet. The ravens ran amuck in the skies, and suddenly the painted raven plummeted to the fresh-ploughed soil. It was still alive, opening its beak and vainly trying to move its wings. Its eyes had been pecked out, and fresh blood streamed over its painted feathers. It made yet another attempt to flutter up from the sticky earth, but its strength was gone.

The painted bird is a perfect symbol of the Other, the Stranger, the Victim. With inimitable artistry, as Szasz puts it, the author depicts both faces of this phenomenon: if the Other is not like the other members of the flock, he is expelled from the group and destroyed; and if he is like them, man intervenes and makes him appear different, so that he may be cast out and destroyed. Bird-painting, says Szasz, who is an adherent of the humanistic anti-psychiatric trend of the late 1960s, has become an accepted medical activity, and among the paints used, the psychiatric diagnosis is the most fashionable one.

The metaphor of the Painted Bird has a definite bearing on the overall issue of minorities, including minority rights. We believe, therefore, that the best way for a state and for its internal laws, above all its constitutional law, to avoid the Painted Bird syndrome with respect to minority rights, especially the rights of ethnic groups, is to adopt appropriate, consistent and effective minority protection policies, combined with confidence-building efforts and with cooperation with existing sovereign states based on mutual respect for territorial integrity.