# TRADITIONAL HUMAN RIGHTS PROTECTION MECHANISMS AND THE RISING ROLE OF MEDIATION IN SOUTHEASTERN EUROPE

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# TRADITIONAL HUMAN RIGHTS PROTECTION MECHANISMS AND THE RISING ROLE OF MEDIATION IN SOUTHEASTERN EUROPE[*]

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## The Established Evolutionary Paradigm

The establishment of rights protection mechanisms in Western democracies is the result of an evolutionary four-stage process which, at a historical and theoretical level, could be described as follows:

> The first stage encompasses the formation of a constitutional state, the establishment of popular sovereignty and the provision of human rights guarantees entrenched in constitutional provisions. In this early stage of constitutionalism, human rights law consists of the basic norms governing the relationships between the individual and the state. The subordination of the state's authority to legal prescriptions, through the establishment of the rule of law, goes hand in hand with the principle of the separation of powers.

The second stage is the emergence of international human rights protection mechanisms which, in principle, attests to the subordination of national to international law and signals a country's consent to international control:

> International law provides a number of devices by which individuals and groups of individuals may obtain protection against the arbitrariness of State authority. Under international customary law, the right of diplomatic protection of citizens abroad, strengthened by the minimum standard and treaty rights, is a generally accepted principle of territorial jurisdiction. Since the seventeenth century attempts were made to grant international protection by means of treaties to religious groups and individual members of such groups even against their own sovereign. In the nineteenth century this policy was extended in favor of ethnical and national minorities. During the inter-war period the protection of national, ethnical and religious minorities came to be closely linked with the League of Nations.[1]

The third stage is comprised of the creation of mediation institutions. This is a state choice, acknowledging the link between the protection of individual rights and the mechanisms providing for state accountability. Furthermore, the creation of mediation institutions of the

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ombudsman type, which have even been accorded constitutional recognition as independent authorities, constitutes an important moment in the wider evolutionary process relating to the consolidation of political democracy and the substantive implementation of the rule of law.

The fourth stage includes the establishment of the non-governmental field of rights. This new pole, acting in favor of the protection of individual rights at the national and international levels, has historically signaled the linking of state sovereignty with civil society. A fundamental theoretical prerequisite for the strengthening of this field is the active involvement of citizens in the protection of rights. Such involvement is connected with the emergence of a "third" pole, defining itself as a mechanism designed not only to limit but also to bridge the division between public and private space, which constitutes a fundamental characteristic of modernity.

**Emerging Realities**

The validity of this intentionally schematic description of the paradigm governing the protection of individual rights in liberal democracies rests on a *prerequisite* logic, rather than on a cumulative -successive one. In other words, the consolidation of the first stage, that of the constitutional state, historically, theoretically and normatively constitutes an essential and necessary prerequisite for the other three stages. It is their precondition. Put otherwise, the activation of international rights protection mechanisms or, even further, the creation of independent mediation institutions and of a non-governmental field of rights are unthinkable without the prior existence of sovereignty. Is this argument as obvious as it appears to be?

The basic premise informing this article is that a *sui generis* inversion of the sequential logic governing the evolutionary paradigm of human rights protection outlined above is taking place in contemporary Southeastern Europe. The first inversion of major importance concerns the dialectic relationship between constitutional sovereignty and international monitoring, in other words the relationship between the first and second stages.

The cases of Bosnia and Herzegovina and Kosovo, after the cessation of inter-ethnic clashes following international intervention, have set off a new type of regime, in the framework of which, protection of individual rights are not dictated by nor directed towards state sovereignty, for the simple reason that such sovereignty does not exist. In these two cases, international supervision as a mechanism inhibiting state abuse of power, either through jurisdictional control (European Court of Human Rights or ECHR) or through the integration of international law into national law, has yielded its place to local administrative arrangements that *de jure* invalidate sovereignty.[2]

In both these cases, the protection of individual rights is provided in a manner which circumvents the logical institutional and political prerequisites for such protection, in other words the constitutional state. In this text, we will not focus on the problems posed by this divergence between the logic of the established paradigm and the emerging realities on the ground. Nor shall we concern ourselves with its labyrinthine legal and political implications that impose novel and awkward questions for international law. Instead, we will concentrate on another divergence, which though less subversive of state sovereignty is, nevertheless, more widely encountered in Southeastern Europe. We are referring to the proliferation of institutions and initiatives

associated with the later stages of the liberal rights protection paradigm (international, independent mediation, nongovernmental). In essence, this proliferation accompanies the dramatic *de facto* downgrading of the role of the protection mechanisms linked to sovereignty, and serves as an antidote for it.

The evolutionary paradigm concerning individual rights protection outlined above is not as easily applicable to post-communist democracies of Southeastern Europe, operating in the context of societies characterized by late socio-economic and political development. While it is relatively safe to opine that the formal requisites for the establishment of a liberal order have been met in most of the countries in the region, it would be entirely premature to argue that the effective protection of human rights is adequate under present conditions. Put otherwise, the detectable weaknesses concerning the effective protection of human rights are not associated with lacunae in the judicial or legislative fields. The decade that has elapsed since the Council of Europe began gradually to admit these new democracies, constituted a sufficiently long time span to integrate (the legal *aquis* of the Council of Europe concerning human rights) in to the legislation of these states. Indeed, this integration is the result of an explicit obligation of candidate states to align their legislation with the legal *aquis* of the Council of Europe, in a wide range of issues *before* accession. In other words, it is a precondition for admission.[3]

This being the case, the problems concerning human rights protection in Southeastern Europe relate more to weaknesses and inadequacies in application and implementation rather than to formal guarantees of the rights themselves. According to the evolutionary paradigm presented at the beginning of this article, these problems relate directly to the hard core function of the Constitution as an instrument of guarantees and as an agent of legitimation, which spells out specific restrictions on the powers of the state designed to enhance the protection of human rights. Through these restrictions on its own power, the state assures the continuation, stability and consolidation of existing power relations within societies. Put simply, what is at stake in Southeastern Europe today, as the states of this region are engaged in an unprecedented historical struggle for the distribution of property and power, is none other than the adequate implementation of the *rule of law* itself and the related principle of the separation of powers. And, in this respect, the overall picture emerging from daily practice in the region suggests the magnitude of the problems facing these states. It is indicative in this context that the judicial system, the individual citizen's last shelter against state abuse, is very often unable to provide effective protection, as envisaged in the constitution. The problem here is not the inadequacy of the national judge to issue rulings compatible with the current interpretation of fundamental rights and freedoms, but rather the inability of the state itself to implement court decisions.

This assessment is not meant to imply that the national judicial authorities in the states of Southeastern Europe have succeeded in incorporating in their practices the entire gamut of the ECHR jurisprudence. Observable differences, however, do not suggest the existence of any significant incompatibility between national judicial authorities in Southeastern Europe and the European Court of Human Rights. As a result, it is safe to conclude that what literally invalidates the rule of law and stands in the way of the effective protection of rights is not the application of "faulty" juridical decisions but the *non-execution of such decisions*.

To summarize our argument so far: a necessary precondition for efficient and effective administration of justice is the constitutional consolidation of the rule of law and the principle of

separation of powers. But this alone is not enough. The smooth operation of a well-ordered polity requires that the power to interpret the law and, therefore, to limit the powers of the sovereign, be assigned to independent judicial authorities according to predetermined procedures. For this to occur, the effective application of the rule of law, the next logical step in the process is the product of a much longer stage, intimately linked to the consolidation of liberal constitutionalism and of the culture of regularity and predictability associated with it.[4]

The long-term process of the spread of the rule of law on an international scale is linked to the progressive establishment of international monitoring and supervising institutions for the protection of human rights. The two processes do not simply coincide. They also feed on each other and politically presuppose one another. Formally, the state controls its constitutional territory, allowing the importation of international law on terms that it determines. At present, for example, national constitutions are particularly hospitable to international law. However, despite these favorable formal preconditions for importing international law concerning human rights protection, and for incorporating it in constitutional provisions ensuring its enforcement, in practice things are far more complicated. This is so primarily because the substantive integration of the current international regime on human rights in the legal order of states depends ultimately on those disparate and often intangible factors, mentioned earlier, indicative of the existence of a "user-friendly" administrative culture. It is the presence or absence of such factors which make it difficult to compare the level of human rights protection in more mature democracies and in recently established ones in Southeastern Europe, even if states in each of these categories have signed and ratified roughly the same number of international or European conventions for the protection of human rights.

So long, therefore, as these factors, not easily amenable to administrative or political manipulation, do not converge, the application of international rules concerning human right protection at the national level remains problematic and incomplete. Illustrative examples of the dilemmas generated by this situation abound. To cite but a few: the international regulations regarding the protection of a prisoner's dignity obviously depend on the living conditions provided by a given country's prison facilities. The same goes for those regulations relating to religious freedom, the adequate implementation of which visibly depends on the state's capacity to construct a place of worship for a minority dogma and, even more generally, on prevailing attitudes regarding religious minorities. The same applies to regulations concerning immigrants' rights and the treatment of citizens by the public administration. As long as the national structures underpinning the rule of law and the principle of the separation of powers—the field of tangible guarantees—remain feeble, the capacity of international legal instruments operating *via* these domestic structures to act in a reinforcing and supplementary manner to national regulations remains commensurately weak. As a result, the legitimacy of these instruments becomes eroded and, over time, minimized. As a Greek scholar of the subject aptly put it: "...the institutions that fail to correspond to real relations of power are condemned to be rendered useless if not ridiculed."[5]

The structural difficulties and the time horizon required for the creation of an efficient and reliable system governing the administration of justice and the protection of human rights through traditional judicial mechanisms have resulted in a novel situation in Southeastern

Europe, characterized by:

- The emergence of a pronounced asymmetry between "things as they are" and "as they should be". Such a disparity derives from the uncritical adoption of international norms reflecting an advanced state of human rights protection by states lacking the capacity for their effective implementation.

- A latent delegitimization of the substantive content of human rights, as the compliance of the state with the moral values dictated by human rights protection is implemented more as a matter of international pressure than as a result of domestic imperatives and social claims.

- International deliberation and pressure for the introduction of new, alternative institutions of human rights protection, designed to by-pass the difficulties associated with the regular procedures followed so far.

**The Ombudsman's Role**

For the preceding reasons, national and international initiatives for the establishment and promotion of ombudsman-type institutions have proliferated in the region in recent years. In the form of an independent authority acting as a mechanism of external control and of accountability *vis-à-vis* the state, the institution of the ombudsman already exists in various forms and levels of development in:

- Albania,
- Bosnia and Herzegovina,
- Croatia,
- The Former Yugoslav Republic of Macedonia,
- Kosovo; and
- Romania.

At the same time, in 2000 and 2001, both Bulgaria and Serbia embarked upon the process of setting up their own ombudsmen, with support from the Council of Europe and the OSCE. In early 2002, draft bills concerning this matter were at a final stage of deliberation before these countries' national parliaments.

A central concern that has emerged in the course of the gradual implementation of the national legislation governing the ombudsman institution in the various countries of Southeastern Europe relates to the proper relation between the ombudsman and judicial authorities. The problem, which highlights this paper's central argument, issues directly from the emerging recognition that the broader political and administrative culture so intimately related to constitutionalism is

insufficiently developed to allow for the effective protection of these rights by means of an independent and adequately functioning judiciary.

The problem results from the inversion of the logic governing the evolutionary paradigm outlined at the outset. More specifically, it results from the assumption that the difficulties in the effective protection of human rights encountered in countries lacking the requisite institutional infrastructure and sufficiently developed political and administrative cultures can be adequately addressed through recourse to the third stage of the paradigm. This stage envisages the creation of mediatory institutions as mechanisms designed to offset the problems generated by the defective or inadequate functioning of judicial institutions.

According to the rationale driving such a policy option, mediatory institutions such as the ombudsman can serve as alternative mechanisms for addressing problems relating to human rights protection created by an inadequate observance and application of the rule of law and of the principles of separation of power in these countries. In simple terms, "if justice does not work, and its proper operation is likely to take time, the ombudsman can be called upon to fill the gap, and serve as a substitute mechanism for awarding justice."

However tentatively, the rationale implicit in such a conceptualization of the ombudsman was initially articulated in the "Conclusions" to the Lubljana Conference on *The Relation between Ombudsmen and Judicial Bodies*. The Conference was co-organized by the Council of Europe and the Slovenian Ombudsman, with financial support from the Swedish government. It was held on November 12-13, 2001 and was attended by representatives of national human rights and ombudsman institutions from countries in Southeastern Europe, including Greece. The preamble to the Conference conclusions contained the following statements:

> "We are of the opinion, that [the Relationship between Ombudsmen and Judicial Bodies] is of particular importance for countries in transition, some of which may be faced with unstable legal systems, a short tradition of independence of the judiciary and ongoing reform of state bodies."
>
> (...)
>
> 6. It is not the ombudsman's role to act on behalf of an individual in court. Legal remedies must be used first and foremost by the individual affected. Yet, whenever an individual for whatever reason does not have effective access to such remedies, it is appropriate for the ombudsman to have the capacity to verify whether there has been any violation of human rights. Such a possibility is provided in some countries by the constitutional complaint.
>
> 7. In countries in transition, which may be faced with outdated, deficient and non-harmonized regulations, as in countries with established democracy, it is important that the ombudsman may also contribute to the development of the legal order. For this reason it is important for ombudsmen that they have the capacity to propose an assessment of constitutionality or legality of regulations before the constitutional court. In this way the ombudsmen may help to eliminate

systemic deficiencies in regulations which may affect negatively, or even violate the rights of individuals.

The thrust of these paragraphs underscores the need for broadening the ombudsman's mandate in countries encountering similar problems, in order to empower his authority and allow him to act as an instrument capable of complementing judicial authorities in the protection of human rights, through their control. The text of the conclusions does not spell out in detail how this additional function can and should be carried out. However, it graphically highlights the dilemmas associated with the insufficient protection of human rights in post-communist democracies, issuing from the defective or insufficient application of the rule of law and of the principle of the separation of powers within their territories. It also brings partially into the open a series of cost-benefit considerations not usually associated with the functioning of the ombudsman institution in more mature democracies. Such considerations need to concern policy makers opting to make use of the ombudsman institution precisely because the absence of precedent makes it more difficult to anticipate outcomes. The principal among these, which we choose to pose in the form of questions, are the following:

1. What are the long-term chances that the ombudsman will become entangled in a vicious cycle of case overload that may undermine his or her capacity to resolve cases within a reasonable time frame, and thus contribute to the gradual delegitimation of the institution in the eyes of its users?

2. How exportable is the Swedish and Finnish experience, where the ombudsman has historically been accorded powers of oversight and control relative to the judiciary? The pertinence of this question lies in the fact that the prior existence of powerful traditions of the rule of law and respect for the separation of powers made it possible for the ombudsman to be entrusted with these extra functions. How easily is this arrangement transferable in countries faced with weak traditions in these very fields?

3. How will the "judicialization" of the ombudsman institution affect its identity as primarily a "non-judicial" mechanism of control and accountability? Are the various "tools of the trade" available to the institution in carrying out its non-judicial functions sufficiently flexible and adaptable to cope with the demands likely to be placed on it by its adherence to the logic of an alternative judicial institution?

4. Finally, how will policy makers in the countries concerned (and ombudsmen themselves) cope with an eventuality involving the inability of the ombudsman institution successfully to respond to the additional responsibilities placed upon it? Put otherwise, what are the likely implications on the ombudsman institution internationally of a potential failure successfully to confront the challenges associated with the expanded mandate arising out of the policy dilemmas of post-communist democracies? How likely is it that the potential inability of the

> ombudsman institution to live up to the additional expectations thrust upon it as a result of problems facing post-communist democracies will have a deleterious effect on the functioning of democracy in these countries, in the specific sense that it will deprive these transitional polities of yet another alternative means of confronting challenges associated with the imperatives of democratization, the consolidation of the rule of law, and the substantive protection of human rights within their territories?

Students of both the theory and practice of democratization and of human rights will profit greatly from the experiences of the countries in Southeastern Europe and from the efforts of their political classes to come up with imaginative and creative answers to these complex questions. Success in this direction will make it possible for this region to make its own distinct and substantive contribution to the gradual accumulation of knowledge concerning democracy, mediating institutions, human rights and systems of control and accountability linked to the logic of the self-restraining state and to the empowerment of civil society.

## Endnotes

[1] G. Schwarzenberg, *International Law as Applied by International Courts and Tribunals*, vol. I (London: Stevens, 1957) at 273.

[2] Regarding Bosnia and Herzegovina, see *The General Framework Agreement for Peace in Bosnia and Herzegovina*, (the "Dayton Agreement"), Annex 10, Art. V of which defines the mandate of the High Representative as follows: "The High Representative is the final authority in theater regarding interpretation of this agreement...." Regarding Kosovo, see United Nations Security Council Resolution 1244 (1999), S/RES/1244 (adopted June 10, 1999), setting out the terms for the establishment of the UN interim administration for Kosovo, Annex 2, para.5, *ibid.*, and UNMIK Reg. 1999/1, s. 1, on the Authority of the Interim administration in Kosovo, which states that "all legislative and executive authority with respect to Kosovo, including the administration of the judiciary is vested in UNMIK".

[3] According to the Vienna Declaration of 1993, the first of its kind adopted by heads of states at the Council of Europe, "accession [to the organization] presupposes that the applicant country has brought its institutions and legal system into line with the basic principles of democracy, the rule of law and respect for human rights. The people's representatives must have been chosen by means of free and fair elections based on universal suffrage. Guaranteed freedom of expression and notably of the media, protection of national minorities and observance of the principles of international law must remain, in our view, decisive criteria for assessing any application for membership. An undertaking to sign the European Convention on Human Rights and accept the Convention's supervisory machinery within a short period is also fundamental. We are resolved to ensure full compliance with the commitments accepted by all member States within the Council of Europe."

[4] E.g., the proclamation of the independence of justice was a distinct feature of early Greek constitutions. The consolidation and functioning of a politically independent justice, however, became a political reality after the fall of the Greek military regime in 1974.

[5] N. Alivizatos, "Kosovo: Right to Intervention and Human Rights" in *The Uncertain Modernization and the Vague Constitutional Revision* (Athens: Polis Publications, 2000) at 284 (Greek).