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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

**HUMAN RIGHTS PROTECTION WITH THE HELP OF
THE INDIVIDUAL COMPLAINT**

by Mr Arne Mav_i_

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I. Individual as an Applicant Before the Constitutional Court

The proceedings before the Constitutional Court have the nature of proposed proceedings (*juridiccion voluntaria*). In principle, the Constitutional Court cannot itself initiate the proceedings; as a rule, the proceedings before the Constitutional Court are based on (restricted to) the corresponding application lodged by a special, duly qualified (privileged) constitutional institution (the so-called legitimate petitioners). Initiation of constitutional review proceedings on the own initiative of the Constitutional Court (*ex officio*) is quite rare. Still it may most often be traced to some of the constitutional review systems of Eastern Europe; further, it is strictly preserved in Croatia and in Slovenia¹ elsewhere *ex officio* proceedings are not as frequent. The Austrian Constitutional Court, for example, may on its own initiative begin the proceedings of the constitutional review of a statute or a regulation only if it refers to a prejudicial question under the proceedings before the respective Constitutional Court. All the above cases may be referred to as objective forms of constitutional review.

On the other hand, some constitutional review systems also allow for the private individual's access to the Constitutional Court (concerning the abstract as well as specific review, based on the constitutional complaint, or on the popular complaint (*actio popularis*) or on other forms of constitutional rights' protection. It involves the so-called subjective constitutional review, violation of individual's rights and protection of individual's rights against the State (in particular against the Legislature). In the states with diffuse constitutional review and in some states with concentrated constitutional review the individual citizen is offered the possibility to request the constitutional review of statutes, administrative measures or judgments in special proceedings. Only after the complaint has been lodged the Constitutional Court will begin the proceedings. Even then, as a rule, the complainant may withdraw his/her complaint in order to thereby terminate the respective proceedings. The individual's standing as complainant before the Constitutional Court has been influenced by extensive interpretation of provisions relating to the constitutional complaint, as well as by ever more extensive interpretation of the provisions relating to the specific review². In some systems the individual's access to Constitutional Courts has become so widespread that it already threatens the functional capacity of the Constitutional Court³. Therefore, the Legislature is trying to find some way for Constitutional Courts to get rid

¹ Para. 2 of Article 15 of the *Croatian Constitutional Court Act* or in Article 39, Article 58 and Para. 4 of Article 61 of the *Slovenian Constitutional Court Act*.

² USA, Switzerland, Greece, Italy.

³ Germany.

of less important or hopeless proceedings (*e.g.* restriction of abstract review with standing requirements). All these proceedings envisage the condition that the complainant must be affected by a certain measure taken by the public authority. With the growth of the number of complaints the percentage of their efficiency decreases. Nevertheless, citizens should have many opportunities to apply for protection of their constitutional rights. France is an specific exception among these systems where private individuals have no access to the Constitutional Council, except with reference to elections. In France, the protection of individual's rights is, however, the task of the National Council acting on the basis of the complaint against administrative acts.

II. Bodies Empowered for Human Rights Protection and Forms of Proceedings

The petition of an affected individual whose constitutional rights are claimed to have been violated is generally the basis of an appropriate procedure of protection in which protection of rights by the Constitutional Court is only one of a number of legal remedies for protection. Even the bodies intended to provide protection are different, depending on the specific system.

1. Basic rights may be protected in **regular Court proceedings**.

a) Some legal systems provide protection of rights predominantly in proceedings before ordinary courts (general courts); for the most part these are states which have also adopted the so-called diffuse or American model of judicial review⁴.

The following are specific forms of protection of rights by the regular Courts:

b) *Habeas corpus* procedure *i.e.* the protection from unjustified deprivation of liberty; an appropriate application is lodged with the regular Court having such jurisdiction. Such proceedings are characterised by speed, simplicity and openness.⁵

c) *Habeas data*, which is a sub-form of *habeus corpus* and was introduced in Brazil with the *Constitution of 1988*. It is a constitutional guarantee of a personal decision about information, in essence the protection of personal data.

d) Further proceedings are recognised mainly by states which have adopted the American model of judicial review.⁶

⁴USA, Barbados, Guyana, Jamaica, Trinidad and Tobago, Iceland, Great Britain, Ireland, The Netherlands, Denmark, Sweden, Norway, Finland, Greece, Japan and Australia.

⁵*Habeas corpus* is mainly used in the USA, Canada, Mexico, Cuba, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Colombia, Argentina, Brazil, Ecuador, Nicaragua, Panama, Paraguay, Peru, Bolivia, Chile, Uruguay and Venezuela as well as in the following Argentinean provinces: Chaco, Neuquen and Formosa; in Africa: Sierra Leone, Ghana, Nigeria, Uganda, Kenya, Tanzania, Malawi, Mauritius, Zambia, Zimbabwe, Botswana, Lesotho and Swazi; in Asia: Pakistan, India, Nepal, Sri Lanka, Bangladesh, Singapore, Malaysia, Indonesia, Philippines, Taiwan and Hong Kong.

⁶USA; in Africa: Sierra Leone, Ghana, Nigeria, Uganda, Kenya, Tanzania, Malawi, Mauritius, Zambia, Zimbabwe, Botswana, Lesotho and Swazi; in Asia: India, Nepal, Bangladesh, Sri Lanka, Philippines.

- the *writ of mandamus*, whereby it is possible to annul a mistake of a lower Court by order of a higher Court;
- prohibition, the preventing the higher Court usurping the jurisdiction of a lower Court;
- the *writ of certiorari*, as the right of a higher Court to resolve a case from the jurisdiction of a lower Court;
- *quo-warranto* preventing a specific person from performing a function of a public nature which she/he has usurped.

e) *Respondeat superior* is a compensation claim by an individual against the State⁷.

2. A specific form of protection of rights which is reminiscent of constitutional complaint, is the so-called **amparo**. This is an universal and a traditional form of human rights' protection in the Hispanophone legal system: the protection of an individual from violations of constitutional rights by government acts of all categories. In the main, the Supreme Courts of the State in question are responsible for this form of protection. The aim of such proceedings is to restore the violated right to the State prior to its violation. It is also a characteristically fast procedure. Mexico is the classic *amparo* state. It is followed by many Central and South American States.⁸

3. **Subsidiary amparo** is still more similar to a constitutional complaint. This is a particular *sub-species* of *amparo*, in that the procedure takes place before the Constitutional Court⁹. This form of protection is also called *accion de tutela*. Colombian *accion de tutela* is comparable to the constitutional complaint. It was introduced by the *Colombian Constitution of 1991*. It is characterised by the fact that the circle of protected constitutional rights is explicitly defined. It is possible to annul legal or administrative acts (in addition to popular complaint (*actio popularis*) and proceedings of *habeus corpus* in Colombia).

4. **Brazil introduced a number of specific legal remedies** for the protection of human rights in the *Constitution of 1988*, including:

- *mandado de seguranca*. A wider form of protection for which the Supreme Court is competent, for the protection of rights not covered by *habeas corpus*;
- *mandado de injuncao*, a special individual complaint for a case of negligence of the Legislature.

5. **Chile** introduced a special modified version of **amparo**, the so-called *recurso de proteccion* in the *Constitution of 1980*.

⁷USA and on the American model, also Taiwan.

⁸Guatemala, El Salvador, Nicaragua, Costa Rica, Honduras, Panama, Colombia, Cuba, Haiti, Dominican Republic, Ecuador, Peru, Bolivia, Paraguay, Argentina, Uruguay, Venezuela and Seychelles.

⁹Spain, Colombia.

6. A **popular complaint** (*actio popularis*) may, equally, be lodged by an individual, generally without restrictions¹⁰. It is a special, individual legal remedy for the judicial protection of rights, although intended for the protection of fundamental rights in the public interest (while a constitutional complaint is lodged in the interest of the individual). A popular complaint (*actio popularis*) is normally directed against a general act (usually statute) which is considered to have violated a constitutional right. The Constitutional Court is generally the competent body for reaching a decision, which deals with the disputed act in the sense of an abstract review of rules. Popular complaint (*actio popularis*) is less common in Europe¹¹. In Israel the popular complaint (*actio popularis*) is common in cases arising within Israel proper, the right to standing is decided mostly by the Court's willingness to grant it. It is most extensive in Central and South America¹². Popular complaint (*actio popularis*) is a relatively rare approach in Africa¹³ while in Asia, popular complaint (*actio popularis*) is only recognised in Japan, and only in electoral matters (as people's action or objective action) and in Iran (complaint before the Court of Administrative Justice).

7. A specific group of systems of constitutional law guarantees the individual only an **indirect protection**, such that the individual does not have direct access to the Constitutional Court or other body of constitutional review. These are systems that consider the protection of the rights of the individual are satisfied through:

- abstract review of rules¹⁴; or
- specific (concrete) review of rules¹⁵; or
- preventative abstract review of rules¹⁶.

III. Constitutional Complaint and its Extent in the World

A constitutional complaint is a specific subsidiary legal remedy against the violation of constitutional rights, primarily by individual acts of government bodies, which enables a

¹⁰ The exceptions are Slovenia and Hungary, where it is restricted by demonstration of standing by the complainant.

¹¹ Bavaria-although in other German provinces and on a federal level there is no popular complaint (*actio popularis*), Hungary, Slovenia, Croatia, Liechtenstein, partly Czech Republic, Macedonia, Malta and FRY and within its framework, Montenegro.

¹² Costa Rica, El Salvador, Panama, Colombia, Venezuela, Brazil, Peru, Paraguay, Argentina.

Argentina is an interesting example, where there is no popular complaint (*actio popularis*) on a federal level, but individual provinces have introduced it: Buenos Aires, La Rioja, Entre Rios, Rio Negro, Chaco, Nequen and Santiago del Estero.

¹³ Benin, Congo, Gabon, Burkina Faso, Ghana, Niger, Sierra Leone-according to the 1991 Constitution.

¹⁴ Poland, Belarus, Cambodia, Bulgaria, Italy, Belgium, Latvia.

¹⁵ Bulgaria, Kazahstan, Bosnia, Italy, Azerbaijan, Estonia, Lithuania, Yakutia.

¹⁶ France.

subject, who believes that his/her rights have been affected, to have his/her case heard and a decision made by a Court authorised to provide constitutional review of disputed acts. Generally, the impugment refers to individual acts (all administrative and judicial acts), in contrast to the popular complaint (*actio popularis*), although it may also indirectly¹⁷ or even directly¹⁸ refer to a statute.

Is constitutional appeal a right? The Slovenian Constitutional Court has taken the view that it is an institute of judicial proceedings, or a special legal remedy¹⁹.

The constitutional complaint is not an entirely new institute; its forerunner may be found in the Aragon law of the 13th to 16th Century²⁰; in Germany from the 15th Century onwards²¹; while Switzerland introduced a special constitutional complaint²² in the *Constitution of 1874* and in the *Statutes of 1874 and 1893*.

The constitutional complaint is very common in systems of constitutional/judicial review. It is most widespread in Europe²³. In Germany, the constitutional complaint appears on the federal and on provincial levels.²⁴

¹⁷Slovenia, Spain.

¹⁸Germany.

¹⁹Ruling No. U-I-71/94 of 6 October 1994, OdIUS III, 109.

²⁰In the form of *recurso de agravios, firme de derecho, manifestacion de personas*.

²¹Incorporated in the institution *Reichskammergericht* of 1495, envisaged in the famous constitutional text, *Paulskirchenverfassung*, of 1849, and in Bavaria it was envisaged in the *Constitutions of 1808, 1818, 1919 and 1946*.

²²*Staatliche Verfassungsbeschwerde*.

²³Russia, Cyprus, Malta, Czech Republic, Ukraine, Slovakia, Hungary, Albania, Macedonia, Croatia, Slovenia, Austria, Andorra, Switzerland-Supreme Court, Germany, Spain, Liechtenstein (1992), Portugal and FRY-on the federal level and in Montenegro.

²⁴- The federal constitutional complaint is the responsibility of the Federal Constitutional Court, and
- The provincial constitutional complaint is the responsibility of certain Provincial Constitutional Courts: Bavaria, Berlin, Hessen and Saarland.

In addition to Europe, some Asian systems recognise constitutional complaint²⁵. It should additionally be noted that other Arabian countries, if they recognise judicial review at all, have in the main adopted the French system of preventative review of rules following the model of the French Constitutional Council of 1958, which does not recognise the right of the individual to direct access to specific constitutional/judicial review bodies. Also in Africa some countries recognise the constitutional complaint²⁶. The only example of constitutional complaint in Central and South America is the Brazilian *mandado de injuncao*, i.e. an individual complaint in case of negligence of the Legislature (the power of the Supreme Court) unless we also count the Colombian *accion de tutela* (the power of the Constitutional Court) usually considered to be a subsidiary *amparo*.

The particularity of individual systems is that they recognise a **cumulation of both forms, the popular and the constitutional complaint**²⁷. The two forms may compete in their functions. The rationale for both forms is protection of constitutional rights the popular complaint (*actio popularis*) in the public and the constitutional complaints in the private interest. In both cases the plaintiff is an individual. As a rule the subject disputed is different: popular complaint (*actio popularis*) refers to general acts and constitutional complaints refer to individual acts²⁸. The standing of the plaintiff or the personal effect the remedy might have upon the plaintiff is a precondition of constitutional complaint. Although it should be possible to exclude the standing of the appellant as a precondition for the popular complaint (*actio popularis*), individual systems do require it for popular complaint (*actio popularis*)²⁹, such that both in the case of constitutional and in the case of popular complaint (*actio popularis*), the standing or the personal effect on an individual works as a corrective with the aim to prevent the abuse and overburdening of the Constitutional Court or other constitutional/judicial review body. In both cases the same aim may be pursued through the introduction of the payment of tax upon submission. It is, however, characteristic that in practice the number of constitutional complaints is increasing everywhere. Therefore, many Constitutional Courts have adapted the organisation of their work to this principle either in the form of specialised individual senates for constitutional complaints³⁰ or by the fact that decisions on constitutional complaints be taken by narrower units of the Constitutional Court (senates, sub-senates)³¹.

²⁵ Georgia (the power of the Constitutional Court), Kirghizia (the power of the Constitutional Court), Uzbekistan (Constitutional Court), Mongolia (the power of the Constitutional Court since the *Constitution of 1992*), South Korea (the power of the Constitutional Court since the *Constitution of 1987*), Taiwan (Supreme Court), Papua-New Guinea (Supreme Court), Syria (Constitutional Court), Baskiria (Constitutional Court).

²⁶ Sudan (Supreme Court), Mauritius (Supreme Court), Senegal (Constitutional Council) and Benin (Constitutional Court).

²⁷ Slovenia, Croatia, Macedonia, Bavaria, Hungary, Malta, FRY and Montenegro, Liechtenstein, Colombia and Brazil, partially Czech Republic.

²⁸ Except for the possibility of indirect impugning of the statute in Slovenia, Spain, FRY and Montenegro, and the direct impugning of the statute in Germany.

²⁹ Slovenia, Macedonia.

³⁰ e.g. the German Federal Constitutional Court and the Spanish Constitutional Court.

³¹ e.g. in Slovenia, Czech Republic, Georgia.

IV. Fundamentals of the Constitutional Complaint

The following are the elements of the institute of constitutional complaint:

- **system of prior selection of complaints in the proceedings** (integration of filters into the proceedings) most highly developed in the German system with intent to sift out potentially unsuccessful complaints, whereby the maneuvering space of the Constitutional Court in rejecting a frivolous complaint is extended. This, in fact, involves the narrowing of the constitutional complaint as a legal remedy in principle open to everybody. As a matter of fact, it is a general problem of the Constitutional Courts as to how to sift the wheat from the chaff and at the same time secure the efficient protection of human rights as the symbol of the democratic system. Individual systems of constitutional review still present the dilemma: in certain systems the proposals for introduction of a constitutional complaint are of recent introduction; some of those familiar with this legal institute tend to introduce prior selection systems; on the other hand, certain systems tend towards the abolition this legal institute;
- the protection through the constitutional complaint generally refers to constitutional rights and freedoms, and the **circle of rights protected by constitutional complaint** is less specifically defined in individual systems (*e.g.* Slovenia, Croatia, FRY and Montenegro, where "all" constitutionally guaranteed fundamental rights are supposed to be protected), while other systems mostly define (narrow) the circle of protected constitutional rights. Special forms of the complaint may be lodged by the Ombudsman (Spain, Slovenia, FRY) or by the public prosecutor (Spain, Portugal).
- the **standing**, or the personal effect the remedy might have upon the plaintiff, as a mandatory element though in the majority of systems the concept of standing is fairly loosely defined;
- the **prior exhaustion of legal remedies** as an essential precondition but with exceptions when the Constitutional Court may deal with a case irrespective of the fulfillment of this condition (Germany, Slovenia, Switzerland);
- the **time limit for lodging the application** ranges from 20 days to three months with an average of one month beginning with the day of receipt or delivery of the final, legally binding act;
- the **prescribed contents of the application**, is prescribed in detail in the majority of systems: written form, sometimes language explicitly stated (Germany, Austria), citing of the particular state, the disputed act, definition of the violation of a constitutional right, *etc.*;
- the majority of systems (but not the systems of the Middle and Eastern Europe) envisage the issuing of a **temporary restraining order (injunction) or ruling (of the Constitutional Court)** *i.e.* an order temporarily suspension the implementation of the disputed act till the adoption of a final decision;
- in some systems the **payment of the costs** of the proceedings is explicitly foreseen in cases of frivolous applications (Germany, Austria, Portugal, Spain, Switzerland);

- the **effects of the decision**: the Constitutional Court is limited in its decision to constitutional matters, to the violation of constitutional rights. However, in the case of finding a violation, a decision may have a cassatory effect and as a rule *inter partes* (and *erga omnes* in a case in which the subject-matter of the decision is a legislative measure). The Constitutional Court here retains the position of the highest judicial authority. These Courts can be referred to as superCourts of cassation, because Constitutional Courts reviewing the decisions of the regular Courts act in fact as the third and the fourth instance. Although the Constitutional Court is not a Court of full jurisdiction, in specific cases it is the only competent Court to judge whether a regular Court has violated the constitutional rights of the plaintiff. It involves the review of microconstitutionality, maybe the review of implementation of the law, which, however, is a deviation from the original function of the Constitutional Court. Cases of constitutional complaint raise sensitive questions of defining constitutional limits. Anyway, the Constitutional Court in its treatment and decision-making is limited strictly to questions of constitutional law. The Slovenian system is specific in that the Constitutional Court may, under specified conditions, make a final decision on constitutional rights or fundamental freedoms themselves (Para. 1 of Article 60 of the *Slovenian Constitutional Court Act*, Official Gazette RS, No. 15/94).

The protection of fundamental rights and freedoms is an important function of the majority of Constitutional Courts, irrespective of whether they perform the function of constitutional judgment in the negative or positive sense. Whenever a Constitutional Court has the function of the "negative Legislature" constitutional review is strongest precisely in the field of fundamental rights. Even in other fields (concretisation of state-organisational and economic constitutional principles) in which the Legislature has the primary role even in principle, Constitutional Courts take care that fundamental rights be protected. Precisely in the field of the protection of rights, the Constitutional Court also has the function of the substitute "Constitution-maker" ("positive function"), which means that in specific cases Constitutional Courts even supplement constitutional provisions.

V. International Forms of Individual Complaint

1. The concept of "constitutional complaint" is usually connected with the national constitutional protection of fundamental rights. However, certain international documents also envisage specific legal remedy of protection of fundamental rights and freedoms in the form of a complaint³².

³²e.g. Article 2 of the *Facultative Protocol of the General Assembly of the UN to the International Pact on Citizenship and Political Rights* of 19 December 1966 (Resolution No. 2000 A (XXI)) since that the Council for human rights must accept and debate reports from individual persons who claim that they are the victims of the violation of any right defined in this Pact. The right to individual complaint is contained in the following: Article 23 of the *Declaration on Fundamental Rights and Freedoms of the European Parliament* of 12 April 1989; section 18(2) of the *Document of the Moscow Meeting of CSCE* of 3 October 1991; Article 25 of the *American Convention on Human Rights* of 22 November 1969; Article 28 of the *Contract on the European Community* of 1 February 1992; Statute of 1979 of the *Comision y la Corte Interamericanas de los Derechos Humanos*; Statute of 1980 of the *Inter-American Court on Human Rights*; *American Convention on Human Rights* of July 18, 1978 (Article 44); Articles 55 through 59 of the *African (Banjul) Charter on Human and People's Rights* of June 27, 1981.

2. The *European Convention for the Protection of Human Rights and Fundamental Freedoms* of 4 November 1950 gives individuals the right to the so-called individual complaint³³. An individual may lodge a complaint with the European Commission for Human Rights because of the alleged violation of rights guaranteed by the *Convention*. It is an explicit international legal remedy comparable to the national constitutional complaint. It fulfills its function of the individual complaint where national law does not guarantee any appropriate protection of rights. Individual complaint is a subsidiary legal remedy (preconditioned on the exhaustion of the national legal remedies), it is not a popular complaint (*actio popularis*) and it does not have retroactive or cassatory effect. It differs from the constitutional complaint in the way that, contrary to the latter, it leads merely to a finding (declaratory relief).

The position of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* in national law specifies whether an individual may refer to the *Convention* or even base a national constitutional complaint thereon. It further narrows the maneuvering space of the Constitutional Court itself in the interpretation of the provisions of the *Convention*. It has actually become a connection of the national Constitutional Court to the European bodies in cases in which a judicial decision as a final national outcome of decision-making becomes the subject of an individual complaint to a European forum.³⁴

3. Slovenia signed the *European Convention for the Protection of Human Rights and Fundamental Freedoms* on 14 May 1993 and ratified it on 8 June 1994³⁵. The *Slovenian Constitution of 1991* resolves these questions in specific constitutional and legal provisions: Statutes and other regulations must be in accordance with the generally valid principles of international law and with international contracts to which Slovenia is bound. Ratified and promulgated international contracts must be applied directly³⁶. The Constitutional Court decides on the accordance of statutes and other regulations with the ratified international

³³ Article 25 of the *Convention*.

³⁴The *European Convention for the Protection of Human Rights and Fundamental Freedoms*:
- is of constitutional impact in Austria;
- is the basis for an internal national constitutional complaint in Switzerland where it has a status comparable with the constitutional level;
In both cases it is permissible to found the national constitutional complaint on the provisions in the *Convention*.

- it is higher than ordinary law (Belgium, France, Luxembourg, Malta, The Netherlands, Portugal, Spain, Cyprus);
- it is ranked as Common Law: Germany, Denmark, which introduced the national use of the *Convention* by special *Statute* on 1 July 1992, Finland, Italy, Liechtenstein, San Marino, Turkey;
- it does not have a direct internal state effect: Great Britain, Ireland, Sweden, Norway, Iceland. Some countries of Anglophone Africa are an exception regarding the latter group of systems (Kenya, Tanzania, Uganda, Nigeria) which expressly adopted the system of protection of rights from the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (e.g. Nigeria in the Constitution of 1960) influenced by the extension clause to the *European Convention* in terms of Article 63, which Great Britain signed on 23 October 1953, whereby only the *Convention* itself and *Protocol 1* apply in these regions.

³⁵Official Gazette RS, International Contracts, No. 33/94.

³⁶Article 8 of the *Constitution*.

contracts and general principles of international law³⁷.

The institution of constitutional complaint and European complaint and the function of European bodies (above all the European Court of Human Rights) raises the question of national and supra-national (final) instance. The national (final) instance: the Constitutional Court as the highest body of judicial authority in a particular state for the protection of constitutionality and legality and human rights and fundamental freedoms³⁸ would be limited to investigation of constitutional-legal questions only. Review of the correct finding of the actual circumstances and the use of simple rules of evidence is a matter for the regular Courts. The subsidiary nature of a constitutional complaint also lies in the division of responsibility between the Constitutional and the regular Courts. The gradation of instance could be established as ascending from the national Supreme Court through the national Constitutional Court to the European Commission or European Court. In fact, instance is not the essence of this gradation although it is essential in the role of supplementing, which means that the national constitutional complaint supplements national judicial protection while supra-national European complaint supplements national constitutional complaint.

VI. Slovenian Experience

1. History

With the introduction of the Constitutional Court by the *Constitution of 1963* the then Slovenian Constitutional Court also acquired jurisdiction over the protection of the fundamental rights and freedoms. It could also decide on the protection of self-government rights and other fundamental freedoms and rights specified by the then Federal and member states *Constitutions* in case these were violated by an individual act or deed by a member state or communal body or company in case this not guaranteed by other judicial protection by statute³⁹. The decision of the Constitutional Court in such proceedings had a cassatory effect in the case of an established violation (annulment or invalidation or amendment of an individual act and the removal of possible consequences; prohibition on the continued performance of an activity). The jurisdiction of the Constitutional Court was, therefore, subsidiary. It was possible to initiate the proceedings only if, in a specific case, there was no judicial protection envisaged, or if all other legal remedies were exhausted.

However, in practice the then Constitutional Court rejected such individuals suits on the basis of absence of power and directed the plaintiff to the proceedings before the regular Courts. Such a state also created a certain negative attitude of the Constitutional Court itself, since it knew in advance that it would reject such suits and thus carry out a never-ending task. The then

³⁷Subpara. 2 of Para. 1 of Article 160 of the Constitution; Subpara. 2 of Para. 1 of Article 21 of the *Constitutional Court Act*.

³⁸The status of the Constitutional Court is thus defined in *e.g.* Para. 1 of Article 1 of the *Constitutional Court Act* of 1994.

³⁹Para. 3 of Article 228 of the *Constitution of the SRS of 1963* and the Articles 36 through 40 of the *Constitutional Court Act*, Official Gazette SRS, Nos. 39/63 and 1/64.

Constitutional Court itself warned that in relation to individual acts, the most sensible solution would be for decisions to be transferred, as a whole, to the regular Courts. The negatively arranged jurisdiction of the Constitutional Court (whenever other legal protection was not provided) resulted in the fact that its activities in this field showed no results, although this activity was initiated precisely because of a complaint for the protection of rights. However, the then system of the constitutional review guaranteed throughout the individual the right of popular complaint (*actio popularis*) without the appellant having to demonstrate his/her own standing.

From then on, the constitutional complaint no longer found any place in the system, until it was again introduced by the *Constitution of 1991*. This specific legal remedy thus remained combined with the previous system, *i.e.*, with the possibility of lodging a popular complaint (*actio popularis*)⁴⁰ with the Constitutional Court - despite the individual as petitioner having to demonstrate his/her standing - which in effect limits the procedural presumption). Accordingly, an individual may impugn all categories of (general) act by lodging a constitutional or popular complaint (*actio popularis*) if he/she is directly aggrieved.

2. Slovenian System in Force

The provisions of the *Slovenian Constitution of 1991* that regulate constitutional complaint in detail are relatively modest⁴¹. However, the *Constitution* itself⁴² envisages the special statutory regulating⁴³.

The Constitutional Court decides cases of constitutional complaints alleging violations of human rights and fundamental freedoms⁴⁴. The protection thus embraces all constitutionally guaranteed fundamental human rights and freedoms⁴⁵ including those adopted through the international agreements become part of the national law through ratification.

Any legal entity⁴⁶ or natural person may file a constitutional complaint⁴⁷, as may the

⁴⁰Para. 2 of Article 162 of the *Constitution of 1991*; Article 24 of the *Constitutional Court Act* of 1994.

⁴¹ Articles 160 and 161 of the *Constitution*.

⁴² Para. 3 of Article 160 of the *Constitution*.

⁴³ Provisions of Articles 50 to 60 of the *Constitutional Court Act*, Official Gazette RS, No. 15/94.

⁴⁴ Subpara. 6 of Para. 1 of Article 160 of the *Constitution*.

⁴⁵ Such a formulation in the Slovenian, as well as in the Croatian and Montenegrin, arrangements and the arrangement of FRY, is rare, since other arrangements as a rule explicitly define the circle of rights protected by the constitutional complaint.

⁴⁶ Ruling taken by the Slovenian Constitutional Court No. Up-10/93 of 20 June 1995, OdlUS IV, 164.

⁴⁷ Para. 1 of Article 50 of the *Constitutional Court Act*.

Ombudsman if directly connected with individual matters⁴⁸ with which he deals⁴⁹, although subject to the agreement of those whose human rights and fundamental freedoms he is protecting in an individual case⁵⁰. The subject-matter of constitutional complaint is an individual act⁵¹ of a government body, a body of local self-government, or public authority allegedly violating human rights or fundamental freedoms⁵².

The precondition for lodging a constitutional complaint is the prior exhaustion of legal remedies⁵³. As an exception⁵⁴ to this condition the Constitutional Court may hear a constitutional complaint even before all legal remedies have been exhausted in cases of *prima sacre* violations and if the carrying out of the individual act would have irreparable consequences for the complainant⁵⁵.

A constitutional complaint may be lodged within sixty days of the adoption of the individual act⁵⁶, though in individual cases with good grounds, the Constitutional Court may decide on a constitutional complaint after the expiry of this time limit⁵⁷. The complaint must cite the disputed individual act, the facts on which the complaint is based, and the suspected violation of human rights and fundamental freedoms⁵⁸. It shall be made in writing and a copy of the respective act and appropriate documentation shall be attached to the complaint⁵⁹.

⁴⁸ Standing: The constitutional complaint shall be rejected because lack of standing: Rulings taken by the Slovenian Constitutional Court No. Up-29/93 of 17 May 1995, OdlUS IV, 155 and No. Up-60/94 of 25 March 1997.

⁴⁹ Para. 2 of Article 50 of the *Constitutional Court Act*.

⁵⁰ Para. 2 of Article 52 of the *Constitutional Court Act*.

⁵¹ Ruling taken by the Slovenian Constitutional Court No. Up-319/96 of 22 November 1996 and No. Up-320/96 of 22 November 1996.

⁵² Para. 1 of Article of the *Constitutional Court Act*.

⁵³ Rulings taken by the Slovenian Constitutional Court No. Up-104/94 of 29 March 1995, No. Up-32/93 of 29 March 1995, No. Up-36/93 of 29 March 1995, No. Up-28/94 of 4 April 1995 *etc.*; (Para. 3 of Article 160 of the *Constitution*; Para. 1 of Article 51 of the *Constitutional Court Act*).

⁵⁴ Only the German and Swiss systems recognise such an exception.

⁵⁵ Decision taken by the Slovenian Constitutional Court No. Up-147/96 of 13 March 1997, OdlUS VI; (Para. 2 of Article 51 of the *Constitutional Court Act*).

⁵⁶ Para. 1 of Article 52 of the *Constitutional Court Act*.

⁵⁷ Ruling taken by the Slovenian Constitutional Court No. Up-81/95 of 5 July 1995 ; (Para. 3 of Article 52 of the *Constitutional Court Act*).

⁵⁸ Para. 1 of Article 53 of the *Constitutional Court Act*.

⁵⁹ Formally imperfect constitutional complaint shall be rejected: Ruling taken by the Slovenian Constitutional Court No. Up-35/95 of 11 October 1995; (Para. 2 and 3 of Article 53 of the *Constitutional Court Act*).

In a senate of three judges⁶⁰ the Constitutional Court decides whether it will accept or reject the constitutional complaint for hearing (or its allowability) at a non-public session. The Constitutional Court may establish a number of senates depending on the need. The ruling of the Constitutional Court on the allowability of a constitutional complaint⁶¹ is final. The constitutional complaint may be communicated to the opposing party for response, either prior to or after acceptance⁶². The Constitutional Court normally deals with a constitutional complaint in a closed session but it may also call a public hearing⁶³. The Constitutional Court may issue a temporary restraining (order, injunction) in the proceedings, either against an individual act, or statute, and other regulation or general act on the grounds of which the disputed individual act was adopted⁶⁴.

The decision *in merito* of the Constitutional Court may:

- Deny the complaint as being unfounded⁶⁵;
- Abrogation, retroactive (*ex tunc*) or prospective (*ex nunc*), of an individual act and returning the case to the empowered body while deciding on a constitutional complaint⁶⁶;
- Abrogation, retroactive (*ex tunc*) or prospective (*ex nunc*), of a general act while deciding on a constitutional complaint⁶⁷;
- Final decision on a contested human right or freedom based on a constitutional complaint (replacement of the disputed individual act by the Court decision), in the case if retroactive abrogation (*ex tunc*) of an individual act, if such procedure is necessary in order to eliminate consequences that have already occurred on the basis of the abrogated individual act, or if such is the nature of the constitutional right or freedom, and if a decision can be reached on the basis of the information in the document⁶⁸. At the beginning the above power of the Constitutional

⁶⁰ Para. 3 of Article 162 of the *Constitution*; Para. 1 of Article 54 of the *Constitutional Court Act*.

⁶¹ Para. 3 of Article 55 of the *Constitutional Court Act*.

⁶² Article 56 of the *Constitutional Court Act*.

⁶³ Article 57 of the *Constitutional Court Act*.

⁶⁴ Rulings taken by the Slovenian Constitutional Court No. Up-61/94 of 22 July 1994, OdlUS III, 129; No. Up-102/94 of 29 March 1995; Decision No. Up-102/94 of 29 February 1996, OdlUS V, 59; (Article 58 of the *Constitutional Court Act*).

⁶⁵ Para. 1 of Article 59 of the *Constitutional Court Act*.

⁶⁶ Over the period from 1996 to 1997 the Slovenian Constitutional Court decided 29 such cases - e.g. 7% of total number of decided cases; (Para. 1 of Article 59 of the *Constitutional Court Act*).

⁶⁷ Decision taken by the Slovenian Constitutional Court No. Up-132/96 of 24 October 1996; (Para. 2 of Article 161 of the *Constitution*; Para. 2 of Article 59 of the *Constitutional Court Act*).

⁶⁸ Decision taken by the Slovenian Constitutional Court No. Up-132/96 of 24 October 1996; (Para. 1 of Article 60 of the *Constitutional Court Act*).

Court gave rise to the discussions whether in this vera case the Constitutional Court represented an instance above the ordinary courts (especially above the Supreme Court). The present constitutional case-law, however, proves that the Constitutional Court is limited to the evaluation of pure constitutional issues, e.g. to the strict evaluation of breaches of certain constitutional rights⁶⁹. Such an order is executed by the body having jurisdiction for 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 currently valid regulations the Constitutional Court shall appoint one⁷⁰.

In addition the Constitutional Court may take the following decisions:

- The possible suspension the implementation of the individual act which is the subject of the constitutional complaint - while deciding on a constitutional complaint⁷¹;
- The possible suspension the implementation of a general act pending final decision - while deciding on a constitutional complaint⁷². The above possibility of temporary order represents a parallel to the temporary order, foreseen in the abstract review procedure⁷³. Hitherto the Constitutional Court has not dealt with any such case.

The Constitutional Court shall decide on the temporary order in the procedure for examining a constitutional complaint and/or may withhold the implementation of a disputed individual act only in case of acceptance of the constitutional complaint. In case of absence of procedural prerequisites and/or if the constitutional complaint was not accepted, the Constitutional Court shall not decide on the applicant's proposal to issue the temporary order⁷⁴.

Accordingly, the **particularities of the Slovenian regulation** are as follows:

- Exceptions from the precondition of legal remedies, having previously been exhausted, for filing a constitutional complaint⁷⁵;
- Wide definition of constitutional rights as the subject of protection by constitutional complaint

⁶⁹ Rulings taken by the Slovenian Constitutional Court No. Up-27/97 of 22 May 1996; No. Up-9/93 of 22 November 1995, OdlUS IV, 182; No. Up-150/95 of 17 January 1996; No. Up-325/96 of 4 February 1997; No. Up-49/96 of 23 April 1996, OdlUS V, 77; No. Up-81/96 of 25 September 1996; No. Up-78/96 of 1 October 1996; No. Up-95/96 of 25 September 1996; No. Up-16/94 of 11 October 1995, OdlUS IV, 178.

⁷⁰ Para. 2 of Article 60 of the *Constitutional Court Act*.

⁷¹ Article 58 of the *Constitutional Court Act*.

⁷² Article 58 of the *Constitutional Court Act*.

⁷³ Para. 1 of Article 161 of the *Constitution*; Article 39 of the *Constitutional Court Act*.

⁷⁴ Ruling taken by the Slovenian Constitutional Court No. Up-9/95 of 28 February 1995, OdlUS IV, 144.

⁷⁵ Article 51 of the *Constitutional Court Act*.

in comparison with other systems which specifically define the circle of the rights so protected;

- Judgment (of the ordinary Courts) as the potential object of impugment by constitutional complaint, which is relatively rare ⁷⁶;
- *Ex officio* proceedings inasmuch as the Constitutional Court is not bound to the complaint in the event of finding that an individual act annulled is based on an unconstitutional regulation or general act - in such a case, the regulation or general act may be annulled or invalidated ⁷⁷;
- Coexistence of constitutional and popular complaint (*actio popularis*) the latter restricted only by the standing requirements for the appellant;
- No particular court fee in the proceedings: each party pays its own costs in the proceedings before the Constitutional Court unless otherwise specified by the Constitutional Court ⁷⁸;
- Possibility of ultimate decision on constitutional rights ⁷⁹.

3. So Far Existing Slovenian Constitutional Case-Law

The *Constitution of 1963* explicitly authorized the Constitutional Court for the decision-making on protection of the right to self-government as well as of other fundamental rights and freedoms specified by the Federal as well as by the member state *Constitution*, if these rights were violated through an individual act of government, communal body or by a work or other organisation and no other judicial protection was provided for by the statute ⁸⁰. Further details were derived from the *Constitutional Court Act* ⁸¹. Examples of constitutional case-law from that period reveal that Constitutional Courts mostly used to reject such individuals' complaints due to the lack of power and they used to refer such complainants to the regular Courts. The activity of the Constitutional Court in the field of fundamental constitutional rights and freedoms was predominantly based on the petitions lodged by the citizens. In the initial period of the activity of the Constitutional Court, since the *Constitution of 1963*, the protection of human rights and freedoms by the Constitutional Court has made no intensive progress. Maybe this was due to an insufficiently specific constitutional and legal basis, such that would provide the Constitutional Court with enough practical standards for its decision-making. The reason perhaps laid in the whole system which was not in favour of Constitutional Court protection of basic rights.

⁷⁶Since only Croatia, Macedonia, Portugal, Spain, FRY and Montenegro expressly envisage it.

⁷⁷ Para. 2 of Article 59 of the *Constitutional Court Act*.

⁷⁸ Para. 1 of Article 34 of the *Constitutional Court Act*.

⁷⁹ Para. 1 of Article 60 of the *Constitutional Court Act*.

⁸⁰ Para. 3 of Article 228 of the *Constitution of the SRS*.

⁸¹ Official Gazette SRS, Nos. 39/63 and 1/64.

The *Constitution of 1974*, however, removed the jurisdiction of the Constitutional Court over individual constitutional rights and freedoms and attributed the protection of these rights to the regular Courts. Nevertheless, in the second period of the Constitutional Court's activity, from the *Constitution of 1974* till the *Constitution of 1991*, the number of decisions explicitly relating to the constitutionally protected human rights and freedoms, scored a slight increase. In this respect the examples of concretisation of the Principle of Equality before the Law, the freedom of work, the right to social security and the right to legal remedies are of special significance. Unfortunately, most of these decisions taken by the Constitutional Court included little reasoning out. The reader may seem to be prevented from comprehending of all the background reasons for the decision-making.

It was also characteristic of Slovenian Constitutional Case-Law prior to 1991 that, in comparison with Europe, it avoided the use of legal principles a great deal more, even of those explicitly included in the text of the *Constitution* itself. In common with foreign practice, however, the principle of equality greatly predominated among otherwise rarely used principles. Decisions consistently remained within the framework of legalistic (formalistic) argument and no other values references were ever allowed: the Constitutional Court respected the principle of self-restraint and stuck to the presumption of the constitutionality of the statute.

The new *Constitution of the Republic of Slovenia of 1991* along with the catalogue of classical fundamental rights in combination with the newly defined powers of the Constitutional Court set the ground for the intensification of its role in this domain. It is considered that the Constitutional Court now has sufficient space for such activity. The *Slovenian Constitution* contains adequate definitions of rights which allow for professionally correct understanding and reasoning. Almost all fundamental rights have the nature of legal principles and are thus open to such an extent that they require significant further concretisation and implementation⁸².

The question as to whether Slovenian Constitutional Case-Law from the period after the introduction of the *1991 Constitution*, in its relations to the fundamental rights and freedoms, has adapted to or is more comparable with foreign constitutional case-law, can be answered in the sense that the Slovenian Constitutional Case-Law comes close to the foreign case-law in its approach to fundamental rights. The number of examples from this field has increased. At this it is necessary to bear in mind that the "frequency" of individual rights before Constitutional Courts mainly depends on what kind of problem appellants place before the Constitutional Court. The Constitutional Court now appears as the guardian of the constitutionality in such a way that it decides not only on the accordance of general legal acts with the constitutional provisions on fundamental constitutional rights (in the sense of abstract and specific review of general legal acts) but also on constitutional complaints against the violation of human rights and fundamental freedoms by individual acts⁸³. Here it is, however, necessary to add that in principle the new *Constitution* slightly limited the still broad possibilities for individuals' impugment of general acts. In accordance to this principle everybody still can give the petition for the beginning of the proceedings, yet on condition to be able to prove his/her standing.

⁸²Citation from Pav_nik Marijan, *Verfassungsauslegung am Beispiel der Grundrechte in der neuen slowenischen Verfassung*, WGO Monatshefte fuer Osteuropaeisches Recht, 35th yearbook 1993, Heft 6, p. 345-356.

⁸³ Para. 1 of Article 160 and Article 162 of the *Constitution*.

VII. Core of Judicial Protection of Human Rights

The core of judicial protection of human rights lies in the constitutional complaint, since:

- Human rights are attributes of any democratic legal system;
- Constitutional complaint is (only) one of the legal remedies for protecting constitutional rights;
- Constitutional complaint is an important remedy for the protection of human rights connected with the human rights themselves⁸⁴; the *Constitution* guarantees the constitutional complaint, in the same way as the rights it protects; at the same time, the constitutional complaint is limited by statute to the benefit of the operational capacity of the Constitutional Court;
- Its effectiveness is disputed, since successful constitutional complaints are in a clear minority, although that should be no reason for their restriction or abolition. The latter is also very often the result of the great burden of this kind of case on Constitutional Courts;

However, despite the internal contradictory properties of this institution, the possibility shall remain open of access by the individual to justice or to judicial protection of his/her constitutional rights. The very existence of the constitutional complaint ensures more effective review of violations of constitutional rights on the part of government bodies, especially over the period of process of transformation of social and legal order.

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