



Council of Europe
Conseil de l'Europe



European Union
Union européenne

Strasbourg, 10 May 2010

CDL-UDT(2010)012
Engl. Only

T-04-2010

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**UNIDEM
CAMPUS TRIESTE SEMINAR**

“ADMINISTRATIVE DISCRETION AND THE RULE OF LAW”

Trieste, Italy

**Palazzo del Ferdinando,
MIB School of Management
Largo Caduti di Nasirya n° 1
tel: +39 040 918 8111**

12 – 15 APRIL 2010

REPORT

**JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS
THE EXTENT AND LIMITS OF JUDICIAL REVIEW
THE EFFICIENCY OF JUDICIAL REVIEW
Comparative and Slovenian Aspects**

by

**Mr Arne Marjan MAVCIC
(Professor, The European Law School Nova Gorica,
The Faculty for State and European Studies, Brdo, Slovenia)**

TABLE OF CONTENTS

I. OBJECTS OF (IN PRINCIPLE, OF THE REPRESSIVE) CONSTITUTIONAL REVIEW 3

II. SUBJECTS/STANDING/LEGAL INTEREST BEFORE THE CONSTITUTIONAL COURT (IN THE REPRESSIVE ABSTRACT OR CONCRETE CONSTITUTIONAL REVIEW PROCEEDINGS)..... 4

III. THE VARIOUS FORMS OF CONSTITUTIONAL REVIEW AND THEIR IMPLEMENTATION IN PRACTICE 4

IV. CONSTITUTIONAL REVIEW IN THE FIELD OF HUMAN RIGHTS PROTECTION 5

A. The Individual as an Applicant before the Constitutional Court 5

B. Bodies Empowered for Human Rights Protection and the Forms of such Proceedings 6

C. The Constitutional Complaint..... 6

D. The Fundamentals of the Constitutional Complaint 8

E. Various International Forms of the Individual Complaint 9

V. THE CHARACTER OF THE DECISIONS OF CONSTITUTIONAL COURTS IN THE CONSTITUTIONAL COMPLAINT PROCEEDINGS AND THEIR PUBLICATION..... 11

A. Contents and the Effects of Decisions 11

 1. *Contents* 11

 2. *The Appointment of a Body Empowered to Implement Court Decisions*..... 11

 3. *Effects*..... 11

 4. *The Rehearing of Proceedings Before the Constitutional Court* 11

B. The Publication of Constitutional Court decisions 12

 1. *Publication* 12

 2. *The Effect of Publication* 12

VI. SLOVENIA - APPLICANTS BEFORE THE CONSTITUTIONAL COURT 13

A. Legal Interest Before the Constitutional Court 13

B. Ordinary Courts as Applicants 13

 1. *Preliminary Issues - Plea of Unconstitutionality* 13

 2. *Exception of Unconstitutionality*..... 15

C. Screening..... 16

D. Scope of Referral of the Constitutional Court – "ex officio" Assessment 17

E. The Slovenian Constitutional Complaint 17

 1. *History*..... 17

 2. *Basic*..... 19

 3. *Procedure*..... 22

 4. *The Particularities of the Slovenian Regulation* 24

F. Some Legal Measures – as an Experiment Towards the Tendency of Limitation in Favour of Lower Number of Arrived Cases – A Stronger Selection in Favour of "more important" Cases 25

G. Any Forecast?..... 27

REFERENCES:..... 28

I. OBJECTS OF (IN PRINCIPLE, OF THE REPRESSIVE) CONSTITUTIONAL REVIEW

The Objects of constitutional review may be as follows:

- In particular systems even a constitution;
- a constitutional act;
- international agreement (in principle, the preventive review);
- statute (organic or systemic statutes, ordinary statutes);
- legal *gap*;
- parliamentary rules of procedure;
- other parliamentary regulations (ordinances, *etc.*);
- act of the Head of State (having the force of law or not having the force of law);
- executive regulation of the Government (decree, ordinance, budget acts, decision, resolution, *etc.*);
- governmental rules of procedure;
- executive regulation of the State administration (rule, order, decision, resolution, *etc.*);
- individual act of the State administration. Individual acts as understood here include administrative acts an administrative body decides in an individual case. All types of administrative bodies constitutionally entitled to issue such acts can be taken into consideration, including regional or local administrative bodies, even though some federal states dispose of federated Constitutional Courts that review acts issued by the federal authorities as far as their compatibility with the constitution of the federated state is concerned, for instance Germany.

In some systems the constitutional revision exists, where an individual is being given a remedy against final decisions by ordinary courts, but not against individual administrative acts. This is in the case in Malta (eher the constitutional complaint can also be brought against *potential* violations of fundamental rights), Bosnia and Herzegovina, Chile (against certain types of resolutions by the higher courts – *auto acordados*) and Albania.

In Austria, on the other hand, only individual administrative acts can be reviewed, but no final decisions of the judiciary. However, individual administrative acts can be challenged parallel to a recourse to the Supreme Administrative Court: First, the Constitutional Court verifies whether constitutional rights have been violated and the negative it refers the case to the Administrative Court for verification whether ordinary laws have been violated. This is seen by Austria Convention as a lacuna to be overcome in Austria.

In legal systems with a complete administrative jurisdiction an individual has the possibility to challenge an illegal or unconstitutional act before administrative tribunals. This means that if the tribunals fail to invalidate the act, effective protection would require that the individual be given standing to challenge their judgments before the Constitutional Court, as access to the Constitutional Court is subject to the exhaustion of all legal remedies (see e.g. Art. 157 of the Slovenian Constitution in connection with Art. 51 of the Slovenian Constitutional Court Act).

With the growing valuation of human rights protection, one can observe a clear tendency towards constitutional review of individual administrative acts and decisions of the judiciary upon application by the individual, as human rights violations often are the result of unconstitutional individual acts based on constitutional normative acts. In the constitutional complaint review proceedings, the Constitutional Court will usually not decide on the merits of the case. Rather, it will consider the purely constitutional aspects of the case. In addition, the Constitutional Court will not enter into a review of respect of the entire hierarchy of norms (e.g. review of legality of an individual act). The function of such »full« constitutional complaints is in the first place the protection of the individual's rights.

- ruling of territorial unit (charter, ordinance, executive regulation *etc.*);
 - collective agreement (in some systems);
 - judgment (final court decision taken by the »ordinary court«);
 - interpretation of rules;
 - the implementation of rules;
 - legislative initiative (in some systems, *ex officio* power of the Constitutional Court, citizen's initiative *etc.*);
 - jurisdictional disputes;
 - the protection of human rights (the constitutional complaint, the popular complaint, other forms);
 - election matters;
 - referendum matters;
 - capacity for offices;
 - impeachment;
- other particular objects.

II. SUBJECTS/STANDING/LEGAL INTEREST BEFORE THE CONSTITUTIONAL COURT (IN THE REPRESSIVE ABSTRACT OR CONCRETE CONSTITUTIONAL REVIEW PROCEEDINGS)

- individuals (citizens, non-citizens)¹. Some constitutional review systems also allow for a private individual's access to the Constitutional Court (concerning the abstract as well as concrete review, based on a constitutional complaint, or on a popular complaint (*actio popularis*) or on other forms of constitutional rights' protection);
- legal entities²;
- associations, trade unions *etc.*
- State bodies (*i.e.* privileged, legitimate petitioners):
- the legislature;
- the executive (the Head of State, the Government, the State administration);
- other State bodies or institutions;
- territorial units;
- the judiciary (ordinary courts; special courts; the Public Prosecutor);
- the Central Bank;
- the Court of Auditors;
- the Ombudsman.

III. THE VARIOUS FORMS OF CONSTITUTIONAL REVIEW AND THEIR IMPLEMENTATION IN PRACTICE

The European (Austro-German, Kelsen's, Concentrated, Continental) model is the most wide spread current model of constitutional review in practice. Such a situation is first of all the result of the introduction of constitutional review, supported by the Austro-German experience as well as by the respective »general« model of constitutional (review) system

¹ Adigea/Russia, Albania, Andorra, Argentina, Austria, Azerbaidjan, Bavaria/Germany, Bashkiria/Russia, Benin, Berlin/Germany, Brazil, Bremen/Germany, Burundi, Buryatia/Russia, Cambodia, Cape Verde, the Central African Republic, Chad, Colombia, Congo, Costa Rica, Croatia, the Czech Republic, Cyprus, Dagestan/Russia, Djibouti, Ecuador, El Salvador, Equatorial Guinea, the FYROM, Georgia, Germany, Guatemala, Hessen/Germany, Honduras, Hungary, Israel, Japan, the Kabardino-Balkar Republic/Russia, Karelia/Russia, Koma/Russia, Kyrgyzstan, Liechtenstein, Montenegro, Mali, Malta, Mauritius, Moldavia, Mongolia, Nicaragua, Niger, Panama, Papua New Guinea, Paraguay, Peru, Poland, Rheinland-Pfalz/Germany, Russia, Saarland/Germany, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, South Africa, South Korea, Sudan, Spain, Sri Lanka, Switzerland, Syria, Taiwan, Tucuman/Argentina, Ukraine, Uganda, Uzbekistan, Venezuela.

² Those entitled to lodge a constitutional complaint are generally individuals but in Austria, Germany, Spain, Switzerland, Montenegro, legal entities explicitly may also, while in the Croatian system legal entities are explicitly excluded as a potential appellant.

promoted by particular international organizations and/or bodies (e.g. the Venice Commission of the Council of Europe), in Central and Eastern Europe, in the Community of Independent States (CIS) as well as in several federal entities of the Russian Federation.³ Furthermore, several elements of the European model were also additionally introduced in some systems in Central and South America, which were based in the past on the judicial review system of the American type.

On the other hand, the introduction of particular models was a result of traditional, historical, cultural, political and commercial links among some countries and/or among several groups of countries, always depending on the specific circumstances in a particular country.

IV. CONSTITUTIONAL REVIEW IN THE FIELD OF HUMAN RIGHTS PROTECTION

A. The Individual as an Applicant before the Constitutional Court

Proceedings before the Constitutional Court have the nature of proposed proceedings (*juridiccion voluntaria*). In principle, the Constitutional Court cannot itself initiate 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).

The initiation of constitutional review proceedings on the initiative of the Constitutional Court (*ex officio*) is quite rare. 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 Slovenia⁴, elsewhere *ex officio* proceedings are not as frequent. The Austrian Constitutional Court, for example, may on its own initiative begin proceedings of the constitutional review of a statute or a regulation only if it refers to a prejudicial question in some proceeding 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 a private individual's access to the Constitutional Court (concerning abstract as well as concrete review, based on a constitutional complaint, or on a popular complaint (*actio popularis*) or on other forms of constitutional rights' protection. This involves the so-called subjective constitutional review, the violation of individual rights and the protection of individual rights against the State (in particular against the legislature). In the countries with a diffuse constitutional review and in some countries with a concentrated constitutional review, the individual citizen is offered the possibility of requesting the constitutional review of statutes, administrative measures or judgments in special proceedings. Only after the complaint has been lodged with the Constitutional Court do proceedings begin. Even then, as a rule, the complainant may withdraw their 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 provisions relating to concrete review⁵. In some systems the individual's access to constitutional courts has become so widespread that it already threatens the functional capacity of the Constitutional Court⁶. Therefore, the legislature is trying to find some way for constitutional courts to eliminate less important or hopeless proceedings (e.g. the restriction of abstract reviews by standing requirements). All

³ Adigea, Altai, Baskiria, Buryatia, Chuvachia, Dagestan, Inguchia, Irkutsk Oblast, the Kabardino-Balkar Republic, Karakalpakstan, the Karachaevo-Cherkez Republic, Karelia, Khalmukia, Komi, Marii-El, Northern Ossetia, Tatarstan, Tuva, Udmurtia, Yakutia/Sakha etc. (see more on www.concourts.net).

⁴ 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*.

⁵ Greece, Italy, Switzerland, the USA.

⁶ Germany.

these proceedings envisage the condition that the complainant must be affected by a certain measure taken by the public authority. With a growth in the number of complaints, efficiency decreases. Nevertheless, citizens should have many opportunities to apply for the protection of their constitutional rights.

B. Bodies Empowered for Human Rights Protection and the Forms of such Proceedings

1. The petition of an affected individual whose constitutional rights are claimed to have been violated is generally the basis for appropriate proceedings of protection in which the 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.

2. Ordinary courts - for the most part these are countries which have also adopted the so-called diffuse or American model of judicial review⁷: e.g. *habeas corpus*, *habeas data*, *amparo* etc.; constitutional courts -).

3. A popular complaint (*actio popularis*) may, equally, be lodged by an individual, generally without restrictions⁸. 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 is normally directed against a general act (usually a statute) which is considered to have violated a constitutional right.⁹ 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.

4. A specific group of systems of constitutional law guarantees the individual only 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 to be satisfied through: an abstract review of rules¹⁰; or a specific (concrete) review of rules¹¹; or a preventive abstract review of rules¹².

C. The Constitutional Complaint

The constitutional complaint is a specific subsidiary legal remedy against the violation of constitutional rights, primarily by individual acts of government bodies which enables a subject who believes that their rights have been affected to have their case heard and a decision issued by a Court authorised to provide a constitutional review of disputed acts. Generally, the indictment refers to individual acts (all **administrative** and judicial acts), in contrast to the popular complaint (*actio popularis*), although it may also indirectly¹³ or even directly¹⁴ 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 remedy¹⁵.

The constitutional complaint is not an entirely new institute; its forerunner may be found in the Aragon law of the 13th to 16th Century¹⁶; and in Germany from the 15th Century

⁷ Australia, Barbados, Denmark, Finland, Great Britain, Greece, Guyana, Iceland, Ireland, Jamaica, Japan, the Netherlands, Norway, Sweden, Trinidad and Tobago, and the USA.

⁸ The exceptions are Hungary and Slovenia, where it is restricted by a demonstration of standing by the complainant.

⁹ Kelsen considers the popular complaint (*actio popularis*) as the strongest guarantee, however he does not recommend such solution because of the possible abuse of the right to initiate a dispute as well as because of the risk of the unbearable burdening of the Constitutional Court by such complaints.

¹⁰ Belarus, Belgium, Bulgaria, Cambodia, Italy, Latvia.

¹¹ Azerbaijan, Bosnia, Bulgaria, Estonia, Italy, Kazakhstan, Lithuania, Yakutia.

¹² France.

¹³ Slovenia, Spain.

¹⁴ Germany.

¹⁵ Ruling No. U-I-71/94 of 6 October 1994, OdiUS III, 109.

¹⁶ In the form of *recurso de agravios*, *firme de derecho*, *manifestacion de personas*.

onwards¹⁷; while Switzerland introduced a special constitutional complaint¹⁸ 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 Europe¹⁹. In Germany, the constitutional complaint appears on the federal and on provincial levels.²⁰

In addition to Europe, some Asian systems recognise a constitutional complaint²¹. It should also be noted that other Arab countries, if they recognise judicial review at all, have in the main adopted the French system of the preventive 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. In Africa some countries recognise the constitutional complaint²². 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 by the legislature (under the jurisdiction of the Brazilian Supreme Court) unless we also count the Colombian *accion de tutela* (the jurisdiction 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 complaint²³. The two forms may compete in their functions. The rationale for both forms is the protection of constitutional rights: the popular complaint (*actio popularis*) in public and the constitutional complaint in the private interest. In both cases the plaintiff is an individual. As a rule, the subject disputed is different: the popular complaint (*actio popularis*) refers to general acts and constitutional complaints refer to individual acts²⁴. The standing of the plaintiff or that the remedy might have a personal effect upon the plaintiff is a precondition for a 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 it²⁵, such that for both the constitutional and the 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 a filing fee. It is, however, characteristic that in practice the number of constitutional complaints is increasing everywhere. Therefore, many constitutional courts have adapted the organization of their work following this trend either in the form of specialised individual chambers for constitutional complaints²⁶ or by narrower

¹⁷ Incorporated in the institution *Reichskammergericht* of 1495, envisaged in the famous constitutional text, *Paulskirchenverfassung*, of 1849, and in Bavaria it was provided for in the *Constitutions of 1808, 1818, 1919 and 1946*.

¹⁸ *Staatliche Verfassungsbeschwerde*.

¹⁹ Albania, Andorra, Austria, Croatia, the Czech Republic, Cyprus, the FYROM, Germany, Hungary, Liechtenstein (1992), Malta, Montenegro, Poland, Portugal, Russia, Slovakia, Slovenia, Spain, Switzerland-Supreme Court, Ukraine.

²⁰ The federal constitutional complaint is the responsibility of the Federal Constitutional Court, the provincial constitutional complaint is the responsibility of certain Provincial Constitutional Courts: Bavaria, Berlin, Hessen and Saarland.

²¹ Baskiria (under the jurisdiction of the Constitutional Court), Georgia (under the jurisdiction of the Constitutional Court), Kyrgyzia (under the jurisdiction of the Constitutional Court), Mongolia (under the jurisdiction of the Constitutional Court since the *Constitution of 1992*), Papua-New Guinea (under the jurisdiction of the Supreme Court), South Korea (under the jurisdiction of the Constitutional Court since the *Constitution of 1987*), Taiwan (under the jurisdiction of the Supreme Court), Syria (under the jurisdiction of the Constitutional Court), Uzbekistan (under the jurisdiction of the Constitutional Court); the Constitutional Courts of Member states of the Russian Federation (Adigea, Buryatia, Dagestan, the Kabardino-Balkar Republic, Karelia, Koma).

²² Benin (Constitutional Court), Cape Verde (the Supreme Court of Justice), Mauritius (the Supreme Court), Senegal (the Constitutional Council) and Sudan (the Supreme Court).

²³ Bavaria, Brazil, Colombia, Croatia, partially the Czech Republic, the FYROM, Hungary, Liechtenstein, Malta, Montenegro, Slovenia.

²⁴ Except for the possibility of indirectly disputing a statute in Montenegro, Slovenia and Spain, and the direct disputing of a statute in Germany.

²⁵ the FYROM, Slovenia.

²⁶ e.g. the German Federal Constitutional Court and the Spanish Constitutional Court.

units of the Constitutional Court (chambers, sub-chambers)²⁷ issuing decisions on constitutional complaints .

D. The Fundamentals of the Constitutional Complaint

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

- the preliminary selection of complaints (the integration of filters into proceedings). This is most highly developed in the German system with the intent to sift out potentially unsuccessful complaints, and as such the space for manoeuvre 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. One general problem of constitutional courts is how to separate the wheat from the chaff and at the same time secure the efficient protection of human rights in a democratic system. In addition, in certain systems the proposals for introducing the constitutional complaint are recent; some tend to introduce prior selection systems; on the other hand, certain systems tend towards the abolition of this legal institution;
- protection through the constitutional complaint generally refers to constitutional rights and freedoms, and the circle of rights protected by the constitutional complaint is less specifically defined in individual systems (e.g. Slovenia, Croatia, Serbia, Montenegro, where "all" constitutionally guaranteed fundamental rights are supposed to be protected), while other systems mostly define the (narrow) the circle of protected constitutional rights.²⁸ Special forms of constitutional complaint may also protect special categories of rights²⁹;
- as a rule, acts disputed by the constitutional complaint refer to **individual acts**, with some exceptions³⁰;
- those entitled to lodge a constitutional complaint are generally individuals but in Austria, Germany, Spain, Switzerland, Montenegro, legal entities explicitly may do so also, while in the Croatian system legal entities are explicitly excluded as a potential appellant; in some systems, the complaint may be lodged by the Ombudsman (Spain, Slovenia) or by the public prosecutor (Spain, Portugal).
- the standing, or the personal effect the remedy might have upon the plaintiff is a mandatory element, although in most systems the concept of standing is fairly loosely defined;
- the prior exhaustion of legal remedies is an essential precondition, but with exceptions when the Constitutional Court may deal with a case irrespective of the fulfilment of this condition (Germany, Slovenia, Switzerland);
- the time limit for lodging an application ranges from 20 days to three months with an average of one month from the day of receipt or delivery of the final, legally binding (individual) judgment or decision or act of the State administration;
- the contents of applications are prescribed in detail in a majority of systems: in written form, sometimes with the language explicitly stated (Germany, Austria), along with the

²⁷ e.g. in the Czech Republic, Georgia and Slovenia.

²⁸ See also Klucka, J., *Suitable Rights for Constitutional Complaints*, Report on the Workshop on the "Functioning of the Constitutional Court of the Republic of Latvia", Riga, Latvia, 3-4 July 1997, Offprint.

²⁹ In Germany, Hungary, Slovenia and in the Czech Republic municipalities are entitled, in order to protect self-government, to file a "**communal**" **constitutional complaint** (Germany recognises the "communal" constitutional complaint on a federal level and on a provincial level in the provinces of Wuerttemberg and North Westphalia). The German system also recognises a special constitutional complaint by an individual in relation to constitutional conditions for the nationalisation of land (*Sozialisierung*) in the province of Rheinland-Pfalz. A special form of constitutional complaint exists in Spain: there, the institute of the citizens' legislative initiative is also protected by constitutional complaint.

³⁰ In Switzerland and Austria a constitutional complaint can dispute only an administrative act, while in Germany, it can dispute acts of all levels (including a statute); in Spain, Slovenia, Montenegro a statute may also be an indirect subject of a constitutional complaint; legislative negligence may be directly disputed by a constitutional complaint in Brazil, and also in the practice of the German Federal Constitutional Court and the Bavarian Constitutional Court.

particular country, the disputed act, and a definition of the violation of the relevant constitutional right, *etc.*;

- a majority of systems (but not the systems of Middle and Eastern Europe) envisage the issuing of a temporary restraining order (injunction) or ruling (of the Constitutional Court) *i.e.* an order temporarily suspending the implementation of the disputed act until 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 to decide on constitutional matters, on the violation of constitutional rights. However, if a violation is found, a decision may have a cassatory effect which is, as a rule, *inter partes* (e.g. Slovenia, Austria, Germany etc.) (and *erga omnes* in a case in which the subject-matter of the decision is a legislative act). The Constitutional Court here retains the position of the highest judicial authority. These Courts can be referred to as the "high ranking courts of cassation", because Constitutional Courts reviewing the decisions of ordinary 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 ordinary court has violated the constitutional rights of the plaintiff. It involves the review of micro-constitutionality, perhaps the review of the implementation of a law, which, however, is a deviation from the original function of the Constitutional Court. In principle, the Constitutional Court **decides to send the case back to a lower court for deciding on the substance** (e.g. Canada, Cyprus – only concerning court decisions, Iceland, Ireland, Japan, Slovenia, Spain United States). If the Constitutional Court annuls a final court decision, it usually **orders a re-trial of the case at hand** (e.g. Austria, Bosnia and Herzegovina, Croatia, Czech Republic, Germany, Liechtenstein, Portugal, Slovakia, Slovenia, Republic of Korea). Likewise, if the Court lifts and individual administrative act, the absence of an administrative act puts the administrative bodies in principle under obligation pass a new act. Constitutional complaint cases raise sensitive questions on defining constitutional limits. In any case, the Constitutional Court in its activities 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).
- Some Constitutional Courts can really **give orders as to how the relevant body must act in order to be in conformity with the Constitution and to execute correctly the decisions at hand** (e.g. Czech Republic, Kyrgyzstan, Malta, Slovakia, Slovenia, Spain, Ukraine).

E. Various International Forms of the 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 remedies for the protection of fundamental rights and freedoms in the form of a complaint³¹.

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

³¹ e.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 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 file an 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; Charter of 1979 of the *Comision y la Corte Interamericanas de los Derechos Humanos*; Statute of 1980 of the *Inter-American Court on Human Rights*; the *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.

complaint³². An individual may lodge a complaint with the European Court of Human Rights following an alleged violation of rights guaranteed by the *Convention*. It is an explicit international legal remedy comparable to a national constitutional complaint. It fulfils the function of an individual complaint where national law does not guarantee any appropriate protection of rights. Individual complaints are a subsidiary legal remedy (preconditioned on the exhaustion of 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 space for manoeuvre of the Constitutional Court itself in the interpretation of the provisions of the *Convention*. It actually connects the national Constitutional Court to European bodies in cases in which a judicial final national decision becomes the subject of an individual complaint to a European forum.³³ - it sometimes does not have a direct internal state effect: e.g. Great Britain, Iceland, Ireland, Norway, and Sweden. Some countries of Anglophone Africa are an exception regarding the latter group of systems (e.g. Kenya, Nigeria, Tanzania, and Uganda), as they expressly adopted the system of the 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.

The institution of the constitutional complaint and the European complaint and the function of European bodies (above all the European Court of Human Rights) raises the question of national and supranational (final) instance. The national (final) instance would entail that the Constitutional Court as the highest body of judicial authority in a particular country for the protection of constitutionality and legality and human rights and fundamental freedoms³⁴ would be limited to the investigation of constitutional-legal questions only. The review of the correct findings of the actual circumstances and the use of simple rules of evidence are matters for the ordinary courts. The subsidiary nature of the constitutional complaint lies in the division of responsibility between the Constitutional and the ordinary courts. The gradation of instance could be established as ascending from the national Supreme Court through the national Constitutional Court to the European Court for Human Rights. In fact, instance is not the essence of this gradation although it is essential in the role of supplementing, in that the national constitutional complaint supplements national judicial protection while the supra-national European complaint supplements the national constitutional complaint.

³² Article 34 of the *Convention*.

³³ The *European Convention for the Protection of Human Rights and Fundamental Freedoms*:

- has constitutional status in Austria;
- is the basis for filing an internal national constitutional complaint in Switzerland, where it has a status comparable to the constitutional level;

In both cases it is permissible to base a national constitutional complaint on the provisions in the *Convention*.

- it is sometimes higher than ordinary law (Belgium, Cyprus, France, Luxembourg, Malta, The Netherlands, Portugal, Spain);

- it is sometimes ranked as Common Law: Denmark, which introduced the national use of the *Convention* by special *Statute* on 1 July

1992, Germany, Finland, Italy, Liechtenstein, San Marino, Turkey;

³⁴ The status of the Constitutional Court is thus defined in e.g. Para. 1 of Article 1 of the *Constitutional Court Act* of 1994.

V. THE CHARACTER OF THE DECISIONS OF CONSTITUTIONAL COURTS IN THE CONSTITUTIONAL COMPLAINT PROCEEDINGS AND THEIR PUBLICATION

A. Contents and the Effects of Decisions

1. Contents

The following results are possible:

- The abrogation, retroactive (*ex tunc*) or prospective (*ex nunc*), of an individual act and return of the case to the empowered body.
- The abrogation, retroactive (*ex tunc*) or prospective (*ex nunc*), of a general act (while deciding on a constitutional complaint).
- The final decision on a contested human right or freedom based on a constitutional complaint (entailing the replacement of the disputed individual act by the Court decision), in the case of a retroactive abrogation (*ex tunc*) of an individual act, if such proceedings 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 document. At first the above power of the Constitutional Court gave rise to a discussion of whether in this case the Constitutional Court represented an instance above the ordinary courts (especially above the Supreme Court). 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 rights.

2. The Appointment of a Body Empowered to Implement Court Decisions

If necessary, the Court specifies which body must implement its decisions (regarding the constitutional review of general acts), and in what manner. The Constitutional Court may order the temporary suspension of the implementation of individual acts, based on a general act abrogated by the Court decision.

The replacement of a disputed individual act by a Court decision is implemented by the body empowered for the implementation of the individual act retroactively abrogated (*ex tunc*) by the Constitutional Court and replaced by the decision of the same. If there is no such empowered body according to the current regulations, the Constitutional Court appoints one.

3. Effects

Under the main accepted principle of constitutional review systems, the decisions of the Constitutional Court are binding and produce effects *erga omnes*.

Exceptions to this rule are constitutional complaints and jurisdictional disputes where decisions have effect only *inter partes*, but even here effects are felt *erga omnes*, when the Constitutional Court acts *ex officio*.

4. The Rehearing of Proceedings Before the Constitutional Court

The decisions of the Constitutional Court are binding (e.g. Para. 3 of Article 1 of the *Slovenian Constitutional Court Act*, Official Gazette RS, No. 15/94) and executable (Para. 2 of Article 40 of the *Slovenian Constitutional Court Act*). The rules concerning the proceedings before the Constitutional Court do not include any exceptional legal remedy against a Constitutional Court decision, which also includes any rehearing or, in general, repetition of proceedings concerning an already adjudicated constitutional dispute.

The rehearing of a Constitutional Court case is not a rehearing in the classical judicial sense (despite the subsidiary implementation of rules concerning judicial proceedings). As a matter of fact, it is a special kind of rehearing of Constitutional Court proceedings that may result in the overturning of the previous Constitutional Court decision and its replacement with a different new decision.

Properly speaking, the Constitutional Court is internally procedurally bound by the text of its decision and/or with the "irrevocability" of the decision³⁵. Such irrevocability means that the Constitutional Court may not abrogate or change a decision which has already been issued. "Any promulgated or issued decision is no longer in the disposition of the Constitutional Court"³⁶.

Consequently, the decisions of the Constitutional Court are indisputable for the parties. However, as an exception it is necessary to consider the *European Convention for the Protection of Human Rights and Fundamental Freedoms* of 4 November 1950, which gives individuals the right to the so-called individual complaint against a national final Constitutional Court decision. Because there is no (national) legal remedy against Constitutional Court decisions, they become formally final when issued.

In a majority of Constitutional Court systems, Constitutional Court decisions are declared final, sometimes they are explicitly defined as irrevocable³⁷. In this way, constitutional courts are prevented from changing their decisions after their enforcement, with the exception of corrections of obvious incorrectness³⁸. So, constitutional courts are completely internally-procedurally bound by their own decisions.

However, the generally accepted principle of the irrevocability of constitutional court decisions are loosened or even partially waived by particular systems. A certain "relaxation" of the aforementioned principle means that such systems authorise the constitutional courts to interpret their own decisions³⁹. Such systems relativise the finality of Constitutional Court decisions.⁴⁰

On the other hand, the Byelorussian, Lithuanian and Ukrainian systems authorise the Constitutional Court to change its decision *ex officio* subsequently, without any external request or petition⁴¹.

B. The Publication of Constitutional Court decisions

1. Publication

Decisions and certain resolutions (if the Constitutional Court so chooses) are published in the Official State Gazette, local official gazettes and/or official gazettes of territorial units and in the official journal in which the respective general act had been published (in Slovenian).

2. The Effect of Publication

One day after the publication of decisions or on the expiry of the period specified by the Constitutional Court, abrogation decisions (*ex nunc*) come into effect. A general act abrogated (*ex nunc*) by the Constitutional Court does not apply to relationships that had

³⁵ *Unwiderruflichkeit*, Jochen Abr. Frowein - Thilo Marauhn, Grundfragen der Verfassungsgerichtsbarkeit in Mittel- und OstEuropa, Cremer, *Die Wirkungen verfassungsgerichtlicher Entscheidungen*, Springer, Band 130, 1998, p. 249.

³⁶ Jochen Abr. Frowein, Thilo Marauhn, *Grundfragen der Verfassungsgerichtsbarkeit in Mittel- und Osteuropa*, Springer, Band 130, 1998, p. 249.

³⁷ e.g. Para. 3 of Article 26 of the *Albanian Constitution* (No. 7561); Para. 4 of Article VI of the *Constitution of the Federation of Bosnia and Herzegovina*; Para. 5 of Article 14 of the *Bulgarian Constitutional Court Act*; Para. 2 of Article 107 of the *Lithuanian Constitution* and Article 59 of the *Lithuanian Constitutional Court Act*; Para. 3 of Article 112 of the *Macedonian Constitution*; Para. 2 of Article 140 of the *Moldavian Constitution*; Para. 1 and 4 of Article 82 of the *Constitution of Kyrgyzstan*.

³⁸ e.g. Article 58 of the *Lithuanian Constitutional Court Act*.

³⁹ Para. 5 of Article 26 of the *Albanian Constitution*, No. 7561; Article 61 of the *Lithuanian Constitutional Court Act*; Article 83 of the *Russian Constitutional Court Act* and Article 41 of the *Belorussian Constitutional Court Act*.

⁴⁰ In addition, it is interesting to note that by the provision of Para 3 of Article 61 of the *Lithuanian Constitutional Court Act*, the Constitutional Court has to interpret its own decisions in such way that the contents do not change. The request for such an interpretation is not permissible if the request does not concern the same disputed object, but may lead to the issuing of a new decision (Decision of the Lithuanian Constitutional Court of 21 September 1994, published in the Official Digest, No. 3/1995, 111).

⁴¹ Article 42 of the *Belorussian Constitutional Court Act*; Article 62 of the *Lithuanian Constitutional Court Act*; Article 68 of the *Constitutional Court Act*.

arisen before the day such abrogation came into effect, if by that day such relationship had not been entered into.

In Slovenia, within three months from the day of the publication of the Constitutional Court decision, any affected person is entitled, based on a Constitutional Court decision, to request an amendment or retroactive abrogation (*ex tunc*) of an individual act or the elimination of detrimental consequences or even claim damages⁴².

VI. SLOVENIA - APPLICANTS BEFORE THE CONSTITUTIONAL COURT

A. Legal Interest Before the Constitutional Court

Constitutional complaint (concrete control) may be initiated by any natural person (as well as a legal entity), the Ombudsman (Arts. 160, 161, 162, *Constitution*, Art. 50, *Constitutional Court Act*). In case of constitutional complaint, legal interest of complainant is incorporated as a substance of the matter.

Additionally, anyone (a natural person and/or a legal entity) who explicitly demonstrate **legal interest** may also request the **individual initiation of abstract (normative review) proceedings** before the Constitutional Court (Art. 162(2), *Constitution*; Art. 24, *Constitutional Court Act*). Additionally, bodies, specified in Art. 23.a of the *Constitutional Court Act*, may request the abstract (National Assembly, one third of deputies, National Council, Government) or concrete constitutional review (Ombudsman, Information commissioner, Bank of Slovenia, Court of Audit, State attorney general, representative body of local community, representative association of local community, national representative trade union – in connection with the concrete case they are dealing with). These bodies do not need to demonstrate their legal interest for commencing constitutional review.

Concerning standing (legal interest) before the Constitutional Court, the Court issued many decisions, which confirm the Court's general restrictive method of treatment and acknowledgment of the mentioned procedural condition. Such restrictive aim has been in the own nature of the legal interest. Therefore, the legal interest means a barrier due to which the petition can not be considered as a popular complaint (*actio popularis*). Bearing in mind the increasing overburdening of the Constitutional Court by (individual) petitions and paralelly by (individual) constitutional complaints, the restrictive interpretation of the legal interest can be well founded. However, on the other hand, it is no permissible to prevent individual petitions (popular complaints) by such interpretation of the legal interest, that in a concrete situation nobody would be able to demonstrate it. It is an essential question where is the extreme point of such restrictive interpretation of the legal interest. Furthermore, it is a question, where is the extreme point of the gradual limitation of the access to the Constitutional Court⁴³.

B. Ordinary Courts as Applicants

1. Preliminary Issues - Plea of Unconstitutionality

The Constitutional Court provides concrete review of provisions when requested by the ordinary Courts if a question relating to constitutionality or legality arises during the proceedings they are conducting (Art. 156, *Constitution*, Art. 23, *Constitutional Court Act*).

The courts are obliged to put the question. Art. 156 of the *Constitution* provides that if a court

⁴² Article 46 of the *Constitutional Court Act*.

⁴³ NERAD, Sebastian. Pravni interes za ustavnosodno presojo zakonov in drugih predpisov, REVUS-revija za evropsko ustavnost, No. 4/2005, GV Založba Ljubljana, p. 42

deciding some matter deems a law that it should apply to be unconstitutional, it must stay the proceedings and initiate proceedings before the Constitutional Court. The proceedings in the court may be continued after the Constitutional Court has issued its decision.

Additionally, the Constitution especially provides for the judicial review of the acts and decisions of all State administrative bodies (Art. 120 (3), Constitution). The Constitution determines as well that courts of competent jurisdiction are empowered to decide upon the legal validity of the decisions of State bodies, local government bodies and statutory authorities made in relation to administrative disputes and concerning the rights, obligations and legal entitlements of individuals or organizations (Art. 157, Constitution). This means that all final individual acts of administrative bodies (those which may not be charged by an appeal) are brought under judicial review. In cases where all legal remedies have been exhausted but the constitutional rights of an individual have allegedly been violated, it is possible to lodge a constitutional complaint before the Constitutional Court (Art. 160 (1) (6), Constitution, Arts. 50 to 60, Constitutional Court Act). This means that the constitutional review of general administrative acts may not be exercised by ordinary courts, but by the Constitutional Court, which may abrogate or annul unconstitutional or illegal general administrative acts (Art. 59 (1), Constitutional Court Act).

Since the Slovenian system is a system of concentrated constitutional review, the ordinary Courts cannot exercise constitutional review while deciding concrete (*incidenter*) proceedings. The ordinary Court must interrupt the proceedings and propose the review of the constitutionality of the statute before the Constitutional Court (Art. 156, Constitution, Art. 23, Constitutional Court Act). The ordinary Court may continue the proceedings only after the Constitutional Court has reviewed the constitutionality of the respective statute (hence the Slovenian regulation, too, adopted the principle that a statute can only be eliminated from the legal system by the Constitutional Court).

If the Supreme Court deems a law or part thereof which it should apply to be unconstitutional, it stays proceedings in all cases in which it should apply such law or part thereof in deciding on legal remedies and by a request initiates proceedings for the review of its constitutionality (Art. 23(2), Constitutional Court Act).

If by a request the Supreme Court initiates proceedings for the review of the constitutionality of a law or part thereof, a court which should apply such law or part thereof in deciding may stay proceedings until the final decision of the Constitutional Court without having to initiate proceedings for the review of the constitutionality of such law or part thereof by a separate request (Art. 23(3), Constitutional Court Act).

The parties before any ordinary court cannot affect such proceedings since the ordinary courts are obliged, as an official duty according to the Constitution, when they raise a question of the constitutionality of the regulations they are applying to stay the proceedings and refer the case to review by the Constitutional Court.

It clearly follows from Art. 156 of the Constitution and Art. 23 of the Constitutional Court Act that the court (e.g. within civil proceedings) is not obliged to stay the proceedings and request the review of the constitutionality of statute when any of the parties to the proceedings requests so. Pursuant to the cited provisions of the Constitution and the Constitutional Court Act, it proceeds in such a manner only when it itself has doubts about the conformity with the Constitution of the statute it should apply⁴⁴.

If the court believes that the statute it should apply is unconstitutional it must, according to Art. 156 of the Constitution, stay its proceedings, commence proceedings before the Constitutional Court and continue the proceedings after the decision on the conformity of the statute with the

⁴⁴ See ruling No. Up-70/96 of 22 May 1996, published on www.us-rs.si.

Constitution. That was the situation in cases on which the Constitutional Court has decided so far upon the proposal of the (ordinary) court⁴⁵. In all the cited cases, on which the Constitutional Court already decided, the Supreme Court stayed the proceedings on a suit filed within the judicial review of administrative decisions, that is, in the phase in which there was no final decision reached yet. In the opinion of certain petitioners, in particular the finality of a decision in connection with which they commence proceedings prevents the effects of possible annulment of the challenged statutory provisions. The Constitutional Court, however, has not so far confirmed such a position. Regarding these questions and the function of the Supreme Court as the highest State court for providing uniform case-law (Art. 127(1), Constitution), the Constitutional Court held in case No. U-I-273/98 of 1 July 1999 (Official Gazette RS, No. 60/99, DecCC VIII, 169, see also www.us-rs.si) that the requirements for commencing proceedings determined in Art. 23 of the Constitutional Court Act were fulfilled although the proceedings in the concrete case were not stayed.

2. Exception of Unconstitutionality

An interesting aspect of relations between the Constitutional Court and ordinary courts is established through the mentioned provision of Art. 156 of the Constitution, which reads: "In the event that a court, in deciding upon any matter, concludes that a statute which it must apply is unconstitutional, it must stay the proceeding and refer the issue of the constitutional validity of the statute to the Constitutional Court. The original proceeding in the court may only be continued after the Constitutional Court has handed down its decision." We shall hereafter call this proceeding concrete control.⁴⁶ This provision establishes relations between ordinary courts and the Constitutional Court in two aspects. To refer an issue of the constitutionality of the statute to the Constitutional Court, the ordinary court (*judex a quo*) has, first, to establish the meaning of the challenged (*suspicious*) provision, and, second, to substantiate its unconstitutionality. In both regards the ordinary court's motion is subject to revision by the Constitutional Court. Dealing in details with this subject would call for more time - let us, at this occasion, only mention that in several cases interpretation of the challenged provision made by the Constitutional Court differed from the one made by the referring court - which could suffice to remove the doubt about constitutionality and contribute to the solution of an individual dispute as well. It need not be mentioned that decisions in these procedures have the same *erga omnes* effects as any decision brought in the field of abstract control. The decision is published in the Official Gazette and its effects spread beyond the case that triggered the constitutional dispute. It is interesting that ordinary courts relatively infrequently use this possibility.⁴⁷

However, it is necessary to consider, that any ordinary court deciding a case may eliminate illegal or unconstitutional bylaws by itself. Accordingly to Article 125 of the Constitution, ordinary courts are bound by the Constitution and law, but not by bylaws and regulations issued by local communities. Bylaws and regulations, issued by local communities, ordinary courts can't even

⁴⁵ See e.g. decisions No. U-I-48/94 of 9 November 1994 – Official Gazette RS, No. 73/94 and DecCC III, 123; No. U-I-48/94 of 25 May 1995 – Official Gazette RS, No. 37/95 and DecCC IV, 50; No. U-I-225/96 of 15 January 1998 – Official Gazette RS, No. 13/98 and DecCC VII, 7.

⁴⁶ We find it necessary to mention that in Slovenian legal literature all procedures related to adjudication on the conformity of statutes (and regulations) are named *abstract control* (obviously because in these procedures *abstract acts* are checked) to be distinguished from constitutional complaint (which, on the other side, is never called *concrete control*, although the subject of scrutiny in these procedures are individual and, as a rule, concrete acts). A term *concrete control* is not used in Slovenian legal literature.

⁴⁷ There is no clear answer as to what are the obligations of the ordinary court if a question of unconstitutionality is raised by a party in a judicial procedure. Does the court have to give some formal *interim* answer or can it deal with the problem in the final decision. Do ordinary courts *at all* even in a negative form have the power to deal with constitutional issues? The question is of a small *practical* relevance, because any party may always challenge any statutory provision directly before the Constitutional Court - if only he or she demonstrates the provision to be applied in his or her case interferes with his or her rights, legal interest or legal position. An ordinary court would in such case stop, if not formally stay, the procedure until the final decision of the Constitutional Court.

implement if they are of opinion that such regulations are contrary to the Constitution or to the law. In such case, the Constitution itself authorises any ordinary judge when deciding on rights and duties, eliminates unconstitutional or illegal bylaws by itself (e.g. *exceptio illegalis*) (e.g. Ruling of the Constitutional Court No. U-I-312/05 of 10 January 2008, published on www.us-rs.si). Relating to such case, one can even speak about the »decentralisation of constitutional review«.

C. Screening

There is no a screening procedure which allows the Constitutional Court to limit the number of cases or to speed up the hearing of those cases (nonsuit, quick reply, demurrer, evident answered).

The Slovenian Constitutional Court has no power to limit the number of cases it is about to adjudicate. Nowhere in the Constitution and the Constitutional Court Act have been such powers vested in the Constitutional Court. Thus, following the old tradition of continental courts, in abstract-review proceedings before the Constitutional Court what applies is the principle of legality, which means that the Constitutional Court must reach a decision on every case submitted to it provided that the procedural requirements are fulfilled.

However, in a certain manner, it may speed up the hearing of certain cases. This is determined in Art. 46 of the Rules of Procedure of the Constitutional Court of the Republic of Slovenia (Official Gazette RS, No. 86/07). According to the Rules, the Order of Precedence for adjudicating cases is as follows: "The Constitutional Court shall adjudicate cases as a rule according to the order of precedence of receiving petitions, except:

- when simpler cases are at issue that can be considered and adjudicated already in the phase of examination or in the phase of preliminary proceedings;
- when consideration and adjudication according to the order of precedence are prevented by the length and complexity of preliminary proceedings or the proceedings for considering an individual case;
- when such cases are at issue for which the regulations that are applied on the basis of Art. 6 of the Constitutional Court Act determine that the Court must consider and adjudicate them rapidly;
- when the Constitutional Court Act or other regulations determine a time limit by which the Constitutional Court must consider a case and decide it;
- when the decision on a jurisdictional dispute is at issue;
- when the resolution of an important legal question is at issue, and in other cases
- when the Court decides so."

D. Scope of Referral of the Constitutional Court – "ex officio" Assessment

In principle, the Constitutional Court is limited by the application regarding its contents. However, in deciding on the constitutionality and legality of a regulation or a general act issued for the exercise of public authority, the Constitutional Court is entitled to assess the constitutionality or legality of other provisions of the respective (or other) regulations or general acts issued for the exercise of public authority whose constitutionality or legality have not been submitted for assessment, if such proposals are mutually related, or if this is absolutely necessary to resolve the case (Art. 30, *Constitutional Court Act*). If the Constitutional Court, while deciding on a constitutional complaint, establishes that a given abolished act was founded on an unconstitutional regulation or general act issued for the exercise of public authority, such act may be set aside (*ex tunc*) or abrogated (*ex nunc*) (Art. 161 (2), *Constitution*, Art. 59 (2), *Constitutional Court Act*). The Constitutional Court shall issue a decision stating which authority is competent and may also abrogate, retroactively or prospectively, the general act, or the general act for the exercise of public powers whose unconstitutionality or illegality has been established (Art. 61 (4), *Constitutional Court Act*).

E. The Slovenian Constitutional Complaint

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 fundamental rights and freedoms. It was empowered to decide on the protection of (at that time officially so called) self-government rights and other basic freedoms and rights determined by the then Federal and constituent republic Constitutions if these were violated by an individual act or deed by a State or municipal body or company if this were not guaranteed by other judicial protection by statute (Art. 228.3 of the Constitution of the SRS of 1963 and Arts. 36 to 40 of the then Constitutional Court Act). The decision of the Constitutional Court in such proceedings had a cassatory effect in the case of an established violation (an annulment or invalidation or amendment of an individual act, and the removal of possible consequences; or a prohibition on the continued performance of an activity). The jurisdiction of the Constitutional Court was, therefore, subsidiary. It was possible to initiate such 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 former Constitutional Court rejected such individual suits on the basis of a lack of jurisdiction, and directed the plaintiff to proceedings before the ordinary Courts. Such a state of affairs also created a certain negative attitude in 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 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 ordinary Courts. To extend powers of constitutional courts – what was proposed by several – to the constitutional review of individual acts of the administration and judiciary would be no possible in the then period already for a reason, that the then constitutional courts are supposed to be substantially charged by the review of more and more broader autonomus regulations and due to the rapid changing and often disharmonious and uncertain legal system⁴⁸. 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 - petition (*actio popularis*) without the appellant – petitioner having to demonstrate his/her own standing.

⁴⁸

Deset let dela Ustavnega sodišča Slovenije, Dopisna delavska univerza Ljubljana 1974, p. 55.

In the initial period of the activity of the Constitutional Court, following the Constitution of 1963, the protection of human rights and freedoms by the Constitutional Court made no intensive progress. Perhaps this was due to an insufficiently specific constitutional and legal basis, one that would provide the Constitutional Court with enough practical standards for its decision-making. The reason perhaps lay in the whole system, which was not in favour of the Constitutional Court protection of fundamental rights. 1

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 ordinary 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 constitutionally protected human rights and freedoms, slightly increased. In this respect the examples of the 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. The reader may be prevented from comprehending all of the background reasons for the decision.

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 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 legal (formal) argument and no other value references were ever allowed: the Constitutional Court respected the Principle of Self-Restraint and stuck to the presumption of the constitutionality of statutes.

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 implementation⁴⁹.

The question as to whether Slovenian Constitutional Case-Law from the period after the introduction of the 1991 Constitution, in its relations to fundamental rights and freedoms, has adapted to or is more in line with foreign constitutional case-law, can be answered in the sense that Slovenian Constitutional Case-Law comes close to foreign case-law in its approach to fundamental rights. The number of examples from this field has increased.

From then on, the constitutional complaint no longer had any place in the system, until it was again reintroduced 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*) (Art. 162(2) of the Constitution of 1991; Art. 24 of the Constitutional Court Act of 1994) with the Constitutional Court - despite the individual as petitioner having to demonstrate his/her legal interest (standing) - which in effect limits the procedural presumption. Accordingly, an individual may dispute all categories of (general) act by lodging a constitutional or popular complaint (*actio popularis*) if he/she is directly aggrieved.

49 Citation from Pavčnik, Marijan, *Verfassungsauslegung am Beispiel der Grundrechte in der neuen slowenischen Verfassung*, WGO Monatshefte fuer Osteuropaeisches Recht, 35th yearbook 1993, Volume 6, 345-356. See also Pavčnik, Marijan, *Understanding Basic (Human) Rights (On the Example of the Constitution of the Republic of Slovenia)*, East European Human Rights Review, Volume 2/1996, Number 1, 41-57.

2. Basic

Although the power of the Constitutional Court to adjudicate on individual cases involving the alleged breaches of constitutional human rights was envisaged already in the Constitution of 1991 (Art. 160(1)(6), Constitution), only the adoption of the Constitutional Court Act in 1994 made the procedure operational. The institute was adopted into the Slovenian legal system under the influence mainly of German jurisprudence - and in framing its practical application the Slovenian Constitutional Court systematically consulted comparative European jurisdictions. One of the most difficult tasks was to establish the proper scope and extent of this new legal remedy: to ensure effective protection of human rights to any person aggrieved on the one hand and to avoid the danger that the Constitutional Court becomes the last (in practice fourth) instance court within the range of ordinary courts, on the other hand.

It should be mentioned that in Slovenia the access to the Constitutional Court for the individual is in principle widely open: there are no limits as to which human rights may serve as a justification to lodge a constitutional complaint - in addition to all the rights established by the Constitution, also any human right laid down in any ratified and published international document may give rise to a constitutional complaint. There are no filing fees to be paid by the complainant. There are no requirements as to legal representation: applications *in forma pauperis* are widely accepted without reservations.

In the field of constitutional complaints the Constitutional Court adopts a two-step procedure. The first step is done by three judicial panels, each of them composed of three judges: a panel for civil cases, a panel for criminal cases and a panel for administrative cases. These judicial bodies are empowered only to decide on admissibility and (manifest) illfoundedness. If the complaint is found to be inadmissible it is dismissed, if it is found to be manifestly ill founded it is not accepted and only if it passes this scrutiny, the complaint is accepted (such decision can only be brought unanimously by the members of the panel, or, fifteen days following the dismissal or the decision of manifest illfoundedness, by any three members of the court) and submitted for decision making to the plenary session (second step of the procedure). Only after the complaint passes the first step examination successfully, the adversary procedure is established by giving the opposing party the possibility to take part in the procedure. At this stage of the procedure the body which issued the challenged decision (typically the Supreme Court) is always given the opportunity to submit its views and explications. The Supreme Court rarely avails itself of this possibility and normally does not take active part in the procedure. As a rule, the complaint is decided at an *in camera* session, and only exceptionally at a public hearing.

The constitutional complaint is not a legal remedy which would empower the Constitutional Court to consider merely the correctness and legality of legally valid court decisions. As mentioned before, this would turn the Constitutional Court into the court of last instance, which is not its constitutional role. The Constitutional Court is only authorized to assess whether the courts have, by their decisions, violated human rights and fundamental freedoms. The (panel of the) Constitutional Court dismisses a complaint if it is too late (60 days), if the complainant has not exhausted all ordinary and extraordinary legal remedies, if the complainant lacks standing (legal interest) or if the constitutional complaint is not complete (inadmissibility). The (panel of the) Constitutional Court does not deal with the constitutional complaint at all (according to the wording of Art. 55(2) of the Constitutional Court Act the Constitutional Court *shall not accept a constitutional complaint*) if there is obviously no violation of human rights and basic freedoms (manifest illfoundedness) or, if the decision cannot be expected to provide a solution to an important legal question and if the violation of human rights or basic freedoms did not have any important consequences for the complainant (triviality). Concept of *triviality* is somehow strange to European legal culture. Some aspects of the concept of *certiorari*, applied by the US Supreme court may be found in it. The important characteristic of this institution in Slovenian

legal system is that also the decision of non-acceptance on this ground has to give reasons. This is why the Slovenian Constitutional Court used this ground not to accept the constitutional complaint only in very few occasions. It is much easier and convincing to substantiate manifest illfoundedness than triviality of the alleged breaches of constitutionally guaranteed human rights. Though, one of the main problems the Constitutional Court is facing is how to cope with the permanently increasing caseload, both, in the field of constitutional complaints as well as in the field of review of statutes and regulations. Serious proposals have been made by legal experts and some former judges of the Court to examine the possibility of a new procedure, which would enable the Court to admit cases completely at its choice, bound only by internal criteria and without having to give reasons on admissibility or illfoundedness. My opinion is that to introduce such system would mean a *tectonic* change in public perception about the position and role of the Constitutional Court in a legal system. I am afraid that the society and the Court itself are not - and will not be in a near future - prepared for such turn.

When deciding about a constitutional complaint the Constitutional Court exclusively limits itself to examining whether the challenged decision is based on some legal standpoint that is unacceptable from the point of view of protection of human rights or whether it is arbitrary. In all three legal sections (civil, criminal, administrative) decisions, where breach of procedural guarantees were found, prevail. Among the constitutional rights of procedural nature the Constitutional Court has so far, by its decisions, protected equality in the protection of rights (Art. 22, Constitution), due process of the law (Art. 23, Constitution) the right to legal remedies (Art. 25, Constitution) and (special) legal guarantees in criminal proceedings (Art. 29, Constitution). Among violations in the field of substantive law the complainants have so far successfully pleaded for the protection of personal liberty - related to the arrest and preventive detention (Art. 19), the right to property (Art. 33, Constitution), the right to privacy (Art. 35, Constitution), the inviolability of dwellings (Art. 36, Constitution) the freedom of expression (Art. 39, Constitution) and the right to social security (Art. 50, Constitution).

It must be mentioned that in examining constitutional complaints the Constitutional Court applies directly also provisions of the European Convention on Human Rights and interprets the extent of constitutional provisions in the light of jurisprudence of the European Court in Strasbourg.

If the (plenary session of) the Constitutional Court finds that the challenged individual act breached the complainant's constitutionally protected human right, it will normally reverse the challenged decision and remand it to the Supreme Court or, as the case may be, to some other court or administrative body, where the breach occurred. If the Constitutional Court establishes that the challenged act was based on an unconstitutional statute or regulation, it may in an incidental procedure quash such act - this part of its decision having an *erga omnes* effect.

A very strong power in relation to ordinary courts is vested in the Constitutional Court through the provision of Art. 60 of the Constitutional Court Act, which gives the Court the power to make a final decision by *changing* the challenged decision. This possibility is a very strong tool in the hands of the Constitutional Court, which enables it to impose its decision as final in cases when the body to which the decision was remanded would be reluctant to bring its decision in line with the Constitutional Court's views. Some constitutions, for example the Croatian Constitution enabled the Constitutional Court only to reverse and remand the decisions of the Supreme Court. In certain cases, (in Croatia dealing with the elections of judges) the Supreme Court would not follow the reasoning of the Constitutional Court, which caused an endless circle of appeals. The situation could only be resolved by giving the Constitutional Court the *reformatory* power to finally decide on the merits. The Constitutional Court of Bosnia and Herzegovina achieved this power through rules of procedure adopted by the Court itself.

Generally it can be said that, after some initial hesitation, the courts in Slovenia have accepted the standpoints and standards expressed in the decisions of the Constitutional Court in constitutional complaints, and have brought their practice in agreement with them. There were no cases of overt opposition to any decision of the Court. Nevertheless in a very small number of cases the Court used its *reformatory* power and brought the final decision by amending the Supreme Court decision to enable the aggrieved party to be mended for the deprivation of a human right swiftly and efficiently. The Constitutional Court adopted this possibility five times (all of them in identical cases - related to military pensions) in 1998.

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 provisions relating to concrete review. In some systems the individual's access to constitutional courts has become so widespread that it already threatens the functional capacity of the Constitutional Court. Therefore, the legislature is trying to find some way for constitutional courts to eliminate less important or hopeless proceedings (e.g. the restriction of abstract reviews by standing requirements by the amended Constitutional Court Act, Official Gazette RS, No. 64/07). All these proceedings envisage the condition that the complainant must be affected by a certain measure taken by the public authority. With a growth in the number of complaints, efficiency decreases. Nevertheless, citizens should have many opportunities to apply for the protection of their constitutional rights⁵⁰.

Prevailing petitioners before the Slovenian Constitutional Court have been and remain individuals. The current system of constitutional review under the Constitution of 1991 preserved the prior (under the Constitutions of 1963 and 1974) unlimited, individual popular complaint (*actio popularis*), but now restricted by the legal interest to be demonstrated by the petitioner (*actio quasi-popularis*) (Art. 162(2), Constitution; Art. 24, Constitutional Court Act)⁵¹. On the other hand, the newly introduced constitutional complaint increasingly intensified the role of the individual before the Constitutional Court (Arts. 160–162, Constitution; Art. 50, Constitutional Court Act). Since the Slovenian system is a system of concentrated constitutional review, the ordinary courts cannot exercise constitutional review while deciding in concrete (*incidenter*) proceedings. An ordinary court must interrupt the proceedings and refer the law to the Constitutional Court for a review of its constitutionality (Art. 156, Constitution; Art. 23, Constitutional Court Act). The ordinary court may continue the proceedings only after the Constitutional Court has reviewed the constitutionality of the respective law (so the Slovenian model, too, adopted the principle that a law can only be eliminated from the legal system by the Constitutional Court). If a court takes the view that an executive regulation does not comply with the Constitution or the law, it will not or must not apply it – the so-called *exceptio illegalis* (exception of illegality).

50 From Arne Mavcic, *The International Encyclopaedia of Laws, Constitutional Law, Slovenia*, ed. Dr. R. Blanpain, Kluwer Law International, The Hague-London-Boston, 1998, pages 160-173.

51 Concerning *de lege lata*: Accordingly, the legal interest is a procedural condition which means - in case of initiation of the constitutional court's proceedings upon the (individual) petition - a condition for the admissibility of in merito decision making on the constitutionality and legality of the disputed regulation.

Concerning *de lege ferenda*: It would be in contradiction with the Constitution if the Constitutional Court either totally "unfreezes" the legal interest in such a manner that the legal interest would not represent any limitation any more, or – what would be more believable – that the Court would "sharpen" the legal interest in such a manner that individual petitioners could not have any access to the Constitutional Court any more, what would be a sign of a virtual abolition of such form of constitutional review. The legal interest is a constitutional phenomenon and shall have a role of demarcation between the individual petition and the request (of a state body), however, on the other hand it should not be interpreted in such a manner that the presentation of individual petitions would be absolutely prevented.

See: NERAD, Sebastian. *Pravni interes za ustavnosodno presojo zakonov in drugih predpisov*, REVUS- revija za evropsko ustavnost, No. 4/2005, GV Založba Ljubljana, p. 42.

3. Procedure

The provisions of the Slovenian Constitution of 1991 that regulate the constitutional complaint in detail are relatively modest (Arts. 160 and 161, Constitution). However, the Constitution itself (Art. 160.3, Constitution) envisages special statutory regulations (Arts. 50 to 60, Constitutional Court Act).

The Constitutional Court accepts a constitutional complaint for consideration if the violation of human rights or fundamental freedoms had serious consequences for the complainant or if a decision concerns an important constitutional question which exceeds the importance of the concrete case (Art. 55.b(2), Constitutional Court Act). Constitutional complaints against individual acts issued in small-claims disputes, in trespass to property disputes, and in minor offence cases, or against a decision on the costs of proceedings, are as a general rule not admissible (Art. 55.a(2), Constitutional Court Act).

Lodged constitutional complaints are first examined by the Constitutional Court judge determined by the work schedule (Art. 54(3), Art. 55(1), Constitutional Court Act). However, as in the case of abstract review, in a screening procedure the Court has no discretionary powers in limiting cases it accepts. The (non-)acceptance of cases depends on the preliminary (i.e. prima facie) review of grounds of a case.

A panel of three Constitutional Court judges determined by the work schedule decides on the rejection, non-acceptance, or acceptance of a constitutional complaint for consideration (Art. 54(1), Art. 55.c(1), Constitutional Court Act). If the panel is not unanimous, Constitutional Court judges who are not members of the panel also decide on such (Art. 55.c(2), Art. 55.c(3), Constitutional Court Act).

The Constitutional Court rejects a constitutional complaint: if it does not refer to an individual act by which the rights, obligations, or legal entitlements of the complainant were decided on; if the complainant does not have legal interest for a decision on the constitutional complaint; if the constitutional complaint is not admissible, if it was not lodged in time, or if all legal remedies have not been exhausted; if it was lodged by a person not entitled to do so; if the constitutional complaint is incomplete because it does not contain all the required information or documents and the complainant does not supplement it in accordance with a call to do so by the Constitutional Court, or if it is so incomplete that the Constitutional Court cannot examine it (Art. 55.b(1), Constitutional Court Act).

If the panel does not decide otherwise, the statement of reasons of the order on the rejection or non-acceptance of the constitutional complaint includes only the reason for the decision and the composition of the Constitutional Court (Art. 55.c(4), Constitutional Court Act).

If a constitutional complaint is accepted for consideration, the Constitutional Court decides in full composition (Art. 57, Constitutional Court Act). If the Constitutional Court has already decided on the same constitutional matter and granted the complaint, the decision by which it grants the constitutional complaint is issued by a panel (Art. 59(3), Constitutional Court Act).

Generally, the Constitutional Court considers cases within its jurisdiction at a closed session or a public hearing (Art. 35(1), Constitutional Court Act) which is called by the President of the Constitutional Court on his own initiative or upon the proposal of three Constitutional Court judges (Art. 35(2), Constitutional Court Act). After the consideration has been concluded, the Constitutional Court decides at a closed session by a majority vote of all Constitutional Court judges. A Constitutional Court judge who does not agree with a decision or with the reasoning of a decision may submit a dissenting or concurring opinion (Art. 40(3), Constitutional Court Act).

The Constitutional Court decides cases of constitutional complaints alleging violations of all human rights and basic freedoms guaranteed by the Constitution (Art. 160(1)(6), Constitution). The protection thus embraces all constitutionally guaranteed basic human rights and freedoms, including those adopted through the international agreements that have become part of the national law through ratification.

Any legal entity or individual may file a constitutional complaint (Art. 50 (1), Constitutional Court Act), as may the Ombudsman if it is directly connected with individual matters with which he deals (Art. 50(2), Constitutional Court Act), although subject to the agreement of those whose human rights and basic freedoms he is protecting in an individual case (Art. 52(2), Constitutional Court Act). The subject-matter of a constitutional complaint may be an individual act of a government body, a body of local self-government, or public authority allegedly violating human rights or basic freedoms (Art. 50(1), Constitutional Court Act).

The precondition for lodging a constitutional complaint is the prior exhaustion of all possible legal remedies (Art. 160(3), Constitution; Art. 51(1), Constitutional Court Act). As an exception to this condition the Constitutional Court may hear a constitutional complaint even before all legal remedies have been exhausted in cases if the alleged violation is obvious and if the carrying out of the individual act would have irreparable consequences for the complainant (Art. 51(2), Constitutional Court Act).

A constitutional complaint may be lodged within sixty days of the adoption of the individual act (Art. 52(1), Constitutional Court Act), though in individual cases with good grounds, the Constitutional Court may decide on a constitutional complaint after the expiry of this time limit (Art. 52(3), Constitutional Court Act). Among others, the complaint must cite the disputed individual act, the facts on which the complaint is based, and the alleged violation of human rights and basic freedoms (Art. 53(1), Constitutional Court Act). It must be made in writing and a copy of the respective act and appropriate documentation must be attached to the complaint (Art. 53(2) and Art. 53(3), Constitutional Court Act).

In a senate of three judges (Art. 162(3), Constitution; Art. 54(1), Constitutional Court Act) the Constitutional Court decides whether it will accept or reject the constitutional complaint for hearing (on its allowability) at a non-public session. The Constitutional Court may establish a number of senates depending on the need (Art.162(3), Constitution, Art. 10(2), Rules of Procedure). The constitutional complaint may be communicated to the opposing party for response either prior to or after acceptance (Art. 56, Constitutional Court Act). The Constitutional Court normally deals with a constitutional complaint in a closed session, but it may also call a public hearing (Art. 57, Constitutional Court Act). The Constitutional Court may suspend the implementation of an individual act, or statute, and other regulation or general act on the grounds of which the disputed individual act was adopted (Art. 58 , Constitutional Court Act).

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

- deny the complaint as being unfounded (Art. 59(1), Constitutional Court Act);
- partially or entirely annul or invalidate the disputed (individual) act or return the case to the body having jurisdiction, for a new decision (Art. 59(1), Constitutional Court Act);
- annul or invalidate (*ex officio*) unconstitutional regulations or general acts issued for the exercise of public authority if the Constitutional Court finds that the annulled individual act is based on such a regulation or general act (Art. 161(2), Constitution; Art. 59(2), Constitutional Court Act);
- if the Constitutional Court has already decided on the same constitutional matter and granted

the complaint, a decision by which it grants the constitutional complaint, in whole or in part abrogates or annuls the individual act, and remands the case to the authority competent to decide thereon, is issued by the panel, which may in such instances also decide in accordance with Article 60 of this Act (Art. 59(3), Constitutional Court Act);

- in case it annuls or invalidates a disputed individual act, the Constitutional Court may also decide on the disputed rights or freedoms if this is necessary to remove the consequences that have already been caused by the annulled or invalidated individual act, or if so required by the nature of the constitutional right or freedom, and if it is possible to so decide on the basis of data in the documentation (Art. 60(1), Constitutional Court Act); such an order is executed by the body having jurisdiction for the implementation of the respective act which was retroactively abrogated by the Constitutional Court, and replaced by the Court's decision on the same matter; if there is no such body having jurisdiction according to currently valid regulations, the Constitutional Court appoints one (Art. 60(2), Constitutional Court Act).

4. The Particularities of the Slovenian Regulation

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

Exceptions to the precondition that all legal remedies must have been previously exhausted (Art. 51(2), Constitutional Court Act) and exceptions to the time limit (Art. 52(3), Constitutional Court Act), for filing a constitutional complaint;

Due to the great burden on Constitutional Court, a tendency to the restriction of procedural preconditions (Arts. 55.a, 55.b, 55.c, Constitutional Court Act);

A wide definition of constitutional rights as the subject of protection by the constitutional complaint in comparison with other systems which specifically define the circle of the rights so protected (Art. 50(1), Constitutional Court Act);

Even a judgment (of the ordinary Courts) as the potential subject of a dispute in a constitutional complaint (Art. 50(1), Constitutional Court Act);

Ex officio proceedings inasmuch as the Constitutional Court is not limited by the complaint in the event that it finds 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 (Art. 59(2), Constitutional Court Act);

The coexistence of the constitutional (Arts. 50 to 60, Constitutional Court Act) and popular complaint (*actio popularis*) (Art. 24, Constitutional Court Act), the latter restricted only by the standing requirements for the appellant;

No particular court fee is required in the proceedings: each party pays its own costs in the proceedings before the Constitutional Court unless otherwise determined by the Constitutional Court Act (e.g. Art. 34.a, Constitutional Court Act⁵²);

The possibility of an ultimate decision on constitutional rights (Art. 60(1), Constitutional Court Act).

52 Article 34a

(1) The Constitutional Court may punish a participant in proceedings or his authorised representative by a fine amounting from 100 to 2,000 Euros if they abuse the rights enjoyed in accordance with this Act.

(2) The Constitutional Court may punish the authorised representative of a participant in proceedings who is a lawyer by a fine referred to in the preceding paragraph if an application does not contain the essential components determined by law.

F. Some Legal Measures – as an Experiment Towards the Tendency of Limitation in Favour of Lower Number of Arrived Cases – A Stronger Selection in Favour of "more important" Cases⁵³

After adoption of the 1991 Constitution and the Constitutional Court Act of 1994, the number of cases before the Constitutional Court was on the increase year by year. Additionally, during this period the grounds of the constitutional review and basic standards of the human rights protection were established by the constitutional case-law. In the first part of the mentioned period individual petitions (popular complaints) prevailed, however, in the next part of the same period (after the regulation of the constitutional complaint by the Constitutional Court Act of 1994) the constitutional complaints absolutely prevailed. Consequently, procedures before the Constitutional Court were extended over the reasonable time which has been requested by Art. 23(1) of the Constitution⁵⁴. The respect of the mentioned human right and the assurance of the

53 Zakon o spremembah in dopolnitvah zakona o Ustavnem sodišču, Predlog zakona, No. 700-03 / 93 - 0002 / 0033, EPA: 1323 – IV, Poročevalec Državnega zbora, No. 35/2007 of 14.05.2007 - Poročilo MDT

This law was adopted and it was published in the Official Gazette RS, No. 51/07, ur. p. b. pa v Official Gazette RS, No. 64707. Consequently, the new Rules of Procedure were adopted too and were published in the Official Gazette RS, No. 86/07

54 The number of unresolved cases and delays indicates that most Slovenian courts are overloaded. The Human Rights Ombudsman has been permanently calling the attention to the State's duty to provide for the enforcement of the right to the trial in reasonable time in the judicial proceedings before ordinary courts as well as before specialized courts. The Human Rights Ombudsman has been also calling the attention to the duty of judges to respect all competences of their judicial function. Only in this way it is possible to provide for the efficient, impartial and fair judicial proceedings. It is worth mentioning that the two thirds of appeals filed to the European Court for Human Rights refer to the violation of the right to the trial in the reasonable time. Such situation should not be overlooked by the judicial branch of power (Human Rights Ombudsman, Annual Report 2004, Ljubljana, May 200)..

For example, the Constitutional Court decided on the constitutionality of the Administrative Dispute Act (CC (Constitutional Court), nr.U-I-65/05, 22 September 2005, Official Gazette 2005, nr. 92). The Constitutional Court discussed the issue if the affected persons have an efficient judicial protection of their right to the trial in the reasonable time (based on Article 23 (1) of the Constitution) in the situation of already terminated proceedings where this right was presumably violated. The Constitutional Court decided that the Administrative Dispute Act is not in conformity with the Constitution.

Under the so far existing Constitutional Court's statement, taking into account the legislation in force, the affected person may file an appeal for compensation (based on Article 26 of the Constitution) whenever the proceedings was finally terminated if the person's right to the trial in the reasonable time was presumably violated. It means that such appeal should be judged by the ordinary court in the civil proceedings applying general rules of the compensation law established by the Code of Obligation. On these grounds, the competent court may award to the affected person only a compensation for the pecuniary and non-pecuniary damage, provided that the conditions for the liability for damages are fulfilled. Irrespective of the above position, the Constitutional Court decided that - taking into account the case law of the European Court for Human Rights – it is necessary (in the spirit of the European Convention for Protection of Human Rights and Fundamental Freedoms) to interpret Article 15 (4) of the Constitution of the Republic of Slovenia, that guarantees the judicial protection of human rights and the right to eliminate consequences of their violation, in the way that this provision provides for the request to ensure (Within the scope of the judicial protection of the right to the trial in the reasonable time) the possibility of enforcement of equitable compensation even when the violation over. Accordingly, the criteria established by the European Court for Human Rights shall be applied for evaluation if the reasonable duration of the trial was exceeded.

Because the Administrative Dispute Act, referring to Article 157 (2) of the Constitution and providing for the judicial protection of the right to the trial in the reasonable time, does not contain any special provisions, adapted to the nature of the discussed right that would also provide for the claiming of a just compensation if the violation of the discussed right is over, the Constitutional Court decided that the Act is not in conformity with Article 15 (4) of the Constitution (in connection with Article 23 (1) of the Constitution).

The Constitutional Court decided only on the issue if the legislation in force provides for the efficient judicial protection of the right to the trial in the reasonable time if the violation is over. However, the Court calls the attention that - in reference to the case-law of the European Court for Human Rights - the reasonable question is also raised about the efficiency of the judicial protection of the discussed right if the proceeding is still in course. As the Constitutional Court stated, in the process of adoption of future legal regulation that will eliminate the unconstitutional provisions declared by the Court's decision, there is also necessary to provide for the appropriate protection of the discussed right if the proceedings is still in course. Additionally, it is necessary to harmonize these issues with the standards adopted by the European Court for Human Rights. Moreover, the basic concern of the State and/or of the all three branches of power is to provide for the efficient enforcement of the judiciary function.

quality of the constitutional review were presented by the authors of the amendments of the Constitutional Court Act of 2007 (Official Gazette RS, No. 64/07) as the principal reasons for draft law.

Following some theoretical standpoints, the Constitution of 1991 introduced the legal interest as a condition for the filing of the individual petition (a popular complaint) (Art. 162(2), Constitution). Later, the Constitutional Court Act of 1994 (Official Gazette, No. 15/94) continued by some more detailed starting point, that a direct encroachment upon the rights and/or the legal position of the petitioner must be demonstrated (Art. 24. Constitutional Court Act). However, the amendments of the Constitutional Court Act of 2007 determined more rigorous and precisely the elements of the expected demonstration of the legal interest especially in cases when the constitutional review of a by-law was requested. The previous decisions taken by the Constitutional Court in such cases concerned mainly individual examples (e.g. by-law relating to the urbanism) when the prior protection of the rights and legal interests could be asserted in the (earlier) individual procedures before ordinary courts⁵⁵. Only if such protection could not be asserted, the procedure before the Constitutional Court might be relevant⁵⁶.

The amended Constitutional Court Act of 2007 (Official Gazette RS, No. 64/07) brought the changes⁵⁷ concern the constitutional complaint procedure:

A constitutional complaint is as a general rule not admissible in instances of small-claims disputes, in trespass to property disputes, minor offence cases, and in instances in which only a decision on the costs of proceedings is challenged (Art. 55.a(2), constitutional Court Act).

The Constitutional Court accepts a constitutional complaint for consideration only:

1) if there is a violation of human rights or fundamental freedoms which had serious consequences for the complainant; or 2) if it concerns an important constitutional question which exceeds the importance of the concrete case – thus, if, from the viewpoint of human rights, such concerns a precedential decision (Art. 55.b (2), Constitutional Court Act).

A panel of three Constitutional Court judges unanimously decides whether the statutory conditions for the consideration of a constitutional complaint are fulfilled. Furthermore, it decides on the acceptance of the constitutional complaint for consideration. Orders by which a constitutional complaint is rejected or is not accepted for consideration will as a general rule not include a statement of reasons (Art. 55.c, Constitutional Court Act).

In procedures for the review of the constitutionality or legality of regulations, the Act is amended in the part which refers to instances in which a regulation that has a direct effect (i.e. an additional procedure is not necessary for its implementation) is challenged by a petition – it may be challenged within one year after such regulation enters into force or within one year after the day the petitioner learns of the occurrence of harmful consequences. This amendment applies only to petitions which will be lodged after the implementation of the amendments of the Act (Art. 24(3), Constitutional Court Act).

55 Accordingly, in the sixtieth of the last century the same statements were affirmed: the protection of the constitutionality and legality should not be conferred only on the constitutional judiciary? Before 1991 in its practice, the Constitutional Court rejected especially individual suits and directed the applicants to proceedings before ordinary courts. The jurisdiction of the Constitutional Court relating to the protection of fundamental rights upon the individual applications as well as relating to the review of constitutionality and legality of by-laws (especially in the field of urbanism) was repeatedly presented as a redundant burdening of the Constitutional Court even in the past (see Deset let dela Ustavnega sodišča Slovenije, Dopisna delavska univerza Ljubljana 1974, p. 55).

56 By such means, the constitutional review procedure has been acquiring a nature of a "real" subsidiary protection by the constitutional judiciary?

57 See www.us-rs.si

If statutory provisions are challenged by the Supreme Court, a court which should apply such statutory provisions in individual proceedings may stay proceedings until the final decision of the Constitutional Court without having to initiate proceedings for the review of the constitutionality of such law or part thereof by a separate request. In order to enable quick access to data regarding which statutory provisions are challenged by the request of the Supreme Court, a list of such cases will be published on the Constitutional Court Web site. On the Constitutional Court Web site, court judges may enable an automatic alert regarding changes to the aforementioned list (Art. 23, Constitutional Court Act).

Henceforth, the Act determines the obligatory components of a request, petition (Art. 24.b, Constitutional Court Act), and constitutional complaint (Art. 53, Constitutional Court Act). These are published on the Constitutional Court Web site⁵⁸ and are included in the forms for lodging a petition or constitutional complaint. This amendment may be of particular interest for attorneys, as the Constitutional Court may punish an attorney by a fine if an application does not contain the essential components determined by law (Art. 34. a, Constitutional Court Act).

G. Any Forecast?

The last change of the Constitutional Court Act in 2007 rigorously limited the access of individuals to the Constitutional Court. The adopted changes introduced more strict criteria as though such additional limitations are a stringent necessity especially from the point of view of the right to a trial without undue delay (e.g. Art. 23(1), Constitution). Accordingly, the previous broad individual access to the Constitutional Court was deemed as a not very necessary; in any case, the human rights and fundamental freedoms protection has been provided by several (ordinar) court(s) during the earlier stages of procedure. Therefore, as the speakers in favour of the Constitutional Court Act changes of 2007 affirm, the limited access would be not to much disadvantageous. However, there are some other Slovenian theorists who affirm that the absence of observation of all welcome effects of the ("full") access to the Constitutional Court on the other hand obviously illustrates the interpretation that the state bodies alone are of the greatest significance. Additionally, the serviceability of the state bodies (which are actually paid to be in service of people) has been repeatedly ignored. Furthermore, it is namely lost in obscurity, that the state bodies are "only tools". The state governed by the rule of law shall strengthen also the harmony and greater exactness of legal rules which shall be in service of people, united in the society. Therefore such proposals and warnings⁵⁹ must not be overlooked that we shall move the focus of scare of the legal theory to the individual. Just a broad individual access to the constitutional review contributes to the protection of human rights and fundamental freedoms, accelerates the democratisation of any legal order and promotes the state governed by the rule of law at the same time. Furthermore, it is a matter of a democratic supervision over the commanding state bodies and the exclusion of contradictions from the legal order and by this means its gradual improvement (bringing in the accordance with the constitution) as well. Accordingly, a broader individual access to the Constitutional Court stimulates the democratisation of the legal order which citizens have an opportunity to initiate a direct and immediate control over the legislative, executive and judicial state power. In some cases such controle would certainly contradict the major will, however just such kind of tension is surely a basic element of the constitutional democracy. Furthermore, anyone's right to initiate the supervision is undoubtedly one of the basic elements of authority. Therefore, it would be necessary to focus on the estimation how the limitation of the individual access to the Constitutional Court could reduce the democratic character of the legal order. The principle of the rule of law shall be not promoted by the understanding of the individual access in a such way that could be easily sacrificed (or replaced)⁶⁰.

58 www.us-rs.si

59 KRISTAN, Andrej, Tri razsežnosti pravne države, Slabitev pravne države z omejevanjem dostopa do ustavnega sodišča, revus (2009) 9, p. 65–89

60 KRISTAN, Andrej, Tri razsežnosti pravne države, Slabitev pravne države z omejevanjem dostopa do ustavnega sodišča, revus (2009) 9, p. 65–89. See also MAVČIČ, Arne, The constitutional review. The Netherlands: BookWorld Publications, cop. 2001. p. 74-75.

REFERENCES:

KRISTAN, Andrej, Tri razsežnosti pravne države, Slabitev pravne države z omejevanjem dostopa do ustavnega sodišča, revus (2009) 9

MAVČIČ, Arne: <http://www.concourts.net>

MAVČIČ, Arne. *Konstitucionna žalova v Slovenii : vystuplenie zavedujuščego otdela meždunarodnyh svjazej Konstitucionnogo suda Respubliki Slovenija Arne Mavčiča*. Azarbaycan Respublikasi Konstitusija Mahkamasinin melumati, 2004, 1, p. 97-99. [COBISS.SI-ID [239103](#)]

MAVČIČ, Arne. *Konstitucionnyj kontrol v Respublike Slovenija*. Evropejskie pravovye kul'tury, 2002, 1, No. 1, p. 441-463. [COBISS.SI-ID [197887](#)]

MAVČIČ, Arne. *La aceptación de un moderno sistema de protección de derechos humanos por la justicia constitucional en Eslovenia*. Revista iberoamericana de derecho procesal constitucional, 2007, No. 7, p. 181-197. [COBISS.SI-ID [305663](#)]

MAVČIČ, Arne. *Slovenian constitutional review : its position in the world and its role in the transition to a new democratic system*. Ljubljana: Nova revija, 1995. p. 235, [18] p. appendix. ISBN 961-6017-25-X. [COBISS.SI-ID [55585280](#)]

MAVČIČ, Arne. *Sloveniya Respublikasi konstitusija mahkamasinin analitik va beynalxalq amakdaşliq idarasinin rahbari*. Azarbaycan Respublikasi Konstitusija Mahkamasinin melumati, 2003, 1, p. 97-106. [COBISS.SI-ID [190207](#)]

MAVČIČ, Arne. *Sloveniyada konstitusiza şikayati : Sloveniya Respublikasinin konstitusija mahkamasinda beynalxalq alaqualar şöbasinin müdiri Arne Mavçičin çixiş*. Azarbaycan Respublikasi Konstitusija Mahkamasinin melumati, 2004, 1, p. 69-71. [COBISS.SI-ID [239359](#)]

MAVČIČ, Arne. *The Constitutional Law of Slovenia (International Encyclopaedia of Laws)*, The Hague, London, Boston, 1998.

MAVČIČ, Arne. *The constitutional review*. The Netherlands: BookWorld Publications, cop. 2001. p. 240, ilustr., zvd. ISBN 90-75228-18-X. [COBISS.SI-ID [152063](#)]

MAVČIČ, Arne. *The Protection of Fundamental Rights by the Constitutional Court and the Practice of the Constitutional Court of the Republic of Slovenia*, The Protection of Fundamental Rights by the Constitutional Courts. Proceedings of the UniDem Seminar, Brioni/Croatia, on 23-25 September 1995, European Commission for Democracy through Law, Collection Science and Technique of Democracy, No. 15, Council of Europe Publishing, 1996, p. 204-231

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

MAVČIČ, Arne. *The Slovenian Constitutional Court and its activities during the period of transition*. Revue de justice constitutionnelle Est-Européenne, 2001, 2, p. 229-251. [COBISS.SI-ID [155391](#)]

MAVČIČ, Arne. *The Slovenian constitutional review : an exception among systems and experiences in the new democracies*. Journal Constitutional Law Eastern Central Europe, 1997, vol. 4, No. 2, p. 169-214. [COBISS.SI-ID [74751](#)]

MAVČIČ, Arne. *The specialities of Slovenian constitutional review as compared with the current systems of souch review in the new democracies*. V: DE VERGOTTINI, Giuseppe (ur.). Giustizia costituzionale e sviluppo

democratico nei paesi dell'Europa centro-orientale, (CISR, 21). Torino: G. Giappichelli, cop. 2001, p. 161-188. [COBISS.SI-ID [97791](#)]

MAVČIČ, Arne. Verfahrensarten, *Entscheidungswirkungen und die einstweilige Anordnung in der slowenischen Verfassungsgerichtsbarkeit*. V: FROWEIN, Jochen Abr. (ur.), MARAUHN, Thilo (ur.). Grundfragen der Verfassungsgerichtsbarkeit in Mittel- und Osteuropa, (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Bd. 130). Berlin [etc.]: Springer, cop. 1998, p. 427-440. [COBISS.SI-ID [74495](#)]

MAVČIČ, Arne. *Zakon o ustavnem sodišču s pojasnili*, (Zbirka Nomos). Ljubljana: Nova revija, 2000. p. 426 ISBN 961-6352-06-7. [COBISS.SI-ID [106511360](#)]

NERAD, Sebastian. Pravni interes za ustavnosodno presojo zakonov in drugih predpisov, REVUS-revija za evropsko ustavnost, No. 4/2005, GV Založba Ljubljana, p. 42