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THE BINDING FORCE OF THE DECISIONS OF THE CONSTITUTIONAL COURT OF SLOVENIA

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The binding force of the decisions of the Constitutional Court of Slovenia

1. Binding force of the decisions of the Constitutional Court

According to the provision of article one, paragraph three of the Constitutional Court Act *decisions of the Constitutional Court are legally binding.* This provision is on the one hand *redundant* while on the other hand it may also be *deficient*. *Redundant* because binding force is *per se* an essential quality of any decision of any state body, organ or agency: to be deemed a decision it has to place the involved parties – or in certain cases even subjects that did not take part in the proceedings - under legal obligation. The provision may be found *deficient* because it is inadequate in degree. The Constitution as well as the Constitutional Court Act lack the provisions on *who* is bound by the decisions, *which parts* of the decision (only its operative part or also reasoning) enjoy a legally binding effect, what are the *sanctions* for the breach of the obligations stemming from the decisions and the mechanisms for the execution or *enforcement* of the Constitutional Court decisions.

2. The relationship with the National Assembly

a. The role of the National Assembly as a party in the procedure of judicial control.

The Constitutional Court has the power – *inter alia* - to rule on the conformity with the Constitution of the laws, adopted by the National Assembly. Within the procedures of the judicial control over laws the National Assembly has the position of a defending party. The Constitutional Court Act requires the Court to send the motion by which the act is challenged to the body which issued the act and to give it the status of a party which shall have the position to defend the act. The National Assembly is served all written motions of the challenging party, its representatives are summoned to the hearings and can take active part in the procedure.

It should also be mentioned that the National Assembly may itself file a motion to challenge the legality or constitutionality of the regulations issued by the Government or other agencies within the executive branch of power or by the local communities. In these cases the National Assembly will take part as a challenging party on the active side of the procedure.

b) Binding force of the Constitutional Court's decisions on the constitutionality of the laws.

With respect to the Court's power to control the constitutionality of laws, different problems as to the binding force of the Court's decisions may arise, depending also on the *type* of decision which is adopted by the Court. I will restrict myself to giving a brief outlook of three types of decisions:

- abrogation of the law,
- mere declaration of the unconstitutionality,
- interpretation of the law in conformity with the Constitution.

b.a) Abrogation of the law.

The Constitutional Court may completely or partly abrogate a law which does not conform to the Constitution. Such decision shall come into effect one day after the publication of the decision or on the expiry of the period determined by the Constitutional Court. This aspect of the Court's competence defines it as a *negative legislator*. The abrogation of a law establishes different relationships between the Court and the National Assembly. It has a constitutive effect in a sense that after the publication in the Official gazette it triggers an immediate change in legal order and its implementation usually calls for no action or reaction by the legislator or any other state body or organ. In certain cases however the abrogation may cause legal *lacunae* which require legislative action. Temporarily these legal gaps may be filled in by the Court itself. The Constitutional Court Act in article forty paragraph two enables the Constitutional Court to determine, if necessary, which body must implement the decision *and in what manner*. By determining *the manner* in which a decision has to be implemented, the Constitutional Court assumed, in certain cases the role of – if only temporary – *positive* legislator. The Court has rather frequently used this power and the National Assembly has often perceived this type of decision as the encroachment onto the legislative field: the conflict was partly mitigated by the Court's ruling that the National Assembly is always free to substitute such provisional and temporary solutions by its own legislative acts – as far as they remain within the margin of appreciation set by the respective Court's decision.

Different from the question of the binding force of this *supplementary* parts of the Court's decisions is the question to what extent is the legislator bound in its future activities by the *abrogating* parts of the Court's decisions. In reacting to the abrogation of the law or of certain provisions of the law the National Assembly may sometimes be tempted to overrule the Court's decision and to *reenact* the annulled law or its provision, which was found to be unconstitutional by the Constitutional Court. This raises the question about who is the final and authoritative interpreter of the Constitution. The jurisprudence of the Constitutional Court in Slovenia has not faced such a case yet. Nevertheless the question was debated in legal doctrine in relation with the execution of some other Court decisions by the National Assembly. The Court at present holds the position that the binding effect of its decisions place it as a supreme and final interpreter of the Constitution and that also the National Assembly has to abide by its rulings. But the attention of the Deputies was drawn by different scholars that they are free to adopt their own interpretation of the Constitution, to oppose it to the interpretation of the Constitutional Court and to override or overrule its decision by reenacting the law with the same contents as the one previously annulled because deemed unconstitutional by the Constitutional Court. The constitutional principle of the division of powers and the jurisprudence of the German Constitutional Court was cited as reasoning for this view. The concept of prohibition of reenactment *(Wiederholungsverbot)* is abandoned in a modern constitutional doctrine, according to this view. The principle of the division of powers demands that all state bodies directly face the Constitution and have the duty to interpret and use it under their own perspective. The binding force as well as the force of law, attributed to the Constitutional Court's decisions do not prevent the Parliament from reenacting the solution essentially the same to the one which had been annulled by the Constitutional Court. To give these decisions the binding force which would prevent the legislator from reenactment would mount to giving the Constitutional Court's decisions the force of Constitution. Following the principle of division of powers the Parliament should always have the right – and duty – to express and confront his own views as far as the interpretation of the Constitution is concerned, to the views and interpretations expressed in the relevant Constitutional Court's decision. By merely passing the law – by a simple majority as any ordinary law – which may be in direct conflict with the previous

Constitutional Court decision the legislator would violate no constitutional principle. The only consequence of such action would be that it risks the repeated annulment of the law if it were challenged anew. The reason for such new annulment could not be the alleged breach of the Parliament's duty to abide by the Court's decisions.

This view leads to the conclusion that there is no final and exclusive interpreter of the Constitution in the Slovenian constitutional order. But the question remains who will have the last say in the constitutional matters. This view reduces the question to what tools does each of the protagonists in this conflict have at its disposal: the Parliament can always enact - and if annulled, reenact - while the Constitutional Court can always annul. The only difference being that the Court can not act *proprio motu.* And, of course, the legislator can gain the final move by enacting its will in a form of a constitutional amendment, which prevents the Court from exercising its competence of the judicial control over such provision.

b.b) Declaration of unconstitutionality – the legislator is called to action.
According to article 48 of the Constitutional Court Act the Constitutional Court may, in certain cases, not abrogate the law which it finds unconstitutional, but only *declare* that such law or a provision within such law is not in conformity with the constitution. This technique was originally designed to enable the Constitutional Court to act in cases of the legislative omissions. In practice the Court adopted this technique in many different legal situations. Though this type of decisions may at first sight seem the most restraint, because it does not materially affect the text of the law which is under the judicial scrutiny, declaratory decisions caused the most frequent conflicts with the legislator. Following paragraph two of article 48 of the Constitutional Court Act, in all such cases the Constitutional Court has to call the National Assembly to abolish the ascertained unconstitutionality by enacting a law or an amendment to such law within certain period set by the Constitutional Court. Through reasoning in such decisions the Constitutional Court frequently delimitates strict constitutional bounds of legislative action, leaving a very narrow margin of appreciation to the National Assembly. The Parliament quite frequently does not respond to such decisions or does not respond in time - the problem being that the unconstitutional provision is not eliminated from the legal system: the provisions, only *declared* unconstitutional remain in full force till substituted by new provisions enacted by the Parliament.

The declaratory decisions issued by the Constitutional Court of Slovenia in the period from 1996 to 2003 and the reaction by the legislator[1]

year	The Parliament did not react in time	The law was brought in line with the Constitution	The time for the legislative action is still pending
1996	1	16	
1997	1	1	
1998	1	16	

[1] The figures include laws issued by the National Assembly as well as regulations issued by the Government and other state agencies. Laws prevail.

1999	1	14	
2000		9	
2001	1	10	
2002	2	5	2
2003			4

The Court has repeatedly ruled that the delays to abolish the unconstitutionalities declared by the Court, represent a serious breach of article 2 (Slovenia is a state governed by the rule of law) and article 3 (division of powers) of the Constitution. The question remains, however, what is the legal nature and what are legal means to enforce the implementation of the Court ruling which calls for certain decision to be brought by the National Assembly.

b.c) How the National Assembly overruled a Constitutional Court decision.
Slovenia has an interesting experience related to the binding force of the decisions, which call for the action of the legislator. A referendum, a Constitutional Court decision an amendment of the Constitution and the advice of the Venice Commission are involved in the case. The Slovenian law on referendum lays down a unique type of so called *consultative* legislative referendum *with binding* force. The idea is to verify on the referendum the public opinion on any issue which may be the subject of regulation by statute, with the effect that the National Assembly is bound to enact the solution, favored by the majority. Based on the signatures of more than 40.000 voters, as required by the Constitution, the referendum on introducing the majority electoral system to replace the proportional system in force, was called. It was generally known that the majority electoral system did not enjoy the necessary support of the parties represented in the National Assembly. Some political parties formed their own, concurrent proposals for the electoral system and put them on the same referendum: at last three concurrent and conflicting proposals were put on vote. The legislation on referendum was not adapted to the situation of three competitive proposals so at the end the result of referendum was vague and challenged at the Constitutional Court. In a very controversial decision it ruled that the proposal for the majority system gained the necessary majority and that the National Assembly is bound to enact the majority electoral system. This could only be done through a law, passed by a two thirds majority of all deputies and from the beginning it was clear that it was impossible to gain this majority in the Parliament. It was impossible to enforce two constitutionally binding decisions: the result of binding referendum and the decision of the Constitutional Court which confirmed the result of the referendum. The situation threatened to cause the constitutional crisis. The National Assembly did not dare implementing the concept of having the power to follow its own interpretation of the Constitution, to deem the Constitutional Court decision unconstitutional, to enter into an open conflict with the Constitutional Court by not reacting to its order or by adopting a law which would disrespect the Court's decision. It decided to override the decision as well as the result of referendum by passing *constitutional* amendment enacting a proportional electoral system. Using – as some theoreticians claimed: *misusing* – this procedure, the National Assembly gained the final word because the Constitution itself prevails over any other decision and can not be challenged before the Constitutional Court. But this was not the end of the story. The Government held that the amendments introduced to overrule the will expressed on referendum and confirmed by the Constitutional Court, are not compatible with the European

democratic traditions and standards and asked the Venice Commission for an opinion. The Commission – one day before the elections were held – issued the opinion that the amendments represented a solution compatible with the European democratic standards – without giving an explicit answer whether or not the Court decision could also be overruled or overriden by an ordinary statute. It is worth mention that the Government was exposed to a severe criticism by the majority of political parties and media not to be able to resolve the conflict within the institutions in Slovenia and to have *"sued"* the National Assembly in front of foreign institutions. Anyhow the prestige of the Venice Commission put an end to the discussion about the legitimacy of the elections.

b.c) Interpretative decision

At this point it must be mentioned that the Slovenian Constitutional Court does not have the formal power to give the official – abstract – interpretations of the Constitution as is the case in some, mainly former Eastern European countries. The Slovenian Constitutional Court, however, figures as an interpreter of the Constitution only as far as it has to use and thereby understand and give the meaning to the constitutional provisions which govern disputes brought to the Court through the procedure of the abstract and concrete control and the procedure of the constitutional complaint in individual cases. The interpretations of the Constitution appear only in the reasoning of the decisions; their binding force can be a matter of discussion.

From the official interpretations of the Constitution one must distinguish the so-called interpretative decisions. The object of interpretation in these decisions is the challenged *law,* not the constitution. This technique was developed in the jurisprudence of the Constitutional Court following the examples in case-law of some comparable European countries. The theory perceives the interpretative decisions as a means to avoid the conflict with the legislator – while apt to cause the conflict with the judiciary. My experience is that also by this type of decisions, although in theory deemed restrained in relation to the legislator – the Constitutional Court runs the risk that by distorting the original meaning of the interpreted provision it encroaches upon the legislative field reserved to the Parliament. The latter, however, has no effective defense against this "disguised" form of the judicial activism.

The record of reactions by the Deputies, political parties, legal experts and media, to the Constitutional Court decisions in last ten years show an interesting phenomenon. The more restraint techniques, such as declaratory and interpretative decisions, together with decisions how to implement the Court decision, cause more tensions and controversies in relationship between the Parliament and the Constitutional Court than the seemingly more radical annulments of the laws.

3. The relationship with regular courts

a) The Constitutional Court as the highest court?

According to the Slovenian Constitution the Constitutional Court is formally not part of the judiciary. None of the constitutional provisions dealing with the judiciary apply directly to the position and constitutional status of the Constitutional Court and its judges. According to article 127 para. 1 of the Constitution, the Supreme Court is the highest court in the State. Nevertheless article 160 para. 1 al. 6 gives the Constitutional Court the power to *decide on constitutional complaints stemming from the violation of human rights through* ***individual***

acts. In this context "individual acts" in practice represent decisions of the courts, predominantly – since the complaint may only be filed after all legal remedies have been exhausted - the decisions of the Supreme Court. Consequently article 1 paragraph one of the Constitutional court Act lays down that the Constitutional Court is the highest body of the *judicial power* for the protection of … human rights. The Constitutional Court Act in many other detailed provisions gives the Constitutional Court the authority which establishes it efficiently as the ultimate judicial power in this field. This position, acquired and confirmed by its operation since the adoption of the Constitutional Court Act in 1994, is firm and generally recognized by legal theory, as well as regular courts including the Supreme Court.

b) Constitutional complaints

A constitutional complaint was introduced into the Slovenian legal system by the 1991 Constitution as a legal remedy, so far unknown – although Slovenia as one of the former Yugoslav republics has had a Constitutional Court since 1963. One of the most difficult tasks of the Constitutional Court in shaping this new legal remedy was to establish its proper scope and extent. How to ensure effective protection of human rights in each individual case without becoming the last (in practice the fourth) instance court within the range of regular courts. The constitutional complaint is not a legal remedy which would empower the Constitutional Court to consider merely the correctness and legality of final court decisions. The Constitutional Court is only empowered to assess whether the courts have, by their decisions, violated human rights. 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.

In the jurisprudence of the Constitutional Court 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 Equal Protection of Rights (art. 22), Right to Judicial Protection (art. 23), Right to Legal Remedies (art. 25) and special Legal Guarantees in Criminal Proceedings (art. 29 of the Constitution). Among violations in the field of *substantive* law the complainants have so far successfully invoked the breach of Personal Liberty – related to arrest and preventive detention (art. 19), the Right to Private Property (art. 33), the Right to Privacy (art. 35), the Inviolability of Dwellings (art. 36, the Freedom of Expression (art. 39) and the Right to Social Security (art. 50 of the Constitution).

If the Constitutional Court finds the challenged individual act (judicial decision) to violate the complainant's constitutionally protected human right it will 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 finds that the challenged decision was based on an unconstitutional law, it may in an incidental procedure, abrogate such law – giving this part of its decision an *erga omnes* effect.

A very strong power in relation to ordinary courts is put into the hands of the Constitutional Court by the provision of article 60 of the constitutional Court Act, which gives the Constitutional Court the power to make a final decision by *changing* the challenged decision. This possibility is a very strong tool which enables the Constitutional Court to impose its decision as final in cases where the body to which the decision was remanded would be reluctant to bring its decision in line with the Constitutional Court's views: if not so, it could cause an endless circle of appeals. The Constitutional Court of Slovenia used this *reformatory*

power in a very limited number of cases. The reason for this judicial activism was not to overcome the opposition of the regular courts but the need to enable the aggrieved party to be mended for the deprivation of a human right swiftly and efficiently.

Generally it can be stated, that after some hesitation, the courts in Slovenia have accepted the standpoints and standards expressed in the decisions of the Constitutional Court in constitutional complaints. In one of its late decisions the Constitutional Court stated that a regular court is constitutionally not prevented from confronting its own views and interpretations of law and Constitution to the interpretations by the Constitutional Court. If persuasive and convincing, the arguments by the regular court may prevail. What the constitutional provision of article 22 demands is that the regular court may not simply overlook the argumentation of the Constitutional Court: it is bound to give reasons for its dissent with the Constitutional Court view and interpretation. The final say whether the argumentation of the regular court in this respect was satisfactory, however goes to the Constitutional Court.