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THE LIMITS OF CONSTITUTIONAL REVIEW OF ORDINARY COURT´S DECISIONS IN CONSTITUTIONAL COMPLAINT PROCEEDINGS

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REPORT

THE LIMITS OF THE REVIEW OF DECISIONS OF ORDINARY COURTS IN CONSTITUTIONAL COMPLAINT PROCEEDINGS BEFORE THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SLOVENIA

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1. Introduction

1. In the Constitution and the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter CCA), the constitutional complaint is defined as the last and ultimate form of legal protection against human rights violations resulting from judicial decisions and acts of other authorities in concrete proceedings. Pursuant to Art. 160.6 of the Constitution, one of the powers of the Constitutional Court is also to decide on constitutional complaints stemming from violation of human rights and fundamental freedoms by the individual acts of state authorities; the same provision is contained in Art. 21.6 of the CCA. According to Art. 50 of the CCA, a constitutional complaint may be filed by anyone who feels that their human rights or fundamental freedoms were violated by an individual act of a state authority, local community authority, or bearer of public authority.

2. The power of the Constitutional Court to decide on constitutional complaints is a mutatis mutandis consequence of the Constitutional Court's basic and original jurisdiction – to review the consistency of statutes with the constitution: the system of constitutional protection is not complete if a court interprets in an unconstitutional manner a statute that is itself in conformity with the constitution. The Constitutional Court could not effectively perform its role as the supreme guardian of human rights and fundamental freedoms if it cannot ensure that statutory provisions are applied in concrete cases in a manner that is not inconsistent with the mentioned constitutional rights.

2. The Reasons for Filing a Constitutional Complaint

3. As mentioned above, by means of a constitutional complaint it is possible to claim a violation of human rights and fundamental freedoms which has occurred due to individual legal acts or in the procedure for their adoption. As the Constitutional Court is limited to reviewing violations of human rights and fundamental freedoms when deciding on constitutional complaints, a review of violations of other constitutional provisions (e.g. the principles of a law-governed state under Art. 2 of the Constitution) is not possible.

4. The reasons for filing a constitutional compliant are not enumerated either in the Constitution, or in statute, so the Constitutional Court has had to establish its own criteria for determining the extent of review in considering constitutional complaints. Concerning such, it has taken into account the case law of the German Constitutional Court and the European Court of Human Rights, and well as conclusions based on the theory of such which was developed on the basis of the case law of these two courts. In its rulings and decisions the Constitutional Court emphasizes that *it is not an appellate authority for supervising courts which decide in judicial proceedings, and it is not competent to review violations which have occurred in the establishment of facts and the application of law, but that it only reviews whether any human right or fundamental freedom has been violated by a challenged decision*.

5. Within the scope of such the Constitutional Court examines a challenged decision from two perspectives:

- whether the court in the proceedings in which the decision was reached violated the constitutional provisions on fundamental procedural guarantees; and
- whether the substance of the challenged decision is contrary to any human right or fundamental freedom.

The Constitutional Court thereby also considers the obligations stemming from ratified treaties, especially the Convention for the Protection of Human Rights and Fundamental Freedoms

(hereinafter the ECHR). As the majority of Convention rights are "covered" by the provisions of the Constitution, it examines allegations regarding violations of the ECHR in the framework of examining the violation of corresponding rights under the Constitution.

3. The Violation of Basic Procedural Guarantees

6. The Slovene Constitution ensures basic procedural guarantees in Art. 22 of the Constitution (the equal protection of rights), Art. 23 (the right to judicial protection), Art. 24 (the public nature of court proceedings), and Art. 25 (the right to legal remedies). Additional procedural guarantees in criminal proceedings are separately ensured in the following articles of the Constitution: Art. 27 (the presumption of innocence), Art. 28 (the principle of legality in criminal law), Art. 29 (legal guarantees in criminal proceedings), and Art. 31 (the prohibition of double jeopardy).

7. The Constitutional Court often deals with allegations that by an erroneous decision the complainant's right to judicial protection or the right to a "fair" trial was violated. In the majority of cases it turns out that the complainant erroneously understood the contents of these rights. The right to judicial protection namely entails only the right to judicial proceedings and a judicial decision on the merits of the case, and not also the right to a correct decision. The same applies to an allegation regarding a violation of the right to the equal protection of rights. This right ensures the right to fair proceedings, which cannot be violated merely by the court not deciding to the benefit of the complainant. Consequently, the Constitutional Court refuses such allegations with an explanation that the violation of constitutional procedural guarantees cannot be substantiated by mere assertion that the decision was erroneous in its substance.

8. The right to judicial protection under Art. 23 of the Constitution must be primarily ensured by the legislature (in that it envisages court jurisdiction to a sufficient extent or not exclude such), however, this right may also be violated in judicial proceeding. From the case law of the Constitutional Court it follows that this right would be violated if the level of court expenses represents an insurmountable obstacle for an individual regarding access to the court.[1] The Constitutional Court determined that there had been a violation of this right in a case in which the court in the procedure for the enforcement of judgement concerning child support had required the child to pay the expenses of the executor in advance, whereby it did not take into account the child's financial situation but the financial situation of his statutory representative.[2] In the opinion of the Constitutional Court, there was no violation of the right to judicial protection in certain cases in which the court had rejected an action due to a lack of procedural prerequisites (e.g. due to erroneous representation[3] or a lack of international jurisdiction in a dispute on damages[4]). However, it judged that there had been a violation of this right in a case in

[1] Ruling No. Up-103/97, dated 26 February 1998, OdlUS VII/2, 118 (in the concrete case the constitutional complaint was not accepted for consideration).

[2] Decision No. Up-376/02, dated 8 July 2004, OdlUS XIII, 80.

[3] In the concrete case a father filed an action for the payment of damages due to pain and suffering resulting from the violation of personal contacts, on behalf of a child whose mother had been awarded custody (Ruling No. Up-310/97, dated 24 March 2000).

[4] In the concrete case the court for reason of immunity rejected the action filed against Germany before a Slovene court by the so-called "stolen children" for the recovery of damages concerning the damage that they suffered during the Second World War. The Constitutional Court established that the matter concerned an interference with the right to judicial protection; however, it dismissed the constitutional complaint. It evaluated that the protection of the immunity of a foreign state is a constitutionally admissible aim for an interference with this right, and that it also stands the test of proportionality in a case in which the court due to immunity rejected

which the court had rejected the action for reason of a lack of jurisdiction, instead of sending it to the court with jurisdiction.[5] According to the Constitutional Court, the right to judicial protection can also be violated in the event that the court dismisses a motion to order an interim measure if it turns out that this entails ineffective subsequent judicial protection.[6]

9. The Constitutional Court most precisely defined the substance of the right to the equal protection of rights or to "fair" proceedings (Art. 22 of the Constitution) in Decision No. Up-39/95, dated 16 January 1997 (OdlUS VI/1, 71). In that case the court used evidence from other proceedings in which the defendant did not take part, in proceedings determining the payment of damages, and as a result the Constitutional Court set aside the challenged judgements. In its reasoning the Court stated that also in civil judicial proceedings the party must be ensured basic procedural guarantees, which encompass the right to make statements and the right of the equal treatment of parties to proceedings. The Constitutional Court explicitly pointed out that every party must have the possibility to present their positions, including their proposals concerning evidence, under conditions that do not place them in an essentially worse situation than the situation of the opposing party. The party must be ensured the possibility to state the arguments in favour of their positions, make statements in any dispute regarding both factual and legal questions, make statements concerning the assertions of the opposing party and the results of the evidence taken, and to be present in the taking of evidence.

10. A duty corresponding to the party's right to make statements is the duty of the court to take into consideration all the statements of a party, weigh their relevancy, and take positions concerning the relevant statements. Frequently the Constitutional Court must set aside a challenged judgement which was without sufficient reasons for the decision or due to the fact that the court did not respond to an important statement of the party.[7] The Constitutional Court has also *inter alia* set aside a challenged judgement in a case in which the court had not explained why it dismissed as unnecessary the complainant's proposal concerning evidence, while the court of second instance failed to respond to the complainant's allegation regarding such.[8] Another interesting decision is that by which the Constitutional Court set aside a Supreme Court judgement in a case in which it did not consider the position that the Constitutional Court had taken in connection with a disputable relation in another decision, as the Supreme Court did not explain why it did not agree with the position of the Constitutional Court.[9]

11. According to Art. 25 of the Constitution, everyone is guaranteed the right to appeal or to any other legal remedy against the decisions of courts and other authorities. However, this constitutional provision does not guarantee more than one level of appeal adjudication, therefore, it is impossible to refer to it if the Supreme Court rejects a request for revision. By

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the complainants' action against a foreign state for the recovery of damages, as the complainants can file an action in Germany, which as a member of the ECHR is obliged to respect high standards of human rights (Decision No. Up-13/99, dated 8 March 2001, OdlUS X, 110)

[5] Decision No. Up-54/704, dated 3 March 2005, OdlUS XIV, 35.

[6] See, e.g., Decisions No. Up-275/97, dated 16 July 1998, OdlUS VII, 232, and No. Up-334/98, dated 10 February 2000, OdlUS IX, 130.

[7] E.g. Decisions No. Up-118/95, dated 11 June 1998, OdlUS VII, 227, No. Up-78/00, dated 29 June 2000, OdlUS IX, 295, No. Up-35/01, dated 19 April 2001, OdlUS X, 112, etc.

[8] Decision No. Up-77/01, dated 4 March 2004, OdlUS XIII, 45.

[9] Decision No. Up-314/99, dated 12 July 2001, OdlUS X, 224.

such decision the right to the equal protection of rights could be violated if the possibility to file for revision was not ensured for both parties.[10] In the opinion of the Constitutional Court, the right under Art. 25 of the Constitution is also not violated if due to different legal evaluation the appellate court modifies the judgment of the court of first instance. The Constitutional Court, however, found a violation of this right in a case in which the party missed the time limit to file an appeal due to erroneous legal instructions,[11] and in a case in which the court issued a default judgement, but it did not follow from the reasoning which legal norm was the basis for finding that the claim was substantiated.[12]

12. The Constitutional Court gives special significance to respect for the basic procedural guarantees in the field of criminal law. The Constitutional Court has taken numerous positions in this area when reviewing statutory provisions, in certain cases even by interpretative decisions.[13] Especially in the initial years the Constitutional Court spent a great amount of time on dealing with the issue of basic procedural guarantees that must be ensured in deciding on detention. In this connection it set aside a number of detention orders for not being properly reasoned.[14] The issue of the adversarial procedure and a fair trial, in connection with the right to a defence, is fairly often raised also as regards numerous other issues. Thus, e.g., the Constitutional Court set aside a Supreme Court ruling dismissing a motion for the extraordinary mitigation of a penalty as the complainant was not serviced the opinion of the state prosecutor, and thereby referred to Art. 22 of the Constitution.[15] The Constitutional Court established a violation of the right to a fair trial in connection with a violation of the right to use one's own language in proceedings also in a case in which the court had rejected the complainant's application because it was written in the Lithuanian language, although statute explicitly provides that a person in custody has the right to file applications in their own language.[16] In several cases the Constitutional Court has set aside judicial decisions for reason of the violation of Art. 29 of the Constitution. According to the Constitutional Court, the right to defence (Art. 29.1 of the Constitution) was violated when the court decided on the basis of a modified indictment even though the prosecutor modified it during the main hearing at which the defendant did not participate.[17] In certain cases the

[10] When the admissibility of revision depends on the value of the object in dispute, in the event that the plaintiff does not state such value the possibility to secure the right to revision must also be given to the defendant (Ruling No. Up-112/94, dated 6 March 1996, OdlUS V/1, 71).

[11] Decision No. Up-148/01, dated 29 November 2001, OdlUS X, 233.

[12] Decision No. Up-201/01, dated 6 November 2003, OdlUS XII, 110. Pursuant to Art. 318.1.3 of the Civil Procedure Act (Official Gazette RS, Nos. 26/99, 96/02, 12/03 – official consolidated text, 2/04 and 36/04 – official consolidated text), one of the conditions for the issuance of a default judgement is that the decision that a claim is substantiated must stem from the facts that are stated in the action.

[13] This concerns a technique of decision-making that the Constitutional Court developed for cases in which a statute can be interpreted in two or more manners, but only one manner is in conformity with the Constitution. Thereby the Constitutional Court retains the validity of the statutory provision, however, the courts must interpret and apply such in conformity with the decision of the Constitutional Court (see Testen, F., *Tehnike ustavnosodnega odločanja* [The Techniques of Constitutional Decision-Making], Ustavno sodstvo, Ljubljana 2000, pp. 238 et seq.

[14] Decisions No. Up-57/95, dated 7 July 1995, OdlUS, 133, No. Up-74/95, dated 7 July 1995, OdlUS IV, 131, No. Up-75/95, dated 7 July 1995, OdlUS IV, 132, and many others.

[15] Decision No. Up-32/01, dated 14 March 2001.

[16] Decision No. Up-599/04, dated 24 March 2005, OdlUS XIV, 38.

[17] Decision No. Up-328/03, dated 12 May 2005, OdlUS XIV, 41.

Constitutional Court has set aside challenged decisions due to a violation of the right to the taking of evidence to the benefit of the defendant (Art. 29.3 of the Constitution)[18] and a violation of the right to a defence conducted by a counsel (Art. 29.3 of the Constitution).[19] Furthermore, it is worth citing a decision by which the Constitutional Court set aside a Supreme Court judgement due to a violation of the right to non-self-incrimination (Art. 29.4 of the Constitution).[20]

4. The Unconstitutionality of the Substance of a Challenged Judicial Decision

13. As mentioned above, in deciding on constitutional complaints the Constitutional Court is limited to examining whether the complainant's human rights or fundamental freedoms have been violated by the decision of a court or other authority. Therefore, it generally rejects allegations which claim that the substance of a decision is erroneous. Notwithstanding that fact a human right can in certain cases be also violated by the substance of a decision. This, in particular, occurs when a challenged decision is based on some legal position that is unacceptable from the viewpoint of human rights. This matter concerns the so-called Schumann formula, according to which a human right is violated if the judicial decision is based on a position due to which the Constitutional Court would annul a statute with the same substance. Thereby the Constitutional Court uses the same method as in the event of a review of the conformity of a regulation with the Constitution. It subsumes the content that the court gave to a legal norm in a concrete case directly under the relevant constitutional provision.[21]

14. The cases in which the Constitutional Court held that the interpretation of a statute was not in conformity with the Constitution are relatively rare. Although the Constitutional Court ascribes important significance to the right to personal liberty (Art. 19 of the Constitution) it has only found the violation of this right in few cases. These are cases in which the courts have violated the substantive conditions for the ordering of detention, which stem from Art. 20 of the Constitution.[22] In other cases it namely has set aside the challenged judicial decisions due to the fact that they were not properly reasoned. Certain other constitutional rights may also be interfered with by decisions issued in a criminal procedure. The Constitutional Court has established the violation of the right to the general freedom of activity, as one of the elements of the right to the protection of privacy and personality rights determined in Art. 35 of the Constitution, in a case in which a person was prescribed the penalty for a minor offence due to their refusal to take an alcohol test, however, the reason why the alcohol test was not carried out was not due to any fault on the complainant's side, but that of the state or police (at the moment when the complaint was ready to take the test the device was not working).[23] In civil

[18] E.g. Decision No. Up-13/94, dated 8 June 1995, OdlUS IV, 128.

[19] E.g. Decision No. Up-521/01, dated 19 February 2004 and Decision No. Up-729/03, dated 8 July 2004, OdlUS XIII, 81.

[20] Decision No. Up-134/97, dated 14 March 2002.

[21] Ude, L., *Ustavna pritožba v civilnih in delovno-socialnih sporih* [The Constitutional Complaint in Civil and Labour-Social Disputes], Ustavno sodstvo, Cankarjeva založba, Ljubljana, 2000, p. 267; Wedam Lukić, D., *Kršitve ustavnih pravic v civilnih sodnih postopkih* [The Violations of Constitutional Rights in Civil Judicial Proceedings], Podjetje in delo, No. 6–7/2000, p. 1144; and Galič, A., *Meje preizkusa ustavne pritožbe v civilnih zadevah* [The Limits of the Examination of a Constitutional Complaint in Civil Cases], Pravnik No. 1–3/2003, pp. 25 et seq.

[22] E.g. Decision No. Up-105/98, dated 10 July 2002, OdlUS XI, 269.

[23] Decision No. Up-215/01, dated 30 January 2003, Official Gazette RS, No. 15/03.

proceedings the court violated this right and the right to the privacy of correspondence and other means of communication (Art. 37 of the Constitution) when it grounded its decision on the evidence that was obtained by the inadmissible tapping of a telephone conversation.[24]

15. In constitutional complaints in the area of civil judicial proceedings complainants often assert that their right to private property under Art. 33 of the Constitution has been violated due to an erroneous decision. The Constitutional Court has repeatedly emphasized that the allegation that a judgement which interferes with the property situation of a complainant, even if such is substantiated, does not by itself demonstrate a violation of the right to private property under Art. 33 of the Constitution. This right is violated only if when deciding the court adopts a legal position that is unacceptable from the viewpoint of this constitutional right.[25] Nevertheless, in certain cases the Constitutional Court has established a violation of this right: e.g., in a case in which the consequences of the erroneous application of substantive law were so severe that the complainant was faced with disproportionately severe consequences;[26] in a case in which the use of apartments (as a crucial element of the right to property) could be endangered due to the interruption of the water supply, also as regards those inhabitants who had regularly paid the water supply bills;[27] and in a case in which the court in an enforcement procedure seized that part of a party's real estate which was not in the ownership of the debtor.[28]

16. From the aspect of constitutional law, cases in which the dispute concerns a collision between two constitutional rights are especially interesting. In certain cases the Constitutional Court established a violation of constitutional rights as the court had given the right of one party too great a weight and thereby disproportionately interfered with the rights of the other party. According to the Constitutional Court, in litigation stemming from the trespass to property the court excessively interfered with the right of the plaintiff to privacy and personality rights (Art. 35 of the Constitution) by granting the claim of an heir who acquired possession of the property only after the death of the owner;[29] as well as in a case in which it granted the claim that the complainant must allow her divorced husband to have free access to her bedroom.[30] In the case of a collision between the right to privacy (Art. 35 of the Constitution) and the freedom of expression (Art. 39 of the Constitution) and artistic endeavour (Art. 59 of the Constitution), the Constitutional Court adjudicated that the Supreme Court gave the right to privacy too great a weight and thereby interfered with the constitutional rights of the constitutional complainant.[31] At first sight it seems that these cases only concern the issue of the correctness of a judicial decision. However, the Constitutional Court remains within the limits of its jurisdiction and does

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[24] Decision No. Up-462/02 dated 7 October 2004, OdlUS XIII, 85.

[25] Decision No. Up-314/99, dated 12 July 2001, OdlUS X, 224. The same argumentation can be found in numerous rulings in which the Constitutional Court did not accept a constitutional complaint for consideration (e.g. Ruling No. Up-31/00, dated 11 June 2001, etc.).

[26] Decision No. Up-52/96, dated 10 December 1998, OdlUS VII/2, 247.

[27] Decision No. Up-156/98, dated 11 February 1999, OdlUS VIII/1, 118.

[28] Decision No. Up 128/03, dated 27 January 2005, OdlUS XIV, 33.

[29] Decision No. Up-32/94, dated 13 April 1995, OdlUS IV/1, 38, and Decision No. Up-60/00, dated 13 July 2000.

[30] Decision No. Up-157/00, dated 10 April 2003, OdlUS XII, 58.

[31] Decision No. 50/99, dated 14 December 2000, Official Gazette RS, No. 1/01, OdlUS IX, 310.

not encroach upon the jurisdiction of ordinary courts unless the basis of the ordinary court's decision is a different understanding of the substance of a constitutional right in question than it is defined in the Constitution. Although I agree with the position that statute can determine a certain right more broadly than is determined in the Constitution,[32] the review on how broadly a certain right is determined in the Constitution without a doubt falls within the jurisdiction of the Constitutional Court. Thus, the matter no longer concerns the issue of whether the ordinary court correctly applied a statute, but whether it correctly applied the Constitution.

5. An "Evidently Erroneous" or Arbitrary Decision

17. The rule that in deciding upon a constitutional complaint the Constitutional Court does not examine the correctness of a challenged decision is superseded in the event that a judicial decision is erroneous already at first sight. From the right to the equal protection of rights under Art. 22 of the Constitution there also namely follows the prohibition against judicial arbitrariness. If a judicial decision is already at first sight erroneous and/or is not based on legal arguments, the party's allegation that the court did not decide on the basis of statute but on the basis of criteria that should not be taken into account in adjudication is substantiated. However, it is necessary to emphasize that it is difficult to determined firm criteria that would enable the clear demarcation of "ordinary" errors, which only entail the incorrect application of the law, from "evident" errors or arbitrariness. Undoubtedly, it is also possible to consider as "evidently erroneous" a decision which is in direct contradiction to a statutory text such that this is immediately clear (e.g., the court considers the time limit for appeal to be 8 days, although it is actually 15 days, and rejects an appeal filed on the ninth day). Those cases which deal with the understanding of statutory provisions are more difficult, whereby their meaning is not completely clear from the statutory text such that the court must resort to other methods of interpretation. If, in view of the established methods of interpretation, a statute can be interpreted in one or several ways, the matter only concerns which interpretation is (more) correct, which is not for the Constitutional Court to evaluate. Interpretation which cannot be determined by the established methods of interpretation, however, can be evaluated as evidently erroneous.[33]

6. The Arbitrary Departure from Case Law

18. From the right to the equal protection of rights under Art. 22 of the Constitution, which in the area of judicial proceedings is a special expression of the right to equality before the law under Art. 14.2 of the Constitution, there follows the requirement that in like cases courts must apply the law in a similar manner. This constitutional requirement cannot be fulfilled absolutely, as this would be contrary to the principle of the independence of judges under Art. 125 of the Constitution. In their decision-making judges are bound (only) by the Constitution and laws, not by judicial decisions reached in other similar cases. Therefore, the requirement concerning like deciding in similar cases must also be considered an expression of the prohibition of judicial arbitrariness. Only such departure from case law that is arbitrary is inconsistent with the right under Art. 22 of the Constitution.[34]

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[32] Galič, *Meje preizkusa…,* p. 30.

[33] On such grounds the Constitutional Court set aside a Supreme Court judgement which was based on the interpretation of a statutory provision that, according to the Constitutional Court, could not stand logical evaluation, as it was contrary to the meaning of the text of that provision (Decision No. Up-270/01, dated 19 February 2004, Official Gazette RS, No. 25/04).

[34] Decision No. Up-297/96 dated 15 June 2000, OdlUS IX, 292. See also Galič, *Ustavnosodna praksa o argumentu precedensa (pred "rednimi" sodišči)* [The Case Law of the Constitutional Court concerning the Argument of Precedent (before "Ordinary" Courts)], Podjetje in delo, 6-7/2004, p. 1082.

19. The Constitutional Court tried to define the concept of such arbitrary departure in different manners. Perhaps the most appropriate formulation is that according to which such departure occurs if the court decides differently than other courts in like cases, and does not appropriately reason such departure from case law. Even with this definition there are several disputable questions. The first is when the matter concerns a similar case. The Constitutional Court has frequently dismissed the allegations that an ordinary court in granting compensation for personally injuries departed from settled case law on the grounds that the amounts of adjudged damages cannot be mutually compared. In the opinion of the Constitutional Court, the Supreme Court, which has a view over the entire case law and its trends, is in a better position than the Constitutional Court to ensure balanced and harmonized criteria for compensation for comparable types of injuries. Only in especially evident cases of major departures concerning the amount of damages is the Constitutional Court able to establish a violation of the mentioned constitutional right.[35] Another question refers to when it is possible to speak of settled case law. The Constitutional Court often emphasizes that one or two different decisions do not already substantiate a departure from case law. Thereby a question is raised whether this should also apply in the event of a Supreme Court decision reached in proceedings upon a request for the protection of legality[36], or even in the event of a principled legal opinion of the Supreme Court[37]. On the other hand, in certain cases in which the Constitutional Court established a departure it was satisfied with the general finding that the court had applied some statutory provision contrary to the prevailing case law.[38] Finally, a question is raised to what extent the court must reason its position such that the departure from case law is not considered arbitrary. In such a case it is expected from the judge to specifically explain the reasons that substantiate the departure: this means that they must know the case law, explain why they do not agree with such, and provide reasons for a different decision.[39] Concerning such it is necessary to point out again that the Constitutional Court cannot adjudicate which statutory interpretation is correct if two such interpretations are, in view of the established methods of interpretation, possible and in conformity with the Constitution.[40]

20. Furthermore, the prohibition of the arbitrary departure from case law does not entail that case law cannot be changed. The Constitutional Court has already taken the position that it cannot prevent changes and thereby the development of case law.[41] If changed case law becomes effective, it is the new case law that is relevant for the review whether the right to the equal protection of rights was violated.

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[35] E.g. Ruling No. Up-313/01, dated 25 April 2002.

[36] A request for the protection of legality is an extraordinary legal remedy which the State Prosecutor of the Republic of Slovenia can file at the Supreme Court against a final judicial decision by which a statute or a treaty has been violated.

[37] Principled legal opinions are adopted by the Supreme Court at a general session of all judges, concerning issues that are important for the uniform application of statutes.

[38] E.g. Decision No. Up-67/00, dated 20 June 2002, OdlUS XI, 265.

[39] Decision No. Up-188/02, dated 11 December 2003, OdlUS XII, 112.

[40] The case in which the same court reached two contradicting decisions in a short period of time is an exception. The Constitutional Court found the violation of the right under Art. 22 as the court had not reasoned why it decided differently than in the first case. The constitutional complaint was nevertheless dismissed as the Constitutional Court established that the position on the basis of which the first decision was grounded was erroneous (Ruling No. Up-22/94, dated 7 March 1997, OdlUS VI, 82).

[41] E.g. Ruling No. Up-22/94, dated 7 March 1997, No. Up-342/96, dated 8 June 1998, No. Up-203/01, dated 25 April 2002.

7. Deciding Constitutional Complaints

21. The procedure for deciding constitutional complaints is detailed in the CCA. From the Constitution (Art. 160.3) it already follows that the Constitutional Court decides on a constitutional complaint – provided that the law does not determine otherwise – only if (all available) legal remedies have been exhausted. According to Art. 51 of the CCA, a constitutional complaint may be filed only after the exhaustion of all legal remedies – both ordinary and extraordinary. The Constitutional Court may exceptionally decide on a constitutional compliant prior to the exhaustion of extraordinary legal remedies if the violation is evident and if the complainant is facing irreparable consequences due to the implementation of the challenged decision. The Constitutional Court does not understand the requirement of the exhaustion of legal remedies only in a formal sense, but the complainant must exhaust all the available legal remedies also in terms of substance.[42] This entails that they should have asserted the violations that they are asserting in the constitutional compliant already within the legal remedies filed in ordinary court proceedings. This requirement is a reflection of the principle of subsidiarity, from which it follows that possible violations should be remedied already in proceedings before ordinary courts. Ordinary courts must also interpret and apply the laws in a manner consistent with the Constitution. If the court opines that a law that it should apply is unconstitutional it must, according to Art. 156 of the Constitution, commence proceedings for its review before the Constitutional Court. The time limit for filing a constitutional complaint is 60 days, however, in especially substantiated cases the Constitutional Court decides on a constitutional complaint even though it was filed after the expiry of this time limit (Art. 52 of the CCA).

22. The Constitutional Court decides on whether a constitutional complaint is accepted for consideration at a closed session in a panel of three judges (Art. 54 of the CCA). The Constitutional Court of the Republic of Slovenia decides on the acceptance of constitutional complaints in three panels: civil, criminal and administrative. The panel rejects a constitutional complaint if the procedural prerequisites for its consideration have not been fulfilled (Art. 55.1 of the CCA), and refuses to accept such: (1) if evidently no human right or freedom was violated; or (2) if no important legal question is expected to be resolved by the decision and the violation of a human right or fundamental freedom has no important consequences for the complainant (Art. 55.2 of the CCA). The panel decides on the rejection or acceptance of a constitutional complaint unanimously. If the panel does not accept a constitutional complaint, it is nevertheless accepted for consideration if any three judges of the Constitutional Court decide in writing to accept such within 15 days from the decision being reached (on non-acceptance or rejection) (Art. 55.3 and Art. 55.4 of the CCA).

23. If a constitutional complaint is accepted for consideration the Constitutional Court decides on its merits at a plenary session. The Constitutional Court dismisses as unfounded a constitutional complaint or grants it, sets aside the challenged judicial decision, and remands the case to the court with jurisdiction for new adjudication (Art. 59.1 of the CCA). In deciding on a constitutional complaint the Constitutional Court is bound by the reasons that the complainant asserted in their constitutional complaint.[43] The direct act which is subject to challenge by a

[42] E.g. Rulings No. 302/97, dated 10 January 2002, OdlUS XI, 108, No. Up-106/02, dated 25 April 2002, OdlUS XI, 128 etc.

[43] According to Art. 53.1 of the CCA, in a constitutional complaint it is necessary to state the decision that is challenged, the facts which should substantiate the complaint, and the alleged violations of a human right and fundamental freedom.

constitutional complaint is a judicial decision reached at the last instance, however, it depends on the concrete case whether the Constitutional Court would set aside only the decision of last instance or also the decisions of lower courts[44] – depending on the level at which the violation of a human right occurred.

24. If in the process of deciding on a constitutional complaint a question is raised whether the statute on which the challenged judicial decision is based is in conformity with the Constitution, the Constitutional Court decides also on the (un)constitutionality of the statute by the same decision (Art. 59.2 of the CCA). Often the Constitutional Court decides on constitutional complaints after it has already decided that the statute on the basis of which the challenged judicial decisions are based was not in conformity with the Constitution. Concerning such, different situations can occur. If the Constitutional Court annuls a challenged regulation, this is not applied to the relations that occurred prior to the day when the setting aside took effect if such were not yet finally decided (Art. 44 of the CCA). As it is possible to interfere with finally regulated legal relations by a constitutional complaint, the annulment of a regulation also affects all those final decisions against which a constitutional complaint was filed in time before the Constitutional Court and which have not yet been decided until such annulment begins to take effect.[45] It is different when the Constitutional Court only establishes that the challenged statute is inconsistent with the Constitution, and determines a time limit for the legislature to remedy such (Art. 48 of the CCA). In the event of such, the statute continues to be applied despite its being found unconstitutional, unless for the period of time until its adjustment with the Constitution the Constitutional Court determines something else "by the manner of the implementation of its decision", on the basis of Art. 40.2 of the CCA. In the event of such, in deciding on the constitutional complaint the Constitutional Court considers the position that it took in the review of the conformity of the regulation with the Constitution. If there is no violation of some other constitutional right, the Constitutional Court grounds its decision on the violation of Art. 22 of the Constitution.

25. Pursuant to Art. 60 of the CCA, provided that a constitutional complaint is substantiated the Constitutional Court can also decide on the complainant's rights. It can act in such a manner if this is necessary due to consequences which have already occurred or if such is required by the nature of a violated constitutional right, and if it is possible to decide on such on the basis of the data in the file. In such cases, one of the criteria is also the duration of judicial proceedings which would be even further delayed by remanding the case to the ordinary court for new adjudication.

8. Conclusion

26. After more than ten years of practice of considering constitutional complaints it is possible to establish that the Constitutional Court mainly succeeded in defining the limits of its review. Certainly, this does not mean that it found a final solution to all the disputable issues. When it treats a concrete case it often finds a problem that it did not notice when deciding previous cases, or new aspects of the already adopted solutions arise. There still remain some questions to which it has not yet found a final answer. Concerning such, the question is raised time and again how far it may go in the review of challenged judicial decisions, and in which cases its intervention is meaningful. It could namely occur that the court violated constitutional procedural guarantees

[44] If it concerns a judicial decision reached in the judicial review of administrative acts, the Constitutional Court may also set aside the decisions reached in the (preceding) administrative procedure.

[45] See Decision No. Up-252/96, dated 30 September 1999, OdlUS VIII, 293.

while, however, there were no consequences for the complainant as the decision would be the same in either case. The Constitutional Court must not "speculate" how the decision would look if there was no violation, but it has already occurred that it dismissed a constitutional complaint despite its finding a violation (the case concerned a decision which was based on the evidently erroneous interpretation of procedural law, but the complainant himself by his inactivity contributed to the detrimental decision).[46] On the other hand the Constitutional Court has tied hands when a decision is otherwise erroneous, however the case only concerns the erroneous application of law which does not interfere with the field of constitutional rights, and does not reach that level of error such that it could be evaluated as arbitrary. In every respect in the evaluation of such a violation a restrictive approach is necessary, as otherwise the limit between the jurisdiction of the Constitutional Court and ordinary courts would be completely blurred.[47]

27. Regarding the position of the relation between the Constitutional Court and the Supreme Court, the most disputable aspect seems to me to be the role of the Constitutional Court in ensuring the like application of regulations in like cases. This is namely a typical task for the Supreme Court, however, the narrowing of the admissibility of extraordinary legal remedies (particularly revision in civil proceedings) has led to more and more constitutional complaints being filed against the decisions of appellate courts. Thereby a role was (indirectly at least) imposed on the Constitutional Court that it does not have according to the Constitution: in an increasing number of cases it must also deal with the question of whether the court in a concrete case departed from the settled case law and thereby violated Art. 22 of the Constitution. The Constitutional Court should deal with this question only exceptionally. I am of the opinion that the Constitutional Court could be relieved of such burden and at the same time the relation between the Constitutional Court and the Supreme Court established such as follows from the Constitution if we adopt a regulation according to which the majority of the violations of constitutional rights could be remedied already within ordinary judicial proceedings.[48]

REFERENCES:

Galič, A.: *Meje preizkusa ustavne pritožbe v civilnih zadevah* [The Limits of the Examination of a Constitutional Complaint in Civil Cases], Pravnik No. 1–3/2003, pp. 23–45
Galič, A.: *Ustavnosodna praksa o argumentu precedensa (pred "rednimi" sodišči)* [The Case Law of the Constitutional Court Concerning the Argument of Precedent (before "Ordinary" Courts)], Podjetje in delo, 6-7/2004, pp. 1081–1092

Testen, F.: *Tehnike ustavnosodnega odločanja* [The Techniques of Constitutional Decision-Making] (Ustavno sodstvo, pp. 213–248)
Ude, L.: *Ustavna pritožba v civilnih in delovno-socialnih sporih* [The Constitutional Complaint in Civil and Labour-Social Disputes], (Ustavno sodstvo, pp. 249–273)
Wedam Lukić, D.: *Kršitve ustavnih pravic v civilnih sodnih postopkih* [Violations of Constitutional Rights in Civil Judicial Proceedings], Podjetje in delo, No. 6–7/2000, pp. 1139–1147

[46] Decision No. Up-108/04, dated 8 September 2005.

[47] Compare Galič, *Meje preizkusa,* pp. 40–43, where he cites a few cases in which, in his opinion, the Constitutional Court drew the limits of evident errors (too) broadly.

[48] Galič, *Ustavnosodna praksa…,* is in favour of the solution according to which in the event of a departure from case law the court would allow revision and thereby enable the Supreme Court to have the last word.