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INDIVIDUAL COMPLAINT AS A DOMESTIC REMEDY TO BE EXHAUSTED OR EFFECTIVE WITHIN THE MEANING OF THE ECHR

Comparative and Slovenian Aspect

ABSTRACT: In some systems the individual's access to constitutional courts has become so widespread that it may threaten the functional capacity of the constitutional court. With a growth in the number of constitutional complaints, efficiency may decrease. Therefore, the national legislature is trying to find some way for the constitutional court to eliminate less important or hopeless proceedings. Nevertheless, individuals should have many opportunities to apply for the protection of their constitutional rights in form of individual (constitutional) complaint which can be considered as an effective "interface" between the national and ECHR human rights protection. Additionally, a broader (national) individual access to the Constitutional Court stimulates the democratisation of the legal order which individuals have an opportunity to initiate a direct and immediate control over the legislative, executive and judicial state powers.

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A) Comparative Aspect

1 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 Slovenia[1], 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 pre-judicial 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 review[2]. 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[3]. 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 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.[4]

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

2 Greece, Italy, Switzerland, the USA.

3 Germany, Slovenia.

4 France is a specific exception among these systems, as private individuals have no access to the Constitutional Council, except with reference to elections. In France, the protection of individual rights is, however, the responsibility of the National Council acting on the basis of a complaint against administrative acts.

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

The complaint 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 particular system.

3 The Constitutional Complaint and its Extent in the World

A constitutional complaint is a specific subsidiary legal remedy against the violation of constitutional rights, primarily by individual acts of government bodies which enables a 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 indirectly or even directly 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 remedy[5].

The constitutional complaint is not an entirely new institute; its forerunner may be found in the Aragon law of the 13th to 16th Century[6]; and in Germany from the 15th Century onwards[7]; while Switzerland introduced a special constitutional complaint[8] in the *Constitution of 1874* and in the *Statutes* of 1874 and 1893. Austria introduced the constitutional complaint from 1868 (exercised by the *Reichsgericht* – Article 3 of the *Constitutional Law on the Reichsgericht* of 21 December 1867). Liechtenstein introduced the constitutional complaint by Para.1 of Article 104 of the *Constitution* of 1921 as well as by Article 23 of the *State Court Act* of 1925. Bavaria regulated the constitutional complaint by the *Constitutional Charter* of 26 May 1818, the *Constitutional Charter* of 14 August 1919 as well as by the *State Court Act* of 11 June 1920.

The constitutional complaint is very common in systems of constitutional/judicial review. It is most widespread in Europe in a broader or in a limited form[9]. In Germany, the constitutional complaint appears on the federal and on provincial levels.[10]

In addition to Europe, some Asian systems recognise a constitutional complaint in a broader or in a limited form[11]. It should also be noted that other Arabian 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 complaint[12]. 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

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

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

7 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*.

8 Staatliche Verfassungsbeschwerde.

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

10 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.

11 Azerbaijan, Georgia (under the jurisdiction of the Constitutional Court), Kyrghyzia (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); the Constitutional Courts of Member states of the Russian Federation (Adigea, Baskiria, Buryatia, Dagestan, the Kabardino-Balkar Republic, Karelia, Koma).

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

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 cumulating of forms, the popular and the constitutional complaint[13]. 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 acts[14]. 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 it[15], 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 complaints[16] or by narrower units of the Constitutional Court (chambers, sub-chambers)[17] issuing decisions on constitutional complaints .

4 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 maneuver 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 and 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.[18] Special forms of constitutional complaint may also protect special categories of rights[19];

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

14 Except for the possibility of indirectly impugning a statute in Serbia, Montenegro, Slovenia and Spain, and the direct impugning of a statute in Germany.

15 the FYROM, Slovenia.

16 *e.g.* the German Federal Constitutional Court and the Spanish Constitutional Court.

17 *e.g.* in the Czech Republic, Slovenia.

18 *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.

19 In Germany, Albania, Austria, Estonia, Liechtenstein, Slovakia, Switzerland, 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

- as a rule, acts disputed by the constitutional complaint refer to individual acts, with some exceptions[20];
- those entitled to lodge a constitutional complaint are generally individuals but in Austria, Germany, Spain, Switzerland, Serbia and 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, Serbia) or by the public prosecutor (Spain, Portugal). In some systems the Constitutional Court is not bound by the petition and may exceptionally *ex officio* extend the proceedings to the general act if in a concrete case is concerned (Slovenia, Germany, Austria, Liechtenstein, similar in the Czech Republic, Spain, Croatia and Macedonia).
- 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 fulfillment 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 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, Slovenia, 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* (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. 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

(*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.

20 In Switzerland, Cyprus and Austria a constitutional complaint can impugn only an administrative act, while in Germany, it can impugn acts of all levels (including a statute, also in case of omissions); in Spain, Slovenia, Serbia and Montenegro a statute may also be an indirect subject of a constitutional complaint; legislative negligence may be directly impugned by a constitutional complaint in Brazil, and also in the practice of the German Federal Constitutional Court and the Bavarian Constitutional Court. In Monaco the constitutional complaint is limited only to statutes. In addition, also newly introduced form of the constitutional complaint which were introduced in Hungary, Turkey, Latvia, Russia, Tadjikistan, Baskhiria, Buryatia, Dagestan, the Kabardino-Balkar Republic, Karelia, Komi and Poland are oriented to the general acts (so called unreal constitutional complaint). However, in case of violation of their human rights the Ukrainian petitioner may apply for the official interpretation by the Constitutional Court. In the last period there are some efforts relating to the introduction of the constitutional complaint (see: Lapinskas, Kęstutis. The perspectives of individual constitutional complaint in Lithuania. Strasbourg: European commission for democracy through law (Venice Commission), Batumi, Georgia, 2008. CDL-JU(2008)004. URL: http://www.venice.coe.int/docs/2008/CDL-JU(2008)004-e.asp.

Constitutional Court may, under specified conditions, make a final decision on constitutional rights or fundamental freedoms themselves (Para. 1 of Article 60 of the *Slovenian Constitutional Court Act*, Official Gazette RS, No. 15/94).

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

B) Slovenia - Applicants Before the Constitutional Court

1 Legal Interest Before the Constitutional Court

The following applicants may initiate constitutional review in the given cases:

Abstract review: anyone (Art. 162 (2), *Constitution*; Art. 24, *Constitutional Court Act*).

Abstract review: the National Assembly, one third of the deputies of the National Assembly, the National Council, the Government, (Art. 23.a¸(1), *Constitutional Court Act*).

Concrete review (regarding its incidenter proceedings): the Courts (Art. 23, Constitutional Court Act), the ombudsman for human rights if he deems that a regulation or general act issued for the exercise of public authority inadmissibly interferes with human rights or fundamental freedoms; the information commissioner, provided that a question of constitutionality or legality arises in connection with a procedure he is conducting; the Bank of Slovenia or the Court of Audit, provided that a question of constitutionality or legality arises in connection with a procedure they are conducting; the State Attorney General, provided that a question of constitutionality arises in connection with a case the State Prosecutor's Office is conducting; representative bodies of local communities, provided that the constitutional position or constitutional rights of a local community are interfered with; representative associations of local communities, provided that the rights of local communities are threatened; national representative trade unions for an individual activity or profession, provided that the rights of workers are threatened;Art. 23.a(1), *Constitutional Court Act*).

Preventative review of treaties: the President of the Republic, the Government or one third of the deputies of the National Assembly (Art. 160 (2), *Constitution*; Art. 70, *Constitutional Court Act*).

Constitutional complaint: any natural person (as well as a legal entity), the Ombudsman (Arts. 160, 161, 162, *Constitution*, Art. 50, *Constitutional Court Act*).

Disputes on powers: the aggrieved authorities (Art. 61 (1)(2), *Constitutional Court Act*), anyone (Art. 61(3), Constitutional Court Act).

Impeachment: the National Assembly (Arts. 109 and 119, *Constitution*, Art. 63 (1), *Constitutional Court Act*).

Unconstitutional acts and activities of political parties: anyone by means of the popular complaint (*actio popularis*) or legitimate subjects by a request for an abstract review - legitimate subjects under Art. 23.a of the *Constitutional Court Act*, (Art. 68 (1) of the *Constitutional Court Act*).

Confirmation of deputies' terms of office: affected candidates or representatives of the lists of candidates (Art. 69 (1), *Constitutional Court Act*; Art. 8 (1) of the *Deputies Act*, Official Gazette RS, No. 48/92).

Confirmation of terms of office of the members of the National Council: affected candidates (Art. 50 (3), *National Council Act*, Official Gazette RS, No. 44/92).

Complaint of local self-government authorities concerning constitutional position and rights of local communities (Art. 91, *Local Self-Government Act*, Nos. 72/93 with amendments).

Conditions for the establishment of a municipality or a change in its territory: government, any deputy, at least 5000 voters, municipal council (Art. 14.a(3), Local Self-Government Act).

Dissolution a municipal council – dismission a mayor: municipal council, mayor (Art. 90.c(4), Local Self-Government Act).

Constitutionality and legality of a request to call a referendum: municipal council (Art. 47.a(2), Local Self-Government Act).

Review the constitutionality of consequences due to the suspension of the implementation or adoption of a law: National Assembly (Art. 21, Referendum and People's Initiative Act).

decision not to call a constitutional amendment referendum: at least thirty deputies (Art. 5.č, Referendum and People's Initiative Act).

Confirmation of elected Slovenian members of the European Parliament: affected candidates (Art. 23(1), Election of Slovenian Members to the European Parliament Act).

Anyone (a natural person and/or a legal entity) who demonstrate legal interest may request the individual initiation of 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 the Court's general restrictive method of treatment and acknowledgment of the mentioned procedural condition. However, a detailed overview of the constitutional case-law shows that the Constitutional Court did not always hold on consistently its earlier decision concerning legal interest. Some of such oscillations can be defined a unconsistence of the constitutional case-law, but other deviations may be results of special circumstances which justify a different treating of apparently similar cases[21].

From the definition of the legal interest which derives from Art. 24(2) of the Constitutional Court Act and from its concretization in practice as well, the following elements can be stressed: the interest shall be legal (an encroachment upon someone's rights, legal interests and/or legal position must arise), so only in such case we can speak about the legal interest; moreover, the interest shall belong to the petitioner itself, accordingly, we speak about his/her own and personal legal interest – the petitioner shall demonstrate his/her legal interest, consequently that the expected decision taken by the Constitutional Court would have influence on his/her legal position; and what is of the highest importance, the enchroachment upon the petitioner's own and personal rights, legal interest and/or the legal position must be direct and concrete. If at least one of the mentioned elements is not present, then the procedural presumption of the legal interest is not present in whole and the Constitutional Court would in principle reject such petition.

Regarding individual petitioners, the Constitutional Court examines at first, if the eventual decision in merito would may have any effect on the petitioner at all (Art. 24(1)(2), Constitutional Court Act), Constitutional Court Act). On the contrary, in rule state and other bodies disputing regulations

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

before the Constitutional Court do not have to demonstrate any legal interest (Art. 23.a, Constitutional Court Act). However, state bodies and other similar bodies as applicants may not submit a request to initiate the procedure for the review of the constitutionality or legality of regulations and general acts issued for the exercise of public authority which they themselves adopted (Art. 23.a(2), Constitutional Court Act)..

First of all, the state bodies don't have any legal interest to dispute legal provisions regulating their powers. Also any eventual unsuitable or even an illegal regulation of issue regarding activities or powers of the particular state body as a petitioner, doesn't indicate any encroachment upon its rights, legal interests or its legal position. State bodies don't have any legal interest to dispute the procedure for implementation of their powers. They are not entitled to dispute legal provisions which directly encroach on the legal position of individuals who's rights are an object of the decision-making of such body; only the affected individuals may demonstrate their legal interest for disputing of the mentioned provision from their own.

The state and other similar bodies can dispute only legal provisions which encroach on their own legal position when they exercise their role of the state body. The same principle shall be implemented for the subjects of public law.

In all cases concerning the state and other similar bodies or the individual members of the state bodies and/or the individuals - executors of the body"s role, a general principle shall be considered that the legal interest would be taken as been demonstrated if it is direct and concrete.

However, the Constitutional Court made an exception in case of petitions of trade unions. Under Art. 23.a (1)(11) the procedure for the review of the constitutionality or legality of regulations or general acts issued for the exercise of public authority can be initiated also by a request submitted by national representative trade unions for an individual activity or profession, provided that the rights of workers are threatened (in contrast to the petion which shall be discussed and/or proved by the Constitutional Court). If the petitioner is not a such trade union, the Constitutional Court discusses and/or proves its request like a petition what means that such trade union shall demonstrate its legal interest.

The Constitutional Court made an exception also in some cases concerning associations and/or some other unions of citizens, however only then when such associations or other unions were established with the aim to assert interests and/or rights of their members.

The stability of the constitutional case-law has been consequently accentuating the necessity of the restrictive interpretation of the legal interest, because of the basic role of the legal interes: to restrict the access to the Constitutional Court. Such restrictive aim has been in the own nature of the legal interst. 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 Court[22].

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

2 Ordinary Courts as Applicants

2.1 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 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 be 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 apply [23].

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 Constitution. That was the situation in cases on which the Constitutional Court has decided so far upon the proposal of the (ordinary) court [24]. 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.

2.2 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.[25] 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.[26]

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

24 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.

25 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.

26 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.

3 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."

4 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*).

5 The Slovenian Constitutional Complaint

5.1 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 basic 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 system[27]. 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.

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 basic 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.

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

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 basic 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 basic rights have the nature of legal principles and are thus open to such an extent that they require significant further concretisation and implementation[28].

The question as to whether Slovenian Constitutional Case-Law from the period after the introduction of the 1991 Constitution, in its relations to basic 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 basic 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.

5.2 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

28 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.

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.

Art. 15(1) of the Constitution stipulates that human rights and fundamental freedoms are to be exercised directly on the basis of the Constitution, while paragraph 2 of the same Art. provides that the exercise of these rights and freedoms may be regulated by law. In conjunction with Art. 125 this means that these rights and freedoms are protected in all judicial proceedings before every court. After all other remedies have been exhausted, individuals also have the possibility of filing a constitutional complaint before the Constitutional Court, i.e. the instrument specially intended for the protection of human rights and fundamental freedoms.

The right to the judicial review of the acts and decisions of all administrative bodies and statutory authorities which affect the rights and legal entitlements of individuals or organizations is guaranteed (Art. 120(3), Constitution; Art. 157(1), Constitution).

As already mentioned, 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 rights[29].

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)[30]. 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).

5.3 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).

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

30 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.

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), ConstitutionalCourt 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).

5.4 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 8Art. 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 Act[31]);

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

6 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[32]

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 Constitutitutional 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 Constitution[33]. The respect of the mentioned human right and the assurance of the quality of the

31 **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.

32 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, consolidated text in the Official Gazette RS, No. 64/07. Consequently, the new Rules of Procedure were adopted too and were published in the Official Gazette RS, No. 86/07

33 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

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 mustl 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 courts [34]. Only if such protection could not be asserted, the procedure before the Constitutional Court might be relevant[35].

The amended Constitutional Court Act of 2007 (Official Gazette RS, No. 64/07) brought the changes [36] 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).

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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.

34 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).

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

36 See www.us-rs.si

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).

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 site[37] 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).

7 Some Comments

As already mentioned, the last change of the Constitutional Court Act in 2007 rigorously limited the access of individuals to the Constitutional Court[38]. 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

37 www.us-rs.si

38 Almost at the same time such measures were introduced in Spain; see GONZÁLEZ BEILFUSS, Markus. The access to the Spanish constitutional court: the administration of a limited good. Strasbourg: European commission for democracy through law (Venice Commission), Riga, Latvia, 2009. CDL-JU(2009)038.

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 bodes are "only tools". The state governed by the rule of law shall trengthen also the harmony and greater exactness of legal rules which shall be in service of people, united in the society. Therefore such proposals and warnings[39] 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)[40].

39 Kristan, Andrej, Tri razsežnosti pravne države, Slabitev pravne države z omejevanjem dostopa do ustavnega sodišča, Revus (2009) 9, p. 65–89. See also Kristan, Andrej, Sodišču čast in vpliv, Pomembnost ustavnopravnega vprašanja in legitimnost odločanja v preizkusnih senatih po ZUstS in ZUstS-A, revus(2010) 12, p. 7-12.

40 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. Mavčič, Arne. *The Slovenian constitutional review*. Preddvor: [samozal.] A. Mavčič, cop. 2009. 125 str. [COBISS.SI-ID 368383]; www.concourts.net

C) The Implementation of Strasbourg Standards

The concept of "constitutional complaint" is usually connected with the national constitutional protection of fundamental rights. However, certain international documents also envisage specific legal remedy of protection of fundamental rights and freedoms in the form of a complaint[41].

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 complaint [42]. An individual may lodge a complaint with the European Commission for Human Rights because of the alleged violation of rights guaranteed by the *Convention*. It is an explicit international legal remedy comparable to the national constitutional complaint. It fulfills its function of the individual complaint where national law does not guarantee any appropriate protection of rights.

Individual complaint is a subsidiary legal remedy (preconditioned on the exhaustion of the national legal remedies), it is not a popular complaint (*actio popularis*) and it does not have retroactive or cassatory effect. It differs from the constitutional complaint in the way that, contrary to the latter, it leads merely to a finding (declaratory relief).

The position of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* in national law specifies whether an individual may refer to the *Convention* or even base a national constitutional complaint thereon. It further narrows the maneuvering space of the Constitutional Court itself in the interpretation of the provisions of the *Convention*. It has actually become a connection of the national Constitutional Court to the European bodies in cases in which a judicial decision as a final national outcome of decision-making becomes the subject of an individual complaint to a European forum [43].

The institution of constitutional complaint and European complaint and the function of European bodies (above all the European Court of Human Rights) raises the question of national and supra-national (final) instance. The national (final) instance: the Constitutional Court as the highest body of judicial authority in a particular state for the protection of constitutionality and legality and human rights and fundamental freedoms 38 would be limited to investigation of constitutional-legal questions only. Review of the correct finding of the actual circumstances and the use of simple rules of evidence is a matter for the regular Courts. The subsidiary nature of a constitutional complaint also lies in the division of responsibility between the Constitutional and the regular Courts. The gradation of instance could be established as ascending from the national Supreme Court through the national Constitutional Court to the European Commission or European Court. In fact, instance is not the essence of this gradation although it is essential in the role of supplementing, which

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41 *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 that the Council for human rights must accept and debate reports from individual persons who claim that they are the victims of the violation of any right defined in this Pact. The right to individual complaint is contained in the following: Article 23 of the *Declaration on Fundamental Rights and Freedoms of the European Parliament* of 12 April 1989; section 18(2) of the *Document of the Moscow Meeting of CSCE* of 3 October 1991; Article 25 of the *American Convention on Human Rights* of 22 November 1969; Article 28 of the *Contract on the European Community* of 1 February 1992; Statute of 1979 of the *Comision y la Corte Interamericanas de los Derechos Humanos*; Statute of 1980 of the *Inter-American Court on Human Rights*; *American Convention on Human Rights* of July 18, 1978 (Article 44); Articles 55 through 59 of the *African (Banjul) Charter on Human and People's Rights* of June 27, 1981; indirectly by Para. 2 of Article 3 of the *Arab Charter on Human Rights* of 22 May 2004

42 Article 34 of the *Convention.*

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

- is of constitutional impact in Austria;
- is the basis for an internal national constitutional complaint in Switzerland where it has a status comparable with the constitutional level;

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

- it is higher than ordinary law (Belgium, France, Luxembourg, Malta, The Netherlands, Portugal, Spain, Cyprus);
- it is ranked as Common Law: Germany, Denmark, which introduced the national use of the *Convention* by special *Statute* on 1 July 1992, Finland, Italy, Liectenstein, San Marino, Turkey;
- it does not have a direct internal state effect: Great Britain, Ireland, Sweden, Norway, Iceland.

Some countries of Anglophone Africa are an exception regarding the latter group of systems (Kenya, Tanzania, Uganda, Nigeria) which expressly adopted the system of protection of rights from the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*e.g.* Nigeria in the Constitution of 1960) influenced by the extension clause to the *European Convention* in terms of Article 63, which Great Britain signed on 23 October 1953, whereby only the *Convention* itself and *Protocol 1* apply in these regions.

means that the national constitutional complaint supplements national judicial protection while supra-national European complaint supplements national constitutional complaint.

The Statute of the Council of Europe came into force for Slovenia on 14 May 1993. The Convention was ratified on 31 May 1994. The Ratification of the Convention Act (in respect of ratification also of Article 25, Article 46, Protocol No. 1, and Protocols Nos. 4, 6, 7, 9, and 11) was published on 13 June 1994 (Official Gazette RS, No 33/94) and came into force on the fifteenth day following publication. On 28 June 1994 Slovenia formally ratified the Convention in Strasbourg by depositing the appropriate instruments with the Secretary General of the Council of Europe. When ratifying the Convention Slovenia made no reservations because new legislation had been prepared following international standards and the Convention. It is also interesting to note that Slovenia was the first member state to ratify Protocol No. 11. Slovenia recognized the competence of the European Commission and the jurisdiction of European Court of Human Rights under former Articles 25 and 46 of the Convention for an indeterminate period. In addition, the Slovenian declarations included a restriction *ratione temporis,* to the effect that the competence of the Commission and the jurisdiction of Court are recognized only for facts arising after the entry into force of the Convention and its Protocols with respect to Slovenia on 28 June 1994.

However, some decisions of the Slovenian Constitutional Court referred to the Convention even before it became formally binding for Slovenia. In this connection, the Court observed that Slovenia had not yet signed and ratified the Convention, but considering its desire to join the Council of Europe it would necessarily have to do so, for which reason it was appropriate that Slovenian legislation be adjusted to meet the criteria of the Convention as soon as possible. There is no doubt that Slovenia has been inspired by the same ideals and traditions of freedom and rule of law principles as the framers of the Convention. While Slovenia is today reintroducing and developing the legal culture of human rights after almost half a century of arrears, it cannot be said that it has no tradition concerning the protection of human rights and fundamental freedoms.

The Slovenian Constitutional Court and the whole system of ordinary courts must ensure the conformity of domestic legal provisions with the provisions of the Convention. In addition, the provisions of the Convention complement national constitutional provisions. Beyond that, the case-law of the European Court of Human Rights is also directly applicable in the decision making process of the Constitutional and other courts in Slovenia. Thus the jurisdiction of the European Court of Human Rights and Slovenian national courts overlap in several ways. Additionally, consideration of Strasbourg case-law is explicitly determined by the Slovenian national law: The decisions of the European Court of Human Rights are to be directly executed by the competent courts of the Republic of Slovenia (Article 113 of the Constitutional Court Act).

It was characteristic of Slovenian practice prior to 1991 concerning human rights protection (especially before the Constitutional Court) that, in comparison with Europe, it largely avoided the use of legal principles, even those explicitly included in the text of the Constitution. In common with foreign practice, however, the principle of equality greatly predominated among otherwise rarely used principles. Decisions consistently remained within the framework of legalistic (formalistic) argument and no other value references were ever allowed: the Constitutional Court respected the principle of self-restraint and stuck to the presumption of the constitutionality of statutes. There were no references to the foreign law and case-law.

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, paved the way 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 having the nature of legal principles and thus being sufficiently open to interpretation that

they require significant further construction and implementation, also taking into account the provisions of the Convention and the practice of the European Court of Human Rights.

Slovenia has reached the standard of contemporary European legal culture in which it has become normal that domestic courts are influenced by the case-law of the European Court of Human Rights, thus raising the level of human rights protection. However, a legal rule and its implementation in everyday practice are two different things. Real, half-real, and often only apparent general interests of society may be extraordinarily strong, especially if they incite national socialist, ideological, or political emotions. At such a time people may forget principles which they had followed until recently, but they still demand and efficient functioning of ordinary courts. Judicial and political independence are almost the sole guarantees against the transformation of law into a tool of some or other ideological and political movement based on impatience.

Despite the internal contradictory properties of the individual access (especially in form of the constitutional complaint), the possibility shall remain open of access by the individual to justice or to judicial protection of his/her constitutional rights on the national level, in the role of subsidiary legal remedy as an "interface" between the national and the international (European) level of the human rights protection. In the Case of Lukenda v. Slovenia, 23032/02, of 06/10/2005[44] the European Court for human rights reiterated, firstly, that by virtue of Article 1 (which provides: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention") the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the European Court for human rights is thus subsidiary to national systems safeguarding human rights. This subsidiary character is reflected in Article 13 and para. 2 of Article 35 of the Convention[45]".

44 http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=67644828&skin=hudoc-en&action=request

45 "The purpose of Article 35 § 1, which sets out the rule on exhaustion of domestic remedies, is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court. The rule in Article 35 § 1 is based on the assumption, reflected in Article 13 (with which it has a close affinity), that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights (see *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V, and *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI). Under Article 35, normal recourse should be had by an applicant to remedies that are available and sufficient to afford redress in respect of the breaches alleged. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see, among other authorities, *Belinger v. Slovenia* (dec.), no. 42320/98, 2 October 2001, and *Vernillo v. France*, judgment of 20 February 1991, Series A no. 198, pp. 11-12, § 27). Additionally, the Court has previously held that the rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism (see *Cardot v. France*, judgment of 19 March 1991, Series A no. 200, p. 18, § 34)".

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