
A. Mavčič

THE SLOVENIAN CONSTITUTIONAL REVIEW

The Slovenian Constitutional Review

Prof. Dr. Arne Marjan Mavčič

e-mail: amavcic@concourts.net
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The Author

Arne Mavčič, LLD, completed his Bachelor of Law degree at the University of Ljubljana Law School from which, after completing his post-graduate studies at the Universities of Zagreb and Ljubljana Law Schools, he was awarded a Doctorate of Law. As head of the Information Department and the Analysis and International Cooperation Department of the Constitutional Court of the Republic of Slovenia from 1976 to 2009, Senior Expert Counsellor to the University of Ljubljana Law School from 1981 and Professor of Human Rights Law at the School of Government and European Studies, Brdo, Slovenia, from 2001 and at the European Law School, Nova Gorica, Slovenia, from 2003, he specializes in legal information systems, (comparative) constitutional law and human rights law. Dr Mavčič was the liaison officer for Slovenia to the Commission for Democracy through Law (the Venice Commission) under the Council of Europe from 1991 to 2009, the national correspondent for Slovenia to the ACCPUF Paris from 1998 to 2009. He was a member on Slovenia to the EU Network of Experts for Human Rights, 2002 – 2006 and he has been member for Slovenia of the EU FRALEX from 2006. He was a Fulbright Scholar in 2001/2002 and an editor of the Collected Slovenian Constitutional Case-Law series from 1992 to 2009. He has been a national author for Slovenia of Kluwer's Encyclopaedia of Constitutional Law from 1998. As the editor and author of several other publications in the field of constitutional law as well as the author of over 250 papers and reports of national and international character, Dr Mavčič has predominantly been engaged in practical and promotional activities in the fields of comparative constitutional review and human rights law.

I. CONSTITUTIONAL HISTORY

In 1848, Slovenian intellectuals drafted the first original amendments to the Austrian Constitution in the Slovenian language: (Address of the Vienna Slovenians (1848), Petition of the Slovenians (1848), Slovenian Petition (1848), Petition of the Slovenia Society (1848), Petition of Matija Majer (1849) ¹

Further national programmes formulated between 1861 and 1914 united Slovenians and gave rise to the notion of a union of southern Slavs.

The May Declaration of 1917 demanded the unification of all Slovenians, Croats and Serbs living under Habsburg rule as one constitutional entity, and that same year the Corfu Conference and Declaration led to the establishment of the Kingdom of Serbs, Croats and Slovenians (SHS), which was finally proclaimed on 1 December 1918. Between 1919 and 1920 the Kingdom's frontiers with Italy and Austria were settled.

The first Yugoslav Vidovdan Constitution was adopted on 28 June 1921 as a Serbian-dominated centralist constitution.

In 1929, King Alexander abolished the Vidovdan Constitution and declared a temporary royal dictatorship. A new strongly centralistic constitution was adopted in 1931 to provide a fig leaf for the royal dictatorship. Following King Alexander's assassination, the Regency Council was established. This lasted from 1934 to 1941.

However, by the Draft Decree of the Banovina Slovenia of August 1939 (which was drafted on the basis of the Decree of the Banovina Hrvatska, Službeni list Kraljevske banske uprave Dravske banovine, X, No. 70, p. 606-608) some elements of constitutional review were framed ².

After the invasion of the Axis powers in 1941, Slovenia was divided between Italy, Hungary and Germany. In that same year, the Slovenian Communist Liberation Front was founded. Communist and anti-communist resistance followed between 1941 and 1945. In May 1945, the National Committee established the Slovenian parliament and declared the united Slovenia to be part of federal Yugoslavia, known between 1945 and 1980 as Tito's Yugoslavia. The Federal Constitution was adopted in 1946, establishing a federation consisting of six republics, includ-

1 Published in *Constitutions of the World from the late 18th Century to the Middle of the 19th Century Online*, *Verfassungen der Welt vom späten 18. Jahrhundert bis Mitte des 19. Jahrhunderts Online*, Sources on the Rise of Modern Constitutionalism, Quellen zur Herausbildung des modernen Konstitutionalismus, Edited by / Herausgegeben von Horst Dippel, <http://www.modern-constitutionns.de/>

2 Šmid, Gašper. *Uprava Dravske Banovine 1929-1941*. Ljubljana 2003, Arhiv Republike Slovenije v Ljubljani, p. 103 in Mahnič, David. *Razvoj sodne presoje ustavnosti v državah na območju nekdanje Jugoslavije*, magistrsko delo, Fakulteta za podiplomske državne in evropske študije, Kranj, 2006, p. 104-107.

ing Slovenia. The right of the people to self-determination, including secession, was stated in Art. 1 of the Federal Constitution.

The people's rights were repeated in the Constitution of the People's Republic of Slovenia of 1947 (Arts. 2 and 10). Under the Slovenian Constitution of 1947, the organization of Slovenia as a constituent republic of the Yugoslav federation was based on the principles of unity of power, democratic centralism and dual responsibility. The supreme bodies of the people's power in Slovenia were the People's Assembly and its Presidium, while the government was at the head of the state administration. The judges of the Supreme Court were elected by the People's Assembly, other judges by the People's Committees.

The later Federal Constitution of 1963 was the basis for further decentralization and the concept of a "self-managed society". This was also reflected in the new Slovenian Constitution of 1963. Under the Slovenian Constitutional Act of 1953 the People's Assembly was bicameral, comprising the Chamber of the Republics and the Chamber of Producers. The Presidium and the government were abolished, the Executive Council (e.g. the Government) was introduced and administrative bodies were given a higher degree of independence.

The Slovenian Constitution of 1963 introduced some changes relating to the parliamentary chambers, but in the area of the judiciary and communal system there were no major changes. The constitutional review exercised by the constitutional court was introduced totally following the European/German/concentrated/continental(Kelsen's model of constitutional review.

In the years between 1968 and 1974 a thorough reform of the federation was conducted, which strengthened the position of the republics and provinces. In 1969 the Assembly's structure was modified. Under the constitutional amendments of 1971 the position of President of the Assembly was strengthened, acquiring some of the powers of the head of state. The Executive Council (e.g. the Government) became increasingly linked to the administrative bodies. The Federal Constitutional Amendments of 1971 gave wider powers to the Federal Chamber of Nationalities and the Republics at the expense of the federation.

The new Federal Constitution of 1974 as well as the new Slovenian Constitution of 1974 strengthened the concept of a "self-managed socialist society". The Slovenian Constitution of 1974 introduced a tricameral parliament. Members of the Republic Assembly were elected indirectly, via delegations, and acted on the instructions of their delegation base. The office of president as head of state was introduced, the president being elected by the municipal assemblies. The Executive Council (e.g. the Government) was responsible for all areas, while administrative bodies were responsible for areas specifically assigned to them. Besides ordinary courts, so-called self-managing courts were established. The organization of municipalities was very similar to that of the Republic.

The then Slovenian constitutions were only constitutions of a federal unit and not constitutions of a sovereign state. There was an absolute necessity for the transition from a system characterized by the privilege of a certain belief, by the monopoly of a certain political organization, and by an electoral system that was opposed to the principle of the equal right of all citizens to participate in the decision-making process on public matters to a system involving the right to freedom of political organization, to simplified and clear electoral proceedings, free from the monopolistic role of any political organization.

In March 1987, the magazine *New Review* (*Nova revija*) published the Contributions to the Slovenian National Programme. The Materials on the New Democratic Slovenian Constitution were published in April 1988. In June 1988, the Committee for the Defence of Human Rights was formed as the first democratic forum and in May 1989 Slovenian writers organized an informal referendum on Slovenia's constitutional status (the May Declaration).

Amendments to the 1974 Slovenian Constitution adopted in September 1989 introduced pluralism of the political system. Amendment X established the permanent, unlimited and inalienable right of the Slovenian people to self-determination, including the right to secession and union. In December 1989 the Political Organizations Act and the Parliamentary Elections Act were adopted. The constitutional amendments XCI-XCV passed in March 1990 eliminated the term "socialist" from the Republic's name and established the freedom to found political organizations and equal rights for all political organizations.

A fully elaborated Draft New Slovenian Constitution was published in April 1990, while on 2 July 1990 the Declaration on the Sovereignty of the Republic of Slovenia was proclaimed. In September of the same year the Slovenian parliament established the National Guard (territorial defence force) under the Republic's control and in October, in implementing the Declaration on Sovereignty, the Slovenian Assembly passed the constitutional amendments XCVI-XCVIII, which invalidated all constitutional laws of the Socialist Federal Republic of Yugoslavia that were not in conformity with the Slovenian Constitution. The plebiscite of 23 December 1990 showed 88.2% of the voters (93.2% of the electorate) to be in favour of independence. The ultimatum of the Belgrade government to Slovenia demanding the disarmament of Slovenian territorial defence units was rejected by the Slovenian government in January 1991. "The independence amendment" was passed by the Slovenian parliament on 22 February 1991, providing the normative basis for the sovereign conduct of internal and international affairs.

On 25 June 1991 the Slovenian parliament declared independence and adopted The Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia. Under Art. I(2) of the Charter, the Constitution of the Socialist Federal Republic of Yugoslavia ceased to be in force for the Republic of Slovenia. However, on 8 July 1991 Slovenia agreed – through the Brioni Declaration

– on the moratorium to “freeze” further activities directed towards the exercise of its sovereignty for three months. On 20 November 1991 the Denationalization Act was passed and on 23 December of that year the Constitution of the Republic of Slovenia was adopted (Official Gazette RS, No. 33/91).

On 16 December 1991 the EC foreign ministers in Brussels declared Slovenia’s international recognition by 15 January 1992. On 24 March 1992 Slovenia was accepted as a member of the CSCE and on 22 May 1992 as a member of the United Nations, while on 12 May 1993 it became a member of the Council of Europe. On 14 May 1993 Slovenia signed the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, including the 11 Protocols ratified on 8 June 1994 (Official Gazette of the RS, International Contracts, No. 33/94). In September 1993 Slovenia concluded a Simple Cooperation Agreement with the European Communities, but on 12 July 1995 it concluded a European Treaty with the European Union. On 11 September 1995 Slovenia joined CEFTA.

During the period of Slovenia’s accession to the European Union some constitutional amendments were adopted: on 14 July 1997 the constitutional amendment of Art. 68(2) (Official Gazette RS, No. 42/97); on 25 July 2000 the constitutional amendment of Art. 80 (Official Gazette RS, No. 66/00); on 7 March 2003 the First Chapter (Art. 3a added) and Arts. 47 and 68 of the Constitution were amended (Official Gazette RS, No. 24/03).

On 23 March 2003 the majority of the Slovenian electorate voted in favour of accession to the European Union and NATO. On 2 April 2004 Slovenia joined NATO and on 16 April 2003 signed the EU Treaty of Accession, joining the European Union on 1 May 2004. Later, on 23 June 2004, Arts. 14, 43 and 50 of the Constitution were amended (Official Gazette RS, No. 69/04).

The Slovenian Presidency of the Council of the European Union from 1 January to 30 June 2008 was a great challenge for Slovenia as one of the youngest EU Member States. The programme of the Slovenian Presidency was basically determined already in the 18-month programme of the EU trio Presidency of Germany, Portugal and Slovenia, however, Slovenia itself defined some priority areas of its action. The EU Council Presidency also offered an opportunity for the promotion of the country throughout the six-month period.

II. CURRENT SOURCES OF CONSTITUTIONAL LAW

1. General

Under the 1991 Constitution the basic sources of state organization are the Constitution, laws, rules of procedure and executive regulations. The autonomous sphere – be it local or functional self-government – is fairly rigorously separated from the state, so that the general regulations issued by organs of self-government as a rule no longer represent a source of state organization.

The 1991 Constitution is very general. Some matters of constitutional significance which have not been regulated by the Constitution are regulated by statute. These statutes rank equal with other laws; the Slovenian legal system does not recognize special laws such as organic laws, etc. Laws regulating issues of constitutional importance are as a rule enacted in the same way as other laws, though the enactment of some of them is by way of exception more rigorous (e.g. the Constitutional Court Act, Official Gazette RS, No. 64/07). The rules of procedure of the basic organs of state are a significant legal source (e.g. the National Assembly's Rules of Procedure, Official Gazette RS, Nos. 35/02, 60/04, 64/07, 92/07). The Constitution provides that some of them organize their method of conducting business and their decision-making in rules of procedure (e.g. the National Assembly's Rules of Procedure; Art. 89, Constitution) and of the National Council (Art. 101, Constitution), while in some cases provision is made for this by law (e.g. the Court of Auditors).

Among executive regulations, a special place is held by presidential decrees, which may be issued by the President of the Republic in the event of the National Assembly being unable to convene due to the existence of a state of war or a state of emergency. The President of the Republic must submit any such decree to the National Assembly for ratification immediately after the National Assembly reconvenes (Art. 92(3), Constitution; Art. 108, Constitution). In general, delegated legislation is limited by the provision of Art. 87 of the Constitution, under which the rights and obligations of citizens and other persons may be determined only by law. This, however, does not prevent executive regulations from regulating the organization of the state.

The sources of the organization of the state also include judgments of the ordinary courts and in particular constitutional case-law (concerning laws), because decisions of the Constitutional Court are legally binding (Art. 1(3), Constitutional Court Act).

2. The 1991 Constitution

2.1. General characteristics

The Constitution of the independent Slovenia was adopted on 23 December 1991. The legitimate basis for this political arrangement was provided by the plebiscite of 1990 and the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia of 25 June 1991.

The constitutional system is based on the principles that Slovenia is a democratic republic (Art. 1, Constitution), and a state governed by the rule of law and a social state (Art. 2, Constitution). The commitment to being a state governed by the rule of law binds it to base all its acts on the law, and its commitment to the provisions of a social state oblige it to care for the material and social well-being of its citizens. The people hold power in Slovenia and citizens can implement it directly and through elections (Art. 3, Constitution). An important part of the Constitution is devoted to human rights deriving from traditional human rights (Art. 5, Arts. 14–65, Constitution) such as the rights to life (Art. 17, Constitution), freedom (Art. 19, Constitution) and property (Art. 67, Constitution).

Additionally, the constitutional system is based on the principle of the separation of powers among the legislature, the executive and the judiciary (Art. 3(2), Constitution). The highest body of legislative authority is the parliament, the National Assembly (Art. 80, Constitution). The National Council has been introduced as a kind of consultative body (Art. 96, Constitution). The President of the Republic represents Slovenia and is the commander-in-chief of its defence forces (Art. 102, Constitution). The government, which consists of a prime minister and ministers, is the highest executive body and is independent within the limits of its powers and accountable to the National Assembly (Art. 110, Constitution). Judges exercise judicial authority (Art. 125, Constitution) and their appointment is for life (Art. 129, Constitution).

Local government reform has completely ended the former system of local communities, since under the new Constitution a municipality no longer has state powers but is merely a self-governing local community (Arts. 138–144, Constitution).

The hierarchy of legal acts is determined by Art. 153 of the Constitution of the Republic of Slovenia, which deals with the conformity of legal acts. According to this provision, laws, regulations, and other general legal acts must be in conformity with the Constitution. Then, laws must be in conformity with generally accepted principles of international law and with valid treaties ratified by the National Assembly, whereas regulations and other general legal acts must also be in conformity with other ratified treaties. Regulations and other general legal acts must be in conformity with the Constitution and laws. Finally, individual acts and

activities of state authorities, local community authorities, and bearers of public authority must be based on a law or regulation adopted pursuant to law.

Thus, the Constitution is the highest legal act. However, from the perspective of human rights protection, the fifth paragraph of Art. 15 of the Constitution must also be considered. According to such, the Constitutional Court only ensures the minimum protection of human rights. If any provision of a legal act applying in Slovenia (e.g. in a treaty) provides broader protection or determines a right that the Slovene Constitution does not determine, the individual must be recognized the human right in the broader extent.

The hierarchy of legal acts was directly referred to also by the Constitutional Court in its case law.³

The Constitutional Act on the Amendment to Art. 80 of the Constitution of the Republic of Slovenia (Official Gazette RS, No. 66/2000) is not an individual act against which a constitutional complaint would be admissible. The petitioners' opinion that it is an individual general act is mistaken. By its substance the Constitutional Act on the Amendment to Art. 80 of the Constitution of the Republic of Slovenia is an act of constitutional rank, as it supplements the Constitution (Act Amending the Constitution; Art. 169, Constitution), and in its implementing part it ensures transition to the application of amended provisions (Art. 174 (2), Constitution). In the hierarchy of general and abstract legal acts the Constitution is the highest act with which all general and individual acts must be consistent (Art. 153, Constitution) (Order No. Up-353/00, dated 29/5-2001, www.us-rs.si).

The criterion of review in proceedings for the preventive review of treaties is only the Constitution, not also ratified and promulgated treaties. However, this does not mean that treaties may not define the contents of a constitutional norm. In connection with ensuring nuclear safety, what derives from certain treaties is the same obligation of the state as is determined in the first and second paragraphs of Art. 72 of the Constitution. Individual aspects that constitute the concept of nuclear safety can thus be defined by means of the mentioned treaties. Furthermore,

3 Problems of legislative omission in constitutional jurisprudence, Questionnaire The Constitutional Court of the Republic of Slovenia, (XIV Congress of the Conference of European Constitutional Courts), Vilnius, 2-7 June 2008 (http://www.lrkt.lt/Conference_R.html)

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The criterion of review in proceedings for the preventive review of treaties is only the Constitution, not also ratified and promulgated treaties. However, this does not mean that treaties may not define the contents of a constitutional norm. In connection with ensuring nuclear safety, what derives from certain treaties is the same obligation of the state as is determined in Art. 72(1) and in Art. 72 (2) of the Constitution. Individual aspects that constitute the concept of nuclear safety can thus be defined by means of the mentioned treaties. Furthermore, in order to define the obligations of the state given general legislation in the field of environmental law, from which the principle of compulsory subsidiary action by the state needs to be emphasized in the context of this case the national law is relevant from the view of the individual elements of nuclear safety (Opinion No. Rm-2/02, dated 25/12-2002, Official Gazette RS, No. 117/02).

in order to define the obligations of the state – given general legislation in the field of environmental law, from which the principle of compulsory subsidiary action by the state needs to be emphasized in the context of this case – the national law is relevant from the view of the individual elements of nuclear safety (Opinion No. Rm-2/02, dated 25/12-2002, Official Gazette RS, No. 117/02 and OdlUS XI, 246).

2.2. Amendments to the Constitution

2.2.1. 14 July 1997: Constitutional Amendment of Art. 68(2) (Official Gazette RS, No. 42/97).

Under the former constitutional regulation of 1991 foreigners were only entitled to acquire title to property affixed to land under the conditions provided by law (Art. 68(1), Constitution). They were not entitled to acquire title to land except by inheritance in circumstances where the reciprocity of such rights of acquisition was recognized (Art. 68(2), Constitution). Prior to ratification of the European Agreement Establishing an Association between the Republic of Slovenia, of the One Part, and the European Communities (hereinafter: Community) and their Member states, Acting within the Framework of the European Union, of the Other Part of 9 June 1996, it was necessary to adapt the provisions of Art. 68 of the Constitution to the EEC standards for the normative regulation of the respective matters (the Constitutional Law on the Amendment of Art. 68 of the Constitution of the Republic of Slovenia, Official Gazette RS, No. 42/97). Under the amended constitutional provision, foreigners can now acquire title to property affixed to land under the conditions provided by law or a treaty ratified by the National Assembly, subject to reciprocity.

2.2.2. 25 July 2000: Constitutional Amendment of Art. 80 (Official Gazette RS, No. 66/00).

Deputies, except for those representing the national communities, are elected according to the principle of proportional representation, with a 4% threshold being required for election to the National Assembly and with due consideration that voters have a decisive influence on the allocation of seats to the candidates (new Art. 80(4), Constitution).

2.2.3. 7 March 2003: Constitutional Amendment of First Chapter (Art. 3a added) and Arts. 47 and 68 (Official Gazette RS, No. 24/03).

The Constitution was amended to enable Slovenia's integration into international organizations, in this case the EU and defence alliances such as NATO. The National Assembly adopted a constitutional Act amending the first chapter of the Constitution as well as Arts. 47 and 68, thus forming the constitutional

foundation for the country's integration. The amendments met three basic demands: they ensured that some of Slovenia's sovereign rights could be transferred to the Union and its institutions, enabled the extradition of Slovenia's citizens to other EU member states and met the EU regulation on the free flow of capital. 3a of the Constitution reads: "Pursuant to a treaty ratified by the National Assembly by a two-thirds majority vote of all deputies, Slovenia may transfer the exercise of part of its sovereign rights to international organizations which are based on respect for human rights and fundamental freedoms, democracy and the principles of the rule of law and may enter into a defensive alliance with states which are based on respect for these values".

Whereas before the changes were instituted citizens of the Republic of Slovenia could not be extradited to a foreign country, the new Art. 47 enables extradition of Slovenian citizens to other EU member states.

Art. 68, which regulates the property rights of foreigners, was amended for the second time since the Constitution came into force. The strict conditions for acquiring ownership rights to real estate (inheritance and condition of reciprocity) contained in the first version⁴ have been relaxed substantially. Aliens may acquire ownership rights to real estate under conditions provided by law or by a treaty ratified by the National Assembly.

2.2.4. **23 June 2004: Constitutional Amendment of Arts. 14, 43 and 50 (Official Gazette RS, No. 69/04).**

The last normative change aimed at tackling the under-representation of women in elected representative bodies was the amendment of Art. 43 of the Constitution on the "right to vote".

A new paragraph was added to Art. 43 conferring on the law the responsibility for defining measures for promoting equal opportunities for men and women in standing for election to state and local-community bodies. This novelty represents a continuation of the introduction of measures into electoral legislation which facilitate a more balanced participation of women in political decision-making.

The constitutional Act amending Art. 14(1) of the Constitution (regulating the prohibition of discrimination) inserted a general prohibition on discrimination due to a disability. In addition, the constitutional Act amending Art. 50 of the Constitution explicitly inserted among constitutional rights the right to a pension.

4 Official Gazette RS, No. 33/91

III. CONSTITUTIONAL REVIEW

1. General

1.1. The Character of Social Relations and the Constitutional Review

For the implementation of constitutionality, proper social circumstances and political and legal guarantees (remedies) must be provided⁵.

The particular social conditions that are important for the implementation of constitutionality, and which are essential for democratic political systems are as follows:

- particular constitutional system against eventual sudden changes which could be caused by social powers that do not favor the present political system. From the point of view of formal legal stability, the constitution should be Social stability. This involves material stability for the protection of a the factor which stabilizes the political system and its institutions. However, the socio-political system is not dependent only on the strength of the constitution, but also on the socio-political basis of the constitution. The socio-political basis is the cause and consequence of the strength of the constitution. Generally we can speak about the social (material and formal) stability when the social and political sphere does not change too often and there are not any too big and sudden changes. Both elements of social stability, i.e. material and formal stability, are closed to each other and both influence the implementation of constitutionality. However, social instability requires a more active role of organized subjective powers with the implementation of constitutionality for social stability.
- Social homogeneity or heterogeneity. This involves the social group composition of society. If the society is more homogeneous concerning social position and social consciousness, there are advantages for implementing constitutionality and legality. The social structure of the society is the basis for determining the framework of the political system as well as the contents of the constitutionality. Social homogeneity and social peace are interwoven. All current societies are more or less heterogeneous (differentiated, structured). Therefore their social structure influences the implementation of constitutionality.
- Social consciousness and public opinion. Consideration of constitutionality and legality is dependent on social consciousness and public opinion and involves the understanding that the constitution and statutes must be considered. Such a democratic consciousness is dependent on the duration of the tradition and

5 See Rupnik, J., *Ustavnost, demokracija in politični sistem, Založba Obzorja Maribor 1975*, p. 15-150.

existence of democratic institutions. Within a concrete society, the belief must be stabilized that consideration of constitutionality and legality is a benefit and the goal of everyone. A developed social consciousness is one of the most important elements needed for the integration of a certain political system. A real democratic system also assures the creation of public opinion and guarantees its affirmation. Such public opinion may be a support for the implementation of constitutionality and legality. Public opinion is also an important political factor for the limitation of power, and entails the condemnation of the violation of constitutionality and legality. Public opinion as a form of social consciousness became a very important political power within the social system and in such a way also a factor for the consideration of constitutionality and legality.

Constitutionality may be exercised within a certain political system only by the willful endeavor of those social powers who have adopted the constitution. Social stability as well as social heterogeneity influences the implementation of constitutionality. The creation of material conditions is an imperative of a stable social and political system, which in turn affects the contents and stability of political institutions.

The protection of the basic political relations determined by the constitution is guaranteed by the different guarantees or remedies (political and legal) for the protection of constitutionality and legality of a democratic political system. Constitutionality and legality can be exercised only within appropriate social circumstances. There are socio-political and legal remedies that guarantee the implementation of constitutionality and legality.

Socio-political guarantees include institutions and instruments that implement constitutionality and legality which are at least partially dependent on human will. The most important remedies are the following: democracy (Art. 1, Constitution), the separation of powers (Art. 3(3), Constitution), and reducing State power and State bureaucracy. The appropriate organization of power (the separation of powers) is one of the most important remedies. Socio-political guarantees insure the objective circumstances necessary for the functioning of the political system that assure that constitutionality and legality function more efficiently. Within a State governed by the rule of law (Art. 2, Constitution), socio-political remedies only consist of guarantees of the efficient functioning of the political system (the prevention of a concentration of power).

In a contemporary State governed by the rule of law, the first legal remedies are the judiciary (Arts. 125 to 134, Constitution) and constitutional justice (Arts. 160 to 167, Constitution). The judiciary as a legal form of the protection of constitutionality and legality was developed through many steps: civil, criminal, and administrative judiciary. The judicial protection of constitutionality, *i.e.* the constitutional review (exercised by constitutional justice), however, was introduced following the realization that regulations of State bodies can also violate the constitution, and

was established with the introduction of written constitutions, and is the highest form of the legal protection of constitutionality.

The concentration of power can be limited only by the separation of powers into legislative, executive and judicial branches. The principle of the separation of powers is an essential component of constitutionality. It is a basic principle of democracy. The result of the introduction of the judicial review of constitutionality was a qualitative change as regards the principle of the separation of powers. Where it was introduced it has become increasingly important in the political field, and it has become an increasingly essential component of the mechanism of State authority as its decisions actively intervene in political and social life.

The political guarantee for the implementation of constitutionality is the right of individuals to participate in public affairs (Art. 44, Constitution). This requires de-bureaucratisation. The institutionalized guarantee against the bureaucracy of political functions is a multiparty system and general and equal voting rights, which assure the relatively quick change of political structures.

Constitutional review is also a remedy against anomalies concerning the concentration of powers within executive bodies. In particular, an excess of State legislative activities oppresses individuals within the political system. Constitutional review is a remedy for balancing processes which could lead to State intervention into certain fields of human activity.

The legal guarantees and/or legal remedies for the protection of constitutionality and legality are as follows:

The principle of the rule of law (the principle of legality) means that all State bodies must act on the basis of the constitution and statutes (Arts. 2, 120(2), 125, Constitution). Any self-interest which is imposed on the principle of expedience is, as a rule, excluded. The principle of the rule of law or the principle of legality is closely bound with the legislative function of a contemporary State. Because a statute is the most direct reflection of sovereignty, the activity of the administration and the judiciary must be subordinated to a statute; within this scope, the principle of legality and the rule of law are reflected. The principle of legality is bound with the idea of basic rights (Art. 15, Constitution) as well as with the separation of powers. In addition, the mentioned principle also has a certain other meaning: the request for the conformity of lower regulations with higher regulations (Arts. 153, Constitution). The principle of legality also reflects the desire to limit power and its political liability (the principle of the political liability of authority). Authority is limited, in particular, by legal norms. This principle of legality regulates the relationship of the executive-administrative and judicial power by statute. The principle of constitutionality means that all other general legal acts must be in accordance with the constitution, because the constitution has the position of the supreme act. Constitutionality has a formal (the process for adopting

an act must be in conformity with the constitution) and a material character (the contents of all other general legal acts must be in conformity with the constitution). The principle of legality reflects the formal and material conformity of executive or individual acts of the administrative and judicial bodies with statutes.

1.2. Particularities of the Constitutional Review during the Transitional Period in Slovenia

In addition to its stronger position within the scope of the national system along with the power to decide constitutional complaints regarding violations of human rights, the most important novelty of the Slovenian Constitutional Court in comparison with other respective systems of the New Democracies is its conspicuous cassatory function with reference to statute. Under the 1991 *Constitution* the Constitutional Court may abrogate a statute (Art. 161, Constitution).

The Slovenian Constitutional Court acquired the status of an independent institution carrying out the constitutional review in relation to the Legislature characterized by the explicit power to abrogate statutes adopted by the Legislature. The former function of the Constitutional Court before 1991; due to the Principle of the Unity of Powers and the Supremacy of the Parliament, focused on the assessment of the unconstitutionality of a statute, changed after 1991 into an active relationship not only involving the cassation of statute, but also guidance of the Legislature in its legislative activity. However, a concession by the Constitutional Court to the Legislature is still possible in that the Court may not abrogate a disputable statutory provision, but rather enables the Legislature to reconcile the disputable statutory regulation with the *Constitution* within a period of time, pursuant to the guidelines of the Constitutional Court in a specific decision (see Art. 48, *Constitutional Court Act*).

In the period after 1991, the Constitutional Court has played a more important role based on its new extended powers⁶. In the sense of contemporary trends, the

6 For example, there was an interesting opinion made by the Constitutional Court of the Republic of Slovenia on the performance of the office of judge in judicial proceedings involving the sentence-based violation of human rights such as representing negative reasons for the election of a judge (Decision No. U-I-83/94, 14 July 1994, *Official Gazette RS*, No. 48/94; DecCC III, 89). The Court held that:

The negative condition specified in Article 8.3 of the Judiciary Office Act is one of the general conditions which must be fulfilled for the election of a judge. The components, bases and criteria for preparing an expert opinion concerning the work of a judge for the purposes of candidature referred to in Articles 101, Para. 1 and 103 of the Judiciary Office Act are also subject to this negative condition, and must be prepared in accordance with the criteria of Article 29 of the Judiciary Office Act. The disputed negative condition should be verified and evaluated in the same way and in accordance with the same proceedings as all other conditions. This is why the Legislature was justified, from the point of view of a State governed by the Rule of Law, in the transitional period, to have also set this precondition for the performance of judicial functions, provided, however, that it can only be applied in accordance with the constitutionally permissible interpretation arising from the principle of a State governed by the Rule of Law, that is: a) the violation of human rights which is a criminal offense, must be found by a final condemnatory judgment of a criminal Court; failing this, the presumption of innocence shall apply. b) The negative condition of Article 8, Para. 3 of the Judiciary Office Act shall not apply to judicial error. c) It is possible and necessary to establish the relation of cause and effect between the proceedings and the ruling with which human rights are claimed to have been violated. d) A candidate for the office of judge must be given a chance of providing counterevidence and opinion with a view to disputing a review made in connection with his/her past performance of judicial functions. e) Also the performance of the office of a judge in judicial

Slovenian Constitutional Court has assumed the role of a negative Legislature.⁷ In this period of transition the Legislature is not always able to follow developments nor to impose standards for all shades of the legal system and its institutions. This results in the so-called interpretative decisions⁸ taken by the Court or the appellate decisions or certain declaratory decisions that include certain instructions by the Constitutional Court to the Legislature on how to settle a certain question, or a specific issue (Art. 48, Constitutional Court Act). However, in compliance with the Principle of Judicial Self-Restraint, a clear limit has been imposed on the Slovenian Constitutional Court due to the fact that the Court has actively been creating the legal rule both negatively (e.g. by abrogation) and positively (e.g. by appellate, interpretative and the declarative decisions), a function theoretically reserved for the Legislature. On the other hand there arises the question whether the Constitutional Court, in deciding on the existence or non-existence of a specific provision, actually creates the law, because it carries out a review of legislative activity. In any case, the Legislature cannot avoid the existence of constitutional case-law in its activity.

Furthermore, Slovenian Constitutional Case-Law, which has a certain tradition, can serve as an example of the knowledge and techniques of a national legislative practice. A comparison of certain topical views could as well add to the promotion of a national democratic process and culture. Accordingly, it could have direct applicative value in the search for systemic solutions in some other countries.

proceedings during the former nondemocratic system, involving the prosecution and sentencing of persons in violation of the principles of a State governed by the Rule of Law, for political and ideological reasons, must be evaluated in proceedings for the election of a judge to permanent office.

The statutory regulation which allows, in as far as the review of criminal liability is concerned, the evaluation of prescribed conditions for judicial office may be carried out by bodies which are not part of judicial authorities, because such influence of the other two branches of power in the proceedings for appointing judges, is, in accordance with the Principle of the Sovereign Power of the People and the requirement of the existence of checks and balances as essential parts of the Principle of the Separation of Powers, not in conflict with the said Principle of the Separation of Powers.

The statutory regulation demanding that a person who has already been a judge to have performed such a function successfully, that is, in accordance with professional standards, independently and without bias, this being the basis for assuming that independent and unbiased adjudication in the service of human rights and basic freedoms will be made in the future, is not in conflict with the Principle of Equality before the Law.

The statutory provision regulating one of the conditions which must be met, or may not be allowed, in connection with the election of a judge, does not interfere with the professional immunities of the judge in the material sense and does not imply a retroactive effect of the general act because it does not encroach upon the rights deriving from the performance of the function on a professional basis, due to the fact that these are linked with the term of office relating to the exercise of the judicial powers and are extinguished upon its expiration.

- 7 The basic difference between the so-called intervention of the Constitutional Court into the field which belongs to the Legislature, and other forms of intervention by which the Constitutional Court would exceed its authorization to be sometimes transformed into a reserve Legislature, would be in fact that the Constitutional Court abrogating a statute only "takes away", but the Legislature may also amplify. On the other hand, the abrogation of statute by a Constitutional Court decision does not create law to a low degree in comparison with writing new statutory provisions. It may depend on the context where the abrogated legal provision is situated, on the type of provision, but sometimes only on pure coincidence concerning which legislative technique was used by the Legislature, if the Constitutional Court really executes its supposed undisputable function of negative Legislature, or participates in the creation of a new provision. How much space will belong to the Legislature concerning the extraction of determined unconstitutionality and how much space has to be occupied by the Constitutional Court, may in cases of the highest degree partially depend also on the intensity of the activities of the Legislature (Testen, F., Techniques of the Decision-Making Process of the Constitutional Court in the Abstract Constitutional Review, Legal Journal (*Pravna praksa*), No. 1/99, p. 5).
- 8 It is exactly by "interpretation" as a decision-making technique that the Constitutional Court can enter the space which is otherwise reserved for the Legislature. This interpretation entails a technique which is used in Constitutional Court sentences describing the particular contents of a legal norm in an affirmative manner (Testen, F., The Techniques of Constitutional Court Decision-Making Process in the Abstract Constitutional Review, Legal Journal (*Pravna praksa*), No. 1/99, p. 5).

The constitutional system declares as a general principle the Conformity of Legislative Measures: Statutes, regulations and other legislative measures must conform with the provisions of the Constitution (Art. 153 (1), Constitution). Statutes must conform with generally accepted principles of international law and with international agreements currently in force and adopted by the National Assembly, and regulations and other legislative measures must also conform with other ratified international agreements (Art. 153(2), Constitution)⁹. Regulations and other legislative measures must conform with the Constitution and statute (Art. 153(3), Constitution). Each and every act and activity of State bodies, local government bodies and statutory authorities must be founded in statute or in regulations made pursuant to statute (Art. 153(4), Constitution).

Being the guardian of the Constitution, the Constitutional Court stands next to the legislature. In a certain aspect we might address the superiority of the Constitutional Court in relation to the legislature, as the Constitutional Court (may) supervise the work of the legislature and prevent what is adopted by the legislature from becoming part of actual practice, and direct legal effects from being created. A broader perspective on the institutional position of the Constitutional Court points, however, to its (indirectly limited) inferiority as after all it is the legislative body, which in an extreme situation can amend the Constitution, such being the act that the Constitutional Court protects and which gives it power and the basis for its activities.¹⁰

Decisions of the Constitutional Court are binding. Concerning their validity, they have the character of a law. Respect for Constitutional Court decisions is an indicator of the height and health of the legal culture of a particular society. Certainly the Constitutional Court may not take the role of the legislature, which would be inadmissible from the viewpoint of the separation of powers. The Constitutional Court rather appears as the negative legislature since by its decisions it annuls laws or usually their individual provisions, bearing in mind that such decisions have the force of law. In principle the Constitutional Court does not reach substantive positive decisions, does not determine the substance of laws, does not fill gaps in

9 General Principles of Law are taken into consideration also by the Constitutional Case-Law (The Constitutionality of the Further Applicability of the Criteria of Criminality Derived from the Military Courts Decree of 24 May 1944). The Constitutional Court of the Republic of Slovenia, Decision No. U-I-6/93, 1 April 1994, *Official Gazette RS* No. 23/94, *OdUS III*, 33. All the elements of the provisions of the Military Courts Decree of 24 May 1944 are contrary to the Constitution that at the time of their issuing and application conflicted with the general legal principles recognised by the civilised nations as well as with the Constitution of the Republic of Slovenia, particularly:

- a) All those elements of the Decree which were, and insofar as they were, applied in specific criminal proceedings as merely the incrimination of status and which did not refer to clearly defined acts of the accused;
- b) All those elements of the provisions of the Decree whose lack of clarity served, and insofar as they served, in specific criminal proceedings as grounds for arbitrary decisions by the Courts of that time;
- c) All those elements of the provisions which enabled trials for actions carried out prior to the enactment of the decree, and which were not punishable according to general legal principles recognised by civilised nations.

Also the current statutory regulation of criminal procedure conflicts with the Constitution. It does not enable the removal of all judicial decisions wrong from a procedural and substantive aspect and issued on the grounds of regulations (general acts) of the revolutionary War and postwar authorities, and the removal of the consequences of these convictions by an extraordinary legal remedy.

10 Problems of legislative omission in constitutional jurisprudence, Questionnaire The Constitutional Court of the Republic of Slovenia, (XIV Congress of the Conference of European Constitutional Courts), Vilnius, 2-7 June 2008 (http://www.lrkt.lt/Conference_R.html)

the law, but only remedies, or annuls the contents which are not in conformity with constitutional foundations and prevents unconstitutional provisions from creating legal consequences in the society.

However, the assertion that the Constitutional Court only decides what must be eliminated as unconstitutional from legal practice does not entail that thereby it in some manner does not indirectly determine the concrete substance of legal norms. The positive legislative activity of the Constitutional Court and its role as an active framer of substantive decisions nevertheless come to the fore regarding both supervising the constitutionality of statutes and their individual provisions and considering the general framework of the activities of the Constitutional Court.

The cases in which the Constitutional Court (allegedly) violates the Constitution refer to situations in which the Constitutional Court interferes with the working area of the legislative body. The Constitutional Court is not empowered to review whether a certain legislative regulation is substantively appropriate. The Constitutional Court may not determine the substance of laws only by positive statutory measures. Such a case concerns the strict judicial self-restraint principle, according to which the Constitutional Court may not carry out the role of a positive legislature. Substance is thus adopted by the legislature, while the Constitutional Court only reviews whether such substance is still within a constitutionally acceptable framework (the role of a negative legislature). In the event that the Constitutional Court establishes that the offered normative solution is not in conformity with the constitutional system, it is the task and exclusive competence of the legislature to substantively reform such.

Art. 1(1) of the Constitutional Court Act determines the position of the Constitutional Court within the system of separation of powers to the legislative, executive and judicial power. Regarding the protection of constitutionality and legality as well as the protection of human rights and fundamental freedoms, the Constitutional Court has been acting as the highest body; such Court's position has been determined by the principle of general binding effect of the Constitutional Court decisions (Art. 51(1), Constitutional Court Act) and especially by the underlined principle of consideration of the Constitutional Court's decision by an ordinary court in the constitutional complaint procedure (the possible abrogation of the ordinary court's judgment by the Constitutional Court's decision – Art. 59 of the Constitutional Court Act, and additionally by the ordinary court's obligation to execute the Constitutional Court's decision – Art. 60(2) of the Constitutional Court Act¹¹).

Standard-setting and respectively functional, the Constitutional Court Act comprised the top of the judicial power. As already mentioned, the (highest) position

¹¹ See also: Art. 112 of the Courts Act, Official Gazette RS, No. 23/05: When the final ordinary court's judgment or any other judicial decision was amended by the Constitutional Court's decision, issued upon the constitutional complaint, the court shall execute it in accordance with the Constitutional Court's decision.

of the Constitutional Court was determined by the Constitutional Court Act. However, beside the constitutional provision that the Supreme Court is the highest Court in the State (Art. 127(1), Constitution) within the scope of the ordinary judiciary (of course) the Constitution of 1991 extended the function of constitutional review of regulations, deciding of jurisdictional disputes and other powers which have been exercised by the former Constitutional Court(s) from 1963 onwards by some new powers, especially be the constitutional complaint and by the impeachment as well. By the constitutional complaint, the position of the Constitutional Court was upgraded to the highest judicial instance for the protection of human rights and fundamental freedoms. By Art. 1(1) of the Constitutional Court Act such position was only confirmed. That means that the Constitutional Court's decisions "control" also the decision-making of ordinary courts regarding the protection of human rights and fundamental freedoms. From the point of view of such general orientation and taking into account the constitutional concept of the separation of powers (Art. 3, Constitution) to the legislative, executive and judicial power and respectively the special independent position of the Constitutional Court, such principles were explicitly settled by the introductory provisions of the Constitutional Court Act.

In relation to other State bodies, the Constitutional Court is an autonomous and independent state body, which quite alone regulates its organisation and its work. The constitutional courts are independent bodies entitled for the special protection of constitutionality and legality. Due to such special character of its mission, the constitutional courts are established as special state bodies within the scope of the particular constitutional system, so they are not a part of the particular judicial system. In comparison with a function of ordinary courts which directly implement a law or other regulation during the concrete procedure, the constitutional courts decide on constitutionality and legality of the particular regulation and by this means on its destiny. Due to the mentioned contents of the constitutional courts' function and the relating top of its special status, they are legitimately considered as state bodies which are closer to the parliamentary system and are not a special and/or new sort of ordinary courts. However, as independent bodies established for the protection of constitutionality and legality which not decide arbitrarily – but in a special procedure - their impartiality shall be guaranteed when implementing the Constitution and a law in relation to the particular normative act – they actually exercise their function as a specific judicial function what justifies their title as well: the constitutional courts.¹² Consequently, the constitutional courts have to be distinguished under the judicial methodology when exercising constitutional review and decision-making.

The importance of the constitutional case-law is not limited to the parties in the particular constitutional dispute but also to individuals and legal entities which rights were violated due to the implementation of an unconstitutional or an unlawful

¹² Globoevnik Josip, *Problem obnove v ustavnem sporu*, Pravnik, at. 4 6/82, str. 80.

general act. Issuing and publishing its constitutional case-law, the Constitutional Court calls the attention on the detected issues of unconstitutionality and illegality to the authors who adopted the same or a similar general act regulating issues which were already discussed and/or decided by the Constitutional Court.

Relating to the mentioned provision of the Constitutional Court Act (Art. 1(1)), also a question can be put, how to sanction the legislature and/or any other author of a legal regulation when they do not respectively respond to the decision taken by the Constitutional Court. In general, such “sanction” may be only of a moral character. In case of some decisions which remained without any respond or in case when such respond was delayed, the Constitutional Court may appeal to the legislator (or any other author of any legal regulation) to fulfil its legal constitutional and/or legal obligation (in the Slovenian case, such appeals are called as “intensification of sanctions”).

The Constitutional Court is the highest body in the state empowered for the review of constitutionality and legality and for the protection of human rights. It is a negative legislature in particular in that by having the power to annul regulations it actually has the power to directly eliminate unconstitutional and unlawful regulations from the legal system. It appears as an indirect legislature, however, when it establishes the unconstitutionality and unlawfulness of individual regulations and their provisions and requires the competent bodies to remedy such incorrectness within a specified time-limit. In accordance with the second paragraph of Art. 40 of the Constitutional Court Act (Official Gazette RS, Nos. 15/94, 51/07, and 64/07 – official consolidated text), it also has the power to determine in its decision which body is to implement a decision and in what manner. This entails that in certain cases it may replace a statutory rule with its own legal rule, which could in a certain sense also mean that it acts as a positive legislature. However, the possibilities of such positive legislation are, in regulations that deal with the competencies of the Constitutional Court, restricted to the minimum extent possible, but they are nevertheless needed in order for the Constitutional Court to effectively perform its function.¹³

Legal theory is aware of the fact that particularly due to the abstract character of constitutional provisions certain moderate activism by the Constitutional

13 The political and legal culture of any modern and democratic state governed by the rule of law, depends especially on the self-control and/or on the internal self-restraint of state bodies from all three branches of powers. Among others, such principle means an obligation for the parliament to respect decisions taken by the Constitutional Court consistently and correctly, exercising its normative role in accordance with the contents of the issued constitutional case-law; on the other hand, the Constitutional Court is requested to stay inside of its functional frames. However, the legal system, in its clear positivistic form, a little bit easier tolerates some periodic Constitutional Court's interferences in the sphere of the legislature; and in such manner it can play even the role of a positive legislator than the legal system tolerates indirect irruptions of the legislature in the field of the constitutional judiciary especially by the disrespect and the unrealised decisions taken by the Constitutional Court. It seems that the negative consequences of the legislative self-will and arbitrariness are for the state governed by the rule of law (from the positivistic-legal point of view) heavier and worse than such consequences which may be caused by the Constitutional Court by its decisions, especially if such decisions are at least relatively founded and reasoned by series of professional illustrative arguments given by constitutional judges. It depends on the level of the political culture, the legal consciousness and the legal culture if the presented constitutional reflections will remain as a positivistic-extremistic speculation. See: Teršek, Andraž, *Ustavnopravna enigma* (1. del), Pravna praksa, Ljubljana, No. 425/99, p. 6.

Court is necessary so that it can correctly perform its function.¹⁴ In this sense it differentiates between allowed and unallowed activism.¹⁵ Not every constitutional activism is also political activism.¹⁶ In this sense theorists question Constitutional Court decisions also when the matter concerns unconstitutional gaps in the law. In connection with the above-mentioned provision of Art. 40(2) of the Constitutional Court Act (i.e. the determination of the manner of the implementation of a Constitutional Court decision), moderate activism would refer to the application of this provision in order to temporarily regulate a certain societal situation by a norm made by the Constitutional Court¹⁷. The activism in such a case would, however, be considered as unallowed if the Constitutional Court permanently made such a statutory norm and prohibited the legislature from appropriately responding to such a decision.

2. The Slovenian Model of the Constitutional Review

2.1. General

The constitutional position of the current Constitutional Court as an independent and autonomous body exercising constitutional review is regulated in more detail by the Constitutional Court Act, which entered into force on 2 April 1994. The amendments to the Constitutional Court Act (Official Gazette RS, No. 51/07 – ZUstS-A) entered into force on 15 July 2007. The official consolidated text of the Constitutional Court Act currently in force was published in the Official Gazette of the Republic of Slovenia, No. 64/07. The Constitutional Court Act determines the procedure for deciding in cases falling under the jurisdiction of the Constitutional Court. In addition, the procedure for the election of the President and judges of the Constitutional Court as well as their position are regulated in more detail. Stemming from the principle that in relation to other state authorities the Constitutional Court is an autonomous and independent state authority, the Constitutional Court Act determines that funds for the work of the Constitutional Court are determined by the National Assembly of the Republic of Slovenia upon the proposal of the Constitutional Court, and that the Constitutional Court alone decides on the use of these funds. The Constitutional Court Act vested in the Constitutional Court the authority to regulate in more

14 P. Jambreč, *Ustavna demokracija* [Constitutional Democracy], Državna založba Slovenije, Ljubljana (1992), p. 341.

15 M. Novak, *Delitev oblasti: medigra prava in politike* [The Separation of Powers: an Interplay between Law and Politics], Cankarjeva založba, Ljubljana (2003), pp. 166–180.

16 M. Cerar, *(Ne)političnost ustavnega sodstva* [The (Un-)Political Character of Constitutional Judiciary]; in: M. Pavčnik, A. Mavčič (eds.), *Ustavno sodstvo* [Constitutional Judiciary], Cankarjeva založba, Ljubljana (2000), p. 370.

17 e.g. In the event of dealing with the temporary regulation of procedural rights of forcibly hospitalized mental patients by determining an analogical application of appropriate provisions of the Criminal Procedure Act after an unconstitutional gap in the law was established (Decision No. U-I-60/03, dated 4/12-2003, Official Gazette RS, No. 131/03).

detail by its own acts its organisation and work, as well as the procedural rules determined by the Constitutional Court Act. The Rules of Procedure of the Constitutional Court, which entered into force on 25 September 2007 (Official Gazette RS, No. 86/07), regulate in more detail not only the organisation of work and the mode of operation of the Constitutional Court, but also the procedural rules for matters falling within its jurisdiction. Additionally, the Court adopted the Rules of Internal Organisation and Administration of the Constitutional Court (Official Gazette RS, No. 93/03).

The Slovenian model of the constitutional review is the standard Continental (European) model of concentrated constitutional review whereof the organizing structure and the powers have mainly been adopted from the German system of constitutional review, which is more modern than its predecessor, the Austrian system¹⁸.

With the Constitution of 1991, the Slovenian system of constitutional review assumed almost all the standard powers of the Constitutional Court such as adopted by later systems following the mentioned model¹⁹.

Beside the prevailing system of repressive constitutional review, the preventative constitutional review has been adopted by the Constitutional Court but only in the adoption process for international agreements. In this case the Slovenian Constitutional Court performs a consultative function, although its opinion is obligatory, which gives to such opinions the force of decision (Art. 160(2), Constitution; Art. 70, Constitutional Court Act).

As a rule, proceedings before the Constitutional Court require an "outside" petition, which means that the Constitutional Court cannot start constitutional review proceedings *ex officio*. This is characteristic for the majority of the modern constitutional review systems. Nevertheless, the *ex officio* proceedings have been partly preserved. The Constitutional Court, though, is not the primary initiator of proceedings, because the initiation of proceedings still depends on an outside petitioner. However, as soon as the application has been filed with the Constitutional Court, the latter is free to act with reference to its opinion on the integrity of the specific legal area, its involvement, and the reciprocal dependence of the respective legal measures. According to Art. 30 of the Constitutional Court Act, when deciding on the constitutionality and legality of statutes or general acts, including those issued in view of exercising public powers, the Slovenian Constitutional Court is

18 Concerning models of constitutional and judicial review see www.concourts.net

19 Jambreč, P., Prispevek k razpravi o načinih in tehnikah odločanja Ustavnega sodišča, *Pravna praksa*, No. 6/94, p. 2. Jambreč, P., Razvoj in izhodišča nove slovenske ustavnosti, *Nova ustavna ureditev Slovenije*, Zbornik razprav, Ljubljana, ČZP Uradni list RS, 1992, p. 7. Jerovšek, T., Zakon o Ustavnem sodišču, *Pravna praksa*, No. 5/94, p. 1. Jerovšek, T., Postopek pred Ustavnim sodiščem in pravne posledice njegovih odločitev, *Nova ustavna ureditev Slovenije*, Zbornik razprav, Ljubljana, ČZP Uradni list RS, 1992, p. 249. Kristan, I., Ustavno sodstvo, *Nova ustavna ureditev Slovenije*, Zbornik razprav, Ljubljana, ČZP Uradni list RS, 1992, p. 236. Kristan, I., Ustavno sodišče in parlament, *Zbornik znanstvenih razprav*, Ljubljana, Pravna fakulteta Univerze v Ljubljani, 1991. Krivic, M., Pravne posledice ustavnosodne razveljavitve in odprave predpisov, *Pravnik*, No. 910/92, p. 355. Rupnik, J., *Ustavnost, demokracija in politični sistem*, Maribor, Založba Obzorja, 1975. Šinkovec, J., Ustavno sodišče ob uveljavljanju ustavnosti in zakonitosti, *Podjetje in delo*, No. 56/93, p. 410. Šturm, L., Ustavno(sodna) presoja o pravni pravnosti aktov državnih organov, *Zbornik znanstvenih razprav*, 1996, LVI, p. 261-283.

not *in merito* bound by the proposal in the request or petition. The Constitutional Court may also evaluate the constitutionality and legality of other provisions of this or some other general act whereof the constitutionality or legality have not been challenged, if such provisions are mutually related or if this is absolutely necessary to resolve the case. According to Art. 59(2) of the Constitutional Court Act, if the Constitutional Court in deciding a constitutional complaint, establishes that an individual act, thus retroactively abrogated, derived from an unconstitutional general act or general act issued for the exercise of public powers, it may abrogate such act with retroactive or prospective effect. When deciding a case relating to jurisdictional disputes, the Constitutional Court may issue a decision as to which body is empowered, and may also abrogate or annul, the general act, or the general act issued for the exercise of public powers, whereof unconstitutionality or illegality has been established (Art. 61(4), Constitutional Court Act).

A specific characteristic of the Slovenian regulation is the existence of the two forms of cassation: annulment (*ex tunc*) and abrogation (*ex nunc*) with the corresponding effect. Both forms of cassation are possible only with the review of constitutionality and legality of regulations or general acts issued for the exercise of public powers (Art. 45 of the Constitutional Court Act), whereas a statute can be abrogated either completely or partly (*ex nunc*) (Art. 43 of the Constitutional Court Act). The Act further specifies the measures for annulment (*ex tunc*) of unconstitutional and illegal regulations or general acts issued for the exercise of public powers: they are abrogated *ab initio* by the Constitutional Court if it determines that harmful consequences arising out of this unconstitutionality or illegality have to be eliminated; such abrogation shall be retroactive (Art. 45(2) of the Constitutional Court Act).

Another specific feature of the system in force is the use of the so-called interpretative judgment as well as the appellative judgment issued by the Slovenian Constitutional Court, and of the contents-related guidelines²⁰.

An individual as a party before the Slovenian Constitutional Court used to have and still has the prevailing role of petitioner. The new system of constitutional review under the Constitution of 1991 preserved the prior (under the Constitutions of 1963 and of 1974) unlimited popular complaint (*actio popularis*), yet imposed a restriction on the declared standing shown by the petitioner (Art. 162(3), Constitution; Art. 24, Constitutional Court Act). By relating the petition for the beginning of proceedings to the legal interest, the possibility of contesting constitutionality and legality became more restricted, because the popular petition, such as envisaged by the former regulation, was excluded. According to the former regulation, however, a petition for the beginning of proceedings could be filed by anybody, irrespective of the fact whether the respective regulation encroached on his/her constitutional or legal rights and legal benefits. On the other hand,

20 see 5.1.1 Interpretative decisions; see 5.1.2 Appellate decisions.

the constitutional complaint, introduced already under the German model, again intensified the role of the individual before the Constitutional Court (Arts. 160 to 162, Constitution; Art. 50, Constitutional Court Act). By introducing the constitutional complaint in addition to the popular complaint (*actio popularis*), Slovenia ranks among the systems that recognize both coexisting forms of individual's access to the Constitutional Court²¹.

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(1)(5), 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).

Constitutional court decisions are final and binding (Art. 1(3), Constitutional Court Act). There is no legal remedy against a constitutional court decision²².

2.2. Relation of Constitutional Courts to Other State Institutions

2.2.1. Concerning the Legislature

The influence of the constitutional bodies upon the appointment or elections of the members of the Constitutional Court differs from system to system. In the election based systems as a rule parliaments exercise greater influence upon the elections of constitutional court judges as compared to the elections of judges of the ordinary courts. In such systems as for instance the Slovenian one, constitutional court judges are exclusively appointed by the legislative body.

The nature of the relation between the parliament and the Constitutional Court is that the parliament as a legislature adopts statutes whose conformity with the *Constitution* is evaluated by the Constitutional Court. Beside this, the parliament regulates by statute the important questions of the status and functioning of the Constitutional Court and the status of the judges of the Constitutional Court. The Constitutional Court has an important influence on the activities

21 see 8.1 History (the Constitutional Complaint).

22 The constitutional complaint is not a legal remedy by which it would be possible to dispute a decision of the Constitutional Court, irrespective of whether it has the character of a general or individual act which it would be possible to dispute by constitutional complaint (see ruling No. Up-271/98 of 28 October 1998, published on www.us-rs.si). Even if the decision taken by the Constitutional Court were to have a nature of an individual act, as the complainant assert, the constitutional complaint is not allowed. The constitutional complaint is a special legal remedy which is allowable against individual acts of other state bodies, bodies of local communities and holders of public authority, whenever (such an act) encroaches on human rights of fundamental freedoms. Art. 55(3) of the Constitutional Court Act of 1994 (Official Gazette RS, No. 15/94) determined that no appeal may be made against a decision of the chamber adopted in a proceedings of investigating the constitutional complaint, that is against a decision of rejection, the acceptance or non-acceptance of the constitutional complaint (ruling of 4 March 1999, Official Gazette RS, No. 17/99).

of the parliament, as it is bound to consider and implement the decisions of the Constitutional Court.

2.2.2. Concerning the Executive, the Head of State and the Government

The Appointment Based Systems (Without the Participation of a Representative Body), but not in Slovenia, constitutional judges may be appointed by the government or by the State sovereign or by the Head of State. In the Argentinean Province of Tucuman one part of constitutional court judges are appointed by an electoral body composed of the judges of the Supreme Court and the rest of the judges are appointed by the executive power.

The mixed systems (appointment and election): In Andorra the appointment of constitutional court judges is subject to the influence of the Head of State (the executive) and the Parliament. In Albania, Armenia, Austria, Bosnia and Herzegovina, Bulgaria, Cambodia, Canada, the Czech Republic, Georgia, Kazakhstan, Romania, and Slovakia one part of constitutional court judges are elected by the Parliament or are appointed by the Head of State or by the President of the Parliament, and the rest by the executive power. In Italy, Peru and Spain one part of constitutional court judges are elected by the Parliament, one part is appointed by the government and the remaining part by the senior judicial officials. With mixed systems, too, the role of the Parliament is prevalent and the role of the executive power is sometimes limited to a mere recruitment of the candidates.

On the other hand, the Constitutional Court is empowered to decide the Proceedings Before the Constitutional Court for Establishing the Responsibility of the President of the Republic, the Prime Minister or Ministers (Impeachment proceedings). It is necessary to emphasize criminal liability and civil liability beside the political responsibilities of a Minister. The individual criminal liability of a Minister is made evident through a special procedure. In the case of civil liability, a minister is liable for material damages.

Furthermore, there is the possibility of discovering the responsibility of the Prime Minister and ministers as regards violations of the *Constitution* and statutes in the performance of their duties which result in charges of Impeachment against the Prime Minister or against any Minister of State. The parliament (*e.g.* the National Assembly in Slovenia) may summon the Prime Minister or any Minister of State before the Constitutional Court to answer charges relating to breaches of the *Constitution* or of statute, committed during the performance of office. Any such charges are determined by the Constitutional Court.

2.2.3. Concerning State Bodies in General

In most systems as in the Slovenian one as well, only the Constitutional Court is entitled to decide on disputes concerning jurisdiction between State bodies (Arts. 160(7), 160(8), 160(9), Constitution; Arts. 61 and 62, Constitutional Court Act).

In addition, all State bodies have in principle the status of a legitimate (privileged) petitioner in proceedings before the Constitutional Court.

2.2.4. Concerning the Judicial Branch

The following relations between the constitutional court and the judicial branch are possible:

- One of the powers of constitutional courts may be a concrete constitutional review; the European system did not adopt a judicial review system - it is obligatory for ordinary courts to present a case of potential unconstitutionality to the Constitutional Court; In the event that a court, in deciding a concrete case, concludes that a statute which it must apply is 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 (Art. 156, Constitution).
- The constitutional court may also decide on jurisdictional disputes between ordinary courts and bodies of the State administration (Art. 160(8), Constitution).
- The constitutional complaint is a special subsidiary legal remedy before the constitutional court. The Constitutional Court is limited in its decisions on constitutional matters, and violations of constitutional rights. However, if a violation is determined, the decision may have a cassatory effect as a rule *inter partes* (and *erga omnes* if 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 superior courts of cassation, because constitutional courts reviewing 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 a plaintiff. It involves the review of micro-constitutionality and perhaps the review of the implementation of a law, which, however, is a deviation from the original function of the Constitutional Court. Cases of constitutional complaint raise sensitive questions of defining constitutional limits. In any case, the Constitutional Court is limited strictly to questions of constitutional law. The Slovenian system is specific in that the Constitutional Court may, under specified conditions, make a final decision on constitutional rights or fundamental freedoms themselves (Art. 60 (1), Constitutional Court Act).

The protection of fundamental rights and freedoms is an important function of many 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 be protected. Precisely in the field of the protection of rights, the Constitutional Court also has the function of the substitute “Constitution-maker” (a “positive function”), which means that in specific cases constitutional courts even supplement constitutional provisions.

The Constitutional Court is not a part of the judicial branch (Art.1(2), Constitutional Court Act).

According to the Slovenian Constitution, the Constitutional Court is formally not part of the judiciary as one of the three independent and separate branches of power. None of the constitutional provisions dealing with the judiciary (Arts. 125 to 134, Constitution; e.g. provisions dealing with the judges’ permanent term of office, the procedure for the election of judges, the power of the Judicial Council etc.) applies directly to the position and constitutional status of the Constitutional Court and its judges.

According to Art. 127 (1) of the Constitution, the Supreme Court is the highest court in the State. Nevertheless, Art. 160 (1) (6) of the Constitution gives the Constitutional Court the power to *decide upon the matters relating to complaints of breaches of the Constitution involving individual acts infringing human rights and fundamental freedoms* (so-called *constitutional complaint*). In this context “individual acts” in practice represent decisions of the courts. Under Art. 160 (3) of the Constitution an appeal against such an individual act can only be lodged after all other legal redress has been exhausted. This in practice means that as a rule the subject of scrutiny by the Constitutional Court will be decisions of the Supreme Court, which is in most legal matters a court of last resort. If somewhat vague Constitutional provisions may leave some uncertainty about the hierarchical position of the two courts, these doubts are clarified by statutory provisions. Although in the Constitution the powers of the Constitutional Court have been specified in detail, the Constitution envisages that many important issues relating to its position, operation and decision-making be specified also by statute. The matters related to the position of the Constitutional Court were hence deconstitutionalized. Art. 1 (1) of the Constitutional Court Act lays down that the Constitutional Court is the highest body of the *judicial power* for the protection of constitutionality, legality, human rights, and basic freedoms. The Constitutional Court Act in many other detailed provisions gives the Constitutional Court the authority that establishes it efficiently as the ultimate judicial power in this field. This position,

acquired and confirmed by its operation since the adoption of the Constitutional Court Act in 1994, is firm and generally recognized by legal theory as well as ordinary courts, including the Supreme Court.

3. The Date and Context of the Establishment of the Constitutional Review

Before 1963 the system of the “protection of constitutionality and legality” included the review of the constitutionality and legality of rules by the appropriate Parliamentary body, under the Principle of Self-Review inside the parliamentary system. This review - in so far as it was practiced - was mainly oriented to conformity of the policy expressed in some rules, and less to legality in the literal meaning. As far as the latter is concerned, it was too tolerant and therefore inefficient. This was the reason for the search for a new solution to these problems. Practice, however, revealed that legislative and executive bodies were, mainly for objective reasons, unable to review the constitutionality and legality of the rules objectively and critically, because they were themselves their authors.

Foreign experiences proved the same - it was a period of many new constitutional review systems. On these grounds it was generally believed that the evaluation of the constitutionality and legality of rules would favour special autonomous bodies, independent of the legislative and executive branches²³. In this period more and more countries introduced special bodies of constitutional review, especially Constitutional Courts, whereof the main task was to evaluate the conformity of legal rules with the Constitution as well as the abrogation and annulment of unconstitutional or illegal rules. In Yugoslavia, a special judicial body was established in 1963 “for the very task of safeguarding the constitutional order, thus placing Yugoslavia – as some –thing of an exception among the socialist states –in the very vanguard of constitutional judicature and judicial review in Europe²⁴.”

The Constitution of the Socialist Republic of Slovenia of 1963 (Official Gazette SRS, No. 10/63) envisaged the first (Federal Constituent Republic) Constitutional Court. This Constitution was adopted at that time when the “social needs for the deepening of the self-managing socialist democracy and additionally for more efficient protection of constitutionality and legality” appeared. In the first place, previously the judicial review (control) of legality of administrative acts was already introduced. However, the practice showed that the legislative and executive bodies (first of all for the objective reasons) were not able to review the constitutionality and legality of regulations enough efficiently and critically by themselves, because

23 See Krbek, Ivo, *Ustavno sudovanje*, Zagreb 1960, Izdavački zavod Jugoslavenske akademije znanosti i umjetnosti.

24 Accetto, Matej, *On Law and politics in the Federal Balance: Lessons from Yugoslavia*, Review of Central and East European Law 32(2007), Martinus Nijhoff Publishers, p. 207.

they were authors of such regulations at the same time. Similarly became evident in other countries as well. Therefore the then government decided that it would be better to introduce special, from the legislature and executive independent state bodies which would be empowered for the protection of the constitutionality and legality of regulations – likely from the establishment of the Austrian Constitutional Court onwards, more and more countries introduced such special constitutional courts²⁵. The respective courts shall interfere with the “sphere of normgiver” by their decisions as “the third, neutral state bodies” which shall decide first of all on the basis of the constitutional reasons and through a special constitutional review procedure what means in the very heart of the matter the depolitisation of such disputes. In this way, as was stressed by the then commentators, the protection of legality rised to the higher level – the protection of constitutionality. The then Yugoslav constitutiongivers promote the constitutional courts (in contrast to the then existent foreign systems) with the accentuated ex officio power, however they connected the activities of constitutional courts with the basic constitutional principles (which were actually determined by the then Yugoslav constitutions of the federal state and the member states as well for the first time) at the same time. The then constitutions of 1963 were (in contrast to the so far existing beliefs which understood the constitution as “more or less considered declaration, a certain common orientation, the long-term goal, ideal”) were welcomed as documents with the transitional role derived from their position of a “basic social order law which shall be respected by the highest legislative and administrative bodies as well”. To assure the aforementioned, the former Yugoslav federation introduced constitutional courts on the federal level and on the level of the member states as well (what was the only example among the then communist and/or socialist countries). However, such transformation did not work so smoothly. Some historical written records from that period testify that “some more time and practice was required that the constitutional review got a strong foothold to be able to realize an appropriate method of its work”. However, when the constitutional review was established with the Constitution of 1963, the idea of having such a Court was heavily criticized as running contrary to the principle of the unity of powers. On the other hand, the establishment of the constitutional court was largely accredited to the support of the then Staten president Josip Broz Tito, who held the review that disputes and controversies in the Yugoslav society should not be resolved politically but, rather, by means of “an objective and legal arbitration”. The Constitutional Commission itself responded to the then criticism with the argument that the Constitutional Court will “contribute to an effective protection of the constitutionality and legality of all acts, including the acts of the Assembly”, thereby only reinforcing the principle of the unity of powers. In the same vein, the the political leader Edvard Kardelj stressed that the Constitutional Court was “ more a part of the parliamentary system than a

25 Ustavnosodno varstvo v Sloveniji, Dopolisna delavska univerza, Ljubljana September 1972, p. 5.

traditional judicial institution”²⁶. The constitutional courts were formed as “social bodies and a part of the then parliamentary system”. The constitutional court was not established as a classic judicial body only, but more as a part of the parliamentary system and/or as - above all – an autonomous judicial institution (established by the parliament) working on the basis and within the scope of the constitution. In the opinion of the then political cream of society, the constitutional judiciary shall contribute to “the faster and more efficient elimination of unconstitutional and illegal events and negative tendencies, but at the same time the constitutional judiciary shall introduce more democratic methods and livelinesses in case of tackling such problems. If such function would be exercised by state bodies themselves, they would not only occupy themselves with a problem of legality, but they would by the nature of matters impose themselves as an interested political factor as well. In some cases that would lead to the direct limitation of the idea of the self-management”. The then actual policy emphasized that’s understood that the constitutional provisions are clearly formulated, but such provisions shall be called into being, they shall be implemented in the daily practice. There “were still many deviations present in the society” and it is a task of the constitutional judges to prevent from such deviations. The constitutional judges are responsible for the estimation of the constitution, furthermore, the prevention from the violation of constitutional provisions falls within their competence not only in an individual case, but also in case of collective interest or in case of interest of any institution the state²⁷. Accordingly, it was stated, that the concept of the constitutional review has reached its confirmation in the practice²⁸. In the opinion of the then commentators, the practice had disproved any previous “theoretical and ideal hesitations which were based on the formalistic and rigid understanding of the marxist theory of the unity of powers. It was shown that the constitutional court’s autonomy does not interfere with the unity of socio-political and economic system but – in opposite – it fortifies such autonomy and it is not serving any self-sufficiency”²⁹. Even more, “the constitutional judiciary as a special autonomus body of the parliamentary system asserted itself as an unavoidable factor due to the luxuriant development of social organisms and their normative activities”. It is interesting that the then Slovenian commentators stated that just the republican constitutional court is an important factor in implementation of the republican constitutionality as well! ³⁰. Considering the then accentuated principle, it was in accordance with the constitution that the protection of constitutionality and legality was a duty of all persons exercising public offices; so it was no possible to transfer such protection only to the constitutional court. In any event, this diluted duty of safeguarding

26 Accetto, Matej, *On Law and Politics in the Federal Balance: Lessons from Yugoslavia*, Review of Central and East European Law 32(2007), Martinus Nijhoff Publishers, p. 207-208.

27 10 godina rada Ustavnog suda Jugoslavije, izd. Ustavni sud Jugoslavije, Beograd, oktobra 1973, p. 27.

28 Deset let dela Ustavnega sodišča Slovenije, Dopisna delavska univerza Ljubljana 1974, p. 23.

29 See also 10 godina rada Ustavnog suda Jugoslavije, izd. Ustavni sud Jugoslavije, Beograd, oktobra 1973, p. 16 and 33.

30 Deset let dela Ustavnega sodišča Slovenije, Dopisna delavska univerza Ljubljana 1974, p. 23.

legality and constitutionality was not reserved to the constitutional courts but fell on all social actors: the courts, the authorities of so-called “socio-political communities, the organizations of self-management and of local self-government and all those holding public office”³¹.

Actually, the Constitutional Court Act specified the power of and the proceedings before the Constitutional Court; it determined that it should start functioning on 15 February 1964. The Assembly of the SRS elected the first President and eight judges to the Constitutional Court on 5 June 1963 (the Resolution on their Election was published in the *Official Gazette SRS*, No. 22/63). The President and the judges were sworn in before the President of the Assembly on 15 February 1964. The first Rules of Procedure of the Constitutional Court were adopted on 23 February 1965.

Under the constitutional regulation of 1963 the constitutional courts were empowered for the abstract and concrete constitutional review of laws and other regulations, deciding in jurisdictional disputes and other disputes on rights and duties between the socio-political communities when such disputes did not fall within the competence of any other (ordinary) court, deciding on jurisdictional disputes between (ordinary) courts and other state bodies, deciding on disputes relating to the status of companies; and finally, the system introduced even the scheme of the constitutional complaint: deciding on the protection of the rights to the self-management and other fundamental rights and freedoms determined by the constitution when they were violated by an individual act issued by the state body and no other judicial protection was guaranteed by law. In spite of the last mentioned power, the constitutional court never took any decision in such procedure, because the official standpoint that the protection by other (ordinary) judicial bodies was guaranteed under the legislation in force.

In the then system, the constitutional court was fundamentally not able to act as a co-author of the contents of any normative act. However, under the Constitution of 1993, the constitutional court declaring the conformity of a law or any other regulation with the constitution, was able (from the point of view of its implementation) to declare by its decision the appropriate meaning of such regulation which correspond the constitution or law. There were only a few such cases decided in the courts' practice, because the then constitutional courts exercised such power always in an accessory procedure and within the scope of the procedure for the review of constitutionality and legality.

Under the *Federal Constitution* as well as under Member State *Constitutions of 1974* the power of Constitutional Courts was based on the separation jurisdiction between the Federation and the Member States and Autonomous Provinces; each of these Constitutional Courts acted with due institutional independence

31 Acetto, Matej, *On Law and Politics in the Federal Balance: Lessons from Yugoslavia*, Review of Central and East European Law 32(2007), Martinus Nijhoff Publishers, p. 208.

in compliance with the powers specified in the constitution of the appropriate level, whereby Constitutional Courts were in no hierarchical relation to one another and the Federal Constitutional Court was not an instance above other Constitutional Courts, nor was the Member State Constitutional Court an instance above Provincial Constitutional Courts. However, the then Federal Constitutional Court was empowered to decide on the jurisdictional disputes between Constitutional Courts of Member States and/or Autonomous Provinces. The proceedings before the Constitutional Courts followed the rules of procedure adopted by Constitutional Courts themselves, pursuing the idea that the proceedings before the Constitutional Court should omit formality and bureaucratic approach to the benefit of efficiency and promptness. Therefore, elements of traditional and contradictory judicial proceedings were omitted from the rules of procedure.

Accordingly, the Constitutional Courts were established and their powers were specified in compliance with the *Constitution*. In individual Member States and Autonomous Provinces their position and the respective proceedings were also specified in detail in *Constitutional Court Acts* or even in internal regulations that as a rule, regulated only organisation and internal operation. Individual Constitutional Courts had different numbers of members. The constitutional judges were elected by the Parliaments, their term of office was eight years without possibility of re-election in the same Court. The President of the Constitutional Court was elected out of the judges for a shorter term of office, most often for a period of 4 years, without the possibility of re-election to the same office. The judges enjoyed the parliamentary immunity.

This initial period was characterized by a small number of applications lodged with the Constitutional Court; the individual petitions prevailed. In spite of the rare ideas that the powers of Constitutional Courts should be extended, in particular to electoral cases, impeachment, constitutional review of referendum, preventative constitutional review of international treaties, or even to constitutional review of the then citizens' associations, officially the opinion was adopted that while the usefulness of the constitutional judiciary should be preserved in the legal system, yet without extension of its powers. The Constitutional Courts should limit themselves to the constitutionality and legality, whereas all other questions relating to the individual belong to the sphere of other bodies outside the Constitutional Courts.

In practice such relations between Constitutional Courts were not easily established, which was also due to inadequate and inaccurate distinction between legislative powers of the Federation and the Member States and in particular, as then believed by the Slovenian Constitutional Court, due to not very reasonable specification of powers of the Federal Constitutional Court. The constitutional review in both Autonomous Provinces (Vojvodina, Kosovo), introduced in 1972, existed

till 1991, when the jurisdiction of the Serbian Constitutional Court was spread over the whole territory of the Member State Republic of Serbia.

Under the then Slovenian regulation, the Constitutional Court was also empowered to officially initiate proceedings at its own initiative. The *ex officio* function was referred to as a broad and independent initiative of the Court requiring no qualification or the payment of any costs. It was regarded as considerably different from the contemporary foreign constitutional review systems and was based on the so called general social interest in constitutionality and legality. Sometimes the *ex officio* function was also manifested in the way that the Constitutional Court extended the petition lodged by a petitioner or proponent, whereby the Constitutional Court in fact performed this *ex officio* function on the basis of the prevailing petitions lodged by the citizens.

Unknown to other contemporary systems of constitutional review was the so-called “monitoring of the phenomena important for the implementation of constitutionality and legality”. This function was justified by the need for such an active role of the Constitutional Court so that it was not a passive observer of the applicants’ petitions and proposals before the Constitutional Court. In fact, it was the specific task of the Constitutional Court in cases of omission by the Legislature (legal gaps). On discovering that the empowered body, in spite of its duty, had not issued a regulation on the implementation of the provisions of the Constitution, statute, or other rule, the Constitutional Court informed the Parliament (in the form of the so-called Letter to the Parliament). In the same way the Constitutional Court also informed the Parliament on the detrimental and negative consequences of a certain regulation, or on the incompleteness and ambiguity of a certain regulation (Art. 417, Constitution 1974, Official Gazette SRS, Nos. 6/74, 24/90 and 35/90).

This system of constitutional review was also characterized by the popular complaint (*actio popularis*), i.e. by everybody’s right to appear as a petitioner before the Constitutional Court, even if they had no proper standing (legal interest).

The Constitutional Court was further empowered to protect constitutional rights and freedoms. This power was the actual beginning of the constitutional complaint. Nevertheless, the Constitutional Court had jurisdiction over violations of rights by individual acts or by actions only in cases where no other judicial protection was secured by statute.

In relation to the Parliament, the contemporary Constitutional Court used to stress the Principle of Self-Restraint, i.e. that the Constitutional Court was entitled to review the relations between the Constitution and the law and not to check the policy expressed by the statute. Accordingly, the Constitutional Court was limited to the question of the adequacy and material rationality of the solutions adopted in the respective provision.

On the grounds of the corresponding authorizing provision, there was a quite widespread practice of reconciling the disputed statutory provision with the author itself. The corresponding initiative was given by a special ruling taken by the Constitutional Court in the form of instructions to the author of the provision on how to reconcile, at this stage, the disputed provision (appellative ruling) without the intervention of the Constitutional Court. Prior to the expiration of the respective term, the author was, however, threatened by the possible intervention of the Constitutional Court (indirect cassation) if they failed to act in compliance with its ruling (in the recent period after the Constitution of 1991, the direct possibility of intervention by the Constitutional Court increased and the Principle of Self-Restraint obeyed by the Constitutional Court was slightly reduced). The regulation also envisaged the interpretative function of the Constitutional Court in the sense of the identification of the rule, which was rarely implemented in practice, and even that was done as an accessory within the scope of the proceedings for the evaluation of constitutionality and legality.

In addition to the Federal Constitutional Court in charge of the protection of federal constitutionality, the Slovenian Constitutional Court as a Court of a Constituent Republic in charge of the protection of constituent republic constitutionality, did not represent a different instance in relation to the Federal Constitutional Court³². In practice such relations between the Constitutional Courts were not easily established, which was also due to an inadequate and inaccurate distinction between the legislative branch of the Federation and the constituent republics and in particular, as then believed by the Slovenian Constitutional Court, due to the not very reasonable specification of the powers of the Federal Constitutional Court.

The Constitution of 1974 did not change many powers of the Slovenian Constitutional Court; more detailed provisions on powers and proceedings were defined in the Proceedings Before the Constitutional Court of the Socialist Republic of Slovenia Act; new Rules of Procedure of the Constitutional Court were also adopted. The Constitution of 1974 later introduced a political alternative by entrusting the Republic Executive Council (the Republic Government) with the task of ensuring the implementation of the Court's decisions whenever necessary (Art. 432, Constitution 1974)³³.

32 There was no hierarchical relationship between the federal Constitutional Court and its counterparts in the republics; rather, they were two parallel systems of constitutional review with comparative competences. This, of course, was also linked to the shift in the question of *Kompetenz-Kompetenz*: while the federation was initially able to "pre-empt" new substantive areas and transfer them within its own sphere of competence, it was no longer able to do so with the adoption of the 1974 Constitution. Of course, such a division of competences was not limited to the legislative branch: it was even more pronounced in the executive branch, where most of the federal acts had to be implemented via the authorities of the republics, but extended all the way to the ordinary judiciary. All judicial proceedings against individuals were to be concluded within a republic and an appeal to a federal court was only possible in the case of capital punishment – even fundamental rights, having been removed from the ambit of the constitutional review, were to be protected at the level of the republics. See Accetto, Matej, *On Law and Politics in the Federal Balance: Lessons from Yugoslavia*, review of *Central and East European Law 32(2007)*, Martinus Nijhoff Publishers, p. 210.

33 Accetto, Matej, *On Law and Politics in the Federal Balance: Lessons from Yugoslavia*, review of *Central and East European Law 32(2007)*, Martinus Nijhoff Publishers, p. 209.

The Slovenian Constitutional Court at that time, in principle, actually still did not have the function of fully empowered constitutional review³⁴. It could not declare a statute unconstitutional directly. Furthermore, it was only indirect cassation, i.e. the statute became ineffective if the Legislature failed to reconcile the disputed statutory provision in the specified term, following the declaratory decision of the Constitutional Court. Such a construction nevertheless enabled the operation of the Constitutional Court as an independent institution within the parliamentary system, where the Parliament was the highest authority (the Principle of the Supreme Power of the Parliament). The Constitutional Court further could not influence the Legislature in the form of the so-called interpretative or appellative decision, although it had the possibility to draw the Legislature's attention to individual deficiencies in its legislative activity in the form of special letters addressed to the Legislature. In fact, this was only an apparent example of a cassation Court, because the actual concentration of power still remained in the Parliament and the Constitutional Court was not empowered to abrogate the statute³⁵. It is, however, necessary to stress the presence of a certain tradition in the field of constitutional review. In Slovenia the continuous existence of institutional constitutional review goes back to the year 1963. This makes for an important difference in comparison with the systems of other new democracies.

4. Judges - The System in Force

4.1. Immunities, Incompatibilities, Material Independence, and Protocol Rank

Most systems recognise the immunity of constitutional court judges and certain systems recognise explicit parliamentary immunity (Slovenia, Art. 167, Constitution)). The independent position of constitutional court judges also implies the recognition of the corresponding material independence, as well as the adequate protocol rank. The respective matter is regulated by the *Constitutional Court Act* (Arts. 71 to 78, Constitutional Court Act, Official Gazette RS, No. 64/07).

A special feature of the office of constitutional court judge is its incompatibility with certain activities. In almost all systems the office of constitutional court judge

34 What is interesting, however, is that legal theory itself did not have a clear answer to the question of the proper role and functioning of the Yugoslav constitutional review. See Accetto, Matej, On Law and Politics in the Federal Balance: Lessons from Yugoslavia, Review of Central and East European Law 32(2007), Martinus Nijhoff Publishers, p. 212.

35 Partly, this was the inevitable consequence of the doctrine of the unity of powers: members of the judicial branch who would be perceived as trumping the popular sovereignty manifested in the federal parliamentary assembly might quickly see their judicial and personal wings clipped. In addition, the complex programmatic nature of the 1974 Constitution vying for the title of the world's longest and most detailed constitution painted a constitutional picture in which all the major strikes seemed to have already been made by the drafters, with very few, if any, gaps left to be filled by reasoned constitutional review. See Accetto, Matej, On Law and Politics in the DFederal Balance: Lessons from Yugoslavia, Review of Central and East European Law 32(2007), Martinus Nijhoff Publishers, p. 211.

is compatible with scientific and artistic activities, but incompatible with political and commercial activities. With reference to political activities there may be various grades of restrictions, ranging from the absolute prohibition of membership in a political party to the prohibition of membership for a certain period prior to election or to the prohibition of membership in the bodies of a political party (*e.g.* Slovenia, Art. 166, Constitution). The prevailing opinion regarding the activities of constitutional court judges in public is that they cannot be exclusively closed within the circle of their institution and that their activities in public contribute to the transparency of the Constitutional Court as well as to the pluralism of opinions.

The following activities are incompatible with judicial function (Art. 166, Constitution; Art. 16, *Constitutional Court Act*):

- Holding office in government bodies;
- Holding office in local government;
- Holding office in political parties;
- Holding other offices and activities deemed incompatible with the office of a judge of the Constitutional Court, in accordance with the *Constitutional Court Act*.

As regards immunities, members of the Constitutional Court enjoy the same immunities as members of the National Assembly (Art. 167, Constitution).

A judge of the Constitutional Court may not be held legally responsible for an opinion or a vote expressed at a public hearing or session. They may not be detained, nor may criminal proceedings be instituted against them without the permission of the National Assembly, unless the judge commits a crime for which a sentence of over five years is prescribed (Art. 18, *Constitutional Court Act*).

4.1.1. Working Conditions of Constitutional Court Judges

a) Salary and allowances

The President of the Constitutional Court is entitled to a salary and additional payment based on his office equal to the amount determined for the President of the National Assembly. Judges of the Constitutional Court are entitled to a salary and an additional payment based on their office equal to the amount determined for the Vice-President of the National Assembly. The Constitutional Court determines the salary of the Secretary of the Constitutional Court. It is determined proportional to the salary of a judge of the Constitutional Court (Art. 71, *Constitutional Court Act*).

Judges of the Constitutional Court are entitled to compensation equal to their proportional salary for the period of their annual leave and for the first 30 days of absence from work due to illness or injury (Art. 72, *Constitutional Court Act*).

b) Employment period and social insurance

The time during which judges of the Constitutional Court perform their office is counted as part of their employment period. During the performance of their office as judge of the Constitutional Court, judges enjoy social insurance in accordance with the social insurance regulations for persons in permanent employment (Art. 73, *Constitutional Court Act*).

c) Other personal incomes and reimbursements

- Judges of the Constitutional Court are entitled to:
- Reimbursement of travel expenses to and from work,
- Reimbursement of expenses for business trips (a travel allowance, daily allowance, hotel expenses),
- An allowance for meals during work,
- An annual leave allowance,
- A displacement allowance,
- Reimbursement for costs incurred for travelling from the place of their business residence to the place of permanent residence and back,
- Reimbursement of expenses for moving from their permanent residence to their business residence and back,
- Reimbursement of training costs,
- A long-service bonus,
- A retirement bonus (Art. 74(1), *Constitutional Court Act*).

Conditions for and the amount of allowances and reimbursements are determined by the Constitutional Court (Art. 74(2), *Constitutional Court Act*).

d) Annual leave and other days off

Judges of the Constitutional Court are entitled to annual leave of 40 days (Art. 75(1), *Constitutional Court Act*). Judges of the Constitutional Court are entitled to extraordinary paid leave not exceeding 7 days each year for personal reasons (Art. 75(2), *Constitutional Court Act*). In exceptional cases Judges of the Constitutional Court may be allowed to take extraordinary leave not exceeding 30 days each year (Art. 75(3), *Constitutional Court Act*). The conditions and examples mentioned in the preceding paragraphs are determined by the Constitutional Court (Art. 75(4), *Constitutional Court Act*).

e) The rights of judges of the Constitutional Court after the expiration of their term of office

Judges of the Constitutional Court who, until their election as judge of the Constitutional Court, performed the office of court judge or some other permanent office in a State body, have the right, after the expiration of their office, to

return to their previous office, if they fulfil all conditions for performing such office and if, within three months after the expiration of the said office, they notify the competent body of their wish to return to their previous function office (Art. 76, *Constitutional Court Act*).

Judges of the Constitutional Court who, until their election as judge of the Constitutional Court, were employed in a State body, public company or public institution, have the right to return to their job within three months after the expiration of their office, or to another job corresponding to their education and their level of professional skill (Art. 77, *Constitutional Court Act*).

Judges of the Constitutional Court whose office has expired and who, for objective reasons, are unable to perform their previous office, or who cannot find other suitable employment, and have not yet reached the age of retirement according to general regulations, have the right to compensation in the amount of the salary they received as a judge until such time as they find new employment or fulfil the conditions for retirement according to general regulations, but for no longer than one year after the termination of their office (Art. 78(1), *Constitutional Court Act*).

The right to compensation under the preceding paragraph may be prolonged until the conditions for retirement are fulfilled according to general regulations, but for a period of no more than one further year (Art. 78(2), *Constitutional Court Act*).

The period from the two preceding paragraphs is included in the employment period of judges of the Constitutional Court whose office has expired. During this period judges enjoy social insurance in accordance with the social insurance regulations for persons in permanent employment. If judges are entitled to annual leave during this period, they also are entitled to an annual leave allowance. They are entitled to a retirement bonus upon retiring (Art. 78(3), *Constitutional Court Act*).

4.2. **The Appointment/Election of Judges to the Constitutional Court**

The influence of constitutional bodies upon the appointment or election of members of the Constitutional Court differs from system to system. The varieties applicable to elections or appointment of constitutional court judges are as follows:

1. Appointment based systems - without the Participation of a Representative Body).
2. Election based systems - as a rule Parliaments exercise greater influence upon the election of constitutional court judges as compared to the election of judges of ordinary courts (e.g. Slovenia, Art. 163 (1), Constitution).

3. Mixed systems - Appointment and Election): With mixed systems, too, the role of the Parliament is prevalent and the role of the executive power is sometimes limited to a mere recruitment of the candidates.
4. Predetermined composition from high judicial officials - because the body competent for constitutional/judicial review consists of representatives of the highest national courts neither the Parliament nor the government exert direct influence on the appointment of constitutional court judges.

The independent position of the Constitutional Court is further symbolized by the mode of appointment of the President of the Constitutional Court. Its independence is even greater if the President is appointed by his/her colleagues - constitutional court judges themselves (Slovenia, Art. 163 (3), Constitution).

Nearly everywhere the qualifications and the required professional experience of constitutional court judges are subject to high standards: the candidates must not only have more than average legal expertise but also a high degree of sensibility for the political effects of their decisions (Slovenia, Art. 163 (2) of the Constitution). In practice constitutional court judges are selected exclusively from first-class lawyers with many years of experience, such as judges of ordinary courts, attorneys at law, senior government officials, professors of law, or politicians.

4.3. Specific Procedural Features

The most important novelty in comparison with the previous system is, however, the cassatory function of the Constitutional Court with reference to statute. This means the Constitutional Court may abrogate a statute directly. The preceding regulation of constitutional review did not envisage such a cassatory function of the Constitutional Court *vis-a-vis* statute due to the Principle of the Unity of Powers and the Supremacy of the Parliament. The former function of the Constitutional Court, which focused on the assessment of the unconstitutionality of a statute, changed not only into the cassation of a statute, but also into the guidance of the Legislature in its legislative activity (predominantly interpretative and appellative decisions of the Constitutional Court). However, it is still possible that the Court does not abrogate the disputable statutory provision, but rather allows the Legislature to reconcile the disputable statutory regulation with the Constitution within a due period of time,

Most powers of the Constitutional Court are explicitly determined by the Constitution. The Constitution determines that also other matters may be vested in the Constitutional Court by laws.

In the past, the the constitutiongiver had a different relation to the regulation of the Slovenian Constitutional Court powers. Under the first constitutional regulation (the Constitution of 1963), the Constitutional Court was able to “attend

some other duties as well which were in its jurisdiction under the law". The 1974 Constitution did not include such possibility and itemized – specified the Constitutional Court powers individually, however, any change or extension of powers would be possible only by the constitutional amendment and/or a constitutional change. The constitutional regulation in force reminds of the regulation of 1963 that the Constitutional Court could receive some other powers as well (Art. 160(1), Constitution); Art. 21(1)(13), Constitutional Court Act: for example, under Art. 5 and Art 21, Referendum and Peoples Initiative Act, (Official Gazette RS, No. 15/94 and amendments). Additionally, the Constitutional Court may decide on the request of the National Assembly for the review of constitutionality and legality of the request for call of referendum; under Arts 47.a and 90.c of the Self Government Act, (Official Gazette RS, No. 72/93 and amendments) the Constitutional Court decides on the “constitutional complaint” of the local self-government’s body. Under Art. 50(3) of the National Council Act (Official Gazette RS, No. 44/92) the Constitutional Court decides on appeals against the decision of the National Council on confirmation of mandates of members of the National Council. Under Art. 23 of the Election of Slovenian Members to the European Parliament Act (Official Gazette RS, No. 98/02 and amendments) the Constitutional Court decides on the request against the decision of the National Assembly on the confirmation of the election of a deputy.

Dissenting/concurring opinions of constitutional judges are allowed.

4.3.1. Dissenting – concurring opinion

4.3.1.1. Practice until 1991

The separate (dissenting, concurring) opinion of the Constitutional Court’s member did not have a power of the Constitutional Court’s decision nor it had any influence on the normative act (regulation) which was an object of the review of constitutionality and legality³⁶. However, in spite of all that, the separate opinion was important for the legal order and for social relations in general as well. Due to the separate opinions, members of the Constitutional Court were faced especially with a task, to discuss and to prove all facts and reasons once more before the respective (final) decision was taken. By this means, the separate opinion had a preventive importance which was realized even during the Constitutional Court’s session. When the constitutional judge’s separate opinion was later published in the official gazette, it could be spoken about its broader and general importance as well. The constitutional court’s decision and the separate opinion both contained the grounded reasons either for the respective (final) decision or for the separate opinion of the constitutional court’s judge. Furthermore, through the separate opinion, the readiness of the particular constitutional court’s member was shown to take the responsibility in public for his/her standpoint which was expressed

36 Vejković, Tomislav, *Izdvojeno mišljenje sudije Ustavnog suda, Naša zakonitost* No. 7-8/1988, p. 934.

in this opinion, especially in the case when such standpoint would be not welcomed in public. The separate opinion was deemed important for the legal theory and/or science as well, especially due to the forming of particular standpoints to the particular legal institutes and principles. Additionally, the separate opinion contributed to the acceptance of the constitutional court's decision in public by the higher attention and interest³⁷. Under the prevailing standpoint of the then legal theory, the separate opinion was not more powerful than the constitutional court's decision and/or the common standpoint of the majority of the constitutional court's members. Therefore it was not possible from the constitutional court's member to request the separate opinion to be published when the respective "basic" constitutional court's decision was not published at which the respective separate opinion was actually pointed. The separate opinion could not be a reason for the publication of the constitutional court's decision itself as well, if such decision would not be published otherwise and/or the Constitutional Court had not find any special reasons for the publication of such decision. In any case, reasons given in the separate opinion did not reduce the importance and did not effect of the constitutional court's decision. The intention of the separate opinion of the constitutional court's member was only to accompany the particular decision taken by the constitutional court and to point out to the public that some other views and reasons for the decision were present as well³⁸.

The federal, the republican constitutions and the constitutions of the Autonomous Provinces Vojvodina and Kosovo of 1974 provided that the constitutional court's member "shall have the right and duty" to give his/her separate opinion, to give written reasoning for such opinion and to (well) found it.

The Constitution of the Socialist Republic of Slovenia of 1974 provided in Art. 420(2) that the Constitutional Court's member giving a separate opinion, has the right and duty to give such opinion in the written form and to present this opinion to the Court. Accordingly, the Constitution did not impose and obligation nor did not exclude any possibility to publish the separate opinion of the constitutional judge. The Procedure Before the Constitutional Court SRS Act (Official Gazette SRS, Nos 39/74 in 28/76) did not contain any provision on this issue. However, the Constitutional Court SRS Act (Official Gazette SRS, No. 39/63) which did not apply any longer by 8 January 1975, provided in Art. 67 that the Constitutional Court may decide to publish the separate opinion with the consent of judge who was its author. In accordance with the mentioned regulation of 1963, the separate opinion was published only once together with the publication of the decision taken by the Constitutional Court³⁹.

37 Veljković, Tomislav, *Izdvojeno mišljenje sudije Ustavnog suda, Naša zakonitost* No. 7-8/1988, p. 936.

38 Veljković, Tomislav, *Izdvojeno mišljenje sudije Ustavnog suda, Naša zakonitost* No. 7-8/1988, p. 937.

39 Decision No. U-I-31/69, *Official Gazette SRS*, No. 27/70.

The voting against the proposed decision did not mean automatically that the voter gave his/her separate opinion to the particular decision taken by the Constitutional Court. The Constitutional Court's member who voted for the proposed decision, but did not agree partially or in total with the reasons which were a basis for such decision had an opportunity to give the separate opinion on the reasons to which he/she did not agree. The written form of the separate opinion was attached to the protocol on the deliberation and voting. Additionally, in the protocol was noted down that the voter gave a separate opinion. With regard to the constitutional right and duty of the constitutional judge to give a separate opinion in the written form and to present it to the Court it was not considered as a real separate opinion any opinion which was declared only during the voting and which was determined by the protocol, but was not presented in the written form in the practice and was not attached to the respective protocol. In accordance with the then constitutional and legal regulation of the Republic of Slovenia, the request of the constitutional judges itself for publication of the separate opinion by the Constitutional Court did not bind the Court to publish the respective separate opinion together with the decision taken unanimously.⁴⁰

From 1974 to 1990 it was no case in the Slovenian practice that the constitutional judge who gave a separate opinion would neither request the publication of such opinion with the decision taken by the Constitutional Court nor that a separate opinion was published together with the anonymous decision itself.

4.3.1.2. Regulation in Force and the Current Practice

A judge who does not agree with a decision or with the reasoning of a decision may declare that he will write a separate opinion, which must be submitted within the period of time determined by the Rules of Procedure of the Constitutional Court. (Art. 40(3), Constitutional Court Act). A Constitutional Court judge who does not agree with a decision adopted at a session of the Constitutional Court may submit a separate opinion, which may be either a dissenting opinion if he disagrees with the operative provisions or a concurring opinion if he disagrees with the statement of reasons. A separate opinion may be submitted by a group of judges, or a Constitutional Court judge may join the separate opinion of another Constitutional Court judge (Art. 71(1), Rules of Procedure). A separate opinion may only be submitted by a Constitutional Court judge who has declared after the voting on the decision that he will submit such opinion. Joining a separate opinion is possible also without prior declaration thereof. (Art. 71(2), Rules of Procedure). The purpose of a separate opinion is to present the arguments that the Constitutional Court judge stated in the discussion and deciding on a case and which dictated his decision (Art. 71(3), Rules of Procedure).

40 The Statement taken by the Constitutional Court SRS of 24 November 1986.

Separate opinions must be submitted within seven days from the day when the Constitutional Court judges receive the text of the decision determined by the Redaction Commission, which is confirmed and signed by the Secretary General (Art. 72(1), Rules of Procedure). The Constitutional Court may determine a time limit for submitting separate opinions which is shorter or longer than seven days if so required by the nature of the matter decided on. Immediately after the final vote, the Constitutional Court decides on the extension or reduction of such time limit by a majority vote of the Constitutional Court judges present (Art. 71(2), Rules of Procedure). Separate opinions are submitted to other Constitutional Court judges, who may comment on such within three days. A Constitutional Court judge who has submitted a separate opinion may reply to such comments within three days (Art. 72(3), Rules of Procedure). If a separate opinion is not submitted within the time limit referred to in the first or second paragraphs, it is deemed that the Constitutional Court judge is not submitting a separate opinion (Art. 72(4), Rules of Procedure).

A separate opinion is sent together with the decision or order to which the separate opinion refers. If, in accordance with an order of the Constitutional Court, the decision or order is sent immediately, the section stating the composition states which Constitutional Court judges have declared that they would write a separate opinion; the separate opinions are then sent after the expiry of the time limits referred to in the preceding article (Art. 73(1), Rules of Procedure). If a decision or an order is published in the Collected Decisions and Orders of the Constitutional Court, on the website of the Constitutional Court, or in other computer databases, separate opinions thereto are published with the decision or order (Art. 73(2), Rules of Procedure).

Following the foreign practice, in the Slovenian system separate opinions have been divided to the concurring, dissenting, partially concurring, partially dissenting and associated opinion. Any constitutional judge may join to any of the mentioned forms of separate opinions, when he/she did not write it down by him/herself, expressing in such manner the solidarity with the colleague's separate opinion. Although separate opinions don't have any legal force and any legal effects, they are important as valuable supplements to the "basic" decision. They give an opportunity to the public to be acquainted with arguments of the minority, which could even sometimes prevail as arguments of the majority in the future. Additionally, the legal doctrine and practice have an opportunity to evaluate all arguments which entered into competition during the constitutional review procedure⁴¹.

41 Poročilo predsednika Ustavnega sodišča za leto 1993 (the President's of the Constitutional Court Report for 1993), Pravna praksa Nos. 10 and 11/94, p. 24 and 26.

4.3.2. Temporary Orders

Pursuant to the regulation in force, a temporary order may refer to both a general and an individual act. It could be applied in the proceedings of an abstract review, a constitutional complaint as well as impeachment (Art. 64(3), Constitutional Court Act). The Constitutional Court considers this type of decision-making to be its own discretionary right. The disputed provision formally still remains in force, but it is prohibited to use it. Accordingly, the temporary order (because of the temporary situation as well as due to legal security) can not be legally implemented by itself, unless the Constitutional Court itself specifies the respective implementation mode.

The Constitutional Court can adopt a temporary order either with a special ruling (if the proceedings is initiated on the request of a privileged applicant) or with a ruling on a general subject. If the Constitutional Court adopts a special ruling on a temporary order, but the constitutional proceedings are subsequently discontinued, the Constitutional Court, by issuing a ruling that discontinues the proceedings, explicitly orders that the temporary order itself is no longer in force either. Otherwise the term of the temporary order is considered to expire according to the final Court decision.

Whether the applicant's proposal for a temporary order is accepted or refused depends on the decision of the Constitutional Court. The Court weighs whether not-easily-reparable damages are probable, which could justify the temporary order. On the other hand, it may also weigh the possible damages following the adoption of the temporary order. Accordingly, the Court decides not to adopt the temporary order if it is of the opinion that the damages resulting from the temporary order might exceed the risk of an unconstitutional interpretation of the disputed legal provision in a concrete case. The Constitutional Court may refuse the applicant's request for a temporary order with a special ruling, but may do it in a ruling on the non-acceptance of a popular complaint.

Suspending the implementation of an act can be total or only partial provided that the implementation thereof could involve not-easily-reparable consequences. If during the term of the temporary order the consequences of the respective ruling are interpreted in different ways, the Constitutional Court may, by a special decision, specify the manner its decision must be implemented.

With reference to the Slovenian system, a temporary order is not limited in time, as in the German constitutional review system (Art. 32 (6), *Federal Constitutional Court Act/BverfGG*). The ultimate limit of its duration extends to the issuance of the relevant final Constitutional Court decision. However, the Constitutional Court is free to order the termination of its validity at any time during its term.

Concerning temporary orders in the Slovenian system, the constitutional court decisions may be as follows:

The Abstract Review

- An abstract review can result in the possible stay of the implementation of a general act pending a final decision (Art. 39, Constitutional Court Act).

The Constitutional Complaint (Art. 58, Constitutional Court Act)

- A ruling on the suspension of the implementation of an individual act which is the subject of a constitutional complaint can be issued while deciding on a constitutional complaint.
- A ruling on the possible suspension of the implementation of a general act pending a final decision can be issued while deciding on a constitutional complaint. The above mentioned possibility of a temporary order parallels the temporary order foreseen in the abstract review proceedings.

The Constitutional Court may decide on a temporary order on a general act only in a plenary session, not also in an *a camera* session.

The Constitutional Court decides on temporary orders in proceedings examining a constitutional complaint and/or may suspend the implementation of a disputed individual act only if the constitutional complaint is accepted. If procedural prerequisites are lacking and/or if the constitutional complaint is not accepted, the Constitutional Court does not decide on the applicant's request for a temporary order.

Art. 39 of the Constitutional Court Act determines that until a final decision, the Constitutional Court may suspend in whole or in part the implementation of a law, other regulation, or general act issued for the exercise of public authority if difficult to remedy harmful consequences could result from the implementation thereof. If a participant in proceedings motions for a suspension, and the Constitutional Court deems the conditions for the suspension not to be fulfilled, it dismisses the motion by an order.

If the Constitutional Court suspends the implementation of a regulation or general act issued for the exercise of public authority, it may at the same time decide in what manner the decision is to be implemented.

The order of the Constitutional Court is published in the Official Gazette of the Republic of Slovenia as well as in the official publication in which the respective regulation or general act issued for the exercise of public authority was published. Such suspension takes effect the day following the publication of the order in the Official Gazette of the Republic of Slovenia, and in case of a public announcement of the order, the day of its announcement.

When dealing with a constitutional complaint under Art. 58 of the Constitutional Court Act the panel or the Constitutional Court may suspend the implementation of the individual act which is challenged by the constitutional complaint at

a closed session if difficult to remedy harmful consequences could result from the implementation thereof, if a constitutional complaint is accepted.

Art. 56 of the Rules of Procedure of the Constitutional Court of the Republic of Slovenia stipulates that the Constitutional Court considers proposals for the temporary suspension of the implementation of laws, regulations, and general acts issued for the exercise of public authority in a manner such that the judge rapporteur submits a report and a draft decision to the other Constitutional Court judges. If none of the Constitutional Court judges declares his opposition to the draft decision within eight days or within a time limit determined by an order of the Constitutional Court, such decision is adopted. If any Constitutional Court judge declares his opposition to the draft decision within the time limit referred to in the preceding paragraph, deciding on the draft decision is placed on the agenda of the next session.

A temporary order ruling shall be published in the Official Gazette RS and/or in other respective official gazette (Art. 69(4), Rules of Procedure).

5. Powers

The functional “rounding up” of the role of the Constitutional Court by the Constitutional Court Act of 1994 (Official Gazette RS, No. 15/94) means the operational assurance of some powers of the Constitutional Court, which were generally provided by the Constitution, but they shall be regulated in details by law, as the constitutional complaint, impeachment, the unconstitutionality of statutes and activities of political parties etc.

Following the constitutional concept and considering systems of constitutional review around the world currently in force, the Constitutional Court Act did not limit itself only to the procedural issues as all earlier constitutional court acts, but it regulated also all other issues relevant for the work and decision making of the Constitutional Court. Such method and the width of issues which are object of regulation by law, derive even from the act's title itself: »the Constitutional Court Act«.

The Slovenian Constitution of 1991 granted to the Constitutional Court the more important role as the Court had under the previous Slovenian Constitution of 1974. The former classic powers (the review of constitutionality and legality of rules and other general acts) within the scope of (repressive) abstract and concrete review were extended by the following new powers:

- deciding on conformity of law and other regulations with the ratified treaties and with the general principles of international law (Art. 160(1)(2), Constitution; Art. 21(1)(2), Constitutional Court Act);

- deciding on constitutional complaints due to violations of human rights and fundamental freedoms by individual acts (Art. 160(1)(6), Constitution; Arts. 50 to 60, Constitutional Court Act);
- deciding on jurisdictional disputes among the National Assembly, president of the State and the Government (Art. 160(1)(9), Constitution; Art. 21(1)(9), Constitutional Court Act);
- deciding on the impeachment of the President of the State, Prime Minister and ministers due to the violation of the constitution and laws (Arts. 109 and 119, Constitution; Arts. 63 and 67, Constitutional Court Act);
- deciding on complaints related to the confirmation of the confirmation of the election of a deputy (Art. 82(3), Constitution; Art. 69, Constitutional Court Act; Art. 8(1), Deputies Act) and
- deciding on the unconstitutionality of the acts and activities of political parties (Art. 160(1)(10), Constitution; Art. 68, Constitutional Court Act).

Additionally, the preventive abstract review was introduced as well: In the process of ratifying a treaty, the Constitutional Court, on the proposal of the President of the Republic, the Government, or a third of the deputies of the National Assembly, issues an opinion on the conformity of such treaty with the Constitution (Art. 160(2), Constitution; 2. odstavek 160. člena Ustave; Arts. 21(2) and 70, Constitutional Court Act).

The Constitution allows any further extension of powers of the Constitutional Court by law (Art. 160(1)(11), Constitution): Beside issues determined by the constitutional provisions, under Art. 160(1)(11) of the Constitution the Constitutional Court decides on other matters vested in the Constitutional Court by the Constitution itself or by laws.

In the period between the adoption of the Constitution of 1991 and the adoption of the Constitutional Court Act of 1994 (Official Gazette RS, No. 15/94) the Constitutional Court worked on the basis of the former Procedure Before the Constitutional Court Act (Official Gazette SRS, Nos. 39/74 and 28/76), considering provisions of the Constitutional Act for the Implementation of the Constitution of the Republic of Slovenia (Official Gazette RS, No. 33/91).

On the basis of the before mentioned constitutional provisions of 1991, it was not possible to prepare and adopt the respective detailed regulation by law immediately or parallelly. Therefore, the mentioned Constitutional Act for the Implementation of the Constitution of the Republic of Slovenia of 28 December 1991 enabled the Constitutional Court to continue its activities and to decide partially still on the basis of the constitutional and legal regulation of 1974. Art. 7 of the mentioned Constitutional Act consequently determined that the Constitutional Court acted on the basis of the (new) Constitution of 1991, however, relating to the constitutional review procedural issues and legal consequences of the constitutional court

decisions which were not yet regulated by the Constitution, until the adoption of the Constitutional Court Act, the Constitutional Court implemented *mutatis mutandis* the then constitutional and legal provisions in force. Consequently, the Constitutional Court implemented *mutatis mutandis* the particular provisions of the 1974 Constitution, but first of all, some provisions of the former Procedure Before the Constitutional Court Act (Official Gazette SRS, No. 10/74).

Accordingly, the 1991 Constitution did not regulate the position and activities of the Constitutional Court in details and explicitly left numerous important issues regarding the position, work and decision-making to be regulated by a special law. The proposed solutions in the Constitutional Court Act of 1994 followed the then foreign systems of constitutional review in force. A new Constitutional Court Act was indispensable, on the new constitutional grounds to establish the complete legal basis for the undisturbed work and decision-making of the Constitutional Court comprising all its powers. In this way, the work of the Constitutional Court stepped aside the earlier provisional arrangements what was necessary for some shorter period after the adoption of the new constitution, but not acceptable for some longer period. If the temporary truncated activities and decision-making of the Constitutional Court would continue, its basic constitutional role would be incapacitated or it would be substantially paralysed.

In accordance with Art. 2(2) of the Constitutional Court Act (Official Gazette RS, No. 15/94) the then Constitutional Court on its session on 26 May 1998 adopted the new Rules of Procedure of the Constitutional Court (Official Gazette RS, No. 49/98). By the mentioned Rules, the Constitutional Court regulated its organization, administration and other issues, important for its work (Art.1, Rules of Procedure).

However, on the basis of the amended Constitutional Court Act (Official Gazette RS, No. 51/07, consolidated text – Official Gazette RS, No. 64/07), the Constitutional Court adopted the new Rules of Procedure (Official Gazette RS, No. 86/07). Accordingly, the Constitutional Court regulated the internal administration by the Rules of Internal Organisation and Administration of the Constitutional Court (Official Gazette RS, No. 93/03).

5.1. The Powers of the Constitutional Courts as Proof of its Independence

The extent of the powers of constitutional/judicial review bodies is as follows: in the traditional approach constitutional review bodies have no positive power in relation to the legislature. They may only be a negative legislature, whereas the role of a positive legislature is reserved for the Parliament. However, the negative powers of constitutional courts in relation to the legislature are also subject to certain

limits, whereby the function of cassation of constitutional justice is limited by certain rights reserved for the legislative and the executive branch (*e.g.* the principle of judicial self-restraint, the *political question doctrine*).

Today, however, constitutional review decisions are no longer limited to the mere function of cassation, and the so-called positive decisions issued by constitutional courts are gradually gaining importance:

- One of these forms involves appellate decisions, in which the Constitutional Court instructs the legislature (explicitly or implicitly, with or without a time limit) to adopt certain regulations in a particular domain. Recently certain countries have even imposed special provisions regarding the right of constitutional/judicial review bodies to instruct the legislature. Such a “positive” authorization of constitutional justice in a rather narrow form exists in some systems of constitutional/judicial review.
- Another factor of the decision-making process is the guidelines issued following a constitutional/judicial review; such guidelines for the future action of the legislature, the government and the administration may include appellate decisions, and partly also other decisions (decisions of abrogation, decisions of annulment, possibly also declaratory decisions relating to conformity with the *Constitution*). Sometimes such decisions already clearly indicate the essential point of the legal regulation, so that the legislature has only to elaborate the details and to provide for official adoption of the statute. This phenomenon is sometimes referred to as the negative legislative activity of constitutional courts or as the paralegislative or superlegislative activity of modern constitutional courts. Nevertheless, from a global point of view, positive decisions of constitutional justice are of a substitutional character. The extent of this function is proportional to the intensity with which constitutional rights are affected.
- The court may issue decisions on unconstitutionality with reservation or with interpretations created by the Constitutional Court itself (the interpretative decisions). In these decisions the Constitutional Court insures with its own interpretation that in the future the implementation of the statute complies with the *Constitution*.

5.1.1. Interpretative Decisions

Can the Constitutional court declare that a rule is constitutional only in the exact interpretation given by it? Can this interpretation deviate from that of “living law”? If so, what use is made of this option? For this purpose, it reaches so-called interpretative decisions as a new technique elaborated by the Court itself.

Additionally to its traditionally recognized power as a *negative legislator* the Constitutional Court has, through the adoption of so called *new techniques* (mainly by the interpretative decisions), achieved some special position in the process of legislating and interpreting the norms. One must bear in mind that neither the

Slovenian Constitution nor any statutory provision expressly empowers the Court to issue such decisions. The Court used this technique as an *intermediary* decision justifying its power to do so *argumento a maiori*: the Court, having explicit power to *annul* the challenged provision or annul it partly, is thereby logically empowered to *interpret* it or to annul its *ideal parts* (specific meanings) as well. The decision to adopt new techniques without having an explicit legal mandate to do so was criticized by part of the former legal doctrine - but the Court not only used interpretation in many cases after that but also developed other new techniques.

The Slovenian Constitutional Court adopted the interpretative technique as early as in 1993. When it is no explicit legal basis for this purpose, however, this kind of decisions was introduced into the judicial control jurisprudence by the German Federal Constitutional Court in 1955 and in adopting it for the first time the Slovenian Court referred to the comparative argument as well. It is interesting to mention that the Constitutional Court Act of Socialist Republic of Slovenia in 1963 (Official Gazette SRS, No. 39/63) contained detailed provision enabling the Constitutional Court to issue interpretative decisions (Art. 29, Constitutional Court Act of 1963⁴²). The respective provision was structured in line with the main characteristics of the interpretative decisions as developed in the German jurisprudence. The Court at that time used this possibility in a few occasions, but was vigorously criticized by the then theory. The results of this technique were compared to the authentic interpretation of the statute: the operation constitutionally reserved exclusively to the legislator. In the Constitution of 1974 relevant provisions were omitted and until 1993 no interpretative decision was issued.

The main characteristic of interpretative decisions is that they tend to keep in force a certain way of interpretation and eliminate from the legal system another possible, but unconstitutional, way of interpretation of the challenged provision *established through the case law formed by ordinary courts*. That is why legal theory perceives this kind of decisions as the one used to avoid possible conflicts with the legislator, while on the other hand apt to cause conflicts with the judiciary. The only scope of this kind of decisions is in fact that the Constitutional Court *in abstracto* and *pro futuro* in the operative part of its decision makes an interpretation of the norm, which normally would be the task of ordinary courts when applying the challenged legal provision from case to case. The Slovenian Constitutional Court has used this technique rather frequently and ordinary courts have so far had no difficulty in adapting their interpretation to the interpretation made by the Constitutional Court.

42 If the Constitutional Court in course of the constitutional review proceedings stated that the law or other regulation is not discordant with the Constitution or with the republic law, but through its implementation such discordance has been given to it, the Court may determine the meaning of such regulation which is in accordance with the Constitution and law.

As already mentioned, the first interpretative decisions were taken by the new Constitutional Court in 1993. Such decisions⁴³ are necessary and meaningful when a challenged norm is in practice understood in several ways, of which some are constitutionally admissible and some are not. In such a case, the annulment of the norm is not meaningful for it would affect also those which applied it in conformity with the Constitution; thus, it is necessary to reach an interpretative decision. Interpretation in particular is that technique of decision-making where the Constitutional Court can closest approach the field reserved for the legislator. The matter concerns a technique by which the Court in a disposition in an affirmatively manner describes the correct content of a certain regulation. However, it is necessary to consider the following: how much space will be given to the legislature in the remedying of the established unconstitutionality, and how much of it will have to be taken by the Constitutional court, can in marginal cases partially depend on the fact how much is the legislature active at all.⁴⁴ By an interpretative decision the Constitutional Court preserves in the legal system the challenged norm in its undisputed or conform-with-the-Constitution extent or meaning. At the same time, it excludes from the legal system the application of the challenged norm which is not conform to the Constitution, in an indirect manner⁴⁵.

As other decisions taken by the Constitutional Court, the interpretative decisions are legally binding as well (Art. 1 (3) of the Constitutional Court Act) and they have either *erga omnes* effect in abstract review cases or *inter partes* effect in constitutional-complaint cases (however, also *erga omnes* effects are possible under Art. 59 (2) of the Constitutional Court Act).

5.1.2. Appellate Decisions

Other specific feature of the Slovenian system is the use of the so-called appellate judgment issued by the Constitutional Court, and of content-related guidelines. The novelty of the *Constitutional Court Act* is that it allows for the possibility of the Constitutional Court assessing whether the Legislature has omitted a necessary legal regulation arising out of the *Constitution*. If the Constitutional Court determines that a statute, a regulation or a general act for exercising public powers

43 e.g. decisions No. U-I-125/92 dated 4 March 1993, published Off. Gaz. RS, No. 13/93, DecCC II, 23; No. U-I-108/91 dated 13 July 1993, published Off. Gaz. RS, Nos. 28/91, 52/92 and 42/93, DecCC II, 67.

44 Franc Testen, *Tehnike odločanja Ustavnega sodišča v abstraktni presoji* (Techniques of Decision-Making by the Constitutional Court in Abstract Review), *Pravna praksa*, Vol. 1/99, p. 6.

45 Through the general duty of all State bodies to follow Constitutional-Court decisions; decisions No. U-85/94 dated 20 May 1994, published Off. Gaz. RS, No. 29/94, DecCC III, 57; decision No. U-I-94/94 dated 23 May 1995, published Off. Gaz. RS, No. 30/94, DecCC III, 59; compared also decision No. U-I-42/96 dated 9 October 1997, published Off. Gaz. RS, No. 68/97, DecCC VI, 123; decision No. U-I-57/97 dated 16 July 1998, published Off. Gaz. RS, No. 62/98, DecCC VII, 148.

To illustrate the wording of one such interpretative decision, let us give you the following example: The Referendum and People's Initiative Act (Off. Gaz. RS, No. 15/94) is not inconsistent with the Constitution if interpreted in a manner such that: - the referenda on all questions, to be subject to referendum, contained in all petitions or requests for the calling of a referendum regarding questions regulated by the same statute, are to be carried at the same time, if they were filed until the adoption of the act on the calling of the statutory referendum; and the National Assembly, in case the decision is reached at two or more referenda, is bound by the result of that referendum which has obtained the greatest percentage of votes in favor in the total number of the voters who voted in a single referendum (decision No. U-I-201/96 dated 14 June 1996, published Off. Gaz. RS, No. 34/96, DecCC V, 99).

is unconstitutional or illegal because a certain matter which it should regulate is not regulated or is regulated in a manner which makes it impossible to be abrogated either retroactively or prospectively, a declaratory judgment is adopted. The Legislature or the body that issued such an unconstitutional or illegal general act must abolish the ascertained unconstitutionality or illegality within a period set by the Constitutional Court (Art. 48 of the *Constitutional Court Act*). In this way the *Constitutional Court Act* offers other new possibilities (techniques, modes) of Constitutional Court decision-making, among which the Constitutional Court is free to choose when looking for an adequate form for its decision. Thus, for example, interpretative decisions are necessary and reasonable whenever in practice a disputed provision is understood and applied in several ways whereof certain ones are constitutionally acceptable and others are not. In such a case abrogation of the provision would not be reasonable because it would also affect those who have already applied the provision in conformity with the *Constitution*; accordingly, it is necessary to use the interpretative decision, through which the Constitutional Court preserves the disputed provision in the legal system in its undisputed extent or its meaning that conforms with the *Constitution*, at the same time indirectly eliminating from the legal system the use of the disputed provision if it is inconsistent with the *Constitution* (through the duty of all government bodies to act in compliance with any decision issued by the Constitutional Court).⁴⁶

Irrespective of the above, the Constitutional Court in its relation to the Legislature usually follows the principle of self-restraint: the interpretation of the provision

46 An indirect form of such power of the Constitutional Court was recognised by the *Constitution of 1974* in Arts. 410 and 417. Nevertheless, in relation to the Legislature, the former system did not allow the abrogation of statutes or more severe forms of the relationship between the Constitutional Court and the legislature. Under Art. 410 of the *Constitution of 1974* the Constitutional Court, however, had a certain "preventive function" of integrating current processes of coordination, complementing the further development of the legal system (along with consideration of the principle of the self-restraint of the Constitutional Court), hence the right and obligation to pursue the phenomena important for the implementation of constitutionality and legality, as well as to inform the Parliament of the situation and the problems in the respective domain and to provide it with the opinions and proposals for issuing, modifying or amending of statutes, as well as with other measures granting constitutionality and legality. It referred to the phenomena encountered by the Constitutional Court in the cases in which it had already adopted a specific decision, but thereby discovered that in practice the interpretation of the *Constitution*, the existing statutory regulations or the implementation of the *Constitution* or statute may involve certain ambiguities or gaps for which the statute or other legal measures should be modified or amended or replaced by an adequate measure. Under Art. 417 of the *Constitution of 1974*, this applied also to the cases when the Constitutional Court discovered that the competent body had not issued a rule for the implementation of provisions of the *Constitution*, statute or other rule, although it had been obliged to do so.

The appellative and the interpretative elements may be the contents of the same Constitutional Court's decision. For example: The Constitutional Court found that the arrangement whereby all unbuild building land for which there is valid spatial implementation plans or there has been no purchase by or transfer to the building land fund carried out shall be considered agricultural lands and forests under Art. 74 of the Cooperatives Act, Art. 5 of the Privatisation of Companies Act and Art. 14 of the Law on the Fund of Agricultural Lands and Forests of the Republic of Slovenia, is unconstitutional. With this, namely, the State also transfers to its own or to municipal ownership unbuild building land within arranged regions of settlements and within individual functionally rounded regions within settlements which shall be regulated by regional planning conditions under the Law on Arranging Settlements and Other Spatial Interventions. There is no difference in relation to the legal position or in relation to the transfer back to agricultural land, between this land and land which is arranged by spatial implementation plans. In removing the conflict with the Constitution found, the legislator should judge whether and to what extent unbuild building land outwith arranged regions of settlements, for which valid regional planning conditions exist, should in addition to this land be considered building land. (the appellative element of the decision). The provision of Art. 17(1) of the Law on the Fund of Agricultural Lands and Forests of the Republic of Slovenia can only be interpreted in compliance with the Constitution such that in the framework of legal regulation of the use and exploitation of agricultural lands and forests, the establishment of leasing or other contract relations or the granting of a concession is guaranteed to affected legal persons, and they are thus guaranteed conditions for further existence or the continued performance of their activities. (the interpretative element of the same decision). (Decision No. U-I-78/93 of 18 October 1995, Official Gazette RS, No. 18/93).

does not exceed its limits, *i.e.* there is no direct amendment or modification of the provision by the Constitutional Court⁴⁷.

The “official interpreter” of the Constitution is the constitution-framer; namely the Constitutional Court is not empowered to review norms of a constitutional character, but to interpret the Constitution in the procedure for deciding on cases falling within its jurisdiction⁴⁸.

5.2. Regulation in Force

Powers are determined by the Constitution or by law.

5.2.1. Powers, Classified by the Legal Basis

5.2.1.1. Powers Determined by the Constitution (Art. 160, Constitution⁴⁹)

In accordance with the Constitution, the Constitutional Court decides:

- on the conformity of laws with the Constitution;
- on the conformity of laws and other regulations with ratified treaties and with the general principles of international law;
- on the conformity of regulations with the Constitution and with laws;
- on the conformity of local community regulations with the Constitution and with laws;
- on the conformity of general acts issued for the exercise of public authority with the Constitution, laws, and regulations;
- on constitutional complaints stemming from the violation of human rights and fundamental freedoms by individual acts;
- on jurisdictional disputes between the state and local communities and among local communities themselves;
- on jurisdictional disputes between courts and other state authorities;
- on jurisdictional disputes between the National Assembly, the President of the Republic, and the Government;

47 Problems of Legislative Omission in Constitutional Jurisprudence, *Questionnaire The Constitutional Court of the Republic of Slovenia*, National report, (XIV Congress of the Conference of European Constitutional Courts), Vilnius, 2-7 June 2008 (http://www.lrkt.lj/Conference_R.ht).

48 The Constitutional Court is not empowered to review the Constitution or regulations of a constitutional character or statutory provisions which only entail the concretization of a norm of a constitutional character (Order No. U-I-32/93, dated 13/7-1993, OdIUS II, 68). The system of foreign currency deposits which the National Bank of Yugoslavia had guaranteed entailed the regulation of one of the issues of transition to the new constitutional system, which was also to be part of the substance of an agreement on legal succession and the assumption of obligations and claims of the former SFRY and the legal entities on its territory. Therefore, according to the assessment of the Constitutional Court, these norms have the character of norms of constitutional law, for the review of which the Constitutional Court is not empowered (Order No. U-I-332/94, dated 11/4-1996, OdIUS V, 42; see also Order No. U-I-184/96, dated 20/6-1996, OdIUS V, 104; Order No. U-I-384/96, dated 3/4-1997, OdIUS VI, 48).

The Constitutional Court is not empowered to interpret the Constitution in a special procedure, but interprets the constitutional provisions when and if this is necessary in the framework of deciding on cases which it is empowered to decide according to the Constitution and the law (Order No. U-I-251/97, dated 29/10-1997, OdIUS VI, 139).

49 See sArt 21, Constitutional Court Act, as well.

- on the unconstitutionality of the acts and activities of political parties;
- on appeals against a decision of the National Assembly on the confirmation of the election of deputies;
- on the accountability of the President of the Republic, the President of the Government, and ministers;
- on the conformity of a treaty with the Constitution in the process of ratifying the treaty.

5.2.1.2. Powers Determined by Law⁵⁰

In accordance with the law, the Constitutional Court:

- decides on appeals against a National Assembly decision on the election of Slovenian members to the European Parliament;
- decides on appeals against a National Council decision that the election of a candidate to the National Council is not confirmed;
- decides on the admissibility of a National Assembly decision not to call a referendum on the confirmation of constitutional amendments;
- decides on a request of the National Assembly to review the constitutionality of consequences which could occur due to the suspension of the implementation of a law or due to a law not being adopted;
- decides on a request of a municipal council to review the constitutionality and legality of a request to call a referendum;
- reviews the constitutionality of a National Assembly decision to dissolve a municipal council or dismiss a mayor.

5.2.2. Powers, Classified by the Contents

5.2.2.1. A Priori Review of Norms

In the process of the ratification of treaties the Constitutional Court furnishes opinions on their conformity with the Constitution (Art. 160(2), Constitution; Art. 21(2) and Art. 70, Constitutional Court Act). The National Assembly is bound by any such opinion.

5.2.2.2. A Posteriori Review of Norms

The Constitutional Court decides (Art. 160(1), Constitution; Arts. 22–49, Constitutional Court Act) whether:

- laws conform to the Constitution;
- laws and other regulations conform to ratified treaties and the general principles of international law;

⁵⁰ The Referendum and Public Initiative Act, Official Gazette RS, No. 15/94 et sub.; the National Council Act, Official Gazette RS, No. 44/92 et sub.; the Local Self-Government Act, Official Gazette RS, No. 72/93 et sub.; the Election of Slovenian members to the European parliament Act, Official Gazette Rs, No. 96/02 et sub.

- regulations conform to the Constitution and laws;
- local government regulations conform to the Constitution and laws;
- general acts issued for the exercise of public powers conform to the Constitution, laws, regulations, ratified treaties and the general principles of international law.

In these matters the Constitutional Court also decides on the constitutionality and legality of procedures under which these acts were adopted (Art. 21(3), Constitutional Court Act).

5.2.2.3. Other Powers

Pursuant to Art. 160(1) of the Constitution and Art. 21(1) of the Constitutional Court Act the Court's jurisdiction also includes:

- the adjudication of constitutional complaints stemming from violations of human rights and fundamental freedoms by individual acts (Art. 160(1), sixth bullet, Constitution; Arts. 50–60, Constitutional Court Act);
- the adjudication of jurisdictional disputes between the National Assembly, the President of the Republic and the government, the state and local communities, between local communities themselves, and between courts and other state bodies (Art. 160(1), seventh –ninth bullet, Constitution; Arts. 61 and 62, Constitutional Court Act);
- the adjudication of the unconstitutionality of acts and activities of political parties (Art. 160(1), tenth bullet, Constitution; Art. 68, Constitutional Court Act; Art. 17, Political Parties Act);
- the adjudication of charges against the President of the Republic for possible impeachment (Art. 109, Constitution; Arts. 63–67, Constitutional Court Act; Art. 23, Act on the Provision of Conditions for Holding the Office of the President of the Republic);
- the adjudication of charges against the prime minister or against any minister of state for possible impeachment (Art. 119, Constitution, Arts. 63–67, Constitutional Court Act);
- the adjudication of appeals against decisions of the National Assembly on confirmation of the election of deputies (Art. 82(3), Constitution; Art. 69, Constitutional Court Act; Art. 8(1), Deputies Act);
- the adjudication of appeals against National Council decisions on the confirmation of its members' mandate (Art. 50(3), National Council Act);
- the adjudication of appeals against National Assembly decisions on the confirmation of Slovenian members of the European Parliament (Art. 23(1), Election of Slovenian Members to the European Parliament Act);
- reviewing the constitutionality and legality of National Assembly decisions finding that conditions for the establishment of a municipality or a change in its territory have not been met (Art. 14(a), Local Self-Government Act);

- requests from municipalities or regions to review the constitutionality and legality of legal acts violating the constitutional position and rights of local communities (Art. 91, Local Self-Government Act; Art. 23(1), (9), Constitutional Court Act);
- decides on the admissibility of a National Assembly decision not to call a referendum on the confirmation of constitutional amendments (Art. 5č, Referendum and People's Initiative Act);
- decides on a request of the National Assembly to review the constitutionality of consequences which could occur due to the suspension of the implementation of a law or due to a law not being adopted (Art. 21, Referendum and People's Initiative Act);
- decides on a request of a municipal council to review the constitutionality and legality of a request to call a referendum (Art. 47a(2), Local Self-Government Act);
- reviews the constitutionality of a National Assembly decision to dissolve a municipal council or dismiss a mayor (Art. 90c(4), Local self-Government Act).

6. Applicants Before the Constitutional Court

6.1. 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 – dismissal 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 cases⁵¹.

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 encroachment 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 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

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

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 petition 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 interest: to restrict the access to the Constitutional Court. Such restrictive aim has been in the own nature of the legal interest. Therefore, the legal interest means a barrier due to which the petition can not be considered as a popular complaint (*actio popularis*). Bearing in mind the increasing overburdening of the Constitutional Court by (individual) petitions and parallelly 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 Court⁵².

6.2. Ordinary Courts as Applicants

6.2.1. 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 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

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

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 apply⁵³.

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) court⁵⁴. 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

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

54 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.

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.

6.2.2. 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.⁵⁵ 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.⁵⁶

55 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.

56 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.

6.2.3. 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.”

6.2.4. 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*).

6.2.5. Parties in the Procedure

Parties to Constitutional-Court proceedings are represented by a counsel if they appoint one. According to Art. 24.a (abstract review) and Art. 50(3) (constitutional complaint) of the Constitutional Court Act, an authorized person must have a special authorization to represent a party in proceedings before the Constitutional Court.

Additionally, pursuant to the Constitutional Court Act, the Constitutional Court shall send to the body which issued the respective general act or to the public authority which issued the general act (the opposing party) a copy of the request or popular complaint, including a copy of its ruling on the acceptance of popular complaint, and determine a suitable time-limit for the answer or for an additional answer if an answer was submitted in the proceedings for examining the popular complaint (Art. 28(1), *Constitutional Court Act*). The Constitutional Court may obtain necessary explanations from other participants in the proceedings and from State bodies, local community bodies and public corporations; it may obtain expert opinions from professionals, professional and other organizations; it may question witnesses and experts and take other evidence or obtain particular evidence from other courts or other bodies (Art. 28(2), *Constitutional Court Act*).

There is no special counsel for the prosecution with the Constitutional Court.

7. The Nature and Effects of Decisions

Decisions of the Constitutional Court are legally binding (Art. 1 (3), Constitutional Court Act).

In the framework of abstract review Court decisions have erga omnes effects, which means that they are binding on everybody regardless of their being parties to a particular constitutional controversy. Constitutional complaint decisions (Arts. 59 and 60, Constitutional Court Act) have, on the other hand, only inter partes effects, meaning that they are binding only on the parties of a constitutional dispute. However, they may have erga omnes effects provided that the requirements determined in Art. 59 (2) of the Constitutional Court Act are fulfilled (If the Constitutional Court establishes that an individual act so retroactively abrogated was based on an unconstitutional general act or general act issued by public authority, it may abrogate such act with retroactive or prospective effect by applying the provisions on the review of the constitutionality and legality of general acts).

7.1. Type of Decision

The list of possible Court decisions, with the general type of decision, is as follows:

- dismissal of proceedings due to the withdrawal of a petition during preliminary proceedings, order (Art. 6, *Constitutional Court Act*);
- interpretative decision (Art. 21, *Constitutional Court Act*);
- determination that a disputed regulation or general act or their provisions are not in conformity with the Constitution (or statute), decision (Art. 21, *Constitutional Court Act*);
- rejection of a request, due to a non-entitled proponent, order (Art. 25 (1), *Constitutional Court Act*);
- rejection of a petition, lack of jurisdiction to review an act which is not a regulation/general act, order (Art. 25(3), *Constitutional Court Act*);
- rejection of a petition, lack of legal interest, order (Art. 25(3), *Constitutional Court Act*);
- rejection of a request and/or petition, lack of fulfilled procedural prerequisite, order (Art. 25, *Constitutional Court Act*);
- refusal of a petition as unfounded, order (Art. 26 (2), *Constitutional Court Act*);
- refusal of a petition for repeated review of the same case, lack of new reasons for a repeated review, order (Art. 26 (2), *Constitutional Court Act*);
- dismissal of proceedings due to an incomplete application, order (Art. 28 (3), *Constitutional Court Act*);

- refusal of a request for exclusion of a constitutional judge, order (Art. 33, *Constitutional Court Act*);
- temporary order (stay of implementation of regulation and/or general act), order (Art. 39, *Constitutional Court Act*);
- prohibition of the application of an unpublished regulation and/or general act, decision (Art. 40, *Constitutional Court Act*);
- determination of the mode of execution of a Constitutional Court decision, decision (Art. 40 (2), *Constitutional Court Act*);
- abrogation of a statute as a whole, with immediate effect, decision (Arts. 43 and 44, *Constitutional Court Act*);
- abrogation of a statute as a whole, with a suspensive time limit, decision (Arts. 43 and 44, *Constitutional Court Act*);
- partial abrogation of a statute, with immediate effect, decision (Arts. 43 and 44, *Constitutional Court Act*);
- partial abrogation of a statute, with a suspensive time limit, decision (Arts. 43 and 44 of the *Constitutional Court Act*);
- annulment of other regulations or general acts, decision (Art. 45, *Constitutional Court Act*);
- abrogation of other regulations or general acts, decision (Art. 45, *Constitutional Court Act*);
- declaratory decision, due to the cessation of the validity of a disputed norm before proceedings (Art. 47, *Constitutional Court Act*);
- declaratory decision due to the cessation of the validity of a disputed regulation or general act during the proceedings (Art. 47(2), *Constitutional Court Act*);
- declaratory decision, time-limit determined for the legislature for a reconciliation (Art. 48, *Constitutional Court Act*);
- rejection of a constitutional complaint, due to the disputed act not being an individual act, order (Art. 55.b(1)(1), *Constitutional Court Act*);
- rejection of a constitutional complaint, due the complaint not having been lodged by an entitled person, order (Art. 55.b(1)(6), *Constitutional Court Act*);
- previous non-exhaustion of all legal remedies, rejection of a constitutional complaint, order (Art. 55.b(1)(5), *Constitutional Court Act*);
- exceptional deciding on a constitutional complaint before the exhaustion of extraordinary legal remedies, order/decision (Art. 51 (2) , *Constitutional Court Act*);
- time limit for lodging a constitutional complaint, rejection due to exceeding a time limit, order (Art. 55.b(1)(4), *Constitutional Court Act*);
- exceptional deciding on a constitutional complaint lodged after the expiry of a statutory time limit, order/decision (Art. 52 (3), *Constitutional Court Act*);

- rejection of a constitutional complaint due to incomplete application, order (Art. 55.b(1)(7), *Constitutional Court Act*);
- rejection of a constitutional complaint which is not admissible (in small-claims disputes, a decision on the costs of proceedings, trespass to property, minor offence cases etc.)(Art.55.b(1)(3), *Constitutional Court Act*);
- (non)acceptance of a constitutional complaint, order (Art. 55.b(2), *Constitutional Court Act*);
- temporary order (stay of the implementation of an individual act), constitutional complaint, order (Art. 58, *Constitutional Court Act*);
- refusal of a constitutional complaint as unfounded, decision (Art. 59 (1), *Constitutional Court Act*);
- constitutional complaint, annulment of an individual act and the return of the case to the empowered body, plenary decision (Art. 59 (1), *Constitutional Court Act*);
- constitutional complaint, abrogation of an individual act and the return of the case to the empowered body, plenary decision (Art. 59 (1), *Constitutional Court Act*);
- constitutional complaint, annulment of an individual act and the return of the case to the empowered body, decision issued by chamber (Art. 59(3), *Constitutional Court Act*);
- constitutional complaint, abrogation of an individual act and the return of the case to the empowered body, decision issued by chamber (Art. 59(3), *Constitutional Court Act*);
- constitutional complaint, annulment of a regulation or general act, decision; abrogation of regulation or general act, decision; declaratory decision (Art. 161 (2), *Constitution*; Art. 59 (2), *Constitutional Court Act*);
- constitutional complaint, final decision on a contested human right or freedom, decision (Art. 60 (1), *Constitutional Court Act*);
- execution of a Constitutional Court decision on a contested human right or freedom, decision (Art. 60 (2), *Constitutional Court Act*);
- determination of an empowered body, decision (Art. 61 (4), *Constitutional Court Act*);
- temporary prohibition from performing the president's office, decision (Art. 64 (3), *Constitutional Court Act*);
- finding a proposal for impeachment to be unfounded, acquittal, decision (Art. 65 (1), *Constitutional Court Act*);
- decision on the grounds for impeachment / decision on the cessation of office, decision (Art. 65 (2), *Constitutional Court Act*);
- refusal of a petition and/or request, order (Art. 68, *Constitutional Court Act*);

- annulment of an unconstitutional political party act, decision (Art. 68 (3), *Constitutional Court Act*);
- prohibition of a political party activity, decision (Art. 68 (3), *Constitutional Court Act*);
- ordering the deletion of a political party from the register of parties, decision (Art. 68 (4), *Constitutional Court Act*);
- annulment of a decision by the National Assembly and deciding on a deputy's election, decision (Art. 69 (3), *Constitutional Court Act*; Art. 8 (1), *Deputies Act*, Official Gazette RS, No. 48/92);
- annulment of a decision by the National Council and deciding on a National Council member's election, decision (Art. 50 (3), *National Council Act*, Official Gazette RS, No. 44/92);
- obligatory opinion on the conformity of an international treaty with the *Constitution*, opinion (Art. 160 (2), *Constitution*; Art. 70, *Constitutional Court Act*).
- annulment of a decision by the National Assembly and deciding on a member of the European Parliament election, decision, (Art. 23(1), *Election of Slovenian Members to the European Parliament Act*);
- annulment of a decision by the National Assembly on the conditions for the establishment of a municipality or a change in its territory, decision (Art. 14.a, *Local Self-Government Act*);
- annulment of a legal act violating the constitutional position and rights of a local community, decision, (Art. 91, *Local Self-Government Act*, Art. 23(1)(9), *Constitutional Court Act*);
- constitutionality of consequences which could occur due to the suspension of the implementation of a law or due to a law not being adopted, declaratory decision (Art. 21, *Referendum and People's Initiative Act*);
- constitutionality and legality of a request to call a referendum, declaratory decision (Art. 47.a(2), *Local Self-Government Act*);
- annulment of a National Assembly decision not to call a referendum on the confirmation of constitutional amendments, decision, (Art. 5.č, *Referendum and People's Initiative Act*);
- annulment of a National Assembly decision to dissolve a municipal council or dismiss a mayor, decision, (Art. 90.c(4), *Local Self-Government Act*).

7.2. Effects - Consequences

In the framework of constitutional-complaint proceedings, pursuant to Art. 59 of the Constitutional Court Act,

(1) the Constitutional Court shall either dismiss a constitutional complaint as unfounded or accept it partly or completely abrogating, retroactively (i.e. *ab initio*, *ex tunc effect*) or prospectively (*ex nunc effect*), the disputed act, and returning the case to the competent body (for re-examination of the case).

(2) If the Court establishes that an individual act so retroactively (*ab initio*) abrogated was based on an unconstitutional general act or general act issued by public authority, it may abrogate such act with retroactive or prospective effect by applying the provisions on the constitutional review of general acts.

In such a case, according to Art. 43 of the Constitutional Court Act, when the Court completely or partly abrogates a statute which does not conform with the Constitution, such decision shall come into effect one day after the publication of the decision or on the expiry of the period determined by the Constitutional Court (the so-called suspensive time-limit).

Is the authority of the rulings of the constitutional court always respected? Does it sometimes meet with opposition from institutions or courts? Do the other courts sometimes experience difficulties in implementing the rulings of the constitutional court?

Formally, decisions of the Constitutional Court are legally binding (Art. 1 (3), Constitutional Court Act). Furthermore, the Republic of Slovenia is constitutionally declared to be a State governed by the Rule of Law (Art. 2, Constitution), where the principle of the separation of legislative, executive and judicial powers has been established (Art. 3(2), Constitution) and where human rights and fundamental freedoms are respected as well (Art. 5(1), Constitution). The essence of the principle of the separation of powers is in its basic function to protect human liberty and dignity from the State. The democratic efficiency of the separation of powers depends primarily on the quality of the relations of mutual supervision, limitation as well as also on cooperation on the common, balanced and efficient reaching of national goals. The principle of the separation of powers does not allow the absolute autonomy of particular branches of powers, but it establishes a mutual dependence among the branches of powers and assures that any one may exercise its functions, which are concerning their nature legislative, executive and judicial functions. The mentioned point of view of the principle of the separation of powers has been forgotten quite often. The basic condition which allows that the institute of checks and balances as a main mode of power of the principle of the separation of powers can operate, is the fact that any of the branches of powers must execute its powers and shoulders the responsibility for the non-execution of such powers. It is not possible to relieve them of this responsibility. Concerning these mentioned issues, the Constitutional Court has been calling attention to the fact that some decisions decided by the Constitutional Court have not been respected.

In some decisions the Constitutional Court declared the unconstitutionality of certain statutory provision(s) and, on the basis of Art. 48 of the Constitutional Court Act, determined a time limit for the legislature to eliminate the respective unconstitutional provision(s). In some cases the legislature responded to such decision, however not always before the respective time limit expired. There are some other cases which caused troubles when the time limit expired but the legislature had not fulfilled its obligation (in some cases even after many years). Concerning such situations, the Constitutional Court often declared that such omissions of the legislature signify actions against the principle of the Rule of Law (Art. 2, Constitution) and the principle of the separation of powers (Art. 3(2), Constitution). Furthermore, the Court stated that any branch of power must exercise its powers strictly. In addition, no branch can avoid its responsibility for the fulfillment of such duties. It is clear that the legislature has been empowered to regulate a particular matter by a law, however also the government is responsible for the current situation. The government has namely been exercising the role of proponent of the regulation of relations between subjects of law. The Constitutional Court's decisions are binding for the government too. Therefore an essential part of its responsibility has been to propose on time to the National Assembly a statutory regulation which should eliminate the unconstitutionality declared by the Constitutional Court's decision.

Legal consequences of the Constitutional Court's abstract review decisions are stipulated in Arts. 43 to 48 of the Constitutional Court Act. The Constitutional Court may in whole or in part abrogate a law which is not in conformity with the Constitution. Such abrogation takes effect the day following the publication of the decision on the abrogation, or upon the expiry of a period of time determined by the Constitutional Court (Art. 43, Constitutional Court Act). The Constitutional Court annuls or abrogates regulations or general acts issued for the exercise of public authority that are unconstitutional or unlawful. The Constitutional Court annuls such acts when it determines that it is necessary to remedy harmful consequences arising from such unconstitutionality or unlawfulness. Annulment has retroactive effect. In other instances, the Constitutional Court abrogates such acts. Abrogation takes effect the day following the publication of the Constitutional Court decision on the abrogation, or upon the expiry of a period of time determined by the Constitutional Court.

The Constitutional Court, exercising the abstract review, deems a law, other regulation, or general act issued for the exercise of public authority unconstitutional or unlawful as it does not regulate a certain issue which it should regulate (i.e. legislative omission) or it regulates such in a manner which does not enable annulment or abrogation, a declaratory decision is adopted on such (Art. 48 of the Constitutional Court Act). If necessary, the Constitutional Court determines which authority must implement the decision and in what manner (Art. 48(2), Constitutional Court Act). The legislature (or authority which issued such

unconstitutional or unlawful regulation or general act issued for the exercise of public authority) must remedy the established unconstitutionality or unlawfulness within a period of time determined by the Constitutional Court. This legislature's duty to fill a gap in the law follows from Art. 2 (the principle of a state governed by the rule of law) and Art. 3(2) of the Constitution (the principle of the separation of powers).

If the legislature does not respect a time-limit which the Constitutional Court determined on the basis of Art. 48 of the Constitutional Court Act, the Constitutional Court may in the event of the repeated review of such regulation establish that the legislature violates Arts. 2 and 3(2) of the Constitution. There is also a possibility of an "intensification of sanctions"⁵⁷.

Concerning the Constitutional Court powers introduced by the 1991 Constitution, besides deciding upon constitutional complaints regarding violations of human rights, the most important new element is that the Slovenian Constitutional Court is empowered to abrogate (*ex nunc*) a statute directly. Due to the Principle of the Unity of Powers and the Supremacy of the Parliament, the

57 The case in which the Constitutional Court in a repeated review intensified the sanction:

The Constitutional Court decided by Decision No. U-I-17/94, of 13/10-1994, Official Gazette RS, No. 74/94 and OdIUS III, 113, that Art. 51 of the Compulsory Composition, Bankruptcy and Liquidation Act, which as a method of financial reorganisation of a company also determined the reduction of the number of employees employed with a debtor, is inconsistent with the Constitution because the legislature did not regulate the rights of employees whose employment is terminated on the basis of this provision with a special law in compliance with the second paragraph of Art. 8 of the same act. This decision required that the legislature adopt such a law within six months of its publication in the Official Gazette RS. In the reasoning of the decision it drew attention to the fact that the rights of redundant employees of insolvent companies must be regulated retroactively, from the day of the implementation of the Compulsory Composition, Bankruptcy and Liquidation Act. The time-limit for remedying the unconstitutionality expired on 31 May 1995.

The new petition of 28 June 1995 disputing the same legal provision alleged that the legislature did not respect the Constitutional Court decision. The applicant therefore again alleged the violation of the principle of a state governed by the rule of law (Art. 2 of the Constitution). In addition, he alleged that by not respecting the Constitutional Court decision the legislature undermined the authority of the Constitutional Court. He proposed that Art. 51 of the Compulsory Composition, Bankruptcy, and Liquidation Act be annulled.

Art. 161(3) of the Constitution determines that the legal consequences of Constitutional Court decisions be regulated by law. In addition, Art. 48(2) of the Constitutional Court Act determines that the legislature must remedy the established unconstitutionality within a period of time determined by the Constitutional Court. In the discussed case, the legislature did not respect the statutory provision based on the constitutional provision, although it is one of the fundamental rules of a state governed by the rule of law (Art. 2, Constitution) that legality must be respected first by the legislature itself.

Non respecting such obligation, the legislature thereby gravely violated the principle of a state governed by the rule of law, as well as the principle of the separation of power (Art. 3(2), Constitution).

Respecting the principle of the separation of powers, namely, entails not only that none of the branches of power interferes with the competencies of another branch, but also that none of them neglects activities which they are obliged to perform within their sphere of activities - especially when such an obligation has been imposed by a judicial decision. The Constitutional Court, in compliance with its constitutional function, is all the more obliged to draw attention to such, in view of the fact that the Constitution, understandably, does not envisage such violations of fundamental rules for exercising power in compliance with the principles of a state governed by the rule of law, and thus also no systemic measures against it.

The Constitutional Court, upon reviewing a new petition, decided that the disputed Art. 51 of the Compulsory Composition, Bankruptcy and Liquidation Act on the termination of employment as a measure for financial reorganisation cannot be applied until the statutory provisions on the special rights of employees enter into force, as determined in the second paragraph of Art. 8 of the same act. Such decision was rendered on the basis of the *mutatis mutandis* interpretation of the first sentence of Art. 43 of the Constitutional Court Act by applying the interpretation *a maiori ad minus*: according to this provision the Constitutional Court may annul a law, it may, as this is a less grave interference than annulment, also suspend (temporarily excludes it from application) in cases as in the present case of endangered constitutional values that cannot be protected in a usual manner. In the present case, the Constitutional Court chose such exceptional manner of deciding because according to the constitutionally established unconstitutionality of a law, the legislature did not do anything to remedy the established unconstitutionality of a statutory regulation which interferes with important constitutional values (especially the principles of a state governed by the rule of law and a social state), and the annulment of a deficient statutory provision is not possible or does not make any sense. Also suspension of a disputable statutory provision will have certain negative consequences (temporary impossibility of the use of one of the methods of compulsory composition), however, respecting the principle of proportionality, the Constitutional Court nevertheless decided on it because in its judgement it is the mildest means by which it can be achieved that constitutional values are respected regarding the persons affected by the established unconstitutional statutory regulation, and at the same time respecting the principle of the separation of powers (Decision, No. U-I-114/95, of 7/12-1995, Official Gazette RS, No. 8/95 and OdIUS IV, 20).

former function of the Constitutional Court focused on assessing the unconstitutionality of a statute. This changed into an active relationship not only involving the abrogation of statutes, but also offering guidance to the legislature for the creation of Law. However, the Constitutional Court agreed to allow the legislature the opportunity to review disputable regulations within a due period of time, following the guidelines of the Constitutional Court in a specific decision.

In this way the Court assumed the role of a “negative legislature”. In a period of transition the legislature is not always able to follow developments nor to impose standards for all shades of the legal system and its institutions. The so-called interpretive decisions issued by the Constitutional Court and the appellate decisions include certain instructions from the Constitutional Court to the Legislature on how to settle certain questions or specific issues. However, in compliance with the Principle of Judicial Self-Restraint, a clear limit has been imposed on the Slovenian Constitutional Court by the Court itself, which indicates that the Constitutional Court has already been creating legal rule (usually reserved for the Legislature). On the other hand, there is the question whether the Constitutional Court actually creates the law, because it also involves the review of legislative activity. In any case, the Legislature cannot avoid the existence of contemporary Slovenian Constitutional Case-Law in its activity.

As a concrete effect of the Constitutional Court decision, any affected person is entitled, based on a Constitutional Court decision regarding the constitutional review of general acts, to request an amendment or retroactive abrogation (*ex tunc*) of an individual act or the elimination of detrimental consequences or even claim damages within three months from the day of the publication of a Constitutional Court decision (Art. 46, Constitutional Court Act).

Concerning effects of the constitutional complaint procedure the Slovenian system allows even a final decision on a contested human right or freedom based on a constitutional complaint (entailing the replacement of the disputed individual act by the Court decision), in the case of a retroactive abrogation (*ex tunc*) of an individual act, if such proceedings is necessary in order to eliminate consequences that have already occurred on the basis of the abrogated individual act, or if such is the nature of the constitutional right or freedom, and if a decision can be reached on the basis of the information in the document (Art. 60, Constitutional Court Act). At first the above power of the Constitutional Court gave rise to a discussion of whether in this case the Constitutional Court represented an instance above the ordinary courts (especially above the Supreme Court which is the highest court in the State, Art. 127(1), Constitution). Present constitutional case-law, however, proves that the Constitutional Court is limited to the evaluation of pure constitutional issues, *e.g.* to the strict evaluation of breaches of certain constitutional rights (see Art. 1(1), Constitutional Court Act).

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

If the Constitutional Court suspends the implementation of a regulation or general act issued for the exercise of public authority, it may at the same time decide in what manner the decision is to be implemented.

If necessary, the Court specifies which body must implement its decisions (regarding the constitutional review of general acts), and in what manner (Art. 40(2), Constitutional Court Act). The Constitutional Court may order the temporary suspension of the implementation of individual acts, based on a general act abrogated by the Court decision.

The replacement of a disputed individual act by a Court decision is implemented by the body empowered for the implementation of the individual act retroactively abrogated (*ex tunc*) by the Constitutional Court and replaced by the decision of the same. If there is no such empowered body according to the current regulations, the Constitutional Court appoints one (Art. 60(2), Constitutional Court Act).

7.4. The Rehearing of Proceedings Before the Constitutional Court

The decisions of the Constitutional Court are binding (*e.g.* Art. 1 (3), *Constitutional Court Act*) and executable (Art. 40 (2), *Constitutional Court Act*). The rules concerning the proceedings before the Constitutional Court do not include any exceptional legal remedy against a Constitutional Court decision, which also includes any rehearing or, in general, repetition of proceedings concerning an already adjudicated constitutional dispute.

The problem of rehearing proceedings was discussed in constitutional theory and practice in the eighties⁵⁸. The discussions looked for inspiration in foreign systems, however not in the American system, which includes accessory constitutional review in ordinary cases with an *in inter partes* judgment effect of the judgment, but first of all in the Austrian and Italian systems⁵⁹; even though also in these systems the rehearing of proceedings is excluded. Therefore, there were some proposals⁶⁰ concerning the subsidiary implementation of rules of other proceedings for the rehearing of proceedings before the Constitutional Court following the example of the regulation governing re-hearings in administrative disputes: i.e. on the grounds of a worse violation occurring during the proceedings, or on the grounds of a particular criminal offence, when a party uncovers new facts or they have an opportunity to be able to submit new evidence with which a case may

58 Globevnik, *Problem obnove v ustavnem sporu*, Pravniki, No. 4-6/82, p. 82.

59 Globevnik, *Problem obnove*, p. 82.

60 Globevnik, *Problem obnove*, p. 83.

have been adjudicated more advantageously for the party if such facts or evidence had been submitted in the previous proceedings. First of all, a rehearing in a constitutional dispute (taking into consideration its particularities, because the object of adjudication in such a dispute is a normative act) would be reasonable if after the issuance of the Constitutional Court decision, new facts or evidence were uncovered which, if they had been known and applied previously, would have caused a different Constitutional Court decision. The rehearing of proceedings would be reasonable in all kinds of Constitutional Court decisions, except when the Constitutional Court by its previous decision has abrogated or annulled a particular normative act⁶¹. If the re-hearing could be implemented in the case of such a normative act, and the previous Constitutional Court decision on an abrogation or annulment were abolished, the Constitutional Court would without competency, in fact, enter into the normative function of the legislature or other author of normative acts which determine the legal order in a particular field.

Concerning the conditions or reasons for rehearing, the same reasons may be applied as for the rehearing of an administrative dispute. In view of what has been explained above, in a constitutional dispute it would not be reasonable in a rehearing to abolish a previous Constitutional Court decision and to replace such a decision with a new one on the grounds that in the confrontation of a normative act with a certain constitutional or statutory provision, such a provision had not been correctly interpreted and was mistakenly legally implemented. However, this does not mean that the Constitutional Court may not even without a formally held rehearing proceeding following a request of a party in the same case, and in a special proceeding, revise the Court's previous decision. In the constitutional case-law of the former Yugoslavia, in some cases a case before the Constitutional Court was reheard, the previous Constitutional Court decision was overturned and replaced by a new one⁶². The rehearing of a Constitutional Court case is not a rehearing in the classical judicial sense (despite the subsidiary implementation of rules concerning judicial proceedings). As a matter of fact, it is a special kind of rehearing of Constitutional Court proceedings that may result in the overturning of the previous Constitutional Court decision and its replacement with a different new decision.

Properly speaking, the Constitutional Court is internally procedurally bound by the text of its decision and/or with the "irrevocability" of the decision⁶³. Such irrevocability means that the Constitutional Court may not abrogate or change a decision which has already been issued. "Any promulgated or issued decision is no longer in the disposition of the Constitutional Court"⁶⁴.

61 Globevnik, *Problem obnove*, p. 84.

62 Globevnik, *Problem obnove*, p. 85.

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

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

Consequently, the decisions of the Constitutional Court are indisputable for the parties. However, as an exception it is necessary to consider the European Convention for the Protection of Human Rights and Fundamental Freedoms, which gives individuals the right to the so-called individual complaint against a national final (also Constitutional Court) decision.⁶⁵ Because there is no (national) legal remedy against Constitutional Court decisions, they become formally final when issued.

7.5. The Publication of Constitutional Court Decisions

Decisions and certain resolutions (if the Constitutional Court so chooses) are published in the Official State Gazette, local official gazettes and/or official gazettes of territorial units and in the official journal in which the respective general act had been published (in Slovenian) (Art. 42, Constitutional Court Act; Arts. 69, 73 and 89, Rules of Procedure).

One day after the publication of decisions or on the expiry of the period specified by the Constitutional Court, abrogation decisions (*ex nunc*) come into effect (Art. 43, Constitutional Court Act). A general act abrogated (*ex nunc*) by the Constitutional Court does not apply to relationships that had arisen before the day such abrogation came into effect, if by that day such relationship had not been entered into (Art. 44, Constitutional Court Act).

Within three months from the day of the publication of the Constitutional Court decision, any affected person is entitled, based on a Constitutional Court decision, to request an amendment or retroactive abrogation (*ex tunc*) of an individual act or the elimination of detrimental consequences or even claim damages (Art. 46, Constitutional Court Act).

65 The individual complaint under Art. 34 of the Convention is an extraordinary legal remedy similar to the constitutional complaint (Stackelberg, 87). The Court deals with the case only if all national legal remedies have already been exhausted in accordance with generally accepted principles of international law (Art. 35, Convention). Furthermore, the constitutional complaint before the Constitutional Court (if it is introduced in a particular national legal system), which is the sole subsidiary legal remedy, follows the exhaustion of legal remedies; this is confirmed also by permanent European constitutional case-law (Stackelberg, 93; Matscher, *Der Rechtsmittelbegriff*, 266; Nedjati, 16 in 18, Klecatsky, 544; Schmalz, 132). The individual has to exhaust, in a particular case, all legal remedies allowed by the national legal order, including the constitutional complaint (Bleckmann, 45). Sources:

1. dr. Bleckmann Albert, *Staatsrecht II - Die Grundrechte*, 3. Auflage, Koeln, 1989, p. 29-46
2. Klecatsky-Oehlinger, *Gerichtbarkeit des oeffentlichen Rechts*, Manz Verlag, Wien, 1984, p. 517, 540.
3. Matscher dr. Franz, *Der Rechtsmittelbegriff der EMRK*, Festschrift fuer Winifried Kralik, Wien, 1968, p. 257
4. Nedjati Zaim M., *Human Rights under the European Convention*, North-Holland Publishing Company, Amsterdam-New York-Oxford, 1978, p. 13-20
5. Schmalz Dieter, *Grundrechte*, 2. Auflage 1991, Nomos Verlagsgesellschaft, Baden-Baden, p. 25-26, 131-133
6. Von Stackelberg Curt Freiherr sen. & jun., *Das Verfahren der deutschen Verfassungsbeschwerde und der europaeischen Menschenrechtsbeschwerde*, Koeln, 1988, p. 85.

8. The Constitutional Complaint⁶⁶

8.1. 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 system⁶⁷. 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.

66 Kristan, Ivan, *Ustavno sodstvo in ustavna pritožba, Zbornik znanstvenih razprav*, 1992, LII, 181-207. Jambrek, Peter, *Slovensko Ustavno sodišče pod okriljem evropskih standardov in mehanizmov za varovanje človekovih pravic, Temeljne pravice*, Ljubljana, Cankarjeva založba, 1997, 330-362. Kranjc, Janez, *Ustavna pritožba kot institut varstva človekovih pravic, Temeljne pravice*, Ljubljana, Cankarjeva založba, 1997, 362-406.

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

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

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 implementation⁶⁸.

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

68 Citation from Pavčnik, Marjan, *Verfassungsauslegung am Beispiel der Grundrechte in der neuen slowenischen Verfassung*, *WGO Monatshefte fuer Osteuropaisches Recht*, 35th yearbook 1993, Volume 6, 345-356. See also Pavčnik, Marjan, *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.

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.

8.2. Basic⁶⁹

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

69 MAVČIČ, Arne, PAVČNIK, Marijan. Temeljne pravice in razlagalna vrednost ustave. *Pravnik (Ljublj.)*, 1992, letn. 47, at. 6/8, str. 271-290. [COBISS.SI-ID 13649]

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some of the constitutional review systems of Eastern Europe; further, it is strictly preserved in Croatia and in Slovenia⁷⁰, 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 review⁷¹. In some systems the individual's access to constitutional courts has become so widespread that it already threatens the functional capacity of the Constitutional Court⁷². 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, effi-

with the support of the European Commission and the Office for Democratic Institutions and Human Rights of the OSCE, (Science and technique of democracy, no. 15). [Strasbourg]: Council of Europe Publishing, 1996, str. 204-231. [COBISS.SI-ID 74239]

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70 Art. 15(2) of the *Croatian Constitutional Court Act* or in Arts. 39, 58 and 61(4) of the *Slovenian Constitutional Court Act*.

71 Greece, Italy, Switzerland, the USA.

72 Germany.

ciency decreases. Nevertheless, citizens should have many opportunities to apply for the protection of their constitutional rights.⁷³

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

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

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

⁷³ 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.

procedure. As a rule, the complaint is decided at an *in camera* session, and only exceptionally at a public hearing.

The constitutional complaint is not a legal remedy which would empower the Constitutional Court to consider merely the correctness and legality of legally valid court decisions. As mentioned before, this would turn the Constitutional Court into the court of last instance, which is not its constitutional role. The Constitutional Court is only authorized to assess whether the courts have, by their decisions, violated human rights and fundamental freedoms. The (panel of the) Constitutional Court dismisses a complaint if it is too late (60 days), if the complainant has not exhausted all ordinary and extraordinary legal remedies, if the complainant lacks standing (legal interest) or if the constitutional complaint is not complete (inadmissibility). The (panel of the) Constitutional Court does not deal with the constitutional complaint at all (according to the wording of Art. 55(2) of the Constitutional Court Act the Constitutional Court *shall not accept a constitutional complaint*) if there is obviously no violation of human rights and basic freedoms (manifest illfoundedness) or, if the decision cannot be expected to provide a solution to an important legal question and if the violation of human rights or basic freedoms did not have any important consequences for the complainant (triviality). Concept of *triviality* is somehow strange to European legal culture. Some aspects of the concept of *certiorari*, applied by the US Supreme court may be found in it. The important characteristic of this institution in Slovenian legal system is that also the decision of non-acceptance on this ground has to give reasons. This is why the Slovenian Constitutional Court used this ground not to accept the constitutional complaint only in very few occasions. It is much easier and convincing to substantiate manifest illfoundedness than triviality of the alleged breaches of constitutionally guaranteed human rights. Though, one of the main problems the Constitutional Court is facing is how to cope with the permanently increasing caseload, both, in the field of constitutional complaints as well as in the field of review of statutes and regulations. Serious proposals have been made by legal experts and some former judges of the Court to examine the possibility of a new procedure, which would enable the Court to admit cases completely at its choice, bound only by internal criteria and without having to give reasons on admissibility or illfoundedness. My opinion is that to introduce such system would mean a *tectonic* change in public perception about the position and role of the Constitutional Court in a legal system. I am afraid that the society and the Court itself are not - and will not be in a near future - prepared for such turn.

When deciding about a constitutional complaint the Constitutional Court exclusively limits itself to examining whether the challenged decision is based on some legal standpoint that is unacceptable from the point of view of protection of human rights or whether it is arbitrary. In all three legal sections (civil, criminal, administrative) decisions, where breach of procedural guarantees were found, prevail. Among the constitutional rights of procedural nature the Constitutional

Court has so far, by its decisions, protected equality in the protection of rights (Art. 22, Constitution), due process of the law (Art. 23, Constitution) the right to legal remedies (Art. 25, Constitution) and (special) legal guarantees in criminal proceedings (Art. 29, Constitution). Among violations in the field of substantive law the complainants have so far successfully pleaded for the protection of personal liberty - related to the arrest and preventive detention (Art. 19), the right to property (Art. 33, Constitution), the right to privacy (Art. 35, Constitution), the inviolability of dwellings (Art. 36, Constitution) the freedom of expression (Art. 39, Constitution) and the right to social security (Art. 50, Constitution).

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

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

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

Generally it can be said that, after some initial hesitation, the courts in Slovenia have accepted the standpoints and standards expressed in the decisions of the Constitutional Court in constitutional complaints, and have brought their practice in agreement with them. There were no cases of overt opposition to any decision of the Court. Nevertheless in a very small number of cases the Court used its *reformatory* power and brought the final decision by amending the Supreme Court

decision to enable the aggrieved party to be mended for the deprivation of a human right swiftly and efficiently. The Constitutional Court adopted this possibility five times (all of them in identical cases - related to military pensions) in 1998.

The Constitution guarantees each individual equal human rights and fundamental freedoms (Art. 14(1), Constitution). It ensures the rights and freedoms that form the basis of a society and a state and that constitute the baseline or starting point for all other legislation (Art.5(1), Constitution).

The Constitution distinguishes two groups of fundamental rights and freedoms: the first group applies to everyone, to each human being (human rights), the second group to citizens only (citizens' rights). Furthermore, under the Constitution human rights and fundamental freedoms are only limited by the rights of others and in those cases for which provision is made in the Constitution (Art. 15(3), Constitution).

Like most current constitutions, the Constitution stipulates that the manner in which human rights and fundamental freedoms are exercised may be regulated by law whenever the Constitution so provides or where this is necessary due to the particular nature of an individual right or freedom (Art. 15(2), Constitution).

The general, basic provisions relating to all human rights and fundamental freedoms are:

- equality before the law (Art. 14, Constitution);
- the exercise and limitation of rights (Art. 15, Constitution);
- the temporary suspension or restriction of rights (Art. 16, Constitution);
- equality in the protection of rights (Art. 22, Constitution), and
- the due process of the law (Art. 23, Constitution).

The most important constitutional provisions are as follows:

- the provisions on the protection of human rights against possible repressive state interventions as well as against the abuse of power (Art. 16, Art. 17, Arts. 18 to 31 and Arts. 34 to 38, Constitution);
- the provisions on the protection of economic, social and cultural rights (generally, Part II, Constitution);
- the provisions on ensuring legal and other measures for the effective protection of human rights and freedoms (Art. 15, Arts. 129 to 134 and Arts. 155 to 159, Constitution);
- the provisions providing for the constitutional complaint (Arts. 160(1)(6), 160(3), 161(2) and 162(2), Constitution).

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).

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)⁷⁴. On the other hand, the constitutional review system also allows 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)⁷⁵. 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 (Art. 50(1), Constitutional Court Act). Even then, as a rule, the complainant may withdraw their complaint in order to thereby terminate the respective proceedings (Art. 55.b(3), Constitutional Court Act).

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, effi-

74 Arts. 23 and 23a of the *Constitutional Court Act*

75 Arts. 24 and 50 of the *Constitutional Court Act*

ciency decreases. Nevertheless, citizens should have many opportunities to apply for the protection of their constitutional rights⁷⁶.

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)⁷⁷. 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).

8.3. 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

⁷⁶ From Arne Mavčič, *The International Encyclopaedia of Laws, Constitutional Law, Slovenia*, ed. Dr. R. Blanpain, Kluwer Law International, The Hague-London-Boston, 1998, pages 160-173.

⁷⁷ 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.

which exceeds the importance of the concrete case (Art. 55.b(2), Constitutional Court Act). Constitutional complaints against individual acts issued in small-claims disputes, in trespass to property disputes, and in minor offence cases, or against a decision on the costs of proceedings, are as a general rule not admissible (Art. 55.a(2), Constitutional Court Act).

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

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

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

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

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

Generally, the Constitutional Court considers cases within its jurisdiction at a closed session or a public hearing (Art. 35(1), Constitutional Court Act) which is called by the President of the Constitutional Court on his own initiative or upon the proposal of three Constitutional Court judges (Art. 35(2), Constitutional

Court Act). After the consideration has been concluded, the Constitutional Court decides at a closed session by a majority vote of all Constitutional Court judges. A Constitutional Court judge who does not agree with a decision or with the reasoning of a decision may submit a dissenting or concurring opinion (Art. 40(3), Constitutional Court Act).

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

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

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

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

In a senate of three judges (Art. 162(3), Constitution; Art. 54(1), Constitutional Court Act) the Constitutional Court decides whether it will accept or reject the constitutional complaint for hearing (on its allowability) at a non-public session. The Constitutional Court may establish a number of senates depending on the need (Art.162(3), Constitution, Art. 10(2), Rules of Procedure). The constitutional complaint may be communicated to the opposing party for response

either prior to or after acceptance (Art. 56, Constitutional Court Act). The Constitutional Court normally deals with a constitutional complaint in a closed session, but it may also call a public hearing (Art. 57, Constitutional Court Act). The Constitutional Court may suspend the implementation of an individual act, or statute, and other regulation or general act on the grounds of which the disputed individual act was adopted (Art. 58, Constitutional Court Act).

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

- deny the complaint as being unfounded (Art. 59(1), Constitutional Court Act);
- partially or entirely annul or invalidate the disputed (individual) act or return the case to the body having jurisdiction, for a new decision (Art. 59(1), Constitutional Court Act);
- annul or invalidate (*ex officio*) unconstitutional regulations or general acts issued for the exercise of public authority if the Constitutional Court finds that the annulled individual act is based on such a regulation or general act (Art. 161(2), Constitution; Art. 59(2), Constitutional Court Act);
- if the Constitutional Court has already decided on the same constitutional matter and granted the complaint, a decision by which it grants the constitutional complaint, in whole or in part abrogates or annuls the individual act, and remands the case to the authority competent to decide thereon, is issued by the panel, which may in such instances also decide in accordance with Article 60 of this Act (Art. 59(3), Constitutional Court Act);
- in case it annuls or invalidates a disputed individual act, the Constitutional Court may also decide on the disputed rights or freedoms if this is necessary to remove the consequences that have already been caused by the annulled or invalidated individual act, or if so required by the nature of the constitutional right or freedom, and if it is possible to so decide on the basis of data in the documentation (Art. 60(1), Constitutional Court Act); such an order is executed by the body having jurisdiction for the implementation of the respective act which was retroactively abrogated by the Constitutional Court, and replaced by the Court's decision on the same matter; if there is no such body having jurisdiction according to currently valid regulations, the Constitutional Court appoints one (Art. 60(2), Constitutional Court Act).

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 Act⁷⁸);
- The possibility of an ultimate decision on constitutional rights (Art. 60(1), Constitutional Court Act).

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

- Human rights are attributes of any democratic legal system;
- The constitutional complaint is (only) one of the legal remedies for protecting constitutional rights;
- The constitutional complaint is an important subsidiary legal remedy for the protection of human rights connected with the human rights themselves⁷⁹;

The Constitution guarantees the constitutional complaint, in the same way as the rights it protects; at the same time, the constitutional complaint is limited by statute in favour of the operational capacity of the Constitutional Court.

Its effectiveness is disputed, since successful constitutional complaints are in a clear minority, although that should be no reason for their restriction or abolition. Such restriction or abolition is also very often the result of the great burden of this kind of case on the Constitutional Court.

Furthermore, despite some contradictory properties of this institution, the possibility of justice or the judicial protection of constitutional rights should remain open to the individual. The very existence of the constitutional complaint ensures

78 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.

79 The Constitutional Court of the Republic of Slovenia, Ruling No. U-I-71/94, 6 October 1994, OdlUS III, 109, www.us-rs.si

a more effective review of violations of constitutional rights on the part of State bodies.

8.4. Influence of the European Case-Law

Concerning Slovenia, the Charter of the Council of Europe came into force on 14 May 1993. The Convention was ratified on 31 May 1994. The Ratification of the Convention Act (incl. Art. 25, Art. 46, Protocol No. 1, Protocol No. 4, Protocol No. 6, Protocol No. 7, Protocol No. 9, Protocol No. 11) was published on 13 June 1994 (the Official Gazette RS, No. 33/94) and came into force on the 15th day following publication. On 28 June 1994, Slovenia in Strasbourg also formally ratified the Convention by filing the appropriate documents at the Office of the Secretary General of the Council of Europe. When ratifying the Convention, Slovenia did not express any reservations, because new legislation had been prepared following international standards and the Convention.⁸⁰ It is also interesting that Slovenia was the first member state to ratify Protocol 11. Slovenia recognized the jurisdiction of the European Commission and the European Court of Human Rights concerning Arts. 25 and 46 of the Convention *uno actu* for an undetermined period.⁸¹ In addition, the Slovenian statement include a *ratione temporis* restriction, i.e. that the jurisdiction of the Commission and the Court is recognized only for the violation of rights, based on facts which came into existence after the coming into force of the Convention and its Protocols, i.e. after 28 June 1994.

In the decisions of the Slovenian Constitutional Court, the *Convention* was already implemented in some cases before the country joined the *Convention* system⁸².

Slovenia signed the Convention on 14 May 1993 and ratified it on 8 June 1994 (Official Gazette of the RS, Treaties, No. 33/94). The Slovenian Constitution of 1991 resolves these questions in specific constitutional and legal provisions⁸³: Statutes and other regulations must be in accordance with the generally valid principles of international law and with international agreements to which Slovenia is bound. Ratified and promulgated international agreements must be applied directly (Art. 8 of the Constitution). The Constitutional Court decides on the accordance of statutes and other regulations with ratified international agreements and general principles of international law (Art. 160 (1) (2) of the Constitution; Art. 21 (1) (2) of the Constitutional Court Act).

80 P. Jambreč, *Ustavna demokracija (Constitutional Democracy)*, Državna založba Slovenije, Ljubljana (1992), p. 338-339.

81 *Id.*, p. 348.

82 MAVČIČ, Arne. Slovenia. V: BLACKBURN, Robert (ur.), POLAKIEWICZ, Jörg (ur.). *Fundamental rights in Europe : the European Convention on Human Rights and its member states, 1950-2000*. New York: Oxford University Press, 2001, p. 781-808. [COBISS.SI-ID 154111]

83 P. Jambreč, *op. cit.*, p. 360.

The institution of the constitutional complaint and the European complaint and the function of European bodies (above all the European Court of Human Rights) raises the question of national and supra-national (final) instance. The national (final) instance: the Constitutional Court, as the highest body of judicial authority in a particular country for the protection of constitutionality and legality and human rights and fundamental freedoms (the status of the Constitutional Court is thus defined in *e.g.* Art. 1 (1) of the *Constitutional Court Act*), would be limited to the investigation of constitutional-legal questions only. The review of the ordinary court's decision on actual circumstances and the use of simple rules of evidence is a matter for the appellate ordinary court. The subsidiary nature of a constitutional complaint also lies in the division of responsibility between the Constitutional and the ordinary Courts. The gradation of instance could be established as ascending from the national Supreme Court through the national Constitutional Court to the European Court of Human Rights. In fact, instance is not the essence of this gradation although it is essential in the role of supplementing, which means that the national constitutional complaint supplements national judicial protection while the supra national European complaint supplements the national constitutional complaint.

The *1991 Constitution* gives priority to the monistic treatment of the relationship between the ratified *Convention* and Slovenian national law. The *Convention* is to be implemented directly (Art. 8 of the *Constitution*) and all Slovenian laws and other regulations must be in conformity with the *Convention* (Art. 153 (2) of the *Constitution*). The Constitutional Court is empowered to sanction any eventual non-conformity of a regulation, and can as well abrogate in whole or partially a regulation after the determination of its non-conformity with the *Convention* (*e.g.* Art. 161 of the *Constitution*; Arts. 43 to 48, Arts. 59 and 60, *Constitutional Court Act*). This means that Slovenia is among those countries where the *Convention* has a higher status than ordinary laws and it has a lower status than the *Constitution*.

There is no doubt that Slovenia has been absorbing the same ideals and tradition of the consideration of Freedom and the Principle of the Rule of Law, as the *Convention* framers. On one hand, it is true that the Slovenia of today has been reintroducing and developing the legal culture of human rights after almost half a century of arrears; but, on the other hand, Slovenia is not without tradition concerning the field of human rights.

Irrespective of such or any other "position" of the *Convention* within Slovenian national law, it is clear that the Slovenian Constitutional Court and the whole system of ordinary courts must also ensure the conformity of individual acts with the provisions of the *Convention*. In addition, the provisions of the *Convention* amend and add to a foundation of national constitutional provisions; following such a process, in Slovenia a complete system of defined formula for interpreting fundamental rights has been created. Beyond that, also the case law of the

European Court of Human Rights is directly applicable to the process of decision-making in the Constitutional and other courts in Slovenia. So the legal grounds of the European Court of Human Rights and Slovenian national courts overlap in several ways.

Because Constitutional-Court decisions have only *inter partes* effect. However, if the matter concerns the same case, provided that the question of a human rights violation is at issue, the interpretation of the Convention by the Constitutional Court will prevail over such interpretation by the ordinary court.

According to Art. 1 (1) of the Constitutional Court Act, the Constitutional Court is the highest body of the judicial power for the protection of constitutionality, legality, human rights and fundamental freedoms. In the context of the admissibility criteria of the Convention, providing that "... the Court may only deal with the matter after all domestic remedies have been exhausted..." it is considered the highest domestic remedy which must be adhered to before the case can be filed in the European Court of Human Rights (Art. 35(1), Convention).

Since 1990 Slovenian constitutional review has confirmed to foreign case law in its attitude towards human rights and freedoms, and has been comparable therewith. The constitutional complaint is especially important institution which fortifies the role of the Constitutional Court as the supreme guardian of human rights by means of which individuals are given an additional possibility to have the concrete decision in their case reviewed exclusively from the perspective of the protection of human rights (Arts. 50 to 60, Constitutional Court Act). Thus, at the national level the Constitutional Court carries out similar tasks as the European Court for Human Rights and partly also the European Court of Justice at the international level, and generally it strives to follow the case law of the two above-mentioned courts.

Since the ratification of the Convention in 1994, references to the Convention and the case law of the European Commission for Human Rights and the European Court for Human Rights has continuously increased, and as a consequence in recent years there has hardly been any important decision which has not arisen from an analysis of the decisions of the European Court for Human Rights. Thus, the Constitutional Court has referred to the Convention and the case law of the European Court for Human Rights also in cases in which the complainants have not cited them in their applications.⁸⁴

84 Ribičič Ciril, Implementing European Standards into the Case Law of the Constitutional Court, A Collection of Papers of the International Conference on "The Position of Constitutional Courts Following Integration into the European Union," Bled 2004 .

8.5. Organisation of the Constitutional Court and the Court Administration

In relation to other state authorities, the Constitutional Court is an autonomous and independent state authority (Art. 1(2), Constitutional Court Act).

The Constitutional Court regulates its organisation and work by its Rules of Procedure and other general acts (Art. 2(2), Constitutional Court Act).

The organisation of the Constitutional Court is regulated by the Rules of Procedure of the Constitutional Court (Official Gazette of the Republic of Slovenia, No. 86/07) and the Rules on the Internal Organisation and Administrative Operations of the Constitutional Court (Official Gazette of the Republic of Slovenia, No. 93/03).

8.5.1. Composition

Under Art. 165(1) of the Constitution, the Court is composed of 9 members (including its president). Under Art. 163(1) and Art. 163(2) of the Constitution and under Arts. 9 to 14 of the Constitutional Court Act, all judges are elected by the National Assembly following nomination by the President of the Republic. The president of the Court is elected by the judges themselves for a period of three years (Art. 163(3), Constitution; Art. 10(1), Constitutional Court Act). A Constitutional Court judge is elected for a term of nine years and is not eligible for re-election (Art. 165(1), Constitution).

Some activities are incompatible with the office of a Constitutional Court judge (Art. 166, Constitution; Art. 16, Constitutional Court Act⁸⁵). The judges of the Constitutional Court enjoy the same immunity as the deputies of the National Assembly (Art. 167, Constitution).

Under Art. 164 of the Constitution and Art. 19 of the Constitutional Court Act, a judge may in some cases be relieved of office prior to the expiration of his term⁸⁶.

85 The office of Constitutional Court judge is not compatible with:

- office in state authorities, in local community authorities, in the bodies of political parties, and in the bodies of trade unions;
- work in state authorities, in local community authorities, and work for bearers of public authority;
- membership in the management and supervisory bodies of companies, institutions, and cooperatives;
- the pursuit of an occupation or gainful activity, except for the position of higher education teacher, researcher, or associate of a higher education institution.

From the day a Constitutional Court judge takes office, he ceases to hold the office or perform the work referred to in the first and second indents of the preceding paragraph.

No later than three months after being elected, the Constitutional Court judge elected must cease to perform the activities referred to in the third and fourth indents of the first paragraph of this article. If he does not do so, his office of Constitutional Court judge terminates.

86 A Constitutional Court judge may be subject to early termination of office in a manner provided by law only:

- if the judge himself so requests,
- if the judge is punished by imprisonment for a criminal offence, or
- due to permanent loss of capacity to perform his office.

8.5.2. Organization

The Constitutional Court hears cases in camera or in public session (Art. 35(1), Constitutional Court Act).

Under Art. 162(3) of the Constitution, the Constitutional Court normally makes decisions by a majority vote of all the judges. Exceptions are nonetheless possible and these are provided for in Art. 41 of the Constitutional Court Act. As a rule the Constitutional Court decides cases in plenary session, but it may also sit in a senate consisting of three judges of the Court in cases involving constitutional complaints (Art. 162(3), Constitution; Arts. 41 and 54, Constitutional Court Act).

A judge who does not agree with the majority decision or the reasons for such a decision, may give a dissenting opinion, which must be submitted within the period defined by the rules of procedure of the Constitutional Court (Art. 40(3), Constitutional Court Act). The

Constitutional Court exercises administrative autonomy in the regulation of its own internal organization (Art. 2(2), Constitutional Court Act).

The Constitutional Court has three three-member panels for the examination of constitutional complaints⁸⁷:

- a panel for the examination of constitutional complaints in the field of criminal law (criminal panel);
- a panel for the examination of constitutional complaints in the field of civil law (civil panel);
- a panel for the examination of constitutional complaints in the field of administrative law (administrative panel).

The division of work among the panels is regulated by the Constitutional Court according to the work schedule. In accordance with the applicable work schedule, the panel for the examination of constitutional complaints in the field of criminal law reviews constitutional complaints against individual acts issued in criminal procedures, in commercial dispute procedures, and minor offence procedures, as well as constitutional complaints against individual acts issued in the judicial review of administrative acts and administrative procedures in accordance with the provisions of the Enforcement of Penal Sanctions Act. The panel for the examination of constitutional complaints in the field of civil law reviews constitutional complaints against individual acts issued in civil and execution procedures as well as in commercial dispute procedures, except in trespass to property dispute procedures. The panel for the examination of constitutional complaints in the field of administrative law reviews constitutional complaints against individual acts issued in procedures for which jurisdiction is determined by the Judicial Review of Administrative Acts Act, constitutional complaints against individual acts issued in

87 www.us-rs.si; Art. 10(2), Rules of Procedure

labour and social dispute procedures, as well as constitutional complaints against individual acts issued in non-litigious civil procedures and probate procedures, as well as against individual acts issued in trespass to property dispute procedures. The president and the members of the panel are determined by the Constitutional Court according to the work schedule.

8.5.3. **The Financing (the Budget) of the Constitutional Court as the Basis of its Independence**

Most constitutional/judicial review bodies have a separate budget, however as a part of the whole State budget, and they are fully independent concerning its proposing. In addition, the financing of some newly introduced Constitutional Courts is regulated in greater detail than other formerly established Courts.

The material basis of the real autonomy and independence of the Constitutional Court also depends on autonomy as regards management of the budgetary funds. Therefore statute declares that the funds for the work of the Constitutional Court are determined by the National Assembly following the proposal of the Constitutional Court, and constitute a part of the Republic of Slovenia Budget (Art. 8(1), *Constitutional Court Act*). The Constitutional Court is not dependent on the Government in proposing the budget, which otherwise proposes the State budget. The Constitutional Court decides on the use of the mentioned funds (Art. 8(2), *Constitutional Court Act*).

Control of the use of these funds is performed by the Court of Auditors (Art. 8(3), *Constitutional Court Act*), which is the body with the ultimate responsibility for auditing State finances, the State budget and monies expended for public purposes (Art. 150(1), *Constitution*).

8.5.4. **The Payment of Fees in Constitutional Court**

Some constitutional court systems have introduced as an additional financial source fees payable when filing for proceedings before the Constitutional Court. However, the Court may exempt a citizen from paying such fees or reduce the fees depending on financial status. Sometimes the fee may be explicitly excluded or the petitioner may be exempt from taxes, fees, and other such financial impositions. The majority of systems have not introduced such fees on principle. On the other hand, prescribing a fee deters the abuse of petitioning or a payment of the costs of proceedings is explicitly foreseen in cases of frivolous applications.

In proceedings before the Slovenian Constitutional Court each participant bears his own costs, unless the Court decides otherwise (Art. 34 (1), *Constitutional Court Act*). If a party fails to provide the necessary information for the Court due to unexcused absence, lack of preparedness or some other reason and, as a result, the hearing must be postponed, the Court may decide that the postponement of

the hearing shall be at the expense of this party (Art. 34(2), *Constitutional Court Act*).

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 (Art. 34.a(1), *Constitutional Court Act*).

Additionally, 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 (Art. 34.a(2), *Constitutional Court Act*).

8.5.5. Public Control/the Public Nature of the Activities of the Constitutional Court

The public nature of the activities of the Constitutional Court is declared by the *Constitution*, but mainly by the *Constitutional Court Act*. This principle may be realized in some different forms:

8.5.5.1. Public Hearings

The activities of the Slovenian Constitutional Court are to be conducted in public in accordance with the *Constitutional Court Act* (Art. 3(1), *Constitutional Court Act*). The principle of the public nature of the activities, declared by this provision, are of general importance concerning all kinds of proceedings; the purpose of the mentioned principle is to ensure a control on the activities of the Court to the parties of the proceedings and also other citizens (the unlimited circle of individuals). The respective function is ensured e.g. also by the statutory provision on public hearings before the Constitutional Court (Arts. 35 to 38, *Constitutional Court Act*). The constitutional Court may exclude the public from a hearing or part thereof on the grounds of protecting public morals, public order, national security, the right to privacy and personal rights (Arts. 37 and 38, *Constitutional Court Act*). The public nature of the activities of the Slovenian Constitutional Court results also from some internal regulations or systems adopted by the Constitutional Court currently or in the past⁸⁸ - the Legal Information System of the Constitutional Court introduced in 1987, the computerised database of Slovenian Constitutional Case-Law as a public database, accessible to all users of legal information via the Constitutional Court homepage (www.us-rs.si).

88 - Arts. 23 to 33 of the Rules of Procedure of the Constitutional Court (Official Gazette SR, No. 86/07;

- the Regulation on Internal Office Administration of 93/03;

- Conclusions on the Assurance of the Public Nature of the Activities of the Constitutional Court Through the Public Media of 13 January 1983 and 24 December 1987;

8.5.5.2. The Publication of Court Decisions - General

Providing information to the public concerning decisions of the Constitutional Court is, moreover, one of the functions, following the principle of the public nature of the activities of the Constitutional Court, set forth in laws and in other regulations⁸⁹. The Constitutional Court applies this principle by publishing its decisions in official publications (Official Gazettes, see Art. 42 of the Constitutional Court Act and Art. 69 of the Rules of Procedure of the Constitutional Court) and by allowing access to information on its decisions in its database.

8.5.5.3. The Circulation of Information

Legal information on constitutional review matters as supported by different means of communication or media, taking into consideration the principle of the public nature of the activities of any Constitutional Court, circulate from the Constitutional Court as a decision issuer, to the public, the potential petitioners before the Constitutional Court, who receive information which may motivate their new petitions. This stream of information constitutes a certain procedural circle due to the nature of proceedings before any Constitutional Court, which are in principle proposed proceedings (*jurisdiccion voluntaria*): only a permanent inflow of petitions to the Constitutional Court actually justifies the existence, function and activities of the Constitutional Court.

The initial purpose of the legal databases of the Slovenian Constitutional Court was to provide more flexible processing of legal information, primarily constitutional case-law, as a support to the Constitutional Court in its decision-making processes. As the activities of the Constitutional Court are conducted in public, the corresponding databases were not created for internal users only (judges and legal advisers of the Court); from the very beginning on 1 January 1987 they were intended for external users of legal information concerned with practice and theory related to constitutional review.

Starting with 1963, the legal information system of the Constitutional Court of the Republic of Slovenia included the constitutional case-law of the Slovenian Constitutional Court in the uniform legal database including also the constitutional case-law of all other constitutional courts from the territory of the former Yugoslavia. The compiled data on the decisions of nine constitutional courts at that time were, however, an indispensable basis for their work. Therefore, since the introduction of constitutional courts in the former Yugoslavia in 1963, the then Legal Information Centre of the Slovenian Constitutional Court was engaged in a systematic acquisition and comparative processing of decisions of all former Yugoslav constitutional courts. These efforts developed into comprehensive records on the decisions of Yugoslav constitutional courts (translated into

⁸⁹ Arts. 3 and 42 of the Constitutional Court Act; Arts. 23 to 33 and 69 of the Rules of Procedure of the Constitutional Court; Official Gazette RS, No. 93/03, Art. 78 of the Regulation on Internal Office Administration.

one language – into Slovenian), organized in files. This was an excellent basis for transition to computer processing of the constitutional case-law. The mentioned database was computerized by 1 January 1987. The database was based on the then full-text program packages of different generations and was open to the public at many locations. The database included full-text documents (covering constitutional practice and theory) and was subject to monthly updating.

Very early, an exchange of constitutional case-law has been practiced with the constitutional courts of Italy, Austria and Germany; besides, in 1989 the first on-line computer communications with foreign information systems were introduced⁹⁰.

The additional goal of the then national (comparative) database(s) was to build the Court's own databases, which is particularly important with reference to the fact that national databases should, wherever possible, be included into international systems of similar character. This was important for several reasons: it led to an exchange and comparison of experiences and thereby to improved efficiency and quality of work. Further, more and more attention was paid to the cooperation related to the building of foreign national and international databases as well as to the improvement of the quality and standardization of primary documents.

The Slovenian Constitutional Court's information exchange with other similar information systems, databases and other similar sources of legal information influenced and still influences the creation of common standards especially concerning the structure of constitutional review, powers, organization and procedure before constitutional courts, and even the unification of some systemic legislative solutions.

The complete external and internal (legal) information system was introduced in 2005. Namely, since 1991, when the Constitutional Court of the Republic of Slovenia was established, the development of information technology has progressed through many stages: from using the computer as a writing machine, to the Integrated Information and Case Management System used at present. The last larger upgrade of the information system was initiated in 2004 and has not yet been completed. That year, an integrated system was introduced that incorporated all previously separate applications and documents into the Integrated Information and Case Management System (CMS), which is used by all staff of the Constitutional Court who take part in the business processes of the Constitutional Court regarding cases.⁹¹

The Information System of the Constitutional Court from the users' perspective includes the following components: integrated case management system,

90 Such as ECHO, Luxembourg, JURIS (including all CELEX bases), Germany, and ALEXIS (including RDB Austria), Germany-Austria.

91 Torbič, Miloš, The Presentation of Certain Issues of the Information System of the Constitutional Court of the Republic of Slovenia, *Prispevki s III. konferenca generalnih sekretarjev ustavnih sodišč in drugih sodišč z ustavnosodno pristojnostjo*, Bled, 29. 30. september 2005, www.us-rs.si

document assembly system (which is actually a part of the case management system), intranet and extranet, information services, internal and external legal databases, website, user tools (Word, Outlook, etc.), other applications (e.g. finance, human resources, etc.), which are not essential for the legal part of the business process.

9. The European Model of the Constitutional Review in the Crisis?

Can we speak about the critique of the Kelsen's Conception? Or could we speak about the consequences of the adaptation of the theoretically projected mission of the constitutional court (of the European style) to the national system momentary in force?

The main problem are the bounds of possibility of coexistence of two individual remedies, popular (petition) and constitutional complaint which can cause an increasing number of the respective arrived cases. The mentioned problem has been arising from time to time in form of several discussions – or to (even) strive one of the mentioned legal remedies from the existing system. It is interesting that the same problem was already discussed even in the early period of the Slovenian constitutional review – in the sixties⁹².

Generally speaking, there have been more or less the following basic options discussed:

- limitation and/or reduction of the Constitutional Court powers (to assure dealing with only “important” cases,
- limitation of the individual access to the Constitutional Court (by introduction of some stricter procedural measure and/or preconditions);
- the introduction of (more) rigorous selection of arrived (new) cases⁹³.

92 As already mentioned, 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. Razairjati pristojnost ustavnih sodišč kot so nekateri predlagali na presojo ustavnosti posamičnih aktov uprave in sodstva naj v tedanjem obdobju ne bi bilo mogoče že iz razloga, ker naj bi bila ustavna sodišča izdatno obremenjena s presojo čedalje airae avtonomne normative in spričo hitrega spreminjanja in pogoste neuskajenosti in nedognanosti pravnega sistema. 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.

93 The Slovenian President of the State Danilo Türk presented to the deputies of the National Assembly on 24 April 2008 his initiative of six items for possible amendments of the Constitution of 1991 regarding powers and activities of the Constitutional Court: 1. The Constitutional Court shall stop with the review of constitutionality and legality of by-laws. Such cases can be discussed and resolved in the ordinary court's procedure; additionally, the Constitution itself provides for measures which may protect individuals in case of unconstitutionality or illegality of by-laws; 2. The Constitutional Court shall stop with the decision-making on jurisdictional disputes between ordinary courts and other state bodies. Such power shall be entrusted to ordinary courts; 3. Petitions for the review of constitutionality of laws shall be limited only to such cases, when an individual or a legal entity do not have an opportunity to file the constitutional complaint for the human rights protection. The protection

9.1. 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” Cases⁹⁴

After adoption of the 1991 Constitution and the Constitutional Court Act of 1994, the number of cases before the Constitutional Court was on the increase year by year. Additionally, during this period the grounds of the constitutional review and basic standards of the human rights protection were established by the constitutional case-law. In the first part of the mentioned period individual petitions (popular complaints) prevailed, however, in the next part of the same period (after the regulation of the constitutional complaint by the Constitutional Court Act of 1994) the constitutional complaints absolutely prevailed. Consequently, procedures before the Constitutional Court were extended over the reasonable time which has been requested by Art. 23(1) of the Constitution⁹⁵. The respect of the mentioned human right and the assurance of the quality of the constitutional review were presented by the authors of the amendments of the Constitutional

of constitutionality of a law may be requested in the ordinary court's procedure as well, however, after conclusion of such procedure the human rights of parties can be protected also by the Constitutional Court by filing the constitutional complaint, if the Court finds it as necessary; 4. The Constitutional Court shall have an opportunity to freely decide, which constitutional complaint will be accepted for the procedure, depending on the importance of the complaint for the legal order and the human rights protection in general; additionally, the Court shall be released of its duty to deal with all other arrived constitutional complaints. In a such way, the Constitutional Court would be disburden of formal procedures in such cases when it would not accept the constitutional complaint in the procedure at all. By this means the Court would dedicate itself more to the already accepted cases. On such occasion, considering its capacity, the Court could determine the scope of accepted cases what would assure an efficient execution of the constitutional review, considering the expected self-confident and authoritative execution of constitutional judiciary power what is bound with a high responsibility of the Constitutional Court as well; 5. The Constitution shall explicitly determine that in minor cases the Constitutional Court may decide in smaller units – chambers; in this way a rational participation of constitutional judges in the decision-making could be reached; 6. Furthermore, the system of election of constitutional judges may be changed too. See: TÜRK, Danilo. Za avtoriteto in učinkovitost državnih institucij, Pravna praksa, No. 19/2008, GV Založba Ljubljana, p. 6.

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

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

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

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

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

Court Act of 2007 (Official Gazette RS, No. 64/07) as the principal reasons for draft law.

Following some theoretical standpoints, the Constitution of 1991 introduced the legal interest as a condition for the filing of the individual petition (a popular complaint) (Art. 162(2), Constitution). Later, the Constitutional Court Act of 1994 (Official Gazette, No. 15/94) continued by some more detailed starting point, that a direct encroachment upon the rights and/or the legal position of the petitioner must be demonstrated (Art. 24. Constitutional Court Act). However, the amendments of the Constitutional Court Act of 2007 determined more rigorous and precisely the elements of the expected demonstration of the legal interest especially in cases when the constitutional review of a by-law was requested. The previous decisions taken by the Constitutional Court in such cases concerned mainly individual examples (e.g. by-law relating to the urbanism) when the prior protection of the rights and legal interests could be asserted in the (earlier) individual procedures before ordinary courts⁹⁶. Only if such protection could not be asserted, the procedure before the Constitutional Court might be relevant⁹⁷.

The amended Constitutional Court Act of 2007 (Official Gazette RS, No. 64/07) brought the changes⁹⁸ concern the constitutional complaint procedure:

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

The Constitutional Court accepts a constitutional complaint for consideration only:

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.

96 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, Dopsna delavska univerza Ljubljana 1974, p. 55).

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

98 See www.us-rs.si

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 site⁹⁹ 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).

9.2. What Kind of Reforms should ne Implemented? The American or the German “Model of Selection of the Relevant Cases”?

There are several standpoints, that we would need “radical changes of powers of the Constitutional Court or the limitation of possibilities of the legal protection”¹⁰⁰. Concequently, there would be the following possible solutions:

1. The limitation of powers of the Constitutional Court;
2. The limitation of access to the Constitutional Court;
3. The Constitutional Court would select only such cases which are important for the human rights and fundamental freedoms as well as for the constitutional case-law and which could be indicators for taking the decision in all similar cases. It should be decided between two options: if among a great number of applications (petitions or constitutional complainst) the Constitutional Court would select “more important cases” completely by its free discretion and/or implementing its own criteria (following the “American example”¹⁰¹) or should be (under the “German example”) the criteria of orientation prescribed by the Constitution and a law.

100 Pavliha, Marko. O reformi ustavnega sodišča, *Pravna praksa*, No. 48/2006, GV Založba Ljubljana, p. 6.

101 The Court's decisionmaking process at the certiorari stage is fundamentally different from traditional judicial decisionmaking. In stark contrast to traditional judicial processes, case selection decisions are made without constraining criteria, majority rule, public accountability, or collegial deliberation. Indeed, the Justices' process for deciding which cases to grant for full consideration on the merits provides the Justices with virtually unfettered discretion. The Court's own Rule 10 sets out the considerations that the Court takes into account in determining whether to grant or deny certiorari as follows: whether a lower court of last resort (1) has entered a decision in conflict with another such court on an important federal question ; (2) has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power ; (3) has decided an important question of federal law that has not been, but should be, settled by this Court ; or (4) has decided an important federal question in a way that conflicts with relevant decisions of this Court. This rule, however, pointedly exerts no restraint on the Justices' decisionmaking, emphasizing that review is not a matter of right, but of judicial discretion, and that the criteria noted are neither controlling nor fully measuring [of] the Court's discretion. RULES OF THE SUPREME COURT OF THE UNITED STATES, ADOPTED JULY 17, 2007, EFFECTIVE OCTOBER 1, 2007 (<http://www.supremecourtus.gov/ctrules/ctrules.html>), Rule 10. Considerations Governing Review on Certiorari. See: Meriwether Corday, Margaret, Corday, Richard, Strategy in Supreme Court Case Selection: The Relationship Between Certiorari and the Merits (<http://moritzlaw.osu.edu/lawjournal/issues/volume69/number1/cordray.pdf>)

However, the Rules of the Supreme Court were adopted by the Court itself and act more as an internal document. Therefore it is to mention is the Judiciary Act of 1925, written largely by members of the court (under the leadership of Chief Justice and former President William Howard Taft) and passed by Congress which amended the Judicial Code as follows: The Judges' Bill of 13 February 1925, 43 Stat 936: CHAP. 229. An Act To amend the Judicial Code, and to further define the jurisdiction of the circuit courts of appeals and of the Supreme Court, and for other purposes. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 128, 129, 237, 238, 239, and 240 of the Judicial Code as now existing be, and they are severally, amended and reenacted to read as follows: SEC. 237. "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

When the Constitution would permit such possibility, (following the German example¹⁰²) the discretion could be limited in this way, that the Constitutional Court takes the application as admissible at least in two cases:

1. if a case is of the fundamental importance for the constitutional law;
2. if it is required that the concrete case should be decided due to the execution and/or protection of human rights and fundamental freedoms when by the rejection of the decision-making would have serious consequences for the applicant.

Accordingly, such methods may lead to the disburdening of the Constitutional Court: the applications could be extracted which would be not of the fundamental importance for the constitutional law or which would not cause some serious consequences for the applicant (»petty cases«).

Some theorists are convinced that such solution following the “German example” could be successful as a compromise of two divergent tendencies: the first one, which trends towards a radical disburdening of the Constitutional Court (the introduction of the discretion under the “American example”), and the second one, which tries by all means to preserve the equality before law also from the point of view of protection of constitutional rights before the Constitutional Court.

The second possible solution in favour of disburdening of the Constitutional Court would be the adoption of constitutional changes following the pure “American model” when the court decides by free discretion which applications to deal with, while not accepting other cases and not presenting reasons for non acceptance.

So far existing objections of a part of the Slovenian legal theory that such solution can be practiced only in the anglo-saxonic legal system (common law), but not in the continental and/or the middleeuropean one (civil law), have been refused by some other experts, despite of non acceptance of such radical reform in practice in Germany some years ago. On the other hand, defenders of the “American solution” maintain that for Slovenia the opportunity arised to take the initiative upon itself and consequently maybe motivate other European countries as well.

Defeners of the “American model” raise objections to the belief that such solution can operate only in the anglo-saxonic legal system (where judgments of higher courts are formally binding legal source for courts of lower instances) by giving warning that in the middle-european systems, judgments of the highest courts

¹⁰² Due to a great burdening the requested demonstration of the legal interest has been an instrument which enables the German Federal Constitutional Court to refuse unnecessary and unfounded applications already in the earlier stages of the procedure. The point is in the so-called “system of obstacles of accessibility” which was gradually established by the amendments of the Constitutional Court Act of 1956, 1963 and 1970 as well by the amended Rules of Procedure of 1978 what was affected by the “American method of treatment of applications”. The core of the phenomena of the legal interest is in fact that the disputed act shall concern the applicant in person, directly encroaching upon his/her legal position and causing legal consequences which have been still continuing during the procedure. Accordingly, the Constitutional Court does not accept applications from which it is clear - that the applicant can assert his/her right also without the Constitutional Court's intervention, - that the Constitutional Court's decision would not make his/her legal position better or at least mitigate the consequences of the violation or that he/she does not have yet or does not have more need of legal protection. Similar solution was actually accepted by Arts. 55.a(3) and 55.b(2) of the amended Slovenian Constitutional Court Act (Official Gazette RS, No. 64/07).

have practically the same effect to the case-law; in the existing middle-european systems certainly not due to the role of precedens (or due to the principle of stare decisis), but due to the constitutional principle of equality before law and due to the respect of the stabilized case-law as well.

A radical disburdening of the Constitutional Court in accordance with the "American model" is reasonable only by simultaneous impartial selection of cases, otherwise a particular group of potential applicants and their interests could be excluded from the access to the constitutional judiciary in advance¹⁰³.

How to assure an impartial selection of cases, paralelly considering a principle that the access to the constitutional protection before the Constitutional Court should be guaranteed¹⁰⁴? How can the history of and justification for the certiorari process in the United States Supreme Court inform the Slovenian Constitutional Court's discussion of whether to adopt a similar process in order to reduce caseload?

Discussions of certiorari in the United States raise several major concerns for implementing a similar process in Slovenia without changing other aspects of

103 Pavliha, Marko. O reformi ustavnega sodišča, Pravna praksa, No. 48/2006, GV Založba Ljubljana, p. 6.

Goals, motives and reasons for the reform of the Constitutional Court shall be discussed some broader. Beside a disburdening, changes shall lead to the more efficient, successful, more rational and more consistent enforcement of its constitutional role. Such as embraced in the grounds of organisational changes in the European Court for Human Rights and its procedure changes under way, regarding the possible reform of the Constitutional Court the substantial request shall be in the forefront, that the Court grows up as a more successful and influential institution in the field of protection of human rights. That is a point of the human rights activism which is (similarly as at the European Court for Human Rights) reasonable also through the activities of the Constitutional Court. The reformation of the European Court for Human Rights will namely lead to the additional burdening of the Constitutional Court and to the extension of its responsibility for the protection of human rights in accordance with the (European) Convention for the Protection of Human Rights and Fundamental Freedoms. From this point of view, the direct effects of expected changes of work of the European Court for Human Rights do not contribute to the disburdening of the Constitutional Court. If it is the aim of such reforms the expectation that national constitutional courts will take over the bigger role in the protection of the European Conventional Rights then the reform of the Constitutional Court can not be successful without any intensification of the responsibility of ordinary courts for the exercise of the constitutional rights protection. Reformatory measures contain some hidden motives that instead of the positive activism as a basic characteristic of activity of the Constitutional Court (as requested nowadays) the belief will overcome that the burdening must be solved only by the leaving the door to the Constitutional Court slightly open as well as by the improvement of mechanisms which could help the Court to defend efficiently as much as possible against new cases and/or to get rid of cases, arriving in the Court in such large numbers. In such case, the anticipated creative constitutional review would be replaced by a bureaucratic administratorship. See: RIBIČIČ, Ciril. Razbremenjevanje ESČP in Ustavnega sodišča, Podjetje in delo, No. 7/2007, GV Založba Ljubljana, p. 993.

104 For the disburdening of the Constitutional Court such proposal would be undoubtedly praiseworthy. However, it is necessary to know that we speak about the institute which would be transferred into our European (originally the Kelsen's) model of the constitutional review from an other model e.g. the American model of judicial review. Beside this we shall not forget that the American model was grown from the roots of the common law legal tradition which is especially known on its doctrine of (formal) validity of precedens law (e.g. stare decisis). Additionally, it is characteristic for such model of judicial review, the diffusion and/or decentralisation of constitutional decision-making. That means in fact that at least in the USA where such system arises from, those hundred cases yearly chosen by the Supreme Court to be decided, represent only a top of the constitutional judiciary pyramide, but the a great deal of it flows through lower courts (e.g. district courts in courts of appeal). See: NOVAK, Marko. Še o diskrecijski izbiri vlog za ustavnosodno presojo, Pravna praksa, No. 9/2007, GV Založba Ljubljana, p. 16

Otherwise, it seems in general that any successful transplanted system of selection of constitutional cases would urgently request a reform of the present basically centralized system of constitutional review which empowers the Constitutional Court to exercise such review. A transfer of the "American model" into the present (Slovenian) system would be reasonable when the current constitutional review would be at least partial decentralised and in such way maybe a mixed system of constitutional review would be adopted or at least would come closer.

The further condition: In such decentralised system, the precedens of the Constitutional Court would (formally as well) be in force for all courts in the country of course only relating to the interpretation of constitutional provisions. Accordingly, dealing with concrete cases, lower courts would yet have enough opportunities not to respect earlier decisions taken by the Constitutional Court when dealing with a different case (different facts of the case) what is a permanent practice of lower courts in the common law system (when we speak about the non-respect of its own precedens and/or the precedens of lower courts. In case of basically equal facts of the case, the lower court should decide in the same manner as previously decided.

In short, the basically revolutionary change in the current constitutional review would come up against a lot of troubles and questions which should be solved or answered. In this connection from the technical point of view the constitutional amendments would be the least problem. See: NOVAK, Marko. Še o diskrecijski izbiri vlog za ustavnosodno presojo, Pravna praksa, No. 9/2007, GV Založba Ljubljana, p. 1.

constitutional review. Because lower courts in the United States have the authority to decide all cases and controversies over which they have jurisdiction, including the authority to review the constitutionality of statutes, the Supreme Court's primary task is not to resolve individual disputes but rather to decide questions of national importance. This understanding of the court's role and the guarantee that a litigant will have his case fully reviewed by two courts are essential to the justification for certiorari, and these conditions are absent from the Slovenian system. A single lower constitutional court or a system that allows lower courts to answer constitutional questions could provide a solution to these problems, although any change to the Slovenian system will raise additional concerns¹⁰⁵.

9.3. Extension of Responsibility of Other Protectors of Constitutionality and Legality?¹⁰⁶

The new constitutionalism actually formed a new hierarchy of regulations which does not include only the priority of the Constitution from the formal point of view, but includes first of all the basic extensiveness of its normative superiority (with human rights and fundamental freedoms in its core) and the institutional conditions of its authoritativeness. Accordingly, the nature and operation of the contemporary constitutional judiciary are included as well. Consequently, the normative logic of the constitutionalism is a logic of limitation of exercise of authority (e.g. the political coalition or majority of citizens) with human rights and fundamental freedoms as a "higher law" which urgently requests the introduction of methods for exercise such law and which legitimates the constitutional judiciary. A real authority of the Constitutional Court shall be reached by its power (the moral persuasiveness, the reasonableness and the expert knowledge) of argument¹⁰⁷.

As previously mentioned, some ideas relating to the disburdening of the Constitutional Court were born in the past. Already before 2000 the disburdening of the Constitutional Court was proposed from time to time by the introduction of the system that

the Slovenian Constitutional Court shall obtain a full discretion to select cases for the decision-making at least to some extent. Additionally, some other experts stressed the importance of the historical tradition, the nature and the level of power of the Constitutional Court and the level of legal culture as prior conditions for an efficient operation of the American model in the continental Europe. Under the opinion of the latter, such solution could be realized only in circum-

105 WITTLIN, Maggie, Memorandum from Maggie Wittlin to Prof. Dr. Arne Mavčič, Head of the Analysis and International Cooperation Dept., Constitutional Court of the Republic of Slovenia (July 15, 2009), p. 1.

106 TERŠEK, Andraž, Za reformo ustavnosodne politike, Pravna praksa, No. 5/2007, GV Založba Ljubljana, p. 22.

107 TERŠEK, Andraž, Politična moč mora zagotavljati "vrhovnost ustavnosti", Pravna praksa, No. 1/2007, GV Založba Ljubljana, p. 31.

stances of the respective political and legal culture, when the Constitutional Court has a real reputation of the incontestable and the highest authority.

Furthermore, some Slovenian theorists¹⁰⁸ propose some new solutions in such a manner that particular new state bodies should be directly or indirectly involved in the constitutional review. So, for example, the connection of the president of the state (from the point of view of the material constitutionality) with his/her direct legal connection with the Constitutional Court. It would be politically and legally suitable that the president of the State (who shall sign the law adopted by the parliament in a term of eight days) should be granted by the “veto power”, e.g. to be able to retain his/her signature of the adopted law with the “argument of unconstitutionality” and at the same time to request the constitutional review of such law.

Additionally, some theorists propose that the Ombudsman shall have more flexible and broader power for filing requests for the constitutional review¹⁰⁹. Under Art. 23. a(1)(5) of the Constitutional Court Act in force, 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 by a request submitted by the ombudsman for human rights “only if he/she deems that a regulation or general act issued for the exercise of public authority inadmissibly interferes with human rights or fundamental freedoms”. Additionally, under Art. 50(2) of the Constitutional Court Act “the ombudsman for human rights may, under the conditions determined by this Act, lodge a constitutional complaint in connection only (from the formal point of view!) with an individual case that he/she is dealing with”. The interpretation of the provision “in connection with an individual case that he/she is dealing with” can be also different, much flexible and much broader. It is obviously, that also in case of the mentioned formal interpretation of the Ombudsman’s appearance before the Constitutional Court, the question remains unclear, when in the opinion of the Constitutional Court the Ombudsman’s request will be in the sufficient connection with “an individual case that he/she is dealing with”, that the Constitutional Court will grant the Ombudsman the procedural legitimacy¹¹⁰.

By its so far existing (precendens) case-law, the Constitutional Court determined the systemic role and the institutional position of the Ombudsman by the preservation of the formalistic control of the Ombudsman’s procedural legitimacy for the constitutional review procedure in general, which means the preservation of the rigorous model of the concrete review of constitutionality; at the same time,

108 TERŠEK, Andraž. Za reformo ustavnosodne politike, Pravna praksa, No. 5/2007, GV Založba Ljubljana, p. 22. See also TERŠEK, Andraž. Ne (le) sprememba ZUS, ampak (tudi) opustitev dogem!, Pravna praksa, No. 26/2006, GV Založba Ljubljana, p. 18.

109 TERŠEK, Andraž. Za reformo ustavnosodne politike, Pravna praksa, No. 5/2007, GV Založba Ljubljana, p. 22.

110 e.g. Ruling, No. U-I-131/01 of 11 March 2004, published on www.us-rs.si

However, in the case No. U-I-57/99 the Constitutional Court considered the “connection with an individual case that the Ombudsman dealing with” as given, although such connection was not demonstrated by the Ombudsman (Decision, No. U-I-57/99 of 20 May 1999, Official Gazette RS, No. 45/99).

the Constitutional Court decided to keep the narrowest interpretation of the connection between the “Ombudsman’s request” and “an individual case that the Ombudsman dealing with”, which must be completely direct (“explicit”). Such standing point has been criticized by some theorists from the point of view that state bodies and institutions which should be under the Slovenian legal order holders of the highest level of the constitutional responsibility and/or which are granted with the highest number of tools and/or the most efficient mechanisms for the elimination of mistakes or for the solution of contrarinesses relating to the protection of constitutionality and human rights, but which have been passive or not enough responsible¹¹¹. Their stronger ambitiousness concerning initiation of the constitutional review procedure would promote the development of constitutionality, the human rights protection and the legal culture in general.

9.4. Constitutionalisation and Judicialisation of the Political and Judicial Decision-Making¹¹²

It has been more and more accentuated that the technics of the constitutional review shall become an important method of argumentation and decision-making of all courts what is a logic (normative) consequence of a direct effect of the constitutional provisions regarding human rights and fundamental freedoms. Assuming the method of constitutional review by ordinary courts and the necessity of inclusion of considered deliberations about the possible constitutional review of laws drafted by the legislature, are the central point of the so-called process of judicialisation.

If in the national legal system the abstract constitutional review exists, the judicialisation (which is of direct character, from this point of view) will be greater. Beside the concrete constitutional review, the judicialisation is indirect, however it is simultaneously longer and politically less conflict. The Slovenian Constitutional Court is a powerful court, at the moment still with all three forms of the constitutional review (the abstract, the concrete review and the constitutional complaint proceedings), therefore a major constitutionalisation and judicialisation of the political and judicial decision-making would be logical.

Into the constitutional discourse as an element of the political process, all subjects within the sphere of the public political process should be included: the parliament, the government, courts, the constitutional court, legal experts and

111 TERŠEK, Andraž. Za reformo ustavnosodne politike, *Pravna praksa*, No. 5/2007, GV Založba Ljubljana, p. 22. See: Stone Sweet, Alec, *Constitutions and Judicial Power*, in Caramani Daniele, *Comparative Politics*, Oxford, Založnik Oxford University Press, 2008, ISBN 0199298416, 9780199298419, p. 217-239.

112 TERŠEK, Andraž. Za reformo ustavnosodne politike, *Pravna praksa*, No. 5/2007, GV Založba Ljubljana, p. 22.

the interested public¹¹³. (Only) a such discourse would open the door to taking the best possible, genuine political wise and constitutional correct decisions. The constitutional dialog between the constitutional judiciary, ordinary judiciary and politics (the legislative) should be the most important mechanism for the defence of the supremacy of the constitution, the achievement of justice as well as for the protection of human rights and fundamental freedoms. Accordingly, from the point of view of the constitutionalisation and constitutional policy it is necessary to reinforce the dialog especially between the Constitutional court and ordinary courts as well as a direct pressure on the ordinary judiciary in case of implementation of constitutional provisions in the process of decision-making of ordinary courts (the so-called “vertical constitutionalisation and judicialisation”).

Still more, some standpoints say that it would be constitutional admissible even a consideration of a legitimate authorization of the Constitutional Court - following an example of the European Court for Human Rights¹¹⁴ - (although on its own initiative) to “afford just satisfaction to the injured party”.

Accordingly, there is no possible to inforce changes of the legal regulation of the constitutional judiciary and its disburdening without any changes in the direction of (the vertical) constitutionalisation of the legal system and the development of constitutionality. Therefore it is necessary to change the traditional manner of thinking concerning the role and importance of case-law, concerning the precedens and/or the stabile case-law; additionally, it is necessary to change the understanding of the constitutional provision concerning “binding of judges by the constitution and laws” (Art. 125, Constitution).

9.5. Should we Let Thigs Take Their Course? Is it the Currently Expected and Belowed Course the Appropriate One?

Only several Slovenian theorists warn that the (as free as possible) access of individuals to the Constitutional Court is not meant only for the human rights protection, but it is an important assistance to the real constitutionality of a legal order. Therefore those theorists accentuate the connection between the individual access to the Constituonal Court and the respect of the principle of rule of law¹¹⁵.

113 It is interesting that similar standpoints were accentuated by treatises on the constitutional review from its early days, e.g. in the sixties of the last century: In any event, this diluted duty of safeguarding legality and constitutionality was not reserved to the constitutional courts but fell on all social actors: the courts, the authorities of so-called “socio-political communities, the organizations of self-management and of local self-government and all those holding public office” (Acetto, Matej, On Law and Politics in the Federal Balance: Lessons from Yugoslavia, Review of Central and East European Law 32(2007), Martinus Nijhoff Publishers, p. 208).

114 (European) Convention for the protection of human rights and fundamental freedoms - Article 41 . Just satisfaction
If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

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

The last change of the Constitutional Court Act in 2007 rigorously limited the access of individuals to the Constitutional Court. The adopted changes introduced more strict criteria as though such additional limitations are a stringent necessity especially from the point of view of the right to a trial without undue delay (e.g. Art. 23(1), Constitution). Accordingly, the previous broad individual access to the Constitutional Court was deemed as a not very necessary; in any case, the human rights and fundamental freedoms protection has been provided by several (ordinar) court(s) during the earlier stages of procedure. Therefore, as the speakers in favour of the Constitutional Court Act changes of 2007 affirm, the limited access would be not to much disadvantageous. However, there are some other Slovenian theorists who affirm that the absence of observation of all welcome effects of the ("full") access to the Constitutional Court on the other hand obviously illustrates the interpretation that the state bodies alone are of the greatest significance. Additionally, the serviceability of the state bodies (which are actually paid to be in service of people) has been repeatedly ignored. Furthermore, it is namely lost in obscurity, that the state bodies are "only tools". The state governed by the rule of law shall strengthen also the harmony and greater exactness of legal rules which shall be in service of people, united in the society. Therefore such proposals and warnings¹¹⁶ 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 control 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)¹¹⁷.

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

117 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.

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