



Conférence des Cours constitutionnelles européennes
Conference of European Constitutional Courts
Konferenz der europäischen Verfassungsgerichte
Конференция Европейских Конституционных Судов

CONSTITUTIONAL JUSTICE: FUNCTIONS AND RELATIONSHIP WITH THE OTHER PUBLIC AUTHORITIES

*National report prepared for the XVth Congress
of the Conference of European Constitutional Courts by
The Constitutional Court of the Republic of Slovenia*

I. THE CONSTITUTIONAL COURT'S RELATIONSHIP TO PARLIAMENT AND GOVERNMENT

- 1. The role of Parliament (as the case may be, of the Government) in the procedure for appointing judges to the Constitutional Court. Once appointed, can judges of the Constitutional Court be revoked by that same authority? What could be the grounds/ reasons for such revocation?**

The appointment of judges to the Constitutional Court of the Republic of Slovenia is regulated by the first paragraph of Article 163 of the Constitution of the Republic of Slovenia, and more detailed conditions and procedure governing appointment are determined in the Constitutional Court Act (hereinafter referred to as CCA), i.e. in Articles 11 to 14.

The judges of the Constitutional Court of the Republic of Slovenia are elected on the proposal of the President of the Republic of Slovenia by the National Assembly of the Republic of Slovenia by secret ballot by a majority vote of all deputies.

Within 30 days of receiving the notice of the President of the Constitutional Court on the expiry of the term of office of a Constitutional Court judge, the President of the Republic publishes a call in the Official Gazette of the Republic of Slovenia for candidates for the office of Constitutional Court judge; the proposed candidatures must include a statement of reasons and the written consent of candidates that they accept their candidature. The President of the Republic is not obliged to propose candidates from among the candidates so proposed, but may additionally propose other candidates or even more candidates than there are vacant positions at the Constitutional Court.

In Article 14 the CCA also regulates the procedure in the event no candidate for judge of the Constitutional Court is elected by the National Assembly. If a Constitutional Court judge is not elected, no later than 14 days after the day of voting in the National Assembly the President of the Republic conducts a new procedure, or within the same period of time proposes candidates for vacant positions on the Constitutional Court from among the candidates who responded to the previous call or other candidates. If also on the basis of such new proposal a Constitutional Court judge is not elected, an election is held on the basis of a new procedure, for which the President of the Republic publishes a call no later than eight days after the day of voting in the National Assembly. If the President of the Republic proposes more candidates than there are Constitutional Court judges to be elected, the order of candidates on the ballot is determined by lot. If none of the candidates receives the required majority or if an insufficient number of judges is elected, those candidates who received the highest number of votes are voted on again. As many candidates are voted on as the number of judges required to be elected to the Constitutional Court. If, even after a repeated election, an insufficient number of candidates are elected to the Constitutional Court, a new election is held on the basis of new candidatures.

If the National Assembly does not elect candidates for all vacant positions, in instances in which the election of new judges is no longer possible before the expiry of the term of office of outgoing judges, which of the judges whose term of office is due to expire should perform such office after the expiry of their term of office until the required number of new judges are elected is determined by lot.

Constitutional Court judges are elected for a term of nine years and may not be re-elected (first paragraph of Article 165 of the Constitution). They may, however, be dismissed before the expiration of their term of office, as well by the National Assembly, who decide on such only in accordance with Article 19 of the CCA and in the cases determined in Article 164 of the Constitution, namely, (1) if the judge himself so requests or (2) if the judge is sentenced to imprisonment for a criminal offence, or (3) due to permanent loss of capacity to perform his office. The President of the Republic proposes the early termination of office of the judge to the National Assembly. The dismissal of a Constitutional Court judge who has himself requested dismissal takes effect on the day proposed by this judge. In the other two instances, the office of Constitutional Court judge is terminated the next day following the publication of the decision on dismissal in the Official Gazette of the Republic of Slovenia.

2. To what extent is the Constitutional Court financially autonomous - in the setting up and administration of its own expenditure budget?

The Constitutional Court of the Republic of Slovenia was established as the guardian of constitutionality, human rights, and fundamental freedoms in the system of the division of state powers with the entry into force of the Constitution of the Republic of Slovenia on 23 December 1991. The CCA determines in Article 1 that the Constitutional Court is the highest body of the judicial power for the protection of constitutionality, legality, human rights, and fundamental freedoms. In relation to other state bodies, the Constitutional Court is an autonomous and independent body. While the funds for its work are determined by the National Assembly, this determination is carried out upon the proposal of the Constitutional Court. These funds are an integral part of the budget of the Republic of Slovenia. The Constitutional Court is therefore a direct recipient of state budgetary funds. The Constitutional Court alone decides on the use of these funds and the Court of Auditors exercises supervision over such use.

3. Is it customary or possible that Parliament amends the Law on the Organization and Functioning of the Constitutional Court, yet without any consultation with the Court itself?

The legislative process is initiated on the basis of a correctly submitted draft law, proposed by one or more persons entitled to exercise the legislative initiative. The Constitution determines that the right to propose laws is enjoyed by the Government, any deputy, and at least 5,000 voters (Article 88 of the Constitution), and the National

Council (Article 97 of the Constitution); the Constitutional Court has no legislative initiative. Laws are passed by the legislature, i.e. the National Assembly. This means that a law governing the organisation and functioning of the Constitutional Court will be adopted only by that body. If a law containing provisions affecting the status, organization, or operation of the Constitutional Court is submitted in the legislative procedure, there is no explicit legal basis requiring the legislature to mandatorily obtain the Constitutional Court's opinion on the draft law. However, it is common that the President of the National Assembly invites the Constitutional Court to provide its opinion on such provisions of a draft law within a certain timeframe at the beginning of the legislative procedure.

In the Republic of Slovenia it is customary that the law governing the functioning of the Constitutional Court is not amended without prior consultation with the Court. The Constitutional Court cooperates in the process of the preparation of the draft law, which is usually proposed by the Government. It should be added that the Constitutional Court itself regulates its organisation and work (the second paragraph of Article 2 of the CCA). To this end, it has adopted the Rules of Procedure of the Constitutional Court of the Republic of Slovenia and the Rules on the Internal Organisation and Administrative Operations of the Constitutional Court.

4. Is the Constitutional Court vested with review powers as to the constitutionality of Regulations/ Standing Orders of Parliament and, respectively, Government?

Neither the Constitution nor the CCA determine explicit competence for a review of the Rules of Procedure of the National Assembly. However, the Constitutional Court held in Decision No. U-I-40/96, dated 3 April 1997, that it has jurisdiction to review the Rules of Procedure of the National Assembly. It held that the Rules of the Procedure are certainly not a law in the formal sense, but "in a formal sense [...] a unique legal act which regulates questions of the internal organisation and operation of the National Assembly, and procedures for adopting the acts of the National Assembly, as well as the relations of the National Assembly to other state organs."¹ In so far as it concerns the legislative procedure and in so far as it concerns relations with other state bodies, the Rules of the Procedure have the nature of a general legal act with external effects, i.e. they have the nature of a regulation, whereas within the hierarchy of legal acts they hold the position of a law, although they are formally not a law. The Constitutional Court reiterated this standpoint several times (*cf.* Decisions No. U-I-84/96, dated 21 October 1999, Official Gazette of the Republic of Slovenia No. 95/99, and OdlUS VIII, 224, and No. U-I-104/01, dated 18 June 2001, Official Gazette of the Republic of Slovenia No. 45/01 and 52/01, and OdlUS X, 123).

¹ Constitutional Court Decision No. U-I-40/96, dated 3 April 1997 (Official Gazette of the Republic of Slovenia, No. 24/97, and OdlUS VI, 46), Para. 3.

In these cases, the Constitutional Court deviated from the formal criterion concerning this act, which it hierarchically classified as a law, and founded its jurisdiction on the hierarchical position of the act and in part, on the substantive criterion that the act contains provisions with external effects.² Should it thus appear that the Rules of Procedure of the National Assembly significantly impede the exercise of any constitutional rights or the respect for constitutionally protected legal positions or actually make such impossible, they would be inconsistent with the Constitution to such extent. The Constitutional Court has so far not reviewed the Rules of Procedure of the Government.

5. Constitutionality review: specify types / categories of legal acts in regard of which such review is conducted.

In proceedings for the review of constitutionality, the Constitutional Court decides upon the constitutionality (and legality) of laws, regulations, local community regulations, and general acts issued for the exercise of public authority. If when deciding on a constitutional complaint (due to a violation of human rights and fundamental freedoms by individual acts by which a state body, a local community body, or a bearer of public authority decides on the rights, obligations, or legal benefits of individuals or legal persons) the Constitutional Court finds that the contested individual act is based on a regulation or a general act issued for the exercise of public authority which it assesses could be unconstitutional or unlawful, it initiates the procedure for a review of the constitutionality or legality of such act.

6. a) Parliament and Government, as the case may be, will proceed without delay to amending the law (or another act declared unconstitutional) in order to bring such into accord with the Constitution, following the constitutional court's decision. If so, what is the term established in that sense? Is there also any special procedure? If not, specify alternatives. Give examples.

The basic technique of constitutional judicial decision-making in cases where the Constitutional Court finds that a particular law or provision of a law is inconsistent with the Constitution is the abrogation of the law or such provision. In this manner, the Constitutional Court intervenes in the law to the extent to which the latter must be excluded from the legal system and establishes a state of affairs that is consistent 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. In such cases the National Assembly is under no specific deadline with regard to the adoption of a substitutive statutory regulation, but it is evident that it must amend the abrogated provisions, since the abrogation usually

² F. Testen in: L. Šturm (ed.), *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2002, p. 1092.

creates a legal gap which needs to be remedied. Given the potential adverse consequences of such a legal gap, the Constitutional Court may decide to apply the option provided for in the second paragraph of Article 40 of the CCA and determine itself the manner of the implementation of the decision that is to be used until the new statutory regulation is adopted in order to temporarily remedy the resulting legal gap.

If the Constitutional Court finds that a law, other regulation or a general act issued for the exercise of public authority is unconstitutional or unlawful as it does not regulate a certain issue which it should regulate or it regulates such in a manner which does not enable annulment or abrogation, the Constitutional Court adopts a declaratory decision on such pursuant to Article 48 of the CCA. The legislature (or the 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. The period of time determined by the Constitutional Court depends on the circumstances of the case at issue. The duration of the particular inconsistency with the Constitution and the need for the inconsistency with the Constitution to be remedied as soon as possible are taken into account (cf. Decision No. U-I-10/08, dated 9 December 2009, Official Gazette of the Republic of Slovenia No. 107/09), as well as the appropriateness of the period of time determined for remedying the established unconstitutionality (cf. Decision No. U-I-411/06, dated 19 June 2008, Official Gazette of the Republic of Slovenia No. 68/08, and OdlUS XVII, 43). The Constitutional Court may determine the manner of the implementation of its decision also in such cases.

It is evident from the constitutional review case law that the Constitutional Court often sets a six-month or one-year period in which the legislature must remedy the unconstitutionality or unlawfulness. For example, in Decision No. U-I-207/08, Up-2168/08, dated 18 March 2010 (Official Gazette of the Republic of Slovenia No. 30/10), the Constitutional Court, upon establishing that Article 25 of the Act Regulating the Protection of the Right to a Trial without Undue Delay was inconsistent with the Constitution, as it did not regulate the status of the injured parties for whom the violation of the right to a trial without undue delay ceased before 1 January 2007, but who did not claim just satisfaction before an international court by this date, the Constitutional Court ordered the legislature to remedy the established inconsistency within six months following the publication of this decision in the Official Gazette of the Republic of Slovenia. In Decision No. U-I-411/06, dated 19 June 2008 (Official Gazette of the Republic of Slovenia, No. 68/08, and OdlUS XVII, 43), the Constitutional Court found that the seventh paragraph of Article 128 of the Aviation Act was inconsistent with the Constitution to the extent that it determines that in addition to the personal data listed in the Aviation Act, also other personal data may be processed. The Constitutional Court ordered the legislature to remedy this inconsistency within one year of the publication of this decision in the Official Gazette of the Republic of Slovenia.

Article 142 of the Rules of Procedure of the National Assembly determine that the National Assembly as the legislature may adopt amendments to laws related to proceedings before the Constitutional Court or the decisions of the Constitutional Court (i.e. even when the Constitutional Court found an unconstitutionality regarding the reviewed law) by the shortened procedure. The legislative procedure usually entails three readings, whereas in the shortened procedure the second and the third reading are held at the same session. A special feature of the shortened procedure is that no general debate on the draft law is held. Amendments may be tabled directly at the session up until the beginning of the third reading of the draft law.

6. b) Parliament can invalidate the constitutional court's decision: specify conditions.

The decisions of the Constitutional Court are binding (the third paragraph of Article 1 of the CCA). Everyone, including the National Assembly, must comply with these decisions. The National Assembly must, within its competences, implement the decisions of the Constitutional Court in a manner consistent with the Constitution, but has no competence to annul them. Furthermore, the legislature should not respond with passivity or indifference to the decisions of the Constitutional Court. When, pursuant to Article 48 of the CCA, the Constitutional Court finds the unconstitutionality of a law and orders the National Assembly to remedy the established unconstitutionality within a determined time period, the National Assembly must adopt a new statutory regulation in this period in order to eliminate the unconstitutionality. In reality, however, the legislature occasionally does not respect this time period and violates its duty to implement the decisions of the Constitutional Court. The Constitutional Court has therefore in several cases again reviewed laws which it had already previously held were inconsistent with the Constitution.

In its decisions in which it found that the legislature had not fulfilled its "legislative obligation based on the Constitution", the Constitutional Court stated that disrespect for its decisions entails a severe violation of the principles of a state governed by the rule of law determined under Article 2 of the Constitution and the principle of the separation of powers under the second paragraph of Article 3 of the Constitution (the Constitutional Court first emphasized this in Decision No. U-I-114/95, dated 7 December 1995, Official Gazette of the Republic of Slovenia No. 8/96, and OdlUS IV, 120; *cf.* also Decision No. U-II-3/04, dated 20 April 2004, Official Gazette of the Republic of Slovenia No. 44/04, and OdlUS XIII, 29, and Decision No. U-II-2/09, dated 9 November 2009, Official Gazette of the Republic of Slovenia, No. 91/09). Until the legislature responds to the established unconstitutionality, such violation continues. Therefore, the Constitutional Court in some cases decided to escalate the sanctions and ordered the legislature to perform its legislative obligation and remedy the ongoing unconstitutionality, and in some cases the Constitutional Court abrogated the unconstitutional provision in the second review.

The only manner in which the National Assembly may render a Constitutional Court decision ineffective is by amending, in its capacity as the institution empowered to amend the constitution, the constitution in such a way that it explicitly regulates in a different manner an issue on which the Constitutional Court has ruled. Thus, the Constitutional Court held in Decision No. U-I-12/97, dated 8 October 1998, that the legislature must enact a majority voting system for elections of deputies to the National Assembly in accordance with the outcome of the referendum, and the National Assembly subsequently amended Article 80 of the Constitution and determined that the deputies are elected on the basis of the principle of proportional representation (i.e. by means of a proportional voting system).

7. Are there any institutionalized cooperation mechanisms between the Constitutional Court and other bodies? If so, what is the nature of these contacts / what functions and powers shall be exerted on both sides?

In relation to other state authorities, the Constitutional Court is an autonomous and independent state authority (the second paragraph of Article 1 of the CCA). Its independence and autonomy follow already from the Constitution. In the Constitution the Court is namely not regulated under the Section "Organisation of the State", which contains provisions on the National Assembly, the President of the Republic, and the Government, but under its own section, entitled "The Constitutional Court".

The Constitution further states in Article 166 that the office of Constitutional Court judge is incompatible with office in state bodies, local self-government bodies, and in bodies of political parties and with other offices and activities that are not compatible by law with the office of Constitutional Court judge. The Constitutional Court moreover cooperates in several ways with the National Assembly, as the legislative body is competent to decide on the election of Constitutional Court judges, on their immunity, on early termination of their office, on determining the funds for their work, etc. In such instances, the manner of cooperation is defined either in the Constitution or in the CCA.

The external relations are also regulated by the Rules of the Procedure of the Constitutional Court which in Article 3 expressly determines that the President of the Constitutional Court cooperates with the President of the Republic, the President of the National Assembly, the President of the Government, the President of the National Council, the President of the Supreme Court, and the heads of other state authorities in a manner that ensures the autonomy and independence of the Constitutional Court as the highest body of the judicial power for the protection of constitutionality, legality, and human rights and fundamental freedoms.

II. RESOLUTION OF ORGANIC LITIGATIONS BY THE CONSTITUTIONAL COURT

1. What are the characteristic traits of the contents of organic litigations (legal disputes of a constitutional nature between public authorities)?

Jurisdictional disputes generally arise between two or more authorities who either all claim to have jurisdiction to decide on a particular matter or who all reject their jurisdiction in a particular matter. Such situations entail either positive jurisdictional disputes, wherein the dispute arises when an authority opines that another authority has interfered with or assumed its jurisdiction, or negative jurisdictional disputes, wherein several authorities are of the opinion that the individual matter is not within their jurisdiction.

2. Specify whether the Constitutional Court is competent to resolve such litigation.

Pursuant to the first paragraph of Article 61 of the CCA, a jurisdictional dispute (a so-called positive jurisdictional dispute) arises when several authorities opine that they have jurisdiction to decide on a particular matter. In such instances, a request for a decision on the jurisdictional dispute may be submitted to the Constitutional Court by the authority which opines that another authority has interfered with or assumed its jurisdiction. The affected authority must submit a request for a decision on the jurisdictional dispute within 90 days of the day it ascertains that another authority has interfered with or assumed its jurisdiction.

Instances of so-called negative jurisdictional disputes, wherein several authorities reject jurisdiction in a particular matter, are more common; the authority to which the matter was assigned, but which is of the opinion that the matter is not within its jurisdiction, may submit a request for a decision on the jurisdictional dispute to the Constitutional Court (the second paragraph of Article 61 of the CCA). Thus, for example, in Constitutional Court Decision No. P-36/09, dated 13 May 2010 (Official Gazette of the Republic of Slovenia, No. 42/10), upon the request of the Trbovlje Police station, the Constitutional Court found that the District Court of Trbovlje had the jurisdiction to decide in proceedings concerning a minor offence. In this case, both authorities refused jurisdiction.

In addition to a request by affected authorities, the Constitutional Court may also deal with a petition to resolve a jurisdictional dispute lodged by a party in the proceedings due to which the jurisdictional dispute arose (the third paragraph of Article 61 of the CCA). Also in such instances, the dispute must be either a positive or a negative jurisdictional dispute.

3. Which public authorities may be involved in such disputes?

The Constitutional Court decides jurisdictional disputes between the state and local communities and between local communities, on jurisdictional disputes between courts and other state authorities, and on jurisdictional disputes between the National Assembly, the President of the Republic, and the Government (the seventh, eighth, and ninth indent of the first paragraph of Article 160 of the Constitution).

4. Legal acts, facts or actions which may give rise to such litigations: do they relate only to disputes on competence, or do they also involve cases when a public authority challenges the constitutionality of an act issued by another public authority? Whether your constitutional court has adjudicated upon such disputes; please give examples.

The Constitutional Court decides on the jurisdiction of the authorities determined in the Constitution only in concrete disputes. The authority initiating the jurisdictional dispute cannot challenge the regulation in this proceeding. If the authority challenges the constitutionality of an act issued by another authority, it must file a request or a petition for a constitutional review to be decided by the Constitutional Court.

Alternatively, the authority may state sufficient arguments in the jurisdictional dispute for the Constitutional Court to initiate the constitutional review of the said regulation on its own motion. The Constitutional Court may namely decide on its own motion in a jurisdictional dispute to review the constitutionality of the regulation if it considers such is necessary to decide on the jurisdictional dispute and can abrogate or annul the regulation or the general act issued for the exercise of public authority which it found unconstitutional or unlawful in such proceedings (the fourth paragraph of Article 61 of the CCA).

For example, when deciding on a jurisdictional dispute the Constitutional Court raised a question on compliance of the third paragraph of Article 134 of the Road Transport Safety Act with the Constitution. Under the fourth paragraph of Article 61 of the CCA the Constitutional Court therefore adopted a decision to initiate the constitutional review of the said provision. In Decision No. P-27/05, U-I-327/05, dated 23 November 2006 (Official Gazette of the Republic of Slovenia, No. 123/06, and OdlUS XV, 82) the Constitutional Court emphasized that provisions on jurisdiction must be phrased in a manner such that it can be determined quickly and without a special procedure which authority has subject-matter jurisdiction to decide a case. The Court concluded that the third paragraph of Article 134 of the Road Transport Safety Act, in so far as it applies to determining jurisdiction regarding deciding on minor offences in the first instance, is inconsistent with Article 2 of the Constitution, due to the fact that two out of three conditions cumulatively provided for determining the existence of a traffic accident in which insignificant danger resulted (insignificant material damage and circumstances which make minor offences particularly

negligible) contain vague legal terms and thus it is not clear, comprehensible, and unambiguous to the extent that excludes the possibility of a different application of the Act and the arbitrariness of state authorities in applying the standard methods of interpretation.

5. Who is entitled to submit proceedings before the Constitutional Court for the adjudication of such disputes?

In jurisdictional disputes, a decision on such a dispute may be requested either by the authority that ascertains that another authority has interfered with or assumed its jurisdiction or which considers that the matter is not within its jurisdiction (i.e. the affected authority) or a party in the proceedings due to which the jurisdictional dispute arose.

6. What procedure is applicable for the adjudication of such dispute?

The Constitutional Court decides jurisdictional disputes in plenary sessions. Jurisdictional disputes are treated as priority cases.

7. What choices are there open for the Constitutional Court in making its decision (judgment). Examples.

In a jurisdictional dispute, the Constitutional Court may decide which authority is competent, and on the basis of the principle of related issues, it can also abrogate or annul the regulation or the general act issued for the exercise of public authority which it found unconstitutional or unlawful in such proceedings. The Constitutional Court may also reject the request for a decision on the jurisdictional dispute if the procedural preconditions are not fulfilled.

The following is an example of a Constitutional Court decision in which it determined which authority has jurisdiction: Decision No. P-27/09, dated 21 January 2010 (Official Gazette of the Republic of Slovenia, No. 8/10), where in a jurisdictional dispute between a local police station and a district court it decided that the police station has jurisdiction to decide in the minor offence proceedings as the minor offence authority charged the suspect with a minor offence for which only a fine is prescribed.

In Decision No. P-16/09, dated 14 January 2010, the Constitutional Court rejected a petition for a decision on a jurisdictional dispute filed by a natural person. It found that in this case neither a positive nor a negative jurisdictional dispute existed. What was apparent from the petitioner's motion was only his opinion that the minor offence authority which filed the motion to commence proceedings, and not the district court, had jurisdiction to decide on the minor offence. In order for the dispute to arise, the minor offence authority and the court would have to declare themselves without

jurisdiction to decide on this case. Since the petitioner did not claim that these authorities had declared that they lacked jurisdiction, the Constitutional Court rejected the petition.

8. Ways and means for implementing the Constitutional Court's decision: actions taken by the public authorities concerned afterwards. Examples.

The decisions of the Constitutional Court are binding (the third paragraph of Article 1 of the CCA). Public authorities must respect the decisions of the Constitutional Court. In instances of jurisdictional disputes, when the Constitutional Court decides which authority has jurisdiction, this entails that this authority will then proceed with this procedure in the concrete case. The persons entitled to exercise the legislative initiative may decide, due to a decision of the Constitutional Court, to propose amendments to laws in the National Assembly that would eliminate eventual uncertainties concerning the jurisdiction of the various authorities.

III. ENFORCEMENT OF CONSTITUTIONAL COURT'S DECISIONS

1. The Constitutional Court's decisions are:

- a) **final;**
- b) **subject to appeal; if so, please specify which legal entities/subjects are entitled to lodge appeal, the deadlines and procedure;**
- c) **binding erga omnes;**
- d) **binding inter partes litigantes.**

The decisions of the Constitutional Court are binding (the third paragraph of Article 1 of the CCA). The fourth paragraph of Article 41 of the CCA provides that no appeal is allowed against decisions and orders issued in cases within the jurisdiction of the Constitutional Court. There have already been constitutional complaints lodged before the Constitutional Court against a decision of the Constitutional Court. The Constitutional Court has always emphasised that a constitutional complaint is not a legal remedy by means of which a decision of the Constitutional Court may be challenged, regardless whether the latter has the character of a general or an individual act (cf., Decision of the Constitutional Court No. Up-271/98, dated 28 October 1998, and Decision No. Up-331/98, dated 4 March 1999, Official Gazette of the Republic of Slovenia No. 17/99, and OdlUS VIII, 120). The Constitutional Court rejects such a constitutional complaint against a decision of the Constitutional Court as inadmissible.

Constitutional Court decisions have *erga omnes* effect. An opinion on the conformity of a treaty with the Constitution binds the National Assembly and the latter cannot ratify a treaty wherein non-conformity was established without a prior adequate amendment to the relevant constitutional provision or the provisions of the treaty at issue. The constitutional complaint is an exception to the rule on having *erga omnes* effect as it has *inter partes* effect. Even in such cases, decisions of the Constitutional Court have *erga omnes* effect if the challenged individual act is based on a regulation or a general act issued for the exercise of public authority which the Constitutional Court deems may be unconstitutional or unlawful, and therefore initiates proceedings for the review of constitutionality or legality of such regulation or general act (the second paragraph of Article 59 of the CCA), and thereupon establishes the unconstitutionality or unlawfulness of the regulation or general act at issue.

2. As from publication of the decision in the Official Gazette/Journal, the legal text declared unconstitutional shall be:

- a) **repealed;**
- b) **suspended until when the act/text declared unconstitutional has been accorded with the provisions of the Constitution;**
- c) **suspended until when the legislature has invalidated the decision rendered by the Constitutional Court;**
- d) **other instances.**

Constitutional Court decisions on the review of constitutionality and legality are 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. Constitutional Court orders are also published when the Constitutional Court so decides (Article 42 of the CCA).

The Constitutional Court may abrogate laws, abrogate or annul regulations or general acts issued for the exercise of public authority, or issue a declaratory decision by which it declares that a reviewed act is unconstitutional or unlawful.

If the Constitutional Court abrogates in whole or in part a law which is not consistent with the Constitution, such abrogation takes effect the day following the publication of the decision on the abrogation, or upon the expiry of the period of time determined by the Constitutional Court (Article 43 of the CCA). In the latter case, i.e. abrogation with a suspensive period of time, this period may not exceed one year. The abrogation of a law or part thereof by the Constitutional Court applies to relations that had been established before the day such abrogation took effect, if by that day such relations had not been finally decided (Article 44 of the CCA). The laws may therefore only be abrogated, but not annulled. The abrogation applies prospectively (*ex nunc*), i.e. from the moment the decision enters into force onwards.

The Constitutional Court annuls or abrogates regulations or general acts issued for the exercise of public authority that are unconstitutional or unlawful (Article 45 of the CCA). It annuls them when it determines that it is necessary to remedy harmful consequences arising from such unconstitutionality or unlawfulness; the annulment has retroactive effect (*ex tunc*) and entails that the regulation is null and void. In other instances, the Constitutional Court abrogates regulations or general acts issued for the exercise of public authority that are unconstitutional or unlawful. Abrogation takes effect prospectively (*ex nunc*) the day following the publication of the Constitutional Court decision on the abrogation, or upon the expiry of the period of time determined by the Constitutional Court.

In addition, the Constitutional Court may deem a law, other regulation, or general act issued for the exercise of public authority unconstitutional or unlawful if it does not regulate a certain issue which it should regulate or if it regulates such in a manner which does not allow for annulment or abrogation. A declaratory decision is adopted on such (Article 48 of the CCA). In such instance, the Constitutional Court only declares the unconstitutionality or unlawfulness of the regulation and the regulation remains valid; the Constitutional Court orders the legislature or the authority which issued such unconstitutional or unlawful regulation or general act issued for the exercise of public authority to remedy the established unconstitutionality or unlawfulness within a determined period of time. Such Constitutional Court decisions are most common in instances of legal gaps. The Constitutional Court may adopt declaratory decisions also if a regulation or general act issued for the exercise of public authority which ceased to be in force at the time when the request or petition was lodged or during the proceedings before the Constitutional Court, and the consequences of its

unconstitutionality or unlawfulness were not remedied (Article 47 of the CCA). In such instances, the Constitutional Court may establish that the challenged regulation was inconsistent with the Constitution or a law. In instances of regulations or general acts issued for the exercise of public authority, the Constitutional Court decides whether its decision has the effect of annulment or abrogation.

3. Once the Constitutional Court has passed a judgment of unconstitutionality, in what way is it binding for the referring court of law and for other courts?

Constitutional Court decisions are binding, therefore the requesting court and ordinary courts are bound by them.

If the Constitutional Court establishes the unconstitutionality of a reviewed regulation, the regulation which is the subject of the constitutional review is applied until the legislature remedies such established unconstitutionality (cf. Constitutional Court Decision No. U-I-173/97, dated 21 January 1999, Official Gazette of the Republic of Slovenia, No. 9/99, and OdlUS VIII, 14). The Constitutional Court may also determine the manner of the implementation of its decisions, which is binding on the ordinary courts. For example, in Decision No. U-I-146/07, dated 13 November 2008 (Official Gazette of the Republic of Slovenia, No. 111/08 and OdlUS XVII, 59), the Constitutional Court held that the Civil Procedure Act (CPA) is inconsistent with the Constitution, as it does not regulate the right of blind and partially sighted persons to access court documents and the written applications of parties and other participants in the proceedings in a form that they are capable of perceiving. The legislature was obliged to remedy the established inconsistency within a period of one year from the publication of this decision in the Official Gazette of the Republic of Slovenia. In order to ensure the blind a position that would enable them equal and effective exercise of their rights in civil and other legal proceedings in which the Civil Procedure Act applies *mutatis mutandis*, the Constitutional Court determined the manner of the implementation of its decision pursuant to the second paragraph of Article 40 of the CCA. According to such, the courts must ensure blind persons access, on their request, to court documents and the written applications of parties and other participants in the proceedings in a form that they are capable of perceiving, and the costs so incurred are to be paid from the funds of the court. If the manner of implementation need not be determined, the statutory regulation which has been found to be unconstitutional applies until the legislature remedies the established unconstitutionality.

4. Is it customary that the legislature fulfills, within specified deadlines, the constitutional obligation to eliminate any unconstitutional aspects as may have been found- as a result of *a posteriori* and/or *a priori* review?

The legislature must respect the decisions of the Constitutional Court, and in the event that the Constitutional Court determines that a regulation or general act issued for the

exercise of public authority is unconstitutional or unlawful, the legislature must remedy the established unconstitutionality or unlawfulness within the period of time determined by the Constitutional Court (Article 48 of the CCA). The legislature or the authority that issued the regulation, in principle, must remedy the unconstitutionality or unlawfulness within the determined period. However, every year, there are some cases of established unconstitutionality and illegalities that are left unremedied past the expiry of the determined period. The Constitutional Court draws special attention to such cases in its annual report.

5. What happens if the legislature has failed to eliminate unconstitutional flaws within the deadline set by the Constitution and/or legislation? Give examples.

The Constitutional Court has faced the question of non-compliance with its decisions in certain cases where the unconstitutionality of the law was established and the National Assembly was given a period of time to remedy the unconstitutionality, but the latter failed to adopt an adequate statutory regulation in the determined period. Upon reviewing such laws anew, the Constitutional Court has regularly emphasised that by failing to observe its obligation, the legislature violates the principle of a state governed by the rule of law (Article 2 of the Constitution) and the principle of the separation of powers (Article 3 of the Constitution). The Constitutional Court emphasised this for the first time in Decision No. U-I-114/95, dated 7 December 1995 (Official Gazette of the Republic of Slovenia, No. 8/96, and OdlUS IV, 120). Respect for the principle of the separation of powers, namely, entails not only that none of the branches of power encroaches on the competencies of another, but also that none of them neglects the activities which they are bound to perform within their proper sphere – especially when such an obligation has been imposed on them by a judicial decision. The Constitutional Court, in compliance with its constitutional function, is all the more obliged to draw attention to this because the Constitution does not envisage such violations of the basic rules on exercising authority in compliance with the principles of a state governed by the rule of law, and thus does not provide for any systemic measures against it. Until the legislature responds to the established unconstitutionality, the violation continues.

When subsequently reviewing a regulation which it has already established to be unconstitutional or unlawful, the Constitutional Court may escalate the sanctions. In Decision No. U-I-17/94, dated 13 October 1994 (Official Gazette of the Republic of Slovenia, No. 74/94, and OdlUS III, 113), it found, for example, that Article 51 of the Act on Compulsory Settlement, Bankruptcy, and Liquidation, which determined as a method of financial reorganisation a reduction in the number of employees of the debtor, is inconsistent with the Constitution as the legislature did not regulate by a special law the rights of workers whose employment was terminated on the basis of this provision. By this decision it obligated the legislature to adopt such a law within six months of publication of this decision in the Official Gazette of the Republic of Slovenia. The period of time for remedying the unconstitutionality expired on 31 May

1995. By Decision No. U-I-114/95, dated 7 December 1995 (Official Gazette of the Republic of Slovenia, No. 8/96, and OdlUS IV, 120), the Constitutional Court held that the legislature had not remedied the established unconstitutionality within the period of time determined by the Constitutional Court and that it still had not at the time of reaching this subsequent decision. In this case, the Constitutional Court held that the gravity of the unconstitutionality was that much greater because the legislature should have given statutory form to the special rights of employees at the same time as the Act on Compulsory Settlement, Bankruptcy, and Liquidation entered into force, and thus it held that the delay had lasted for 22 months. The Constitutional Court deemed that the unconstitutionality had particular gravity also due to the fact that it entails a legal position which could in all probability cause difficult-to-remedy consequences for individuals. Therefore, upon the new petition the Constitutional Court decided that the provision of Article 51 of the Act on Compulsory Settlement, Bankruptcy, and Liquidation may not be applied until statutory provisions on the special rights of employees enter into force. This decision was issued on the basis of a teleological interpretation of the first sentence of Article 43 of the CCA, with the interpretation a *maiori ad minus*: since under these provisions it can abrogate a law, it can also suspend a law (temporarily exclude its application) since this is a milder intervention than abrogation, when the threatened constitutional values cannot be protected in the usual manner. In this case, the Constitutional Court chose such an exceptional manner of decision-making because, after the judicial finding of the unconstitutionality of the law, the legislature did nothing to remedy the established unconstitutionality of the statutory regulation which affects important constitutional values (especially the principle of a state governed by the rule of law and a social state), and abrogation of the impugned statutory provision is not possible or reasonable. Even the suspension of the disputed statutory provision will have some negative effects (the temporary impossibility of applying one of the methods of compulsory settlement), but bearing in mind the principle of proportionality, the Constitutional Court nevertheless decided on it because in its judgement, it is the mildest means by which respect for the constitutional values affected by the established unconstitutional statutory regulation may be achieved, as well as respect for the principle of the separation of powers.

6. Is legislature allowed to pass again, through another normative act, the same legislative solution which has been declared unconstitutional? Also state the arguments.

As already mentioned in the answer to the previous question, the Constitutional Court has already been faced with the issue of non-compliance with its decisions in a few cases in which the unconstitutionality of a law was established and the National Assembly was given a period of time to remedy the unconstitutionality, but the latter did not adopt an adequate statutory regulation. When subsequently reviewing such laws, the Constitutional Court has repeatedly emphasised that by failing to observe its obligation, the legislature violates the principles of a state governed by a rule of law and the principle of the separation of powers.

If the legislature nevertheless decides to adopt a law in accordance with which the same statutory regulation the Constitutional Court already found unconstitutional would be enacted, the new law could be reviewed in proceedings for the review of constitutionality before the Constitutional Court. In such a case, the Constitutional Court could decide, if possible, also on a method of escalating sanctions (*cf.* the case presented in the answer to the previous question).

7. Does the Constitutional Court have a possibility to commission other state agencies with the enforcement of its decisions and/or to stipulate the manner in which they are enforced in a specific case?

The Constitutional Court may not authorise another state authority to implement its decisions, but in accordance with Article 40 of the CCA, it has the possibility to determine which authority should implement the decision and the manner of implementation, if necessary. Such decision must include a statement of reasons. This provision entails an authorisation for the Constitutional Court to fill the legal gap caused due to the abrogation or annulment of unconstitutional or unlawful provisions, but this provision can be applied also in the event of the establishment of unconstitutionality. It is true that in this manner the Constitutional Court assumes the role of a so-called "positive" legislature, but it has to be taken into account that this is done to temporarily fill the legal gap caused by the abrogation or annulment of unconstitutional or unlawful provisions. If the manner of the implementation is determined in a decision in which the Constitutional Court only establishes the unconstitutionality of a law or regulation as it does not regulate a certain issue which it should regulate or it regulates such in a manner which does not allow for abrogation or annulment, determining the manner of its implementation may also temporarily fill the unconstitutional legal gap, or the manner of implementation is determined due to the fact that the further application of the regulation found to be unconstitutional would cause harmful consequences that would be difficult to remedy.

For example, the Constitutional Court explained in more detail the nature and effects of determining the manner of the implementation of its decisions in Decision No. U-I-163/99 (Official Gazette of the Republic of Slovenia, No. 59/99 and 80/99 and OdlUS VIII, 209), in which it stated: "The Constitutional Court may decide on the manner in which its decision must be implemented irrespective of the proposals of the participants in the proceedings. What is most important is that by a decision reached on such a basis, the Constitutional Court does not necessarily interpret the Constitution and thereby, in this part, does not explicitly exercise constitutional review as it is empowered under Articles 160 and 161 of the Constitution. This means that the legal character of a decision reached by the Constitutional Court pursuant to the second paragraph of Article 40 of the CCA is different from the legal character of a decision relating to the constitutional review of regulations. Thus, the legislature may change the manner of implementing a decision determined on the basis of the second paragraph of

Article 40 of the CCA by a law. The adoption of such a law is not in itself unconstitutional. Only the manner of implementation included in such a law may be unconstitutional, which, however, should be the subject of a case-by-case constitutional review if such is requested of the Constitutional Court. Thus, the Constitutional Court had to evaluate also in this case whether the provisions of the challenged law are in conformity with the Constitution."