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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

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in co-operation with
THE CONSTITUTIONAL COURT OF AZERBAIJAN

INTERNATIONAL
LEGAL TRAINING WORKSHOP

Improving Eexamination Methods of
Individual Complaints
Effective Case Management
Effective Decision Drafting

Baku, 26-27 February 2004

REPORT ON

"The Constitutional Complaint"

Arne Mavcic, Slovenia

The Constitutional Complaint[1]

A 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 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 (Article 228.3 of the Constitution of the SRS of 1963 and Articles 36-40 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. 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 (actio popularis) without the appellant having to demonstrate his/her own standing.

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[1] Mavčič, A., The Citizen as an Applicant Before the Constitutional Court, Report on the Seminar organised by the European Commission for Democracy Through Law in conjunction with the Constitutional Court of Georgia on Contemporary Problems of Constitutional Justice, Tbilissi, Georgia, 1-3 December 1996. Kristan, I., Ustavno sodstvo in ustavna pritožba, Zbornik znanstvenih razprav, 1992, LII, 181-207. Pirnat, R., Ustavna pritožba s področja upravnega prava - nekatera začetna vprašanja, Javna uprava, No. 3/94, 275-285. Mavcic, A., The Constitutional Complaint and its Extent in the World, Report on the Seminar organised by the European Commission for Democracy through Law in conjunction with the Constitutional Court of Kyrghyzstan, Bishkek, Kyrghyzstan, 16-17 June 1997. Mavcic, A., The Constitutional Complaint, Report on the Seminar organised by the European Commission for Democracy Through Law in conjunction with the Constitutional Court of Latvia, Riga, Latvia, 3-4 July 1997. Jambrek, P., Slovensko Ustavno sodišče pod okriljem evropskih standardov in mehanizmov za varovanje človekovih pravic, Temeljne pravice, Ljubljana, Cankarjeva založba, 1997, 330-362. Kranjc, J., Ustavna pritožba kot institut varstva človekovih pravic, Temeljne pravice, Ljubljana, Cankarjeva založba, 1997, 362-406. Mavčič, A., Temeljne (človekove) pravice v praksi Ustavnega sodišča Republike Slovenije, Temeljne pravice, Ljubljana, Cankarjeva založba, 1997, 489-523.

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) (Article 162.2 of the Constitution of 1991; Article 24 of the Constitutional Court Act of 1994) with the Constitutional Court - despite the individual as petitioner having to demonstrate his/her 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.

B The Constitutional Complaint in Slovenia

The provisions of the Slovenian Constitution of 1991 that regulate the constitutional complaint in detail are relatively modest (Articles 160 and 161 of the Constitution). However, the Constitution itself (Article 160.3 of the Constitution) envisages special statutory regulations (provisions of Articles 50-60 of the Constitutional Court Act).

The Constitutional Court decides cases of constitutional complaints alleging violations of human rights and basic freedoms (Article 160.1.6 of the 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[2].

Any legal entity or individual may file a constitutional complaint (Article 50.1 of the Constitutional Court Act), as may the Ombudsman if it is directly connected with individual matters with which he deals (Article 50.2 of the Constitutional Court Act), although subject to the agreement of those whose human rights and basic freedoms he is protecting in an individual case (Article 52.2 of the 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 (Article 50.1 of the Constitutional Court Act).

The precondition for lodging a constitutional complaint is the prior exhaustion of all possible legal remedies (Article 160.3 of the Constitution; Article 51.1 of the 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 (Article 51.2 of the Constitutional Court Act).

A constitutional complaint may be lodged within sixty days of the adoption of the individual act (Article 52.1 of the 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 (Article 52.3 of the Constitutional Court Act). 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 (Article 53.1 of the 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 (Article 53.2 and Article 53.3 of the Constitutional Court Act).

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[2] Such a formulation in the Slovenian system is rare, since other arrangements as a rule explicitly define the circle of rights protected by the constitutional complaint.

In a senate of three judges (Article 162.3 of the Constitution; Article 54.1 of the 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. The ruling of the Constitutional Court on the allowability of a constitutional complaint (Article 55.3 of the Constitutional Court Act) is final. The constitutional complaint may be communicated to the opposing party for response either prior to or after acceptance (Article 56 of the Constitutional Court Act). The Constitutional Court normally deals with a constitutional complaint in a closed session, but it may also call a public hearing (Article 57 of the 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 (Article 58 of the Constitutional Court Act).

The decision in merito of the Constitutional Court may:

- deny the complaint as being unfounded (Article 59.1 of the 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 (Article 59.1 of the 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 (Article 161.2 of the Constitution; Article 59.2 of the 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 (Article 60.1 of the 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 (Article 60.2 of the 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, for filing a constitutional complaint (Article 51 of the 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;

- A judgment (of the ordinary Courts) as the potential subject of a dispute in a constitutional complaint, which is relatively rare;

- 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 (Article 59.2 of the Constitutional Court Act);

- The coexistence of the constitutional and popular complaint (actio popularis), 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 (Article 34.1 of the Constitutional Court Act);

- The possibility of an ultimate decision on constitutional rights (Article 60.1 of the 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 remedy for the protection of human rights connected with the human rights themselves;[3]

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 Constitutional Court.

Furthermore, despite some contradictory properties of this institution, the possibility of justice or the judicial protection of constitutional rights must remain open to the individual. The very existence of the constitutional complaint ensures a more effective review of violations of constitutional rights on the part of State bodies.

C Human Rights Protection Viewed Through Slovenian Constitutional Case-Law

The Constitution of 1963 explicitly authorized the Constitutional Court to make decisions on the protection of the self-government right as well as other basic rights and freedoms specified by the Federal as well as by the constituent republic Constitution, if these rights were violated through an individual act of government, municipal body or by the activities of other organisations, and no other judicial protection was provided for by statute (Article 228.3 of the Constitution of the SRS). Further details were derived from Articles 36-40 of the Constitutional Court Act. Examples of constitutional case-law from that period reveal that Constitutional Courts rejected such individuals' complaints due to a lack of jurisdiction, and

[3] The Constitutional Court of the Republic of Slovenia, Ruling No. U-I-71/94, 6 October 1994, OdlUS III, 109.

they used to refer such complainants to the ordinary Courts. The activity of the Constitutional Court in the field of basic constitutional rights and freedoms was predominantly based on petitions lodged by citizens. 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[4].

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 implementation.[5]

The question as to whether Slovenian Constitutional Case-Law from the period after the introduction of the 1991 Constitution, in its relations to basic rights and freedoms, has adapted to or is more in line with foreign constitutional case-law, can be answered in the sense that Slovenian Constitutional Case-Law comes close to foreign case-law in its approach to basic rights. The number of examples from this field has increased. Concerning this, it is necessary to bear in mind that the "frequency" of individual rights before Constitutional

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[4] See Part IV. Citizenship and the Administration of Justice, Chapter 4. The Judicial Control of Administrative Actions, § 2. Curative Legal Protection, III. The Constitutional Complaint, A. History.

[5] Citation from Pavčnik, M., Verfassungsauslegung am Beispiel der Grundrechte in der neuen slowenischen Verfassung, WGO Monatshefte fuer Osteuropaeisches Recht, 35th yearbook 1993, Volume 6, 345-356. See also Pavčnik, M., 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.

Courts mainly depends on what kind of problems appellants place before Constitutional Courts. The Constitutional Court now appears as the guardian of constitutionality in such a way that it decides not only on the accordance of general legal acts with constitutional provisions on basic constitutional rights (in the sense of an abstract and specific review of general legal acts) but also on constitutional complaints against the violation of human rights and basic freedoms by individual acts (Article 160.1 and Article 162 of the Constitution). Here it is, however, necessary to add that in principle the new Constitution slightly limited the still broad possibilities for individuals' dispute of general acts. In accordance with this principle, any one still can submit a petition for the initiation of proceedings, yet on the condition that they are able to prove their standing. The concretisation of this newly prescribed condition is one of the issues which the Constitutional Court is consistently concerned with in its actual practice.[6]

The basic current text was taken from Mavcic A., Constitutional Law of Slovenia, Kluwer Law International, Den Haag/Boston/NY, Suppl. 27 (June 1998), pages 262-269, however the text was modified and updated.

[6] Mavčič, A., Slovenian Constitutional Review, Its Position in the World and its Role in the Transition to a New Democratic System, Ljubljana, Založba Nova revija, 1995.

Constitution

(Official Gazette RS, Nos. 33/91, 42/97, 66/00 and 24/03)

Article 160

Unless otherwise provided by law, the Constitutional Court decides on a constitutional complaint only if legal remedies have been exhausted. The Constitutional Court decides whether to accept a constitutional complaint for adjudication on the basis of criteria and procedures provided by law (Para. 3).

Article 161

(Abrogation of a Law)

If in deciding on a constitutional complaint the Constitutional Court establishes the unconstitutionality of a regulation or general act, it may in accordance with the provisions of the first paragraph of this article annul or abrogate such regulation or act (Para. 2).

Article 162

(Proceedings before the Constitutional Court)

The Constitutional Court may decide whether to initiate proceedings following a constitutional complaint with fewer judges as provided by law (Para. 3).

CONSTITUTIONAL COMPLAINT
(Constitutional Court Act, Official Gazette RS, No. 15/94)

Article 50

1. Any person may, under the conditions determined by this Law, lodge a constitutional complaint with the Constitutional Court if he believes that his human rights and basic freedoms have been violated by a particular act of a state body, local community body or statutory authority.
2. The human rights ombudsman can, under the conditions defined by law, lodge a constitutional complaint with the Constitutional Court concerning a particular issue which it is discussing.

Article 51

1. A constitutional complaint may be lodged only after all legal means have been exhausted.

2. Before all extraordinary legal means have been exhausted, the Constitutional Court may exceptionally decide on a constitutional complaint if a violation is probable and if certain irreparable consequences would occur complainant as a result of the implementation of a particular act.

Article 52

1. A constitutional complaint shall be lodged within 60 days after the day of the acceptance of a particular act against which a constitutional complaint is permitted.

2. A human rights ombudsman shall submit a constitutional complaint with the agreement of the person whose human rights or basic freedoms are being protected during a particular matter.

3. In specially founded cases the Constitutional Court may exceptionally decide on the constitutional complaint which has been lodged after the time-limit defined in the first paragraph of this article.

Article 53

1. The constitutional complaint must indicate the particular act which is the subject of the complaint and the facts of the alleged violation of human rights and basic freedoms on which the complaint is based.

2. A constitutional complaint shall be lodged in writing. It must have enclosed with it a copy of the particular act which is the subject of the complaint and all documents forming the basis of the complaint.

3. An complaint with supplements must be lodged in three copies.

1. Procedure for Examining a Constitutional Complaint

Article 54

1. A decision on whether to accept a constitutional complaint and begin proceedings shall be brought by the Constitutional Court in a senate of three judges at a session closed to the public.

2. If the complaint is incomplete and if the Constitutional Court cannot examine it because it does not contain all the required data or documents from the preceding article of this Law, the

Constitutional Court shall calls for the complainant to supplement the complaint within a specific time-limit.

Article 55

1. The Constitutional Court shall decide not to begin proceedings if:

- the constitutional complaint was lodged too late, except in cases from the third paragraph of article 52 of this Law,
- legal means have not been exhausted, except in the case from Article 51 of this Law,
- the constitutional complaint was lodged by a person with no authorisation to do so,
- if the complaint was submitted without due cause within the specified time-limit without supplementing the complaint, in cases from the second paragraph of Article 54 of this Law.

2. The Constitutional Court shall not accept a constitutional complaint if:

- there is no obvious evidence of a violation of human rights and basic freedoms from Article 50 of this Law,
- if the decision provides no 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.

3. The rejection or acceptance of a constitutional complaint shall be decided upon unanimously by the senate. An complaint against such resolution shall not be permitted.

4. If a constitutional complaint was not accepted by the senate, it shall nevertheless be accepted if such is the written decision of any group of three judges of the Constitutional Court within 15 days after the initial decision.

2. Discussion and Adjudication

Article 56

After being accepted, a constitutional complaint shall be sent to the body which issued the particular act and against which the constitutional complaint was lodged, in order that they may reply to the constitutional complaint within a determined period.

Article 57

If a constitutional complaint is accepted, it shall be discussed by the Constitutional Court,

usually at an in camera session, but also possibly at a public hearing.

Article 58

If a constitutional complaint is accepted, the senate or the Constitutional Court may suspend the implementation of the particular act which is the subject of the complaint, if its implementation would cause irreparable damage. The Constitutional Court may also suspend the implementation of a certain law or other regulation or general act for the exercise of public authority, on the basis of which the individual act was adopted.

Article 59

1. The Constitutional Court shall issue a decision declaring that the complaint was unfounded or it shall accept the complaint and partly or completely abrogate or vitiate the act that was the subject of the complaint, and return the matter to the competent body.

2. If the Constitutional Court 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 abrogated or vitiated by application of the provisions of chapter IV of this Law.

Article 60

1. If the Constitutional Court abrogates an individual act, it may also decide on a contested right or freedom if such procedure is necessary in order to abolish consequences that have already occurred on the basis of the individual abrogated act, or if such is the nature of the constitutional right or freedom, and if a decision can be reached on the basis of information in the record.

2. The provision from the preceding paragraph shall be implemented by the body competent for the implementation of the particular act which was abrogated by the Constitutional Court and replaced by decision of the same. If there is no such competent body according to valid regulations, the Constitutional Court shall appoint one.

THE RULES OF PROCEDURE
OF THE CONSTITUTIONAL COURT

(Official Gazette RS, No. 93/03)

The Constitutional Court shall have three three-member panels for the examination of constitutional complaints. The division of work among the panels and their composition shall be regulated by the Constitutional Court according to a plan of work (Para. 2 of Article 10).

The sessions of the Constitutional Court shall be as a rule determined for the spring term between 10 January and 15 July, and for the autumn term between 10 September and 20 December (Para. 2 of Article 11). Panel sessions shall also be held within the periods mentioned in the previous paragraph (Para. 3 of Article 11).

In constitutional-complaint cases, persons who are not parties to proceedings shall not be given information on the state of the proceedings, unless they have been allowed, on the basis of Paragraph 3 of the previous article, to inspect a file (Para. 4 of Article 25).

A decision reached in the proceedings commenced upon a constitutional complaint or a ruling issued in the proceedings examining a constitutional complaint shall be published and recorded in a database in the form which contains imaginary initials instead of the names of persons and locations (Para. 2 of Article 30).

Article 32

(The Acceptance of an Application)

(1) Requests for the review of the constitutionality of a statute, the constitutionality and legality of a regulation, or a general act for the exercise of public authority (hereinafter request), petitions for instituting proceedings for the review of the constitutionality of a statute, the constitutionality and legality of a regulation or a general act for the exercise of public authority (hereinafter petition), constitutional complaints, and other applications and writings shall be filed with the Office of the Registrar of the Constitutional Court.

(2) The contents of individual applications shall be determined in an annex of these Rules of Procedure (Annex 1).

(3) A submitter may submit a petition or a constitutional complaint on forms which are attached in an annex of these Rules of Procedure (Annex 2 – petition, Annex 3 – constitutional complaint). The forms shall also be found at the Constitutional Court, on the website of the Constitutional Court and at the head offices of the courts which offer free legal aid.

Article 33

(The Submitting of an Application)

(1) Applications determined in Paragraph 1 of the previous article may be filed personally in the Office of the Registrar of the Constitutional Court during office hours, sent by mail, by means of communication technology or, under the conditions determined by these Rule of Procedure, by means of information technology.

(2) Applications that are filed in the electronic form, however which do not contain a safe electronic signature, shall not be considered applications that the Constitutional Court receives in the framework of office operation, and thus it is not obliged to respond to them.

(3) If a constitutional complaint for which ZUstS determines that it must be filed in three copies and that it must include certain documents, is filed in the electronic form and has an electronic signature, the application is entered into the record of constitutional complaints, if the applicant in the period of time of three days after its filing submits personally or by mail the documents determined in Paragraphs 2 and 3 of Article 53 of ZUstS. If the documents are not submitted within the mentioned period of time, it shall be considered that the application was not filed.

(4) A time when an application arrives at the Constitutional Court shall be considered the time of submitting the application in the electronic form.

Article 37

(The Completion of an Application)

(1) If it is established that an application does contain all the elements necessary for its examination, consideration and adjudication, the Constitutional Court shall reject such without calling the applicant to supplement it, unless ZUstS provides otherwise.

(2) If the judge rapporteur calls the applicant to supplement the application, they also warn them of the consequences determined by ZUstS if the petitioner does not complete their application within a specified time.

Article 40

(Authorization)

An authorized person must have a special authorization to represent a party in proceedings before the Constitutional Court. In constitutional-complaint proceedings, the authorization for representation in such proceedings must be given after the service of an individual act against which the constitutional complaint is filed.

If a constitutional complaint also contains a petition for the review of the constitutionality or legality of regulations or general acts for the exercise of public authority, and their joint consideration is not necessary or expedient, a panel of the Constitutional Court may upon the proposal of the judge rapporteur separate by a ruling the petition due to separate consideration and decision Para. 2 of Article 49). A separated application may be entered as an independent case, or may be joined with another case if the requirements under the previous article are met (Para. 3 of Article 49).

A decision or a ruling adopted in proceedings instituted upon a constitutional complaint, and a decision in jurisdictional disputes, shall be published in the Official Gazette, if this is so decided by the Constitutional Court (Para. 5 of Article 68). A decision or a ruling adopted in the proceedings of adjudication upon a constitutional complaint shall be published in the form which contains imaginary initials instead of the names and the places (Para. 6 of Article 68).

9. Panels

Article 74

(The Application of the Rules of Procedure Provisions)

(1) The provisions of these Rules of Procedure which refer to consideration and decision shall be sensibly applied also to the work and decisions of panels, unless these Rules of Procedure do not determine otherwise.

(2) In the cases of constitutional complaints a panel shall decide on the proposal of a judge rapporteur or any other Constitutional Court judge for priority consideration according to Paragraph 3 of Article 46.

Article 75

(Circulation After a Panel Session)

(1) A panel ruling that a constitutional complaint is rejected or not accepted for consideration shall be submitted to other Constitutional Court judges in circulation, according to Paragraph 4 of Article 55 of ZUstS.

(2) If the Constitutional Court judges who are not panel members agree with the rejection or non-acceptance of a constitutional complaint, the ruling may be delivered still prior to the expiry of a time limit determined in Paragraph 4 of Article 55 of ZUstS.

(3) A panel may decide to supplement or change the reasoning of a ruling whose operative provisions were accepted. In such a case the supplemented or corrected reasoning of a ruling shall be prior to its redaction submitted to panel members in three-day circulation. If during this time limit any panel member declares that they do not agree with the reasoning, the case together with their proposal for re-consideration shall be placed at the panel session, otherwise it is after the expiry of the time limit submitted to other Constitutional Court judges in circulation according to Paragraph 2 of this article.

Article 76

(The Decision of a Panel)

(1) If at voting on a ruling on the non-acceptance or rejection of a constitutional complaint at a panel session a Constitutional Court judge announces their separate opinion, they shall elaborate such in five days from the day when they receive the edited text of the ruling.

(2) A panel ruling shall be submitted to other Constitutional Court judges when the time limit for submitting a separate opinion expires or when a Constitutional Court submits their separate opinion to the Office of the Registrar.

Article 77

(The Cessation of being a Rapporteur)

(1) If a judge rapporteur had voted against the acceptance of a constitutional complaint in proceedings for its examination, and then the constitutional complaint was accepted on the basis of Paragraph 4 of Article 44 of ZUstS, they shall cease to be the rapporteur in the same case.

(2) In such a case from the previous paragraph of this article, the judge rapporteur shall be that judge who voted for the acceptance of the constitutional complaint. If two members of the panel voted for the acceptance of the constitutional complaint, the judge rapporteur shall be the one whose last name is alphabetically first, if the Constitutional Court judges do not agree otherwise.

(3) If, in such a case from the previous paragraph, none of the members of the panel voted for the acceptance of the constitutional complaint, the judge rapporteur shall be the judge who voted for its acceptance whose last name precedes is alphabetically first, if the Constitutional Court judges who voted for acceptance do not agree otherwise.

Article 78

(The Editing of a Panel Ruling)

The final text of a panel ruling shall be edited by the President or the President of the panel.

Article 79

(Decision on Costs)

If a constitutional complaint is not accepted for consideration, it shall also be decided on the costs of the proceedings if such were declared by a ruling on its non-acceptance or rejection or by a ruling on the discontinuance of proceedings for the examination of the constitutional complaint.

Article 80

(Publication)

(1) A ruling which was adopted in proceedings examining a constitutional complaint shall be published in the form containing only the imaginary initials of the persons and places.

(2) A panel decides on the publication of a ruling determined in the previous paragraph in the Collection of Decisions and Rulings of the Constitutional Court, while the Constitutional Court shall decide upon the proposal of the judge rapporteur on the publication of such in the Official Gazette of the Republic of Slovenia.

Article 81

(Corrections of Errors)

(1) Errors in rulings which were adopted at a session shall be corrected by a ruling that is issued by the President of the panel. The correction ruling shall be entered at the end of the original, parties to proceedings shall be serviced the copy of the ruling.

(2) If the ruling has already been published, the correction ruling shall be published in the same manner.

Annex to the Rules of Procedure:

1. The Contents of Requests, Petitions and Constitutional ComplaintsA request, petition, or constitutional complaint should contain:

- the first and last name, the title or firm of the petitioner,
- the permanent or temporary residence or the seat of the petitioner,
- the first and last name or the firm and the permanent or temporary residence or the seat of the representative or mandatory of the petitioner,
- the statement of the general or individual act which is challenged by the application, and the organ which issued this act,
- the statement of the provisions of the Constitution or statute which were allegedly violated by the challenged act,
- the statement of the facts on which the applicant grounds their claim, and which allegedly entail the violation of the Constitution or statute,
- the statement of the reasons why the challenged act is allegedly inconsistent with the Constitution or statute.

Besides the stated components, a petition should also show of the legal interest of the petitioner and the proof of their status when the applicant is not a natural person.

Besides the stated components, a constitutional complaint should also contain:

- a statement of the allegedly violated human right or fundamental freedom,
- a statement on the exhaustion of legal remedies,
- the facts which substantiate the obviousness of the alleged violation, and the facts which substantiate the asserted irreparable consequences which would occur for the petitioner by the execution of a single act, if the constitutional complaint is filed before the exhaustion of legal remedies,
- the circumstances on the timeliness of the constitutional complaint or the facts which substantiate deciding the constitutional complaint, even though it has been filed after the expiration of the time limit for its filing.

If a request is made by the representative organ of a local community, the resolution on making the request should be enclosed with the request; in the request the allegedly threatened rights of the local community should be stated.

If a request is made by the mayor on behalf of the representative organ of a local community, the authorization of the council of the local community or the statement of the general authorization contained in the charter of the local community should be enclosed with the request.
If a request is made by a trade union which represents a certain group of workers throughout the country, the proof of its representation should be enclosed with the request; in the request the allegedly threatened rights of workers should be stated.

Applicant/seal of attorney's office:

Constitutional complaint is to be sent to the address:

The Constitutional Court of the Republic of Slovenia
P.O. Box 1713
SI-1001 LJUBLJANA

CONSTITUTIONAL COMPLAINT

The form contains rubrics for the entry of the recommended components of a constitutional complaint (Annex 1 of the Rules of Procedure of the Constitutional Court of the Republic of Slovenia, Official Gazette RS, No. 93/03).

Any person may, under the conditions determined by the Constitutional Court Act (Official Gazette RS, No. 15/94 – ZUstS), lodge a constitutional complaint with the Constitutional Court if they believe that their human rights and basic freedoms have been violated by an individual act of a state body, local community body or holder of public authority.

1.1 CONSTITUTIONAL COMPLAINANT

a) Name and surname / title or company's name:

b) Permanent or temporary residence / registered office:

c) Representative of a legal entity: (state also the legal basis for representation: e.g. authorization in a statute, order of a competent body, etc.)

1.2 STATUTORY REPRESENTATIVE

Complete this rubric only in cases when the complainant has a statutory representative (e.g. the parent of a minor person, etc.)

a) Name and surname:

b) Permanent or temporary residence of the statutory representative:

1.3 AUTHORIZED PERSON

Complete this rubric only if the complainant is represented by an authorized person. In this case such a person must attach their authorization for representation before the Constitutional Court, which stems from the time when the right to file a constitutional complaint was created.

a) Name and surname / name of the law firm:

b) Permanent or temporary residence / registered office:

1.4. AUTHORIZED PERSON FOR THE ACCEPTANCE OF WRITINGS

Complainants who jointly submit a constitutional complaint, however who do not have a joint statutory representative or an authorized person, should designate an authorized person for the acceptance of writings.

When submitting a constitutional complaint, a complainant living abroad who does not have an authorized person in the Republic of Slovenia should designate an authorized person for the acceptance of writings in the Republic of Slovenia.

a) Name and surname / name of the law firm:

b) Address / registered office:

2. CHALLENGED ACT

IMPORTANT: A constitutional complaint must indicate the individual act which is challenged (Paragraph 1 of Article 53 of ZUstS). A constitutional complaint must have enclosed with it a copy of the particular act which is challenged and all the documents on which the complaint it based (Paragraph 2 of Article 53 of ZUstS).

Statement of the individual act which is challenged by this constitutional complaint:

Court or authority which issued the act	Reg. No.	Date

3. EXHAUSTION OF LEGAL REMEDIES

IMPORTANT: A constitutional complaint may only be filed after all legal remedies have been exhausted (Paragraph 1 of Article 51 of ZUstS).

Prior to the exhaustion of legal remedies the Constitutional Court may exceptionally decide on a constitutional complaint if the alleged violation is evident or if by the implementation of an individual act the complainant would suffer irreparable consequences (Paragraph 1 of Article 51 of ZUstS).

State, in time sequence, all the decisions issued in connection with the subject of your constitutional complaint:

Court or authority which issued the decision	Reg. No. of a case	Date

4. TIMELINESS

IMPORTANT: A constitutional complaint shall be filed within 60 days from the service of an individual act against which the constitutional complaint can be filed (Paragraph 1 of Article 52 of ZUstS).
In specially substantiated cases the Constitutional Court shall exceptionally decide on a constitutional complaint that was filed after the expiry of the sixty-day time limit (Paragraph 3 of Article 52 of ZUstS).

State the circumstances that demonstrate the fact that the constitutional complaint was filed in due time (e.g. the date of the service of the individual act):

5. VIOLATED HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

IMPORTANT: The challenged individual act, the facts that substantiate the complaint and the allegedly violated human rights and fundamental freedoms must be stated in a constitutional complaint (Paragraph 1 of Article 53 of ZUstS).

5.1. Introduction (Describe briefly the subject of decision-making (issue) in the challenged individual act)

5.2. Statement of allegedly violated human rights and fundamental freedoms

State which of your human rights and fundamental freedoms were violated by the challenged act (e.g. presumption of innocence under Article 27 of the Constitution).

5.3. The reasons that substantiate the alleged violations

State the reasons by which you substantiate that your human rights or fundamental freedoms were violated. If you assert several human rights or fundamental freedoms violations, state the reasons for each alleged violation separately.

(Use another page, if necessary.)

6. OTHER STATEMENTS

If you file a constitutional complaint prior to the exhaustion of legal remedies, state the facts that substantiate the evident character of human rights and fundamental freedoms violations, and the facts which substantiate the allegation of irreparable consequences that you would suffer by the implementation of the individual act.
If the constitutional complaint is being filed after the expiry of the 60-day time limit, state the facts that substantiate extraordinary adjudication of the constitutional complaint that is filed after the expiry of the mentioned time limit.

(Use another page, if necessary)

7. ATTACHED DOCUMENTS

No.	Document
1.	
2.	
3.	
4.	
5.	
6.	
7.	
8.	
9.	
10.	

IMPORTANT: A constitutional complaint shall be filed in writing. A copy f the challenged individual act and appropriate documents on which the complainant bases their complaint must be attached to the complaint. The constitutional complaint must be filed, with attachments, in three copies. (Article 53 of ZUstS)

Place and date:

Signature of the complainant:

Up-134/97-17
14 March 2002

D E C I S I O N

At a session held on 14 March 2002 in proceedings to decide the constitutional complaint of A.A. of Ž., represented by B.B., attorney in Z., the Constitutional Court

decided as follows:

1. Judgment of the Supreme Court No. I Ips 200/95, dated 9 January 1997, judgment of Ljubljana Higher Court No. Kp 1033/94, dated 31 August 1994, and judgment of Novo Mesto Basic Court, Sevnica Unit, No. K 56/93, dated 25 April 1994, are overturned.

2. The case is remanded to Krško District Court.

Reasoning

A.

1. On 28 April 1997 the complainant lodged the constitutional complaint against the judgments cited in the disposition of this decision. With the final judgment she was found guilty of committing a criminal offence of arson, pursuant to Article 180.1 of the Penal Code of the Republic of Slovenia (Official Gazette SRS, No. 12/77 et seq. – hereinafter KZ77). She was sentenced to imprisonment of one year and was to pay compensation for the damage caused by the criminal offence.

2. Article 27 of the Constitution was allegedly violated with the challenged judgments as, according to the assertions of the complainant, the court and the expert witness made a conclusion on the existence of the criminal offence and guilt prior to the finality of the court decision. Furthermore, the instructions of the court to the expert witness, and subsequently also the expert opinion itself were given contrary to the presumption of innocence. The violation of Article 29.3 of the Constitution (the right to present all evidence to the benefit of the defendent) allegedly occurred as the court dismissed the proposed evidence of the defense to examine the witness C. C. without giving grounds for such a decision. Additionally, this right was allegedly also violated since the court did not directly hear the expert of psychiatry Dr. Č. Č., as his expert opinion was only read at the trial. Moreover, the court allegedly violated the constitutional right provided in Article 29.4 of the Constitution which secures the defendant the right not to incriminate himself or his relatives or those close to him, or to admit guilt (the privilege against self-incrimination). The complainant asserted that the court in the legal caution prior to every examination (not only in the investigation on 20 January 1993 and 15 March 1993, but also at the trial on 4 October 1993 and 25 April 1994) instructed her that "… the confession of a criminal offence is a mitigating circumstance which may be considered in sentencing". The instructions of the court concerning "a mitigating circumstance as the result of a confession" were allegedly deceptions for reaching an unlawful goal – a confession. The complainant was allegedly mislead and deceived, as she expected that due to the given confession she would receive a suspended sentence; throughout the proceedings she denied the criminal intent of the arson of the building.

3. From the reasoning of the judgment in the lower court, it follows that the court entirely considered the defense of the defendant regarding the confession of the act committed and the course of events on 25 September 1992 (the critical day). The court established that the complainant did not deny that she cast away a burning match on the paper and hay, which was lying in the upper area of the outbuilding of the injured party D. D. The court held that, with the examining of E. E. and F. F., it was completely established that the arson occurred around 17.30. The court established the ability of a reasonable judgment of the defendant at the moment of committing the criminal offence, with the expert of psychiatry. It determined that at the critical day the ability of a reasonable judgment and the controlling of the emotional reactions and ensuing acts of the defendant was diminished due to the strong emotional reaction, however, not substantially. She committed the criminal offence in anger and because she felt offended, as the written note they had left her was offensive. However, the vengeance demonstrated at the time of committing the offence does not mean that at that particular time the defendant was mentally abnormal. The court concluded, as regards to the complainant's criminal responsibility that her awareness, as she herself explained that she cast the burning match on the paper and hay and yet she knew that this could cause a fire, only indicates that she had committed the offence with the highest form of guilt, i.e. with a direct intent. The cause for the complainant's conduct was an argument with the F. F.´s parents, nevertheless, due to the overall feeling of being aggrieved, her ability to rationally judge and control the emotional reactions was diminished, however, not substantially. According to the court's opinion, the complainant's hostility is additionally manifested through two circumstances: 1) after setting a fire she walked towards V.; as she had, after about 5 minutes, turned around, heard the cracking noise and seen smoke on the corn-rack of F. she continued to walk without calling for help; 2) her hostility and vengeance are also manifested in the fact that she left the house leaving the electric stove on. On the basis of the above-stated, the court concluded that following the carried out hearing of evidence the complainant fulfilled all the objective and subjective elements of the criminal offence of arson pursuant to Article 180.1 of KZ77. The court considered the fact that the complainant had no criminal record and her sincere defense as mitigating circumstances.

4. The Ljubljana Higher Court dismissed the appeal as unfounded and affirmed the judgment of the lower court. In the reasoning the court explained why it was not possible to consent to the assertions in the appeal that the defendant was not aware or did not wish to cause a fire, as she cast the match on the ground. The court established that the defense of the appellant implied her distress caused by F.´s mother, and it completely agreed with the finding of the lower court that the note, the defendant had left for F´s mother, showed her vengeance or threat. The appellate court completely affirmed the decision of the lower court according to which, regarding the established motive, the expressed vengeance and threat, did not accept the defense of the defendant that she had not deliberately set fire on the building. Moreover, according to the opinion of the Higher Court, the correctness of the finding of the lower court allowed no doubt that the defendant had committed the offence with direct intent. Thus, the factual situation was correctly established and on such basis the lower court correctly applied the Penal Code. The Higher Court also fully agreed with the imposed sentence and it established that the committed offence could not be deemed to be of a low significance, furthermore, special mitigating circumstances, which would allow the pronouncement at a suspended sentence as well as imposing a reduced sentence, were not present. In the opinion of the Higher Court, all the mitigating circumstances were amply considered.

5. The Supreme Court dismissed a request for the protection of legality as unfounded. As derives from the reasoning of the challenged judgment, the substantial violation of the provisions of criminal procedure, which was allegedly in the fact that the court should not have based its evaluation whether the convicted person had committed the criminal offence on her defense, did not exist. Moreover, the Supreme Court established that the lower court instructed before every hearing the convicted person that the confession of a criminal offence is a mitigating circumstance, which may be as such considered in sentencing. As regards to the above-stated, the Supreme Court established that the lower court acted neither in accordance with the provisions of Article 218 of the Code of Criminal Procedure (Official Gazette of SFRJ, No. 4/77 et seq. – hereinafter ZKP77), which refer to the hearing of a defendant in investigation, nor in accordance with the provisions of Articles 314, 316 and 317 ZKP77, which provide what a defendant must be instructed in prior to pleading their case at the trial. The Supreme Court emphasized that neither ZKP77 nor the new Code of Criminal Procedure (Official Gazette of RS, No. 63/94 et seq. – hereinafter ZKP), which came into force on 1 January 1995, provided the court with the basis on which the defendant should also be instructed that the confession of a criminal offence may be considered as a mitigating circumstance. However, in the opinion of the Supreme Court the lower court could have based the judgment on her defense, as coercion, threat or other similar methods were not used against the convict to acquire any statements or a confession (Article 259.3 of ZKP). In the viewpoint of the Supreme Court, only in such a case the court decision could not have been based on her testimony (Article 218.10 of ZKP77). As derives from the reasoning of the challenged judgment, the violation of the right to defense was not given, due to the fact that the court did not examine the expert witness at the trial. At the trial on 15 April 1993 the expert opinion was read with the consent of the parties, thus in accordance with the provision of Article 333.2 of ZKP77.

B.

6. The panel of the Constitutional Court accepted the constitutional complaint against the challenged judgments for consideration with order No. Up-134/97, dated 5 December 2000. Pursuant to Article 56 of the Constitutional Court Act (Official Gazette RS, No. 15/94 – hereinafter ZUstS), the constitutional complaint was served to all the competent courts, which did not reply to it.

7. The Constitutional Court examined criminal record No. K 56/93 of Novo Mesto Basic Court, Sevnica Unit.

8. The complainant asserted that with the challenged judgments her rights determined in Article 29.4 and Article 27 of the Constitution were violated.

9. Article 29 of the Constitution provides legal guarantees in criminal proceedings. In accordance with subparagraph 4, a person charged with a criminal offence must, in addition to absolute equality, be guaranteed the right not to incriminate himself or his relatives or those close to him, or to admit guilt. Thereby, the Constitution provides the privilege against self-incrimination. The International Covenant on Civil and Political Rights (Official Gazette RS, No. 35/92, IT, No. 9/92) embraces a similar provision. Article 14.3.g [1] provides that, in determination of any criminal charge against a person, everyone shall be entitled in full equality not to be compelled to testify against himself or to confess guilt. The Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94,

IT, No. 7/94 – hereinafter EKČP) does not explicitly regulate such a right, however, according to the case-law of the European Court of Human Rights (hereinafter ESČP), the privilege against self-incrimination is recognized as one of the general guarantees of a fair trial determined in Article 6 of EKČP. [2]

10. By virtue of the linguistic and authentic interpretation of the provision of Article 29.4 of the Constitution, it could be established that the privilege against self – incrimination implies the constitutional right to silence, [3] which also the legislature summarized. [4] The right to silence is, as well as the prohibition against any form of coercion in obtaining confessions and statements, one of the fundamental (constitutional) procedural rights of the defendant. The right to silence does not only mean the prohibition against the use of coercion or deception, but also the prevention of self-incrimination, as the defendant is possibly not aware (for the lack of legal knowledge) that they are not obliged to incriminate themselves. [5] A legal caution, in which the defendant must to be instructed in this right, must be as such that a decision whether to exercise the right to silence entirely depends on their free will. [6] The essence of the privilege against self-incrimination in conjunction with the prohibition against extorting testimonies is that the authorities of prosecution in the broadest sense must allow the defendant to be completely passive, or that the defendant willfully, rationally and above all voluntarily decides whether to cooperate with them or not. Furthermore, the right to silence has an extraordinarily important evidentiary procedural consequence. A state prosecutor must prove all the elements of the indictment and the defendant is not obliged to do anything in their defense. In this aspect the right to silence is the element of the constitutional right determined in Article 27 of the Constitution (the presumption of innocence), therefore, the prosecutor must prove all the elements of a criminal offence in order to convince the court, even if the defendant remains completely passive. The Constitutional Court in decision No. U-I-18/93, dated 11 April 1996 (Official Gazette RS, No. 25/96 and DecCC V, 40), emphasized that the presumption of innocence means that the burden of proof (onus probandi) is on the plaintiff (the state) and not on the defendant, and that the State as the plaintiff bears the burden of persuasion: “Actore non probante reus absolvitur!” Precisely the right to silence is the stronghold which prevents that the burden of proof falls on the defendant. The right to silence secures the defendant the possibility not to say anything about the charges against them, [7] thereby it is particularly important that the defendant is aware that they have the right to silence without any consequences that the exercising of this right in itself would have for them.

11. In the discussed case the complainant was given the following legal caution by the judge: “She is instructed that she is not obliged to testify nor answer questions, a confession is regarded as a mitigating circumstance which as such may be considered in sentencing, that she has the right to an attorney, that she must notify every change of residence until the end of the criminal proceedings …”. As regards to the stated in the previous paragraph, it is crucial for the review whether the complainant’s constitutional right determined in Article 29.4 was violated, if after such a legal caution the complainant could have freely and independently decide whether to exercise this right or not.

12. The instruction that a confession is a mitigating circumstance, which may be considered in sentencing, affected the complainant’s decision whether to say anything and what to say. With such a legal caution the complainant was led into temptation – she had to decide an additional issue - whether to cooperate with the court or not. The promised “reward” (a lower sentence which the complainant even expected as a suspended sentence) undoubtedly increased the possibility of a decision in this direction – in the direction of a confession (notwithstanding the fact whether the complainant was, in fact, guilty of the alleged criminal

offence). Simultaneously with the offered "reward" the probability of an autonomous and independent decision decreased, and the probability of a decision for the offered "reward" (a lower sanction) increased. Thereby, the subjective circumstances of the complainant have to be considered as well: during the court proceedings she was 18 years old and she had already tried to commit suicide. Moreover, the circumstance for the part of the deciding body - the court, had to be considered as well: such a legal caution was repeated to the complainant four times. The complainant's confession was thus not obtained respecting her will to freely and independently decide her interest on the basis of a legal caution on her rights.

13. A court as an independent and impartial body has a task to decide on charges brought against the defendant (Article 23.1 of the Constitution). The task of the court is to establish the truth and hear both sides, as well as to decide the dispute. Its tasks is not to try to persuade one of the parties to consent to the assertions of the other side, and that even in criminal proceedings where there exists a duty of a state prosecutor to prove with certainty that the defendant is guilty, yet the defendant may be completely passive. Precisely the fact that the court does not cooperate with the state prosecutor but remains impartial is one of the functions of the privilege against self-incrimination, as well. Therefore, it is unfair and unjust if a court as a body which has to judge, tries to persuade the defendant to confess to the committing of a criminal offence in a manner such that the court promises a reward (a lower sentence). The court has to establish a substantive truth. However, the truth is not necessarily what the state prosecutor asserts. Persuading for a confession of a criminal offence forces the defendant to act against themselves even if they did not commit a criminal offence, or they did not commit it in a manner as asserted by the state prosecutor in the indictment. Such a legal caution not only forces the defendant to cooperate with the prosecution, but also forces them to act against their interests and to confess the allegations in the indictment. Thus, it is also inconsistent with the presumption of innocence (Article 27 of the Constitution), since it derives just from the opposite presumption – from the presumption of guilt.

14. The court with the given legal caution actually persuaded the complainant to confess and thereby testify against herself. As in this case, persuading by the court, whose role is to be an independent and impartial body, can no longer be seen as enabling a person to decide for themselves whether to testify against themselves or not. It derives from the defendant personal right that they are not obliged to testify that such a decision may not be bound by any conditions, supplements or pressures. In a situation when an individual is secured the right to silence every, even the smallest pressure, may cause the violation of human rights. The defendant is in an inferior position merely for the fact that they are at a police station or before a judge. This fact alone can influence their decision. For this particular vulnerability a threshold for the review of the privilege against self-incrimination must be set with a special care and rigorousness in order to be carried out. This means that every more or less subtle influencing or conditioning must be interpreted as a pressure or an influence on a free decision. Thus, according to the Constitutional Court, the legal caution given by the court meant influencing the will of the complainant to decide whether to exercise the right to silence. Therefore, her decision could not be free. Accordingly, in the proceedings before the lower court the complainant was violated a guarantee provided in Article 29.4 of the Constitution, and as regards the reasons from the previous paragraph, also the right from Article 27 of the Constitution. The violations were not remedied in the appellate proceedings, as they were not remedied in deciding on the request for the protection of legality. The standpoint of the Supreme Court, according to which the lower court could base its judgment on the complainant's testimony due to the fact that coercion, threat or other similar means that would force her to confess were not used, and is based merely on the restrictive linguistic interpretation, is regarding the above-mentioned inconsistent with the provision of Article

29.4 of the Constitution. Thereby, the Supreme Court overlooked the teleological interpretation of the privilege against self-incrimination, embraced in the provision of Article 29.4 of the Constitution, as one of the fundamental, generally recognized procedural guarantees of the defendant (Paragraph 10 of this reasoning). It is namely not enough that only the prohibition of use of coercion, threat or deception exist, this prohibition must be defined as an active procedural right of the defendant, even for an extremely passive thing – a silence. [8]

15. As the Constitutional Court established that in the criminal proceedings the complainant was violated her human rights determined in Article 29.4 and Article 27 of the Constitution, it overturned the challenged judgments and remanded the case to the competent court. In the renewed decision-making the court will have to secure the complainant all the procedural guarantees determined in the Constitution.

16. As the challenged judgments had to be overturned for the violations stated in the previous paragraph, it was not necessary to further establish whether the other asserted violations of human rights existed.

C.

17. The Constitutional Court reached this decision on the basis of Article 59.1 of ZUstS, composed of: dr. Dragica Wedam-Lukić, President, and Judges: dr. Janez Čebulj, dr. Zvonko Fišer, Lojze Janko, Milojka Modrijan, dr. Ciril Ribičič, dr. Mirjam Škrk, Franc Testen and dr. Lojze Ude. The decision was reached unanimously. Judge Ribičič gave a concurring opinion.

P r e s i d e n t
Dr. Dragica Wedam-Lukić

Footnotes:
[1] It embraces generally recognized minimum guarantees in criminal proceedings.

[2] The ESČP in the case Funke v. France (judgment dated 25 February 1993) understood the privilege against self-incrimination as "the right to silence and not to incriminate oneself." In the case Saunders v. United Kingdom (judgment dated 17 December 1996) the ESČP wrote "The Court recalls that, although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, inter alia, in the protection of the defendant against improper compulsion by the authorities…. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seeks to prove their case against the defendant without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the defendant. In this sense the right is closely linked to the presumption of innocence…". Some recent cases in which the ESČP dealt with the issue of the privilege against self-incrimination are: Khan v. United Kingdom (judgment dated 12 May 2000), Magee v. United Kingdom (judgment dated 6 June 2000), Averill v. United Kingdom (judgment dated 6 June 2000) and Heaney and McGuinness v. Ireland (judgment dated 21 December 2000).

[3] Katja G. Šugman, Dokazne prepovedi v kazenskem postopku, Bonex Publishing House, Ljubljana 2000. p. 173.

[4] In Article 4.1 of ZKP it is provided, inter alia, that a person deprived of freedom shall immediately be instructed that he is not bound to make any statements, Article 5.3 reads as follows "The defendant shall not be obliged to plead his case or to answer any questions; if he pleads his case he shall not be obliged to incriminate himself or his relatives or those close to him, or to admit guilt." ZKP77 did not contain such provisions among the fundamental principles. It only contained a provision (Article 10) equal to the provision of Article 11 of ZKP, according to which it is prohibited to force a confession or any other statement from the defendant or from any other participant in the proceedings.

[5] The privilege against self-incrimination was historically first put forward in the Anglo-American legal system. In the Constitution of the USA it is determined in the V. Amendment (1791). The right against coercive self-incrimination is not only the right to refuse to testify before a court, but it also applies to the bodies authorized by the law to carry out the investigating authority. The early American case law protected the defendant only from the inappropriate methods of examination. It emphasized the word "compelled". In essence it only embraced the prohibition of torture and other similar examining methods. According to the contemporary concept brought by the decision of the Supreme Court in the Miranda case, the privilege is understood as the right of a suspect and defendant to remain silent. This means that a State cannot legitimately demand the testimonial evidence which would incriminate an individual. The privilege is fulfilled only in a case when a person has the right to remain silent secured, except if they, in an unimpeded carrying out of their will, decide to speak. They must have a free will to admit, deny or refuse an answer to a question. An individual may wave the right to silence, however, waiving of the right must be conscious, rational and intelligent (according to Helmholz and Gray, The Privilege Against Self-incrimination, The Chicago University Press, 1997). The additional guarantees, which secure the effective carrying out of this right, are a request for the instruction on the right before the examination and on the right to a representative (also according to Helmholz and Gray…). The privilege against self-incrimination is also based on the fact that in criminal proceedings the State bears the entire burden of proof. According to the case-law of the Supreme Court of the USA, this privilege only protects against obtaining testimonial and communicative evidence and not against investigations or procedures by which the defendant is a physical source of evidence against themselves (the case Schrember v. California, 1966).

[6] In the concurring separate opinion Justice Walsh in the above mentioned case Saunders v. United Kingdom emphasized that a trial is unfair (violation of Article 6 of EKČP) inasmuch as some of the evidence upon which his conviction was based was obtained by self-incrimination on the part of the applicant and that the self-incrimination was not the result of the unfettered exercise of his own will.

[7] Katja G. Šugman, ibidem, p. 170.

[8] Katja G. Šugman, ibid., p. 166.

Up-134/97
27 March 2002

The Concurring Opinion of Judge Dr. Ribičič

I voted for the decision of the Constitutional Court on overturning the judgments for which A. A. from Ž. Z. lodged the constitutional complaint. I agree that the complainant was violated the constitutional rights, as the court with the legal caution persuaded the complainant to confess the criminal offence even though she is secured the right to silence as well as the privilege against self-incrimination. However, I believe that in this case and in other similar cases it would be more reasonable to reach declaratory decisions with which the Constitutional Court establishes the violation of the complainant's rights and that she would be assessed the adequate material satisfaction. The advantage of the solution that I suggest is that the renewed adjudication for the violations that the Constitutional Court establishes in 2002, however, they had occurred at the beginning of 1993, and the complainant already served the sentence, would not take place. It is not reasonable to remand the case which can take quite long and, moreover, it is hard to predict its final result. The confession to which the court persuaded the complainant will, even though it should not, influence the new adjudication.

It is common knowledge that the European Court of Human Rights on the basis of the Convention for the Protection of Human Rights and Fundamental Freedoms with the Protocols (Article 41) awards just material satisfaction when it establishes the violation of rights and freedoms prescribed with the Convention. Indeed this remedy of the European Court, which the Court constantly applies [1], was created as the Court does not have jurisdiction to overturn the decisions of national courts. However, this does not apply to the constitutional court in relation to the decisions of domestic courts.

Thus, it is obvious that the overturning of a judgment is a stronger, more important competence as the awarding of just satisfaction. Therefore, I find the striving to build such a lenient possibility into our legal system even less disputable. I am convinced that also in some cases in Slovenia it is not in the interest of the complainant whose constitutional rights were violated that the whole very painful criminal proceedings are repeated, particularly in a case where for the kind of the established violation it is not possible to predict with certainty the favorable final result. In some cases it will not be possible to repeat the trial due to the absolute limitation of the criminal prosecution. Therefore, the best solution for such cases is the establishing of the violation (with or without overturning the judgment), which gives the complainant moral satisfaction and, with the awarded just satisfaction, also material satisfaction. Obviously such a decision by no means interferes with the complainant's right to claim damages on the basis of Article 26 of the Constitution. A decision on such claim depends on the fulfilling of the conditions according to tort law.

Awarding of just satisfaction would, in my opinion, be reasonable first of all in cases where the overturning of a judgment is not possible, or it would not lead to a different decision in a renewed proceedings, or it would even lead to a decision to the complainant's prejudice. In the discussed case the issue of the reasonableness of the overturned judgment arises. In some cases which the Constitutional Court already reviewed, and in others which it has not yet finally decided, a declaratory judgment on the violation and just material satisfaction are the only thing that the Constitutional Court can do if it establishes the violation of human rights in criminal proceedings. I refer particularly to constitutional complaints lodged by private and

subsidiary prosecutors, which naturally cannot and may not result in the overturning of a final judgment of acquittal, but merely whish to establish that in the criminal proceedings their constitutional right was violated. The Constitutional Court does not recognize private and subsidiary prosecutors the right to lodge a constitutional complaint. It is possible that such a standpoint of the Constitutional Court, with which I cannot agree, was also influenced by a negative opinion on declaratory judgments and just satisfaction.

That such regulation for which I strive is not incompatible with the role of constitutional courts in the contemporary democratic systems is proved by the instances of its introduction in some states. For example the amendments to the Constitution of the Slovak Republic from 2001 explicitly provide (Article 127) that the Constitutional Court may award adequate material satisfaction (primerane finančne zadostučinenie) on the basis of a constitutional complaint for the violation of human rights.

Regarding the fact that this possibility is not explicitly provided in the Constitution and the legislation in Slovenia, the question arises whether the Constitutional Court could nevertheless begin to apply it. One of the possibilities is that, with the aid of an interpretation of the Constitution and the legislation, the Constitutional Court would establish that it has a sufficient basis not only for adopting such declaratory decisions but also for determining just material satisfaction. [2] This could be perhaps possible to carry out with the application of the provisions of the Judicial Review of Administrative Acts Act on the basis of Article 6 of the Constitutional Court Act which provides that for the issues of procedure not regulated by this Act, regarding the legal nature of a case, the Constitutional Court applies the provisions of statutes which regulate proceedings conducted by courts. According to the standpoint of Judge Dr. Janez Čebulj, the Constitutional Court may also decide a claim of an injured party for the compensation of damages as it has a direct basis for this in Article 62 of the Judicial Review of Administrative Acts Act in conjunction with Article 6 of the Constitutional Court Act. Judge Dr. Čebulj particularly emphasizes the meaning of these provisions for the cases of violations of the right to have any decision brought without undue delay (Article 23 of the Constitution) [3] [4].

Irrespective of the fact whether the possibility of awarding just satisfaction would be regulated with an amendment to the statute or without such an amendment, this could substantially diminish the number of applications from Slovenia regarding the violations of human rights, lodged with the European Court of Human Rights. The deciding on such applications would be substantially influenced by the fact that within the legal system of Slovenia there exist an additional legal protection and an effective legal remedy for claiming the violations of human rights. This would be to the benefit of all citizens who could more simply, faster and cheaper exercise their rights, and to the benefit of the Republic of Slovenia.

Considering the fact that I was in a minority with the proposition for a declaratory decision and just satisfaction, I had to decide whether to support the decision in the disposition on the overturning of the judgment and remanding the case. Despite the expressed serious doubts, I decided to vote in favor of the majority decision, inter alia also because the complainant explicitly requested the overturning of the challenged judgments [5], and did not even subsidiary request a declaratory decision and just satisfaction.

Dr. Ciril Ribičič

Footnotes:

[1] Just satisfaction was also awarded in some cases, to which the decision refers in note 2, paragraph 9, p. 4, concerning the violation of a fair trial according to Article 6 of the Convention in conjunction with the privilege against self-incrimination and right to silence. According to the standpoint of the European Court in the case Kudla v. Poland, a bare determination on the violation of their right is already a partial damage caused to the complainant.

[2] More extensively on the techniques of deciding of the Constitutional Court in connection with an interference into the field of the legislature, see: Franc Testen, The Techniques of the Constitutional Deciding, in: Constitutional Justice, CZ, Ljubljana, 2000, p. 243.

[3] Janez Čebulj, Particularities of a Constitutional Complaint in the Field of Administrative Law, in: Constitutional Justice, pp. 319, 320.

[4] It is interesting that the Administrative Court of the Republic of Slovenia in case U 836/98-25 already established an interference with the constitutional right of the complainant, according to Article 23 of the Constitution and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, however, it did not accept the claim for the compensation of caused damage »for the complainant did not sufficiently specify these claims so that they could not be at all considered« (p. 4).

[5] A. A. in the constitutional complaint requests that the Constitutional Court »entirely overturns the challenged judgments and remands the case to the lower court«.