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

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REPORT

**REVIEW OF DECISIONS OF ORDINARY COURTS IN
CONSTITUTIONAL COMPLAINT PROCEEDINGS BEFORE THE
CONSTITUTIONAL COURT OF THE SLOVAK REPUBLIC
(GRASPING THE NETTLE)**

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Introductory word

Most of the constitutional courts (or similar courts) are empowered to review proceedings and decisions of the ordinary courts including supreme courts. The Slovak Constitutional court (hereinafter: the Court) is one of those courts which reviews constitutionality of proceedings before the ordinary courts and their decisions in full extend.

According to Art. 127 section 1 of the Constitution the Court decides on complaints of natural persons or legal persons if they are pleading the infringement of their fundamental rights or freedoms, or human rights and fundamental freedoms resulting from the international treaty which has been ratified by the Slovak Republic and promulgated in the manner laid down by a law, **save another court shall decide on protection of these rights and freedoms.**

If, pursuant to Article 127 sections 2 and 3 of the Constitution, the Court acquits a complaint, it pronounces in its decision that through the valid decision, measure or another interference the rights or freedoms have been infringed according to Art. 127 section 1, and **quashes such decision, measure or other interference.** If the infringement of rights and freedoms, according to section 1, has arisen due to inactivity, the Court may **order that an authority who has infringed such rights or freedoms should act in the case.** The Court may, at the same time, **return the case for further proceedings, prohibit the continuation of infringing** fundamental rights and freedoms or human rights and fundamental freedoms resulting from the international treaty ratified by the Slovak Republic and declared in a way set by law, or if it is possible to **order a person who infringed rights or freedoms, according to section 1, that s/he should renew the state before infringement.** The Court may through its decision, acquitting a complaint, to acknowledge a person whose rights have been infringed pursuant to section 1 an **appropriate financial satisfaction.**

This is the constitutional basis of reviewing decisions of ordinary judiciary. The legal basis for this review is contained in the Act No. 38/1993 Collection of Laws on the Organisation of the Constitutional Court of the Slovak Republic, Proceedings before the Court and the Status of its Judges as amended (hereinafter “Act of the Court”).

This competence of the Court rises **the tension** between it and the ordinary courts, notably the Supreme court. Sometimes it evokes the so called “judicial war” between the highest courts of the country. The reason for that is obvious. Ordinary courts feel themselves as capable guards of legality and at the same time also constitutionality. For all that they are at times not willing to accept the review of their final decisions. But the reasons of doing that has its deep sense.

Generally speaking the Court **does not form a part of the ordinary court system.** It results from art. 124 of the Constitution. According to this article the Court is an independent judicial authority vested with the mandate to protect the constitutionality. Thus it does not possess a right of supervision over the decision-making of ordinary courts. The Court is authorized to intervene into the decision-making of ordinary courts only in the case that the final decision of one of those courts results in the violation of constitutionality, predominatly guaranteed fundamental right or freedom. This means that the Court is not entitled to intervene into the ordinary courts’ decision-making activities in each case in which there has been a violation of legality or of some other incorrect decision which, in its essence, resides on the plane of a ordinary law.

From this approach of the Court follows relatively considerable reduction of its powers to review the decisions of ordinary courts and eventual application of cassation entitlement. We do not

assume, not even in the future, that the Court should review the decisions of ordinary courts also from the point of view of their objective inaccuracy without the fact, that such objective inaccuracy will not be, at the same time, not respecting or not understanding of constitutionally guaranteed fundamental rights and freedoms. The entitlement of the Court to review and eventually to reverse the decision of the ordinary court may therefore arise at the time, when such decision contains principal misinterpretation of the meaning or scope of the fundamental right or fundamental freedom, for the protection of which the ordinary court has been asked.

The principle of subsidiarity

The basic principle for resolving the possible tension between the Court and the ordinary judiciary is the principle of subsidiarity.

The Court builds up its doctrine of individual protection of fundamental rights and freedoms upon the principle of subsidiarity. From this follows the Court's persuasion that the protection of fundamental rights and freedoms refers to all public authorities, predominantly ordinary courts.

The right to the judicial protection of fundamental rights and freedoms, applied before ordinary courts in conformity with the subsidiarity principle, does not continue in proceedings before the Court. The Court is not a further remedy instance and it does not belong to ordinary courts either. In spite of that fact natural and legal persons can ask the constitutional court protection if the ordinary courts applied their powers in a way that the constitutional procedural principles, regulating the judicial protection of fundamental rights and freedoms, have been violated. Excludingly in these cases could be applied the Court power.

When the protection of fundamental rights and freedoms fails at the level of the competent ordinary courts, and the natural or legal person does not have any other instruments of protection, or if all such instruments have been applied, then the power of the Court to deal with the protection of fundamental rights and freedoms arises, but only within the scope which substantially does not replace the powers of other courts.

The Court (Ruling No. III. ÚS 40/04 of 12 February 2004) in connection with that states: "If an extraordinary appeal has already been filed in the case then it is not possible to seek protection before the Constitutional Court of the Slovak Republic under the subsidiarity principle (Art. 127 of the Constitution of the Slovak Republic)".

In another similar case the Court (Ruling No. IV. ÚS 128/04 of 16 April 2004) stresses: „The subsidiarity principle of the Constitutional Court of the Slovak Republic powers is a constitutional order for everyone. For that reason everyone challenging his/her fundamental rights has to respect the graduality of this protection, i.e. before filing a complaint to the Constitutional Court of the Slovak Republic, it is necessary to ask for protection from that public authority whose jurisdiction precedes the Constitutional Court powers”.

The Court consequently insists on the fact that the claimant may not arbitrarily determine whether s/he turns to the Court or to other court with particular power. Before s/he files the complaint to the Court, the claimant has to prove the exhaustion of all accessible remedies of the protection of her/his rights and freedoms pursuant to special regulations and at the same time the fact, that after applying such instruments there was no protection of her/his fundamental rights and freedoms.

Hence the Court (Ruling No. II. ÚS 102/04 of 14 April 2004) underlines: “If the applicant addressed her complaint directly to the Constitutional Court of the Slovak Republic in which she claimed violation of her procedural rights involving the admissibility of the appeal under § 237 f) of the Civil Procedural Code, but she did not lodge first an ultimate appeal, doing so the concerned applicant did not exhaust under Art. 127 sec. 1 of the Constitution of the Slovak Republic and of § 53 sec. 1 of Act. No. 38/1993 Coll. on the Organisation of the Constitutional Court of the Slovak Republic, Proceedings before the Court and the Status of its Judges as amended, all the admissible effective remedies in proceedings before ordinary courts and her complaint shall be refused for the lack of the Constitutional Court’s jurisdiction”.

The Court must apply the principle of subsidiarity also in cases in which the participants object the breaching of their fundamental rights in proceedings of enforcement of valid court judgements or other similar decisions passed in legal proceedings. For example, if the applicant as an entitled person can propose against the liable person who is a client of the State Treasury some other legal ways of enforcement of judicial decisions then those excluded by the special law under the VIth part of the Civil Procedural Code and under the Dstraint Procedural Code, then these methods of enforcement of judicial decisions excluded the powers of the Court in protection of the fundamental right to own property under Art. 20 sec. 1 of the Constitution and the fundamental right to judicial protection (Art. 46 sec. 1 of the Constitution). This is so because of the failure of exhausting the effective and admissible measures accessible for the participants (Ruling No. II. ÚS 113/04 of 28 April 2004).

Two sets of reasons for annulment of decisions of ordinary courts

The Court differentiates between two basic groups of reasons for annulment of a decision of an ordinary court. The first one concerns the infringement of constitutional right to a fair trial (Art. 46 to Art. 48 of the Constitution). The second group of reasons for repealing the decisions of ordinary courts contains violation of substantial fundamental rights and freedoms.

The reversal of decisions of ordinary courts on account to the infringement of procedural rights are more usual and often than for the violation of substantial fundamental rights and freedoms. The reason of this approach of the Court stems from the opinion of the Court that an ordinary court should give, if possible, the opportunity to retrieve its failure of acting properly in relation to a substantial right, for instance the right to own property and so on.

The breaching of the right to a fair trial

Pursuant to the case-law of the Court the assertion that the ordinary court infringed fundamental rights or freedoms which limit the access to the court and principles of a fair trial in proceedings before this court can lead to the conclusion on existence of the power of the Court.

There have been founded several grounds of the infringement of the constitutional principles ruling the fundamental right to a fair trial. They can be divided as follow:

- a) The breaching of the right to the acces to judicial protection,
- b) refusal of the judicial protection in proceedings before administrative courts,
- c) the lack of reasoning of a decision in a question,
- d) arbitrariness of the reasoning of a decision in a question.

First of all the Court insists that ordinary courts should prefer **substantial comprehension of the fundamental right to judicial protection** to the formalistic assessment of preconditions of the admissibility of the motion submitting to a ordinary court. If a ordinary court failes to do so then the Court can repeal the decision on abatement of proceeding before the ordinary court. There were various cases in which the Court had to decide by such a way and returned the cases to the ordinary courts for further procedure (for example findings No. IV. ÚS 156/03, IV. ÚS 1/02).

The content of the fundamental right to judicial protection involves also that the party to proceedings shall not be affected by any infavourable decisions in appeal proceedings **without meeting the admissibility requirements of the extraordinary remedy**. In such a case the Court always annuls the decision in a question because admitting of an extraordinary procedure contrary with legal requirements breaches also the principle of legal certainty that constitutes a part of the principle rule of law (for instance finding No. II. ÚS 172/03 of 27 May 2004).

The ordinary court **must interpret and apply the provisions of the Code of Civil Procedures in accordance with the purpose of the fundamental right to judicial protection**. Through the interpretation and application of these provisions cannot be restricted the fundamental right to judicial protection without legal basis. The ordinary court must respect that they should provide material protection of legality in civil proceedings in a way that the just protection of the rights and lawful interests of the parties to proceedings be ensured (§ 1 of Code of Civil Procedures). The civil proceedings must become in each individual case the guarantee of the legality and they must serve to consolidation and development in this respect. Undue formalism in evaluation of the acts of the parties to civil proceedings and an excessive pressure aimed at completing data in procedural acts of the parties not having basis in the laws and which overstep the frameworks of the law or being irrelevant for protecting the legality are not in conformity with the constitutional principles of the fair proceedings (Finding No. II. ÚS 135/04 of 24 September 2004).

If the challenged court decisions do not show internal conflicts and during the adoption of factual and legal conclusions no evident errors occur or presenting such facts which would contradict evidently to the essence of the fundamental right to judicial protection requested in proceedings on retrial of the case, then the conclusion on violation of the fundamental right to judicial protection is excluded already in the preliminary proceedings on the complaint. (for instance ruling No. II. ÚS 108/04 of 28 April 2004).

But there are cases in which ordinary courts failed to write why they have decided the case as so it was issued. Such situations are usually linked with the lack of reasoning of final decisions or arbitrariness of reasons used by the court.

As far as an ordinary court arrives at a legal conclusion that a certain entity is not liable to provide information under law No. 211/2000 Coll. On free access to information as amended later (Law on freedom of information), and the court within its decision-making acts **without settling all the decisive facts** being the basis for the above conclusion, it is necessary to consider such general court's decision arbitrary, and also contradictory to Art. 46 sec. 2 in connection with Art. 26 sec. 2 of the Constitution (No. I. ÚS 59/04 of 24 June 2004). The final decision in this case had to be annulled. The case was returned for further proceedings to the Supreme court that was bound by the legal opinion of the Constitutional court.

Breaching of substantial fundamental rights and freedoms

The Court upholds the view that the interpretation of a legal regulation must not restrict or obstruct the real application of the fundamental right. A gap in the legal regulation cannot result in violation of the applicant's fundamental right guaranteed in the Constitution. In this case it is necessary to apply an interpretation which does not breach the fundamental right, but on the contrary it guarantees it.

Taking into consideration this legal opinion the Court (finding No. II. ÚS 299/04) repealed the judgement of the Regional court and returned the case for the further proceeding after adopting the legal opinion that the Regional court through its judgement had violated the fundamental right to own the property (Art. 20 of the Constitution) because it rejected the motion on payment for delay, using unconstitutional reasoning in which it improperly differentiated between two groups of claimants. This differentiation adopted by the Regional court meant **the discriminatory approach** to the complainant who had failed with his claim asking for payment for delay. The Regional upheld the opinion that the claimant had no right to payment for delay because of its health care facility was being run privately not by the state. The Court stated that the right to payment for delay belonged not only to health care facilities running by the state but also to all health care facilities including private ones. The abatement of action asking payment for delay in such a case meant the contradiction to the principle of equality (Art. 12 section 2 of the Constitution) and subsequently the breaching the prohibition of discrimination due to a different position of a private health care facility in comparison with a health care facility running by the state.

In connection with substantial fundamental rights the Court often insists on its restraint approach. In a case, in which the claimant applied the protection of his **fundamental right to protection of privacy (his personality)** which should have been infringed by the decision of the ordinary court not granting his complaint on protection of personality, the Court rejected this complaint and stated (ruling No. II. ÚS 54/02): Through the motion for decision, the claimant demands the pronouncement of infringement of a fundamental right pursuant to Article 19 sections 1 and 2, which has been caused in civil conflict, in a special kind of conflict proceedings on the protection of a personality.

On protection of such rights (particular claims and their scope) and upon legal regulation laid down in Sections 11 to 17 of the Civil Code exclusively the civil court decides. Within the scope of the decision-making activity on claims stemming from the infringement of the right to protection of a personality, only the civil court may and has to consider circumstances specified in the hypothesis of Section 13 section 2 of the Civil Code and to draw conclusion on the fact whether the plaintiff has, and in what scope, or does not have the right to reimbursement of non-pecuniary damage in financial terms. The Constitutional Court is entitled to review the non-constitutionality of proceedings, or decision-making activities of ordinary courts, i.e. whether in proceedings before them there has or has not been the infringement of procedurally legal principles of proceedings (Articles 46 to 50 of the Constitution). **This power of the Constitutional Court is however not connected with the origin of such entitlement and obligation to evaluate legal opinions of ordinary courts**, to which they came upon the interpretation and applications of laws, in this case Section 13 section 2 of the Civil Code, as it is claimed and demanded by the claimant.

Violation of the fundamental rights and freedoms in criminal cases

The Court does not have jurisdiction over deciding on the guilt of the accused persons and on imposing punishments for criminal acts. Its role lies in checking the compatibility of these decisions with the Articles of the Constitution of the Slovak Republic, regulating the fundamental rights and freedoms, and conformity with international treaties regulating this sphere becoming a part of the legal order of the Slovak Republic. The Constitutional Court of the Slovak Republic's role is to review whether the decision-making activity is in conformity with the fundamental principle of imposing punishments based exclusively on the law. (Finding No. III. ÚS 60/02 of 4 February 2004).

Similarly, in the case of the claimant who claimed the infringement of his fundamental right to personal freedom (II. ÚS 76/02), the Court rejected the complaint and acknowledged: "The Court is not, even since 1 January 2002, i.e. since when new regulation of the complaint in proceedings before the Court has been applied, either entitled or obliged to realize such proceedings which are upon the law (Criminal Procedure) vested to the power of general courts acting and deciding on the custody of accused persons. Application of powers of the Court in these cases comes into consideration exclusively only then, when the claimant objects the infringement of the constitutionally procedural principles stemming from the custodial cases, especially from Article 17 of the Constitution and Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms. An important and determining condition for the establishment of the power of the Court is cumulatively the fact that objected infringement of the constitutionally procedural principles has not been remedied upon a complaint by the functionally particular custodial court (higher court).

Occasionally the Court makes void a decision pertaining the custody of accused person. The Court in remand prison cases underlines the necessity of reasoning that must contain all relevant facts allowing to extend the time of custody or rejecting an application on release made by an accused person. If a custodial court of last resort failed to give enough reasons of keeping the accused person into custody then the Court would be entitled to make such a decision void and return the case to an ordinary court for the completion of the reasoning or releasing the accused person.

Conclusions

From time to time the Court is obliged to review and annul the valid decisions issued by the ordinary courts including the Supreme court. The only reason for "grasping the nettle" in this sensitive area is the protection of constitutionality, predominantly the protection of human rights and fundamental freedoms. So the constitutional framework for applying these powers of the Court consists above all of the principle of subsidiarity and self-restraint approach to review of decisions passed by the ordinary courts in Slovakia.