4th Congress of the World Conference on Constitutional Justice

THE RULE OF LAW AND CONSTITUTIONAL JUSTICE IN THE MODERN WORLD

11–14 September 2017, Vilnius, Lithuania

QUESTIONNAIRE

A. The rule of law and constitutional justice in the modern world

I. The different concepts of the rule of law

1. *What are the relevant sources of law (e.g. the Constitution, case law, etc.) which establish the principle of the rule of law in the legal system of your country?*

The Constitution of the Republic of Slovenia, which was adopted on 23 December 1991, six months after the Republic of Slovenia gained its independence (25 July 1991), is the first and most important source that has to be mentioned with regard to the concept of the rule of law. Article 2 of the Constitution explicitly determines, albeit in very general terms, the principle of a state governed by the rule of law by stating that Slovenia is a state governed by the rule of law. On the basis of this provision, the Constitutional Court identified and developed a range of different aspects of the principle of a state governed by the rule of law which function as independent constitutional principles in the framework of its case law, even though all of them find their constitutional basis (origin) in Article 2 of the Constitution. Therefore, case law and academic scholars no longer refer to the principle of a state governed by the rule of law (in singular form), but to the principles of a state governed by the rule of law (in plural form). The principles that the Constitutional Court has inferred from the general principle of a state governed by the rule of law, are *inter alia* the general principle of proportionality, the principle of clarity and precision of regulations, the principle of trust in the law, and the principle that the law must adapt to social relations. However,

the Constitution also determines other fundamental principles that are essential for the rule of law, such as the principle of legality and the principle of the obligation of judges to comply with the Constitution and laws (Articles 120, 153 and 125), in addition to the broad catalogue of human rights and fundamental freedoms as guaranteed by the Slovene Constitution that limits all conduct of state authorities. The work of the Constitutional Court importantly contributed to the Republic of Slovenia becoming a constitutional democracy. In such a democracy, the Constitutional Court is entrusted with the role of precisely determining the boundaries of the playing field of the democratic majority, which is delineated by human rights and fundamental freedoms.

In addition to the Constitution and constitutional case law, international law and the law of the European Union also have to be mentioned. Article 8 of the Constitution determines that laws and other regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. In addition, the third paragraph of Article 3a of the Constitution determines that legal acts and decisions adopted in the framework of the EU apply in the Republic of Slovenia in conformity with the legal regulation of the EU. The application of the principles of the rule of law has certainly also been influenced by foreign case law, in particular the standards that have been formulated by the European Court of Human Rights (hereinafter referred to as the ECtHR).

2. *How is the principle of the rule of law interpreted in your country? Are there different concepts of the rule of law: formal, substantive or other?*

The Constitution determines that administrative authorities perform their work independently within the framework and on the basis of the Constitution and laws (the second paragraph of Article 120 of the Constitution), that judges shall be bound by the Constitution and laws (Article 125 of the Constitution), and that all individual acts and actions of state authorities, local community authorities, and bearers of public authority must be based on a law or regulation adopted pursuant to law (the fourth paragraph of Article 153 of the Constitution). Any authoritative action must therefore be based on a law.

As has already been mentioned in the answer to the first question, state power is limited by human rights. In Decision No. U-I-109/10, dated 26 September 2011,[1] the Constitutional Court thus emphasised that the principle of respect for human dignity lies at the centre of the Slovene constitutional order. Its ethical and constitutional significance already proceeds from the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, wherein certain principles that demonstrate the fundamental constitutional quality of the new independent and sovereign state are outlined. Human dignity is the fundamental value which permeates the entire legal order and therefore it also has an objective significance in the functioning of authority, not only in individual proceedings but also when adopting regulations. As the fundamental value, human dignity has a normative expression in numerous provisions of the Constitution and it is especially concretised through provisions which guarantee individual human rights and fundamental freedoms. As a special constitutional principle, the principle of respect for human dignity is directly substantiated in Article 1 of the Constitution, which determines that Slovenia is a democratic republic. The principle of democracy in its substance and significance exceeds the definition of the state order as merely a formal democracy, but substantively defines the Republic of Slovenia as a constitutional democracy, namely as a state in which the acts of authorities are legally limited by constitutional principles and human rights and fundamental freedoms. This is because individuals and their dignity are at the centre of its existence and functioning. In a constitutional democracy, the individual is a subject and not an object of the functioning of the authorities, while his or her (self)realisation as a human being is the fundamental purpose of the democratic order.

The Constitutional Court does not distinguish between a formal and substantive concept of the rule of law. However, constitutional case law regarding the principles of the state governed by the rule of law (i.e. *Rechtsstaat*) is quite extensive. As mentioned, the Constitutional Court identified and developed a range of different aspects of the principle of a state governed by the rule of law which function as independent constitutional principles in the framework of its case law, even though all of them find their constitutional basis in Article 2 of the Constitution. The

[1] Codices SLO-2012-1-001.

Constitutional Court has *inter alia* inferred the principle of trust in the law,[2] the principle of clarity and precision of regulations, the general principle of proportionality, and the principle that the law must adapt to social relations[3] from the general principle of a state governed by the rule of law.

The principle of clarity and precision of regulations requires that rules be clear and precise, so that their content and purpose can be determined using conventional methods of interpretation. Such is true for all regulations, it is however of particular importance regarding statutory provisions containing legal norms that establish rights or obligations of individuals. The requirement of clarity and precision of regulations does not entail that rules should be such that they require no interpretation. The application of rules namely always entails their interpretation. In terms of clarity and precision, a rule becomes problematic when the clear content of the regulation cannot be inferred through established methods of interpretation.[4] The implicitly determined constitutional principle of clarity and precision of regulations is further concretised by the explicitly defined constitutional requirement in Article 28 of the Constitution that criminal offences must be determined in a clear and precise manner by law before the act at issue was committed (*lex certa*).

There are certain particularities that characterise the principle of proportionality that the Constitutional Court has also established as one of the principles of a state governed by the rule of law. The substance of the principle of proportionality is the prohibition of excessive measures when regulating human rights and fundamental freedoms. A particularity of the principle of proportionality is that this principle does not act as a stand-alone criterion of Constitutional Court decisions, but is used as a

[2] *Cf.*, for instance, Decisions No. U-I-123/92, dated 18 November 1993 (Codices SLO-1993-X-048), and No. U-I-60/06, dated 7 December 2006 (Codices SLO-2009-3-006).
[3] *Cf.* Decision No. U-I-69/03, dated 20 October 2005, in which the Constitutional Court stated that the legislature has not only the right but also a duty to amend the statutory regulation if societal changes require such. The principle that the law must adapt to social relations is one of the principles of a state governed by the rule of law (Article 2 of the Constitution). The Constitutional Court has repeatedly explained this position, see e.g. Decision No. U-I-146/12, dated 14 November 2013 (Codices SLO-2014-3-012), wherein it stated that the legislature must respond to needs in all fields of social life by adopting appropriate statutory regulation, which is even truer if such needs concern the foundations of the functioning of the state or its ability to efficiently ensure human rights and fundamental freedoms (the same position has also been adopted earlier in Decision No. U-I-186/12, dated 14 March 2013).
[4] See Decisions No. U-I-32/00, dated 10 July 2003, No. U-I-131/04, dated 21 April 2005, and No. U-I-24/07, dated 4 October 2007. *Cf.* also Decision No. U-I-155/11, dated 18 December 2013 (Codices SLO-2014-3-013).

test for determining whether a certain statutory restriction of a human right is proportionate and therefore admissible or whether the legislature adopted an excessive (disproportionate) measure and the interference with the right is therefore unconstitutional. The principle of proportionality consequently has no independent role, but is always applied together with individual human rights and fundamental freedoms.

As demonstrated by the mentioned cases, the Constitutional Court identified and developed a range of different aspects of the principle of a state governed by the rule of law without specifically clarifying whether it was referring to their formal or substantive concept.

3. *Are there specific fields of law in which your Court ensures respect for the rule of law (e.g. criminal law, electoral law, etc.)?*

The Constitutional Court may refer to the principles of a state governed by the rule of law in all areas of law. Their application is thus not confined to a specific area of law. The Constitutional Court frequently refers to the principles of a state governed by the rule of law and applies them regularly, either directly as the major premise – the criterion of review – or as value-oriented criteria for the interpretation of other provisions of the Constitution, especially those guaranteeing human rights and fundamental freedoms. In the process of reviewing the constitutionality and legality of regulations, different aspects of the principle of a state governed by the rule of law can thus constitute an independent basis for deciding on the conformity of regulations with the Constitution. However, according to established Constitutional Court case law, a violation of the principles of a state governed by the rule of law cannot be independently invoked in constitutional complaint proceedings. A constitutional complaint can namely only invoke violations of human rights and fundamental freedoms, and the mentioned principles do not concern human rights directly.[5] The answers to the questions below include examples of the application of these principles in the case law of the Constitutional Court in various areas of law.

[5] See Decision No. Up-2597/07, dated 4 October 2007.

4. *Is there case law on the content of the principle of the rule of law? What are the core elements of this principle according to the case law? Please provide relevant examples from case law.*

As was already mentioned, the case law of the Constitutional Court regarding the principle of a state governed by the rule of law is extensive. It was the Constitutional Court that has inferred a range of different aspects from this principle, among them the already mentioned principles of clarity and precision of regulations, trust in the law, the principle that the law must adapt to social relations, and the general principle of proportionality. Three examples of the application in the case law of the Constitutional Court are presented below.

In Decision No. U-I-146/12, dated 14 November 2013,[6] the Constitutional Court reviewed the Fiscal Balance Act. The applicant challenged the provisions according to which the employment contract of a public servant was terminated due to the fulfilment of the statutory conditions for obtaining an old-age pension. The Constitutional Court reviewed the challenged regulation from several viewpoints, with the main emphasis on the review whether the regulation violated the prohibition of discrimination on grounds of age or sex. Apart from the review with regard to discrimination, the Constitutional Court also reviewed the challenged provisions of the Fiscal Balance Act from the viewpoint of the principle of the clarity and precision of regulations (Article 2 of the Constitution), and the principle of trust in the law (Article 2 of the Constitution). It found no unconstitutionalities regarding such. However, the Constitutional Court stressed that the requirement that provisions be defined clearly and precisely so that their content and purpose can be identified with certainty is the substance of one of the principles of a state governed by the rule of law determined by Article 2 of the Constitution. However, this does not entail that regulations do not require any interpretation. It follows from constitutional case law that a regulation is inconsistent with this constitutional principle when the clear content of the legal provisions cannot be obtained by applying rules of interpretation. The content of the challenged provision, however, could be determined by means of established methods of interpretation. As the challenged regulation did not include a

[6] Codices SLO-2014-3-012.

transitional period, the applicant also alleged that it inadmissibly interfered with the principle of trust in the law, another principle of a state governed by the rule of law determined by Article 2 of the Constitution. The Constitutional Court explained that the Constitution does not prevent a regulation from changing previously determined rights or conditions for their exercise with effect for the future, provided that such changes do not contradict constitutionally determined principles or other constitutional provisions, in particular the principle of trust in the law as one of the principles of a state governed by the rule of law. According to established constitutional case law, this principle ensures individuals that the state will not aggravate their legal position in an arbitrary manner, i.e. without a sound reason substantiated by a prevailing and legitimate public interest. When a new regulation interferes with on-going relationships or legitimate legal expectations, due to the observance of the principle of trust in the law, the legislature must lay down a transitional period intended to regulate the rights and legal relationships that have already been established under the law that was previously in force and that still exist upon the entry into force of the new law. The Constitutional Court concluded that the legislature may change the labour law position of civil servants if it takes into account the above-mentioned conditions.

In Decision No. U-I-155/11, dated 18 December 2013,[7] the Constitutional Court reviewed certain provisions of the International Protection Act that determined the concept of a safe third country in relation to the principle of *non-refoulement*. The Constitutional Court found that certain provisions of the International Protection Act were problematic with regard to the principle of the clarity and precision of regulations (Article 2 of the Constitution), as they did not determine the legal position of applicants for international protection with sufficient clarity and certainty, thereby enabling different applications of the law and arbitrary conduct of the authorities of the state. Since the extradition of an applicant for international protection to a third country may entail a threat to the prohibition of torture and inhuman or degrading treatment determined by Article 18 of the Constitution, the requirement of clear and precise norms is of special importance. The regulation of the conditions for the extradition of applicants for international protection to a third country must precisely

[7] Codices SLO-2014-3-013.

and clearly determine their rights, duties, and legal position. However, the challenged statutory provisions regulated the assessment of whether a third country is competent for the substantive review of an application in an uncertain manner. Furthermore, an applicant for international protection could find him- or herself in an uncertain position if, after an order rejecting his or her application is issued, the third country disallows the applicant's entry into its territory. In addition, the circumstances which an applicant could challenge in this procedure were not clearly defined. As a consequence of these shortcomings the legal situation of applicants for international protection was characterised by such a degree of uncertainty that it enabled a different application of the law and arbitrary conduct of the authorities of the state when deciding on the rights of individuals. Therefore, the Constitutional Court abrogated the challenged statutory provisions.

In Decision No. U-I-312/11, dated 13 February 2014, the Constitutional Court reviewed the regulation of the retention of DNA profiles determined in the Police Act, which the applicant, the Supreme Court, deemed unconstitutional. The Constitutional Court determined that a DNA profile that enables the identification of an individual constitutes personal data that enjoy protection under the first paragraph of Article 38 of the Constitution. In accordance with established constitutional case law, an interference with any human right, including the right to information privacy, is admissible if there exists a constitutionally admissible aim and if the limitation is consistent with the principles of a state governed by the rule of law, i.e. with those principles that prohibit excessive measures of the state (the general principle of proportionality that also follows from Article 2 of the Constitution). The Constitutional Court decided that an interference with information privacy is admissible if a law precisely determines what data may be collected and processed and for what purpose they may be used. The purpose of collecting personal data must be constitutionally admissible, but only those data may be collected that are appropriate and necessary for achieving the purpose determined by the law. The Constitutional Court established that DNA profile retention does pursue the admissible aim of determining the perpetrators of criminal offences for reasons of safety and effective protection against criminal activities, but the measure was excessive in terms of the criterion of necessity. The challenged statutory provision allowed for the retention of DNA profiles until criminal prosecution of the offence became time-barred, and it did

so even in cases where prosecution was no longer possible due to the final dismissal of the proceedings or even a final decision of acquittal. By allowing the retention of DNA profiles even after the purpose of retention (the identification of the perpetrator) was achieved, the legislature inadmissibly interfered with the right of these individuals to information privacy. The Constitutional Court therefore held that the challenged statutory regulation was not consistent with the right to information privacy.

The Constitutional Court recently also decided on the statutory basis for the extraordinary measure of writing off or converting eligible bank liabilities adopted by the Bank of Slovenia. In Decision No. U-I-295/13, dated 19 October 2016, the Constitutional Court *inter alia* stated that the legislature did not interfere with the principle of trust in the law, which is one of the principles of a state governed by the rule of law under Article 2 of the Constitution. This principle guarantees that the legal position of an individual will not be arbitrarily aggravated by the State, i.e. without an objective reason based on a prevailing and legitimate public interest. The extraordinary measure of writing off or converting was in substance a decision that a particular category of creditors of the bank will not be rescued with public funds. The writing off or conversion were applied only to those financial instruments for which the holders knew in advance (although in other aspects) that their legal position is relatively weaker and bears a bigger default risk. There is no interference with the principle of the trust in the law if a measure is adopted which, in economic terms, has similar effects as if the state allowed the banks to go into bankruptcy and subsequently grant a restitution for outstanding claims only to the bank's ordinary but not to its subordinated creditors. In this case, the Constitutional Court submitted its first question to the European Court of Justice for a preliminary ruling. The European Court of Justice adopted a Judgment regarding such in Case C-526/14 on 19 July 2016.

5. *Has the concept of the rule of law changed over time in case law in your country? If so, please describe these changes referring to examples.*

It clearly follows from its case law that, during its 25-years of functioning in the independent and sovereign Republic of Slovenia, the Constitutional Court has not

only identified and defined the concept of the principle of a state governed by the rule of law, but has been continually upgrading this concept. Concrete cases concerning the review of constitutionality and constitutional complaints enabled the Constitutional Court to fulfil this task. Over time, these cases have highlighted new challenges based on the changed circumstances in society, requiring that the Constitutional Court performs its review also in terms of the principles of a state governed by the rule of law. The Constitutional Court referred to these principles and applied them as the major premise in a number of its decisions in various legal fields. Thus, for example, in the initial years of its functioning the Constitutional Court established the principle of proportionality as one of the principles of a state governed by the rule of law.

If we concentrate on the principle of proportionality, it should be mentioned that the Constitutional Court first applied this principle in Decision No. U-I-47/94, dated 19 January 1995,[8] and adopted the version of the proportionality test it currently applies in Decision No. U-I-18/02, dated 24 October 2003.[9] In this Decision, the Constitutional Court reiterated its already well-established position that a human right or fundamental freedom can be restricted only if by such restriction the legislature pursues a constitutionally admissible aim and if the restriction is consistent with the principle of proportionality, which prohibits excessive state interferences.

A review of whether an interference is disproportionate is always preceded by a test of the legitimacy of the interference (i.e. establishing whether the interference pursues a constitutionally admissible aim) and is carried out by the Constitutional Court on the basis of the so-called strict test of proportionality. This test comprises a review of three aspects of the interference:
(1) whether the interference is actually necessary (needed),
(2) whether the reviewed interference is appropriate for achieving the aim pursued, and
(3) whether the weight of the consequences of the reviewed interference for the affected human right is proportional to the value of the aim pursued or to the benefits which will arise due to the interference (the principle of proportionality in the narrow

[8] Codices SLO-1995-1-001.
[9] *Cf.* also Decision No. U-I-218/07, dated 26 March 2009, Codices SLO-2009-2-004.

sense). Only if an interference that passes all three aspects of the test is constitutionally admissible. Otherwise, the Constitutional Court abrogates the statutory provision as unconstitutional or establishes its unconstitutionality.

In its case law, the Constitutional Court has been constantly developing the manner of application of the principles of a state governed by the rule of law. An example of such development can be found in decisions that address the issue of residence of persons who were removed from the register of permanent residents in the Republic of Slovenia following its independence (the so-called erased persons). In Decision No. U-II-3/04, dated 20 April 2004, the Constitutional Court elaborated on the principle of a state governed by the rule of law in terms of the binding nature of decisions of the Constitutional Court and the respect they demand. The Constitutional Court has namely ruled on the constitutionality of the referendum question in the request for calling a preliminary statutory referendum on the draft act that would regulate the position of the so-called erased persons. It concluded that the referendum question was contrary to the Constitution.

Following this decision, the Constitutional Court had to decide twice more on the admissibility of a preliminary statutory referendum on the same draft act. By Decision No. U-II-4/04, dated 17 June 2004, and by Decision No. U-II-5/04, dated 8 July 2004, the Constitutional Court decided that initiatives for calling a preliminary statutory referendum were submitted in order to delay proceedings and therefore contrary to Article 2 of the Constitution prolonged the unconstitutionality established by a prior decision of the Constitutional Court. The Constitutional Court emphasised that principles of a state governed by the rule of law in accordance with Article 2 of the Constitution do not oblige only the legislature to respect Constitutional Court decisions but also voters (the people) in the event in which the subject being decided on at a referendum is a statute by which the unconstitutionality established by a Constitutional Court decision is to be remedied.

6. *Does international law have an impact on the interpretation of the principle of the rule of law in your country?*

The status and effects of international law in the Slovene legal order are regulated by a number of provisions of the Constitution. Article 8 of the Constitution determines that laws and other regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. Article 153 of the Constitution further elaborates that laws must be in conformity with generally accepted principles of international law and with treaties ratified by the National Assembly of the Republic of Slovenia (whereas regulations and other general legal acts must also be in conformity with other ratified treaties, i.e. those that were, in accordance with the law, ratified by the Government of the Republic of Slovenia). From the perspective of the hierarchy of regulations, it follows from the mentioned provisions of the Constitution that in the Slovene (constitutional) legal order treaties are inferior to the Constitution, but superior to laws, as laws have to be in conformity with them. In addition, it is important to stress that Article 8 of the Constitution clearly determines that ratified and published treaties shall be applied directly. Such entails that provisions of treaties – provided they are, by their nature, self-executing – produce direct legal effects for individuals and they can rely directly on such provisions when invoking their rights. The Constitutional Court held, for example, that the provision of point 3 of Article 9 of the United Nation's Convention on the Rights of the Child is a self-executing provision and applied it in the case at issue.[10]

Among treaties, the ECHR should be specifically mentioned, as it plays an important role in the work of the Constitutional Court, especially when deciding on constitutional complaints, through which individuals invoke violations of human rights and fundamental freedoms in concrete proceedings.[11] By ratifying the ECHR, the Republic of Slovenia adopted the obligation under international law to respect the standards of protection of human rights and fundamental freedoms guaranteed by the ECHR. From the viewpoint of national constitutional law it is undisputable that the ECHR is directly applicable (Article 8 of the Constitution). Such entails that the ECHR must be taken into consideration by all authorities of the state, especially the courts, when deciding on the rights and obligations of individuals. Therefore, when deciding

[10] See Constitutional Court Decision No. U-I-312/00, dated 23 April 2003.

[11] One of the conditions for lodging a constitutional complaint is the prior exhaustion of judicial protection and all legal remedies before regular courts. Such entails that, as a general rule, constitutional complaints are lodged against decisions of the Supreme Court. An exception to this rule are proceedings in which procedural regulations do not envisage the intervention of the Supreme Court.

on whether a law is consistent with the Constitution or whether human rights or fundamental freedoms of individuals were violated in procedures before authorities of the state, the Constitutional Court also regularly considers the ECHR and the case law of the European Court of Human Rights (hereinafter referred to as the ECtHR). This is not only an obligation under international law, but also an obligation under internal law stemming from national constitutional law. The Constitutional Court can apply the ECHR directly as the underlying reason of its decision; however, as a general rule, it considers it indirectly through the standpoints of the ECtHR when interpreting the provisions of the Constitution.[12]

When the Republic of Slovenia joined the EU in May 2004, it thereby transferred the exercise of part of its sovereign rights to the EU and transposed the entire *acquis communautaire* into its legal order. The internal constitutional legal basis for such was provided by Article 3a of the Constitution. The third paragraph of Article 3a of the Constitution is key for the position of EU law in the legal system of the Republic of Slovenia: legal acts and decisions adopted in the framework of the EU apply in the Republic of Slovenia in conformity with the legal regulation of the EU. This provision establishes the internal constitutional legal foundation on the basis of which all authorities of the state, including the Constitutional Court, must, when exercising their competences, take into account EU law, including the case law of the Court of Justice of the European Union, namely in conformity with the principles and rules of EU law. With the Lisbon treaty entering into force, the Charter of Fundamental Rights of the European Union also became an important point of reference for the Constitutional Court.

It should further be highlighted that the Constitutional Court held that the fundamental principles of EU law are at the same time also constitutional principles. In above mentioned Decision No. U-I-146/12, it stated that from the third paragraph of Article 3a of the Constitution there follows the requirement that in the exercise of its competences also the Constitutional Court must apply EU law in accordance with the legal order of the European Union. Due to the third paragraph of Article 3a of the

[12] In Decision No. U-I-65/05, dated 22 September 2005 (Codices SLO-2005-3-003), the Constitutional Court specifically underlined that when assessing the constitutionality of a law it must take into consideration the case law of the ECtHR, regardless of the fact that it was adopted in a case in which the Republic of Slovenia was not involved in the proceedings before the ECtHR.

Constitution, the fundamental principles that define the relationship between internal law and EU law are at the same time also internal constitutional principles that have the same binding effect as the Constitution. As internal constitutional law principles, these principles also bind the Constitutional Court in the exercise of its competences in the framework of legal relationships that concern EU law. In the cited Decision, the Constitutional Court provided the following examples of such principles: the principle of the primacy of EU law, the principle of sincere cooperation, including the principle of consistent interpretation (the third paragraph of Article 4 of the Treaty on European Union, hereinafter referred to as the TEU), the principle of the direct applicability of EU law, the principle of the direct effect of EU law, the principle of conferral of competences (the first paragraph of Article 5 of the TEU), the principle of subsidiarity (the third paragraph of Article 5 of the TEU), and the principle of proportionality (the fourth paragraph of Article 5 of the TEU).

II. New challenges to the rule of law

7. *Are there major threats to the rule of law at the national level or have there been such threats in your country (e.g. economic crises)?*

During the recent economic and financial crisis, which also affected the Republic of Slovenia, the Constitutional Court was faced with petitions and constitutional complaints, associated with this crisis. In cases where the Constitutional Court established an inconsistency of the adopted statutory regulation with the Constitution or the violation of human rights and fundamental freedoms by individual acts, the regulation or the individual act at issue were often challenged from the viewpoint of the principles of a state governed by the rule of law.

The Constitutional Court thus reviewed a number of legislative measures adopted to cope with the on-going financial crisis.[13] In Decision No. U-I-186/12, the Constitutional Court reviewed the admissibility of a decrease of the amount of old-age pensions adopted only for certain groups of persons who had been insured

[13] See e.g. Decisions No. U-I-186/12, dated 14 March 2013, No. U-I-13/13, dated 14 November 2013, and No. U-I-146/12, dated 14 November 2013, Codices SLO-201-3-012, regarding the Fiscal Balance Act.

under the mandatory pension insurance scheme. The Constitutional Court noted that a pension in a determined amount is an acquired right determined by statute, which is protected in the framework of the principle of trust in the law under Article 2 of the Constitution. It clarified, however, that the economic inability of the state to provide for social expenses can represent a constitutionally admissible reason for the legislature to decrease legally determined acquired rights in the future (the amount of a pension determined by a final decision) without such being inconsistent with the principle of trust in the law. As the classification of groups of beneficiaries whose pensions were to be decreased in the challenged statute was arbitrary, the Court found that it was thus inconsistent with the principle of equality before the law determined in the second paragraph of Article 14 of the Constitution.

In the context of the principle of trust in the law, the Constitution protects acquired rights from statutory interference. In its case law, the Constitutional Court has repeatedly explained that the Constitution does not prevent a regulation from changing previously determined rights or conditions for their exercise with effect for the future, provided that such changes do not contradict constitutionally determined principles or other constitutional provisions, in particular the principle of trust in the law as one of the principles of a state governed by the rule of law as determined by Article 2 of the Constitution.[14] According to established constitutional case law, this principle ensures individuals that the state will not aggravate their legal position in an arbitrary manner, i.e. without a sound reason substantiated by a prevailing and legitimate public interest. When the new regulation interferes with on-going relationships or legitimate legal expectations, due to the observance of the principle of trust in the law, the legislature must lay down a transitional period intended to regulate the rights and legal relationships that have already been established under the law that was previously in force and that still exist upon the entry into force of the new law.

By Decision No. U-I-15/14, dated 26 March 2015, the Constitutional Court decided on the constitutionality of the Intervention Measures Act, by which the time limit for the classification of judicial positions into the final salary grades (by which salary

[14] See e.g. Decision No. U-I-146/12, dated 14 November 2013 (Codices SLO-2014-3-012).

imbalances between the office holders of all three branches of power were to be completely eliminated) was postponed for a year. The applicant claimed that such statutory provision entailed a decrease in judicial salaries and a less favourable position of judges compared to the office holders of the other two branches of power. The Constitutional Court considered the case from the viewpoint of judicial independence (Article 125 of the Constitution) and the principle of the separation of powers (the second paragraph of Article 3 of the Constitution). The protection of judges from a decrease in salaries while holding office is one of the fundamental principles of judicial independence, which is protected by Article 125 of the Constitution. The Constitutional Court established that the challenged provision represented one of the intervention measures for limiting budgetary expenditures, which are grounds that can justify the temporary postponement of an increase in judicial salaries. Also as regards the principle of the separation of powers, the Constitutional Court did not establish an inconsistency with the Constitution. The Constitutional Court has in fact already adopted the position that the requirement of the equality of individual branches of power also presupposes comparable pay for the office holders of different branches of power whose statuses are comparable. The classification of judges into salary grades could only be considered inconsistent with the principle of the separation of powers if it resulted in substantial imbalances between the salary grades for judicial positions compared to the salary grades for positions within the executive and legislative branches of power. Such could not be alleged in the case at issue, even though judges had not yet been classified into their final salary grades, as the final classification was in fact postponed. It is not in itself inconsistent with the Constitution if the legislature decided to gradually eliminate salary imbalances. In addition, the legislature at the same time also suspended, for the same period of time, the full implementation of the final salary grades for the bearers of the other two branches of power.

8. *Have international events and developments had a repercussion on the interpretation of the rule of law in your country (e.g. migration, terrorism)?*

If we limit the reply to the work of the Constitutional Court, we may initially find that the concept of the state governed by the rule of law is a substantively broad concept which the Constitutional Court applies, according to the ever changing (international

and domestic) context, in the interpretation of other constitutional provisions and as the major premise in its decision-making. In recent years, the Constitutional Court *inter alia* referred to the principle of a state governed by the rule of law when reviewing the constitutionality of national regulations adopted in response to the issues of migrations and terrorist threats. The Constitutional Court also regularly considers asylum law cases and in doing so frequently applies the relevant European Union directives and international law.

By Decision No. U-II-2/15, dated 3 December 2015, the Constitutional Court decided a dispute regarding the admissibility of a subsequent legislative referendum on the amendment of the Defence Act by which the National Assembly accorded the army new extraordinary powers for protecting the state border which it carries out together with the police. The National Assembly justified the need for such Act with the current refugee and migrant crisis. Following the adoption of the Act, the National Assembly decided on the admissibility of the proposal to call a referendum on the Act. By an order, which was subsequently challenged before the Constitutional Court, the National Assembly decided to reject the call for a legislative referendum, as the case concerned a law, regarding which referenda are inadmissible in accordance with the first indent of the second paragraph of Article 90 of the Constitution. This provision namely provides that no referendum may be called regarding laws on urgent measures to ensure the defence of the state, security, or the elimination of the consequences of natural disasters. In that case, the Constitutional Court agreed with the National Assembly and held that the rejection to call a referendum was not inconsistent with the Constitution.

The Constitutional Court subsequently also reviewed the above mentioned amendment to the Defence Act in Decision No. U-I-28/16, dated 12 May 2016. The applicant challenged the consistency of certain provisions of the amendment to the Defence Act with the principle of the clarity and precision of regulations as one of the principles of the state governed by the rule of law (Article 2 of the Constitution) before the Constitutional Court. The applicant stated that the definition of the army's powers is so general and loose that is allows (excessively) broad interpretation, as it does not determine the scope of application of such powers. In addition, the question of whether the Slovene army may use coercive measures when exercising the

challenged powers was raised. The applicant also asserted that the regulation of the responsibility of the members of the Slovene army for possible violations resulting from the exercise of individual powers was unclear and that no appeal procedures and control mechanisms with regard to individuals had been established in advance. Furthermore, it was allegedly not clear whether the Slovene army exercises its powers autonomously and the regulation of the mutual relationships of superiority and subordination between the Slovene army and the police was unclear. Although the challenged regulation was allegedly aimed at mitigating the current migrant and refugee crisis, the Defence Act spoke only of persons, groups, and crowds (without explaining the potential difference between a group and a crowd). Therefore, it was allegedly not clear in what instances the use of the challenged powers was admissible. In addition, the terms “security situation” and “protection of the state in the wider sense” were allegedly undefined. The Constitutional Court reiterated its position that a statutory norm fulfils the requirement of clarity and precision of regulations if its content may be construed through established methods of interpretation and thus the conduct of the authorities who have to implement it is determinable and predictable. As the content of the powers and open-textured legal terms from the first paragraph of Article 37a of the Defence Act can be construed through established methods of interpretation, the challenged provisions are not inconsistent with the principle of clarity and precision enshrined in Article 2 of the Constitution. The Constitutional Court did not establish an inconsistency of the challenged law with the Constitution.

9. *Has your Court dealt with collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your Court compared to regional / international courts (e.g. the African, Inter-American or European Courts) or international bodies (notably, the UN Human Rights Committee)? Are there related difficulties in implementing decisions of such courts / bodies? What is the essence of these difficulties? Please provide examples.*

In the Slovene legal order, the hierarchy of legal acts is determined by Article 153 on the conformity of legal acts. Laws, regulations, and other general acts must be in conformity with the Constitution. Laws must be in conformity with generally accepted

principles of international law and with valid treaties ratified by the National Assembly, whereas regulations and other general acts must also be in conformity with other ratified treaties. Regulations and other general acts must be in conformity with the Constitution and laws. Individual acts and actions of state authorities, local community authorities, and bearers of public authority must be based on a law or regulation adopted pursuant to law. The Constitution is thus the highest legal act. However, with regard to the protection of human rights, the fifth paragraph of Article 15 of the Constitution, guaranteeing the principle of maximum protection of human rights, must be taken into account. If another legal act in force in Slovenia (i.e. a treaty) guarantees greater protection of a right than the Constitution, an individual must be recognised this right in accordance with such broader meaning.

The competences of the Constitutional Court thus imply that a review of a collision between national and international legal norms can come about only in the scope of the proceedings for so-called preliminary (*a priori*) review of the constitutionality of treaties, i.e. a review conducted before a treaty is adopted or comes into force. In the process of ratifying a treaty, the Constitutional Court, acting upon the proposal of the President of the Republic, the Government, or a third of the deputies of the National Assembly, issues an opinion on the conformity of such treaty with the Constitution. The opinion is binding on the National Assembly (the second paragraph of Article 160 of the Constitution). On the proposal of the Government, the Constitutional Court gave its opinion on the conformity of the Europe Agreement establishing an association between the European Communities and their Member States, acting within the framework of the European Union, of the one part, and the Republic of Slovenia, of the other part, with the Constitution.[15] In that Opinion, the Constitutional Court established, *inter alia*, the inconsistency of certain provisions of this Agreement with a provision of the Constitution, according to which foreign citizens could not acquire title to land except by inheritance, under the condition of reciprocity, which lead to a constitutional amendment. Had the National Assembly ratified this Agreement, containing provisions contrary to the Constitution, the Republic of Slovenia would have been bound by international obligations that would have required amending the Constitution. The purpose of the Constitutional Court's

[15] Opinion No. Rm-1/97, dated 5 June 1997, Codices SLO-1997-2-008.

competence for preliminary review of the constitutionality of treaties is precisely in preventing the adoption of such obligations. This competence can thus be understood as a safeguard, preventing that unconstitutional legal norms enter into the internal legal order of the Republic of Slovenia, as well as the existence of international obligations that the Republic of Slovenia could not fulfil in the framework of the existing constitutional order.

In hitherto constitutional case law, there are no decisions from which a divergence of the positions of the Constitutional Court and other international or regional jurisdictions (e.g. the ECtHR) could be inferred. Order No. U-I-223/09, Up-140/02, dated 14 April 2011, should, however, be mentioned. In this Order, the Constitutional Court touched upon the question of the relationship between the Constitutional Court and the ECtHR, and the limitation of the ECtHR's competence. By Judgment in the case *Gaspari v. Slovenia*, No. 21055/03, dated 21 July 2009, the ECtHR established that in proceedings before the Constitutional Court a violation of the first paragraph of Article 6 of the ECHR occurred, because, due to an erroneous serving of the constitutional complaint of the opposing parties from the civil action, the applicant, who was requesting a new trial, was denied the possibility to participate in constitutional complaint proceedings. Despite having established a violation, the ECtHR did not grant the applicant requesting a new trial indemnity for pecuniary damage (due to failure to demonstrate the existence of a causal link between the established violation and the alleged damage). The ECtHR added that the most appropriate manner of reparation would be to ensure the party a possibility to be reinstated in the position in which she would have been if the requirements under Article 6 of the ECHR had been fulfilled. In the view of the ECtHR, in the case at issue such would have best been attained if the domestic legislation enabled a party to re-open proceedings before the Constitutional Court.

Following the judgment of the ECtHR, the petitioner, *inter alia*, lodged a proposal to re-open constitutional complaint proceedings before the Constitutional Court. The Constitutional Court rejected her proposal. In the reasoning it adopted the position that the ECtHR does not have the competence to impose on a contracting party the adoption of precisely determined measures. The contracting party may of itself choose appropriate measures to remedy the consequences of a disputed individual

act or measures by which it will be able to ensure the consistency of its domestic legislation with the requirements of the Convention. Only in exceptional circumstances, when a violation is such that it excludes every possibility of choice of measures, the ECtHR refers the contracting party to an adoption of a precisely determined measure. In the reasoning of the Judgment in case *Gaspari v. Slovenia*, the ECtHR actually stated what would be the most appropriate manner for the elimination of the violation. The Constitutional Court determined, however, that the reasons stated in the ECtHR Judgment do not mean in the present case that an obligation was thereby imposed on the Constitutional Court to unconditionally institute new constitutional complaint proceedings. The Constitutional Court Act namely does not determine the possibility to initiate new constitutional complaint proceedings. The ECtHR does not have the competence to impose that new domestic judicial proceedings be instituted. Therefore, also in the case at issue, such phrasing in the reasoning of the ECtHR Judgment cannot be interpreted otherwise than as constituting an indication of a possible measure that in the assessment of the ECtHR could be appropriate for the elimination of the consequences of the established violation.

III. The law and the state

10. *What is the impact of the case-law of your Court on guaranteeing that state powers act within the constitutional limits of their authority?*

Within the framework of its competences, the Constitutional Court also ensures that state authorities function within the limits determined by the Constitution. In this regard it should be mentioned that the Constitutional Court Act accords the Constitutional Court broad competences through which it may ensure the effectiveness of its decisions in practice. Thus, on the basis of Article 39 of the Constitutional Court Act, it may suspend the implementation of a law or other regulation until a final decision, and, on the basis of Article 58 of the Act, the execution of an individual act if such could result in difficult to remedy harmful consequences. The Constitutional Court may determine the manner of the implementation of its decision (Article 40 of the Act), meaning that it temporarily assumes the legislative function and itself regulates the question at issue until the

legislature adopts a final solution. In constitutional complaint proceedings it may even itself decide on a disputed right or freedom (Article 60 of the Act) if such is necessary and if the decision can be reached on the basis of information contained in the case file.

Decision No. U-I-114/11, dated 9 June 2011,[16] by which the Constitutional Court decided that the Municipality of Ankaran is established, may serve as an example of a truly wide use of its competences. Even earlier, in Decision No. U-I-137/10, dated 26 November 2010,[17] the Constitutional Court established that the Establishment of Municipalities and Municipal Boundaries Act was inconsistent with the Constitution. It deemed that the National Assembly acted arbitrarily by failing to establish the municipalities of Ankaran and Mirna and thus violated certain of the petitioners' constitutional rights and fundamental constitutional principles. Consequently, it requested the National Assembly to remedy the mentioned unconstitutionality. By establishing the Municipality of Mirna, the National Assembly responded to the decision only in part, but it failed to adopt a law establishing the Municipality of Ankaran. As the National Assembly failed to respond to Constitutional Court Decision No. U-I-137/10 in its entirety, despite having been successful in the proceedings before the Constitutional Court, the petitioners remained without effective constitutional protection against the National Assembly's arbitrary conduct. However, in the Republic of Slovenia, everyone whose constitutional rights have been infringed must be ensured legal protection, as such is required by the principles of a state governed by the rule of law. Thus, in the case at issue such protection had to be ensured by the Constitutional Court. In order to ensure effective constitutional protection of the petitioners' constitutional rights, the Constitutional Court would have had to interfere with the elections called in the Urban Municipality of Koper (Ankaran used to be part of this Municipality) and abrogate the challenged Calling of Regular Local Elections in the Urban Municipality of Koper Act. Instead, it decided to adopt an approach that effectively protected not only the right to elections and the right to local self-government of the residents of the Urban Municipality of Koper, but also the right to local self-government of the residents of Ankaran. To this end, in Decision No. U-I-114/11 the Constitutional Court determined a new manner of implementation of

[16] Codices SLO-2014-2-006.
[17] Codices SLO-2014-2-005.

Decision No. U-I-137/10 and thus ensured all affected persons the exercise of their constitutional rights: to the petitioners and the residents of Ankaran by establishing the Municipality of Ankaran and determining everything necessary for the calling of elections to its authorities within the framework of the regular local elections in 2014, and to the residents of the Urban Municipality of Koper by enabling that elections are carried out on the basis of the challenged Act and the Decree calling the elections.

Furthermore, in the Republic of Slovenia the principle of the separation of powers, determined in the second sentence of the second paragraph of Article 3 of the Constitution, applies. Along with some other constitutional provisions, such as the adherence of all three (i.e. legislative, executive, and judicial) branches of power to the Constitution (the first paragraph of Article 153 and Article 125 of the Constitution), the state's obligation to protect human rights and fundamental freedoms (the first sentence of the first paragraph of Article 5 of the Constitution), and their direct exercise on the basis of the Constitution (the first paragraph of Article 15 of the Constitution), the prohibition of arbitrariness as a principle implementing the rule of law (Article 2 of the Constitution), and the principle of equality (Article 14 of the Constitution), legal theory and constitutional case law classify the principle of the separation of powers as one of the fundamental principles of a democratic state governed by the rule of law. The Constitution contains numerous specifications of the functions and mutual limitations of state power, to be precise from a functional and organisational point of view (e.g. Article 83, the second paragraph of Article 120, Article 134, Article 125), as regards personnel (the third paragraph of Article 103 of the Constitution), or the incompatibility of functions (the second paragraph of Article 82, Articles 100, 105, 133, and 136 of the Constitution). The principle of the separation of powers limits the arbitrary use of power and establishes a government that is accountable to its citizens. The Constitutional Court can, for example, review the consistency of a challenged regulation with the constitutional principle of the separation of powers and establish whether the challenged regulation fulfils the requirements of this constitutional principle.[18] The main content of the principle of the separation of powers is namely not only in ensuring that no branch of state power interferes with the competences of another, but also in ensuring that neither of them

[18] See, e.g., Decision No. U-I-57/06, dated 29 March 2007, Codices SLO-2007-2-002.

omits activities that it is required to carry out in the framework of its tasks – especially when a task has been imposed by a judicial decision. The rule that all state authorities and bearers of public authority (as well as all individuals and legal entities), including the legislature, must consider, respect, and enforce judicial decisions, including Constitutional Court decisions, is one of the fundamental postulates of the state governed by the rule of law and the very heart of constitutional democracy. Failure to observe judicial decisions negates the rule of law and establishes the rule of unrestrained and unlimited arbitrariness.[19]

As the Constitutional Court stressed in Decision No. U-I-159/08, dated 11 December 2008, the principle of the separation of powers is a fundamental principle of the organisation of the state. As it is one of the fundamental principles of the constitutional order, its full effect, especially from the viewpoint of the position and functions of the judicial power, must be understood in connection with other fundamental constitutional principles, such as the principle of democracy (Article 1) and the principle of a state governed by the rule of law (Article 2). In addition, we must at all times be aware that all fundamental constitutional principles and the constitutional order on the whole serve to protect the freedom of individuals in relation to state power. The concept of power that is limited by law, i.e. power that functions within the framework and on the basis of the Constitution and, particularly, that respects constitutionally determined human rights and fundamental freedoms, is the highest constitutional and societal value, which must be the starting point of every review of the constitutional consistency of relations between the holders of different offices of state power. The contemporary understanding of the principle of the separation of powers entails that authorities which perform fundamental functions of state power are in their functioning relatively independent and autonomous in relation to other authorities such that none of them prevails. There exists a sophisticated system of mutual supervision, constraints, control, intertwined dependence, and balance. In that Decision, the Constitutional Court further stressed that the separation of state power into legislative, executive, and judicial branches does not entail a relation of superiority or subordination, but a relation of the constraint and cooperation of equal branches of power such that each functions within the

[19] Decision No. U-I-248/08, dated 11 November 2009, Codices SLO-2010-1-003.

frameworks of its own position and its own competence. A starting point of the regulation of mechanisms of checks and balances between branches of power must be the constitutional equality of the legislative, executive, and judicial powers. The relations between them must be set in a manner such that the relative independence and integrity of an individual branch of power in performing its function are not endangered.

In a number of its decisions, the Constitutional Court also highlighted that the principle of the separation of powers has two important elements, i.e. the separation of the individual functions of state power and the existence of checks and balances between them. By Decision No. U-I-57/06, dated 29 March 2007,[20] the Constitutional Court reviewed the provision of the Act regulating the incompatibility of holding public office with profit-making activities. According to the challenged provision a commission composed only of deputies of the National Assembly supervised the financial status of officials and whether the incompatibility of performing public office with other offices and activities was respected by officials who are ensured an independent and autonomous position by the Constitution. The Constitutional Court found that the provision was inconsistent with the principle of the separation of powers. It highlighted that the principle of the separation of powers was established in order to prevent the abuse of power, which is always to the detriment of the people or the rights of an individual. The first element of this principle (i.e. the separation of individual functions of power) requires that the legislative, executive, and judicial branches of power be separated from each other, which also entails that authorities or bearers of these individual branches of power are separated or are not the same. The second element of this principle (i.e. the existence of checks and balances), on one hand, requires that between individual branches of government there must exist a system of checks and balances, by virtue of which any of them can influence another and restrict such, while, on the other hand, they must cooperate to a certain extent since it is otherwise impossible to imagine the functioning of the system of government of the state as a whole.[21] As the regulation under review determined that only deputies of the National Assembly composed the commission, the Constitutional

[20] Codices SLO-2007-2-002.
[21] Also held by the Constitutional Court in Decision No. U-I-83/94, dated 14 July 1994 (Codices SLO-1994-X-048).

Court found that it in fact entailed a supervisory authority of one of the branches of government. Such entails a concentration of the power of supervision over public offices in the National Assembly, i.e. the power of supervision over public offices in all the branches of power, except in the judicial branch, and supervision over public offices in all constitutionally defined authorities. Therefore, by the challenged regulation an extensive authority was given to one branch of power such that endangered the constitutional requirement that the branches of power be balanced, and consequently the challenged regulation was inconsistent with the principle of the separation of powers determined in the second paragraph of Article 3 of the Constitution.

In Decision No. U-I-304/96, dated 7 November 1996, the Constitutional Court stressed that the separation of powers is the foundation of the constitutional order of the Republic of Slovenia. Within the framework of their competences, state authorities of the legislative, executive, and judicial branches of power perform the functions of government, governed by a system of mutual checks and balances. In this system based on the separation of powers, the Constitutional Court has the role of guardian of constitutionality and legality in relation to all other government authorities, local self-government authorities, and bearers of public authority. The third paragraph of Article 1 of the Constitutional Court Act provides that Constitutional Court decisions have binding effect. As the Constitutional Court established that the legislature adopted an amendment to a piece of legislation that was contrary to a position expressed in a Constitutional Court decision, by disregarding the content of that decision, the legislature threatened the balance of the constitutional order that is based on respect for the mutual relations between authorities of the different branches of power as they are determined by the Constitution and the laws. Therefore, the Constitutional Court established an inconsistency of the relevant provisions of the challenged act with the Constitution.

11. *Do the decisions of your Court have binding force on other courts? Do other / ordinary courts follow / respect the case law of your Court in all cases? Are there conflicts between your Court and other (supreme) courts?*

The Constitutional Court occupies an important position in the system of separation of powers. Its position and competences are determined by the Constitution. The Constitutional Court Act defines the Constitutional Court as the highest body of the judicial power for the protection of constitutionality, legality, and human rights and fundamental freedoms (Article 1 of the Act). The third paragraph of Article 161 of the Constitution determines that legal consequences of Constitutional Court decisions are determined by law, and the third paragraph of Article 1 of the Constitutional Court Act provides that Constitutional Court decisions have binding effect. Regardless of the fact that the binding effect of Constitutional Court decisions is determined "merely" by a law, such rule also follows already from the fundamental constitutional principles – the principles of a state governed by the rule of law (Article 2 of the Constitution) and the principle of the separation of powers (the second paragraph of Article 3 of the Constitution) – and would thus be applicable even if the Constitutional Court Act contained no such provision.[22] Constitutional Court decisions are thus binding for everyone, including, for instance, the regular courts. The Constitutional Court has noticed that regular courts often refer to decisions of the Constitutional Court in their decisions. Even though different decisions are adopted by courts of different instances and the dialogue between the Constitutional Court and the Supreme Court can sometimes be harsh, there have been no conflicts that would merit mentioning.

12. *Has your Court developed / contributed to standards for law-making and for the application of law? (e.g. by developing concepts like independence, impartiality, acting in accordance with the law, non bis in idem, nulla poena sine lege, etc.).*

By its decisions, which have binding effect, the Constitutional Court of the Republic of Slovenia has naturally contributed to the establishment of standards which the legislature has to observe when adopting legislation and which are binding on courts and other state authorities when applying the law. The body of constitutional case law regarding the development of the different standards for drafting legislation or applying the law is extensive and difficult to limit to the extent of the questionnaire. It

[22] See Constitutional Court Decision No. U-I-248/08, dated 11 November 2009, Codices SLO-2010-1-003, which was already mentioned in the reply to question III.10.

should be noted that all of the concepts listed in the questionnaire are determined either as human rights or as constitutional principles by the Slovene Constitution and the Constitutional Court frequently decided on them. These broad issues are thus the subject of extensive constitutional case law. With regard to drafting legislation, the Constitutional Court derived the principle of the clarity and precision of regulations from the principles of a state governed by the rule of law, which has already been discussed *supra* (see especially replies to questions I.2 and I.4).

As an example of a standard for the application of law developed by the Constitutional Court, the requirement stemming from constitutional case law that courts must provide a substantive reasoning of their decisions should be mentioned. Thus, already in Decision No. Up-39/95, dated 16 January 1997,[23] the Constitutional Court stated that the right of a party to proceedings to be heard is reflected in the duty of the court to take notice of all of the parties statements, to assess their relevance, and to also take a position on the statements that are of essential importance for a decision in its reasoning. Thereby the reasoning of a court decision is not only a means for ensuring another human right (e.g. the right to be heard), but it also constitutes an independent and autochthonous element of the right to a fair trial, guaranteed by Article 22 of the Constitution (Constitutional Court Decision No. Up-1273/09, dated 13. October 2011). Its original value lies in ensuring the disclosure of the reasons underlying a decision, especially to parties who were unsuccessful in proceedings regarding a decision on their rights, obligations, or legal interests. In Decision No. Up-1067/11, dated 19 January 2012, the Constitutional Court added to such that when the Supreme Court itself decides on a lawsuit in administrative dispute proceedings, it must not only respond to the statements raised in the appeal, but also to all relevant allegations contained in the lawsuit.

In Decision No. Up-919/10, dated 8 November 2012, the Constitutional Court similarly held that for a higher instance court, which amends a decision of lower instance courts, the duty to provide reasons for its decision cannot be significantly narrower that as regards first instance courts. In such cases, it must thus follow from the decision of a higher instance court that, when deciding, the court considered all of

[23] Codices SLO-1997-S-001.

the complainant's significant statements. According to established constitutional case law, a court's duty to take a position does not only refer to the statements of fact, but also encompasses the requirement that the court take a position regarding a party's principal legal positions, provided these are sufficiently reasoned, not manifestly unfounded, and if, in the court's reasonable assessment, they are not irrelevant for a decision on the case. In addition, the higher instance court must not disregard the decisive reasons by which a lower court justified the adoption of a decision that is favourable to the complainant.

Constitutional Court Order No. U-I-302/09, Up-1472/09, U-I-139/10, Up-748/10, dated 12 May 2011,[24] must further be mentioned. In this case the Constitutional Court considered constitutional complaints and petitions for the review of constitutionality of the regulation of the procedure for deciding on granting leave to appeal to the Supreme Court. The fundamental reason underlying the petitions and the constitutional complaints was the fact that the Supreme Court does not provide a substantive reasoning of its decisions not granting leave to appeal. The Constitutional Court held that the purpose of the human right to the equal protection of rights determined by Article 22 of the Constitution, which also includes the requirement to ensure an appropriate reasoning of decisions, is to protect individuals in proceedings regarding their rights, obligations, and legal interests. The assessment as to what extent the proceedings refer to the individual position of a party is, therefore, an important factor which determines the scope of the protection of the right to appropriate reasoning guaranteed by the Constitution. The Constitutional Court stated that deciding on granting leave to appeal is a *sui generis* preliminary procedure in which the Supreme Court reviews whether the case involves legal issues relevant to the legal order as a whole that go beyond the specific case and interests of the parties to the specific proceedings. Therefore, it does not follow from the right to make statements and the right to a fair trial determined in Article 22 of the Constitution that the Supreme Court must provide a statement of reasons on the merits as to whether based on the criterion of public interest it will grant a legal remedy that human rights do not demand. From the standpoint of this procedural guarantee, it suffices that in its decision the Supreme Court merely makes a general

[24] Codices SLO-2011-3-004.

reference to the legal reasons for dismissing the leave to appeal. The requirement to provide reasoning on the merits of orders dismissing leaves to appeal would undermine the purpose of the regulation of the appeal to the Supreme Court and consequently the significance of that court would be weakened, which would affect the development of the law, the protection of the human right to equality before the law, and, in a broader sense, the foundations of constitutional democracy. The Constitutional Court applied the same reasons to justify its decision in Order No. U-I-60/11, Up-349/11, dated 14 February 2013. By this Order it concluded that the right to give a statement in proceedings and the right to a fair trial determined in Article 22 of the Constitution do not constitute an obligation for the Constitutional Court to give a fully reasoned decision for rejecting or not accepting a constitutional complaint for consideration. From the standpoint of these procedural guarantees, it is namely sufficient if the Constitutional Court provides general reasons in an order on the rejection or non-acceptance of a constitutional complaint issued in the preliminary examination phase of constitutional complaint proceedings.

13. *Do you have case law relating to respect for the rule of law by private actors exercising public functions?*

A number of constitutional provisions are relevant in connection with the position of bearers of public authority, whereby in particular Article 121 of the Constitution, which determines that legal entities and natural persons may be vested with the public authority to perform certain duties of the state administration by law or on the basis thereof, should be mentioned. The Constitution thus determines public authority as an entitlement of individuals and legal entities of private law to perform administrative tasks. In connection to the work of the Constitutional Court, the question of respect for the principles of a state governed by the rule of law by bearers of public authority is raised especially as regards the principle of legality, i.e. that the bearers of public authority carry out their work within the limits and on the basis of the Constitution and the laws (the second paragraph of Article 120 of the Constitution) and that their individual acts and conduct have a basis in a law or a regulation adopted in accordance with a law (the fourth paragraph of Article 153 of the Constitution). The principles of a state governed by the rule of law as they have developed in

established case law are thus also binding on bearers of public authority when carrying out their work.

In Decision No. U-I-123/92, dated 18 November 1993, when reviewing the authorisation of an agency to adjust differences in pension levels, the Constitutional Court stated that the principle of democracy (Article 1 of the Constitution) requires that the directly elected deputies adopt the most important decisions affecting citizens and that therefore administrative authorities may only act on the basis of a law and within its boundaries. The principles of a state governed by the rule of law (Article 2 of the Constitution) also require that fundamental legal relations between the State and its citizens are regulated by laws. Such also equally applies to bearers of public authority who perform certain functions of state administration in accordance with the second paragraph of Article 121 of the Constitution.

14. *Are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an effective fight against corruption? Do you have case law related to the accountability of public officials for their actions?*

The relevant regulation in the Republic of Slovenia includes incompatibility of office as well as immunity. Incompatibility of office means that some offices are incompatible and therefore an official may not perform any such functions or carry out other activities aimed at obtaining income or other forms of financial gain in addition to his or her public office. The incompatibility of simultaneously performing offices in different state authorities derives from the principle of the separation of powers, which has already been discussed *supra*. The incompatibility of simultaneously performing public offices and the incompatibility of simultaneously performing a public office and other activities, especially gainful ones, aim at preventing possible abuses of a public office or official position. The Slovene legal order regulates the incompatibility of the office of deputy of the National Assembly, member of the National Council, President of the Republic, and the office of a judge (see the second paragraph of Article 82, the first paragraph of Article 100, and Articles 105 and 133 of the Constitution). Slovenia recognises immunity as a guarantee of legal certainty and independence of officials in the performance of their

functions. The purpose of the immunity of deputies is in ensuring that the representative body can function independently and without interruptions, and the members of the National Council and Constitutional Court judges enjoy the same immunity as the deputies of the National Assembly (see Articles 83, 100, and 167 of the Constitution).

The Constitutional Court *inter alia* considered the question of whether deputies enjoy immunity for statements made during a parliamentary debate, i.e. statements that entail political speech regarding matters of public importance and that have a sufficient connection to the parliamentary debate.[25] In the case in question, the constitutional complainant believed that, while he was still as a deputy, his freedom of expression determined in the first paragraph of Article 39 of the Constitution was violated, as the court refused to grant him immunity as a deputy for statements he had made at the podium in the National Assembly. The Constitutional Court emphasised that the Constitution (in the first paragraph of Article 83) determines the so-called professional or material immunity, meaning that a deputy is not criminally liable for any opinion expressed or vote cast at sessions of the National Assembly or its working bodies. Such immunity protects the deputy from criminal liability for certain acts also after his term of office expires. However, it follows from the wording of the first paragraph of Article 83 of the Constitution that immunity is expressly limited to protection from criminal liability. Criminal and civil liability are two different kinds of liability. The freedom of speech (Article 39 of the Constitution) of a deputy as an elected representative of the people must enjoy special protection, especially as regards deputies belonging to the opposition. However, this does not entail that such freedom is completely unlimited. Even with regard to a deputy's political speech (in the broader sense), it has to be taken into account that human rights and fundamental freedoms are limited by equal rights or freedoms of others. In a conflict of constitutional rights (freedom of speech on the one side and, e.g., the right to personal dignity and one's good name on the other), freedom of speech must be given a greater weight when balancing interests and values and the mentioned circumstances must be deemed to be such as to shift the balance strongly in favour of freedom of speech. Therefore, in cases concerning the limitation of the freedom of

Decision No. Up-462/02, dated 13 October 2004.

speech of a deputy regarding political questions, the existence of constitutionally admissible reasons for the limitation must be verified with particular care. In the mentioned case the Constitutional Court found that the regular courts did not excessively interfere with the complainant's freedom of expression.

The Constitutional Court also considered the question of immunity of judges. Criminal proceedings were instituted against the constitutional complainant, who was a criminal judge, on the basis of a private lawsuit lodged by the person for whom the complainant proposed detention in another criminal case. By Order No. Up-689/11, dated 24 January 2012, the Constitutional Court held that the decision by which the National Assembly allowed the institution of criminal proceedings against the complainant is not an individual act by which the complainant's rights, obligations, or legal benefits were decided on. The procedural immunity of judges, determined in Article 134 of the Constitution, is namely not a right (and even less so a human right), but a privilege that is not intended to protect judges as individuals, and its purpose is to prevent possible interruptions of the work of the judicial branch of power by instituting unjustified criminal proceedings. In this sense, the procedural immunity of judges is also one of the fundamental elements of the independence of judges (held by the Constitutional Court already in Order No. U-I-319/97, dated 2 April 1998).

IV. The law and the individual

15. *Is there individual access to your Court (direct / indirect) against general acts / individual acts? Please briefly explain the modalities / procedures.*

In the Republic of Slovenia, individuals may access the Constitutional Court in the framework of proceedings to review the constitutionality and legality of regulations as well as in proceedings to decide on constitutional complaints.

The Constitutional Court decides on the conformity of laws with the Constitution; of laws and other regulations with ratified treaties and with the general principles of international law; of regulations with the Constitution and with laws; of regulations of local communities with the Constitution and with laws; and of general acts issued for the exercise of public authority with the Constitution, the laws, and regulations. When

deciding on the constitutionality and legality of regulations, the Constitutional Court also decides on the constitutionality and legality of the procedures by which these acts were adopted. It thus decides not only on substantive, but also on formal unconstitutionality or illegality. In principle, the Constitutional Court only has jurisdiction to review regulations that are in force, however under certain circumstances it may also review regulations that already ceased to have effect.

The procedure to review the constitutionality of laws or to review the constitutionality and legality of other regulations may be initiated by a petition of an individual who demonstrates legal interest. Legal interest is established if a law or other regulation directly interferes with the petitioner's rights, legal interests, or legal position. Unless the petitioner's legal interest is personal, concrete, and direct, the Constitutional Court rejects the petition. When a petition is lodged against regulations inferior to laws, it may be lodged within one year after such regulation entered into force or within one year after the day the petitioner learned of the occurrence of harmful consequences. In proceedings to review constitutionality and legality, the Constitutional Court decides by orders and decisions. It rejects a petition by an order if not all of the procedural requirements are fulfilled. It dismisses a petition by an order if it is manifestly unfounded or if it cannot be expected that an important legal question will be resolved. The Constitutional Court adopts decisions on the merits (i.e. constitutionality and legality) in the form of decisions. Until a final decision, the Constitutional Court may suspend in whole or in part the implementation of a challenged regulation if its implementation could result in difficult to remedy harmful consequences.

A constitutional complaint is a special legal remedy for the protection of human rights and fundamental freedoms. A constitutional complaint may invoke violations of rights and freedoms enshrined in the Constitution as well as those recognised by valid treaties ratified by the Republic of Slovenia. Under the conditions determined by law, a constitutional complaint may be lodged against individual acts by which state authorities, local community authorities, or bearers of public authority decided on an individual's rights or obligations. The most important procedural requirements for lodging a constitutional complaint are the time limit and the exhaustion of legal remedies. A constitutional complaint has to be lodged within 60 days of the day the

individual act against which a constitutional complaint is admissible was served. In especially well-founded cases the Constitutional Court may exceptionally decide on a constitutional complaint which has been lodged after the expiry of that time limit. A constitutional complaint may be lodged only after all ordinary and extraordinary legal remedies have been exhausted. Before all extraordinary (but not the ordinary) legal remedies have been exhausted, the Constitutional Court may exceptionally decide on a constitutional complaint if the alleged violation is manifestly obvious and if irreparable consequences for the complainant would result from the implementation of the individual act.

Provided that the procedural requirements are fulfilled, a constitutional complaint is admissible if there is a violation of human rights or fundamental freedoms which had serious consequences for the complainant. The Constitutional Court Act determines four types of cases where it is deemed that the violation of human rights or fundamental freedoms did not have serious consequences for the complainant. These are constitutional complaints against individual acts issued (1) in small claims disputes, (2) in trespass to property disputes, (3) in minor offence cases, or (4) if only a decision on the costs of proceedings is challenged. Nevertheless, the Constitutional Court may always consider a constitutional complaint if it concerns an important constitutional question which exceeds the importance of the concrete case.

Constitutional complaint proceedings have two stages. In the first stage, a panel of three Constitutional Court judges examines the constitutional complaint in the light of the procedural requirements and decides whether the constitutional complaint will be accepted for consideration. In the second stage, the entire Constitutional Court (i.e. in plenary session) decides the constitutional complaint on the merits, i.e. on whether the alleged violations of human rights and freedoms exist. By a decision the Constitutional Court may either dismiss a constitutional complaint as unfounded or grant it, and in whole or in part annul or abrogate the individual act, and remand the case to the authority competent to decide thereon.

16. *Has your Court developed case law concerning access to ordinary / lower courts (e.g. preconditions, including, costs, representation by a lawyer, time limits)?*

The Constitutional Court of the Republic of Slovenia has a vast body of case law on the right to equal protection of rights determined in Article 22 of the Constitution and the right to judicial protection determined in Article 23 of the Constitution regarding different aspects of access to courts. A thorough presentation of the case law on access to courts goes beyond the scope of this questionnaire. However, a part of the case law is illustrated through examples referring to the Constitutional Court's review of measures adopted by the legislature in 2008 in order to accelerate judicial proceedings and the challenging of paternity.

By Decision No. U-I-322/11, dated 24 May 2012, the Constitutional Court abrogated a provision of the Labour and Social Courts Act that determined that a plaintiff is deemed to have withdrawn a lawsuit if he or she does not attend a settlement hearing or the first hearing of a trial without stating a justified reason for his or her absence. In practice, this provision has often had the effect that, following the fiction of the withdrawal of the lawsuit which resulted in the proceedings being stayed, due to the strict and short time limits for filing a lawsuit in a great number of labour and social disputes, a plaintiff was never again able to judicially protect his or her substantive-law entitlements. The challenged provision therefore limited the human right of plaintiffs to judicial protection determined in the first paragraph of Article 23 of the Constitution. The challenged sanction for not attending a hearing was relatively severe and strict. As a general rule, it namely resulted in the permanent and irreparable loss of judicial protection of important substantive-law rights of the plaintiffs, namely in a particularly sensitive area in which the need to protect the weaker party, namely workers enforcing their rights in court, is strongly accentuated. In addition, the positive influence of the challenged provision on the speed and efficiency of proceedings was not such as to outweigh the significant weight of the limitation of the human right to judicial protection. Imposing sanctions on plaintiffs due to their failure to attend a hearing cannot essentially contribute to a speedy and efficient conclusion of proceedings, as in such instances the court could also conduct a hearing and decide on the lawsuit. The challenged regulation thus excessively interfered with the human right of plaintiffs determined in the first paragraph of Article 23 of the Constitution, and the Constitutional Court abrogated it.

By Decision No. U-I-74/12, dated 8 November 2012, the Constitutional Court abrogated a part of the provision of the Civil Procedure Act that in instances where an attorney failed to enclose a power of attorney with a lawsuit prescribed the sanction that the court may not allow the attorney to temporarily perform procedural acts for a client but immediately rejects the lawsuit. The Constitutional Court held that such sanction interferes with the right of the persons in whose name the attorney submitted a request for judicial protection. One of the fundamental aims of the amendment to the Civil Procedure Act of 2008 was to achieve and enforce in practice the principle that the responsibility to contribute to the acceleration and concentration of proceedings lies also with parties to proceedings and their attorneys. In this regard, it is relevant that an attorney practices his or her profession as a liberal profession and is a legal expert with experience in representation before the courts, therefore a higher degree of diligence may and must be expected from him or her than from other parties. The proposed legal regulation was intended to strengthen the attorneys' responsibility to conduct the proceedings more swiftly and effectively, as well as the responsibility to ensure quality and professional representation of parties in proceedings before the courts. In the opinion of the Constitutional Court, the mentioned objectives are constitutionally admissible aims that justify the restriction of the human right of the plaintiff under the first paragraph of the Article 23 of the Constitution, because they are substantively related to the protection of the same human right of the defendant, especially in the light of the right to a trial without undue delay. In assessing the statutory measure from the perspective of the principle of proportionality, the Constitutional Court concluded that, the challenged regulation was an appropriate measure for achieving the aim. However, it did not pass the test of necessity, in the framework of which the Constitutional Court assesses whether the measure is at all necessary for achieving the pursued aim, meaning that the aim cannot be (to the same degree) achieved with a less invasive measure or even without it. The Constitutional Court assessed that the challenged sanction was not necessary for accelerating proceedings in connection to reinforcing the principle of the due diligence of attorneys. Such sanction namely affected primarily and especially the client, while its effect on the attorney was merely secondary and conditioned by his or her liability for damage incurred by his or her client for failing to produce a power of attorney which rendered a decision on the merits impossible. The introduction of a special fine that would eventually have to be paid by the attorney in

question and which would not influence the proceedings would produce at least the same effect (if not a greater one). This entails that the admissible aim of limiting the human right to judicial protection can be achieved without any interference with the human rights of the parties to proceedings. Furthermore, the Constitutional Court also assessed that such interference with the right to judicial protection was disproportionate in the narrower sense, as the weight of the consequences of the assessed interference with the affected human right was not proportionate to the value of the aim pursued or to the benefits that would result from the inference. In this regard, the decisive element was the fact that severe interferences with the right to judicial protection occurred due to the challenged provision, even when attorneys have failed to include a power of attorney due to a *lapsus*, *force majeure*, blameless error, and in other instances when they could not be reproached for demonstrating insufficient professional diligence. The dismissal of a lawsuit filed by an attorney, without the court requesting the submission of a power of attorney, as a general rule entailed a permanent loss of the right to judicial protection. Furthermore, in the opinion of the Constitutional Court, in assessing the scope of the benefits it also has to be taken into consideration that requesting the submission of a power of attorney normally only results in a minor delay in proceedings.

In Decision No. U-I-328/05, dated 18 October 2007, the Constitutional Court reviewed a provision of the Act regulating marriage and family relations. The challenged provision determined that a fatherless child may bring a lawsuit to determine his or her paternity, but limited such right by a preclusive time limit to a period of five years after the child has attained the age of majority. The Constitutional Court found that the provision excessively limited the right of a child to learn about his or her origin, which is protected by Article 35 of the Constitution. It held that the interest of a child who learns about his or her origin later than five years after he or she has attained the age of majority outweighs the interest of legal certainty and the need to secure permanence of existing family relations. Consequently, the challenged statutory provision was declared inconsistent with the Constitution.

In Decision No. U-I-85/10, dated 13 October 2011, the Constitutional Court reviewed another provision of the Act regulating marriage and family relations. Due to the Decision summarised in the preceding paragraph, at the relevant time there was no

longer a preclusive time limit for a fatherless child to file a declaratory lawsuit to determine his or her paternity. However, the challenged provision still imposed a time limit of five years after a child has reached the age of majority on a lawsuit for challenging paternity as presumed pursuant to law. The Constitutional Court stressed that a successful challenge to a child's statutorily presumed paternity is in fact a necessary precondition for the determination of the child's true paternity. Thus, if a child did not learn in time of the circumstances that are decisive for a determination of who his or her biological parents are, the expiration of the time limit for challenging his or her paternity in practice also prevented a declaratory lawsuit for determining his or her paternity from being successful. From the right to know one's origin, protected by Article 35 of the Constitution, there follow the right of individuals to know the identity of their biological parents and the right to create legal ties with their biological parents through a lawsuit. From this right there further arises the right to sever or challenge the possible legal ties between a child and his or her statutorily presumed parents that are not in accord with reality. The right to challenge paternity and the right to require that paternity be determined are thus indivisibly interwoven parts of the same constitutionally protected whole. Imposing a preclusive time limit for a child to file a lawsuit for challenging paternity entails an interference with the child's personality right to know his or her origin, as after the expiry of the statutorily determined time limit such lawsuit may no longer be filed. The Constitutional Court held that the legislature disproportionately limited the child's right to challenge legally recognised parental relationships which are not in compliance with biological facts, as it limited the possibility to judicially exercise this right to an objective five-year time limit after a child has reached the age of majority. The interests of a child, who has learned of circumstances which could be legally relevant for the determination of his or her paternity after the expiry of the disputed time limit, outweighs the interests of protecting confidentiality and the permanence and unchangeable nature of existing family relations. Consequently, the Constitutional Court decided that the challenged statutory provision was inconsistent with Article 35 of the Constitution.

Decision No. U-I-251/14, dated 21 October 2015, was the last in the series of cases regarding paternity issues up to date. In that case, the Constitutional Court reviewed the constitutionality of the provision of the Act regulating marriage and family relations, which determined a preclusive time limit for the right of a statutorily

presumed father (i.e. a married man who has reason to believe that he is not the biological father of a child born during his marriage) to challenge before a court his paternity, namely a time limit of five years following the birth of the child. The petitioner alleged that due to the expiration of the time limit he was unable to challenge his paternity of his statutorily presumed daughter, which allegedly constituted a disproportionate interference with his right to personal dignity and safety (Article 34 of the Constitution) and with the right to protection of the rights to privacy and personality rights (Article 35 of the Constitution). The Constitutional Court adopted the position that Article 35 of the Constitution also protects the personality right of statutorily presumed fathers to initiate judicial proceedings and obtain judicial recognition of the fact that their statutorily presumed (formal) paternity does not correspond to the actual biological origin of the child and that, consequently, the legal relationship between them shall cease. The Constitutional Court stated that ensuring the permanence, stability, and unchangeable nature of parent-child relationships, and the protection of children's interests, are indeed constitutionally admissible and legitimate aims for the challenged statutory regulation. However, it concluded that the measure at issue constituted an excessive interference with the personality right protected by Article 35 of the Constitution and therefore abrogated the challenged provision.

17. *Has your Court developed case law on other individual rights related to the rule of law?*

The answer to this question can be found in previous answers, particularly in the introductory part. Namely, almost the entire body of the case law of the Constitutional Court refers to the rule of law, as all human rights are intrinsically and inseparably linked therewith.

18. *Is the rule of law used as a general concept in the absence of specific fundamental rights or guarantees in the text of the Constitution in your country?*

In this regard, attention should once again be drawn to the fifth paragraph of Article 15 of the Constitution, according to which no human right or fundamental freedom

regulated by legal acts in force in Slovenia may be restricted on the grounds that the Constitution does not recognise that right or freedom or recognises it to a lesser extent. Such entails that not only human rights and fundamental freedoms that are guaranteed by the Constitution, but also all human rights and fundamental freedoms that are guaranteed by valid treaties that are binding on the Republic of Slovenia, thus including the ECHR, or form part of customary international law, enjoy constitutional protection.

While constitutional principles can constitute an independent basis for the decision-making of the Constitutional Court when it reviews the constitutionality of laws and other regulations, they cannot be independently invoked in constitutional complaint proceedings. It namely follows from the established case law of the Constitutional Court that constitutional principles do not regulate human rights directly (e.g. a violation of the principles of a state governed by the rule of law cannot be invoked as an independent violation in a constitutional complaint; *cf*. Decision No. Up-2597/07, dated 10 April 2007). A constitutional complaint can only invoke violations of human rights and fundamental freedoms.