Slovenia's steps on the European path

Arne Marjan Mavčič[*]

ABSTRACT

The article discusses the first steps of Slovenia on its path toward accession, adaptation, and implementation of the European Convention on Human Rights and the case law of the European Court of Human Rights. Although the Convention was known under the previous system, its actual partnership was unattainable in the then political circumstances, as the conditions for membership in the Council of Europe were not met and the level of human rights protection remained questionable. The former Yugoslavia did submit an application for membership in the Council of Europe shortly before its dissolution, but it was never realized. This turning historical period — a time of major social and political changes following the decline of Soviet influence — encouraged processes of democratization and transformation of values throughout Europe, particularly in its eastern part. For Slovenia, it was a time of exceptional sensitivity due to the war events in the neighbourhood, yet with internal political unity it succeeded in taking a new, democratic path. Shortly after independence, Slovenia became the first new state in the region to join the Venice Commission and to establish partnership with the Council of Europe, the European Convention, and the European Court of Human Rights. The acceptance of the Convention's values and the Court's case law among

[*] Professor at the European Faculty of Law, New University.

the first new or renewed states marked the beginning of a period of adaptation, renewal, and internalization of fundamental democratic principles throughout Slovenian society and the state.

Keywords: European Convention on Human Rights; European Court of Human Rights; democratization; Slovenian Constitutional Court; subsidiarity principle

Koraki Slovenije na evropski poti

POVZETEK

Prispevek obravnava prve korake Slovenije na poti pridruževanja, prilagajanja in uresničevanja Evropske konvencije o varstvu človekovih pravic ter sodne prakse Evropskega sodišča za človekove pravice. Čeprav je bila Konvencija v prejšnjem sistemu poznana, je bilo njeno dejansko partnerstvo v takratnih političnih razmerah neuresničljivo, saj pogoji za članstvo v Svetu Evrope niso bili izpolnjeni, raven varstva človekovih pravic pa je ostajala vprašljiva. Bivša Jugoslavija je sicer tik pred razpadom vložila kandidaturo za sprejem v Svet Evrope, vendar do uresničitve ni prišlo. Prelomno zgodovinsko obdobje oziroma obdobje velikih družbenih in političnih sprememb po propadu sovjetskega vpliva je v Evropi, zlasti v njenem vzhodnem delu, spodbudilo procese demokratizacije in preobrazbe vrednot. Za Slovenijo je bilo to čas izjemne občutljivosti zaradi vojnih dogodkov v soseščini, vendar ji je z notranjo politično enotnostjo uspelo stopiti na novo, demokratično pot. Tako je že kmalu po osamosvojitvi kot prva nova država v regiji postala članica Beneške komisije ter sklenila partnerstvo s Svetom Evrope, Evropsko konvencijo in Evropskim sodiščem za človekove pravice. Sprejetje konvencijskih vrednot in sodne prakse Evropskega sodišča med prvimi novimi ali prenovljenimi državami je pomenilo začetek obdobja prilagajanja, prenove in

ponotranjenja temeljnih demokratičnih načel v vseh porah slovenske družbe in države.

Ključne besede: Slovenija; Evropska konvencija o človekovih pravicah; Evropsko sodišče za človekove pravice; demokratizacija; slovensko ustavno sodišče; načelo subsidiarnosti

1. Introduction

The article is divided into an analysis of the situation during the Slovenian transition processes, and then discusses the transformation of the Slovenian legal system in comparison with similar events in the former systems under Soviet influence with the assistance of the Venice Commission of the Council of Europe. It discusses Slovenia's entry into the Council of Europe together with the signing of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the adoption of European values from the case law of the European Court of Human Rights. Special chapters of the article discuss the initial return of the possibility of individual applications for the protection of human rights before the Slovenian Constitutional Court and the subsequent gradual restriction of individuals' access to this institution, in parallel with the expected increase in the number of such applications, this restriction being influenced by related processes within the framework of the European Court of Human Rights and in some foreign systems of constitutional justice. The author's methodological approach combines the descriptive, comparative, and inductive methods and also stems from personal impressions from direct monitoring of the processes under consideration.

2. Breaking news in the early 1990s

In the specific circumstances of the late 1980s and early 1990s, Slovenian independence and Slovenia's partnership with the Council of Europe, as well as with the European

Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR), were born. It was a turning point in history – a period of vibrant movements, democratization processes, and great social changes in the region, in Europe, and in the former Soviet Union as a result of its collapse.

For Slovenia, this was also a sensitive period due to the disintegration of the Yugoslav Federation and the war events at home and in the neighbourhood. New states emerged, new constitutional arrangements were created, and constitutions were changed or newly adopted. The Council of Europe, with its newly established Venice Commission, played a major role as a supporting and advisory body.

It was the period after the fall of the Berlin Wall, the time of the passing of former Soviet influence, when new state arrangements arose from the ashes of failed authoritarian undemocratic regimes. It was a period of optimism, political unity, and the conscious construction of a new legal order based on European values – a period of high expectations and positive change, of creating something new, marked by openness to new ideas and a strong sense of common political will. Even in the Slovenian Constitutional Court, established on a new constitutional basis, strengthened with new important powers, this was a time of the realization of new constitutional values. These were years of trust in shared ideals, years of breaking with the past, years of constructive judicial activism, and forward-looking vision – years in which the values of the ECHR and the practice of the ECtHR were embraced.

Slovenia embarked on a new democratic path despite the war events in its immediate vicinity, becoming the first new country in the region to join the Venice Commission immediately after gaining independence, which was a great recognition. It joined the Council of Europe and acceded to the ECHR among the first of the new states (Gornik, 2012). Slovenia hastened to follow this new democratic path. The

period of transformation and change was relatively smooth, and the processes in this direction have been gradually consolidated since the late 1980s (Mavčič, 1998).

3. Great expectations

The consensus achieved among political parties enabled the adoption of a new constitution by the Slovenian parliament at the end of 1991. Of course, this was only the first step, and at that time the aim was for Slovenia to adopt new legislation within a year and a half, by the end of 1993, that would meet the norms and standards established by the European institutions for the protection of human rights (Bavcon, 1993).

The new constitution therefore provided the framework for the further development of the Slovenian legal system, based on the constitutionally codified position of human rights and civil liberties (Pučnik, 1993). The constitutional framework for the protection of human rights encompasses all the basic forms of protection: the judicial system, the Constitutional Court, and the Ombudsman. The actual functioning of these institutions was, at that time, still a matter for the future. However, one of their common denominators was that each of the new democratic institutions benefited from the experience gained in applying the provisions of the ECHR (Türk, 1993).

The movements for new constitutionalism in the former socialist countries of Central and Eastern Europe had to fulfil a crucial historical task under turbulent political circumstances. Not only did they have to establish lasting constitutional frameworks for democratic states (to replace the previous ones based on different ideological foundations), but also had to create a basis for a new legitimacy of entire legal systems and to lay lasting constitutional foundations strong enough to withstand the social and political pressures and conflicts inevitable in that part of Europe. Internationally

agreed human rights standards, in all their many aspects, were relevant to all three aspects of this task (*ibid.*).

Proposals emerged to reintroduce the constitutional appeal into the new constitutional and legal system. In this way, the constitutional complaint was to be reinstated in the Slovenian system, as it had been abolished in the former system through an amendment to the 1974 Constitution of Slovenia. On 4 April 1989, the then Council for the Protection of Human Rights proposed expanding the jurisdiction of the Slovenian Constitutional Court so that it could address specific violations of human rights under certain procedural conditions (after other legal remedies had been exhausted) (*ibid.*).

Almost at the same time, however, foreign experts pointed out the importance of the constitutional complaint as a primary means of protecting rights in national systems, in order to avoid overburdening the competent European bodies. Moreover, the very existence of this remedy (i.e., the constitutional complaint) would ensure more effective control over violations of constitutional rights by the legislative, executive, and judicial authorities. In many cases, limiting the constitutional complaint would only postpone the work of domestic courts to the (then) European Commission. Naturally, it is preferable that the legal protection of constitutional rights be realised in the country where the right was violated, before the case is brought before the institutions in Strasbourg (Dannemann, 1993).

4. The Venice Commission and the transformation of legal systems

The period of the major state transformations and the emergence of new states in the late 1980s and early 1990s, together with the aspiration to align with the standards of Western democracy, gave rise to the establishment of the European Commission for Democracy through Law or the

Venice Commission. It was created as a consultative body of the Council of Europe for constitutional law issues (in a sense, as a form of "constitutional first aid"), not only to connect constitutional courts and other equivalent bodies responsible for judicial review of constitutionality.

The Commission was formally established at the Conference of European Foreign Ministers held in Venice in January 1990, from which it also took its name (Mavčič, 2009a). In May 1990, the Charter of the Venice Commission was adopted on the basis of a special agreement concluded with the Council of Europe. Membership in the Venice Commission is not automatic for Council of Europe member states; it requires an application supported by the relevant documentation. The idea of interconnection soon expanded beyond its initial scope, evolving toward the broader promotion of accepted democratic legal standards and traditions.

The Venice Commission found its mission in implementing the principles of the European legal heritage in national constitutional and legislative systems and in legal practice more broadly. It became a vital source of assistance to the so-called new democracies in reforming their constitutional or legal frameworks. The result was a gradual harmonisation of legal systems and an increasing convergence of constitutional thought – to the point that scholars have spoken of a "European constitutional area", a shared European legal culture, or even unified solutions, especially in the field of judicial review of constitutionality. From its initial involvement in the general constitutional transformations of transition countries, the Commission's work later shifted toward more specific systemic issues or fundamental national institutional reforms (Završnik, 2001; Malinverni, 2004; Mavčič, 2009a).

The Venice Commission has thus established itself as a key, stable, diversified and well-organised actor in this field. It promotes the principles of modern constitutionalism, particularly the separation of powers, the rule of law, and the social state. It supports the establishment and the develop-

ment of constitutional review mechanisms in member states, strengthens the authority of these bodies in national systems, encourages the harmonisation of European law, and facilitates the integration of constitutional case law databases among member states. Where necessary, the Commission even prepares model frameworks of constitutional jurisprudence or intervenes preventively in situations of constitutional crises by providing interpretative guidance on constitutional norms. Over time, the Venice Commission has extended its influence far beyond the original European framework, as it carries out its mission beyond the European continent.

The Council of Europe has witnessed first-hand the changing political map of Europe during the state-building processes that embraced the three principles it promotes – respect for human rights and freedoms, pluralist democracy, and the rule of law – which are recognised as fundamental European constitutional values. In this spirit, on 11 May 1989, the Parliamentary Assembly of the Council of Europe adopted Resolution 917, introducing the concept of "special guest status" for states undergoing democratic and economic reforms.

The transformation period of the former communist and socialist states thus directly inspired the establishment of the Venice Commission as one of the Council of Europe's mechanisms, aimed at assisting these states in developing their own democratic models and constitutional and legal systems suited to their specific circumstances. The goal was to implement and enhance – in accordance with each national environment – the values that today constitute the "European constitutional heritage". From its initial role of providing "constitutional legal assistance" to newly independent states, the Commission's focus has evolved toward ensuring respect for constitutional order and promoting common constitutional values underpinning the functioning of democratic institutions. In this way, the Venice Commission has

become a truly independent, internationally recognized legal think tank (Zorko, 2019).

5. Slovenia's democratic transformation and integration into European human rights protection

The quality and essence of the previous constitutional order, and of all constitutions during Slovenia's membership in the former Yugoslav Federation, were highly specific. Fundamental human rights were not the starting point of the system but merely an element of it, whose scope was precisely delineated in advance. This system accepted the principle of pluralism of self-managing interests, yet it was not prepared to institutionalise this pluralism legally and politically. Pluralism was tolerated only as long as it remained within the system. Once it began to challenge the system or sought to change it, however, it became suspect and even subject to criminal prosecution. It is therefore not accidental that the Communist Party was defined in the former Constitution as the "leading ideological and political force of the working class and of all working people".

The authority of Slovenia as a constituent unit of the former Yugoslav Federation corresponded to a directorial (assembly) system, with elements of both parliamentary and presidential systems. Typically, the system as designed in the constitution did not function in practice, and the elements of the principle of the separation of powers were largely ideological ornaments rather than effective institutions. The rules of the "division of powers" are meaningful only if cultural, economic, and political conditions exist that activate the system of checks and balances. The system, dominated *de jure* and *de facto* by a single political party (the Communist Party), certainly did not meet these conditions. This rendered the legal form ideological: it provided precisely what its designers did not intend. Nevertheless, the rights

to self-management, social property, and pluralism of self-managing interests created specific features of the Yugoslav order, distinguishing it from other typical countries of "real socialism" (Pavčnik, 2005).

The transition to a democratic system was therefore imperative. It involved moving from a system characterized by the monopoly of a single political organization and an electoral system that violated the principle of the equal rights of all citizens to participate in the decision-making process on public matters, to a system guaranteeing freedom of political organization, simplified and transparent electoral procedures, and the absence of any monopolistic political influence. Externally, Slovenia transitioned from a formally federal, but effectively administrative, unit of the Yugoslav Federation to an independent, internationally recognized state. Internally, it moved from real socialism with social ownership to a traditional ownership system. A notable advantage of this transition was its relative smoothness (Jambrek, 1992).

The 1991 Constitution of the Republic of Slovenia played a pivotal role in this transition. Legally, it differed from previous constitutions in several key respects: it introduced new constitutional principles, a revised concept of human rights, and the principle of the separation of powers.

During this transitional period, the Slovenian Constitutional Court assumed an increasingly important role, empowered with new competencies. Its transformation from the old to the new system of constitutional review was progressive. In line with contemporary trends, the Slovenian Constitutional Court, too, assumed a role akin to that of a negative legislator. At times, the legislature was unable to keep pace with developments or establish standards for all aspects of the legal system. Within the principle of judicial self-restraint, the Constitutional Court nonetheless exercised both negative functions (e.g., abrogation) and positive functions (e.g., appellate, interpretative, and

declarative decisions), tasks theoretically reserved for the legislature.

Only on the basis of this new constitutional order could Slovenia realistically aspire to join the Council of Europe and become a partner in the ECHR and the ECtHR.

6. Slovenia's alignment with European human rights standards

The existence of the ECHR was known even under the previous system, and a Slovenian version circulated almost clandestinely, but achieving actual partnership was a different matter – at the time, it was considered utopian, as it required a level of political maturity for the acceptance of democratic values. The former Yugoslav Federation did apply for membership in the Council of Europe shortly before its collapse, but this did not materialize. Under the previous system, the conditions for membership in the Council of Europe were absent, given the prevailing level of human rights protection and the lack of democratic standards.

Consequently, the former SFRY did not ratify the ECHR, as it was not a member of the Council of Europe. While the ECHR did not yet formally bind the Republic of Slovenia, its candidacy for admission to the Council of Europe made it important that Slovenia's civil procedure corresponded with the provisions of the Convention (Ude, 1993).

After independence, Slovenia seriously embarked on the path of adopting European values and standards. The most significant circumstances included Slovenia's independence and international recognition, its gradual integration into European structures, and the adoption of the Declaration on Respect for the Fundamental Conventions of the Council of Europe (Assembly of the Republic of Slovenia, 6 December 1990, Official Gazette of the RS, No. 45/90). With this declaration, the then Assembly of the Republic of Slovenia committed to consistently respecting the standards defined

by the Council of Europe conventions on the protection of human rights, which are an integral part of the organization of modern democratic Europe, within its domestic legal system. The Assembly was thus confident that the conditions required for membership in the Council of Europe conventions, particularly the ECHR, were met in the Republic of Slovenia (Brinc, 1993).

7. Implementation of the ECHR and ECtHR practice in Slovenia

After joining the Council of Europe and signing and ratifying the ECHR, Slovenia began the process of full implementation.

The Statute of the Council of Europe came into force for Slovenia on 14 May 1993. The Convention itself was ratified on 31 May 1994. The Ratification of the Convention Act – covering ratification of Article 25, Article 46, Protocol No. 1, and Protocols Nos. 4, 6, 7, 9, and 11 – was published on 13 June 1994 (Official Gazette RS, No. 33/94) and came into force on the fifteenth day following publication. On 28 June 1994, Slovenia formally ratified the Convention in Strasbourg by depositing the appropriate instruments with the Secretary General of the Council of Europe.

Slovenia made no reservations upon ratification, as new legislation had been prepared in accordance with international standards and the Convention. Notably, Slovenia was the first member state to ratify Protocol No. 11. Slovenia recognized the competence of the (former) European Commission and the jurisdiction of the ECtHR under former Articles 25 and 46 of the Convention for an indefinite period. The Slovenian declarations also included a *ratione temporis* restriction, limiting the competence of the (former) Commission and the jurisdiction of the Court to facts arising after the entry into force of the Convention and its Protocols with respect to Slovenia on 28 June 1994.

During this initial period, there were some practical challenges in introducing European legal institutions into the new Slovenian legal environment. Characteristic of this time was the gradual adaptation of state bodies to the ECHR and the case law of the ECtHR. Initially, no Slovenian-language sources were available; only commentaries on the ECHR and prior ECtHR case law in foreign languages existed. Consequently, a project was gradually introduced within state institutions to translate ECtHR case law into Slovenian. Eventually, the State Attorney's Office assumed responsibility for these translations as part of its role in representing Slovenia before the ECtHR.

At the outset, many state institutions required guidance in accessing foreign law databases. At that time, the Slovenian Constitutional Court already had connections to the German (JURIS) and Austrian (RIS) databases. Connections to the ECtHR HUDOC database were established only after its creation and public launch, initially via telephone lines. In parallel, the Venice Commission created the global CODICES constitutional case law database.

Early personal contacts with the ECtHR began quickly, including the election of the first Slovenian judge to the Court, Prof. Dr. Peter Jambrek (1993–1998). Gradually, applicants for legal remedies began to recognize the ECHR and the ECtHR as the highest European authority for human rights protection, to be approached after exhausting all domestic remedies. References by applicants to the ECHR and the practice of the ECtHR gradually became internalized within the domestic legal system.

The approach of ordinary courts to renewed domestic constitutional review and to European protection institutions – particularly regarding respect for Slovenian Constitutional Court decisions and ECtHR judgments – was regulated by Articles 112 and 113 of the Slovenian Courts Act.

The Council of Europe's recommendation that human rights issues should first be resolved within national legal

systems, before referring cases to the ECtHR (Dannemann, 1993), was reflected in the gradual restriction of access to the ECHR/ECtHR and, consequently, to some national constitutional courts. With the expansion of Council of Europe membership and the expected growth in applications for the protection of rights at European and national levels, a consensus emerged regarding the protection of the ECtHR (and, by extension, national constitutional courts) from an overwhelming number of complaints. This may raise a fundamental question: should European and national institutions be shielded from excessive applications (potentially at the expense of the principle of subsidiarity), or should these institutions maintain open access as mandated by their functions?

8. Slovenia's integration into the Council of Europe and the ECHR system

During its years of membership, Slovenia has established itself as a Council of Europe member with a recognized high level of respect for human and minority rights, strong democratic institutions, and adherence to the rule of law.

Even before the ECHR formally became binding for Slovenia, some decisions of the Slovenian Constitutional Court referred to the Convention and the case law of the ECtHR. In this context, the Constitutional Court noted that while Slovenia had not yet signed and ratified the Convention, its intention to join the Council of Europe made ratification inevitable. Consequently, Slovenian legislation needed to be adjusted promptly to meet the standards of the Convention. From the outset, there was no doubt that Slovenia was inspired by the same ideals and traditions of freedom and rule of law principles that had guided the framers of the ECHR.

The position of the ECHR in national law determines whether individuals may invoke the Convention directly or

even base a national constitutional complaint on it. It also limits the manoeuvring space of the Constitutional Court in interpreting ECHR provisions. In effect, the Constitutional Court became a link between national judicial processes and European bodies in cases where a domestic final judicial decision could be subject to an individual complaint at the European level.[1]

The interaction of (national) constitutional complaints and the function of the ECtHR raises the question of the relationship between "national and supra-national European (final) instance". The national "final instance" is the Constitutional Court, which serves as the highest body of judicial authority for protecting constitutionality, legality, human rights, and fundamental freedoms. However, the Court's role is limited to constitutional-legal questions; determination of facts and application of ordinary rules of evidence remains the responsibility of ordinary courts. The subsidiary nature of the constitutional complaint reflects the division of responsibility between constitutional and ordinary courts. The hierarchy of review could be seen as ascending from the national Supreme Court, to the Constitutional Court, and ultimately to the ECtHR. While instance is not the essence of this hierarchy, it supplements national judicial protection: national constitutional complaints supplement ordinary judicial remedies, while supranational Eu-

[1] The status and effect of the ECHR vary across national legal systems. In Austria, the ECHR has constitutional effect. In Switzerland, the ECHR serves as the basis for an internal constitutional complaint and has a status comparable to constitutional law. In both Austria and Switzerland, it is permissible to base national constitutional complaints directly on the provisions of the Convention. In Belgium, France, Luxembourg, Malta, the Netherlands, Portugal, Spain, and Cyprus, the ECHR ranks above ordinary legislation. In Germany and Denmark, the ECHR was incorporated into national law by a special statute on 1 July 1992. It also has comparable status in Finland, Italy, Liechtenstein, San Marino, and Turkey, where it functions as part of national common law. In Great Britain, Ireland, Sweden, Norway, and Iceland, the ECHR does not have direct domestic legal effect. Some Anglophone African countries are exceptions to this latter group. For example, Kenya, Tanzania, Uganda, and Nigeria have expressly adopted ECHR-based protections in their legal systems. In Nigeria, this was included in the Constitution of 1960, influenced by the extension clause of Article 63 of the ECHR, which Great Britain signed on 23 October 1953. Under this provision, only the Convention itself and Protocol 1 apply in these regions.

ropean complaints supplement the constitutional review system.

Both the Slovenian Constitutional Court and the ordinary court system ensure the conformity of domestic laws with the ECHR. Moreover, ECHR provisions complement national constitutional provisions, and the ECtHR case law is directly applicable in the decision-making of Constitutional and other courts in Slovenia. In practice, therefore, the jurisdiction of the ECtHR and Slovenian national courts overlaps in multiple ways. Slovenian law explicitly regulates this relationship: Article 113 of the Courts Act requires that ECtHR decisions be directly executed by the competent courts of the Republic of Slovenia.

Prior to 1991, Slovenian human rights protection, particularly within the then Constitutional Court, largely avoided reliance on legal principles, even those explicitly enshrined in the Constitution. The principle of equality was a notable exception, predominating among the otherwise rarely applied principles. Decisions remained largely within legalistic (formalistic) argument and no other value references were ever allowed. The Constitutional Court maintained strict judicial self-restraint and adhered to the presumption of constitutionality of laws. There were no references to foreign law or case law.

After joining the Council of Europe, Slovenia aligned with contemporary European legal culture, where national ordinary courts routinely consider ECtHR case law, thereby raising the standard of human rights protection. However, codified law and its practical implementation are not always identical. Societal interests, especially those inflamed by ideological or political sentiments, may challenge legal norms. In such contexts, judicial and political independence remain essential guarantees against the use of law as an instrument of ideological or partisan agendas based on impatience.

9. Restrictions on individual applications originating from the European parable

The ECtHR has established itself as a pan-European judicial body for the protection of human rights. With the expansion of the Council of Europe's membership, the Court began facing a significant increase in individual applications, a development that has seriously threatened both the efficiency of its work and the effectiveness of the ECHR system as a whole.

In the early 1990s, significant reforms to the ECHR and the ECtHR were announced. The steadily growing caseload of the then European Commission of Human Rights reflected the increasing trust of applicants in the ECHR monitoring mechanism and their hope for effective protection of their rights. However, legal scholars and practitioners at the time argued that this very success was jeopardizing the proper functioning of the Commission's procedures. Criticism was often voiced about the excessive length of the proceedings before the Commission. In light of these circumstances, various proposals for reforming the system as a whole were understandably put forward. The most far-reaching among them envisaged the merger of the Commission and the Court (Westerdiek, 1993).

At that time, many Council of Europe member states faced new and complex challenges in the field of human rights protection. Experts observed that adequate answers could not always be found solely within the text of the Convention or even in its rich accompanying case law. It was therefore essential to consider the ongoing processes of democratization in Eastern and Central Europe, with an eye toward their future membership in the Council of Europe and eventual adoption of the ECHR. The Commission of the then European Community also considered the possibility of the Community itself acceding to the Convention (Drzemczewski, 1993) – a project that ultimately did not materialize.

The issue of the ECtHR's excessive caseload also prompted a political response. In November 2000, at the European Ministerial Conference on Human Rights held in Rome, a new phase began in the process of reforming both the organisation of the ECtHR's work and the Convention itself.

Short-term measures were proposed, including the allocation of additional financial resources for the Court's operation and the strengthening of its Secretariat. Long-term measures focused on amending the Convention, with the dual aim of ensuring greater efficiency of the Court and, above all, reducing the number of pending cases. In accordance with the principle of subsidiarity and the idea that "a true Convention judge is, in fact, a national judge," the ECtHR sought to enhance the role of national courts in the protection of human rights. This approach aimed to reduce the inflow of cases to the ECtHR, limiting its function to that of a *"safety net"* – the ultimate guarantor of human rights and fundamental freedoms.

Another proposal for tightening the admissibility criteria for individual applications suggested that the ECtHR should decline to hear cases which, although formally admissible and well-founded in substance, concerned issues of minor or secondary importance and were unlikely to contribute to the resolution of a significant legal question. This approach was justified at the ECtHR level as consistent with the principle that the primary responsibility for human rights protection lies with national courts, while the ECtHR should focus on matters of substantial importance. Within this framework, the possibility of remitting less significant cases back to national jurisdictions was also considered.

In parallel, the Slovenian Constitutional Court discussed these same concerns during its administrative session of 24 March 2003. This meeting was held in response to a growing sense of alarm triggered by a wave of ECtHR judgments against Slovenia for violations of the "reasonable time" requirement in proceedings before the ordinary judiciary.

Essentially, it was a matter of balancing two fundamental values: the effective judicial protection of human rights, on the one hand, and individual access to a court, on the other. In any case, such balancing cannot be carried out to the detriment of individual rights. The Slovenian Constitutional Court consistently emphasized that it sought to apply the provisions of the ECHR as a standard in its own practice, while also contributing through its decisions to the homogeneity of relevant national legislation – thus reducing the likelihood of future ECHR violations in advance.

With regard to the ECHR reforms, the Slovenian Constitutional Court favoured the principle of subsidiarity, but always with the aim of ensuring primary and effective protection of rights at the national level. Since the Constitutional Court itself was also facing a similar overload problem at the time, it stressed the increased responsibility of all other state bodies that adjudicate human rights and freedoms in individual proceedings.

The strengthening of the principle of subsidiarity and the emphasis on the protection of rights at the national level were reflected in a significant rise in the number of cases before the Slovenian Constitutional Court. According to some observers, this further reinforced the need for internal reform of the Court's procedures, particularly regarding constitutional complaints (for example, by tightening certain procedural requirements). The Constitutional Court repeatedly underlined that the prevention of constitutional rights violations should primarily be the task of the executive branch and the ordinary judiciary.

In my opinion, the enthusiastic promotion of the principle of subsidiarity may also be understood as a gradual shift of responsibility for human rights protection – from the top down: from the ECtHR to national constitutional courts, and from there to ordinary courts. This transfer of responsibility has sometimes been facilitated by various mechanisms, such as the strengthening of the requirement of legal in-

terest or the application of the *exceptio illegalis*. It is interesting to note that the reasoning of the former socialist-era Slovenian Constitutional Court before 1991 was, in essence, quite similar – though grounded in the then programmatic principle of the everyone's responsibility for constitutionality and legality. The consequence of such an approach was the elimination of the constitutional complaint procedure in the former system of constitutional review, which almost led to the dissolution of the Constitutional Court itself due to its drastically reduced caseload (Mavčič, 2010b).

10. Restricting access for efficiency: balancing productivity and individual justice at the Constitutional Court

After Slovenia established its partnership within the ECHR system, both the ECtHR and the Slovenian Constitutional Court experienced a marked increase in the number of individual applications. The institutional response, both at the European and national levels, was to introduce measures limiting access to these courts. The reasons were twofold: on the one hand, the excessive number of cases threatening the courts' efficiency, and on the other, the growing wave of applications resulting from the new Slovenian Constitution of 1991 and accompanying legislation, which had reintroduced the constitutional complaint as a legal remedy. The model for these limitations was drawn from reforms at the European level, which also influenced several national systems (Mavčič, 2007).

The newly introduced constitutional complaint inevitably led to a rise in the number of such applications before the Slovenian Constitutional Court – a development that could also be viewed as an expression of public trust in this institution. Yet, following the ECtHR's own policy of limiting access, similar tendencies began to appear in some national constitutional courts. In Slovenia, the reintroduction of the

constitutional complaint through the 1991 Constitution and the 1994 Constitutional Court Act coincided with the Council of Europe's recommendations and the Venice Commission's promotion of this mechanism. However, as the number of applications increased, new restrictions followed, taking the form of stricter procedural requirements and narrower interpretations of standing in practice.

The Slovenian legislature sought to devise ways for the Constitutional Court to filter out less significant or hopeless complaints. Nevertheless, individuals continued to have broad access to constitutional protection through the individual (constitutional) complaint – an effective "interface" between national and ECtHR human rights protection. Moreover, broader (national) individual access to the Constitutional Court has contributed to the democratisation of the legal order, giving individuals the opportunity to initiate direct and immediate control over the legislative, executive, and judicial branches (Mavčič, 2011).

In Slovenia, this trend intensified before 2007 and continued with amendments to the Constitutional Court Act adopted that year. Although the proposed constitutional amendments in the same direction were not passed, the 2007 legislative changes aimed to "protect" the Constitutional Court, following the example of the procedurally restrictive amendments to the ECHR (notably Protocol No. 14) and similar developments in other European systems of constitutional justice (e.g., Turkey, Lithuania, Spain).

As already mentioned, a comparable situation existed in Slovenia before 1991. The former system of constitutional review removed the constitutional complaint in 1974, arguing that almost no one filed such complaints – though in reality, applicants had abandoned them due to a widespread expectation of rejection (Mavčič, 2010a; Gornik, 2012). With the introduction of the Slovenian Constitutional Court by the former Constitution of 1963, the then Slovenian Constitutional Court was nominally empowered to protect human

rights and freedoms, yet in practice, it rejected individual complaints for lack of jurisdiction and referred complainants to the ordinary courts. This created a negative dynamic within the Constitutional Court itself, which faced a repetitive and unproductive workload (Mavčič, 1996).

During the early years of the Constitutional Court's operation under the 1963 Constitution, the protection of human rights and freedoms made little substantive progress – perhaps due to the lack of a sufficiently concrete constitutional framework providing practical standards for decision-making. The entire system at the time was structurally unsupportive of constitutional protection of basic rights (Mavčič, 1990; Mavčič, 2000). The former Slovenian Constitution of 1974 subsequently eliminated the Constitutional Court's jurisdiction over individual rights entirely, transferring responsibility for their protection fully to the ordinary courts (Mavčič, 2004).

From that point onward, the constitutional complaint no longer had any place in the system, until it was reintroduced by the 1991 Constitution (Mavčič, 2002). Following the adoption of the 1991 Constitution and the Constitutional Court Act of 1994, the number of cases before the Constitutional Court increased steadily year by year. During this period, the foundations of constitutional review and the basic standards of human rights protection were developed through constitutional case law. In the first phase of this period, popular complaints (abstract review) prevailed. However, after the regulation of the constitutional complaint (concrete review) in the 1994 Constitutional Court Act, constitutional complaints became predominant. As a result, proceedings before the Constitutional Court began to exceed the "reasonable time" requirement guaranteed by Article 23(1) of the Constitution. Respect for this human right – and the need to ensure the quality of constitutional review – were among the key reasons cited by the drafters of the 2007 amendments to the Constitutional Court Act (Official Gazette RS, No. 64/07) (Mavčič, 2009b).

The 2007 amendment of the Constitutional Court Act significantly restricted individual access to the Constitutional Court by introducing stricter admissibility criteria. These additional limitations were presented as a necessary measure to guarantee the right to trial without undue delay (Article 23(1) of the Constitution). Consequently, the previously broad individual access to the Constitutional Court was deemed unnecessary, based on the view that human rights protection should primarily be provided by the ordinary courts in earlier stages of proceedings. Supporters of the reform argued that the restriction of access would therefore not be particularly disadvantageous. However, several Slovenian theorists have argued that this reasoning overlooks the broader, positive effects of full individual access to the Constitutional Court. They emphasize that state institutions, which exist to serve the people, are merely instruments – not ends in themselves. A state governed by the rule of law must ensure coherence and precision in its legal norms, which should function in the service of individuals, united in society (Kristan, 2009; Mavčič, 2011). These scholars warn that legal theory should refocus its attention on the individual. Broad access to constitutional review not only strengthens human rights protection but also accelerates the democratisation of the legal order and reinforces the state governed by the rule of law (*ibid.*). Such access enables democratic oversight of state authority – legislative, executive, and judicial – and allows individuals to initiate direct constitutional control over state power. Although this may sometimes contradict the will of the majority, this very tension between individual and collective will is a cornerstone of constitutional democracy. The right of any person to initiate constitutional review is therefore a key element of democratic authority itself. Limiting individual access to the Constitutional Court could thus undermine the democratic character of the legal system.

The principle of the rule of law cannot be genuinely promoted if individual access to constitutional protection is

treated in a such way that could be easily sacrificed (or replaced). The possibility of the individual access (especially in form of the constitutional complaint) must remain open as a subsidiary remedy – an "interface" between national and international (European) level of human rights protection. In *Lukenda v. Slovenia* (ECtHR, no. 23032/02, judgment of 6 October 2005), the ECtHR reiterated, firstly, that under Article 1 of the Convention ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention"), the primary responsibility for protecting human rights rests with national authorities. The Strasbourg complaint mechanism is therefore subsidiary to national systems safeguarding human rights, as reflected in Article 13 and Article 35(2) of the ECHR.[2]

Otherwise, it could happen that – as already happened in the Slovenian system of constitutional review before 1991 – the sad fate of the constitutional complaint, as the most important national legal remedy for the protection of human rights, could be repeated.

[2] "The purpose of Article 35 § 1 of the ECHR, which sets out the rule on exhaustion of domestic remedies, is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court. The rule in Article 35 § 1 is based on the assumption, reflected in Article 13 (with which it has a close affinity), that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights (see *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V, and *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI). Under Article 35, normal recourse should be had by an applicant to remedies that are available and sufficient to afford redress in respect of the breaches alleged. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see, among other authorities, *Belinger v. Slovenia* (dec.), no. 42320/98, 2 October 2001, and *Vernillo v. France*, judgment of 20 February 1991, Series A no. 198, pp. 11-12, § 27). Additionally, the Court has previously held that the rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism (see *Cardot v. France*, judgment of 19 March 1991, Series A no. 200, p. 18, § 34)".

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