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Just Satisfaction as an Effective Remedy

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This study explores the importance of the instrument of just satisfaction as part of an effective remedy in cases of violation of patients' rights, when no other immediate remedy is available and when the violation is ongoing. The conceptual approach of my research is based on: (I) the justification of an effective remedy that can achieve immediate effect, and (II) the award of just satisfaction: (a) when patients' rights are violated and, because of human sensitivity, are affected by their inability to enforce them, and (b) when the violation of patients' rights is unrelated to the harm (whether due to medical negligence or to the unprofessional conduct of medical personnel) that patients have suffered to their health. Instead, the breach of the patient's right is related to the harm caused as a consequence of the patient's inability to benefit from medical treatment in a timely manner, which directly jeopardises the patient's state of health. The purpose of this article is to examine whether the court is obliged to provide monetary compensation in the form of just satisfaction arising from the existence of non-pecuniary damage (physical and mental pain suffered) due to the interference with the patient's legal sphere in order to preserve the patient's health and prevent illness - to provide medical treatment within a reasonable time.

Keywords: *Just satisfaction; Right of access to health care, Patient's rights; Non-pecuniary damage; Immediate effect*

Introduction

The European Member States of the Council of Europe are committed to the rule of law and the enjoyment of human rights and fundamental freedoms by all persons within its jurisdiction[1]. The excessive length of court proceedings highlighted by the case law of the European Court of Human Rights (ECtHR) was a key reason for the Committee of Ministers to issue important guidelines and recommendations with practical guidance. On the basis of these guidelines, Member States should ensure the rights and freedoms protected by the European Convention on Human Rights (ECHR)[2], including the right to a trial within a reasonable time under Article 6(1) and the right to an effective remedy under Article 13. In accordance with Article 15b of the Statute of the Council of Europe, the Committee of Ministers issued Recommendation CM/Rec(2010)3 to Member States on effective remedies in cases

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[1]Statute of the Council of Europe (ETS No. 001), ETS No. 001, London 05/05/1949 - 03/08/1949 (7 Ratifications.), Article 3.

[2]Convention for the Protection of Human Rights and Fundamental Freedoms. Official Journal of the Republic of Slovenia (28 February 1994) - MP, No 3-20/1994 (RS 11/1994).

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of excessive length of proceedings[3], which highlighted the effectiveness of the judiciary.

States Parties to the ECHR are obliged to provide effective remedies in practice - that is, remedies that can lead to a substantive decision on the complaint and adequate redress for the violation found[4]. The provision of Article 19 TEU[5], which was incorporated into the Lisbon Treaty, provides that Member States shall establish remedies to ensure effective remedies in areas governed by EU law[6]. This obliges European Union (EU) Member States to guarantee the right of access to justice. The Member States' commitment to the right to access to justice is enshrined in Article 47 of the Charter of Fundamental Rights of the European Union (the Charter)[7], taking into account the interpretation of Articles 6 and 13 of the ECHR[8] and the case law of the ECtHR in relation to this provision. Effective remedies before the domestic authorities must be guaranteed to anyone whose rights and freedoms recognised in the ECHR have been violated. In particular if they have been violated by an official in the performance of his official duties. An effective remedy must include a thorough and effective investigation that could lead to the identification and punishment of the perpetrators and allow effective access by the victim or his/her relatives to the investigation process.[9] The remedy required by Article 13 of the ECHR must be effective in practice and in law, in particular in the sense that its implement must not be unduly impeded by acts or omissions of State authorities[10].

ECtHR, Kudła *v.* Poland of 26.10.2000[11]

The Court interpreted effective remedies within the meaning of Article 13 ECHR as not depending on the certainty of a favourable outcome for the applicant. Nor is it necessary that the authority referred to in that provision is a judicial authority; if it is not, its powers and the guarantees it gives are taken into account in determining whether the remedy submitted to it is effective. If one remedy alone does not fully satisfy the requirements of Article 13 ECHR, a combination of remedies provided for in the domestic legal order may do so.[12]

The right to an effective remedy is the obligation of the State to provide judicial protection where a violation of a right or freedom guaranteed by EU law has been established. This right has a dual dimension, namely: (i) on the one hand, the procedural right of effective access to a fair trial and (ii) on the other hand, the

[3]Recommendation of the Committee of Ministers to member states on effective remedies for excessive length of proceedings (Adopted by the Committee of Ministers on 24 February 2010 at the 1077th meeting of the Ministers' Deputies), CM/Rec(2010)3, 24/02/2010, Committee of Ministers, pp. 1-2, point 1.
[4]Recommendation of the Committee of Ministers to member states on the improvement of domestic remedies (adopted by the Committee of Ministers on 12 May 2004, at its 114th Session), Rec(2004)6, 12/05/2004, Committee of Ministers, pp. 1-6.
[5]Treaty on European Union (TEU). Official Journal of the EU, 2012/C 326/01, 26.10.2012.
[6]Ibid, para. 1.
[7]Ibid.
[8]Ibid, Article 6, para. 1; Article 13.
[9]CCRS decision Up-555/03, Up-827/04, (6.7.2006), para. 32.
[10]ECtHR *Aksoy v. Turkey*, no. 21987/93, (18.12.1996), para. 95.
[11]ECtHR *Kudła v. Poland*, no. 30210/96, (26.10.2000), para. 157.
[12]ECtHR *Silver and Others v. the United Kingdom,* (25 March 1983), Series A no. 61, p. 42, para. 113; ECtHR *Chahal v. the United Kingdom*, 15 November 1996, Reports 1996-V, pp. 1869-70, para. 145.

substantive right to an adequate remedy[13]. Without the guarantee that claims brought before the courts are dealt with in a fair procedure, justice cannot be expected to be done with certainty[14]. The effectiveness of a remedy lies in preventing the alleged violation of the law or its further violation, or in providing adequate redress for any violation that may have already occurred. The standard of the right to an effective remedy is met differently in all EU countries.[15] A remedy is effective if it can be used, as a rule, in a way that speeds up the decision of the court hearing the case or, to the extent that it allows a party to the proceedings to settle for delays that have already occurred[16]. The only effective remedy is one which is available to the complainant in due time, both in theory and in practice, and which offers him or her adequate satisfaction and a reasonable prospect of success[17].

The SCRS in Case II Ips 976/2007 of 14.10.2010[18]

In that judgment, the Court took the view that the mere allegation of the length of the proceedings before the administrative authority could not justify a violation of the right to a trial without undue delay under Article 23 of the Constitution. In so doing, the Court took the view that a violation of the right to a trial without undue delay can only be committed in judicial proceedings, but not in administrative proceedings, where there are cases of excessive length in the determination of an administrative case, for example in the case of so-called silence on the part of the authority. In the light of such a view, the Court's judgment must be interpreted as meaning that the right to a fair trial under Article 23(1) of the Constitution can only be achieved through judicial proceedings. Remedies for the protection of the right to a trial within a reasonable time, including damages, can only be invoked before domestic courts in so far as they are established in the domestic legal order.

According to the methodological concept of "damage", the court is obliged (and not only if necessary) to compensate the claimant for the actual harmful consequences of the infringement, once a breach has been established. In the Slovenian legal system, the principle applies that damage may not be caused unless it is specifically permitted. Likewise, everyone has the right to request a court or other competent authority to order the cessation of an act which violates the inviolability of the human person, personal and family life, or any other personal right, in order to prevent such an act or to remove its consequences[19]. Only deprivation that is legally recognised shall be considered as harm. According to the principle of *»res ipsa loqitur«,* the person who caused the damage is liable to pay compensation and can only be exonerated if he proves that he is not at fault or responsible for it[20]. An impermissible, unlawful act is an act by which the injured party violates the law (a specific regulation,

[13]Casarosa (2016) at 64.
[14]Gentile (2023) at 692.
[15]Friday (2019) at 163.
[16]ECtHR *Lukenda v. Slovenia*, no. 23032/02, (6.10.2005), para. 68.
[17]Potisek (2014) at 79.
[18]Supreme Court of the Republic of Slovenia (SCRS; Supreme Court of the Republic of Slovenia), SCRS Judgment II Ips 976/2007, (14.10.2010), para. 8; Kerševan (2015) at 162.
[19]Official Journal of the Republic of Slovenia, No. 97/07 - Officially Consolidated Text, 64/16 - Decree of the US, 20/18; OZ, Article 134, para. 1.
[20]Cigoj (1978) at 62-163.

general norms of the legal order) and, in doing so, interferes with a protected interest of the injured party[21]. In all legal systems, the person who wrongfully injures another is liable for compensation for the damage caused[22]. The State is no exception to this rule, which, on the basis of Article 26 of the Constitution of the Republic of Slovenia (URS[23], the Constitution), provides a legal basis for direct liability for damages to an individual when he or she is harmed by an unlawful act of a public authority[24]. In the case of systemically conditioned delays in justice, the State is also liable when the unlawful conduct is not attributable to a specific person or body, but to the State or its apparatus as a whole.[25] The question arises as to the liability of the State in damages for the unlawful implement of its authority, due to the inappropriately long waiting time for the provision of a health service as a consequence of the objective situation of the delay in the provision of the health service and the existence of a systemic deficiency in the procedure for the legal protection of patients' rights.

Existence of a Right to Health under EU and Slovenian National Law

As Regards the Existence of a Right to Health Services under EU Law

Health as a value is highlighted in a number of international law instruments (treaties and conventions), which impose a positive obligation on the signatory states to these instruments, including the Republic of Slovenia (RS), to ensure the realisation of the right to health. The right to health has been recognised as a fundamental human right for a very long time in the 1946 Constitution of the World Health Organisation (WHO) and in international human rights law[26]. The commitments made to protect health date back to 1946, when the WHO Constitution was adopted and signed by representatives of 61 countries. The WHO Constitution sets out the commitments of signatory countries to respect the fundamental principles on which the health of all peoples will be promoted and protected. They highlighted health as a key building block for physical, mental and social well-being and stated an obligation to achieve the highest standard of health[27]. The WHO Constitution states in its preamble the responsibility of governments for the health of their populations, which derives from the provision of adequate health and social measures.

The International Covenant on Economic, Social and Cultural Rights (ICESCR)[28] which gives effect to individual economic, social and cultural rights as well as civil

[21]Jadek Pensa (2003) at 670.
[22]Shelton (2007) at 96.
[23]In this text the official abbreviations of Slovenian Laws are used.
[24]Možina (2019) at 257.
[25]CCRS Decision Up-695/11-15, (10.01.2013), para. 13.
[26]Zang (2019) at 613.
[27]The WHO Constitution was adopted at the International Health Conference held from June 19 to July 22, 1946, in New York, and signed on July 22, 1946, by representatives of 61 countries (*Off. Rec. World Health Organisation*, 2, 100) and entered into force on April 7, 1948.
[28]International Covenant on Economic, Social and Cultural Rights (ICESCR). Official Journal of the RS, No 35/92 - MP, No 9/92. It was signed on December 16, 1966, in New York and entered into

and political rights, creates a legal basis for the implement of social security and social insurance rights. It imposes an obligation on States Parties to respect human rights and fundamental freedoms universally and in practice. Article 4 of the ICESCR provides that the State may restrict the enjoyment of rights only by law and only to the extent consistent with the nature of those rights, in order to improve the general welfare in a democratic society[29]. Article 12(1) of the ICESCR implies an obligation which provides for the right to the highest attainable standard of physical and mental health[30]. States have a duty to take measures to ensure the full realization of this right, as well as to create conditions that ensure the assistance of the health services to all in the event of illness[31]. The Committee on Economic, Social and Cultural Rights (CESCR) has adopted General Comment 14, The right to the highest attainable standard of health[32], which covers Article 12.2 (d), the right to health facilities, goods and services, as part of its comments and general recommendations to facilitate the implementation of the ICESCR. This creates a requirement to build conditions for all health services and medical care in the event of illness, both physical and mental, which include ensuring equal and timely access to basic preventive, curative, rehabilitative health services and health education and associated programmes[33]. The legal nature of the General Recommendation is non-binding and serves as guidance for independent experts in the implementation of the ICESCR in States Parties.

Article 35 of the Charter states that everyone has the right to preventive health care and to medical care under the conditions laid down by national laws and customs. A high level of human health protection shall be ensured in the definition and implementation of all EU policies and activities[34]. In the context of international treaties and conventions, Article 25 of the Universal Declaration of Human Rights highlights the right to a standard of living which enables the individual and his family [...] to have access to health care and to the necessary social services [...].[35] While the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in its Article 5, imposes on States Parties the elimination of racial discrimination in all its forms and the guarantee to everyone, regardless of race, sex, colour, national and ethnic origin, of the right to equality before the law, including when it comes to enjoying the benefits of health care, medical facilities,

force on January 3, 1976. It has been in force in Slovenia since July 1, 1992 (Official Gazette of the Republic of Slovenia, No. 35/92 - MP, No. 9/92).

[29]Ibid.

[30]Ibid, para. 1.

[31]ICESCR, Article 12, para. 2, point d.

[32]CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12). Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4). Office of the High Commissioner for human rights.

[33]Ibid; Regular screening programs; appropriate treatment of widespread diseases, injuries, and disabilities, preferably at the community level; provision of essential medicines; and appropriate mental health treatment and care.

[34]Ibid.

[35]Universal Declaration of Human Rights (UDHR). Official Journal of the RS, no. 24/2018.

social insurance and social welfare[36]. By adopting the Convention on the Rights of Persons with Disabilities, States Parties recognise in Article 25 the right of persons with disabilities to the highest attainable standard of health without discrimination on the grounds of disability. In doing so, States Parties are required to take all appropriate measures to ensure that persons with disabilities have access to health services appropriate to their sex, including medical rehabilitation.[37]

The right to good administration as an obligation of EU law derives from Article 41 of the Charter and reads as follows: "Everyone has the right to have his affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union"[38]. The third paragraph of the same Article states: "Everyone has the right to compensation from the Union for any damage caused by its institutions or its servants in the performance of their duties, in accordance with the general principles common to the legal systems of the Member States".[39] While the responsibility of the Member States for defining health policy derives from the provision of Article 168[40] of the Treaty on the Functioning of the European Union (TFEU). The responsibility of the Member States under the TFEU includes the responsibility for the management of the health service and care system and the allocation of the resources allocated.

As Regards the Existence of a Right to Health Services under Slovenian National Law

The two general rights enshrined in the Constitution, the right to social security[41] and the right to health care[42] extend the fulfilment of obligations under the »*lex specialis*« rules to the field of health care, health insurance and the implement of the right of access to health care[43]. The implement of the right of access to health care and the provision of preventive services[44] is a necessary condition for the implement of all other rights laid down in the Law on Patients' Rights (ZPacP)[45]. According to Article 50(2) of the URS, in conjunction with Article 51(1) of the URS, health care services must be economically accessible to all those who need them. This ensures, to the greatest extent possible, economic security and human dignity for the individual[46].

[36]International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), UN General Assembly resolution 2106 (XX), 21.12.1965; e point.
[37]Act on the Ratification of the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention on the Rights of Persons with Disabilities (ICERD) , Official Gazette of the RS-MP, no. 15-116/2010 of 4.10.2010; Article 25, para. 1.
[38]Convention on the Rights of Persons with Disabilities: Resolution adopted by the General Assembly [without reference to a Main Committee (A/61/611), 24.01.2007.
[39]Charter of Fundamental Rights of the European Union. Official Journal of the EU, C 326/395, 26.10.2012; Article 4, para. 3.
[40]Treaty on the Functioning of the European Union (TFEU). Official Journal of the EU, 2012/C 326/01, 26.10.2012; Article 41, para. 7.
[41]Ibid, para. 51.
[42]Ibid, para. 51; para. 50.
[43]Patients' Rights Act (ZPacP, Zakon o pacientovih pravicah), Article 6, para. 1.
[44]Ibid, Article 6, para. 1.
[45]Official Journal of the Republic of Slovenia, no. 15/08, 55/17, 152/20 -ZZUOOP, 175/20 - ZIUOPDVE, 177/20, 15/21 - ZDUOP, 206/21 - ZDUPŠOP, 100/22 – ZNUZSZS.
[46]CCRS Decision U-I-396/20, (20.10.2022), para. 37.

The State's right to social security is based on the principle of the welfare state, defined in Article 2 of the URS. It fulfils its positive obligation to implement the right to social security by providing a minimum level of protection to persons who, due to a number of circumstances, find themselves in a vulnerable situation. The right to social security is highlighted in the Slovenian legal system as a fundamental constitutional human right, which is realised through the social security system[47]. It is the State's obligation to provide assistance, economic security and help to preserve and realise human dignity to individuals at risk[48]. In the event of illness, injury, childbirth or death, the patient is guaranteed social security in the area of health care through the implement of health insurance rights.[49]

The system of health care and health insurance, as well as the social actors responsible for health care and their tasks, and the implement of health insurance rights are regulated by the Health Care and Health Insurance Act (ZZVZZ)[50]. The Act defines the scope of health care, which includes a system of social, group and individual activities, measures and services for health promotion, disease prevention, early detection, timely treatment, care and rehabilitation of the sick and injured, as well as the scope of health insurance[51]. The legislator's obligation to regulate health care rights has been realised through the establishment of a network of publicly funded health service providers. The Health Care Act (ZZDej) regulates the content and performance of health care activities, the public health service[52] and the association of health organisations and health professionals and their colleagues in chambers and associations[53]. Health services are provided as a public service within the public health network and must be organised in such a way as to ensure that all inhabitants of the RS have access to emergency medical care, including emergency ambulance transport and the supply of emergency medicines.[54] Healthcare activities comprise actions and activities carried out by healthcare professionals, workers and associates in accordance with medical doctrine and using medical technology. Healthcare

[47]Bagari & Strban (2019) at 9.
[48]Letnar Černič (2019) at 453.
[49]Act on Health Care and Health Insurance Act (ZZVZZ, Zakon o zdravstvenem varstvu in zdravstvenem zavarovanju); ZZVZZ, Article 1, para. 3.
[50]Official Journal of the Republic of Slovenia, no. 72/06 - officially consolidated text, 114/06 - ZUTPG, 91/07, 71/08 - Art. US, 76/08, 62/10 - ZUPJS, 87/11, 40/11 - ZUPJS-A, 40/12 - ZUJF, 21/13 - ZUTD-A, 63/13 - ZIUPTDSV, 91/13, 99/13 - ZUPJS-C, 99/13 - ZSVarPre-C, 111/13 - ZMEPIZ-1, 95/14 - IUPTDSV-A, 95/14 - ZUJF-C, 47/15 - ZZSDT, 90-15 - ZIJZ-1, 90/15 - ZIUPTD, 61/17 - ZUPŠ, 64/17 - ZZDej-K, 75/17 -ZIUPTD-A, 36/19, 49/20 - ZIUZEOP, 152/20 - ZZUOOP, 175/20 - ZIUOPDVE, 203/20 - ZIUPOPDVE, 189/20 - ZFRO, 15/21 - ZDUOP, 51/21, 112/21 - ZNUPZ, 206/21 - ZDUUPŠOP, 15/22, 43/22, 100/22 - ZNUZSZS, 141/22 - ZNUNBZ;ZZVZZ, Article 1, para.
[51]Ibid., Article 1, para. 2, para. 3.
[52]Public health services comprise health services that are provided in the public interest, permanently and without interruption, by the state and local communities. They are based on the principle of solidarity and are in accordance with the regulations governing health care and health insurance.
[53]Health Care Act (ZZDej, Zakon o zdravstveni dejavnosti; Official Journal of the RS, no. 23/05 - Official consolidated text, 23/08, 58/08 - ZZdrS-E, 15/08 - ZPacP, 77/08 - (ZDZdr), 40/12 - ZUJF, 14/13, 88/16 - ZdZPZD, 64/17, 1/19 - Odl. US, 73/19, 82/20, 152/20 - ZZUOOP, 203/20 - ZIUPOPDVE, 112/21 - ZNUPZ, 206/21 - ZDUPŠOP, 100/22 - ZNUZSZS, 132/22 - odl. US, 141/22 - ZNUNBZ, 14/23 - odl. US, 76/23 - ZNUZSZS-A, 196/21 - ZDOsk, 163/22 - ZDOsk-A, 84/23 - ZDOsk-1, 136/23 - ZIUZDS, 35/24, 112/24 - ZDIUZDZ, 102/24 - ZZKZ, 32/25); ZZDej, Article 1, para. 2.
[54]ZZDej, Article 6, para. 1; SCRS VIII Ips 59/2021, 17.05.2022, pt. 13.

services are provided as compulsory health insurance entitlements and are fully or partially financed from public funds, mainly from compulsory health insurance[55]. By its very nature, a public health service fulfils the criteria set by legal doctrine for this type of public service: (I) the profit-making purpose is subordinate to the satisfaction of public needs; (II) it is an activity which provides goods or services which are subject to human rights and fundamental freedoms and to which access must be possible for everyone, regardless of their financial situation; (III) the underlying motive for the establishment of this legal regime or institution is the pursuit of the public interest, which is manifested in the satisfaction of individual needs that could not be adequately met in a normal market system.[56]

In the RS, it is the compulsory insurance system that directly provides health services. Anyone who is recognised as an insured person under the provisions of Article 15 of ZZVZZ has the right to benefit from health insurance to the extent provided for in that Act[57]. The patient, as an insured person, shall be provided with health insurance rights to the extent, in the manner and according to the procedures laid down in the special regulations of ZZVZZ. In accordance with the provisions of ZPacP, the patient is guaranteed the right to appropriate preventive health services in the network of public health service providers to maintain health and prevent disease[58], as well as the possibility to freely choose a doctor and a health service provider[59]. The freedom to choose a doctor and a healthcare provider is also a health insurance right[60], which is in practice linked to the availability of health services. Individual patients also have the possibility to seek healthcare in another EU Member State. Directive 2011/24/EU on the application of patients' rights in cross-border healthcare[61] allows access to safe and high-quality cross-border healthcare, on the basis of which a patient can seek planned treatment abroad (subject to the condition that the patient is an insured person). A patient has the right to have an examination, examination or treatment abroad, or to have the costs of these services reimbursed, if treatment options in the RS have been exhausted. The medical examination, investigation or treatment abroad is reasonably expected to cure or improve or prevent further deterioration of the health condition.[62]

[55]CCRS, U-I-194/17-21, para. 12.
[56]CCRS, U-I-194/17-21, para. 19.
[57]ZZVZZ, Article 78, para. 1.
[58]ZPacP, Article 6, para. 3.
[59]Ibid, Article 9, para. 2; SCRS Judgment VIII Ips 237/2017, 10.4.2018, para. 13.
[60]ZZVZZ, Article 80, para. 1.
[61]Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare. Official Journal of the European Union, L 88/45, 4.4.2011; Article 1.
[62]Health Insurance Act, Article 44a, para 1.

Methodology

The methodological approach is based on a review of the existing literature by national and international authors. The research is based on the already established methods of legal science, the normative-dogmatic method, the comparative, axiological and sociological methods and, to a lesser extent, the dialectical method of legal science. The research focuses on the descriptive and explanatory part of the issue and on the understanding of the right to health recognised in a number of legal acts of the EU, which are directly applicable in the RS. It summarises the international legal foundations of the implement of the patient's right to effective judicial protection in the field of health care, on which the commitments of the Member States of the European legal area are based.

Results

The conceptual approach of the research is based on: (1) the justification of an effective remedy that can achieve immediate effect and (2) the award of just satisfaction: (I) when the patient's rights are violated and, due to human sensitivity, are affected by the patient's inability to enforce them, and (II) when the violation of the patient's rights is unrelated to the harm (due to medical negligence or unprofessional conduct of medical personnel) that patients have suffered to their health. Where a patient is unable to seek specific medical treatment within a reasonable period of time to enable him or her to seek a specific medical or other intervention to prevent the deterioration of a disease or to improve health, the patient suffers damage through the breach of the recognised rights under the ZPacP, as well as through the breach of the provision of Article 13 of the ZZVZZ, which defines the scope of compulsory health insurance[63].

Inference by Analogy "A Simili ad Simile"

Pavčnik[64] states that in law, reasoning by analogy *»a simili ad simile«* (reasoning from like to like) is established as an analogy intra (inter) legem, as a legal analogy (analogia legis) and as a legal analogy (analogia iuris). In the case of a legal analogy (analogia legis), we proceed from a case that is governed by a specific statutory or other legal rule. From an individual regulated case, we infer an unregulated case which does not fully correspond in its constituent elements to the typical signs of an abstract state of affairs, but which nevertheless so closely resembles them that it corresponds to them in essential characteristics. The essential characteristics are the "value criterion" (*»tertium comparationis«*) by which it can be inferred that the same legal consequence applies to the case not directly regulated as to the regulated case, which is substantially identical. It is precisely the "common essential features" which

[63]ZZVZZ, Article 13, para. 1.
[64]Pavčnik (2019) at 167; Slovenian legal theorist who dealt with the issue of legal loopholes or legislative omissions for many years, which is why the overview of the theory of legal loopholes is mainly based on his findings.

are essential, and which must be present to such an extent and with such intensity that the analogous case is also subject to the "principle of legal equality". What is legally identical must be treated in the same way as what is identical, or what is identical in essential respects[65].

In the light of the Court's interpretation, it appears that such a rule can be generalised and applied to other types of social relations if they are equivalent in value.

The CCRS in Case U-I-65/05 of 22.09.2005[66]

In that case, the Court considered whether the legislation in force provides "effective judicial protection of the right to a trial without undue delay" once the infringement has ceased. In this particular case, the CCRS found that the Administrative Disputes Act (ZUS)[67] was incompatible with the URS. In the reasoning of the decision, the Court ordered the legislator to comprehensively regulate the protection of the right to a trial without undue delay in the ZUS or in another law, in order to satisfy the guarantees provided for in Article 5 and Article 15(4) of the URS[68]. In doing so, the Court noted that, in the light of the case law of the ECtHR, the question of the "effectiveness of judicial protection of the right to a trial without undue delay" in cases where the proceedings are pending reasonably arises. It called on the legislator to consider the adequacy of remedies also in such cases and to bring them into line with the requirements of the ECtHR.

For the purposes of this debate, one of the key questions is whether the legislator has established "effective judicial protection of the right to a trial without undue delay" in the field of health care, in the face of interference with human rights and fundamental freedoms recognised by the ECHR and its Protocols. This is particularly so where the patient is unable to seek, within a reasonable time the right to specific medical treatment which would enable him or her to benefit from a specific medical or other intervention. In Article 3 of ZVPSBNO, the legislator has provided for the payment of monetary compensation in the form of "just satisfaction" only in those cases were, despite the party's efforts to expedite the judicial proceedings, judicial protection will not be provided within a reasonable time. The ZVPSBNO did not provide for the payment of monetary compensation in the form of 'just satisfaction' for interference with human rights and fundamental freedoms recognised by the ECHR and its Protocols. The question is whether it is sufficiently regulated and whether it is sufficiently regulated in the field of health care. In fact, the law does not provide that the patient/complainant may implement judicial protection of his/her rights through the establishment of the institute of "just satisfaction" on the basis of Article 41 of the ECHR – judicial protection of the patient's rights is not guaranteed for the duration of the violation and until its consequences have been remedied – thus constituting an interference with the constitutionally protected right of Article 23 of the URS.

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[65]Pavčnik (2019) at 164.
[66]CCRS Decision U-I 65/05, (22.09.2005), para. 14.
[67]Law on General Administrative Procedure (ZUP; Zakon o upravnem postopku), Official Journal of the Republic of Slovenia, no. 24/06 - Official consolidated text, 105/06 - ZUS-1, 126/07, 65/08, 8/10, 82/13, 36/20 - ZZUSUDJZ, 61/20 - ZZUSUDJZ-A, 175/20 - ZIUOPDVE, 203/20 - ZIUPOPDVE, 3/22 - ZDeb.
[68]CCRS Decision U-I-65/05, (22.9.2005), para. 14.

In the following, I would like to highlight a court case where the CCRS, in the case Up-695/11, took the view that the State is liable in damages for the violation of the right to a trial without undue delay, even if the unreasonably long trial is the result of an objective state of backlog in the court.[69]

The CCRS in Case Up-695/11 of 10.01.2013[70]

The Court extended the interpretation of the State's liability arising from unlawful conduct attributable to a particular person to the effect that the State is liable under Article 26 of URS in the case of systemically caused judicial delays (due to a violation of the right to a trial within a reasonable time) even when the unlawful conduct is not attributable to a particular person or a particular authority, but to the State or its apparatus as a whole. The first and foremost victim of a dysfunctional judicial system is the individual who has not received a trial without undue delay. The latter suffers the consequences of systemic delays in the administration of justice, which are reflected in material and/or non-material damage. The Court also observes that a well-organised judicial system is in itself a value of paramount importance for the community and is based on the rule of law. However, it is the individual who is primarily affected by a dysfunctional judicial system and who has not received a trial without undue delay. It is the individual who bears the consequences of systemic delays in justice, which are reflected in material and/or non-material damage.

According to the CCRS, under the applicable law, if the proceedings in which the right to a trial without undue delay was violated have already (finally) been concluded, the only remedy available to the person concerned is an action for damages under Article 26 of the Constitution[71]. This action is to be decided by a court in civil proceedings under the general rules of the law of damages governed by the Civil Code (OZ)[72]. On this basis, the court may award damages to the injured party, both for pecuniary and non-pecuniary damage, provided that the prerequisites for liability for damages are met. However, there are no specific statutory provisions allowing the injured party to invoke the right to just satisfaction within the meaning of the ECHR. This is also the case when damages are claimed in an action brought in administrative dispute[73]. The CCRS has taken the view that "just satisfaction" for a violation of the right to a trial within a reasonable time within the meaning of the ECHR does not constitute compensation in the classical sense, according to the criteria of civil liability for pecuniary or non-pecuniary damage, which is also the case for compensation under Article 26 of URS[74]. In this context, it is a form of compensation whose primary purpose is to assess damages for the State's failure to

[69]CCRS Decision Up-695/11, (10.01.2013), para. 11.
[70]CCRS Decision Up-695/11, (10.01.2013), para. 13; Možina (2015) at 221.
[71]Mozina (2019) at 2 57.
[72]Ibid; Civil Code (OZ; Obligacijski zakonik), Official Gazette of the Republic of Slovenia, no. 97/07 – official consolidated text, 64/16 – decision of the Constitutional Court, 20/18.
[73]Administrative Dispute Act (ZUS-1; Zakon o upravnem sporu), Official Journal of the RS, no. 105/06, 26/07 – skl. US, 119/08 - odl. US, 107/09 – odl. US, 62/10, 98/11 - odl. US, 109/12 and 10/17 - ZPP-E,49/23, 131/23; ZUS-1, Article 62, para. 1.
[74]The Constitutional Court of the Republic of Slovenia states that Article 26 of the Constitution of the Republic of Slovenia covers, in the most general terms, all forms of unlawful conduct by the state through which the state causes damage to an individual.

comply with its positive duty to ensure that the system or organisation of procedures is such as to enable the individual to obtain a decision from a court within a reasonable time[75]. However, this does not allow the conclusion that the URS gives rise to two different forms of State liability for damages, which would have different constitutional bases and would have no relationship with each other. Article 26 of URS encompasses all possible forms of unlawful conduct by the State and is, from this point of view, the so-called *»lex generalis«*[76].

Using the analogy *»a simili ad simile«,* which refers to similar court cases, methods of interpretation that remain within the possible literal meaning of the law are permissible when the directly legally regulated factual situation and the directly legally unregulated factual situation correspond in essential characteristics. In such a case, it can be assumed that the same legal consequence that is established for the directly regulated legal case also applies to a similar case[77]. This means, however, that a situation which is not expressly dealt with by a provision of the law may, by presumption, also be applied to a similar situation which is dealt with by the law.

If the analogy »*a simili ad simile*« is applied to the healthcare system, it would mean: that an organised health system is in itself a value of paramount importance for the community, the effectiveness of which in protecting the right to justice depends on the availability of a remedy, or a set of several remedies, which gives the patient the possibility of enforcing the content of the rights and freedoms enshrined in the ECHR at EU level. While an effective remedy before a national authority for an alleged violation should provide the patient with a remedy to enforce the content of the rights, on the basis of the doctrine of *»lex specialis«,* it is not necessary to provide the patient with a remedy for the violation of the rights and freedoms enshrined in the ECHR. The individual patient is primarily affected by a dysfunctional healthcare system, as he/she has not received and has not been able to avail himself/herself of the right to receive medical treatment within a reasonable time (within a reasonable time without undue delay). It is the complainant/patient who bears the consequences of the systemic conditioned health backlogs, which are reflected in pecuniary and/or non-pecuniary damages.

The ZPacP does not contribute to ensuring faster access to health services, for systemic reasons of the problem of waiting times in health care, but it obliges healthcare providers to strive to achieve the shortest possible waiting times. It gives the patient the right to know the reasons for the waiting time and its length, and the right to consult the waiting list. It also regulates a number of other details relating to patients' waiting times in healthcare. Where a patient's treatment is not immediately possible, the healthcare provider is obliged to place the patient on a waiting list in a place justified by professional standards and, in particular, the degree of urgency of the patient's treatment.[78]

[75]CCRS Decision U-I-65/05, (22.09.2005), para. 13.
[76]CCRS, Decision Up-695/11-15, (10.01.2013), para 12.
[77]Pečarič (2023) at 23.
[78]Administrative Court of the Republic of Slovenia (UPRS; Administrative Court of the Republic of Slovenia); ACRS Judgement III U 43/2020-26, (29.06.2022), para. 23.

For systemic reasons, the problem of waiting times (disproportionately long waiting times in the healthcare system[79]) deprives the patient of the right to adequate, high-quality and safe medical treatment[80], because the patient is unable to implement the right to treatment within a reasonable period of time. Such a circumstance can be interpreted as an impairment of the functioning of the system beyond the maximum reasonable time. Reasonable time[81] is the time which, on the basis of objective medical judgement and the clinical needs of the patient (in the light of the patient's state of health, medical history, the likely course of the illness, the degree of pain or the nature of the impairment at the time of the implement of the right), is still permissible for the patient to obtain medical treatment. Article 23 of ZZVZZ regulates the right to health care services. The more detailed scope of services, standards and norms are defined by the Rules of the Compulsory Health Insurance (POZZ)[82]. While the term "waiting period"[83] is defined in the provision of Article 2 of ZPacP and means the period of time expressed in days from the inclusion on the waiting list to the actual (concrete) provision of the health service. A waiting period is considered to exist if the period is more than one day.

Patients are denied the protection of their rights under the ZPacP when, due to excessively long waiting times, they are unable to claim for health services provided by the ZZVZZ within the scope of their rights under the compulsory health insurance in the network of the public health service. By not being able to safely claim timely health care[84] and preventive services within a reasonable period of time in the public health service network for his/her health (Article 6 of ZPacP), to implement equal access and treatment in health care (Article 7 of ZPacP), to implement the right to adequate, high-quality and safe healthcare (Article 11 of ZPacP), the right to decide independently on treatment (Article 26 of ZPacP) , the right to prevention and relief of suffering (Article 39 of ZPacP), as well as the right to address violations of patients' rights (Article 47 of ZPacP), he/she is deprived of the right to health, to improve health and to maintain health, necessary for the implement of all other rights and fundamental freedoms. The good management of the health care system and the administration of health insurance rights are the responsibility of the Health Insurance Institute of Slovenia (ZZZS), the competent chambers, associations of health care institutions and other institutions and organisations carrying out health care activities, and the ministry responsible for health, which agree annually on the programme of services of the compulsory health insurance,

[79]ZZVZZ, Article 1, para. 1; The Act regulates the health care and health insurance system, defines the providers of social health care and their tasks, health care in relation to work and the working environment, and regulates relations between health insurance and health care institutions, and the enforcement of rights under health insurance.
[80]ZPacP, Article 11.
[81]ZPacP, Article 2. art, point 17.
[82]Official Journal of the Republic of Slovenia, no. 79/94, 73/95, 39/96, 70/96, 47/97, 3/98, 51/98 - odl. US, 73/98 – odl. US, 90/98, 6/99 - Amended, 109/99 - odl. US, 61/00, 64/00 - Amended, 91700 - Amended, 59/02, 18/03, 30/03, 35/03 - Amended, 78/03, 84/04, 44/05, 85/06, 90/06 - Amended, 64/07, 33/08, 71/08 - skl. US, 7/09, 88/09, 30/11, 49/12, 106/12, 99/13, 25/14 – odl. US, 25/14, 85/14, 10/17 - ZČmlS, 64/18, 4/20, 43/20, 91/20, 42/21 – odl. US, 61/21, 183/21, 142/22 – odl. US, 163/22.
[83]ZPacP, Article 2, point 2.
[84]ZPacP, Article 2, explanation of the term "Health care", point 22.

define the capacities and necessary for its implementation, and determine the volume of health care resources[85]. The failure to treat a patient in a systemic manner may justify a violation of the right to health services, as well as the failure to deal with a judicial case without undue delay, which violates the right to timely health treatment and preventive services (Article 6 of ZPacP), as well as the right to a trial without undue delay, which is derived from the right to justice under Article 23 of the URS, and the right to a fair trial under Article 23 of the URS, which is based on the right to a fair trial under Article 23 of the URS[86]. The State is responsible, on the one hand, of failing to organise the health system in such a way that the patient can implement the requirements of Article 2 of the ECHR, and, on the other hand, of failing to organise the functioning of the judicial system in such a way that the patient can implement the requirements of Article 6(1) of the ECHR.

To the extent that we discuss further, it can be concluded that the interference with the independent, constitutionally protected right of Article 51 of the URS[87], which is characterised by the protected right of the individual to health care when a deterioration in health puts a person's life at risk, also affects the individual's right to health care, which is fulfilled by the protected good under Article 17 of the URS. It is linked to the constitutional provisions relating to the prohibition of torture (Article 18 of the URS), the right to justice (Article 23 of the URS), the right to personal dignity and security (Article 34of the URS), the right to the protection of privacy and personality rights (Article 35 of the URS) and, last but not least, the right to social security (Article 50 of the URS).

This interpretation can also be supported by Article 51(2) of the URS, which both empowers and obliges the legislator to determine the scope and content of publicly funded health care rights. For health services provided under the compulsory health insurance scheme, the manner and extent of public financing of services must already be determined from the right to social security under Article 50 of the URS[88]. The constitutionally protected core of the right under Article 51(1) and (2) of the URS is the right to social security, which is the subject of the right to social security under Article 50(1) of the URS: (I) availability of health goods and services and health care facilities; (II) accessibility to health goods, services and facilities, which includes an adequate level of temporal, informational, economic and geographical access to health services, goods and facilities; (III) health care services must be provided in accordance with professional medical or health standards, be ethically acceptable and take into account cultural characteristics and specificities; and (IV) health care services must be safe, appropriate and of adequate quality for the patient.[89] With the exception of emergency medical care, which the legislator interprets as urgent action necessary to preserve vital functions or to prevent irreversible and serious deterioration of the patient's health[90]. The legal framework must ensure effective protection of the substantive and procedural aspects of the implement the right to healthcare.

[85]ZZVZZ, Article 63.
[86]Ibid, para. 1.
[87]Ibid.
[88]Ivanc (2019) at 456.
[89]Ivanc (2019) at 457.
[90]ZPacP, Article 2, point 12.

Effective access to justice imposes a positive obligation on the State to lay down procedural rules for the implement of the right to a remedy that ensures the effective implement of the right to justice for everyone, regardless of circumstances and social barriers[91]. The existence of effective remedies must be guaranteed not only in theory but also in practice[92]. Access to justice must be fair, effective and prompt. Measures must be taken to prevent violations and to investigate promptly, thoroughly and impartially violations that do occur[93]. Under the ZPacP, a patient's right to access to justice by bringing an action before a court of general jurisdiction is subject to a very limited time limit. The Slovenian legal system does not provide a particularly fast and effective procedure before a court or before an administrative authority, which would decide independently, impartially and without undue delay on a right under the ZPacP, in the context of an effective remedy. The Slovenian legal system does not have an established instrument, such as the one known to the Inter-American Court[94]. The Court has ensured the effectiveness of remedies by establishing trust funds, appointing experts, creating non-monetary remedies (adequate compensation requiring the State to take action) and keeping cases pending until the remedies granted have been fully implemented. The remedy required by Article 13 of the ECHR must be effective both in practice and in law, in particular in the sense that its implement must not be unduly impeded by acts or omissions of the State authorities[95]. The existing legal framework in the RS does not fully provide an effective remedy for the implement of judicial protection of patients' rights. It is not guaranteed for the duration of the infringement and until the infringement and its consequences on the patient's health (loss and/or deterioration of health) have been remedied.

The right to a remedy while the infringement is still ongoing should also be enforced by the legal system as part of an effective remedy. Under the legal regime under the ZPacP, a patient may only implement judicial protection of rights and legal interests against decisions and actions of state bodies (only against decisions and decisions of the Commission of the Republic of Slovenia which terminate the procedure for requesting a second hearing on a violation of patient's rights)[96] in the manner and in accordance with the procedure provided for in this Act, if no other judicial protection is provided for by law for a specific matter[97]. A remedy which initiates proceedings before a court which is limited to reviewing the legality of an administrative act and does not provide for a full and *»ex nunc«* examination of the matter should be considered ineffective for such an effective remedy regime. The mere fact that a patient suffers a violation of a right protected by law should require the court to examine all the facts and not merely to review the legality of the administrative act and to mitigate, without undue delay, the ongoing violation and its consequences. The judicial protection guaranteed by the constitutional right in Article 23 of the URS obliges the courts to effectively protect the right of the individual to

[91]SCRS Conclusion II Cp 1464/2019, 16 September 2019.
[92]ECtHR *Slavicek v. Croatia*, no. 20862/02, (10 May 2002); ECtHR *Lukenda v. Slovenia*, no. 23032/02, (6 October 2005), para. 43.
[93]Shelton (2007) at 106.
[94]Shelton (2007) at 111.
[95]ECtHR *Aksoy v. Turkey,* no. 21987/93, (18.12.1996), para. 95.
[96]ZPacP, Article 79, para. 2.
[97]ZUS-1, Article 1.

obtain judicial protection of his legal rights, which corresponds to the duty of the courts to effectively protect rights[98]. From a review of the legal framework, it cannot be stated with certainty that there is effective judicial protection, neither under the rules *»lex specialis«* laid down by the ZPacP, nor under the *»lex generalis«* (ZZDej and ZZVZZ, key health laws).

The unlawful conduct of failing to treat a patient, which bears the consequences of a systemic health backlog, is, within the understanding of the analogy *»a simili ad simile«*, not attributable to a particular person or a particular body, but to its State or its apparatus as a whole. Such unlawful conduct worsens the health status of the patient, which may lead to a deterioration of the state of health (physical and psychological damage to health), which is reflected in pecuniary and/or non-pecuniary damage. Early assessment of the identification, response and management of deterioration in the patient's health status allows for timely initiation of nursing interventions and/or escalation of care by clinicians, thereby improving patient safety and outcome. In the general hospital setting, the timely response, knowledge and skills of the nurse are essential to prevent further deterioration in the patient's health status.[99]

With a dysfunctional healthcare system, the patient is affected when he/she has not received medical treatment, as well as with a dysfunctional judicial system, when the patient has not received treatment from the appropriate authority, which is not necessarily a judicial authority, in order to be able to implement his/her rights guaranteed by law. The consequences of systemic delays in both health care and justice can be reflected in material and/or non-material damage. The ECtHR frequently rules on complaints[100] relating to a violation of Article 2 ECHR in the context of health care. [101]

ECtHR in the case of Erdinç Kurt and Others *v.* Turkey of 6.6.2017.

The Court points out that, although "the right to health" as such is not listed among the rights guaranteed by the ECHR or its Protocols, the Contracting States have, in parallel with their positive obligations under Article 2 of the ECHR and under Article 8(1) of the ECHR, to ensure that the right to health is not a right guaranteed by the ECHR or its Protocols. Article 8(2) ECHR, they are obliged to establish: (I) regulations applicable to both public and private hospitals to take appropriate measures to protect the physical integrity of their patients; and (II) procedures to enable victims of medical negligence to obtain compensation for the harm suffered, where appropriate[102]. The Court emphasises that the principles derived from settled case-law in relation to Article 2 ECHR in the field of medical negligence

[98]Gentile (2023) at 692.
[99]Donnelly et al. (2024) at 585.
[100]ECtHR *Oyal v. Turkey*, no. 4864/05, (23.3.2010) para. 54; ECtHR *Lambert and others v. France*, no. 46043/14, para. 140; ECtHR *Calvelli and Ciglio v. Italy*, no. 32967/96, para. 49, ECtHR 2002-I; ECtHR *Vo v. France*, no. 53924/00, para. 89; ECtHR 2004-VIII; ECtHR *Powell v. The United Kingdom, no. 45305/99,* ECtHR 2000-V; ECtHR *Glass v. The United Kingdom*, no. 61827/00, (9.3.2004), para. 74.
[101]ECtHR Lopez de Sousa Fernandes v. Portugal, no. 56080/13, (19.12.2017), para. 162.
[102]ECtHR *Erdinç Kurt and others v. Turkey*, no. 50772/11, (6.6.2017), para. 51. See also ECtHR *Jurica v. Croatia*, no. 30376/13, (2. 8. 2017), para. 84.

also apply under Article 8 ECHR where an individual has suffered physical harm (whether minor or serious) which does not amount to a violation of the right to life.[103]

It should be noted that Article 2(1) of ZZVZZ provides that everyone has the right to the enjoyment of the highest attainable standard of health and the duty to take care of his or her health. As well as that no one may endanger the health of others[104] the Republic of Slovenia, within the Health Council, implement its tasks in the field of health care by ensuring a legislative policy based on health care objectives, by planning health care and determining its development strategy, and by adopting regulations and measures that promote the promotion and protection of health[105]. The State budget also provides, among other things, the means to design measures to improve health, monitor their implementation and evaluate their effectiveness by making proposals for improvement. It monitors the efficiency, accessibility and quality of the health care system and makes proposals for improvement[106]. Each year, the Institute, the competent chambers, associations of health care institutions and other institutions and organisations providing health care, and the Ministry of Health agree on a programme of compulsory health insurance services, define the capacity to implement it and determine the level of resources. On this basis, they set the basis for the implementation of the programmes and establish the prices of services and programmes or services and other bases for concluding contracts with health care institutions, other institutions and organisations providing health care and private health professionals[107]. Payment for health services and reimbursement of travel expenses in connection with the provision of health services shall be provided to insured persons to the extent provided for in the ZZVZZ.[108]

Award of just satisfaction

The implementation of just satisfaction in the context of Article 41 ECHR often raises the issue of redress through the award of monetary compensation or payment of monetary damages for the harm suffered by an individual for the trauma, distress, grief and impairment of health caused[109]. The ECtHR, in relation to national courts, awards just satisfaction only where national law does not allow for full reparation of the damage or where this is necessary. (*"S'il y a lieu*"). In doing so, the Court takes into account the specificities of individual cases. Recent case law[110] and the Rules of Procedure of the ECtHR[111] show that the ECtHR will only award pecuniary compensation for non-pecuniary damage if the damage suffered is the result of the

[103]ECtHR *Erdinç Kurt and others v. Turkey,* no. 50772/11, (6.6.2017), para. 51. See also ECtHR *Vasileva v. Bulgaria*, no. 23796/10, (12.9.2016), para. 63; ECtHR *Codarcea v. Romania*, no. 31675/04, (2.9.2009), para. 101; ECtHR *Benderskiy v. Ukraine*, no. 22750/02, (15.2.2008), paras. 61-62.
[104]Ibid.
[105]ZZVZZ, Article 4; point 1, 2. and 4.
[106]ZZVZZ, Article 7, point 4 and 5.
[107]ZZVZZ, Article 63, para. 1.
[108]ZZVZZ, Article 13, para. 2.
[109]ECtHR *McMichael v. the United Kingdom,* no. 16424/90; (24.2.1995), para. 103.
[110]ECtHR *I v. Finland*, no. 20511/03, (17.7.2008), para. 55; ECtHR *Buhuceanu and others v. Romania*, no. 20081/19 in 20 others, (23.5.2023), para. 91.
[111]ECtHR Rules of Court 2025 at 75.

established breach and where the non-pecuniary damage suffered cannot be remedied by the establishment of the breach[112] alone.

Under the national legal order, the law gives the complainant the possibility, on the basis of the provision of Article 3 of the ZVPSBNO[113], read in conjunction with Article 16 of the ZVPSBNO[114], to pursue a claim for just satisfaction, but only on the ground of the excessive length of the judicial proceedings, which have infringed his right to a trial without undue delay. The payment of financial compensation for non-pecuniary damage caused by a violation of a human right and fundamental freedom recognised by the ECHR and its Protocols is not expressly provided for in the reparation scheme. The legislator has not provided for the long-term effective functioning of the system of protection established by the ECHR at national and international level in the national legal order. Neither in the ZVPSBNO, nor on the basis of the doctrine of '*lex specialis*', has the legislator regulated the way in which the judicial protection of patients' rights is to be implemented 'during the duration of the violation', as a result of the interference with human rights and fundamental freedoms recognised by the ECHR and its Protocols, and until the consequences of the violation have been rectified - an interference with a constitutionally-protected right, Article 23 of the URS. Just satisfaction in the form of monetary compensation for non-pecuniary damage was introduced for the first time by the Slovene legal system only with the adoption of the ZVPSBNO. However, the ZVPSBNO did not explicitly provide for the payment of financial compensation in the form of "just satisfaction" to compensate for non-pecuniary damage caused by the violation of a patient's right not only in the case of inadequate provision of health care (the right to adequate, high-quality and safe healthcare), but also in the case where the inappropriately long waiting time for the provision of a health care service is the result of an objective situation of delays in the provision of a health care service and the existence of a systemic deficiency in the procedure of legal protection of patient's rights. In such a case, the court would also be obliged to take into account the degree of impairment of the patient's state of health, for example, where the patient is at risk of deterioration (severity of the patient's physical and mental condition).

The ZVPSBNO provided for the possibility of equitable relief only for those cases where, despite the party's efforts to expedite the proceedings, he or she is not granted a trial within a reasonable time[115]. The legislator has not regulated the way in which effective judicial protection of the right to a trial without undue delay can be implemented, directly while the infringement is still ongoing (the patient has an interest in a prompt decision on the case due to a possible deterioration of his/her health) and until the infringement has been remedied.

[112]ECtHR *K.H. and others v. Slovakia*, no. 32881/04, (6.11.2009), para. 77.
[113]Ibid, para. 3.
[114]Ibid, para. 1.
[115]CCRS Conclusion U-I-37/11, Up-215/11, (1.7.2011), para. 7.

Discussion

In the healthcare system in the RS, there is no prompt and effective access to justice through effective remedies when a patient's right to timely healthcare (right to adequate, high-quality and safe healthcare) is deprived or violated in the healthcare system and when such violation persists. Patients who suffer an interference with their legally granted right of access to health care and to the provision of preventive services[116] also suffer an interference with their constitutionally protected right to personal dignity and security[117]. As such, the patient cannot implement the right granted by national legislation in the health care system. The State thus infringes the human rights and fundamental freedoms recognised by the ECHR and its Protocols. This is already apparent from a number of ECtHR case-law cases (Article 6), which dictate that the State is liable in damages for a violation of the right to a trial without undue delay, not only in the case of an inadequate procedure by the court, but also where the unreasonable procedure is the result of an objective state of delay on the part of the court. In the absence of an extremely expeditious remedy or a set of remedies available to the patient to enable the competent authority to adjudicate on his or her right, it cannot be said that the patient is afforded effective judicial protection against infringements of his or her rights. Nor is it possible for a patient to obtain, in the context of judicial protection, an effective remedy or set of remedies, preventive or compensatory redress ("just satisfaction"), which would enable him or her to obtain the swiftest possible treatment in a health care system other than that of the public health care network.

It may be pointed out, on the basis of the analogy *»a simili ad simile«*, that, like an organised judicial system, an organised health system is in itself a value of paramount importance for the community, the effectiveness of which in safeguarding the right to justice depends on the availability of a remedy, or a set of several remedies, which gives the patient the possibility of enforcing the content of the rights and freedoms enshrined in the ECHR at EU level. The effectiveness of a remedy is manifested in terms of preventing the alleged violation from occurring or continuing and providing adequate redress for any violation that has already occurred. An effective remedy must be available before a court[118]. The individual (patient) who has not been able to enjoy and benefit from the right to health care within a reasonable time (without undue delay) is the one who is primarily affected by a dysfunctional health care system. It is the complainant/patient who bears the consequences of systemic health care delays, which are reflected in pecuniary and/or non-pecuniary damages. This in turn suggests that the State is liable for damages when it violates the right to reparation protected by Article 26 of the URS. Where the State fails to organise its judicial system in such a way as to enable the courts to give effect to the requirements of Article 6 of the ECHR, there is a violation of human rights and fundamental freedoms.[119] The State must organise its judicial system in such a way as to enable the courts to comply with the requirements of the ECHR, including those embodied

[116]ZPacP, Article 6, para. 1.
[117]URS, Article 34.
[118]Friday (2019) at 163.
[119]CCRS, Up-695/11-15, (10.1.2013), para. 11.

in the procedural obligation under Article 2.[120] The remedy must be effective and available at the relevant time, both in theory and in practice. This means that the remedy must be accessible, capable of providing redress in relation to the party's complaint and offer a reasonable prospect of success.[121]. Although none of the available remedies may prove effective, the totality of the available remedies may meet the criteria set out in the ECHR[122] .

The case law of national courts makes an important contribution to the study of liability for non-pecuniary damage.

Conclusion

The research findings suggest that, in evaluating the meaning of the instrument of 'just satisfaction', the Court should examine whether the rules governing the admission of patients to medical treatment and the conditions under which they receive medical treatment provide a sufficient regulatory framework to ensure that the patient's health is protected by an effective remedy or sets of remedies, as required by Article 13 ECHR. Effective remedies should provide the patient with due process, enabling the Court to implement effective judicial review and adjudicate the case. Within the criteria of just satisfaction, guarantees in the form of compensation should be provided to enable the patient to benefit from medical care outside the network of public health service providers within a reasonable time in order to obtain appropriate medical treatment. The case law of the ECtHR, like that of national courts, is extremely diverse. However, it is the Courts which, in my view, should examine, either independently or in cooperation with other competent institutions, whether and in what way their decisions have an impact on the systemic regulation or improvement of the health system.

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[120]ECtHR *Šilih v. Slovenia*, 71463/01, (09.04.2009), para. 210; ECtHR *R.M.D. v. Switzerland*, (26.09.1997), no. 81/1996/700/892, para. 54, Reports 1997-VI)

[121]ECtHR *Akdivar and others v. Turkey,* no. 21893/93, (16.9.1996), para. 68*;* Reports 1996-IV, pp. 1211.

[122]ECtHR *Lukenda v. Slovenia*, no. 23032/02, (6.10.2005), para. 44; ECtHR *Silver and others v. The United Kingdom,* nos. *5947/72; 6205/73; 7052/75;* 7061/75; 7107/75; 7113/75; 71336/75*,* (25.3.1983), series A, no.61, para. 113; ECtHR *Chahal v. The United Kingdom*, no.22414/93, (15.11.1996), para. 145.

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