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SEMINAR ON
“MODELS OF CONSTITUTIONAL JURISDICTION”
Ramallah, 25-26 October 2008

REPORT

**“SOME COMPARATIVE COMMENTS TO
THE INTRODUCTION OF CONSTITUTIONAL REVIEW
IN THE STATE OF PALESTINE”**

by

Mr Arne Marjan MAVČIČ
(Liaison Officer, Constitutional Court, Slovenia)

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1. **EXISTING MODELS OF CONSTITUTIONAL/JUDICIAL REVIEW**

The Court exercising the constitutional review is a special body that as the bearer of the protection of constitutionality holds a certain legal superiority in relation to other branches of power. Its review covers all legislative acts that are the highest legal instruments of a specific legal and political system. The status of a true institution with the power to provide constitutional review should only be held by the institution that in the specific system of the separation of powers holds such a limiting relation to the legislative power (the Parliament) that it may annul statutes adopted by the legislative body. It is a judicial institution established in view of special and exclusive decision-making powers on constitutional matters. This institution is located outside the ordinary court system and is fully independent of other branches of public authorities.

2. **THE SYSTEMS IN FORCE**

In principle, from the organizational point of view, it is possible to distinguish different models of constitutional/judicial review in force, as follows:

- The currently still prevailing "Austrian" (Continental - Constitutional Review) Model (based on Kelsen's Model of 1920, involving the interconnection of the principle of the supremacy of the Constitution and the principle of the supremacy of the Parliament), whereunder constitutional matters are dealt with by specialized Constitutional Courts with specially qualified judges or by ordinary Supreme Courts or high courts or their special chambers (concentrated constitutional review) in special proceedings (*principaliter*). As a rule it is an abstract review, although a concrete review is also possible. In addition to the *a posteriori* review, *a priori* review is also foreseen. The decisions have an *erga omnes* effect with reference to the absolute authority of the institution by which they are taken.

Bodies exercising constitutional review may be:

a) Constitutional Courts

- IN EUROPE: Albania, Andorra, Austria, Belarus, Belgium, the Federation of Bosnia and Herzegovina (with the Constitutional Courts of the federal entities Bosnia and Herzegovina and the Serbian Republic of Bosnia), Bulgaria, Croatia, the Czech Republic, Serbia, Montenegro, Germany (with the regional Constitutional Courts: Baden-Wuerttemberg, Bavaria, Brandenburg, Bremen, Hamburg, Hessen, Niedersachsen, Nordrhein-Westfalen, Rheinland-Pfalz, Saarland, Sachsen, Sachsen-Anhalt), Hungary, Italy, Latvia, Lithuania, Luxembourg, Macedonia (FYROM), Malta, Moldavia, Poland, Romania, the Russian Federation (with the federal unit Constitutional Courts: Adigea, Altai, Baskiria, Buryatia, Chechnia, Chuvachia, Dagestan, Inguchia, Irkutska Oblast, the Kabardino-Balkar Republic, Kakasa, the Karachaewo-Cherkez Republic, Karelia, Khalmukia, Koma, Marii-El, Northern Ossetia, Tatarstan, Tuba, Udmurtia, Yakutia/Sakha), Slovakia, Slovenia, Spain, Turkey, Ukraine;
- IN AFRICA: Angola, Benin, Burundi, the Central African Republic, Egypt, Equatorial Guinea, Gabon, Madagascar, Mali, Rwanda, South Africa, Togo;
- IN THE MIDDLE EAST: Cyprus, **Palestine**, Syria, Bahrain;
- IN ASIA: Armenia, Azerbaijan, Georgia, Kyrgyzstan, Mongolia, South Korea, Sri Lanka, Tajikistan, Thailand, Uzbekistan (with the regional Constitutional Committee of the Republic of Karakalpakstan);
- IN CENTRAL AND SOUTH AMERICA: Chile, Surinam, Tucuman Province (Argentina) with the *Constitution of Tucuman* of 28 April 1990;

b) High Courts or their special chambers

- IN EUROPE: Iceland, Liechtenstein, Monaco, Kosovo;
- IN THE MIDDLE EAST: UAE, Yemen;
- IN AFRICA: Burkina Faso, Cameroon, Chad, Eritrea, Niger, Sudan, Uganda (1995), Zaire, Zambia;
- IN ASIA: the Philippines;
- IN CENTRAL AND SOUTH AMERICA: Costa Rica, Nicaragua, Panama, Paraguay, Uruguay;

c) The Constitutional Council

- in the Middle East: Lebanon;
- IN AFRICA: Mauritania, Senegal;
- IN ASIA: Cambodia, Kazakhstan.

Institutions based on the European model of constitutional review share some common characteristics:

- institutionally independent institutions of constitutional review are mainly located outside the judicial branch;
- in the proceedings following a constitutional complaint it is necessary to consider the separated dealing with constitutional question out of regular procedure before the ordinary courts;
- administrative and financial autonomy is a prerequisite for the independence of the Court;
- a monopoly of constitutional review (specialization in constitutional review), the concentration of power in one institution, most often with the power to abrogate statutes adopted by the Parliament;
- constitutional court judges are appointed in principle by bodies of political power;

- the specialty of the jurisdiction: decisions are of a legal and political nature although they may also have a purely consultative function;
 - statutes as the prevailing object of constitutional review;
 - generally such constitutional review is repressive, although to a minor extent constitutional review is of a preventive nature.
- The "American" - Judicial Review Model (in principle based on the *Marbury Case* (1803), dealt with by the Supreme Court of the United States, and on John Marshall's doctrine), whereunder constitutional matters are dealt with by all ordinary courts (a decentralized or diffuse or dispersed review) under ordinary court proceedings (*incidenter*). It is a specific and a *posteriori* review, whereby the Supreme (high) Court in the system provides for the uniformity of jurisdiction. In the diffuse system, the decisions as a rule take effect only *inter partes* (except for the principle *stare decisis*, whereunder the courts in the future abide by the ruling). In principle the decision concerning the unconstitutionality of a statute is declaratory and retrospective, *i.e. ex tunc* (with *pro praeterito* consequences). This system was adopted by the following countries:
 - IN EUROPE: Denmark, Estonia, Ireland, Norway, Sweden;
 - IN AFRICA: Botswana, Gambia, Ghana, Guinea, Kenya, Malawi, Namibia, Nigeria, the Seychelles, Sierra Leone, Swaziland, Tanzania;
 - IN THE MIDDLE EAST: Israel;
 - IN ASIA: Bangladesh, Fiji, Hong Kong (until 1 July 1997), India, Japan, Kiribati, Malaysia, the Federal States of Micronesia, Nauru, Nepal, New Zealand, Palau, Papua New Guinea, Singapore, Tibet¹, Tonga, Tuvalu, Vanuatu, Western Samoa;
 - IN NORTH AMERICA: the Canada, USA;
 - IN CENTRAL AND SOUTH AMERICA: Argentina, Bahamas, Barbados, Belize, Bolivia, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Mexico, St. Christopher/Nevis, Trinidad and Tobago.

The New (British) Commonwealth Model (Mauritius) cannot be classified either under the American or the European model. It is characterized by a concentrated constitutional review under the jurisdiction of the Supreme Court consisting of ordinary judges without political nomination; as a rule, it involves preventive (*a priori*) review and the consulting function of the Supreme Court, although repressive (*a posteriori*) review is also possible; decisions take an *erga omnes* effect.

- The Mixed (American Continental) Model with the elements of both a diffuse and concentrated system; despite the constitutional review power of the central Constitutional or Supreme Court (or its special chambers), all ordinary courts in the particular country are entitled to not apply laws deemed as not in conformity with the *Constitution*:
 - a) Constitutional Courts
 - IN EUROPE: Portugal;
 - IN CENTRAL AND SOUTH AMERICA: Colombia, Ecuador, Guatemala, Peru;
 - b) High Courts or their special departments
 - IN EUROPE: Greece, Switzerland (in view of the fact that in the Swiss system - a system of limited constitutional review - the Swiss Federal Court cannot evaluate

¹ Under the *Charter of the Tibetans in Exile* of 14 June 1991.

federal statutes, generally binding resolutions and ratified international agreements: the principle of supremacy exists on the federal level);

- IN ASIA: Indonesia, Taiwan;
- IN AFRICA: Cape Verde;
- IN CENTRAL AND SOUTH AMERICA: Brazil, El Salvador, Honduras, and Venezuela.
- The "French" (Continental) Model (based on the model of the French Constitutional Council - *Conseil Constitutionnel* - of 1958), where constitutional matters are subject to review by special bodies of constitutional review (most often the Constitutional Council) or by special chambers of ordinary Supreme Courts (concentrated constitutional review) in special proceedings (*principaliter*), provided that constitutional review is mainly of a preventive (consultative) character (although these systems also have particular repressive forms of constitutional review, especially with reference to electoral matters):
 - IN EUROPE: France;
 - IN AFRICA: Algeria, Comoros, Djibouti, Ivory Coast, Morocco, and Mozambique.
- Other Bodies with the Power of Constitutional/Judicial Review (the National Council, Parliament or specialized parliamentary bodies, *etc.*):
 - IN EUROPE: Finland;
 - IN THE MIDDLE EAST: Kuwait, Oman;
 - IN AFRICA: Congo, Ethiopia, Guinea-Bissau, Sao Tome and Principe, Tunisia, Zimbabwe;
 - IN ASIA: Brunei, Burma/Myanmar, China (as well as Hong Kong after 1 July 1997), Laos, North Korea, Pakistan, Turkmenistan, Vietnam;
 - IN AUSTRALIA;
 - IN CENTRAL AMERICA: Cuba.
- Systems Without Constitutional/Judicial Review:
 - IN EUROPE: Great Britain², the Netherlands³;
 - IN AFRICA: Lesotho, Liberia, and Libya⁴.

3. THE STATE OF PALESTINE (THE SUPREME CONSTITUTIONAL COURT) – REGULATION IN FORCE

Any particular system (**the Supreme Constitutional Court of the State of Palestine as well**) may be classified on the basis of a common model of constitutional review body structures considering the following essential components:

4. DOSSIER OF THE FEDERAL SUPREME COURT OF THE STATE OF PALESTINE

STATE: The State of Palestine

² Although the powers of the House of Lords include some elements of the preventive constitutional review.

³ Concerning the system of the Netherlands, there are a few exceptions concerning the powers of the Supreme Court to decide cases connected to European Communities institutions.

⁴ However, certain functions of constitutional review may be exercised in Libya by the Supreme Court of Libya which is also a member of the Arab Group of the Constitutional Courts and Constitutional Councils.

TITLE: Supreme Constitutional Court

YEAR OF FOUNDATION: XXXX

SEAT: Jerusalem

I. CHRONICLE

1. Date and context of establishment: the Constitution of the State of Palestine, version 2003
2. Position in the hierarchy of courts: the supreme judicial body

II. STANDARD LEGAL REFERENCE

1. The Constitution of the State of Palestine 2003
2. The Federal Law
3. The Rules of Procedure.....?.....
4. Other Internal Rules.....?.....

III. COMPOSITION AND ORGANIZATION

1. Composition
 - 1.1. *The number of judges:*9
 - 1.2. *Electoral/appointment body:*
 - 1.2.1. *APPOINTMENT BASED SYSTEM (Without the Participation of a Representative Body): the State President (+nomination by the Council of Ministers + approval by the House of Representatives)*
 - 1.2.2. *Election Based System:*
 - 1.2.3. *Mixed Systems (Appointment and Election):*
 - 1.2.4. *Predetermined Composition From High Judicial Officials:*
 - 1.3. *The Court members:*
 - 1.3.1. *The term of office: 9 years*
 - 1.4. *The Court President:*
 - 1.4.1. *The term of office: 3 years*
 - 1.5. *The qualifications and the required professional experience of constitutional court judges:*
 - 1.6. *Incompatibilities: other public employment, any commercial, political or partisan activities, no party membership*
 - 1.7. *Immunities:*
 - 1.8. *Release from office prior to the expiration of the term: the constitutionally determined end of the judge's term, voluntary resignation loss of one of the preconditions of membership, judicially convicted of a criminal offense*
2. Proceedings
 - 2.1. *Hearing in plenum: yes*
 - 2.1.1. *A quorum: ?*
 - 2.2. *Hearing in camera:*
 - 2.2.1. *A quorum: ?*
 - 2.3. *The Dissenting/Concurring opinion: ?*
 - 2.4. *Public hearing: ?*
 - 2.5. *Internal session: ?*
3. Organization
 - 3.1. *Administrative autonomy: yes*
 - 3.2. *The budget: state budget*
 - 3.3. *Administrative services:*
 - 3.4. *Secretary: yes*
 - 3.5. *Financial service:*
 - 3.6. *Special services:*
 - 3.6.1. *Legal information center:*
 - 3.6.2. *Legal library:*
 - 3.6.3. *Legal advisers:*
 - 3.6.4. *Clerical staff:*

IV. POWERS

1. Constitutional Court Review
 - 1.1. *Preventive review: yes*
 - 1.2. *A posteriori review: yes*
 - 1.2.1. *Abstract review: yes*
 - 1.2.2. *Concrete review: yes*
2. Other powers
 - 2.1. *Constitutional complaints: yes*
 - 2.2. *Jurisdictional disputes: yes*
 - 2.3. *The unconstitutionality of acts and activities of political parties: yes*
 - 2.4. *Charges against the President of the Republic: yes*
 - 2.5. *Charges against the Prime Minister or against any Minister of State: yes*
 - 2.6. *Electoral matters: yes (the president of the Supreme Constitutional Court may temporarily replace the president of the State)*
 - 2.7. *Referendums: no*
 - 2.8. *Other matters with which the Court is charged by the Constitution or statute: yes*
3. Standing before the Constitutional Court

- 3.1. *State bodies: yes*
- 3.2. *Individuals: yes*

V. NATURE AND EFFECTS OF DECISIONS

- 1. Finality: yes
- 2. Binding force: yes
 - 2.1. *Erga omnes: yes*
 - 2.2. *Inter partes: yes*
- 3. Ex officio: no
- 4. The temporary order: ?
- 5. Abrogation in whole or in part: yes
- 5.1. EFFECTIVENESS IMMEDIATELY OR WITHIN A CERTAIN PERIOD OF TIME:?**
- 6. Annulment in whole or in part: yes
- 7. The consequences of decisions, damage claims ?
- 8. The declaration of unconstitutionality and illegality: ?
- 9. The legislative omissions: ?
- 10. The abrogation, retroactive or prospective, of a general act while deciding on a constitutional complaint: yes
- 11. The final decision on a contested human right or freedom based on a constitutional complaint: ?
- 12. Stating the competent body: yes in case of jurisdictional disputes
- 13. Impeachment: yes
 - 13.1. *Finding the proposal for impeachment to be unfounded: yes*
- 13.2. DECISION ON THE BASIS FOR IMPEACHMENT/DECISION ON THE TERMINATION OF THE PRESIDENTS/PRIME MINISTERS/MINISTERS OFFICE: YES**
- 14. The annulment of an unconstitutional act/activity of a political party act/activity or the ordering of a deletion from the register of legal political parties: yes
- 15. The annulment of decisions of the National Assembly and rulings on the election of representatives: no
- 16. Opinions on the conformity of international treaties with the Constitution: yes
- 17. Declarations on the constitutionality of a proposal to call a referendum: no
- 18. Other forms of decisions: possible yes

VI PUBLICATION OF CONSTITUTIONAL COURT DECISIONS

- 1. The Official Gazette: ?
- 2. The Official Digest: ?
- 3. Legal Journals: ?
- 4. Electronic Publishing: ?
- 5. Other forms: ?

VII THE LEGAL INFORMATION SYSTEM ?

5. THE POWERS OF THE SUPREME CONSTITUTIONAL COURT OF THE STATE OF PALESTINE FROM THE COMPARATIVE POINT OF VIEW

* The powers of the Constitutional Court of the State of Palestine regulated by the Constitution 2003 are presented in bold.

The following countries feature the Constitutional Court functions listed:

I PREVENTIVE REVIEW:

- a. CONSTITUTIONAL PROVISIONS (Costa Rica, Chile, Moldavia, Switzerland - as regards the canton constitutions, the Central African Republic);
- b. **INTERNATIONAL AGREEMENTS** (Albania, Algeria, Andorra, Armenia, Azerbaijan, Belarus, Bulgaria, Burkina Faso, Burundi, Buryatia/Russia, Cameroon, Cape Verde, the Central African Republic, Chile, Comoros, Congo, Dagestan/Russia, Estonia, France, Gabon, Georgia, Germany, Guatemala, Guinea, Hungary, the Ivory Coast, Karelia/Russia, Kazakhstan, Lithuania, Madagascar, Mali, Moldavia, **Palestine**, Poland, Portugal, Russia, Slovenia, Spain, Tajikistan, Tunisia, Ukraine, United Arab Emirates);

- c. **STATUTES** (Afghanistan, Algeria, Austria - as regards the acts of federal entities, Belarus, Burkina Faso, Burundi, Cambodia, Cameroon, the Central African Republic, Chad, Chile, Comoros, Congo, Costa Rica, Cyprus, Djibouti, Ecuador, Finland, France, Gabon, Germany, Guatemala, Guinea, Hungary, Indonesia, Ireland, Italy, Ivory Coast, Kazakhstan, Madagascar, Mali, Mauritius, Morocco, Namibia, Niger, Northern Ossetia/Russia, **Palestine**, Peru, Poland, Portugal, Romania, Russia, South Africa, Spain, Sri Lanka, Syria, Thailand, Togo, Tucuman/Argentina, Turkey, Tunisia, Venezuela, Zambia);
- d. **REGULATIONS** (Belarus, Burundi, the Central African Republic, Comoros, Congo, Gabon, Madagascar, Namibia, Northern Ossetia/Russia, Portugal, Tucuman/Argentina);
- e. **ACTS OF THE HEAD OF STATE** (Algeria, Guinea, Madagascar);
- f. **ACTS OF TERRITORIAL UNITS** (South Africa);
- g. **OTHER REGULATIONS: BUDGET ACTS, PARLIAMENTARY INTERNAL REGULATIONS** (Belarus, Burundi, Cameroon, the Central African Republic, Chad, Comoros, Cyprus, Djibouti, France, Madagascar, Niger, Romania, Thailand, Togo).

REPRESSIVE (A POSTERIORI) REVIEW:

h. Abstract review:

- i. Concerning the Constitution, constitutional amendments, or basic constitutional provisions (Baden-Wuerttemberg/Germany, Brazil, Costa Rica, Cuba, Cyprus, Dagestan/Russia (the constitutions of administrative units); Kyrgyzstan, Rheinland-Pfalz/Germany, Russia (constitutions of federal entities), Saarland/Germany, Turkey, Ukraine, Uzbekistan (the conformity of the *Constitution of the Republic of Karakalpakstan* with the *Constitution of Uzbekistan*);
- ii. International agreements (including agreements between the Federal State and federal entities) (Adigea/Russia, Afghanistan, Austria, Azerbaidjan, Bashkiria/ Russia, Cameroon, Chad, Comoros, Congo, Costa Rica, Greece, the Kabardino-Balkar Republic/Russia, Latvia, Liechtenstein, Lithuania, Madagascar, Mauritania, Moldavia, the Philippines, Russia, Senegal, Tatarstan/Russia, Tuba/Russia, Uzbekistan, Yakutia/Russia);
- iii. **Statutes** (Adigea/Russia, Afghanistan, Albania, Algeria, Angola, the Argentinean Province of Tucuman, Armenia, Austria, Azerbaidjan, Baden-Wuerttemberg/ Germany, Bashkiria/Russia, Bavaria/Germany, Belgium, Benin, Berlin/Germany, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Buryatia/Russia, Cambodia, Cameroon, Cape Verde, Chad, Chile, Colombia, Congo, Comoros, Costa Rica, Cuba, Croatia, the Czech Republic (and the subsidiary power of the Supreme Court), Cyprus, Dagestan/Russia, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, the FYROM, Georgia, Germany, Guatemala, Greece, Hamburg/Germany, Hessen/Germany, Honduras, Hungary, Irkutsk Oblast/Russia, Italy, the Kabardino-Balkar Republic/Russia, Karelia/Russia, Koma/Russia, Kuwait, Kyrgyzstan, Latvia, Lebanon, Liechtenstein, Lithuania, Madagascar, Malawi, Malaysia, Mauritania, Mauritius, Moldavia, Mongolia, Montenegro, Mozambique, Namibia, Nicaragua, Niedersachsen/Germany, Nordrhein-Westfalen/Germany, Northern Ossetia/ Russia, **Palestine**, Panama, Paraguay, Peru, the Philippines, Poland, Rheinland-Pfalz/Germany, Russia, Rwanda, Saarland/Germany, Senegal, Serbia, the Serbian Republic of Bosnia, the Seychelles, Slovakia, Slovenia, South Africa, South Korea, Spain, Sudan, Syria, Taiwan, Tajikistan, Tatarstan/Russia, Tuba/ Russia, Turkey, Uganda, Ukraine, United Arab Emirates, Uruguay, Uzbekistan, Karakalpakstan/ Uzbekistan, Venezuela, Zaire, Zambia, Yakutia/Russia, Yemen);
- iv. Resolutions of the Parliament (Latvia);

- v. **Regulations** (Adigea/Russia, Afghanistan, Albania, Angola, Armenia, Austria, Azerbaidjan, Buryatia/Russia, Cape Verde, Comoros, Congo, the Czech Republic, Dagestan/Russia, Ecuador, Egypt, El Salvador, Eritrea, Georgia, Guatemala, Hungary, Irkutsk Oblast/Russia, the Kabardino-Balkar Republic/Russia, Karelia/Russia, Koma/Russia, Kuwait, Latvia, Liechtenstein, Lithuania, Madagascar, Mauritania, Moldavia, Mongolia, Montenegro, Mozambique, Northern Ossetia/Russia, South Africa, **Palestine**, Panama, the Philippines, Poland, Russia, Serbia, the Serbian Republic of Bosnia, Slovakia, Slovenia, Sudan, Tajikistan, Tatarstan/Russia, Tucuman/Argentina, Ukraine, United Arab Emirates, Uzbekistan, Karakalpakstan/Uzbekistan, Yakutia/Russia, Yemen);
 - vi. **Acts of the Head of State** (Adigea/Russia, Algeria, the Argentinean Province of Tucuman, Armenia, Azerbaidjan, Bashkiria/Russia, Bulgaria, Buryatia/Russia, Ecuador, El Salvador, Georgia, Latvia, Lithuania, Madagascar, Moldavia, Mongolia, Northern Ossetia/Russia, **Palestine**, Panama, the Philippines, Russia, Tajikistan, Tatarstan/Russia, Ukraine, Uzbekistan, Karakalpakstan/Uzbekistan, Yakutia/Russia, Yemen);
 - vii. **Rules and other acts of national administrative units (federal member states, (autonomous) provinces, local communities, etc.)** (Azerbaidjan, Bashkiria/ Russia, Buryatia/Russia, Cyprus, Dagestan/Russia , Georgia, Irkutsk Oblast/Russia, Karelia/Russia, Koma/Russia, Latvia, Northern Ossetia/Russia, Serbia, Slovakia, Slovenia, Spain, Russia, Tajikistan, Ukraine, **United Arab Emirates**, Uzbekistan, Yakutia/Russia);
 - viii. Proclaimed regulatory measures of statutory authorities (Slovenia);
 - ix. The conformity of national legal norms with international agreements (Albania, Bulgaria, the Czech Republic, Hungary, Latvia, Poland, Slovakia, Slovenia);
 - x. Regional agreements/the agreements of constituent republics closed with the Federal State (Buryatia/Russia, Dagestan/Russia, Irkutsk Oblast/Russia, the Kabardino-Balkar Republic/Russia, Karelia/Russia, Koma/Russia).
 - xi. **Other rules** (Austria, Bolivia, Croatia, Ecuador, the FYROM, Hungary, the Kabardino-Balkar Republic/Russia, Madagascar, Mali, Northern Ossetia/Russia, **Palestine**, the Philippines, Poland, Tajikistan, Serbia , Slovakia, Slovenia, Turkey, Uganda);
 - xii. Adoption proceedings of land planning acts (Montenegro).
- i. **CONCRETE REVIEW - SPECIALIZED CONSTITUTIONAL/JUDICIAL REVIEW BODIES REQUESTED BY ORDINARY COURTS** (Adigea/Russia, Austria, Azerbaidjan, Bashkiria/Russia, Bavaria/Germany, Bremen/Germany, Bulgaria, Buryatia/Russia, Cambodia, Cape Verde, Congo, Costa Rica, Croatia, Cuba, the Czech Republic, Cyprus, Dagestan/Russia, Djibouti, Estonia, Gabon, Georgia, Germany, Guatemala, Hamburg/Germany, Honduras, Hungary, Iran, Italy, Karelia/Russia, Kazakhstan, Koma/Russia Kyrgyzstan, Lithuania, Madagascar, Malaysia, Malta, Montenegro, Niedersachsen/Germany, Niger, **Palestine**, Panama, Paraguay, Poland, Romania, Russia, the Seychelles, Slovenia, South Africa, South Korea, Spain, Taiwan, Thailand, Togo, United Arab Emirates, Uruguay, Zambia, Yakutia/Russia).
- 2. THE INTERPRETATION OF RULES (as an interpretative function):**
- a. **CONCERNING THE CONSTITUTION** (Adigea/Russia, Albania, Azerbaidjan, Bashkiria/Russia, Bulgaria, Burundi, Buryatia/Russia, Cambodia, Dagestan/Russia, Eritrea, Gabon, Germany, Hungary, Irkutsk Oblast/Russia, Kazakhstan, Koma/Russia, Kyrgyzstan, Madagascar, Moldavia, Montenegro, Namibia, Niger, **Palestine**, Papua New Guinea, Russia, Slovakia, Sri Lanka, Sudan, Taiwan, Uganda, United Arab Emirates, Uzbekistan, Zaire, Yakutia/Russia);

- b. CONCERNING STATUTES AND OTHER RULES (Azerbaijan, Cambodia, Dagestan/Russia (in relation to federal legislation), Egypt, Equatorial Guinea, France, Indonesia, Madagascar, Poland, Sudan, Taiwan, Uzbekistan).
3. THE IMPLEMENTATION OF RULES - DECIDING ON MATTERS RELATING TO THE CONFORMITY OF A RULE'S IMPLEMENTATION WITH THE *CONSTITUTION* (Bashkiria/Russia, Ecuador, Irkutsk Oblast/Russia, the Kabardino-Balkar Republic/Russia, the Philippines, Rheinland-Pfalz/Germany, Russia, Tuba/Russia).
4. THE OMISSION OF (STATUTORY) REGULATIONS - *LEGAL GAPS* (Brazil, Hungary, Italy, Portugal, the Seychelles, Slovenia, Uganda).
5. LEGISLATIVE INITIATIVES:
 - a. CITIZEN'S INITIATIVES (Austria, Hungary, Romania, Spain);
 - b. Constitutional Court Legislative initiatives (Adigea/Russia, Bashkiria/Russia, Burundi, Buryatia/Russia, Dagestan/Russia, the Kabardino-Balkar Republic/ Russia, Karelia/Russia, Koma/Russia, Northern Ossetia/Russia, Tatarstan/Russia, Tuba/Russia, Yakutia/Russia, Montenegro);
 - c. Participation in the legislative procedure (the Central African Republic).
6. **JURISDICTIONAL DISPUTES:**
 - a. **BETWEEN TOP GOVERNMENT BODIES** (Adigea/Russia, Albania, Andorra, Austria, Azerbaijan, Baden-Wuerttemberg/Germany, Bashkiria/Russia, Bavaria/Germany, Berlin/Germany, Bremen/Germany, Bulgaria, Buryatia/Russia, Cameroon, the Central African Republic, Chad, Croatia, Cyprus, Dagestan/Russia, Ecuador, El Salvador, the FYROM, Gabon, Georgia, Germany, Guatemala, Hamburg/Germany, Hessen/Germany, Irkutsk Oblast/Russia, Italy, the Kabardino-Balkar Republic/Russia, Karelia/Russia, Kazakhstan, Koma/Russia, Madagascar, Mali, Mongolia, Mozambique, Nicaragua, Niedersachsen/Germany, Niger, Nordrhein-Westfalen/Germany, **Palestine**, Peru, Poland, Russia, Saarland/Germany, Senegal, the Serbian Republic of Bosnia, Slovakia, Slovenia, Spain, South Africa, South Korea, Taiwan, Tajikistan, Tatarstan/Russia, Thailand, Ukraine, United Arab Emirates, Yakutia/Russia);
 - b. BETWEEN THE STATE AND REGIONAL OR LOCAL UNITS (Adigea/Russia, Albania, Austria, Bashkiria/Russia, Bosnia and Herzegovina, Brazil, Bulgaria, Buryatia/Russia, Cameroon, the Central African Republic, the Czech Republic (and the subsidiary power of the Supreme Court), Dagestan/Russia, the FYROM, Germany, Hungary, India, Irkutsk Oblast/Russia, Italy, Karelia/Russia, Koma/Russia, Madagascar, Malaysia, Mexico, Montenegro, Nicaragua, Nigeria, Pakistan, Russia, the Serbian Republic of Bosnia, Slovenia, South Africa, South Korea, Spain, Switzerland, Tatarstan/Russia, Ukraine, United Arab Emirates, Yakutia/Russia);
 - c. BETWEEN LOCAL OR REGIONAL UNITS (Austria, Bashkiria/Russia, Bolivia, Bosnia and Herzegovina, Brazil, Buryatia/Russia, Cameroon, Germany, Irkutsk Oblast/Russia, Italy, Karelia/Russia, Koma/Russia, Mexico, Montenegro, Nicaragua, Nigeria, Peru, Russia, Slovenia, South Africa, South Korea, Spain, Switzerland, Tatarstan/Russia, Tucuman/Argentina, Ukraine, United Arab Emirates);
 - d. **BETWEEN THE COURTS AS WELL AS BETWEEN THE COURTS AND OTHER GOVERNMENT BODIES** (Austria, Egypt, Greece, Montenegro, **Palestine**, Serbia, Slovenia, Tucuman/Argentina, United Arab Emirates);
 - e. OTHER SPECIFIC JURISDICTIONAL DISPUTES (Austria, Croatia, Cyprus, Hungary, Nicaragua, Tucuman/Argentina, Ukraine, Yakutia/Russia, Yemen);
 - f. STATE OF EMERGENCY (Montenegro)

7. **POLITICAL PARTIES - DECISIONS RELATED TO MATTERS OF UNCONSTITUTIONAL ACTS AND ACTIVITIES** (Albania, Armenia, Azerbaidjan, Bashkiria/Russia, Bulgaria, Burkina Faso, Chile, Croatia, the Czech Republic, the FYROM, Georgia, Germany, Moldavia, Montenegro, **Palestine**, Poland, Portugal, Romania, Russia, Serbia, the Serbian Republic of Bosnia, Slovakia, Slovenia, South Korea, Yakutia/Russia).
8. REFERENDUMS - DECISIONS REGARDING A REFERENDUM'S CONFORMITY WITH THE *CONSTITUTION* (Algeria, Armenia, Austria, Berlin/Germany, Burkina Faso, Cameroon, Chad, Chile, Comoros, Congo, Croatia, Djibouti, Equatorial Guinea, France, Gabon, Georgia, Greece, Hessen/Germany, Hungary, Ivory Coast, Kazakhstan, Madagascar, Mali, Mauritania, Moldavia, Mongolia, Mozambique, Niger, Nordrhein-Westfalen/Germany, Portugal, Romania, Saarland/Germany, Slovakia, Slovenia, Zaire).
9. ELECTIONS - DECISIONS REGARDING THE CONFORMITY OF ELECTION PROCEEDINGS WITH THE *CONSTITUTION* AND STATUTE (Albania, Algeria, Armenia, Austria, Baden-Wuerttemberg/Germany, Bavaria/Germany, Berlin/Germany, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, the Central African Republic, Chad, Comoros, Congo, Croatia, the Czech Republic, Cyprus, Djibouti, Ecuador, Equatorial Guinea, France, Gabon, Georgia, Germany, Greece, Guinea, Hamburg/Germany, Ivory Coast, Kazakhstan, Kyrgyzstan, Lebanon, Lithuania, Madagascar, Mali, Malta, Mauritania, Mauritius, Moldavia, Mongolia, Morocco, Mozambique, Namibia, Niedersachsen/Germany, Niger, Nigeria, Nordrhein-Westfalen/Germany, Portugal, Rheinland-Pfalz/Germany, Romania, Saarland/Germany, Serbia, Slovakia, Sri Lanka, Syria, Togo, Tucuman/Argentina, Zaire, Yemen).
10. **THE CONFIRMATION OF THE ELECTION OF REPRESENTATIVES** (Austria, Baden-Wuerttemberg/Germany, Bavaria/Germany, Berlin/Germany, Bulgaria, Chile, France, Georgia, Germany, Greece, Hamburg/Germany, Kazakhstan, Mongolia, Niedersachsen/Germany, Nordrhein-Westfalen/Germany, **Palestine**, Saarland/Germany, Slovakia, Slovenia, Ukraine).
11. DISMISSAL OF SOME REPRESENTATIVES (Montenegro).
12. THE PROTECTION OF HUMAN RIGHTS (constitutional complaints and similar constitutional remedies):
 - a. **HUMAN RIGHTS PROTECTION** (Adigea/Russia, Albania, Andorra, Austria (partially), Azerbaidjan, Bavarian/Germany, Bashkiria/Russia, Benin, Berlin/Germany, Brazil, Bremen/Germany, Burundi, Buryatia/Russia, Cape Verde, Colombia, Congo, Croatia, the Czech Republic, Cyprus, Dagestan/Russia, Djibouti, Ecuador, El Salvador, Equatorial Guinea, the FYROM, Georgia, Germany, Guatemala, Hessen/Germany, Honduras, Hungary, Israel, the Kabardino-Balkar Republic/Russia, Karelia/Russia, Koma/Russia, Kyrgyzstan, Liechtenstein, Montenegro-only in administrative matters, Mali, Malta, Mauritius, Mongolia, Nicaragua, **Palestine**, Panama, Papua New Guinea, Poland, Russia, Saarland/Germany, Senegal, Slovakia, Slovenia, South Africa, South Korea, Sudan, Spain, Sri Lanka, Switzerland, Syria, Taiwan, Tucuman/Argentina, Ukraine, Uzbekistan);
 - b. CONSTITUTIONAL COMPLAINTS REQUESTED BY COMMUNES (Baden-Wuerttemberg/Germany, the Czech Republic, Germany, Nordrhein-Westfalen/Germany);
 - c. CITIZENS' LEGISLATIVE INITIATIVES (Spain, Saarland/Germany);
 - d. NATIONALISATION (Rheinland-Pfalz/Germany, Saarland/Germany).
13. **CAPACITY TO HOLD THE OFFICE:**
 - a. **CONCERNING THE HEAD OF STATE** (Adigea/Russia, Algeria, Armenia, Azerbaidjan, Bashkiria/Russia, Bulgaria, Burundi, the Central African Republic, Croatia, Cyprus,

France, Kazakhstan, Kyrgyzstan, Lithuania, Mauritania, Moldavia, Mozambique, **Palestine**, Poland, Portugal, Romania, Yakutia/Russia);

- b. **CONCERNING OTHER STATE REPRESENTATIVES** (Bulgaria, Cyprus, France, **Palestine**, Russia, Yakutia/Russia);
- c. Accepting the oath of the Head of State upon assuming office (Burundi).

14. **IMPEACHMENT:**

- a. **CONCERNING THE HEAD OF STATE/OR A MEMBER STATE OF THE FEDERATION** (Adigea/Russia, Albania, Algeria, Armenia, Austria, Azerbaidjan, Bashkiria/Russia, Bolivia, Bulgaria, Buryatia/Russia, Chile, Colombia, Croatia, the Czech Republic, Dagestan/Russia, Eritrea, the FYROM, Georgia, Germany, Hungary, Irkutsk Oblast/Russia, Ireland, Italy, the Ivory Coast, Karelia/Russia, Kazakhstan, Koma/Russia, Lithuania, Madagascar, Mongolia, Montenegro, Namibia, **Palestine**, Russia, Rwanda, Slovakia, Slovenia, Tatarstan/Russia, Turkey, Ukraine, Yakutia/Russia);
 - b. **OTHER STATE REPRESENTATIVES** (Austria, Baden-Wuerttemberg/Germany, Bavaria/Germany, Bolivia, Bremen/Germany, Bulgaria, Comoros, Dagestan/Russia, Georgia, Italy, South Korea, Karelia/Russia, Koma/Russia, Lithuania, Mongolia, Niedersachsen/Germany, Nordrhein-Westfalen/Germany, **Palestine**, Rheinland-Pfalz/Germany, Saarland/Germany, Slovenia, Taiwan, Tucuman/Argentina, Turkey, Ukraine, United Arab Emirates).
15. **SPECIAL POWERS** (violations of international law, decisions relating to the appointment of constitutional court judges and their immunity, opinions relating to the declaration of martial law, the implementation of decisions issued by international courts, proposals for the amendment of the *Constitution*, consultative functions, etc.) (Afghanistan, Algeria, Armenia, Austria, Berlin/Germany (membership in the *Richterwahlausschuss*); Bulgaria, Burundi, Cambodia, Chad, Cuba, the Czech Republic, Cyprus, Egypt, France, Germany, Hamburg/Germany (Representatives Rights), the Ivory Coast, Mauritania, Moldavia, Russia, Spain, Sri Lanka, Togo, United Arab Emirates (crimes directly affecting the interests of the federation etc.), Uzbekistan (concerning the dissolution of the Parliament, or the approval of a Head's of State decision), **Palestine (presentation of property of deputies, ministries, judges and the president of the state; the temporary presidency of the parliament exercised by the president of the Supreme Constitutional Court, the temporary performance of presidency of the state in case of his/her impeachment)**)).

XVII **OTHER TASKS WHICH THE COURT IS CHARGED WITH BY THE CONSTITUTION OR STATUTE** (Adigea/Russia, Azerbaidjan, Baden-Wuerttemberg/Germany, Bashkiria/Russia, Bavaria/Germany, Berlin/Germany, the Central African Republic, Chile, Croatia, Dagestan/Russia, Ecuador, the FYROM, Georgia, Germany, Guatemala, Hamburg/Germany, Hessen/Germany, Koma/Russia, Montenegro, Nicaragua, Niedersachsen/Germany, Nordrhein-Westfalen/Germany, **Palestine**, Portugal, Rheinland-Pfalz/Germany, Slovenia, South Africa, Spain, Tajikistan, Tuba/Russia, Turkey, Ukraine, United Arab Emirates, Uzbekistan).

6. LEGAL BASIS

The Constitution of the State of Palestine, the version of 2003

Supreme Constitutional Court

Article (181)

A Constitutional Court shall be established by virtue of the Constitution to exercise its jurisdiction independently in order to preserve the legality of the work of state institutions. It

shall be composed of nine judges appointed by the head of state and nominated by the council of ministers, and approved by the House of Representatives. The Court shall set its internal regulation to operational procedures. The judges shall be elected for one term of nine years that shall not be renewed or extended directly.

Article (182)

The judges of the Constitutional Court shall elect one of them as a president for the court for a three year term. The president of the Court and the judges in the Constitutional Court swear the legal oath before the president of the state, the speaker of the House of Representatives and the president of the Supreme Judicial Council at the same time before they start their duties.

Article (183)

A judge on the Constitutional Court may not assume any other public employment or conduct any commercial, political or partisan activities. He must resign from party membership before taking the legal oath.

Article (184)

Membership of a judge in the Constitutional Court shall terminate:

- At the end of the judge's term as stated in the Constitution;
- By voluntary resignation;
- By loss of one of the preconditions of membership; or
- By being judicially convicted of a criminal offense.

A successor shall be appointed within one month of the position becoming vacant.

Article (185)

The Constitutional Court shall examine the constitutionality of the following matters, pursuant to a request from the president of the state, or the Prime Minister, or the speaker of the House of Representatives, or ten members of the House of Representatives, or from the courts, the public

prosecutor, or anyone whose constitutional rights have been violated:

- The constitutionality of laws before they are promulgated, whenever requested by the president

of the state provided the request was submitted within 30 days of referring to the head of state for

ratification and promulgation;

- Deciding disputes related to the constitutionality of laws, ordinances, regulations, measures and

decisions issued by the president or the council of ministers which have the force of law;

- Interpretation of constitutional texts when a dispute arises over the rights, duties and competencies of the three branches, and in case of a jurisdictional dispute between the head of state and the prime minister;

- Deciding problems that arise concerning the constitutionality of programs and activities of political parties and associations and the procedures of their dissolution and suspension and their

conformity with the Constitution;

- The constitutionality of signing treaties and the procedures of their implementation, and nullification of or some of its articles if it contradicts with the Constitution or an international treaty; and

- Any other jurisdictions assigned to it by the Constitution.

Article (186)

The Constitutional Court shall render void an unconstitutional law, regulation, ordinance or procedure, or end its effectiveness, as the case may be, and the conditions specified in governing its operation.

Article (187)

Judicial decisions of the Constitutional Court shall be final and may not be appealed in any manner and binding on all government authorities and natural and legal persons.

7. THE HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS PROTECTION BEFORE THE CONSTITUTIONAL COURT

In continuation, there are some ideas how such subsidiary legal remedies for the human rights and fundamental freedoms protection have been introducing before bodies exercising constitutional/judicial review in particular national systems:

7.1 The Individual as an Applicant before the Constitutional Court

Proceedings before the Constitutional Court have the nature of proposed proceedings (*juridiccion voluntaria*). In principle, the Constitutional Court cannot itself initiate proceedings; as a rule, the proceedings before the Constitutional Court are based on (restricted to) the corresponding application lodged by a special, duly qualified (privileged) constitutional institution (the so-called legitimate petitioners).

The initiation of constitutional review proceedings on the initiative of the Constitutional Court (*ex officio*) is quite rare. It may most often be traced to some of the constitutional review systems of Eastern Europe; further, it is partially preserved in Croatia and in Slovenia⁵, elsewhere *ex officio* proceedings are not as frequent. The Austrian Constitutional Court, for example, may on its own initiative begin proceedings of the constitutional review of a statute or a regulation only if it refers to a prejudicial question in some proceeding before the respective Constitutional Court. All the above cases may be referred to as objective forms of constitutional review.

On the other hand, some constitutional review systems also allow for a private individual's access to the Constitutional Court (concerning abstract as well as concrete review, based on a constitutional complaint, or on a popular complaint (*actio popularis*) or on other forms of constitutional rights' protection. This involves the so-called subjective constitutional review, the violation of individual rights and the protection of individual rights against the State (in particular against the legislature). In the countries with a diffuse constitutional review and in some countries with a concentrated constitutional review, the individual citizen is offered the possibility of requesting the constitutional review of statutes, administrative measures or judgments in special proceedings. Only after the complaint has been lodged with the Constitutional Court do proceedings begin. Even then, as a rule, the complainant may withdraw their complaint in order to thereby terminate the respective proceedings.

The individual's standing as complainant before the Constitutional Court has been influenced by extensive interpretation of provisions relating to the constitutional complaint, as well as by ever more extensive interpretation of provisions relating to concrete review⁶. In some systems the individual's access to constitutional courts has become so widespread that it already threatens the functional capacity of the Constitutional Court⁷. Therefore, the

⁵ Para. 2 of Article 15 of the *Croatian Constitutional Court Act* or in Article 39, Article 58 and Para. 4 of Article 61 of the *Slovenian Constitutional Court Act*.

⁶ Greece, Italy, Switzerland, the USA.

⁷ Germany.

legislature is trying to find some way for constitutional courts to eliminate less important or hopeless proceedings (e.g. the restriction of abstract reviews by standing requirements). All these proceedings envisage the condition that the complainant must be affected by a certain measure taken by the public authority. With a growth in the number of complaints, efficiency decreases. Nevertheless, citizens should have many opportunities to apply for the protection of their constitutional rights.⁸

7.2 Bodies Empowered for Human Rights Protection and the Forms of such Proceedings

The petition of an affected individual whose constitutional rights are claimed to have been violated is generally the basis for appropriate proceedings of protection in which the protection of rights by the Constitutional Court is only one of a number of legal remedies for protection. Even the bodies intended to provide protection are different, depending on the specific system.

1. Basic rights may be protected in ordinary Court proceedings.

- a) Some legal systems provide protection of rights predominantly in proceedings before ordinary courts (general courts); for the most part these are countries which have also adopted the so-called diffuse or American model of judicial review⁹.

The following are specific forms of the protection of rights by ordinary courts:

- b) The *Habeas corpus* proceedings, i.e. the protection against unjustified deprivation of liberty; an appropriate application is lodged with an ordinary court having such jurisdiction. Such proceedings are characterised by speed, simplicity and openness.¹⁰
- c) *Habeas data*, which is a sub-form of *habeus corpus* and was introduced in Brazil by the *Constitution of 1988*. It is a constitutional guarantee of a personal decision about information, in essence the protection of personal data.
- d) Further proceedings are recognised mainly by countries which have adopted the American model of judicial review, and include the following:¹¹
 - *mandamus*, whereby it is possible to annul a mistake of a lower court by order of a higher court;
 - *prohibition*, which prevents a higher court from usurping the jurisdiction of a lower court;
 - *certiorari*, which involves the right of a higher court to resolve a case from the jurisdiction of a lower court;
 - *quo-warranto*, which prevents a specific person from performing a function of a public nature which they have usurped.

⁸ France is a specific exception among these systems, as private individuals have no access to the Constitutional Council, except with reference to elections. In France, the protection of individual rights is, however, the responsibility of the National Council acting on the basis of a complaint against administrative acts.

⁹ Australia, Barbados, Denmark, Finland, Great Britain, Greece, Guyana, Iceland, Ireland, Jamaica, Japan, the Netherlands, Norway, Sweden, Trinidad and Tobago, and the USA.

¹⁰ *Habeas corpus* is mainly used in Argentina (as well as in the following Argentinean provinces: Chaco, Neuquen and Formosa); Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, the USA, and in Venezuela; in Africa: Botswana, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Sierra Leone, Swazi, Tanzania, Uganda, Zambia and Zimbabwe; in Asia: Bangladesh, Hong Kong, India, Indonesia, Malaysia, Nepal, Pakistan, the Philippines, Singapore, Sri Lanka, and Taiwan.

¹¹ the USA; in Africa: Botswana, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Sierra Leone, Swazi, Tanzania, Uganda, Zambia, Zimbabwe; in Asia: Bangladesh, India, Nepal, the Philippines, Sri Lanka.

- *Respondeat superior*, which is a compensation claim by an individual against the State¹².
2. A specific form of the protection of rights which is reminiscent of the constitutional complaint, is the so-called *amparo*. This is a universal and a traditional form of human rights' protection in the Hispanophone legal system: the protection of an individual against violations of constitutional rights by government acts of all categories. In the main, the Supreme Courts of the State in question are responsible for this form of protection. The aim of such proceedings is to restore the violated right to the individual prior to its violation. It is also a characteristically accelerated proceedings. Mexico is the classic *amparo* country. It is followed by many Central and South American countries¹³ as well as by the Seychelles.
 3. Subsidiary *amparo* is still more similar to the constitutional complaint. This is a particular *sub-species* of *amparo*, in that the proceedings takes place before the Constitutional Court¹⁴. This form of protection is also called *accion de tutela*. Colombian *accion de tutela* is comparable to the constitutional complaint. It was introduced by the *Colombian Constitution of 1991*. It is characterised by the fact that the circle of protected constitutional rights is explicitly defined. It is possible to annul legal or administrative acts (in addition to the popular complaint (*actio popularis*) and proceedings of *habeas corpus* in Colombia).
 4. Brazil introduced a number of specific legal remedies for the protection of human rights in the *Constitution of 1988*, including:
 - *mandado de seguranca*, which is a wider form of protection, for which the Supreme Court is competent, for the protection of rights not covered by *habeas corpus*;
 - *mandado de injuncao*, which is a special individual complaint for a case involving the negligence of the legislature.
 5. Chile introduced a special modified version of *amparo*, the so-called *recurso de proteccion* in the *Constitution of 1980*.
 6. A popular complaint (*actio popularis*) may, equally, be lodged by an individual, generally without restrictions¹⁵. It is a special, individual legal remedy for the judicial protection of rights, although intended for the protection of fundamental rights in the public interest (while a constitutional complaint is lodged in the interest of the individual). A popular complaint is normally directed against a general act (usually a statute) which is considered to have violated a constitutional right.¹⁶ The Constitutional Court is generally the competent body for reaching a decision which deals with the disputed act in the sense of an abstract review of rules. The popular complaint is less common in Europe¹⁷. In Israel the popular complaint is common in cases arising within Israel proper, the right to standing is decided mostly by the Court's willingness to grant it. It is most extensive in

¹² The USA, and on the American model, also Taiwan.

¹³ Argentina, Bolivia, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, Uruguay, Venezuela.

¹⁴ Colombia, Spain.

¹⁵ The exception is Slovenia, where it is restricted by a demonstration of standing by the complainant.

¹⁶ Kelsen considers the popular complaint (*actio popularis*) as the strongest guarantee, however he does not recommend such solution because of the possible abuse of the right to initiate a dispute as well as because of the risk of the unbearable burdening of the Constitutional Court by such complaints.

¹⁷ Bavaria - although in other German provinces and on a federal level there is no popular complaint, Croatia, partly the Czech Republic, the FYROM - Macedonia, Hungary, Liechtenstein, Malta, Montenegro, Serbia, Slovenia.

Central and South America¹⁸ Argentina is an interesting example where there is no popular complaint (*actio popularis*) on a federal level, but individual provinces have introduced it: Buenos Aires, Chaco, Entre Rios, La Rioja, Nequen, Rio Negro and Santiago del Estero.. The popular complaint is a relatively common approach in Africa¹⁹, while in Asia, the popular complaint is only recognised in Cambodia, in Japan, and only in electoral matters (as a *peoples' action* or *objective action*) as well as in Iran (a complaint before the Court of Administrative Justice).

7. A specific group of systems of constitutional law guarantees the individual only indirect protection, such that the individual does not have direct access to the Constitutional Court or other body of constitutional review. These are systems that consider the protection of the rights of the individual to be satisfied through:
- an abstract review of rules²⁰; or
 - a specific (concrete) review of rules²¹; or
 - a preventive abstract review of rules²².

7.3 The Constitutional Complaint and its Extent in the World

A constitutional complaint is a specific subsidiary legal remedy against the violation of constitutional rights, primarily by individual acts of government bodies which enables a subject who believes that their rights have been affected to have their case heard and a decision issued by a Court authorised to provide a constitutional review of disputed acts. Generally, the indictment refers to individual acts (all administrative and judicial acts), in contrast to the popular complaint (*actio popularis*), although it may also indirectly²³ or even directly²⁴ refer to a statute.

Is constitutional appeal a right? The Slovenian Constitutional Court has taken the view that it is an institute of judicial proceedings, or a special legal remedy²⁵.

The constitutional complaint is not an entirely new institute; its forerunner may be found in the Aragon law of the 13th to 16th Century²⁶; and in Germany from the 15th Century onwards²⁷; while Switzerland introduced a special constitutional complaint²⁸ in the *Constitution of 1874* and in the *Statutes of 1874 and 1893*.

¹⁸ Argentina, Brazil, Colombia, Costa Rica, El Salvador, Panama, Paraguay, Peru, Venezuela.

¹⁹ Burundi, the Central African Republic, Chad, Congo, Djibuti, Niger, Seychelles, Sierra Leone-according to the 1991 Constitution, South Africa and Uganda.

²⁰ Belarus, Belgium, Bulgaria, Cambodia, Italy.

²¹ Bosnia, Bulgaria, Estonia, Italy, Kazahstan, Lithuania, Yakutia.

²² France.

²³ Slovenia, Spain.

²⁴ Germany.

²⁵ Ruling No. U-I-71/94 of 6 October 1994, OdlUS III, 109.

²⁶ In the form of *recurso de agravios, firme de derecho, manifestacion de personas*.

²⁷ Incorporated in the institution *Reichskammergericht* of 1495, envisaged in the famous constitutional text, *Paulskirchenverfassung*, of 1849, and in Bavaria it was provided for in the *Constitutions of 1808, 1818, 1919 and 1946*.

²⁸ *Staatliche Verfassungsbeschwerde*.

The constitutional complaint is very common in systems of constitutional/judicial review. It is most widespread in Europe²⁹. In Germany, the constitutional complaint appears on the federal and on provincial levels.³⁰

In addition to Europe, some Asian systems recognise a constitutional complaint³¹. It should also be noted that other Arabian countries, if they recognise judicial review at all, have in the main adopted the French system of the preventive review of rules following the model of the French Constitutional Council of 1958, which does not recognise the right of the individual to direct access to specific constitutional/judicial review bodies. In Africa some countries recognise the constitutional complaint³². The only example of constitutional complaint in Central and South America is the Brazilian *mandado de injuncao*, i.e. an individual complaint in case of negligence by the legislature (under the jurisdiction of the Brazilian Supreme Court) unless we also count the Colombian *accion de tutela* (the jurisdiction of the Constitutional Court), usually considered to be a subsidiary *amparo*.

The particularity of individual systems is that they recognise a cumulation of both forms, the popular and the constitutional complaint³³. The two forms may compete in their functions. The rationale for both forms is the protection of constitutional rights: the popular complaint (*actio popularis*) in public and the constitutional complaint in the private interest. In both cases the plaintiff is an individual. As a rule, the subject disputed is different: the popular complaint (*actio popularis*) refers to general acts and constitutional complaints refer to individual acts³⁴. The standing of the plaintiff or that the remedy might have a personal effect upon the plaintiff is a precondition for a constitutional complaint. Although it should be possible to exclude the standing of the appellant as a precondition for the popular complaint (*actio popularis*), individual systems do require it³⁵, such that for both the constitutional and the popular complaint (*actio popularis*), the standing or the personal effect on an individual works as a corrective with the aim to prevent the abuse and overburdening of the Constitutional Court or other constitutional/judicial review body. In both cases the same aim may be pursued through the introduction of a filing fee. It is, however, characteristic that in practice the number of constitutional complaints is increasing everywhere. Therefore, many constitutional courts have adapted the organization of their work following this trend either in the form of specialised individual chambers for constitutional complaints³⁶ or by narrower

²⁹ Albania, Andorra, Austria, Croatia, the Czech Republic, Cyprus, Serbia, the FYROM - Macedonia, Germany, Liechtenstein (1992), Malta, Montenegro, Poland, Portugal, Russia, Slovakia, Slovenia, Spain, Switzerland-Supreme Court, Ukraine, Latvia.

³⁰ The federal constitutional complaint is the responsibility of the Federal Constitutional Court, the provincial constitutional complaint is the responsibility of certain Provincial Constitutional Courts: Bavaria, Berlin, Hessen and Saarland.

³¹ Azerbaijan (under the jurisdiction of the Constitutional Court), Baskiria (under the jurisdiction of the Constitutional Court), Georgia (under the jurisdiction of the Constitutional Court), Kyrgyzia (under the jurisdiction of the Constitutional Court), Mongolia (under the jurisdiction of the Constitutional Court since the *Constitution of 1992*), Papua-New Guinea (under the jurisdiction of the Supreme Court), South Korea (under the jurisdiction of the Constitutional Court since the *Constitution of 1987*), Taiwan (under the jurisdiction of the Supreme Court), Syria (under the jurisdiction of the Constitutional Court), partially in Uzbekistan (under the jurisdiction of the Constitutional Court); the Constitutional Courts of Member states of the Russian Federation (Adigea, Buryatia, Dagestan, the Kabardino-Balkar Republic, Karelia, Koma).

³² Benin (Constitutional Court), Cape Verde (the Supreme Court of Justice), Mauritius (the Supreme Court), Senegal (the Constitutional Council) and probably in Sudan (the Supreme Court).

³³ Bavaria, Brazil, Colombia, Croatia, partially the Czech Republic, Serbia, the FYROM - Macedonia, Liechtenstein, Malta, Montenegro, Slovenia.

³⁴ Except for the possibility of indirectly impugning a statute in Serbia, Montenegro, Slovenia and Spain, and the direct impugning of a statute in Germany.

³⁵ the FYROM - Macedonia, Slovenia.

³⁶ e.g. the German Federal Constitutional Court and the Spanish Constitutional Court.

units of the Constitutional Court (chambers, sub-chambers)³⁷ issuing decisions on constitutional complaints .

7.4 The Fundamentals of the Constitutional Complaint

The following are the elements of the system of the constitutional complaint:

- the preliminary selection of complaints (the integration of filters into proceedings). This is most highly developed in the German system with the intent to sift out potentially unsuccessful complaints, and as such the space for manoeuvre of the Constitutional Court in rejecting a frivolous complaint is extended. This, in fact, involves the narrowing of the constitutional complaint as a legal remedy in principle open to everybody. One general problem of constitutional courts is how to separate the wheat from the chaff and at the same time secure the efficient protection of human rights in a democratic system. In addition, in certain systems the proposals for introducing the constitutional complaint are recent; some tend to introduce prior selection systems; on the other hand, certain systems tend towards the abolition of this legal institution;
- protection through the constitutional complaint generally refers to constitutional rights and freedoms, and the circle of rights protected by the constitutional complaint is less specifically defined in individual systems (e.g. Slovenia, Croatia, Serbia and Montenegro, where "all" constitutionally guaranteed fundamental rights are supposed to be protected), while other systems mostly define the (narrow) the circle of protected constitutional rights.³⁸ Special forms of constitutional complaint may also protect special categories of rights³⁹;
- as a rule, acts disputed by the constitutional complaint refer to individual acts, with some exceptions⁴⁰;
- those entitled to lodge a constitutional complaint are generally individuals but in Austria, Germany, Spain, Switzerland, Serbia and Montenegro, legal entities explicitly may do so also, while in the Croatian system legal entities are explicitly excluded as a potential appellant; in some systems, the complaint may be lodged by the Ombudsman (Spain, Slovenia, Serbia) or by the public prosecutor (Spain, Portugal).
- the standing, or the personal effect the remedy might have upon the plaintiff is a mandatory element, although in most systems the concept of standing is fairly loosely defined;
- the prior exhaustion of legal remedies is an essential precondition, but with exceptions when the Constitutional Court may deal with a case irrespective of the fulfillment of this condition (Germany, Slovenia, Switzerland);

³⁷ e.g. in the Czech Republic, Georgia and Slovenia.

³⁸ See also Klucka, J., *Suitable Rights for Constitutional Complaints*, Report on the Workshop on the "Functioning of the Constitutional Court of the Republic of Latvia", Riga, Latvia, 3-4 July 1997, Offprint.

³⁹ In Germany, Austria, Slovakia, Liechtenstein, Switzerland, Estonia, Albania, Hungary, Slovenia and in the Czech Republic municipalities are entitled, in order to protect self-government, to file a "**communal**" constitutional complaint (Germany recognises the "communal" constitutional complaint on a federal level and on a provincial level in the provinces of Wuerttemberg and North Westphalia). The German system also recognises a special constitutional complaint by an individual in relation to constitutional conditions for the nationalisation of land (*Sozialisierung*) in the province of Rheinland-Pfalz. A special form of constitutional complaint exists in Spain: there, the institute of the citizens' legislative initiative is also protected by constitutional complaint.

⁴⁰ In Switzerland and Austria a constitutional complaint can impugn only an administrative act, while in Germany, it can impugn acts of all levels (including a statute); in Spain, Slovenia, Serbia and Montenegro a statute may also be an indirect subject of a constitutional complaint; legislative negligence may be directly impugned by a constitutional complaint in Brazil, and also in the practice of the German Federal Constitutional Court and the Bavarian Constitutional Court.

- the time limit for lodging an application ranges from 20 days to three months with an average of one month from the day of receipt or delivery of the final, legally binding (individual) judgment or decision or act of the State administration;
- the contents of applications are prescribed in detail in a majority of systems: in written form, sometimes with the language explicitly stated (Germany, Austria), along with the particular country, the disputed act, and a definition of the violation of the relevant constitutional right, *etc.*;
- a majority of systems (but not the systems of Middle and Eastern Europe) envisage the issuing of a temporary restraining order (injunction) or ruling (of the Constitutional Court) *i.e.* an order temporarily suspending the implementation of the disputed act until the adoption of a final decision;
- in some systems the payment of the costs of the proceedings is explicitly foreseen in cases of frivolous applications (Germany, Austria, Portugal, Spain, Switzerland);
- the effects of the decision: the Constitutional Court is limited to decide on constitutional matters, on the violation of constitutional rights. However, if a violation is found, a decision may have a cassatory effect which is, as a rule, *inter partes* (and *erga omnes* in a case in which the subject-matter of the decision is a legislative act). The Constitutional Court here retains the position of the highest judicial authority. These Courts can be referred to as the "high ranking courts of cassation", because Constitutional Courts reviewing the decisions of ordinary courts act in fact as the third and the fourth instance. Although the Constitutional Court is not a court of full jurisdiction, in specific cases it is the only competent court to judge whether a ordinary court has violated the constitutional rights of the plaintiff. It involves the review of micro-constitutionality, perhaps the review of the implementation of a law, which, however, is a deviation from the original function of the Constitutional Court. Constitutional complaint cases raise sensitive questions on defining constitutional limits. In any case, the Constitutional Court in its activities is limited strictly to questions of constitutional law. The Slovenian system is specific in that the Constitutional Court may, under specified conditions, make a final decision on constitutional rights or fundamental freedoms themselves (Para. 1 of Article 60 of the *Slovenian Constitutional Court Act*, Official Gazette RS, No. 15/94).

The protection of fundamental rights and freedoms is an important function of a majority of constitutional courts, irrespective of whether they perform the function of constitutional judgment in the negative or positive sense. Whenever a Constitutional Court has the function of a "negative legislature", constitutional review is strongest precisely in the field of fundamental rights. Even in other fields (the concretisation of State-organisational and economic constitutional principles) in which the legislature has the primary role even in principle, constitutional courts insure that fundamental rights are protected. Precisely in the field of the protection of rights, the Constitutional Court also has the function of a substitute "Constitution-maker" (the "positive function"), which means that in specific cases constitutional courts even supplement constitutional provisions.

7.5 Various International Forms of the Individual Complaint

1. The concept of "constitutional complaint" is usually connected with the national constitutional protection of fundamental rights. However, certain international documents also envisage specific legal remedies for the protection of fundamental rights and freedoms in the form of a complaint⁴¹.

2. The *European Convention for the Protection of Human Rights and Fundamental Freedoms* of 4 November 1950 gives individuals the right to the so-called individual complaint⁴². An individual may lodge a complaint with the European Court of Human Rights following an alleged violation of rights guaranteed by the *Convention*. It is an explicit international legal remedy comparable to a national constitutional complaint. It fulfils the function of an individual complaint where national law does not guarantee any appropriate protection of rights. Individual complaints are a subsidiary legal remedy (preconditioned on the exhaustion of national legal remedies), it is not a popular complaint (*actio popularis*) and it does not have retroactive or cassatory effect. It differs from the constitutional complaint in the way that, contrary to the latter, it leads merely to a finding (*declaratory relief*).

The position of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* in national law specifies whether an individual may refer to the *Convention* or even base a national constitutional complaint thereon. It further narrows the space for manoeuvre of the Constitutional Court itself in the interpretation of the provisions of the *Convention*. It actually connects the national Constitutional Court to European bodies in cases in which a judicial final national decision becomes the subject of an individual complaint to a European forum.⁴³ - it sometimes does not have a direct internal state effect: e.g. Great Britain, Iceland, Ireland, Norway, and Sweden. Some countries of Anglophone Africa are an exception regarding the latter group of systems (e.g. Kenya, Nigeria, Tanzania, and Uganda), as they expressly adopted the system of the protection of rights from the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (e.g. Nigeria in the Constitution of 1960), influenced by the extension clause to the *European Convention* in terms of Article 63, which Great Britain signed on 23 October 1953, whereby only the *Convention* itself and *Protocol 1* apply in these regions.

The institution of the constitutional complaint and the European complaint and the function of European bodies (above all the European Court of Human Rights) raises the question of national and supranational (final) instance. The national (final) instance would entail that the Constitutional Court as the highest body of judicial authority in a particular country for the

⁴¹ e.g. Article 2 of the *Facultative Protocol of the General Assembly of the UN to the International Pact on Citizenship and Political Rights* of 19 December 1966 (Resolution No. 2000 A (XXI)) since the Council for human rights must accept and debate reports from individual persons who claim that they are the victims of the violation of any right defined in this Pact. The right to file an individual complaint is contained in the following: Article 23 of the *Declaration on Fundamental Rights and Freedoms of the European Parliament* of 12 April 1989; section 18(2) of the *Document of the Moscow Meeting of CSCE* of 3 October 1991; Article 25 of the *American Convention on Human Rights* of 22 November 1969; Article 28 of the *Contract on the European Community* of 1 February 1992; Charter of 1979 of the *Comision y la Corte Interamericanas de los Derechos Humanos*; Statute of 1980 of the *Inter-American Court on Human Rights*; the *American Convention on Human Rights* of July 18, 1978 (Article 44); Articles 55 through 59 of the *African (Banjul) Charter on Human and People's Rights* of June 27, 1981.

⁴² Article 34 of the *Convention*.

⁴³ The *European Convention for the Protection of Human Rights and Fundamental Freedoms*:

- has constitutional status in Austria;
- is the basis for filing an internal national constitutional complaint in Switzerland, where it has a status comparable to the constitutional level;

In both cases it is permissible to base a national constitutional complaint on the provisions in the *Convention*.

- it is sometimes higher than ordinary law (Belgium, Cyprus, France, Luxembourg, Malta, The Netherlands, Portugal, Spain);
- it is sometimes ranked as Common Law: Denmark, which introduced the national use of the *Convention* by special *Statute* on 1 July 1992, Germany, Finland, Italy, Liechtenstein, San Marino, Turkey;

protection of constitutionality and legality and human rights and fundamental freedoms⁴⁴ would be limited to the investigation of constitutional-legal questions only. The review of the correct findings of the actual circumstances and the use of simple rules of evidence are matters for the ordinary courts. The subsidiary nature of the constitutional complaint lies in the division of responsibility between the Constitutional and the ordinary courts. The gradation of instance could be established as ascending from the national Supreme Court through the national Constitutional Court to the European Court. In fact, instance is not the essence of this gradation although it is essential in the role of supplementing, in that the national constitutional complaint supplements national judicial protection while the supra-national European complaint supplements the national constitutional complaint.

7.6 The Core of the Judicial Protection of Human Rights

The core of the judicial protection of human rights lies in the constitutional complaint, since:

- Human rights are attributes of any democratic legal system;
- The constitutional complaint is (only) one of the legal remedies for protecting constitutional rights;
- The constitutional complaint is an important remedy for the protection of human rights and can be considered a human right itself⁴⁵; the *Constitution* guarantees the constitutional complaint, in the same way as the rights it protects; at the same time, the constitutional complaint is limited by statute to the operational capacity of the Constitutional Court;
- Its effectiveness is disputed, since successful constitutional complaints are in a clear minority, although that should be no reason for its restriction or abolition. Such a number of unsuccessful constitutional complaints is also very often the result of the great number of the same kind of case filed before Constitutional Courts;

⁴⁴ The status of the Constitutional Court is thus defined in e.g. Para. 1 of Article 1 of the *Constitutional Court Act* of 1994.

⁴⁵ Ruling issued by the Slovenian Constitutional Court No. U-I-71/94 of 6 October 1994.

However, despite the internal contradictory properties of this institution, individuals should still have access to justice or to the judicial protection of their constitutional rights. The very existence of the constitutional complaint ensures a more effective review of violations of constitutional rights on the part of government bodies, especially during the process of transforming the social and legal order.

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