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INTRODUCTION TO THE REPORT OF THE VENICE COMMISSION ON INDIVIDUAL ACCESS TO CONSTITUTIONAL JUSTICE

REPORT

by

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The idea to prepare a study on the individual access

In April 2009, the Permanent Representative of Germany to the Council of Europe, Mr Eberhard Kölsch requested, on behalf of the German Government, an opinion on individual access to constitutional justice. He pointed out that "such a study could be a valuable contribution to the promotion of national remedies for human rights violations and could thereby essentially help to guarantee the long-term effectiveness of the European Court of Human Rights".
The Venice Commission invited Mr Harutyunian, President of the Constitutional Court of Armenia, Ms Nussberger, Professor at the University of Cologne (presently Judge at the ECHR), and myself to act as rapporteurs on this issue.
Why did the German Ambassador ask for this study? If we look at the background of the request it becomes clear that he spoke out for the ECHR. The ECHR has been for more than a decade in a dramatic situation regarding the case-load. The Court in 1999 received 8400 applications, last year, in 2012 not less than 65200!
The number of pending application was 12600 in 1999, and 151600 in 2011! Obviously, the Court has to rationalize the number of the applications, to dismiss the unimportant or unfounded ones as quick as possible. This process leads to a clear anomaly: it is not the vocation for a Court set up to protect human rights to devote most of its time to dismissing inadmissible complaints – as it was stated by the former president of the Court, Mr Jean-Paul Costa[1]. The second anomaly is the uneven distribution of the accumulated backlog. While 37 countries out of the 47 member states of the Council of Europe are effected by 21 % of the pending cases, Russia in itself is challenged by the 22,3% of all applications. nearly 70% of all applications came from six high case-count countries (Russia, Turkey, Italy, Ukraine, Serbia, and Romania).[2] The Court's statistics show that those countries in which such a full constitutional complaint mechanism exists have a lower number of complaints before the Court than others, which do not have such a mechanism.
Thus the idea behind the study was to prove that countries with individual access constitutional justice provide effective remedy within the country and thus lift the overburden from the ECHR.
A serious fact-finding helped the rapporteurs in their work. The liaison officers of the constitutional courts submitted the relevant information on the legislation and court practice of their respective countries. The members and substitute members of the Commission verified the submitted information.
After a series of discussions and improvements the report was adopted by the Commission at its 85th Plenary Session (Venice, 17-18 December 2010). The study was published originally in English, and translated into French, Spanish, Russian, and Arabic.

The structure of the study

The study is structured the following way:
It has an introductory part that deals with general, historical, theoretical questions, and addresses the problems of the respective terminology.
The study consists of four chapters. The first part presents the different types of access, the acts under review in these proceedings, and the protected rights.
The second chapter examines the procedural questions: the conditions for starting the procedures, the method of filtering the petitions, the possibility to join similar cases, the interim measure (the possibility to suspend the implementation), and the discontinuation of the procedure if the petition si withdrawn, finally the time-limits for taking the decision.
The third chapter is focusing on the effects of the decision delivered.

[1] Dialogue between judges, ECHR, Strasbourg, 2008. 127-8.
[2] Source: Analysis of statistics 2012. http//:www.echr.coe.int. 7-8.

In the final chapter two sensitive problems are discussed, namely the delimitation of the jurisdiction between constitutional courts and supreme courts, and the overburdening of the constitutional courts due to the flood of individual complaints.
21 detailed tables are completing the study with detailed comparative presentation of the relevant legislative acts.
The 1st table summarizes and in a very compact form overviews the different types of access in the member states of the Venice Commission. The other tables present the relevant constitutional and legal provisions.
The study uses the comparative method to examine the questions of individual access. The authors consciously chose the genuine comparative method. We did not want to list only the respective solutions of the different member states of the Council of Europe but we delivered a microcomparison of a specific legal institution, namely the individual access to constitutional justice. I recall the warning of the great authorities of comparative law, Konrad Zweigert and Hein Kötz: "... the mere study of foreign law falls short of being comparative law... One can speak of comparative law only if there are specific comparative reflections on the problem to which the work is devoted."[3]
In order to elucidate the general framework of the comparative analysis, a number of preliminary considerations are made at the beginning of the study. This part concerns the historical background and the evolution of constitutional review, as well as the different types of constitutional review (concentrated vs. diffuse, *a priori vs. a posteriori*, abstract vs. concrete) and the different competences of constitutional courts (paragraph 25.) The comparative method of the study takes into generalizes the experiences of the examined countries, and draws conclusions at the end of all chapters. An overall outline of the findings is summed up in the executive summary.
One might say that there is a double tendency in the world. One tendency is that countries and constitutional courts that do not have the competence to adjudicate full constitutional complaints, are seriously taking into consideration to introduce this way of individual access. Countries and constitutional courts that do have that competence are seriously taking into consideration to limit the possibility of the individual access, mostly because of the overburden caused by this competence.
We have to refer, for example, to the overburden of those the constitutional courts that apply the full constitutional complaint as the individual access to the court. As we know, the 97 percent% of the cases before the German Federal Constitutional Court are constitutional complaints. Another example is the Constitutional Court of Slovenia that had 4 000 constitutional complaints a year and asked the legislature to limit the possibility of accessing the court by individual complaints. So this flood of constitutional complaints in individual cases on one side gives the possibility to remedy individual violations of human rights. On the other side the overburden might lead to ineffective functioning of the court that basically does not allow fulfil the genuine function of the court to protect individual rights.

Basic concepts used in the study

Individual access to constitutional justice according the definition means the various different mechanisms that enable violations of individuals' constitutionally guaranteed rights, either separately or jointly with others, to be brought before a constitutional court or equivalent body.
Access mechanisms are either: indirect or direct. Indirect access refers to mechanisms through which individual questions reach the Constitutional Court for adjudication via an intermediary body (e.g. ombudsman or an ordinary court. Direct access refers to the variety of legal means through which an individual can personally petition the Constitutional Court i.e., without the intervention of a third party (para 21.)

[3] Konrad Zweigert and Hein Kötz, Introduction to Comparative Law, Clarendon Press, Oxford, 1998. p. 6.

As regards the models of judicial review, the comparison of diffuse and concentrated review is used. The oldest model of constitutional review is the American one. This is characterised by diffuse, incidental control, which offers direct access to constitutional justice for individual citizens as they can raise issues of constitutionality before the courts. Ordinary courts are entitled to assess the constitutionality of any legal norm or individual act (para 34.).
While he even rejected the idea of introducing rights litigation as such, Hans Kelsen invented an alternative to the diffuse model. In the 1920 Austrian Constitution he developed the concentrated review model. This model met with extraordinary success in countries in transition to democracy. It was, for instance, copied by Germany and Italy after WW II; by Spain and Portugal at the end of the 1970s; and by virtually all Central and Eastern European states, becoming evident mainly after the fall of communism. In a concentrated system a separate court, usually placed outside the ordinary court system, is given the power to review the constitutionality of normative acts (para 35.)

The evaluation of constitutional complaint in the opinions of the Venice Commission

The work of the Venice Commission in this field was obviously not unprecedented, and the examination of individual solutions is continuing. The Commission in its opinions addressed the importance of the constitutional complaint and considered the initiative to introduce the constitutional complaint procedure to be welcomed.
For example, it declared in the case of the Republic of Moldova, that "the possibility of individual complaint would definitely serve better and more effective protection of fundamental rights".[4] In its opinions on the draft constitutional amendments in the regard to the Constitutional Court of Turkey the Venice Commission has outlined generally and in a comparative perspective the role and importance of the individual complaint. It stated that the institutions of the constitutional complaint in Germany or in Spain are the most well-known examples of the constitutional complaint.[5]
The Venice Commission has been in generally and in the present study in favour of the full constitutional complaint, not only because it provides for comprehensive protection of constitutional rights, but also because of the subsidiary nature of the relief provided by the European Court of Human Rights.[6]
As regards the recent reform of constitutional justice in Hungary[7], the Venice Commission appreciated that constitutional complaints both against all legal provisions and court decisions are provided for in order to counterbalance the abolishment of the *actio popularis*.
Other European countries have also established some procedures for the adjudication of constitutional complaint. Recent tendencies in constitutional adjudication can rightly be described as the path from the review of constitutionality of laws to the review of the application of laws. This means a shift from the review of the legislator to the review of the judiciary. So that is the basic change in the history of constitutional courts in the recent decades.
According to the opinions of the Venice Commission the constitutional complaint has the following characteristics to be sound out:
first, it is a legal remedy of subsidiary character after the exhaustion of other legal remedies;
secondly, it can be invoked on account of violation of basic rights and liberties;

[4] CDL-AD(2004)043 Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the Constitutional Court) adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004)
[5] CDL-AD(2011)040 Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011)
[6] The full constitutional complaint is the constitutional complaint in its genuine sense. An individual may lodge subsidiary complaint against any act by the public authorities (administrative and judicial decisions) which violate directly and currently his/her fundamental rights.
[7] CDL-AD(2012)009 Opinion on Act CLI of 2011 on the Constitutional Court of Hungary adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012)

third, it can be invoked against violation either from a law or a statute or an administrative act or a judicial decision forth even in the case of the omission of public authorities;
the fourth element of this notion of constitutional complaint in the Venice Commission opinions is that it can be invoked by any person who pretends to be the victim of the violation of basic rights and liberties.
Finally the Venice Commission observed another review trend. This new trend in different countries is to provide the protection of fundamental rights not only enlisted in the constitution, but also those in international treaties. More and more countries now allow for a constitutional complaint procedure even in cases where rights enlisted in international treaties are violated.
The constitutional complaint is a mixed blessing because of this its double character,: it that has a very important role in the protection of individual rights, but also gives a lot of problems to the constitutional courts that has to be dealt with very cautiously in order to fulfil the original function of the constitutional court.
I have to admit, that regarding constitutional justice in Latin America, the study contains only a very short statement. “The Latin American states most often reflect a strong American influence with diffuse review and a strong Supreme Court (e.g. Brazil, Mexico). Some have opted for a specialised Constitutional Court (e.g. Peru, Chile)” (para 33.). This conference makes an invaluable contribution to deepen our knowledge on the topic.