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LE GREFFIER DE LA COUR D'ARBITRAGE DE BELGIQUE

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1. Introduction

Le grade de « secrétaire général » n'existe pas à la Cour d'arbitrage ni davantage auprès d'une quelconque autre juridiction belge. Il est pourtant bien connu dans le secteur public : le fonctionnaire dirigeant d'un département ministériel est en effet revêtu du grade de secrétaire général.

En Belgique, contrairement à la plupart des autres pays, le fonctionnaire dirigeant des assemblées législatives (Chambre des représentants, Sénat, etc.) porte le titre de greffier, il est vrai avec le rang de secrétaire général. De même, le fonctionnaire dirigeant des administrations provinciales est titulaire du grade de greffier (provincial).

Il convient enfin de constater que la Cour de Justice du Benelux à Bruxelles, la Cour de justice des Communautés européennes à Luxembourg et la Cour européenne des droits de l'homme à Strasbourg sont assistées par un greffier (en chef).

Mais « What is in a name ? »

L'importance de la fonction de greffier/secrétaire général dépend des compétences qui sont liées à cette fonction et plus encore de la manière dont elles sont exercées. Le greffier de la Cour d'arbitrage a une double fonction : d'une part, il exerce des fonctions judiciaires et, d'autre part, des fonctions administratives.

Les fonctions judiciaires, qui découlent de manière tacite ou explicite des dispositions de la loi, sont exercées par le greffier en sa qualité d'officier ministériel, au nom du pouvoir d'Etat qui l'a nommé. A côté des fonctions judiciaires, le greffier exerce également des fonctions administratives en tant que gestionnaire de la Cour. Contrairement à ses fonctions judiciaires, il n'exerce pas la fonction administrative *ex officio* mais bien sous l'autorité de la Cour.

Après l'exposé relatif au statut du greffier de la Cour d'arbitrage de Belgique, les fonctions judiciaires et administratives précitées feront l'objet d'un commentaire plus approfondi.

2. Statut du greffier

2.1. Base juridique du statut

La loi organique relative à la Cour constitutionnelle belge, la loi spéciale du 6 janvier 1989, fixe dans une large mesure le statut du greffier. Le statut pécuniaire et le régime des pensions sont

déterminés dans une loi distincte portant la même date. Enfin, plusieurs articles du Code judiciaire (le Code de la procédure) sont également applicables au greffier.

2.2. Nature et déroulement de la fonction

Le greffier n'est pas un fonctionnaire au sens stricte du terme. Il possède donc un statut propre à sa fonction. Il est admis que le greffier est un fonctionnaire public, revêtu par la loi d'une part de la puissance publique.

2.3. Statut pécuniaire

En Belgique, le statut pécuniaire du greffier de la Cour d'arbitrage est comparable à celui des magistrats supérieurs, des fonctionnaires supérieurs, des officiers supérieurs à l'armée ainsi qu'à celui des professeurs d'université.

2.4. Régime des pensions

Le régime des pensions du greffier est le même que celui des magistrats de l'ordre judiciaire. Ce régime est de tout temps plus favorable que le régime des pensions applicable aux agents de l'Etat, en particulier parce que ces derniers n'atteignent une carrière complète (et, partant, la pension maximum) qu'après quarante-cinq années de service, alors que les magistrats atteignent une carrière complète après trente années de service.

Le greffier est mis à la retraite lorsqu'il atteint l'âge de 65 ans.

2.5. Conditions de nomination

Pour pouvoir être nommé greffier de la Cour d'arbitrage, il convient de satisfaire aux conditions de base suivantes :

1) être âgé de trente ans accomplis;
2) être docteur ou licencié en droit;
3) être lauréat de l'examen donnant accès à la magistrature ou à une fonction de juriste auprès d'un service public;
4) posséder une expérience utile de deux ans au moins;
5) être lauréat de l'examen linguistique français/néerlandais.

2.6. Autorité investie du pouvoir de nomination et procédure de nomination

Le greffier de la Cour d'arbitrage est nommé par arrêté royal délibéré en Conseil des ministres sur une liste de deux candidats présentés par la Cour d'arbitrage.

Il ne peut être procédé aux présentations que quinze jours au moins après la publication de la vacance de la fonction de greffier au *Moniteur belge*. Cette publication pourra avoir lieu au plus tôt trois mois avant la vacance.

Chaque présentation fait également l'objet d'une publication au *Moniteur belge*; la nomination ne peut intervenir au plus tôt que quinze jours après celle-ci.

2.7. Prestation de serment

Le greffier prête serment entre les mains du président de la Cour.

2.8. Statut disciplinaire

Le greffier qui manque à ses devoirs est averti et réprimandé par le président de la Cour et il est suspendu et démis par la Cour.

2.9. Incompatibilités

La fonction de greffier est incompatible avec d'autres fonctions judiciaires, avec l'exercice d'un mandat public conféré par élection, avec toute fonction ou charge publique d'ordre politique ou administratif, avec les charges de notaire et/ou d'huissier de justice, avec la profession d'avocat, avec l'état de militaire et avec la fonction de ministre d'un culte reconnu.

Il peut être dérogé par le Roi, sur avis favorable et motivé de la Cour, à l'alinéa 1er :

1° lorsqu'il s'agit de l'exercice de fonctions de professeur, chargé de cours, maître de conférence ou assistant dans les établissements d'enseignement supérieur, pour autant que ces fonctions ne s'exercent pas pendant plus de cinq heures par semaine ni en plus de deux demi-jours par semaine;

2° lorsqu'il s'agit de l'exercice de fonctions de membre d'un jury d'examen;

3° lorsqu'il s'agit de la participation à une commission, à un conseil ou comité consultatif, pour autant que le nombre de charges ou fonctions rémunérées soit limité à deux et que l'ensemble de leurs rémunérations ne soit pas supérieur au dixième du traitement brut annuel de la fonction principale à la Cour.

3. Tâches judiciaires

3.1. Examen succinct de chaque nouvelle affaire

Avant qu'une nouvelle affaire ne soit inscrite au rôle, le greffier vérifie si la requête peut effectivement être considérée comme un recours en annulation. C'est ainsi que le greffier vérifiera, par exemple, si la requête tend effectivement à l'annulation d'une norme ayant force de loi et si le délai prévu pour attaquer directement une norme n'a pas expiré. Le cas échéant, le greffier n'inscrit pas l'affaire au rôle mais fait savoir à la partie requérante que la requête ne peut être considérée comme un recours en annulation pour les motifs que le greffier précisera dans sa réponse.

Par ce même examen succinct, le greffier vérifie si l'affaire n'entre pas en ligne de compte pour une procédure courte (manifestement irrecevable, manifestement non fondée ou arrêt de réponse immédiate). Il s'agit en l'occurrence d'une procédure préliminaire en vertu de laquelle un arrêt

est très rapidement rendu, éventuellement par une chambre restreinte, sans examiner l'affaire au cours d'une audience.

Dans le cadre de son examen succinct, le greffier peut également proposer à la Cour de joindre l'affaire à une autre affaire ou à d'autres affaires au motif qu'elles sont à ce point connexes qu'il y aurait lieu de statuer à leur égard dans un seul et même arrêt.

Enfin, le greffier peut demander à la juridiction de renvoi ou à la partie requérante des informations complémentaires ou solliciter l'envoi de pièces faisant encore défaut.

3.2. Procédure

Les tâches principales du greffier sont celles qui relèvent de la procédure. Toutes ces tâches sont fixées par la loi. Seul le greffier est compétent pour exécuter ces tâches judiciaires. Il agit en l'occurrence *ex officio* et personnellement. Les responsabilités qu'entraînent ces compétences impliquent une autonomie d'action.

Les principales compétences du greffier dans le domaine de la procédure sont les suivantes :

3.2.1. Inscription des affaires au rôle

Chaque affaire est inscrite au rôle suivant un numéro d'ordre (numéro de rôle) en fonction de son ordre d'arrivée. En principe le greffier est tenu d'inscrire chaque affaire, sauf lorsqu'une lettre/un écrit ne peut être considéré comme une « affaire » (voy. supra). En cas de doute, il se concertera évidemment avec le président.

3.2.2. Notifications

La loi spéciale sur la Cour d'arbitrage prévoit un grand nombre de notifications de pièces de la procédure, comme les actes introductifs d'instance – le recours en annulation ou le jugement ou arrêt posant une question préjudicielle -, les mémoires et mémoires en réponses, les diverses ordonnances, les arrêts interlocutoires et les arrêts définitifs.

3.2.3. Publications

Toutes les nouvelles affaires sont publiées au *Moniteur belge* (le journal officiel) à l'intervention du greffier sous la forme d'un avis qu'il rédige. Cet avis mentionne l'identité de l'auteur et l'objet du recours ou de la question préjudicielle.

Cet avis vise à permettre à toute personne justifiant d'un intérêt dans l'affaire d'introduire un mémoire par lequel cette personne devient partie à l'instance devant la Cour.

De même, tous les arrêts de la Cour sont publiés au *Moniteur belge*, à l'intervention du greffier, les arrêts sur recours en annulation étant publiés intégralement, les arrêts sur question préjudicielle l'étant par extrait.

Tous les arrêts sont, en outre, publiés dans un recueil officiel « Arrêts de la Cour d'arbitrage » et sur le site internet de la Cour (www.arbitrage.be).

3.2.4. Assistance à la Cour

Bien que toutes les tâches du greffier puissent être considérées comme une forme d'« assistance de la Cour », le greffier assiste obligatoirement à toutes les audiences et à certaines autres séances non publiques.

A l'audience, le greffier dresse pour chaque affaire instruite un procès-verbal, qui est signé par le président et le greffier. Un procès-verbal est également établi pour le prononcé d'un arrêt.

3.2.5. Ordonnances et arrêts

En cours de procédure d'une affaire, le greffier établit plusieurs ordonnances prévues par la loi. Une des principales ordonnances est celle qui déclare une affaire en état. Cette ordonnance fixe également la date des plaidoiries.

Le greffier participe également à l'élaboration des arrêts, bien que ce soit principalement là l'œuvre des juges et des référendaires. Son intervention se limite en principe à l'établissement de la partie de l'arrêt portant sur la procédure.

En même temps que le président, le greffier signe toutes les ordonnances et tous les arrêts.

4. Tâches administratives

A côté des « fonctions judiciaires », le greffier exerce un grand nombre de tâches administratives qui lui sont attribuées par la Cour de manière tacite ou explicite. Sur avis du Conseil d'Etat, l'énumération des tâches mentionnées dans l'avant-projet de loi spéciale sur la Cour d'arbitrage n'a pas été reprise dans la loi ultérieure au motif qu'à l'estime du Conseil d'Etat, cette énumération de tâches était superflue et en tout état de cause incomplète.

Les principales tâches administratives sont examinées succinctement ci-après.

4.1. Personnel

Le greffier est le chef du personnel administratif mais pas celui des référendaires, qui relèvent de l'autorité présidentielle.

Le personnel du greffe se trouve sous l'autorité directe du greffier, lequel est évidemment le chef du greffe.

Sur les autres membres du personnel, il exerce plutôt un contrôle en vertu de sa compétence disciplinaire.

Le greffier est responsable de l'administration du personnel, aussi bien pour ce qui concerne les membres de la Cour que les référendaires et le personnel administratif. L'administration du personnel comprend, entre autres, l'administration des salaires, le suivi des divers statuts des juges, des référendaires et du personnel, l'organisation des examens de recrutement, les

recrutements, les promotions, les décorations, les mises à la retraite, les demandes de pension, etc.

4.2. Direction des divers services

Le greffier est chargé de la direction du greffe, de la comptabilité et de l'économat; les autres services sont plutôt placés sous son contrôle puisqu'ils sont dirigés par un chef de service. C'est notamment le cas du service de traduction, du service de documentation, de la bibliothèque, du service informatique, etc.

4.3. Budget et comptes

Comme mentionné ci-dessus, le service « comptabilité » est placé sous la direction du greffier.

Il y a lieu d'établir annuellement un budget détaillé, qui est approuvé par la Cour. C'est sur la base de ce budget qu'une dotation annuelle est demandée au Parlement. Cette dotation doit permettre à la Cour de pourvoir à ses dépenses, aussi bien les dépenses courantes (frais de fonctionnement) que les dépenses de capital (investissements). Il peut arriver qu'en cours d'année, il soit constaté que la dotation demandée sera insuffisante pour pourvoir à toutes les dépenses. Dans un tel cas, il y a lieu de demander une dotation complémentaire au Parlement.

En plus du budget, il y a également lieu d'établir les comptes de l'année écoulée. Il s'agit de comptes détaillés justifiant l'utilisation du budget de l'année précédente. Une fois les comptes approuvés par la Cour, ils sont soumis à l'approbation du Parlement.

4.4. Gestion du bâtiment

Le greffier est également chargé de la gestion du bâtiment. Il s'agit d'un bâtiment qui est la propriété de l'Etat. Tous les travaux de réparation et d'entretien qui incombent au propriétaire sont exécutés par la Régie des bâtiments (organisme d'Etat) sous le contrôle du greffier. Le greffier fera exécuter lui-même tous les travaux qui incombent au locataire.

4.5. Autres tâches (administratives)

Il va sans dire qu'il y a encore toute une série d'autres tâches (administratives) qui relèvent de la compétence du greffier. Comme, par exemple, le contact journalier avec les avocats, les justiciables, les magistrats et les fonctionnaires de divers organismes d'Etat.

5. Conclusion

Comme le fait apparaître la description succincte des principales tâches du greffier, il occupe une place centrale à la Cour d'arbitrage.

Il exerce en totale indépendance ses fonctions judiciaires, qui lui sont confiées par le législateur, cependant qu'il exerce ses fonctions administratives sous l'autorité de la Cour et en étroite concertation avec le président de la Cour.

Le greffier s'efforcera de travailler en bonne intelligence avec le président et avec les juges et il se montrera correct et loyal à l'égard des référendaires et des collaborateurs administratifs en vue d'assurer un bon fonctionnement de la Cour.

En se montrant, en même temps que ses collaborateurs, aimable et serviable vis-à-vis des justiciables, le greffier procurera un « visage humain » à la Cour et donnera ainsi corps à sa tâche principale qui consiste à servir la société.

HEAD OF THE OFFICE AT THE POLISH CONSTITUTIONAL TRIBUNAL AND THE FUNCTIONING OF THE CONSTITUTIONAL TRIBUNAL

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The position of the Head of the Office of the Constitutional Tribunal functions in the Polish constitutional court system since November 1, 2001. This change had the purpose to relieve the President of the Tribunal of the administrative duties, personnel management and the daily supervision over the operation of the support functions assisting the work of the Constitutional Tribunal. The intention was to enable the President, the Vice-President and the Judges of the Tribunal to concentrate more fully on the elaboration of their rulings, without the necessity to be excessively absorbed by administrative and organizational issues.

The Head of the Office is responsible for all of the works of his subordinate institution, reporting to the General Assembly of the Judges of the Tribunal, and to the President of the Constitutional Tribunal.

Pursuant to Article 17 para. 1 of the Act on the Constitutional Tribunal[1] of August 1, 1997, the organisational and administrative conditions of the work of the Tribunal are to be secured by the President of the Tribunal and the Office of the Tribunal subordinate to him.

By adding Paragraph 1a to the above quoted Article, the management of the Office of the Tribunal on behalf of the President has been entrusted to an officer in charge of the Office – the Head of the Office, appointed and dismissed by the General Assembly of the Judges of the Constitutional Tribunal upon the request of the President. The Head of the Office reports to the President, or to the Vice-President of the Tribunal acting for the President in his absence. The President also exercises the formal supervision over his activities.

The functions of the Head of the Office, specified in detail in the Regulations of the Constitutional Tribunal and in the By-Laws of the Office of the Tribunal[2], include the following:

1. Issuing of orders, instructions and decisions, within the scope of functioning of the Office;
2. Representing the Office in external matters, and also with respect to the President and Vice-President of the Constitutional Tribunal, as well as the General Assembly of the Judges of the Constitutional Tribunal

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[1] *Law from 1st of August 1997 on the Constitutional Tribunal, Dz. U. Nr 102 pos. 643, with changes from the year 2000 no. 48 pos. 552, no. 53 pos. 638; from the year 2001 no. 98 pos. 1070.*
[2] *Constituting an annex to the Resolution of the Plenary Meeting of Judges of the Constitutional Tribunal from 4th of February 2002.*

3. Periodically informing the President of the Constitutional Tribunal about the work of the Office and the implementation of its tasks;

3. Annually submitting to the General Assembly of the Judges of the Constitutional Tribunal a report on the operation of the Office;

4. Representing the President of the Constitutional Tribunal in specific matters, each time on the basis of specific authorisation granted by the President.

In order to assure more effective performance of the above functions laid down in the By-Laws, the Head of the Office of the Tribunal may:

1. Authorise the employees managing the organisational units of the Office or holding independent positions to take decisions on his behalf and to represent the Office in specific matters;

2. Appoint committees or advisory bodies for reviewing, considering or elaboration of specific issues, determining their composition, tasks and means of operation.

The Head of the Office of the Tribunal approaches the President with requests to issue orders regulating matters of particular importance for the efficiency and security of the review of cases by the Tribunal, such as the following:

1. Office work activities and the form of keeping the files, document records, time schedules and auxiliary books at the Tribunal, supporting the reviews of cases considered by the Tribunal;
2. The method of keeping records of the implementation of the rulings of the Tribunal;
3. The methods of using and safekeeping of the official stamps of the Tribunal.

The Head of the Office is the superior officer in charge of the staff of the Office of the Constitutional Tribunal and is responsible for their activities. He assures the proper functioning of the Office, and in the case of such needs he submits proposals concerning issues of the organization of the Office. Pursuant to the By-Laws of the Office of the Tribunal, the Office comprises the following units:

1. Secretariat of the Constitutional Tribunal;
2. Preliminary Examination of Constitutional Complaints and Claims Section;
3. Case Law and Research Section
4. Executive Presidium Support Section;
5. Press and Information Section;
6. Library of the Constitutional Tribunal;
7. Financial and Accounting Department;
8. Administration and Economy Department;
9. Information Technology Department;
10. Editorial Board of the Publications of the Constitutional Tribunal;
11. Security Guard of the Constitutional Tribunal;

12. Independent Positions of Aides to the Judges of the Constitutional Tribunal: for Case Law and Assistants;
13. Independent Human Resources Officer;
14. Legal Counsel;
15. Internal Auditor.

The Head of the Office informs the President and the Vice-President of the Tribunal about any problems in the functioning of the Office of the Constitutional Tribunal, and at least once a year he presents a report on the activities of the Office to the General Assembly.

The Head of the Office is responsible for the management of the funds granted to the Constitutional Tribunal from the state budget. The draft plan of income and expenses of the Tribunal is prepared by the Financial and Accounting Department of the Tribunal, in the name and under the leadership of the Head of the Office, who submits the final draft for approval to the President of the Tribunal and for adoption by resolution of the General Assembly of the Judges of the Tribunal. The plan adopted in such a manner is subsequently included by the Minister of Finance in the draft budget of the state, which it is next subject to the subsequent legislative procedure.

The Head of the Office is responsible for the fulfilment of the budget of the Tribunal, and whenever necessary he proposes the introduction of changes to the actual execution of the budget; he is also responsible for the assets under the administration of the Tribunal. The Head of the Office submits reports to the General Assembly of the Judges of the Tribunal concerning the actual fulfilment of the Tribunal's budget of the past year.

Together with the introduction of the position of the Head of the Office, significant changes have been put into effect in the functioning of the Constitutional Tribunal. The basic modification, with consequences for the proceedings of the Tribunal, was the formation of the Preliminary Examination of Constitutional Complaints and Claims Section.

The above indicated unit has the task to perform the preparatory activities [preliminary control], related with the receipt and initiating procedures for the claims submitted to the Tribunal by those entities, which the law entitles to so called limited capacity to submit claims [i.e. they may only turn to the Tribunal in the situation, when the challenged regulation applies to the scope of activity of these entities]. The Preliminary Examination of Constitutional Complaints and Claims Section also executes the orders of the judges concerning these cases. The above-indicated category of subjects is specified under the Items 3-5 Article 191 Section 1 of the Constitution of the Republic of Poland. These comprise the following:

1. constitutive organs of units of local self-government
2. national organs of trade unions as well as national authorities of employers' organizations and occupational organizations
3. churches and other religious organizations.

4. The tasks of the Preliminary Examination of Constitutional Complaints and Claims Section have been regulated in detail by the Regulations of the Constitutional Tribunal. They include the following:

1. performance of activities related with handling the receipt and procedural initiation of constitutional complaints
2. preliminary selection of the received documents into procedural writs and documents of a different nature
3. keeping logs and records of the cases concerning constitutional complaints and performance of the appropriate technical and office activities, including electronic processing
4. preparing draft documents and orders, as well as executing the instructions of the judges concerning constitutional complaint cases, in particular those specified in Article 49 of the Constitutional Tribunal Act
5. providing information concerning the formal requirements concerning the constitutional complaint
6. answering letters and petitions addressed to the Constitutional Tribunal
7. inputting data related with the scope of the subject matters concerning the constitutional complaints to the information technology database of the Office
8. preparing of periodical information of the judges of the Constitutional Tribunal on case law applying to a constitutional complaint – at the stage of preliminary examination
9. transmitting of the judicial decisions of the Constitutional Tribunal for publication in the Official Collection of such rulings
10. cooperation with the Secretariat of the Constitutional Tribunal.

Following the examination, a draft decision concerning the initiation of the procedural course of the case is prepared, which is submitted to the judge appointed by the President of the Tribunal to consider the case in question. In the event of an approving decision by the judge, the case is submitted for consideration by the Tribunal, whereby it is taken over by the Secretariat of the Tribunal.

The plaintiff party may file a complaint against a negative decision of the judge concerning the further course of the case. Under such circumstances the President of the Tribunal, by way of his order, submits the case for consideration at a sitting in camera of an enlarged bench – of three judges of the Tribunal. Also in the appeal procedure the Preliminary Examination of Constitutional Complaints and Claims Section supports the decision-making panel in the preparation of the respective decision.

Preliminary Examination of Constitutional Complaints and Claims Section also handles the huge number of letters addressed to the Constitutional Tribunal by the citizens concerning miscellaneous matters in the nature of complaints, petitions and stipulations concerned with the

circumstances in which they have found themselves, or with the functioning of the law, but which are not constitutional complaints in terms of the respective procedural requirements.

The next organizational unit of the Constitutional Tribunal, the work and organization of which have been modified on the occasion of the creation of the position of the Head of the Office, consists of the Secretariat of the Tribunal. The scope of competence and duties of the Head of the Office of the Tribunal includes supervision over the work of that team, due care for the quality of the performance of its tasks and their efficient organization, as well as the selection of adequately prepared professional staff.

According to the By-Laws of the Office of the Tribunal, the basic tasks of the Secretariat of the Tribunal include the following:

1. execution of the orders of the President of the Tribunal concerning the cases received for consideration by the Constitutional Tribunal, and also preparing draft documents and orders issued by the President of the Tribunal and by the presiding judge of the adjudicating bench
2. conducting technical and office works concerning the court documentation, including the repertories, register files, case-lists and judgements and other judicial decisions of the Constitutional Tribunal
3. secretarial and office support for the judges of the Constitutional Tribunal
4. technical and office support for the sittings of the judges and the hearings before the Constitutional Tribunal
5. providing access to the files of the cases examined by the Constitutional Tribunal to the participants in the proceedings, including the issuing of copies and extracts from such files
6. drawing up records of the course of the hearings
7. transmitting the conclusions of the judgements of the Constitutional Tribunal for public announcement, and also of the decisions for publication in the Official Collection of Judicial Decisions of the Constitutional Tribunal and in the computerized database at its Office
8. inputting of data concerning the judicial decisions and the works of the Constitutional Tribunal to the computerized database at its Office.

The tasks of the Head of the Office include the direct supervision over the performance of duties by the Secretary of the Tribunal. In practice, the excellent qualifications and professionalism of the Secretary and his staff have contributed to the development by that organizational unit of the status of almost complete independence in the performance of the tasks entrusted to him. The controlling actions of the Head of the Office are limited just to receiving regular information on the activities of the Secretariat, and concerning all the applications received by the Tribunal.

Together with the formation of the Preliminary Examination of Constitutional Complaints and Claims Section, the scope of duties of the Secretariat of the Tribunal was reduced by eliminating the preliminary review of certain case categories, which were in practice frequently returned in order to be supplemented because of formal defaults, or remained unconsidered due to the inability to classify them as cases subject to adjudication by the Tribunal. At present, such cases reach the Secretariat of the Tribunal only after the approving decision by the judge, issued on the basis of the opinion drafted by the Preliminary Examination of Constitutional Complaints and Claims Section.

At the same time, the Secretariat of the Tribunal – without the participation of the Preliminary Examination of Constitutional Complaints and Claims Section – directly initiates the course of proceedings, by obtaining the respective instructions from the President of the Constitutional Tribunal, for the applications from entities other than the ones indicated above. Pursuant to Article 191 Paragraph 1 Items 1 and 2 of the Constitution, these consist of applications submitted to the Tribunal by the following parties:

1. the President of the Republic, the Marshal of the Sejm [Speaker of the Lower Chamber of Parliament], the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Chief Administrative Court, the Prosecutor-General, the President of the Supreme Chamber of Control, the Commissioner for Citizens' Rights [Ombudsman]

2. the National Council of the Judiciary, to the extent specified in Article 186 Paragraph 2 of the Constitution.

In the activities of the Office of the Constitutional Tribunal very high importance is attached to contacts with public opinion. The Head of the Office is responsible for the organization of the work concerned with such contacts. The information function, concerning both the role, the tasks and the works of the Tribunal, as well as specific cases considered by the Tribunal, is realized in the form of direct contacts with the press and with the public media of communications, as well as via the Internet site of the Constitutional Tribunal.

Direct contacts with the press and with the media consist of preparing informative press releases for the journalists prior to a hearing. The hearings are open to the press and to the general public. Dedicated press and information services are offered to their disposal. Such support services include the Press and Information Section, supervised by the Head of the Office, which above all deals with press relations and looking after the image of the Tribunal presented by the public media.

The by-Laws of the Office of the Constitutional Tribunal contain the basic duties of the Press and Information Section. These comprise the following:

1. press services for the Constitutional Tribunal
2. activities promoting the public image of the Constitutional Tribunal and its works as presented by the media – adequate to the rank and position in the institutional system of the state and in public life
3. performance of tasks concerned with providing information to the public opinion – using the appropriate means of communications – concerning the works of the

4. Constitutional Tribunal, and in particular on the content and the substance of the decisions contained in the judgements of the Constitutional Tribunal close cooperation with the other organisational units of the Office serving the needs of the implementation of the tasks specified under the items 1-3
5.performance of duties connected with the implementation of the Act on access to public information.

After each hearing the Press and Information Section organises press conferences with the judges, with the purpose to explain and highlight the substance of the Tribunal's judicial decision. The Press and Information Section is also charged with the tasks resulting from the implementation of the Act on access to public information. Following each case being considered by the Tribunal, a special press release is prepared on the essence of the decision together with the conclusion of the passed judgement. It may be observed, taking into account the specific nature of the judicial decisions of the Tribunal combined with the complexity of legal discourse – that the press directly quotes the texts drafted and issued by the Office of the Tribunal.

Information concerning the hearings is also displayed on the Internet site of the Constitutional Tribunal – presenting the press releases preceding and following a hearing, as well as the text of the passed judgement.

The Head of the Office Constitutional Tribunal organises and oversees the works on the form and updating of the information published on the website of the Tribunal – www.trybunal.gov.pl. The Internet pages of the Constitutional Tribunal are one of the modes of implementation of the provisions of the Act on access to public information. The website is treated as a basic instrument for communicating with public opinion. It serves for publishing current information concerning the hearings – information about the time of the anticipated hearing, a press release preceding the court sitting, and a press release following the hearing, which is displayed already on the same day as the actual hearing takes place. The Internet pages of the Constitutional Tribunal also contain all of the judicial decisions of the Tribunal passed over the almost 17 years of its active existence. The maintenance of the website of the Constitutional Tribunal belongs to the tasks of the Presidium Support Section, in cooperation with the other organizational units of the Office.

The following information may be found on the Internet pages of the Tribunal:

4. on statutory acts (among others – the former Polish constitutions and the present one, the Constitutional Tribunal Act, the Regulations of the Constitutional Tribunal, the By-Laws of the Office of the Tribunal)
5. on the Tribunal – the institution itself, on the judges, and also on its Office
6. on the judicial decisions of the Tribunal (among other things also its database)
7. on cases in process at the Tribunal – these include all the cases in procedural course, the case-list – with the times set for hearings and press releases concerning the respective hearings
8. statistical data concerning the judicial decisions, verdicts, judgements and resolutions passed by the Constitutional Tribunal
9. news – information concerning visits and lectures taking place at the Tribunal, on seminars, conferences and exhibitions, announcements, information concerning the budget of the Tribunal, and also some of the public pronouncements by the President and the Vice-President of the Tribunal

10. on the Constitutional complaint institution – the requirements that have to be met by a complaint lodged to the Constitutional Tribunal
11. on the publications of the Tribunal, including those accessible electronically [e-publications] and its library resources.

The Office continues to improve the quality of the WWW pages and their informative contents. In the nearest future it is being planned to significantly facilitate the access to information concerning the body of judicial decisions of the Constitutional Tribunal, as well as to develop an electronic register of the cases received by the Tribunal, in order to facilitate the work of the judges, and also to provide many other enhancements of the system for retrieving and processing the available information.

The Head of the Office is responsible for the organization of the works of the Editorial Board of the Publications of the Constitutional Tribunal. The Tribunal publishes the collection of all of its judicial decisions in print – „Judicial Decisions of the Constitutional Tribunal. Official Collection." The same judicial decisions are also published in electronic form. In order to provide for more effective communication of the substance of the verdicts and judgements of the Tribunal, compendiums of the theses and conclusions of the judgements passed by the Tribunal are published, comprising its verdicts in summary form presented very attractively and comprehensibly. The Office of the Tribunal issues descriptive reviews, collections of judicial decisions and other materials covering the scope of constitutional issues and the work of the constitutional court. Annual Information on the Constitutional Tribunal and its activities and judicial problems – approved by the General Assembly of the Judges – is published every year.

Function of the Head of the Office at the Polish Constitutional Tribunal is being effectively performed since the end of the year 2001. It should therefore be noted, that this position is still in the process of being shaped and stabilised in practice, adapting as appropriate the respective experiences of other constitutional courts. This is why the opportunity to exchange experiences during the Conference in Madrid is so important for us. Previously, there had been no officer in charge of coordinating the totality of the works and activities of the Office of the Constitutional Tribunal, responsible for its functioning to the President of the Tribunal and to the entire Assembly of Judges of the Tribunal. It is still too early for making the first assessment of the pertinence of creating this position and the resulting benefits – but the first report on the first year of his activity will be submitted very soon now to the General Assembly of the Judges. Such evaluations, however, are not to be made by the Head of the Office himself.

Warsaw, November 6, 2002.

- III -

LA COUR SPÉCIALE SUPRÊME DE GRÈCE LE JUGE CONSTITUTIONNEL ET LE FONCTIONNEMENT DE SON SECRÉTARIAT

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Grèce

1. D' après la Constitution hellénique de 1975 (révisée en 1986 et 2001), tout tribunal, indépendamment d'ordre juridictionnel, a le devoir de contrôler la constitutionnalité de la loi qui est apelée à appliquer dans un cas précis[3]. Mais le fait qu'une loi ou bien une disposition législative soient considérées comme contraires à la Constitution, ne suffit évidemment pas pour qu'elle soient reconnues automatiquement caduques. Une autre cour peut très bien les considérer comme étant conformes à la Constitution et de ce fait les appliquer. Pour résoudre le problème de l'insécurité juridique que peut provoquer ce système diffus de contrôle de la constitutionnalité, le constituant de 1975 a prévu (pour la première fois) la création d'une cour spéciale, nommée *"Cour Spéciale Suprême"* (art. 100). Celle- ci n'appartient à aucun ordre juridictionnel et n'est pas une cour supérieure face aux trois cours suprêmes du pays (Conseil d'Etat, Cour de Cassation, Cour des Comptes).

2. La compétence de la Cour Spéciale Suprême est réglée par la Constitution (art. 100). De sa compétence relèvent : a) Les litiges relatifs aux élections législatives et européennes (concernant ces dernières v. la loi 1180/1981), ainsi qu´ à la validité et les résultats des référendums, b) Le règlement des conflits d´ attribution, c) le règlement de divergences concernant la qualification de règles du droit international comme généralement admises pour l ' application de l'article 28 par. 1 de la Constitution. La Cour Spéciale Suprême est enfin compétente pour connaître du *"...règlement des contestations sur l'inconstitutionnalité de fond ou sur le sens des dispositions d'une loi formelle, au cas où le Conseil d'Etat, la Cour de Cassation ou la Cour des Comptes ont prononcé des arrêts contradictoires à leur sujet. "* (art. 100 par. 1e).

L´ organisation et le fonctionnement de la Cour, ainsi que la procédure sont réglementés par la loi 345/1976 aussi bien que par son règlement intérieur.

Comme il résulte du tableau suivant la jurisprudence de la Cour Spéciale Suprême concerne surtout le contentieux électoral.

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[3] *Selon l'art. 87 par. 2: "Dans l'exercice de leurs fonctions, les magistrats sont soumis seulement à la Constitution et aux lois; ils ne sont en aucun cas obligés de se conformer à des dispositions issues en abolition de la Constitution ". D'autre part, selon l'art. 93 par. 4: "Les tribunaux sont tenus de ne pas appliquer une loi dont le contenu est contraire à la Constitution". La Constitution actuelle est la première Constitution hellénique qui traite explicitement de la question du contrôle de la constitutionnalité des lois. Pourtant la jurisprudence avait admis depuis la fin du XIX s. que les tribunaux étaient compétents, par voie d'exception, pour connaître de la constitutionnalité d'un texte législatif (arrêt 23/1897 de la Cour de Cassation).*

Année	Total de décisions rendues	Décisions concernant la constitution-nalité	Décisions concernant le contentieux électoral	Autres
1996*	6	-	2	4
1997	91	5	62	24
1998	4	-	2	2
1999	37	5	7	25
2000*	51	-	47	4
2001	35	1	21	13

*1996 et 2000 ont été des années électorales.

Le fait que la Cour Spéciale Suprême ne rende pas un nombre important d' arrêts en ce qui concerne le contrôle de la constitutionnalité des lois est dû aux conditions strictes qui doivent être remplis afin qu'elle soit saisie.

3.
a. Selon une jurisprudence constante, l´art. 100 de la Constitution se réfère à constitutionnalité matérielle de la loi, c.à.d. à l'opposition de son contenu à la norme constitutionnelle. Par conséquent le juge ne contrôle pas le respect de la part du législateur de la procédure d' édiction des lois.

b. D' après l´ interprétation de la constitution ainsi que de la loi 345/1976, il y a *"contestation sur l'inconstitutionnalité"* d'une disposition législative quand sont déjà rendus ou qu'il est possible que soient rendus par deux cours suprêmes des arrêts contraires. Il suffit à cet égard que l'une des cours suprêmes dans un arrêt contenant un considérant sur la constitutionnalité d'une disposition législative adopte une interprétation différente de celle adoptée par une autre cour suprême, dans un arrêt rendu à un moment antérieur, à l'occasion d'une affaire quelconque.

c. La Cour Spéciale Suprême peut être amenée à se prononcer sur la constitutionnalité d'un texte législatif, de deux façons: Soit après renvoi préjudiciel de la part d'une des cours suprêmes (Conseil d'Etat, Cour de Cassation, Cour des Comptes) si cette dernière est amenée à adopter une interprétation contraire à celle déjà adoptée par une autre cour suprême, soit après demande du Ministre de la Justice, du Procureur de la Cour de Cassation, du Commissaire Général d'Etat auprès de la Cour des Comptes, du Commissaire Général préposé à la Justice Administrative ou quiconque a un intérêt pour agir, dans le cas ou la cour suprême n'a pas rendu de jugement de renvoi, mais un jugement final concernant l'ensemble de l'affaire[4].

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[4] *En tout cas il faut qu'au moins l'un des arrêts ait été rendu après l'entrée en vigueur de la Constitution de 1975.*

d. L' ouverture de l'instance devant la Cour Spéciale Suprême a des effets étendus : les tribunaux sont obligés d'ajourner d'office toute affaire pendante devant eux à laquelle s'appliquent les dispositions législatives dont la constitutionnalité est mise en cause. Si le

tribunal n'ajourne pas mais prononce l'arrêt final, ce dernier peut être attaqué par une *"requête de reprise de la procédure"* après la publication de l'arrêt de la Cour Spéciale Suprême.

4. Selon l'article 100 de la Constitution et la loi 345/1976, la Cour Spéciale Suprême est composée de trois membres ex officio, c.à.d. des trois Présidents des cours suprêmes et de huit membres avec mandat de deux ans, c.à.d. de quatre conseillers d'Etat et de quatre conseillers de la Cour de Cassation, tous désignés par tirage au sort, qui a lieu tous les deux ans, au mois de décembre, devant l'Assemblée plénière du Conseil d'Etat en séance publique. A ces onze membres provenant de la magistrature, sont ajoutés deux professeurs universitaires de droit (désignés aussi par tirage au sort) dans le cas ou la Cour est saisie d'une affaire relative au règlement d'un conflit d'attribution ou à celui de contestation concernant l'inconstitutionnalité d'une loi. La Cour Spéciale Suprême est présidée par le plus ancien des présidents du Conseil d'Etat ou de la Cour de Cassation, qui est remplacé par l'autre en cas d'absence ou d'empêchement. La loi 345/1976 prévoit aussi un personnel auxiliaire, composé de magistrats et d'enseignants de disciplines juridiques de la Faculté de Droit de l'Université d'Athènes.

Les fonctions de Secrétaire Général de la Cour Spéciale Suprême sont assurées par le Secrétaire de la cour suprême dont le Président préside la Cour[5]-[6]. Le personnel du secrétariat est Composé par, au maximum, dix fonctionnaires des secrétariats-greffes des tribunaux administratifs, civils ou pénaux, qui y sont détachés. Actuellement le secrétariat de la Cour Spéciale Suprême est composé de six employés.

a. Le statut des fonctionnaires du greffe des tribunaux est régi aussi bien par la Constitution (art. 92) que par la loi ordinaire (lois 2812/2000 et 2993/2002). La Constitution considère que les fonctionnaires du secrétariat-greffe des tribunaux sont des agents auxiliaires de la Justice et c'est pour cette raison qu'elle reconnaît en leur faveur des garanties statutaires plus importantes que celles prévues pour les autres fonctionnaires. Plus précisément l'article 92 prévoit que les employés du greffe sont des fonctionnaires qui restent en service tant que leurs emplois existent. Ils ne peuvent être révoqués ou licenciés qu'en vertu d'une décision de justice pour cause de condamnation pénale ou qu'en vertu d'une décision d'un conseil formé de magistrats pour cause de faute disciplinaire lourde, d'infirmité ou d' insufissance professionnelle, constatées de façon prévue par une loi (par. 1). Les qualités requises pour les employés du greffe, ainsi que leur statut sont définis par une loi (par.2). Les avancements, affectations, déplacements, détachements et mutations des employés du greffe sont effectués après avis conforme d'un conseil

[5] *Ceci a été prévu par la loi 2190/1994. Jusqu'alors les fonctions du Secrétaire Général étaient accomplies par un employé du secrétariat de la Cour d'Appel. Cette modification visait à donner du prestige au secrétariat de la Cour Spéciale Suprême.*

[6] *Actuellement s'est le Président du Conseil d'Etat qui préside la Cour Spéciale Suprême. Par conséquent s'est le secrétaire de la haute juridiction administrative qui exerce les fonctions du Secrétaire Général.*

de service constitué en majorité par des magistrats et par des employés du greffe. Le pouvoir disciplinaire sur eux est exercé par les juges, procureurs ou commissaires qui sont leur supérieurs hiérarchiques, ainsi que par des conseils de service, selon la loi. Les décisions concernant l'avancement, ainsi que les

décisions disciplinaires des conseils de service, sont susceptibles de recours, selon la loi[7] (par. 3).

b. La promotion d'un fonctionnaire du secrétariat - greffe du Conseil d'Etat ou de la Cour de Cassation, aux fonctions du secrétaire de la dite cour, se fait après avis conforme d'un conseil de service composé de cinq membres (trois conseillers et deux fonctionnaires), sur demande des employés intéressés. Les candidats à ce poste doivent appartenir aux catégories PE (c.à.d. être titulaire d'un diplôme d'enseignement supérieur), TE (c.à.d. être titulaire d'un diplôme d'enseignement supérieur technique) ou bien DE (c.à.d. avoir obtenu le baccalauréat)[8]. Le choix du plus apte à posséder ce poste se fait en considération de la notation, des titres, du temps de service et, plus généralement, de tous les élémements du dossier du candidat au poste qui attestent de sa compéténce, son initiative et ses connaissances[9]. Le choix, enfin, se fait pour une période de trois ans et peut être renouvelé.

Une fois choisi pour occuper le poste du secrétaire du Conseil d' Etat ou de la Cour de Cassation, l' employé du secrétariat-greffe peut être appelé à exercer les fonctions du Secrétaire Général de la Cour Spéciale Suprême si celle - ci est présidée par le Président de la cour à la quelle il appartient.

6. Selon le règlement intérieur Cour Spéciale Suprême le Secrétaire Général, lequel est remplacé en cas d'empêchement par le plus ancien des employés, a les devoirs d'un chef de service : il est responsable du bon fonctionnement du greffe et surveille les employés afin qu'ils accomplissent correctement leur tâche. C'est sur sa proposition que le Président fixe les devoirs de chaque employé.

7.
a. La requête par laquelle est soulevée la question de constitutionnalité[10] ou l'arrêt préjudiciel, sont déposés auprès Secrétaire général, lequel, après l'enregistrement au rôle, doit les soumettre au Président. Ce dernier désigne le rapporteur, son assistant (magistrat ou enseignant) ainsi que la date de l'audience (le jour de l'audience étant, selon le règlement intérieur, toujours un mercredi). Ensuite, le Secrétaire Général communique aux parties[11] et au Ministre de la Justice (qu'il peut participer aux débats sans aucune

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[7] L'organisation et le fonctionnement des conseils de service sont régi par la loi 2993/2002.

[8] D' après une jurisprudence du Conseil d'Etat qui prête le flanc à la critique, sous certaines conditions, tous les employés du greffe indépendamment de leurs titres peuvent accéder à la catégorie PE.

[9] Le ou les candidats qui n'ont pas été choisi, aussi bien que le Ministre de la Justice, peuvent former un recours devant un conseil composé de sept membres (cinq magistrats et deux employés).

[10] La même procédure est valable en ce qui concerne le règlement des contestations sur le sens des dispositions d'une loi.

[11] Les personnes considérées comme partie sont, outre le requérant, toutes celles qui avaient la qualité de partie devant la cour qui a rendu l'arrêt préjudiciel.

formalité), une copie de la requête ou de l'arrêt ainsi que de l'acte du Président désignant le rapporteur et l'audience.

Enfin, l'acte du Président fixant la date de l'audience est publié, accompagné d'un résumé de l'objet de la divergence, par deux quotidiens de la capitale vingt jours au moins avant l'audience.

Le Secrétaire Général a le devoir de notifier la citation du Président désignant le jour de l'audience à tous les membres de la Cour Spéciale Suprême, ainsi qu'à leurs suppléants, quinze jours au moins avant l'audience, accompagnée d'une liste des affaires qui seront discutées.

Le rapporteur rassemble les éléments indispensables au jugement de l'affaire et rédige son rapport qui est déposé au secrétariat - greffe cinq jours avant l'audience et dont les parties peuvent prendre connaissance.

b. L'audience commence par la lecture du rapport du rapporteur. Si les notifications ont été faites l'audience et le jugement de l'affaire peuvent avoir lieu, même en l'absence des parties. D'autre part si les parties sont présentes et ne soulèvent pas le moyen de notification irrégulière, la Cour Spéciale Suprême peut débuter ses débats. Si une des parties n' a pas été appelée à comparaître, la Cour Spéciale Suprême renvoie la discussion de l'affaire à un autre jour pour que les notifications soient faites. Une copie de la décision de report est notifiée par les soins du Secrétaire Général à toutes les parties, vingt jours au moins avant le jour de la nouvelle audience.

c. Le Secrétaire Général est présent pendant l'audience et tient les procès verbaux de la procédure. Ils contresignent avec le Président et le rapporteur la décision et les procès verbaux.

d. Les arrêts de la Cour Spéciale Suprême sont irrévocables, ne sont pas soumis à révision et sont valables à partir de leur publication vis-à-vis de tous, la publication des arrêts rendus sur des affaires relatives au contrôle et à la validité d'un référendum, au règlement d'un conflit sur la constitutionnalité ou le sens d'une disposition législative et sur la qualification de normes du droit international comme étant généralement admise, au Journal Officiel ayant un but informatif, sans incidence sur la validité de l'arrêt. La Cour Spéciale Suprême peut, par une décision spécialement motivée, décider que les dispositions jugées contraires à la Constitution sont caduques à partir d'une date précédant la publication de l'arrêt.

8. Il est vrai que malgré le rôle régulateur que joue la Cour Spéciale Suprême (juge constitutionnel, juge des conflits, juge des élections) il n' en demeure pas moins que du point de vue effectif et équipement il s'agit d'une "petite" Cour, qui ne rend, par an, au maximum une centaine d'arrêts. A cet égard on constate que:

- La Cour Spéciale Suprême n'a pas de salle propre d'audiences, celles-ci (comme, d'ailleurs, les délibérations) ayant lieu soit au Conseil d'Etat, soit à la Cour de Cassation;
- Les quelques employés qui forment son secrétariat - greffe se contentent de petits bureaux qui se trouvent au dernier étage d'un immeuble où siége le Tribunal d'instance de la capitale.

- Le secrétariat - greffe n'est pas divisé en services. Plus spécialement il n'existe pas de service de documentation, de bibliothèque ou de recherche. Ceci est dû au fait que les rapporteurs (magistrats ou professeurs) utilisent les services de documentations du Conseil d'Etat, de la Cour de Cassation ou de l'Université.

- Les tâches principales des employés du secrétariat-greffe sont la tenue des livres prévus par le règlement intérieur[12] et le soin de procéder à temps aux notifications exigées par la loi.
- Les arrêts de la Cour Spéciale Suprême ne sont pas publiés dans une collection officielle; si l'on met de côté la publication de certaines catégories d'arrêts au Journal Officiel, la publication se fait par les revues juridiques.
- Le Secrétaire Général contrôle le fonctionnement du secrétariat-greffe de son bureau au Conseil d'Etat ou à la Cour de Cassation. D'ailleurs ses visites aux locaux du secrétariat sont extrêmement rares.

Bien que le secrétariat - greffe de la Cour Spéciale Suprême ne correspond pas à l'idée qu'on pourrait se faire du secrétariat d'une Cour ayant les compétences décrites plus haut, l'expérience a montré qu'il forme une structure suffisante pour le bon fonctionnement de la Cour, du moment où, à cause de l'organisation de celle - ci, il suffit que ses tâches, purement administratives, soient orientées vers la préparation des débats et aucunement vers l'assistance au juge rapporteur.

Néanmoins, il serait souhaitable d'envisager quelques améliorations dans l'organisation du secrétariat, comme p.ex. la création d'une base de données, en vue de faciliter la recherche, la création d'un service de presse, afin de garantir l'information du public et de la presse d'une manière responsable et la publication des arrêts dans une collection dont la Cour soit responsable (comme, p.ex. c'est le cas pour la jurisprudence du Conseil d'Etat. Dans tous ces cas la contribution du Secrétaire Général, fonctionnaire, en principe, d' une grande expérience, pourrait être d'une importance considérable. -

Novembre 2002

[12] *Ces livres sont : Le livre où sont enregistrées les requêtes par ordre chronologique; le livre où sont enregistrées les requêtes par ordre alphabétique; le livre où sont notés les rapporteurs; le rôle; le livre où sont enregistées les décisions par ordre chronologique; le répertoire des décisions, où sont notées toutes les décisions par ordre alphabétique; le livre où sont enregistrés les actes du Président et, enfin, le livre du protocole.*

- IV -

THE STAFF OF THE CONSTITUTIONAL COURT AND THE CONSTITUTIONAL COMPLAINT

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When compared with the European Constitutional Courts, the Republic of Latvia Constitutional Court in both sectors, mentioned in the topic, finds itself in a specific situation. The Constitutional Court staff is administered by the Chairman of the Constitutional Court himself. **At the Republic of Latvia Constitutional Court there is no Secretary General, no Director, no Chancellor or any other staff member, who administers the apparatus**. Principal administrative functions of the Constitutional Court – side by side with other functions of the Constitutional Court justice and Chairman- are carried out by **the Chairman of the Constitutional Court himself.** In the Court's staff there isn't anybody, who does not find himself/herself under the administrative power of **the Chairman of the Constitutional Court.**

In practice it means that the Constitutional Court Chairman himself signs every money order, every contract and the most number of letters in the name of the Constitutional Court. Of course, the question may arise, how the Chairman manages to combine the above scope of work with the other functions of the Chairperson and justice. Our experience proves that it can be done. However, it does not mean that we advise other courts to adopt this experience. As a matter of fact, the above is possible just because there are two peculiarities of the situation in Latvia.

First of all – the number of justices at the Constitutional Court is small. Only 7 justices. The staff of the Court is also small – 41 staff units, including the employees, who help to realize judicial functions and those, who carry out all kinds of non- judicial functions (among them – the technical personnel –as office cleaners, drivers etc.).

Secondly, the model of the constitutional claim in Latvia is also specific, namely, the so-called "counterfeit constitutional claim". Thus the workload at the Constitutional Court, especially in the preliminary examination stage, is much smaller than that of our colleagues at courts, where there exists the real constitutional claim.

In my report I shall shortly dwell on both the above specifics in general. Namely – I shall try to tell how the staff of the Constitutional Court may function without the Secretary- General. Besides, I shall explain what the Latvian constitutional claim model – the counterfeit constitutional claim means. After that I shall turn to some moments in the activities of the staff as regards constitutional complaints in a more detailed way. Of course, it is not possible to discuss all the nuances of everyday situation; therefore I shall stress just some of them.

The Constitutional Court Law incorporates one – the last Chapter VI OFFICIALS AND EMPLOYEES OF THE CONSTITUTIONAL COURT. This chapter contains only one Article – Article 40. The Article provides:

" **(1)** The list of positions of officials and employees of the Constitutional Court shall be established by the Chairperson of the Constitutional Court within the limits of the Court's budget.

(2) The employment relations between the Constitutional Court and its officials and employees shall be regulated by the Latvian Labor Code.

(3) All benefits and social guarantees provided for officials and employees of the judiciary by the Law "On Judicial Power" and other normative acts currently in effect shall apply to the officials and employees of the Constitutional Court."

What essential moments are fixed in this Article?

1. It follows from the second part of the above Article that the employment relations between the Constitutional Court and its staff members are regulated by Labour Agreement (Contract). No staff member of the Constitutional Court is the member of the state civil service. Why so? The objective of this norm has been implemented to guarantee independence of the Constitutional Court. In compliance with the State Civil Service Law, officials are subordinated to the State Civil Service Board. The authors of the Constitutional Court Law were of the viewpoint that if the staff members of the Constitutional Court were formally subordinated to any state administrative institution, they would encounter difficulties when examining and reviewing cases on acts, passed by the government.

However, the third part of the above Constitutional Court Article envisages that all benefits and social guarantees provided for officials and employees shall be applied also to the personnel of the Constitutional Court. The aim of this norm has been incorporated to ensure that the security of the Constitutional Court employees in the social sector is not lower than that at other state institutions.

As a result a specific model has been created for the employees of the Constitutional Court of Latvia and – from the academic point of view – one may find disadvantages to it but in practice it acts efficiently.

2) The salary for the employees of the Constitutional Court is to be established within the limits of the Court's budget. Unfortunately the process of determining the "limit of the budget" is quite imperfect and it is difficult to speak of the Court independence.

The first part of Article 66 of the Republic of Latvia Constitution establishes that " annually, before the commencement of each financial year, the Saeima shall determine the State Revenues and Expenditures Budget, the draft of which shall be submitted to the Saeima by the Cabinet."

In compliance with the Law "On Administration of Budget and Finances" the Minister of Finance – on the basis of budget requests, submitted in conformity with the requirements of the law and the requirements envisaged by the Ministry of Finance Instruction - prepares the annual draft law on the state budget. Besides, in compliance with Article 19 of the Law, the Minister of Finance shall be entitled to assess the budget requests, at any stage of working out the draft law on the state budget, according to their correspondence to the anticipated tasks and their economic

efficiency. According to the results of such assessment the Minister of Finance shall decide on including the budget requests into the draft law on the state budget before submitting it to the Cabinet of Ministers. The Minister of Finance may express his viewpoint; supplement the necessary opinions as well as the results of specific audits at any stage of working out the draft law on the state budget.

Before acceptance of it by the Cabinet of Ministers, all the ministries and other central state institutions, among them also the Constitutional Court, receive the draft law on the state budget and may submit motivated objections concerning this draft law to the Ministry of Finance within two weeks. The Minister of Finance tries to reach agreement with the heads of the relevant ministries and other state institutions. If the agreement is not reached, he/she forwards the issue to the Cabinet of Ministers for resolution.

The Law anticipates only one exception, namely, the Saeima budget request up to the time of forwarding the draft law on the state budget to the Saeima may not be amended without the consent of the submitter of the request. We hold that analogous norm shall be applied also to the budget of the Constitutional Court, as the situation when the Chairman of the Constitutional Court has to ask the Minister of Finance to grant money and has to prove the necessity of every-even the slightest expense is absurd. For example, last year we did not manage in proving the necessity of receiving the participation payment for the European Constitutional Court Conference. Neither the Ministry of Finance, nor the Cabinet of Ministers and the Parliament agreed to incorporate the budget request into the Court budget. This fall, when the Saeima reviewed the amendments to the draft of the state budget, the Saeima Legal Committee – on the request of the Constitutional Court – submitted a motion to envisage funds for the above payment; however the motion did not receive any support. Of course, this situation is not normal.

3) The salary of the Constitutional Court justices has been determined by the law, in its turn the staff model and remuneration, even though within the limits of the Court budget, depends on the Constitutional Court itself, to be more precise –on the Chairman of the Court. Neither the Constitutional Court Law nor the Rules of Procedure of the Constitutional Court envisage organization of specific Constitutional Court sessions to reach a decision on the staff or its separate members. The norms of the above Constitutional Court Law establish that the list of positions and employees of the Constitutional Court shall be established by the Chairperson of the Constitutional Court within the limits of the Court's budget.

Still one has to take into consideration that – in conformity with Article 12 of the Constitutional Court Law "The Chairperson of the Constitutional Court and his/her Deputy shall be elected for a period of three years from among the members of the Constitutional Court by an absolute majority vote of the entire total of the justices. The voting shall be by secret ballot." Thus the concern that the Chairman of the Constitutional Court or his Deputy might act inconsiderately simply does not exist. Besides, one shall remember that there are just seven justices at the Constitutional Court and the greatest amount of cases is reviewed by the whole Court body. The justices meet almost every day and among other things may discuss all the issues of the activity of the Constitutional Court.

The present staff model of the Constitutional Court has been created already at the time when the Court commenced its activities, i.e., at the end of 1996 and the beginning of 1997. Some noticeable changes took place in 1999, when the Constitutional Court moved from their temporary to constant premises. On the one hand there was the necessity of increasing the

attending personnel but on the other hand there was the possibility of employing additional employees, for example, the press secretary.

The staff of the Constitutional Court may be conditionally divided into five departments:

1. The accounting office, which is subordinated directly to the Chairman of the Constitutional Court and consists of two employees – the chief accountant and the accountant, who – when the necessity arises – carries out the duties of a cashier as well.

The accounting office carries out the traditional functions and is not involved into realization of legal functions.

2. Technical personnel - the administrator, office-cleaners, a janitor, drivers etc. , who are subordinated to the managing director. The managing director plans, manages, organizes and coordinates the maintenance processes, coordinating the financial issues with the accounting office. Within the limits of his/her competence and authority, the managing director represents the Constitutional Court in civil relations with suppliers of goods and services and other physical or legal entities. Besides he/she, within the limits of estimate, plans and handles funds, granted to the Constitutional Court.

The managing director and employees, subordinated to him/her do not carry out any legal functions.

3. The Court Office – is a structural unit, employees of which regulate record keeping of the Constitutional Court, organize receipt of documents from the applicants as well as hand out documents of the Constitutional Court, register the correspondence and control the terms of execution, are responsible for correspondence, carry out the archive duties etc.

The Court Office if managed by the Head of the Court Office. The Head of it is directly subordinated to the Chairman of the Constitutional Court. The Court Office consists of the secretary of the Court sessions, clerks, technical secretaries etc.

The functions of the Court Office are closely connected with legal functions. The Rules of Procedure of the Constitutional Court envisage several functions to be carried out by the Court Office, like mailing or forwarding of particular documents in certain time limits, preparation and mailing of announcements on the procedural documents, arranging of registers etc. However, none of the functions means decision-making and does not influence the contents of the procedural documents.

Among the above persons, the only one, who carries out legal functions, is the secretary of the Court sessions. It is the only employee whom the Constitutional Court Law endows with a certain competence. Namely, Article 28 (the last sentence of the tenth paragraph) establishes that ”The Chairperson of the Court session and the secretary shall sign the Court record”.

Technical secretaries are also included in the staff of the Court Office. The technical secretary is as if under ”double subordination” as he/she is being subordinated to the Head of the Court Office and to the justice with whom he/she works. The technical secretary attends the justice, secures carrying out of the Court justice activities, i.e. –creates favourite conditions for efficient performance of the justice: registers phone calls and callers, receives telephone messages and

notices, prints and copies papers etc. All the functions are technical and shall not be referred to as legal functions.

4. Assistants to the Constitutional Court justices. Every justice of the Constitutional Court has an assistant, thus there are seven assistants. The justice himself/herself chooses the candidate for the above post. The former practice was to conclude the labour agreement with the assistant to the time of office of the justice. It means that the assistant may hand in notice under general procedure – warning about it a month before. In its turn, if the authority of the justice because of this or that reason is terminated, the labour contract of the assistant is terminated as well. Since July 1, 2002 a new Labour Law has taken effect. It limits the number of cases when a terminated labour contract may be concluded. Therefore at the present moment no contracts for the period of office of the justice are concluded with the assistants, who are employed anew.

The assistant to the Constitutional Court justice is subordinated to him/her and carries out activities indicated by the justice. The assistant prepares procedural or other documents as well as fragments of their projects, oral or written analyses on legal issues, collects information, which is needed for the justice to carry out his/her duties etc.

The job of the Constitutional Court assistant is connected with legal functions.

Article 30 (its first part) of the Constitutional Court Law envisages that ”Following the session of the Constitutional Court, the justices shall meet to reach a judgment in the name of the Republic of Latvia. During the voting only those justices, who are in the body, shall be in the conference hall.” Thus the Law attributes secret of the conference hall only to the process of voting, however participation of employees at the process of formulation of the judgment text is permissible and is used in practice. Item 203 of the Rules of Procedure of the Constitutional Court establishes that ” In accordance with the decision of the conference, the judgment is worked out and drawn up by one or several justices. If necessity arises, they invite employees of the Constitutional Court to participate.” Most of all just the assistants are the employees, who participate in formulation of the judgment text.

5. Other employees of the Constitutional Court are directly subordinated to the Chairman of the Constitutional Court. In several cases those functions, which at other courts are carried out by departments or other structural units, at our Court are performed by one person.

The Constitutional Court library is under the authority of the librarian.

Public relations are managed by the press secretary of the Constitutional Court.

Translation of the Constitutional Court judgments and other documents from Latvian into English and from English into Latvian is accomplished by the senior interpreter of the Constitutional Court.

Administrator of the computer network is solving all the issues connected with the functioning of the network, starting from administration of the system and ending with helping out in case when somebody has pushed the wrong button or is not able to correct a simple error.

Side by side with the above employees, whose functions can be guessed by their names or titles, there are also several advisors at the Court.

Namely, the advisor to the Chairman of the Constitutional Court, the advisor to the Deputy Chairman of the Constitutional Court and the advisor of the Constitutional Court. Labour contracts of the first two are concluded for the period of office of the Chairman of the Constitutional Court and his Deputy.

The above employees carry out different functions in several sectors, say, prepare draft documents and correspondence, which are later adopted by the Chairman of the Court and his Deputy as the Administrators of the staff of the Constitutional Court (labour contract drafts and other staff documents), when performing the procedural functions envisaged for the Chairman of the Constitutional Court (decisions on Panels for reviewing claims, decisions on organizational sessions etc.) as well as when representing the Constitutional Court.

The advisor of the Constitutional Court performs functions, which could be named as the functions of the legal documentation center, is partially connected with preparation of correspondence on issues of constitutional complaints and partially participates in elaboration of procedural documents drafts, among them also the drafts of the Constitutional Court judgments.

Both – the advisor to the Chairman of the Constitutional Court and the advisor to the Deputy Chairman – are among those persons, who perform legal functions. In future another employee – the consultant of the Constitutional Court, who is going to prepare the greatest amount of document drafts before forwarding the constitutional claims to the Panels, will be one more person performing legal functions.

This in short is the structure of the apparatus of the Constitutional Court. To understand how it functions during the process of reviewing constitutional complaints, I have to mention specifics of the constitutional complaint model in Latvia.

In Latvia review of the constitutional complaint was introduced on July 1, 2001. However the so-called ”classical” constitutional claim does not exist in Latvia. Latvia has chosen a different, ”narrower” model of the constitutional complaint.

Application, submitted by a person to the Constitutional Court, has been traditionally named the constitutional claim. In compliance with Article 19^2 of the Constitutional Court Law ” any person, who holds that his/her fundamental rights have been violated by applying a normative act, which is not in compliance with the legal norm of higher legal force, may submit a claim to the Constitutional Court.”

Thus the model of a Latvian constitutional claim is specific. The German legal scientists classify it as the”counterfeit” (unechte) constitutional claim. On the one side, our constitutional claim, as any constitutional claim, may be submitted by a person, if its fundamental rights, fixed in the Satversme (Constitution) have been violated. But on the other hand, our constitutional claim may be submitted only in case if the above rights have been violated by a legal norm, incorporated into a normative act. In difference from the ”real” constitutional complaint, not all the acts of the public power are subjected to the control of the Constitutional Court. Decisions of the judicial power and administrative acts remain outside the Constitutional Court control.

When choosing this model we have tried to ”soften” the potential conflicts in the relations between the Supreme Court and the Constitutional Court and not to turn the Constitutional Court into an institution with ”super inspecting ”power. Besides, it has helped the Court in avoiding an overburdened schedule. At the moment it seems, that we have solved both the above problems.

Certainly, one may find disadvantages in our model. The most essential one is that a person may protect its rights with the help of a constitutional claim only in a limited way.

The Latvian constitutional claim has been intended as supplementary or subsidiary means of protection. The second part of Article 19^2 of the Constitutional Court Law envisages that ”the constitutional claim shall be submitted only after exhausting the ordinary legal remedies (a claim to a higher institution or official, a claim or application to a court of general jurisdiction etc.) or if there are no other means.”

The Law envisages that a constitutional claim may be submitted to the Constitutional Court within six months from the date of the decision of the last institution becoming effective…

However, the third part of Article 19^2 of the Constitutional Court Law envisages an exceptional case, namely ” if the review of the constitutional claim is of general importance or if the legal protection of the rights with general legal means cannot avert material injury to the applicant of the claim, the Constitutional Court may reach the decision to review the claim (application) before all the other legal means have been exhausted.”

As only a normative act, applied in a particular case and not any court decision on its merit may be challenged, number of cases, initiated on the constitutional complaints is not great. From July 1, 2001 till January 1, 2002 12 cases have been initiated but from January 1, 2002 till November 1, 2002 – 18 cases. Thus all in all 30 constitutional cases have been accepted for review. The number of the announced judgments is even less as several of the cases have been joined together but one of them was dismissed. Up to November 1, 2002, we may speak of 12 judgments in 17 cases, which have been initiated on constitutional claims. 12 more cases are in the stage of preparation for review or elaboration of the judgment.

Number 30 greatly differs from two other numbers. Namely, in the above period about 900 applications with the requests, expressed by persons to the Constitutional Court have been received. A little bit more than 300 out of the 900 were qualified as constitutional complaints and forwarded to the Constitutional Court Panels for review. What is the process under which 30 cases out of 900 are ”sifted” like?

As concerns our Constitutional Court we may speak of two stages of ”sifting”, which a document, submitted by a person, has to ”go through”. Both of them follow from the first part of Article 20 of the Constitutional Court Law, which establishes: ”The Panel, consisting of three justices, examines the application and takes the decision to initiate a case or refuse to initiate it.”

The first stage refers to the notion ”application”, which is incorporated into this norm. The Chairman of the Constitutional Court takes the decision on the issue, which of the ”letters” or ”applications” shall be considered as a claim. Item 67 of the Constitutional Court Rules of Procedure envisages that the document –disunited from its name- shall not be considered an application if it does not meet the requirements determined by law. Thus the Chairman does not forward any applications, which are evidently discrepant to the Panels. As a matter of fact about 2/3 of the applicants receive a refusal. The Court Office registers all the received letters and forwards them to the Chairman of the Constitutional Court. The Chairman of the Constitutional Court – but in his absence- the Deputy Chairman of the Constitutional Court - acquaints himself with the correspondence and reaches the decision, which of the applications has evident unconformity with the requirements to the applications and which shall be forwarded to the

Panels of the Constitutional Court. After that the Chairman asks the advisors to prepare relevant documents: drafts of letters or directive drafts on forwarding the claims to the Panels.

If the claim is evidently unconformable with the requirements of the law, a letter to the applicant is written, in which the functions of the Constitutional Court and requirements, envisaged by the law are explained. There are about ten standardized texts of letters, which in every particular case are supplemented with facts, following from the particular letter.

The real situation is like this: if a claim, which is within the competence of the Constitutional Court, has been stated and some reference to the fundamental rights guaranteed by the Satversme made, the Chairman of the Constitutional Court forwards it to the Constitutional Court Panel to examine it and take a decision on initiating a case or dismissing it.

Every Constitutional Court Panel consists of three justices. There are four Panels at the Constitutional Court. Thus the Chairman of the Constitutional Court and his Deputy are each in one body of the Panel but all the other five justices are in the body of two Panels. Panels are elected for a year by an absolute majority vote of the entire total of the justices.

The Chairman of the Constitutional Court forwards all the submitted applications, including the claims, to the Panels in the succession of the applications entered in the Received Correspondence Register. This provision is essential to ensure that the appointment of justices, who shall take a decision on initiating a case or refusing to initiate it, is settled by abstract, previously established criteria and not on the will of the Chairman. Thus the Chairman may not be reprimanded that he has forwarded the particular claim to this or that Panel just because of selfish motives.

The Constitutional Court Rules of Procedure permit deviation from the above procedure only by a motivated decision and only with an objective of advancing objective and quick review of the claim. In practice it most often happens in two cases. Firstly, when several persons submit similar constitutional claims with one and the same request. And secondly – when one and the same person submits several, mutually connected constitutional claims.

The Chairperson of the Panel distributes the claims to be reviewed to the members of the Panel – the justices, who are the speakers at the Panel session. If it is necessary, employees of the Constitutional Court – mainly the assistants – may be asked to attend the Panel session or arrange the documents.

The Constitutional Court Panel reaches decisions with a majority vote. The decisions allow of no appeal. The Law does not envisage the possibility of the Panel on its own initiative forwarding the review of a particular claim to the entire body of the Constitutional Court. May be that is an imperfection of our Law, as the practice proves that the viewpoint of different Panels may be different.

The decision on initiating a case or refusal to initiate it has to be adopted by the Panel within one month from the date of the submission of the claim. In more complicated cases the Constitutional Court may extend the term to two months. As a matter of fact, there have not been many cases when the term was extended. Out of 311 complaints (both- constitutional claims and other applications), which have been submitted from July 1, 2001 till October 31, 2002, the term has been extended in 15 cases.

Occasions, when the Constitutional Court Panel experiences the right of refusing to initiate a case, are determined in the fifth and sixth parts of Article 20 of the Constitutional Court Law.

The fifth part refers to both – constitutional claims and other applications. In accordance with it, the Panel, when examining the applications, experiences the right of refusing to initiate a case, if:

1) the case is not within the jurisdiction of the Constitutional Court;
2) the applicant is not entitled to submit the claim;
3) the claim does not comply with the requirements of Articles 18 or 19 – 19^2 of this Law;
4) an application on an already reviewed claim has been submitted.

The sixth part, in its turn refers only to constitutional claims. It envisages that ”when reviewing the constitutional claim, the Panel may refuse to initiate a case, if the legal justification of the claim is evidently insufficient to satisfy the appeal”. This norm was incorporated into the Law to guarantee that the Court shall not ”run idle” with absolutely hopeless claims.

I would like to stress that there is a possibility to hold Court proceedings in writing. Namely, ”in cases when the documents, attached to the case, suffice, it is possible to hold Court proceedings in writing, without participants in the case attending the Court session.” The justices reach the decision on establishing Court proceedings in writing at the organizational session if the justice, who has prepared the case for review, expresses a motion on it. ”Fifteen days after receiving the announcement on Court proceedings in writing, the participants in the case have the right of examining the case material and express their viewpoint on it in a written form.”

The Constitutional Court does not envisage the principle of continuity; it just establishes that the judgment shall be reached within a month after the Court session. Therefore, to reach the judgment in a short term, the Constitutional Court may simultaneously work on judgments for several cases and is doing so.

Since the time of existence of the constitutional complaint, the performance of both – the justices and the other staff has changed – work has become more intensive and hastier. With the number of applications and initiated and reviewed cases increasing, the question – if the existing staff model is in compliance with the requirements of the Constitutional Court – becomes topical. The main problem is lack of specialization. The justices are asked to prepare cases for review in turn. Every justice has one and the same assistant. It is possible that, if the number of cases continues increasing, we shall have to consider whether it is not necessary to create additional corps of assistants, employees of which are specializing in this or that legal sector and are able to work together with justices, who prepare cases for review. However, that is the issue of future.

At the end I would like to point out that at the moment the Constitutional Court with its compact and economically created staff under the guidance of the Chairman of the Constitutional Court copes with the requirements of the model of our constitutional claim.

Thank you for your attention!

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ENLARGEMENT OF THE ACCESS TO THE CONSTITUTIONAL COURT OF AZERBAÏJAN REPUBLIC

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Introduction

The Constitutional Court of Azerbaijan Republic was set up in 1998. Although it is considered to be a part of judicial system it is neither appeal nor cassation instance with respect to decisions rendered by ordinary courts. Being the body of constitutional justice its basic mission is to ensure the supremacy of Constitution. In my presentation I am going to dwell on the issues of possible mechanism of Court functioning in the light of legal reforms held in Azerbaijan.

The legal status of Constitutional Court before referendum

Before referendum of 24 August 2002 that entailed the introduction of constitutional modifications there were six entities enabled to apply directly to the Constitutional Court[1]. Their petitions were confined to the requests as to verification of:

- the conformity of the laws of AR, decrees and orders of the President of AR, resolutions of National Assembly of AR, resolutions and orders of Cabinet of Ministers of AR, normative acts of central bodies of executive power to Constitution of AR;
- the conformity of decrees of the President of AR, resolutions of Cabinet of Ministers of AR, normative acts of central bodies of executive power to the laws of AR;
- the conformity of resolutions of Cabinet of Ministers of AR and normative acts of central bodies of executive power to decrees of the President of AR;
- in cases specified in the legislation, the conformity of decisions of Supreme Court of AR to Constitution and laws of AR;
- the conformity of acts of municipalities to Constitution of AR, laws of AR, decrees of the President of AR, resolutions of Cabinet of Ministers of AR (in Nakhichevan Autonomous Republic – also to Constitution and laws of Nakhichevan Autonomous Republic and resolutions of Cabinet of Ministers of Nakhichevan Autonomous Republic);
- the conformity of interstate agreements of AR, which have not yet become valid, to Constitution of AR; correspondence of intergovernmental agreements of AR to Constitution and laws of AR
- the conformity of the Constitution and laws of Nakhichevan Autonomous Republic, resolutions of the Supreme Assembly of Nakhichevan Autonomous Republic, resolutions of Cabinet of Ministers of Nakhichevan Autonomous Republic to Constitution of AR;
- the conformity of laws of Nakhichevan Autonomous Republic, resolutions of Cabinet of Ministers of Nakhichevan Autonomous Republic to the laws of AR;

[1] *President of Republic, National Assembly, Cabinet of Ministers, Supreme Court; Procurator's Office; Supreme Assembly (Article 130.3 of the Constitution of Azerbaijan Republic)*

- the conformity of resolutions of Cabinet of Ministers of Nakhichevan Autonomous Republic to decrees of the President of AR and resolutions of Cabinet of Ministers of AR[2]" as well as to give interpretation of the Constitution and laws of AR based on inquiries of the President of AR, Milli Majlis of AR, Cabinet of Ministers of AR, Supreme Court of AR, Procurator's Office of AR and Ali Majlis of Nakhichevan Autonomous Republic and settle the disputes connected with division of authorities between legislative, executive and judicial powers.

Whereas the right of individual to apply to the Constitutional Court was envisaged in the Law of AR "On Constitutional Court"[3] this access was not of direct nature: it could be implemented via ordinary courts – in fact via the Plenum of Supreme Court. This kind of complicated access made the people reluctant to refer their complaints to Constitutional Court. Thus, in practice no case initiated by individual has reached the Constitutional Court. Nevertheless, Constitutional Court has been receiving 10-12 individual complaints per day. It was compelled to register the incoming complaints and send them to the relevant governmental institutions asking them to pay attention to them and take necessary measures.

Despite the fact that in all its decisions the Constitutional Court of AR was guided by the need to protect the human rights and fundamental freedoms enshrined in the Constitution, this system precluded the citizens to consider the Constitutional Court as the effective legal remedy against any violation.

Competences of the Constitutional Court after referendum

The accession of Azerbaijan to Council of Europe entailed the introduction of amendments to the Constitution and legislation. The commitments undertaken by our Republic states inter alia: "to re-examine the conditions of access to the Constitutional Court and grant access also … to courts at all levels and – in specific cases – to individuals, at the latest within two years of its accession"[4]. In pursuance of this commitment and as a result of the referendum held on 24 August 2002 their were introduced the relevant provisions to Article 130 of the Constitution enlarging the list of entities who are "direct applicants" by adding individuals, Ombudsman and ordinary courts. Thus, the new provisions of Constitution state:

"V. Everyone claiming to be the victim of a violation of his/her rights and freedoms by the decisions of legislative, executive and judiciary, municipal acts set forth in the items 1-7 of the Para III of this Article may appeal, in accordance with the procedure provided for by law, to the Constitutional Court of the Republic of Azerbaijan with the view of the restoration of violated human rights and freedoms.

VI. In accordance with the procedure provided for by the laws of Azerbaijan Republic the courts may file the Constitutional Court of Azerbaijan Republic a request on interpretation of the

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[2] *Article 130.3 of the Constitution of AR*

[3] *Article 4 of the Law of AR "On Constitutional Court" states: "In its activity the Constitutional Court shall protect the human rights and freedoms of citizens. In case of violation of the individuals' rights and freedoms by operative normative legal documents the citizens may by means of appropriate courts apply to the Supreme Court of Azerbaijan Republic with a request to refer the case to the Constitutional Court. The procedure of exercising this right is determined by the Law of Azerbaijan Republic on the Courts and Judges as well as the Legislation of Azerbaijan Republic on Criminal and Civil Procedures".*

[4] *Opinion No. 222 (2000) Azerbaijan's application for membership of the Council of Europe*

Constitution and the laws of Azerbaijan Republic as regards the matters concerning the implementation of human rights and freedoms.

VII. Ombudsman of Azerbaijan Republic in accordance with the procedure provided for by the laws of the Republic of Azerbaijan for solving the matters indicated in items 1-7, para III of the given Article[5] shall apply to the Constitutional Court of the Republic of Azerbaijan in cases where the rights and freedoms of a person had been violated by legislative acts in force, normative acts of executive power, municipalities as well as the court decisions."

The introduction of above indicated modifications gave the individuals, ordinary courts and Ombudsman[6] the right of access to Constitutional Court "via the procedure specified in law". This means that the procedural frameworks of lodging the petitions by newly introduced entities are to be provided for in the Law of AR "On Constitutional Court".

Draft Law of AR "On Constitutional Court"

The new draft law passed the expertise of Venice Commission that expressed its opinion on Commission's Plenary Session held on March 2002. Almost all recommendation contained in this opinion have been taken into account. In fact the elaboration of new law was reasoned by the need to provide for the effective procedure of examination of individual complaints. While drafting it the special attention was paid to the legislation on Constitutional Court of Germany and Latvia in this field.

As a body invested with judicial powers the Constitutional Court in its activity will mostly deal with individual complaints. Therefore, one of the first articles of draft law state: "In its activity the Constitutional Court shall protect fundamental rights and freedoms of each individual." That means that the Court in its functioning will inevitably be engaged with individual complaints challenging the actions/omissions of State bodies. Article 33, para I of the draft law stating, "Any person who alleges that the normative legal act applied in a case has violated his/her fundamental rights guaranteed by the Constitution may submit a complaint to Constitutional Court" secures once again the basic aims of Constitutional Court. The draft law contains the basic requirements to be met by constitutional complaint in order to be adopted for examination by Court. They are as follows:

a) to have his/her rights be violated by action/omission of State bodies;
b) exhaustion of ordinary legal remedies;
c) observance of time-limits: the constitutional complaint can be submitted to Constitutional Court within three months after the decision of the court of last instance came into force."

a. to have his/her rights be violated by action/omission of State bodies. In order to be able to lodge the complaint with Constitutional Court the person should have his/her rights be violated by action/omission of State bodies. In this regard, the term "action" means any normative act issued by State body. And "omission" should be considered as unwillingness or inability of State body to exercise their legal duties what in its turn entailed the violation of human rights. At the same time this requirement means that the complainant should be the direct victim of such action/omission at the time of lodging the complaint.

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[5] *See above the petitions of State entities for verification of conformity of enumerated normative acts*

[6] *In fact the right of Ombudsman to directly address to Constitutional Court was envisaged in Constitutional Law that was adopted in December 2001. Article 13.2.8 states: "If, as a result of an investigation, the Ombudsman finds a violation of the rights and freedoms of an applicant, he/she may ... apply to the Constitutional Court of the Republic of Azerbaijan in cases where the rights and freedoms of a person had been violated by legislative acts in force".*

b. exhaustion of ordinary legal remedies. Before lodging the complaint with Constitutional Court the individual should pass all existing judicial instances. But is not obligatory for him/her to get the decision of ordinary court: it is enough at least to attract the attention of ordinary courts to the unlawful action/omission of State bodies. This requirement does not cover the cases where the constitutionality of laws is challenged: anyway, the ordinary courts are not enabled to cancel the adopted laws. This is the prerogative of Constitutional Court. Moreover, there is an exclusion concerning this requirement: if the legal protection of the constitutional rights by means of general remedies can not preclude the complainant of being imposed an irreparable damage then the Constitutional Court may consider the issue as to admission of the complaint for examination before these general remedies have been exhausted.[7] Moreover, according to para VI of the same Article, where the Constitutional Court establishes that the normative act that was applied within as a result of case hearing by ordinary court violates the fundamental rights then the proceedings in that court should be re-opened.[8]

c. observance of time-limits. The constitutional complaint can be submitted to Constitutional Court within three months after the decision of the court of last instance came into force.[9] Whereas there are basic requirements for complaints there exist also subsidiary requisites of formal character the non-respect to which ones cannot in principle entail the non-admission of complaint. According to Article 29, a complaint shall contain as follows:

1) the Constitutional Court shall be indicated as a body which a complaint has been lodged with;
2) the complainant shall contain the first, middle and last name of complainant;
3) necessary information about representative of a complainant and his/her authorities;
4) name and address of the state body or local self-government body that issued the act to be examined;
5) provisions of the Constitution of AR and legislation enabling to address to Constitutional Court;
6) exact name, number, date of issue, source of publication and other information about the act to be examined;
7) position of the complainant with respect to the issue brought up by him/her and it's legal grounds with reference to relevant provisions of the Constitution of AR;
8) the request in connection with the complaint lodged;
9) list of documents enclosed to complaint.[10]

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[7] *Article 32, para IV of the Draft Law*

[8] *the procedure of re-opening and re-examining the case in such matters is specified in Criminal Procedure Code of AR and Civil Procedure Code of AR*

[9] *Article 32, para V of the Draft Law*

[10] *According to Article 30 of the Draft Law the following documents are to be enclosed to complaint: letter of attorney or other document, confirming the authorities of the representative except the cases when representation is implemented ex officio as well as copies of documents confirming the right of a person to speak at Constitutional Court as a representative; translation of all documents into Azeri language submitted in other language. The list of witnesses, specialists (experts) proposed to be called to the session of Constitutional Court as well as other documents and materials may also be enclosed to a petition or complaint.*

The drafters of law realized that it would be impossible for Court to deal with the huge volume of individual complaints without disposing of special structures within the Court invested with definite competences. The setting up of Chambers would enable the Court to consider the cases not in its full compliment and accelerate the adoption of decisions. Besides that, one of the basic roles in dealing with the influx of complaints is to be played by the Court Secretariat. The law drafters followed the way of investing the Secretariat with powers[11]:

- to receive the citizens;
- to preliminarily consider the complaints[12];
- to assist to Judges in preparation of cases for consideration.

The reception of citizens. One can hardly imagine the effective work of Secretariat without reception of citizens. Although the procedural details of reception of citizens are to be specified in Internal Regulations of Court it is possible to pre-say that almost all departments and divisions will be involved into this procedure. The reception of citizens can be also regarded as one of means of preventing the influx of Court by complaints. However, this procedure will inevitably turn into explaining and providing the citizens with legal counsel as to lodging the complaints with Constitutional Court.

The preliminary consideration of complaints. Above I have mentioned three criteria the Secretariat of Court is going to be guided by when preliminarily examining the individual complaints. The "screening procedure" is to be carried out the way it would be possible to reject the complaints, which have no chances to be admitted by Court itself.

Assistance to Judges in preparation of cases for consideration. Although each Judge has got personal assistant and specialist it is namely the Secretariat that has to provide Judges with necessary information and give opinions as to the different aspects of both domestic and international law.[13] I have to emphasize that since in its resolutions the Constitutional Court frequently refers to the case-law of European Court of Human Rights and European Court of Justice of European Communities as well as study the practice of European Constitutional Courts and courts of equivalent jurisdiction it is very important to have in the Secretariat the employees speaking the European languages.

Certainly, the actions of Secretariat cannot be regarded as the Court decisions and therefore the draft law contains very useful provision that ensures the individual's right to have

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[11] *The procedural aspects of implementation of these powers are to be envisaged in Internal Regulations of Constitutional Court*

[12] *but only those, which do not require the examination by the Judges of Constitutional Court (Article 34 of the Draft Law)*

[13] *Article 91 of the Draft Law enumerates the responsibilities of Court staff as follows: The staff of Constitutional Court shall: maintain the activities of Constitutional Court and its Judges; prepare the reference papers and other informational materials which are necessary for the functioning of Constitutional Court; provide Constitutional Court with Clerks of court sessions; arrange shorthand reports of the sessions of Constitutional Court; conduct the case-management work of Constitutional Court; implement the registration and storage of the documents of Constitutional Court; hold the reception of citizens; examine preliminarily the complaints, which do not require the involvement of Judges; resolve the material, technical, financial and domesticity matters connected with the functioning of Constitutional Court and its Judges; fulfill various instructions of the Chairman, Deputy Chairman and Judges of Constitutional Court connected with the functioning of Constitutional Court; fulfill other duties connected with functioning of Constitutional Court*

his/her complaint be considered by Court.[14] This provision proceeds from the Constitution of AR[15] and European Convention of Human Rights.[16]

The position of Constitutional Court in judicial hierarchy

At first sight the modifications introduced into the Constitution of AR "adjusted" the position of Court with respect to other ordinary courts: the individuals were granted the right to challenge to Constitutional Court the decisions of ordinary courts, which violate the fundamental rights and freedoms and the courts have been enabled to ask the Constitutional Court for request on interpretation of the Constitution and laws as regards the matters concerning the implementation of human rights and freedoms. Despite these changes, which were aimed at more effective involvement of Court into protection of constitutional principles, the Constitutional Court has become neither cassation nor appeal instance because its mission is still the same: examination of the matter on the points of law only. Even in the case of the decisions rendered by ordinary courts the Court can "intervene" only when there have been violated the constitutional rights and freedoms leaving the res gestae at disposal of ordinary courts.

Conclusion

There can be a number of both governmental and non-governmental institutions which can establish the fact that the individual's right was violated. But the Constitutional Court is always regarded by people as the last hope for restoration of violated rights. Nevertheless, even the Court's decisions, which are of higher importance for individual can become useless remedy if there is no good will among governmental bodies to respect and implement them.

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[14] *It states: "The petitioner who disagrees with notification of the Secretariat of Constitutional Court shall have the right to request adoption of a decision on his/her complaint by Constitutional Court. In this case Chairman of Constitutional Court shall refer the complaint to one or several Judges for verification of validity of the decision adopted by the Secretariat. The results of verification shall be considered at the sessions of Chambers or Plenum within 15 days"*

[15] *"Everyone has the right for consideration of his/her case in the law court specified by the legislation." (Article 63 of the Constitution of AR)*

[16] *In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (Article 6.1 of ECHR)*

- VI -

ACTIVITIES OF THE SECRETARIAT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF BELARUS ON EXAMINATION OF COMPLAINTS OF CITIZENS

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Secretariat of the Constitutional Court shall be a legal entity and the Head of the Secretariat of the Constitutional Court of the Republic of Belarus who is appointed by the Chairperson of the Constitutional Court shall carry out direct control of the Secretariat. Legal status of Head of the Secretariat of the Constitutional Court of the Republic of Belarus shall be specified in Article 52 of the Law "On the Constitutional Court of the Republic of Belarus" and functions of the Head of the Secretariat shall be envisaged in Article 46 of the Rules of Procedure of the Constitutional Court.

One of the spheres of the activities of the Secretariat of the Constitutional Court is examination of written applications of citizens. Moreover, there is regularly personal reception of citizens in the Constitutional Court of the Republic of Belarus. The reception is carrying out by the judges and responsible officials of the Secretariat according to schedule. Citizens at the reception may apply with any question and a specialist, if he/she comes to the conclusion that the problem is of a public interest, the application shall be subject to examination in the Secretariat of the Constitutional Court. As a result of such an application there may be prepared proposals, as well as a draft decision of the Constitutional Court. The procedure of study of applications of citizens shall be general procedure irrespective of the fact whether the application to the Constitutional Court is written or oral one.

Staff which shall secure the work of the judges of the Constitutional Court of the Republic of Belarus numbers 47 specialists with profile education. Staff is consisted mainly of lawyers. There are philologists, interpreters and translators, journalists, computer technical engineers and other specialists. Structure of the Secretariat shall be determined by the functions it exercises. Due to the fact that the staff of the Secretariat is not big, there are not so many subdivisions in the Secretariat and certain functions are for individual specialists. Therefore, there are a number of functions which are duplicated by the specialists of other profiles. However, administrative issues are not the topic of the report.

Brief description. Two main departments of the Secretariat of the Constitutional Court of the Republic of Belarus — legal expert department (10) and department of courts' sessions and control over implementation of court's decisions (5). In addition, department of accounting and systematisation of legislation where specialists deal with processing of normative material which is necessary on the stage of adoption of a decision on the particular issue — search, collation, comparison etc. (4). Each judge of the Constitutional Court shall have an assistant. There is an obligatory requirement for the assistant not only to have law education but also to have sufficient experience of professional activities. Selection of personnel is based on the fact that judge's

assistant should gain an understanding himself of the wide circle of legal issues as well as prepare draft documents for the judge under applications of citizens included.
After receiving by the Constitutional Court of the proposal from the proper subject legal expert department of the Secretariat shall make preliminary analysis of enforceable enactments which shall be examined by the Constitutional Court. As a result of institution of the proceedings on the case legal expert department under the instruction of a judge-speaker shall prepare its own conclusion as regards the issue under verification of the Constitutional Court which thereupon shall be analysed by the judges while elaborating by the Constitutional Court of its position equally with the materials available in the case.

In accordance with the Constitution of the Republic of Belarus (Article 116) the Constitutional Court shall exercise constitutional control over the constitutionality of enforceable enactments in the state.

Legislation of the Republic of Belarus still does not contain the notion of the institute of a constitutional complaint, which shall envisage special procedure for examination of the complaints by the Constitutional Court. However, according to Article 40 of the Constitution of the Republic of Belarus everyone may appeal to the Constitutional Court as to the state body. In that case the issue will be examined within the Law "On applications of citizens". The Constitutional Court of the Republic of Belarus shall use actively these possibilities for making proposals into the lawmaking bodies on removal from contradictions in the legislation, as well as references to the branch state bodies for solution of complicated and conflicting situations of law nature.

Moreover, Article 122 of the Constitution of the Republic of Belarus shall guarantee everyone the possibility to appeal to the court of law against decisions of local representative and executive bodies that restrict or violate civil rights and liberties and the legitimate interests of citizens, and in other instances specified in law. Since verification of enforceable acts of state bodies of local government as regards their conformity with the laws and the acts of the Government is the prerogative of the Constitutional Court, those complaints and applications may not find their solution in the courts of common competence.

In addition, the peculiarity of the competence of the Constitutional Court of Belarus is that the subject to verification of the constitutionality may be acts of both state bodies of republican level (enforceable acts of the Government, Ministries and Departments etc.) and state bodies of oblast and region level (decisions of oblast and region Council of deputies, decisions of oblast and region executive committees and region administrations).

Being based on the constitutional guarantees enshrined in Articles 40 and 122 of the Constitution, as well as on strict grounds of the competence of the Constitutional Court, the Secretariat shall study all the complaints of citizens from both formal point of view (admissibility and procedure) and from legal positions which refer to the essence of the matter raised in the letter.
At the beginning a complaint is analysing from the point of view of the presence of legal problem which may be worded and put it before the Constitutional Court. If while examining a complaint the collision of enforceable legal acts is revealed, legal expert department of the Secretariat shall make detailed analytical note with the statement of the essence of a legal problem and with the opinion of the specialists as regards admissibility of interference of the Constitutional Court with the solution of the raised issue, as well as with the method and form of making of legal position of the Constitutional Court on the given problem.

Due to the norm specified in Article 7 of the Law "On the Constitutional Court of the Republic of Belarus", the Constitutional Court may submit any state body proposal as to the necessity of amending or supplementing the enforceable enactments, adoption of new enforceable enactments; the Court is also entitled to submit state bodies other proposals deriving from its powers. Certain peculiarities of the work of our Secretariat shall follow directly from those powers since it may take place wide variety in elaboration of the solution of a problem on the stage of preparation of documents.

If the specialists of the legal expert department of the Secretariat find that a question shall not refer to the competence of the Constitutional Court, i.e. there is no collision of enforceable legal acts, the question is not subject to examination by the judges of the Constitutional Court, and the reply for the person who made the complaint (as it has been mentioned above — within the Law "On applications of citizens") shall be given by the Secretariat of the Constitutional Court signed by the Head of the Secretariat or by Deputy Head of the Secretariat who is responsible for the complaints of citizens.

There is a procedure in our Secretariat under which repeated application on the already studied issue of the same person the issue shall be subject to obligatory examination by the Head of the Secretariat. In that case there is a rather complicated and not fully regulated by legal acts moment: I shall take independently decision on whether the problem raised in the applications may be subject to examination by the Constitutional Court. Therefore, in case of taking by the Head of State of such a decision, it may not be final and under specific conditions the process of analysis of the question raised in the complaint may be in progress, if the grounds appear. Decision of the Head of the Secretariat may be altered in such a situation by Chairperson of the Constitutional Court.

This practice took place, first of all, due to the absence in Belarus of the institute of constitutional complaint, secondly, there are no panels of judges in the Constitutional Court (for example, as it is in Russia and Ukraine), i.e. the Constitutional Court shall sit in its full composition in the presence of a quorum. Moreover, there are only six subjects enumerated in Article 6 of the Law "On the Constitutional Court of the Republic of Belarus" which may make their applications to the Constitutional Court under the constitutional procedure specified in Article 6 of the Law "On the Constitutional Court of the Republic of Belarus".

Thereafter the following procedure shall be effective: materials, the note of experts included, shall be reported thereon the Chairperson of the Constitutional Court who shall determine further course of the question under consideration. The question is the subject to study by one of the judges of the Constitutional Court or the Head of the Secretariat may be charged for further examination of the question by the Secretariat. In the second case on the instructions of the Head of the Secretariat there shall be prepared the reply on the complaint with the statement of the position of the specialists of the Secretariat on the raised question, i.e. either the reply which shall reflect formally inadmissibility of examination of the issue by the Constitutional Court or the reply with the explanation of a legal question and position of the Head of the Secretariat on the specified question.

While studying the question by a judge of the Constitutional Court, sometimes for determination of a position there is a need of additional study of the materials. In that case the judge's assistant and the appointed for this purpose by the Head of the Secretariat expert from among the staff of the Secretariat shall make the note for the judge. In certain, so-called borderline cases, there shall

be created the group of experts which shall prepare expert conclusion and report thereon the Head of the Secretariat for further taking of a decision.

If the Chairperson of the Constitutional Court has specified that the question will not be subject to examination by the Constitutional Court, all further correspondence is carried out by the Secretariat. In that case the replies and explanations shall by signed by the Head of the Secretariat who is responsible as an official for the legality of their content and that they are well-grounded. One of the conditions of such a procedure shall be the fact that the question may not be referred to law problems which are under the jurisdiction of the Constitutional Court. The replies may contain not only the issues of procedure and admissibility which are necessary for the explanation of the legal matter. Secretariat of the Constitutional Court shall receive applications and complaints of the persons who practically have already come through all the possible stages of solution of the situation. Therefore, specialists of the Secretariat shall face in practice with the most complicated and disputable special cases.

Thus due to the absence in the legislation of the Republic of Belarus of the institute of the constitutional complaint, the Constitutional Court of the Republic of Belarus shall pay special attention to examination of “ordinary” (not related to the constitutional) complaints and applications of citizens which come the Secretariat of the Constitutional Court.
Secretariat of the Constitutional Court shall prepare law replies not only on the applications of citizens but also on the requests of legal entities who address their questions to the Constitutional Court.

In addition, the procedure of solution of the issue on whether the problem raised in the letter shall refer to the competence of the Constitutional Court shall be the same as while examining the complaints of citizens. That procedure has already been mentioned above. The approach to examination of applications of legal entities has been worked out by the practice, since there is no normative basis (like the Law ”On applications of citizens”), which may regulate the procedure of their examination by the Constitutional Court and accordingly by the Secretariat of the Constitutional Court. Specialists of legal expert department in that case shall make analysis not of the questions of procedure and admissibility but shall make preliminary document as regards the essence of the raised question. That may be both draft decision of the Constitutional Court and reply to a legal entity.

Experts of the Secretariat of the Constitutional Court while preparing drafts and letters shall use the library of the Constitutional Court, but there is no sufficient information at our disposal since it has begun to be formed of 1994. We feel certain lack of information while preparing analytical references on this or that problem. Due to that while studying the practice of legal regulation of certain issues we ask the Constitutional Courts of Russian Federation, Poland, Lithuania, Latvia, Ukraine and other countries. As for the countries where there is no institute of constitutional control we make requests for the Embassies for the information on legal remedies for the solution of the concrete issues. There is an example. While preparing draft decision of the Constitutional Court of Belarus on the issue on the practice of transportation and storage on payable parkings of cars owned by citizens, the Secretariat of the Constitutional Court has asked British Embassy which kindly presented materials on methods for the solution of the issue in London. Similar requests were forwarded to other Embassies in the Republic of Belarus.

Article 80 of the Rules of Procedure of the Constitutional Court shall charge the Head of the Secretariat with the obligation to prepare draft of annual Message of the Constitutional Court on constitutional legality. After preparation of draft Message this draft shall be subject to consideration at the session of the Constitutional Court as a result of the report thereon of the Head of the Secretariat. There is a practice that the draft Message shall contain a special section with the characteristics where the initial information shall be the issues raised by citizens in their applications. I deem that such an approach shall promote to reveal the scope of the picture of estimations on constitutional legality which shall adopted by the judges of the Constitutional Court.

- VII -

THE ROLE OF THE CHANCELLOR OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LITHUANIA IN THE COURSE OF DISCHARGING OF THE ADMINISTRATIVE FUNCTIONS

Report by
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Three weeks ago Lithuania celebrated the 10th anniversary of its Constitution, next year there will be the 10th anniversary of the Constitutional Court.

During these years the democracy and constitutional justice have gained strength in our state. Still, a 10-year period is not much if compared with the traditions of the democracy of Western Europe. Therefore we are very happy at the occasions of such conferences as the present one in which we can learn certain experience from our colleagues who work at the constitutional courts that have celebrated 50th or even bigger anniversaries.

The Constitutional Court of the Republic of Lithuania is composed of 9 justices who are appointed for a 9-year term of office by our Parliament. Our Court does not enjoy broad competence. It considers cases on the conformity of the laws and other acts of the Parliament with the Constitution and on the conformity of acts of the President and the Government with the Constitution and laws. The form of the constitutional review is a passive one. The Constitutional Court considers cases only in the event that it receives petitions requesting to investigate whether a legal act is in conformity with the Constitution. However, there is only a limited circle of persons that may file such petitions, i.e. the Parliament, the President, the Government, a group of Members of Parliament consisting of not less than 1/5 of all its members, and the courts.

Most of the cases are filed by courts of general jurisdiction and administrative courts, which comprises more than two thirds of the cases. Quite a few cases have been filed by groups of Members of Parliament. The Parliament itself, the President and the Government seldom apply to the Constitutional Court.

There is no constitutional complaint in Lithuania. However, it is established in our Constitution that every person whose constitutional rights or freedoms have been violated shall have the right to apply to court. Quite often, after consideration of such applications, the courts suspend the investigation of the case by adopting rulings in which they request the Constitutional Court to investigate whether the legal acts adopted by the Parliament, the President and the Government are not in conflict with the Constitution. Hence the explanation why the Constitutional Court is mostly supplied with cases from courts of general jurisdiction and administrative courts (there are no other specialised courts in Lithuania).

We receive, however, a lot of cases. To this day we have 42 petitions pending. Since the Court considers all the petitions *en banc*, it takes not less than a year and a half to consider the petitions received. The long terms of consideration of cases make the Constitutional Court anxious. Due to this we are rebuked by Members of Parliament and criticised by the media.

To help the Justices to shorten the terms of the consideration of cases, we increase the number of the servants of the Court. Recently we established the Law Department the main function of which is to prepare the cases for judicial investigation, i.e. to help the Justices to consider the received petitions.

I am the Director of the Law Department and, since the Head of the employees of our Court was not able to come to this Conference, on his instruction I have arrived at this Conference.

The servants working in our Court constitute the staff of the Constitutional Court. The legal status of the staff is defined by the Law on the Constitutional Court in one sentence "The Constitutional Court shall have an assisting staff, the structure and statutes of which shall be approved by the Constitutional Court." Today, the staff is composed of the following structural subdivisions:

the group of assistants to Justices (9 servants);
the Secretariat of the President of the Court (3 servants);
the Law Department (6 servants so far, although 10 servants are planned);
the Department of Codification and Computer Technologies (2 servants)
the Department of Finance (3 servants);
the Common Department (7 servants);
the Department of Economy (14 servants).

All servants of the Constitutional Court are headed by the Chancellor of the Court. He is the Head of the staff of the Court. The post of the Chancellor is not mentioned in the Law on the Constitutional Court. His legal status, rights and duties are established by the Statute of the Staff and the Law on Public Service.

The Law on Public Service grants the Chancellor broad rights. He appoints and dismisses the servants of the Constitutional Court. As a matter of fact, the career servants are appointed to office only if they win the competition. However, the competition commission is also appointed by the Chancellor and, most often, he chairs it. The competition commission examines the applicant to the post of a public servant in writing and orally. The written examination consists of a test (100 questions) which is compiled by the Ministry of the Interior, an establishment that discharges the functions of organisation of public service. The competition commission receives this test only after the examination starts. The Ministry of the Interior also prepares the answers to the questions of the test and sends them to the competition commission by e-mail after the examination has ended. Such a procedure rather considerably limits the opportunities of the competition commission to select the people who are most qualified to work at the Constitutional Court as the questions of the test are not adapted to the specificity of the Constitutional Court. The questions are common on a state-scale for all the applicants who, on that day, are taking the examination in order to take state service.

Upon the order of the Chancellor, under the procedure established in the Law on Public Service, the servants of the Constitutional Court are either promoted or demoted, are stimulated (by means of honourable mention, a memorial gift, a one-time bonus) or punished (by means of remark, reprimand, severe reprimand, dismissal from office), and they are let on leave.

The Law on Public Service, which is valid in Lithuania, provides that the public servants (including those of courts) are granted qualifications classes—first, second and third. The evaluation commissions are established to assess the activity of every servant during the calendar year and they suggest which qualifications class the servant is to be granted. The Chancellor grants this class. For the qualifications class an extra-pay is paid: for the first class—50 percent, second—30 percent and third—15 percent.

As we see, the Chancellor enjoys broad rights in the administration of the servants of the Constitutional Court. However, he is not the head enjoying full rights. The list of the servants of the Court is confirmed by the President of the Constitutional Court. This list is compiled on the ground of the uniform office list of public servants, which is approved by the Parliament. The list confirmed by the President of the Court determines the level and category of the post, i.e. particular remuneration for the post.

Upon the order of the President of the Court, the commission for evaluation of court servants is established, and, ultimately, the Chancellor is appointed to office by the President of the Court as well.

Of course, it must be noted that concerning all issues the decision of which is within the competence of the President of the Court, the proposals to him are submitted by the Chancellor. Draft orders of the President are given signature of consent by the Chancellor. Without the signature of consent by the Chancellor, no order of the President is signed.

Although the Chancellor is the formal head of all servants of the Constitutional Court, however, his influence to all structural units of the Court is not equal. The President of the Court directly gives instructions to the Secretariat of the President (although most of the documents prepared by this secretariat are signed by the Chancellor). The Law Department prepares cases under the supervision of the Justices, and the President gives instructions to this department directly as well. The instructions to the assistants to Justices are given by respective Justices to whom the assistants are attributed. Meanwhile, the Department of Codification and Computer Technologies, the Department of Finance, the Common Department, and the Department of Economy are completely headed by the Chancellor. Even the President, if need be, gives instructions to these divisions through the Chancellor only.

The Statute of the Staff of the Constitutional Court obligates the Chancellor to ensure that all the servants follow labour discipline, the laws of the Republic of Lithuania and other legal acts, as well as to control that the orders and instructions issued by the President of the Court, or instructions issued by the Justices, be executed well and in time, to concern with the raising of the servants' qualifications, to prompt them to learn foreign languages, to administer other organisational, economic and financial affairs, to sign the official documents concerning the above issues.

The Chancellor considers the letters from the people and establishments, as well as papers regarding various issues and signs the answers to them.

The Law on the Constitutional Court declares "the Constitutional Court freedom and independence from other institutions shall be ensured by financial, material-technical as well as organisational guarantees secured by law.

The Constitutional Court shall be financed from the State budget by ensuring the possibility to the Constitutional Court to independently and properly perform the functions of constitutional supervision. The estimate of expenditure shall be approved by the Constitutional Court which shall also independently dispose of the means that are allocated to it."

Such is the law, however, it does not automatically guarantee the funding necessary for the Constitutional Court, therefore one of the most important concerns of the Chancellor is finance. Although the economy of our state has been developing rapidly during the past two years, however, the state is so far unable to satisfy the needs of all establishments and institutions which are maintained by the budget of the state. Therefore, every year, in the course of the drafting of the budget of the state, there is much strenuous work the purpose of which is to achieve that enough allocations for the Constitutional Court are provided for in the budget of the state. According to the settled practice, in the middle of each year the Ministry of Finance informs the possessors of the allocations, which are mentioned in the budget of the state, as to how much finances one intends to allocate to each of the latter, including the Constitutional Court. As a rule, one provides for less finances every year. Next year is an exception. The Ministry of Finance has informed us this year that next year they have provided for the same amount of allocations for the Constitutional Court as this year.

As a rule, the Constitutional Court disagrees with the amount of the funds planned by the Ministry of Finance for the allocation to the Constitutional Court and draws up a thorough paper for the Ministry of Finance and the Government in which it points out (rather minutely) as to how much finances are necessary for the Constitutional Court the next year. In this paper, which can be considered to be a proposal of the Constitutional Court for the Government, one points out how much finances are needed for the payment of the remuneration of Justices and the servants, as well as of the experts and specialists that are invited by the Court to present conclusions in individual cases; how much finances are needed for the holding of conferences (next year we are planning to hold 4 conferences); how much finances are needed for the planned reception of the delegations from other institutions of constitutional review; how much finances are needed for duty journeys of the Justices and servants; how much finances are needed for office expenses, the maintenance and repair of the building, acquisition of computer and other office equipment etc.

We protect this need of the finances necessary for the Constitutional Court in the meetings with the servants of the Ministry of Finance of all levels. In such meetings the President of the Court, and the Chancellor, as well as the Head of the Department of Finance, take part, depending on the level of the servants participating in the meeting.

According to the Constitution of the Republic of Lithuania, the Government of the Republic of Lithuania shall prepare a draft budget of the State, and shall submit it to the Seimas not later than 75 days before the end of the budget year (in Lithuania, the budget year begins on the 1st of January and ends on the 31st of December).

After the submission of the draft budget of the state at the plenary sitting of the Parliament, it is considered in parliamentary committees. The draft budget of the Constitutional Court is, as a rule, considered in the Committee on Legal Affairs and, if this committee proposes changing the amount of the expenditures of the Constitutional Court (by increasing or reducing) which is proposed by the Government, indicating particular amounts, then the discussion moves to the Committee on Budget and Finance. In the committee sittings the Chancellor of the Constitutional Court always takes part and he tries to prove to the Members of Parliament how much finances must be allocated to the Constitutional Court so that it could properly fulfil its functions. As a rule, we agree with the amount of allocations proposed by the Government since the said amount is coordinated with the Ministry of Finance before (the amount of the allocations is always bigger if compared with the initial proposal by the Ministry of Finance). This year is an exception. We disagree with the amount of allocations for the Constitutional Court proposed by the Government and we request that the Parliament increase the said amount by 6 percent. Our arguments are that it is necessary to increase the number of the employees in the Law Department so that the help of the same Department for Justices would carry more weight and that due to this, the terms of consideration of cases (I have already mentioned this problem) would become shorter. Our request has been considered by the Committee on Legal Affairs with participation of the President and the Chancellor of the Constitutional Court. However, no decision has been adopted yet. We will still have to struggle both at this Committee and the Committee on Budget and Finance.

I would also like to point out that the Chancellor plays a very important role in the formation of the budget. He must continually follow the preparatory work at the Ministry of Finance, the Government, Parliament committees, submit information on this process to the President of the Constitutional Court, actively participate everywhere so that appropriate financing of the Constitutional Court would be ensured.

This is a great and important job, which so far has been successfully fulfilled. The Constitutional Court is allocated enough funds every year. The financial supply of the Court is much better that that of other courts and institutions of law and order. Not only this is the merit of the Chancellor, but also of the President of the Constitutional Court and the Department of Finance as well. The authority of the Constitutional Court, which is generally recognised in our state, plays its part also.

The employees of the Constitutional Court are paid good remuneration, if compared to employees of other institutions of Lithuania. The amounts of remuneration are adequate to those received by employees of analogous positions in the Parliament, the President office and the Government. The remuneration of our Justices is bigger than that of Ministers or even the Prime Minister. It was attempted to reduce remuneration of judges (of all courts of Lithuania) a few years ago after a change of the Government (governments in Lithuania change often). The Parliament adopted a law, which established remuneration of politicians (members of the Parliament, Ministers, vice-ministers, mayors of municipalities), judges and prosecutors. The law provided for significantly smaller (nearly twice) remuneration of judges that they receive today. Some judges of courts of general jurisdiction applied to administrative courts with a complaint on violation of their constitutional rights. They argued that by the said law the Parliament violated

the constitutional principle of independence of judges. The administrative court addressed the Constitutional Court with a petition requesting to determine whether the new law on remuneration of judges was in compliance with the Constitution. The Constitutional Court ruled that the reduction of remuneration of judges violated their constitutional rights to independence, i.e. recognised the provisions of the law, reducing the remuneration of judges, as conflicting with the Constitution.

The list of work of the Chancellor of the Constitutional Court of the Republic of Lithuania is not limited by the work that I have told you about. His duties include a great deal of other work. Much time is consumed by book publishing activities. This year the Constitutional Court has published 9 books already. They are the material of international conferences, collections of rulings and decisions of the Court, publications about the Constitutional Court. We perform all publishing work by ourselves: we compile the collections, we do the editing, translation and design. We do not have a printing-house; therefore we give to others the material prepared in all other respects for the printing. The Chancellor organises all the publishing work and most often he himself is the compiler of the collection or the editor-in-chief of the edition.

The Chancellor takes care of the expansion of the stock of the library, the computerisation of the whole Court, the codification of the legal acts, rulings and decisions of the Constitutional Court, the repair of the building, the clerical work, the management of the archive as well as of a lot of other work.

The governance of our Court is a centralised one. The administration is the President of the Court and the Chancellor. The Justices do not interfere with the activities of the administration and the governance of the Court. We do not have any commissions on the supervision of the work of the library, or those on the duty journeys issues, or those on the distribution of financial reserves etc., as is the case in some other constitutional courts. Everything is decided by the President and the Chancellor.

Concluding my short report, I would like to thank wholeheartedly the organisers of this Conference for an opportunity to take part in this event so wonderfully prepared as well as the President of the Spanish Constitutional Court, Mr. Cruz Villalo and the Secretary General of the Spanish Constitutional Court Jimenez Campo.

I am happy also that I have an opportunity to communicate thanks of the Constitutional Court of the Republic of Lithuania to Mr. Gianni Buquicchio, Secretary General of the Venice Commission, and Ms. Caroline Martin. We constantly feel their care and concern for constitutional courts.

5 November 2002

- VIII -

ADMINISTRATIVE FUNCTIONS OF SECRETARY GENERAL OF THE CONSTITUTIONAL COURT

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Before presentation of my report, dedicated to the problems of the secretaries general functions of the constitutional justice bodies, to your consideration, I do express sincere gratitude to the organizers of the given conference, and first of all, to host country, where,by the way, I am second time, to our Spanish colleagues for the warmest reception and the organization of the conference.

I would like to express special gratitude to the Venice Commission of the Council of Europe for organization, consecutive and effective realization of discussions of actual problems of whole complex issues of constitutional law and constitutionalizm development, for providing conditions for full satisfaction of informational-legal necessities of constitutional control bodies.

The seminars and conferences organized by this Commission in the various countries have an important significance in the exploitation of basic directions of democratic society development and further perfection of constitutional justice system.

The traditional Yerevan International Seminars, dedicated on actual problems of the constitutional justice are the result of the fruitful cooperation of Venice Commission and our court and this year the 7th Yerevan international seminar was organized in cooperation with the Venice Commission and the Constitutional Court of the Republic of Armenia. The materials of all these seminars were published in separate collection.

The first conference of secretaries general of Constitutional Courts, taken place in January, 1998 in Kiev and devoted to the issues of constitutional court budget, its control and management, gave us many orients and possibilities for comparative analysis of this issue in different constitutional courts.

This conference has a special importance. This thematic conference is the only measure, the aim of which is the summarizing of international experience and creation of further possibilities for development of the institute of secretary general of the constitutional court and possibilities for effective realization of his/her functions.

I called the institute of secretary general. I would like to begin with that we have gathered under aegis of secretaries general of the constitutional courts and in spite of that the functions are often coinciding, the position of not all the participants of the conference, and generally, not all general administrators is called “Secretary general”. In some constitutional courts, as we have mentioned, this position is called “Secretary general”, in others it is just “Secretary”, we often meet the understanding ”head of the secretariat or financial-economical administration”, in our constitutional court it is called “head of the staff”. There are many constitutional courts, where

the functions of secretary general are divided into departments and there is not position of basic coordinating manager. I begin with this understanding, because the name of the position has a great importance for definition of its status and functions and it will be desirable if in semantic aspect the names of our positions will sound identically. It will promote for the coordination of our activity, addressing to each other, specification of our functions and finally it will give the possibility for the managers and members of different constitutional courts to have ideas on hierarchy and structure of serving institute of other constitutional courts. In our opinion, it should be recommended to reflect the question of rapprochement of structure and names of the position of head of serving institute of the constitutional courts in recommendations of the given conference or corresponding documents of the Venice Commission.

The status and basic functions of the head of the Constitutional Court of the Republic of Armenia are determined by the Law "On Constitutional Court" of the Republic of Armenia, and all other serving and administrative functions found their development in Regulation of the Constitutional Court. The head of the staff shall be appointed by the President of Constitutional Court, who will be responsible for the management of staff. There are not any limitation for the position of head of the staff (speciality, type of education, age and etc). The requirements of the Law "On Civil Servant" of the Republic of Armenia do not also concern the status and powers of the head of staff.

Head of the staff is responsible for realization of administrative functions and management of the constitutional court. All basic questions, that are necessary for normal functioning of constitutional court, are in framework of administrative functions of the head of the staff. All departments, subdivisions, as well as garage of the constitutional court are in framework of structure of the staff. Within the estimate of expenses, the President of Constitutional Court shall establish the quantity, structure and personnel timetable of the staff. The legal-advisory service, department of international relations, financial department (accounts department), protocol department, subdivision of letter and correspondence, library, publishing group, material-technique and economical service, as well as editing of "Bulletin" of the Constitutional Court, information providing service (electronic measures of information, Internet and etc.), Inspector of personnel and garage are under the subjection of the head of staff. Press-service, assistants of judges, state security of the President and territories of the Constitutional Court are autonomous. Estimate of costs for maintenance of the Constitutional Court staff of the Republic of Armenia is component of estimate of costs of the Constitutional Court generally.

Guarantees for independence in the system of as high organs of the state power, as well as high judicial organs are personnel, informational and other provisions of activities,which the courts realize completely independently. But for the full and objective realization of powers of the most important guarantees for the independence are the financial securities of the Constitutional Court activity at the expense of means of the State budget. The normative regulation of financial and material security of the Constitutional Court and the Constitution of the Republic of Armenia are presented in the common plan: "guarantees for activities of judges of the Constitutional Court shall be prescribed by law" (Part 2, Article 97). It would be sufficient if we would have the system of constitutional law, where it will be regulated the process of presentation and approval of the Constitutional Court budget. In accordance with Article 7 of the Law "On the Constitutional Court" of the Republic of Armenia, the President of the Constitutional Court shall present to the Government for inclusion in the State budget the projected expenses of the Constitutional Court, in spite of that in the laws and in the Constitutions of many countries are established that "financing of the courts shall be realized only from the State budget and shall provide the possibility for independence of constitutional proceeding".

There are many countries, in legislation of which are established that the estimate of expenses of the Constitutional Court can not be decreased in comparison with the previous financial year (obviously, with calculation of indexation of inflation, and increasing of prices and etc.). This provision is one of the important guarantees for stable financial security of the Constitutional Court activity. But, regretfully, there are countries, including Armenia, in legislation of which this norm is absent. The above mentioned provision, as well as formulation: "The President of the Constitutional Court shall present to the Government for inclusion in the State budget the projected expenses of the Constitutional Court", - give opportunity to the Government to consider and present to the Parliament the project of the Constitutional Court budget, that is obviously the possibility for indirect influence of the Government to the powers of Constitutional Court. In our opinion, it will be more correct, if in the legislation it will be clear established that "the project of the Constitutional Court budget, exploited on the basis of acting norms, is to be presented to the Government for its inclusion in the project of the State budget without any changes". This order of approval of the Constitutional Court budget will allow the providing of financial independence of the court.

From the technique point of view, in Armenia, the project of the Constitutional budget for the regular financial year shall be made by the head of the staff, it shall be also agreed with the President of the Constitutional Court and presented to the Government of the Republic (Ministry of Finance). All interested subdivisions of the Constitutional Court participate in preparation of the estimate of costs.

After adoption of the Constitutional Court budget by the Parliament of the Republic of Armenia, the head of the staff administers the financial means in the framework of approved budget, and the control for its execution is foreseen by the Regulation of the Constitutional Court, by which it is envisaged to create special commission in composition of judges and workers of the staff, responsible for the execution of budget.

As we have already mentioned, the Constitutional Court shall administer independently the means envisaged by the State budget of Armenia, and its execution is out of control of any state organs. The head of the staff shall present the report on execution of the estimate of expenses for the last financial year to the consideration of the Constitutional Court and then of the Parliament of the Republic.

Not only the citizens of the country, but also foreigners, citizens, not having citizenship and legal persons (Ukraine, Russian) can address to the Constitutional Courts of many countries for provision of the realization and protection of the constitutional rights. The ground for constitutional address of these persons is the existence of execution of the Constitutional provisions and laws of the courts of general jurisdiction, other organs of the state power.
Besides, the significance of such way of protection of rights and freedoms is that, having considered the individual appeals, the Constitutional Court influences to the whole legal practice and provides the protection of human rights and freedoms, as well as assists responsible attitude of these organs for the provision of the rights and freedoms in the process of execution of normative-legal acts.

This provision, being the important means of protection of citizens' rights and freedoms, has not reflected in the legislation of the Republic of Armenia, the citizens of which have not right to address to the Constitutional Court on the issues of conformity of laws and other legal acts with the Constitution, but they suffer from willfulness of the state organs and the courts of general

jurisdiction, which differently understand the requirements of the Constitution and the laws of the Republic of Armenia. Regretfully, the Constitutional Court has not opportunity to consider the individual complaints.

Therefore, in accordance with the Law "On applications, letters and complaints of citizens" of the Republic of Armenia, all the state organs and organizations are obliged to consider the citizens' applications. The Article 11 of the same Law establishes, that each citizen and legal person have right to address to the court, and to the judicial power of the country, where in conformity with Point 2 of Article 92 of the Constitution of the Republic of Armenia, is also included the Constitutional Court. Taking into account the above mentioned, the citizens, legal and other persons are addressing to the Constitutional Court for protection of the rights and freedoms. Proceeding from the requirements of the Constitution and corresponding laws, including the Article 29 of the Law "On the Constitutional law", the applications presented to the Constitutional Court, are subject to obligatory registration. Those applications, that are presented by the subjects, having right to address to the Constitutional Court, are considered in the manner prescribed by law, and all other applications are registered by the staff of the Constitutional Court and their future depend on that to the consideration of which state organ or institute the application will be readdressed. The staff of the Constitutional Court is also responsible for control of the execution of requirements or suggestions presented in the letters and complaints of the citizens and legal persons.

The practice shows that about 200 applications and complaints of the citizens are readdressing to the Constitutional Court, the decisions of which are out of the control of the Constitutional Court.

Statements, conclusions and other decisions of the Constitutional Court of the Republic of Armenia in accordance with the Article 69 of the Law "On the Constitutional Court" are publishing in chronological order in the official "Bulletin" of the Constitutional Court, which is publishing since the day of establishment of the Constitutional Court. "Bulletin" is consists of 2 parts. In the first part there are published the analytical articles of the representatives of the constitutional justice organs and well-known scientists-constitutionalits of different countries of the world. In the second part of the "Bulletin" there are published the statements and decisions of the Constitutional Court, which will take effect upon the publication. The head of the staff of the Constitutional Court is responsible for the publication of the "Bulletin".

The whole management of the activity of international relations department of the Constitutional Court is also carried out by the head of the staff. During the last 5 years more than 10 conferences, seminars and Pupil and Student Olympiads, 3 international Scientific student were organized by the international relations department of the Constitutional Court organized conference. There were concrete steps in the sphere of cooperation between the Constitutional Courts. We think that active cooperation of the staff (secretariat) of the Constitutional Courts of different countries needs the serious activation and the given conference assists for such cooperation. I am sure that during this conference we came to the interesting and instructive conclusions on many issues, and active contacts between us, as well as through the Venice Commission will assist for the more effective cooperation.

The materials of this conference, undoubtedly, will be useful for the solution of many problems and improvement the works of the staff of the Constitutional Court.

In the conclusion, I would like to mention the high level of organization of this conference and express my gratitude to the Venice Commission and the Constitutional Court of Spain for huge work have been done for this conference.

Simultaneously, I would like to underline that we have got acquainted with the magnificent country - Spain, with its wonderful culture, cheerful people, and of course, with effective work of the Constitutional Court.

- IX -

INDIVIDUAL APPEAL TO THE CONSTITUTIONAL COURT AND THE ROLE OF THE SECRETARY GENERAL (ON THE BASIS OF LEGAL PROVISIONS AND PRACTICE OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION)

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1. POWER OF THE COURT AND INDIVIDUAL RIGHT.

The right of the individuals to appeal to the Constitutional Court is one of the most effective legal instruments to protect human rights and fundamental freedoms of large groups of society, since the Court does not resolve single cases, but rules on the constitutionality of legal provisions or even legal acts as a whole, which have been applied or ought to be applied in individual cases by the courts of general jurisdiction or other law-enforcement bodies.

In Russia the individual appeal to the Constitutional Court of a citizen or of a group of citizens who question a provision of a law is called “complaint”. This procedure was introduced into our legal system by the Constitutional Court Act of 21 July 1994, adopted on the basis of the 1993 Russian Constitution. The Constitution itself provides for such a procedure in Art.125, para.4: “The Constitutional Court of the Russian Federation, at complaints on the violation of constitutional rights and freedoms of citizens and at inquires of courts, shall verify the constitutionality of a law that has been applied or ought to be applied in a specific case, in accordance with the procedure established by federal law”.

Art. 96 of the Constitutional Court Act specifies: “The right to petition the Constitutional Court of the Russian Federation with the individual or collective complaint on the violation of the constitutional rights and freedoms shall be vested in the citizens, whose rights and freedoms have been violated by the law that has been applied or ought to be applied in a specific case, and in the associations of citizens, as well as in other bodies and persons, envisaged in the federal law”.

It should be noted that “citizens” here means: 1) Russian citizens; 2) foreign nationals; 3) stateless persons. “Associations of citizens” means any collective enterprise like joint-stock company, tread-union, etc.

“Other bodies and persons” include the Prosecutor General of Russia and the Ombudsman, whose rights to petition the Court in the interests of individuals are envisaged in respective federal laws.

2. GENERAL REQUIREMENTS TO THE PETITION. PRELIMINARY CONSIDERATION OF COMPLAINTS BY THE SECRETARIAT OF THE COURT.

Articles 37-39 of the Constitutional Court Act contain general requirements to the petitions to the Court that are applied also to the individual complaints. The complaint must contain all the necessary information about the petitioner, the appealed law, the specific case in which the law has been or ought to be applied. But the most important in the complaint are, of course, the specific grounds for consideration of the complaint by the Constitutional Court; the position and arguments of the petitioner; the request addressed to the Constitutional Court. There is also a list of documents that have to be attached to the complaint. The individual complaint shall be communicated to the Court in 3 copies. The complaints shall be charged with the state fee.

For many people some of these requirements are difficult to meet; they need legal education and certain skills. The Secretary General or members of the staff on his behalf often consult complainants on these matters without going into the merits of the case.

All complaints are subject to compulsory registration in the Clerk's Office of the Secretariat of the Court. After that they are dealt with by the Correspondence Division and the Departments of the Secretariat, which study them from both formal and substantive points of view. The most complicated or repeated complaints, as well as those of inter-disciplinary nature, go directly to the Secretary General who decides what action should be taken next.

Art. 40 of the Court Act provides the Secretariat with quasi-judicial right to dismiss the complaints (and other petitions) on formal grounds. It reads as follows:

" In the events when the petition:

1) apparently does not fall under the jurisdiction of the Constitutional Court of the Russian Federation;
2) does not meet in its form the requirements of the Federal Constitutional Law *(CC Act.-Y.K.)*;
3) originates from an inappropriate body or person;
4) has not been paid for by the state fee, unless stipulated otherwise by the present Federal Constitutional Law, he Secretariat of the Constitutional Court of the Russian Federation shall notify the petitioner that his petition does not meet the requirements of the present Federal Constitutional Law…".

Art. 111 goes even further, saying that the Secretariat of the Court shall, among other matters, "…consider the petitions to the Constitutional Court as a preliminary measure and in the events when the petitions do not pertain to the questions that require the examination by the judges of the Constitutional Court;…'. In other words, the Law gives the Secretary General of the Constitutional Court of Russia and his staff a high degree of discretion.

The question of powers of the staff of constitutional courts is still under discussion. In particular, this issue was discussed at the meeting of the secretaries of the constitutional courts of Europe organised by the Council of Europe and held in Strasbourg in March 1997, at the Conference held in Kiiv in November 1999. It was agreed that, given the amount of petitions addressed to the constitutional courts, the variety of subjects which in their overwhelming majority do not fall

under the jurisdiction of the constitutional courts, the powers of the staff of the courts must be broadened in order to screen the waterfall of complaints, to select those of constitutional matters to be considered by the judges. This would create an additional guarantee for the right to trial in reasonable time.

It goes without saying that the acts and decisions of the court staff must be put under strict control of the court itself. In Russia the Constitutional Court Act provides for this important guarantee of the constitutional right to access to court: according to Art.40, the petitioner has the right to demand that the Constitutional Court take a decision on the matter previously considered by its Secretariat. Having received such a demand, the Secretary General gives a commission to the appropriate staff members to prepare all the necessary documents and sometimes a draft decision on the admissibility and then transmits it to the judges.

Some statistical data may illustrate the workload of the Secretariat of the Constitutional Court of Russia. The Court has received in 1995 – May 2002 81 400 petitions, out of which individual complaints number 86 560 (12 294 and 12 164 respectively in 2001). Out of this number about 51 200 were dismissed by the Correspondence Division of the Secretariat as apparently not falling under the jurisdiction of the Constitutional Court. Many others were considered by the departments (experts) following the instructions of the Secretary General and were dismissed by them on the grounds enlisted in Art.40. Only about 3% were considered by the judges in plenary sessions, out of which the majority were dismissed by the Court's decision.

3. **ADMISSIBILITY OF COMPLAINT.**

Given the potential number of petitions addressed to the Constitutional Court as well as the variety of subjects of complaints, it is natural that the Court Act provides for certain conditions of admissibility of complaints, so that the Court does not waste its own time and that of thousands of citizens, dealing with matters which fall under the jurisdiction of other state bodies.

A complaint on the violation by the law of the constitutional rights and freedoms is considered as admissible if: 1) the petitioner questions a law adopted by the legislative body (federal or regional), but not a decree, ordinance etc.; 2) the law affects his/her personal rights and freedoms; 3) there rights and freedoms are of constitutional (or of international) level; 4) there is a specific case, the consideration of which has been completed or initiated in the court or other law-enforcement body; 5) the law has been applied or ought to be applied in this case to the petitioner.

All the conditions of admissibility listed above are to be grounded by the petitioner himself or by his legal representative and checked by the Secretary General and his staff and then by the Court. Art. 96, quoted above, continues: "Enclosed with the complaint… shall be a copy of the official document confirming application or the possibility of application of the appealed law in the resolution of the specific case. The official or the body that considered the case shall produce the copy of such a document to the petitioner at his request".

The Constitutional Court has elaborated in its decisions legal positions containing some additional criteria for assessment of the admissibility of a complaint:

- a complaint may be considered as admissible even if the decision of a court of general jurisdiction is positive for the petitioner;

- if a law questioned by the petitioner limits his rights in accordance with Art. 55 of the Constitution, which allows it in certain cases, the complaint shall not be admissible;

- if there is a lacunae in a law, which prevents the petitioner from exercising his right, this shall be prerogative of the legislator;

- lacunae, vague formulas, unclear terminology of a law may be considered as grounds for admissibility only under a condition that they lead to incorrect interpretation of that law by the state bodies and therefore to violation of human rights.

4. **DISMISSAL OF COMPLAINTS.**

The Court shall decide to dismiss a complaint in the events when:

1) resolution of the question raised in the complaint does not fall under the jurisdiction of the Constitutional Court;

2) in accordance with the requirements of the Constitutional Court Act the complaint is inadmissible;

3) the Constitutional Court has issued a ruling on the subject of the complaint, that ruling retaining its force.

General provision of Art. 43 stipulates that, if the act the constitutionality of which is being contested has been abrogated or terminated by the beginning or during the consideration of the case, the proceedings initiated by the Constitutional Court may be cancelled, except for the events when constitutional rights and freedoms of citizens have been violated by the operation of the act.

The dismissal decision is formalized in the interlocutory order, the copy of which is sent by the Secretary General to the complainant together with the order to the local bank to return the state fee paid. Some interlocutory orders are published, when the Court considers their motives and legal grounds for dismissal being of wide social interest.

In 2001 the Court has taken 235 interlocutory orders on the dismissal of individual complaints. In the same year the Court has considered 20 cases in public sessions, the reasons for them being 132 individual complaints of citizens or their associations (often cases are merged as having the same subject).

5. **ADMISSION OF COMPLAINTS.**

The decision on the question of admission of a complaint for consideration shall be taken by the Court in plenary session in no event later than a month after the completion of the preliminary review of the complaint by the judges. The Secretary General notifies the parties of this decision.

In the events of urgency the Constitutional Court may propose to the respective bodies and officials that they suspend the disputed act until the Court has completed the consideration of the case.

The Constitutional Court having taken up the complaint for its consideration shall notify about that the court of general jurisdiction, court of arbitration or other body which considers the case

in which the appealed law has been applied or ought to be applied. The court or other body may suspend the proceedings pending the passing of the judgement of the Constitutional Court.

Deciding to take up the complaint for consideration, the Court also appoints the judge-rapporteur, who from this moment on becomes the key figure in the proceedings. The Secretary General and his staff provide expert assistance to the judges and organise the hearing of the case (correspondence with the parties in the case; distribution of documents; contact with mass-media, etc.).

6. FINAL DECISION AND ITS LEGAL CONSEQUENCES.

Based on the outcome of the consideration of a complaint the Constitutional Court passes one of the following decisions (Art. 100):

1) on acknowledgement of the conformity of the law or individual provisions thereof with the Constitution;
2) on acknowledgement of the non-conformity of the law or individual provisions thereof with the Constitution.

If the Court acknowledges the non-conformity of the law applied in a specific case with the Constitution, the case shall in any event be subject to review by the competent body in accordance with the regular procedure.

The restoration of the constitutional rights is sometimes a serious problem in Russia, especially when it requires significant material and financial resources.

It must be also noted that the Constitutional Court Act in its Art. 87 indicates general consequences of the Court's decision on non-conformity of enactments with the Constitution, that applies to the individual complaints: "The acknowledgement of non-conformity of enactment or treaty, or individual provisions thereof with the Constitution of the Russian Federation shall make grounds for the abrogation in accordance with the prescribed procedure of the provisions of the provisions of other enactments, based upon the enactment or the agreement that were acknowledged as unconstitutional, or reproducing it, or containing the same provisions that made up the matter of the petition. The provisions of these enactments and agreements may not be applied by the courts, other bodies and officials".

This means that a decision of the Constitutional Court based on one individual case can affect many other legal provisions and therefore many other people and their rights, giving them legal grounds for appeal to courts of general jurisdiction.

The Secretary General is responsible for the distribution and mailing of the copies of the Court's decisions, as well as for their official publication.

Implementation of court decisions has always been a problem in Russia. Constitutional Court is not an exception in this respect. The Secretariat of the Court includes special Division of Control over the Implementation of Court Decisions. The Division gathers information on its own or receives complaints on non-implementation of the Court's decisions by state bodies or state officials, as well as by courts of general jurisdiction. The information is reported to the Secretary General, who may either write to the appropriate authority on his own or report the matter to the Chairman of the Court in order to take the necessary measures.

ANNEX

Petitions (all of them, individual complaints included being 99% of the total) communicated to the Constitutional Court of the Russian Federation in 2001 can be classified as follows:

- constitutional law 371, among them acts of the legislative power 108; those of the executive power 31; judicial power 91; other 141;
- constitutional rights and freedoms 3021, among them: equality 60; labour rights 344; housing 455; health 24; education 10; social care 1896; citizenship and emigration 48;
- federal relations 48;
- civil law and procedure 2547;
- appeals of court decisions in civil or administrative cases 1585;
- finance, tax law etc. 1361;
- criminal law and procedure 2929;
- complaints on the violations of rights during preliminary investigation or inquiry, amnesty and parole requests, detention problems 4418;
- administrative sanctions 269.

- X -

HEAD OF THE SECRETARIAT AND SUBJECTS OF APPEAL: ROLE OF INFORMATION, ACCEPTABILITY CRITERIA, DECISIONS ON UNACCEPTABILITY; CORRESPONDENCE WITH SUBJECTS OF APPEAL PRIOR TO AND UPON DECISION OF THE COURT

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By their number, appeals to the Constitutional Court of Ukraine for protection of the rights and freedoms of the citizens and legal entities, have shown stability year to year. At the same time, this does not mean, each appeal to the Constitutional Court may result in the decision. The reason is that the Constitution of Ukraine and the Law of Ukraine "On the Constitutional Court of Ukraine", hereinafter referred to as "the Law", specify the body of subjects eligible to apply to the Constitutional Court, and cases, in which such application is allowed. Nevertheless, in any case, the Constitutional Court shall examine each appeal and the appellants shall be given response on the merits.

We should notice that in accordance with Article 38 of the Law, the forms of application to the Constitutional Court of Ukraine are constitutional petition and constitutional appeal.

Subjects of the right to a constitutional petition, in accordance with Articles 40, 41 of the Law, are the President of Ukraine, the Verkhovna Rada of Ukraine, the Cabinet of Ministers of Ukraine, no fewer than forty five National Deputies of Ukraine, the Authorized Representative of the Verkhovna Rada of Ukraine on Human Rights, the Supreme Court of Ukraine, the Supreme Rada of the Autonomous Republic of Crimea, local self-government authorities, and other state authorities.

Subjects of the right to a constitutional appeal, in accordance with Article 43 of the Law, are the citizens of Ukraine, aliens, stateless persons, and legal entities.

All appeals which arrive to the Constitutional Court of Ukraine, shall be preliminary examined by the relevant structural divisions of the Secretariat of the Constitutional Court.

Upon registration with the documentary provision service, the appeals are referred to the Constitutional Petitions and Appeals Preliminary Examination Division of the Secretariat's Legal Examination Department, which within ten business days shall perform their initial check for conformity with the requirements of the Law, which accurately specifies the list of attributes, by which acceptability or unacceptability of the appeals shall be established. In particular, the requirements to making of appeals are specified in Articles 39, 42, 45, 93, 94 of the Law. Except for this, the Rules of the Constitutional Court of Ukraine specify that in the event of non-conformity of an appeal to the specified requirements or if the appeal obviously may not be a subject for examination by the Constitutional Court of Ukraine, Head of the Secretariat shall give a written notice to that effect to the subject(s) of such appeal. Based on the results of the

validation, alternatives of further handling of the appeal shall be specified. If an appeal complies with the specified requirements, the employees of the Department shall make a certificate signed by the Head of the Secretariat, which shall be referred to the Chairman of the Constitutional Court.

With the purpose to improve the appeal examination process, the Constitutional Petition and Appeal Preliminary Examination Division on a quarterly basis generalizes the appeals of the citizens and legal entities. Such generalization shall be referred to the Head of the Secretariat for examination. The generalization analyzes the problematic issues mentioned in the appeal, and the reasons for repeated appeal to the Court.

Further preparation of scientific and expert opinions on the matters, mentioned in the appeals accepted for examination by the Court, on authorization of the reporter judge shall be performed by the Constitutional Petition and Appeal Legal Examination Division of the Legal Examination Department.

In the event that the appellant fails to observe the specified requirements, the Head of the Secretariat shall give a written notice to that effect to such appellant. Such notice shall specify the deficiencies of the appeal, and shall explain the grounds on which the appeal may not be accepted for examination by the Court.

One of the appeal acceptability criteria is availability of rights of appeal in the appellant. So, citizens of Ukraine, foreigners, stateless persons, and legal entities may appeal to the Constitutional Court on issues of providing official interpretation of the Constitution and the laws of Ukraine. In relation to issues of recognition of the legal acts as unconstitutional, subjects of the right to appeal shall include the President of Ukraine, no fewer than 45 National Deputies of Ukraine, the Supreme Court of Ukraine, the Authorized Representative of the Verkhovna Rada of Ukraine on Human Rights, the Supreme Rada of the Autonomous Republic of Crimea.

At the moment, there is a discussion on introduction of so-called "constitutional complaint" institution whereby the citizens may apply to the Court with a request to recognize a legal act unconstitutional in connection with violation of their constitutional rights.

The analysis of the appeals which have arrived to the Court since inception, shows that appeals are made mainly by the citizens. Nevertheless, they appeal to a wrong authority rather frequently.

So, only a minor part of the appeals as to official interpretation is referred to the examination by the Collegium of Judges. For nine months in this year, the Constitutional Court has received nearly 300 appeals from citizens and legal entities, which by formal attributes comply with the requirements of the law to certain extent, on which upon preliminary examination, only 67 have been referred to examination by the Collegium of Judges. This is stipulated, first and foremost, by non-compliance of the applicants with the requirements to appeal in relation to grounds, their form and content, specified by the Law. Totally for this period of 2002, the Constitutional Court of Ukraine has received 1491 letters from the citizens and 133 letters from the legal entities.

A condition precedent of acceptability of an appeal is observance of the rules of jurisdiction, as even when any and all formal requirements are observed, but the case appears to be beyond the jurisdiction of the Constitutional Court, the Head of the Secretariat shall give to the applicant a motivated notice to that effect.

Frequently, citizens apply with a request to check the legitimacy and justification of the decision of the courts of general jurisdiction, including the Supreme Court of Ukraine, or even seek decision of a specific civil, criminal cases on the merits. In particular, we receive many complaints on the decisions and acts of officials, state and local self-government authorities. In such case, the appellants are explained, that in accordance with Article 14 of the Law, the authority of the Constitutional Court of Ukraine does not cover issues concerning the legality of acts of state power authorities, power authorities of the Autonomous Republic of Crimea and local self-government authorities, as well as other issues which are subject to the authority of the courts of general jurisdiction.

In their appeals, citizens also complain on the amount of pension, delayed receipt of social benefits, forfeiting of privileges, disagree with recalculation of pensions, etc. The Constitutional Court of Ukraine is not authorized to decide on such issues, as determination, recalculation, and calculation of pensions and social benefits shall be performed by the authorities of social protection of the population subject to the procedure specified by the laws of Ukraine.

In addition, citizens apply with petitions on filling the gaps in the law, elimination of differences between the laws and other legal acts, which are also beyond the authority of the Constitutional Court, as contraventions between the laws and other legal acts may not be eliminated by official interpretation of their individual provisions.

Most frequently, appeals raise issues related to complaint against the decisions of the courts of general jurisdiction, depreciation and return of money deposits, acts of officials and civil servants, issues related to social maintenance, residential, property, and land issues.

The main reason for the Constitutional Court receiving from the citizens and legal entities of appeals, which by their form and contents are subject to no examination by the Court, is lack of legal awareness of the population of the related authorities of the Court, and, in some cases, misunderstanding of the concepts of constitutional appeal and the requirements to the contents thereof specified by the Law. With the purpose to render legal assistance to the citizens, the notices of unacceptability are accompanied with the relevant excerpts from the Law of Ukraine "On the Constitutional Court of Ukraine". We should note, that notices, which the Secretariat sends to the applicants, facilitates proper making of the appeals. So, in the event that the citizen removes the deficiencies, such citizen may re-apply to the Court.

We should note, that the majority of appellants upon sending to them of the notice do not re-apply to the Court, being apparently satisfied with the response or the recommendation to send their applications to the authority competent in the issues mentioned by the applicant.

Some appellants apply for the second and even for the third time, contesting the notices of their appeals' non-conformity to the specified requirements sent to them by the Head of the Secretariat. In this case, the Secretariat prepares the detailed information and the appeal is referred to examination by the Collegium of Judges to examine the issues related to possibility of initiating the constitutional proceedings.

Repeated, deliberately unjustified appeals to the Constitutional Court in accordance with Article 60 of the Law may be regarded as an abuse of the right. In this case, the meeting of the Constitutional Court makes the relevant motivated resolution, and the Constitutional Court, upon

decision on refusal in opening constitutional proceedings of the case may charge from the applicant the state duty in the amount specified by the Law. However, no such precedent has occurred in the practice of the Constitutional Court of Ukraine so far.

If the Constitutional Court has made the decision, provided opinion or made procedural resolution on refusal in opening of the constitutional proceedings on the case as to the issues raised in the constitutional appeal, the applicant shall be given a notice to that effect, signed by the Head of the Secretariat, accompanied with a copy of the decision, opinion or procedural resolution of the Constitutional Court.

As we have already noted, an appeal should comply with the requirements specified by the Law. So, one of the obligatory acceptability criteria of the appeals in accordance with the issues raised by the applicants, is: legal justification of the statement of unconstitutionality of the legal act (individual provisions thereof) or justification of the necessity in official interpretation of the provisions contained in the Constitution of Ukraine and the laws of Ukraine.

An appeal shall also comply with the requirements of the Law, whereby the grounds for constitutional appeal as to official interpretation of the Constitution and the laws of Ukraine is the availability of ambiguous application of the provisions laid down in the Constitution or the laws of Ukraine by the Courts of Ukraine, other state authorities, if the subject of the right to constitutional appeal believes that this may result or has resulted in violation of such subject's constitutional rights and freedoms (Article 94 of the Law).

Rather complicated is the problem of setting the criteria of ambiguous application by the Courts of Ukraine or other state authorities of the provisions laid down in the laws of Ukraine. Application of legal norm is ambiguous in those cases when the Courts of Ukraine, other state authorities differently understand the contents of some norm that results in different decision on similar cases, and in turn, violation of the constitutional rights and freedoms of the citizens. Everyone may also apply to the Constitutional Court, if his/her right is likely to be violated in future. However, both such possibility and the facts of ambiguous application of the laws, shall be proved.

A requirement to provide evidence of ambiguous application of the provisions contained in the Constitution and the laws of Ukraine by the Courts of Ukraine and other state authorities is not always understood right by the applicants. Rather frequently, there arrive appeals where personal disagreement of the applicant with the decision of the court of general jurisdiction or acts of other state authorities are treated as ambiguous application of legal norms.

Sometimes, applicants understand the legal norms differently than the courts of general jurisdiction and, therefore believe that their application at examination of the cases by the courts (other state authorities) was wrong. In this case, we would tell about differences in the application practices of the norms by the courts of general jurisdiction, other state authorities and understanding thereof by the appellant rather than ambiguous application.

No grounds for constitutional appeal is provided also by different interpretation (construal) of the legal norms by state power authorities, local self-government authorities, institutions, organizations, etc., which the citizens rather frequently treat as ambiguous application of these norms. However, the letters of the said authorities constitute no acts of law enforcement, they contain only certain explanations provided by some institution, statement of their views on the specified fact, and also the decision on the specified situations.

Constitutional appeals of the citizens are refused by the Constitutional Court owing to absence in such appeal of ambiguous application of the provision contained in the Constitution and the laws of Ukraine.

The Secretariat is committed to on-going improvement of appeals handling, looks for new approaches, studies international practice. So, we have developed the Tentative Regulations for Handling the Appeals which accurately describes all stages of examination, mechanism for appeal handling.

We seek attentive approach towards every issue dealt with in appeals. Giving a notice, we seek to suggest how to defend the violated rights, where to apply for the decision on the problem or how to revise the appeal so that it could be examined by the Constitutional Court.

- XI -

WORKING TOWARDS ELECTRONIC FILING OF DOCUMENTS IN THE SUPREME COURT OF IRELAND

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Introduction

In common with courts in many other jurisdictions, the Irish Supreme Court finds itself drowning under a flood of paper. The ease with which modern office equipment such as photocopiers and laser printers can produce paper means that cases on appeal often involve large folders, or even large boxes of documents. In the experience of the court, a sizeable part of these are not relevant to the questions at issue, and they present great difficulties in terms of storage, transport and ease of reference. The Supreme Court is therefore examining how modern technology can be used to solve these problems.

The Supreme Court has a number of characteristics which make it ideally suited to a pilot project involving Information Technology. The court is numerically small (it has 8 members), generally sits in a single courtroom and all of its members work in the same building. It is almost exclusively a court of appeal. It therefore very rarely hears evidence at first instance but is instead primarily concerned with reading documents. These include the documentary evidence at the original trial, the transcript of the hearing and written legal submission from counsel for the parties to the appeal. This means that the Supreme Court can be used as a "trial run" for the use of technology in the Irish courts in general. It is hoped that if this experiment is successful, the methods, procedures and technology used in the Supreme Court can be rolled out to the High Court and ultimately to the Circuit and District Court (where appropriate) in the future.

It is therefore important to this project that the technologies, standards and procedures adopted are scaleable, as they must ultimately be extended out to the other courts. It is also important that we get it as right as possible the first time – once the system is extended out to other jurisdictions and is adopted by a majority of legal practitioners, it will be difficult to make changes quickly. We are laying the foundations for an infrastructure that may last 5 or 10 years. In terms of the development of the legal system, this is but the blink of an eye. In terms of technology, this is several lifetimes, at least in product terms. While it is difficult to avoid points of detail when planning a technology project, the Working Group has tried to keep its eye on the question of general principles and procedures, so that what is implemented here will last into the future.

The Irish Courts Service is committed to making the best use of technology for the management of its work and of court business. Up to recent years there was an underinvestment in technology in the courts. This is both a disadvantage and an advantage. The disadvantage is that there is very little in terms of an installed base of technology in the courts, and the staff and judges are not exposed to modern tools. The advantage that this presents is that the Courts Service can leap frog generations of technology and move directly to using the most modern equipment, software, and techniques without having to worry about upgrading, modifying or integrating legacy systems.

The Supreme Court has been involved in an incremental process of computerisation over the last two years. Judges now have computers on their desktops and are given access to facilities such as e-mail, electronic research databases and the Internet. As part of this process the court decided to investigate the possibility of having parties to cases before it file documents electronically. Following discussions between Courts IT and the Supreme Court, it was decided to establish a Working Group to look into the matter further.

Supreme Court Computerisation Working Group

The Working Group has been set up as a consultation forum for the discussion of the views, concerns and ideas of those who are likely to be affected by the proposed computerisation project. The aim of the project is to move to the use of information technology to manage all aspects of the functioning of the court, i.e., the submission of documents to the court, the display of documents in the courtroom and case management. The hope is that the Working Group will deliver a report containing a detailed description of three elements vital to this: the technology standards to be used, the roadmap for the implementation of this technology (inside and outside the court) and the timetable for the implementation (again inside and outside the court).

The Working Group included representatives from the Supreme Court, the Supreme Court Office (which is the Courts Service unit responsible for accepting documentation to be used in court), Courts IT, the Directorate of Supreme and High Courts, the Judicial Researchers, the Bar Council, the Law Society, the Attorney General's office and the Chief Prosecutions Solicitors office. I am the secretary to the Working Group.

Initial Meetings

The Working Group has met three times since April 2002. It soon became clear that the scope of the project was very large. The Working Group had to discuss issues relating to the use of computer hardware in the courtroom, the software and document formats to be used and the systems to use for the transmission of information to the court. As was to be expected, the various bodies represented on the group had different perspectives and wishes. It was, however, heartening to see that the representatives of the legal profession were enthusiastic about the idea of electronic filing and indeed were eager to get underway.

One question which was the subject of much discussion was the location of computers in the courtroom. A courtroom requires a certain air of decorum and ceremony. This is easily disrupted by placing computer screens and keyboards on the bench and in front of counsel. Nonetheless, computers must be in the courtroom in some fashion if electronic filing is to be of any purpose. The Working Group gave some consideration to wireless networking but ultimately decided that it was not feasible, largely on security grounds. There was some reluctance to dive into refitting the benches and desks in the courtroom with computer screens when they would only be used for a small number of cases in the initial period. It was therefore decided that it would make the most sense to use laptops which can be brought in and out of court on a temporary basis as needed.

It was decided to focus on four types of documents for the initial pilot cases: the Notice of Appeal, the High Court judgment, the transcript of the High Court hearing and counsel's written submissions. The Notice of Appeal is the formal document setting out the appeal and the grounds on which it is taken. The transcript of the High Court hearing is, as the name suggests, a written

record of what was said and done at the original High Court hearing. This may be quite lengthy. Counsel's written submissions are a summary or skeleton of the arguments which counsel propose to make in court. They have no formal legal status, but are submitted for the convenience of the court.

Both of these would be particularly useful to have electronically. Because of the length of the transcript, it is very useful to be able to search through it or to jump from location to location quickly. Having the document in electronic format would also greatly alleviate the difficulties which the court experiences in transporting and storing large volumes of paper. The written and legal submissions are the core of what the court will hear argued before it (it should be borne in mind that oral argument is regarded as a vital part of a court hearing in common law systems). Therefore, having this in electronic form, hyperlinked to the authority cited and the relevant documentary evidence and portions of the transcript would make the work of the court easier in that judges would be able to read their way into the case more quickly.

As it became clear that the issues to be discussed and decided were quite extensive, it was decided to try to reduce the amount of time required for plenary meetings of the group and instead to move the discussions forward on paper. The primary mover in this regard was Courts IT, which prepared some discussion documents setting out issues to be decided upon by the group and giving Courts IT's opinion on the questions raised. The other bodies represented on the group also put forward written submissions. From these it was possible to distil the issues down to some net questions, upon which the group was able to reach consensus.

The final systems to be adopted by the Working Group are constrained by several factors. These include the levels of technology in use by legal practitioners and by the court itself; the Rules of the Superior Courts (which govern the processing of appeals and the submission of documents to the court) and the considerable challenge of implementing a system which is robust, scaleable and long lasting. This led the Working Group to some decisions on the technology to be used.

The document formats to be used should be as open and non-proprietary (i.e. not tied to a particular company or software package) as possible and therefore PDF was selected as the best file format. The Rules of the Superior Courts require that documents be filed in person in the Supreme Court Office. While initially the Working Group did consider the feasibility of allowing documents to be filed at a distance i.e., by e-mail or over the internet in some other way, it was decided that this would not make sense in the short term. The Courts Service and the Irish Government does not have any public key infrastructure in place and this is not likely to change in the near future. The investment required to implement such a system is beyond the resources available to this project. Also, a short term decision made in the context of this project may not be the best for the long term and may be difficult to dislodge. It was therefore decided that electronic submissions would be made directly to the Supreme Court office, on CD or DVD.

The intention is that solicitors for the parties will file a CD of documents each, containing high resolution images of the documentary evidence, along with the full text versions of the High Court transcript and the written legal submissions. We hope to be able to hypertext the written legal submissions to the transcript and other documents. We are also investigating how we can link the references to authorities (legislation in case law) in the written legal submissions to electronic sources such as Lexis, and other online sources of case law. The Supreme Court Office will take these CDs over the counter as it does with written submissions at present. The CDs will be processed by a custom application which will verify that the contents of the CD are present and correct and contain no viruses, extraneous information or errors.

When the Supreme Court Office has received and processed electronic submissions from all the parties to a case, it can then perform optical character recognition (OCR) over all of the documents and prepare a common CD which can be duplicated and distributed back to all of the parties. In this fashion, all of the parties to a case will receive electronic versions of all the documentation involved. This CD can also be used in laptops which are used in court. While we have not yet made a selection in terms of what software will be used internally to manage the documentation we intend to ensure that this software will be able to create CDs that can be used on a stand alone basis, i.e. without needing to be connected to a central server, and thus can be used by judges on the bench and lawyers in the courtroom without any need to login to the Courts network. This means that everyone will be working from the same set of documents but does not raise the security issues involved in granting access to the courts network to those working outside the courts.

Investigating the Details

Once the Working Group had arrived at these overall policy decisions, it was clear that the next step forward was to investigate the details of the technology. As this was a task beyond the resources and time available to the Working Group itself, an external firm of consultants was employed. These have spent the summer months distributing questionnaires, interviewing members of the Working Group and preparing a lengthy report setting out the context in which the project operates, its aims and ambitions and the best means to achieve these. This report has just been finalised.

The Future

As for the future, the Working Group should meet shortly to consider this report and hopefully approve of its contents. We will then be in a position to see what needs to be done and by whom in order to move this project forward. The consultants' report calls for the development of software and hardware and network infrastructure to deal with and process electronic submissions. The aim would be to carry out this work in early 2003, finishing during the summer vacation and perhaps to take some pilot cases at the beginning of the 2003/2004 legal year.

Initially, this will be a pilot project and will therefore proceed on a parallel basis, i.e., parties will submit documents both on paper and electronically simultaneously in the first few cases. This means that if something goes wrong – and it often can, with new technology – the court can fall back to the paper documentation. These early cases will be a learning experience for all concerned – courts staff, judges and legal practitioners – and we will be looking to see what we can learn from them and how the systems and procedures can be improved. We will also need to take steps to deal with any failures that occur (although hopefully there should not be too many of them!).

Over the longer term, the use of electronic filing will slowly be expanded. Eventually we should be able to move beyond parallel submission to a situation where documentation is only submitted to the court in electronic form. It remains to be seen whether this can be done for all cases. For smaller or shorter cases, the extra effort involved in preparing electronic submission may simply not be worth the expense. The Supreme Court (and the Irish courts in general) must also be sensitive to the resource implications of electronic filing for smaller solicitor's practices and for lay litigants. We cannot deny such people access to court simply because they do not have the money to equip themselves for these new horizons. The Courts Service may need to establish

service bureaux to assist those without easy access to technology in scanning documents and preparing CDs, as is done in Singapore.

Also in the longer term, the Working Group will have to consider what changes may be required to the Rules of the Superior Courts to permit electronic filing without the need for paper documentation being submitted also. Although the Working Group has considered this issue it was decided to defer further discussion to some future date.

Once we are satisfied that electronic filing is working successfully in the Supreme Court, it will be time to consider how it can be expanded to include the High Court. That, thankfully, will not be a task for this Working Group. The Courts Service will also ultimately need to consider that possibility of electronic filing at a distance, i.e., over the Internet. These, however, are challenges for a future date. For the moment, there is enough to be done to arrive at the first electronic hearing in the Supreme Court.

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THE DECISIONS OF THE CONSTITUTIONAL COURT - THEIR PUBLICATION AND EXECUTION

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The Director of Court´s Administration of the Czech Constitutional Court is not competent to act in the proceedings before the Court and the Justice Rapporteur himself is in charge of preparing the case for a decision. For this reason I will mention in brief the procedure of the Court.

After the registration of a submission to the registry, the registrar assigns a Justice Rapporteur who is either a member of the Plenum or a permanent member of a Panel designated by the work schedule.

Justices Rapporteur must work with every submission. Justices may assign the task of refusing submissions to their assistants, if the petition is manifestly not worthy of instituting proceedings, and should set a deadline by which a petitioner should cure the defects in the petition.

The Justice Rapporteur may reject the petition through a ruling, without holding an oral hearing and in the absence of the parties should the petitioner have failed to cure defects in the petition within the period determined therefor, or if the petition was submitted after the proper deadline, or if the petition was submitted by a person clearly not authorised to do so, or if the said petition does not belong to the jurisdiction of the Constitutional Court, or if the submitted petition is inadmissible.

The Panel may reject the petition through a ruling without an oral hearing and in the absence of the parties if the petition is manifestly ill-founded, or if the Panel finds in a petition, submitted pursuant to § 64, Art. 1 to 4 or § 71a, para 1, {i.e. in the proceedings for cancellation of Acts or other legal regulations or their individual provisions}, the reasons for refusal pursuant to Article 1 or item a). The resolution must be decided unanimously. The vast majority of constitutional complaints are dismissed in this initial examination.

In all other cases, the Rapporteur prepares the matter for the Plenum or for the Panels. The oral hearing takes place in the proceeding for the annulment of a statute or other legal enactment. The Court may refrain from the oral hearing with the consent of the parties. The oral hearing is held in public.

According to the Act on CC there are two kinds of decisions. The Court decides the merits of the matter by judgment and all other issues by ruling. It concerns especially procedural questions (i.e. refusal submission, excluding the Justice, imposing a disciplinary fine, imposing the obligation to pay cost of a proceedings, discontinuance of a proceeding etc.). However, the Court can also decide by judgment some procedural questions.

Should the Court conclude that a statute conflicts with a constitutional act, or that some other enactment conflicts with a constitutional act or a statute, it declares that such statute or other type of enactment shall be annulled on the day specified in the judgment.

Otherwise, the Court will reject the petition on the merits.

Should the Court conclude that a statute is unconstitutional, an annulment will take place only if necessary and no other alternative exists. In some cases the Court has decided that an act is constitutional only on a certain interpretation.

Should Court annul a statute, it shall also state in its judgment which of the implementing regulations shall lose force and effect simultaneously with the statute.

The majority of submissions to the Court consist of constitutional complaints. The Court decides on the merits by a judgment and can reject or grant it in its entirety or grant and reject it in part.

The Court in its granting decision declares, which of the constitutionally guaranteed rights or freedoms and which provision of a constitutional act was infringed and which encroachment by a public authority resulted in the infringement.

Should a complaint be directed at a legitimate decision, the Court shall annul the contested decision of a public authority.

Should a complaint be concerning a matter other than an encroachment by a public authority then a decision (inactivity of an institution), the Court enjoins the authority from continuing to infringe this right or freedom and orders it to restore the situation that existed prior to the infringement.

Judgments are always announced publicly in the name of the Republic. This applies also in the cases when the Court has made a decision without an oral hearing.

After pronouncing finding/decision, written judgments and rulings are delivered in person to the parties, and secondary parties involved and to their lawyers. After returning the receipts signed by the parties, a copy of the judgment or ruling is given to the Vice-President, as delegated by the President of the Court, with the consent of the Plenum, performance of the task to publish the Court's decisions pursuant to the ACC.

The Act on the Constitutional Court distinguishes between the publication of the Court's decision in the Collection of Laws of the Czech Republic (hereinafter Collection of Laws) and in the Collection of Judgments and Rulings of the Constitutional Court (hereinafter Collection of Decisions).

Collection of Laws of the Czech Republic

The Collection of Laws is the official bulletin issued by the Ministry of Interior in which are published statutes and other generally binding regulations. The Act on the Collection of Laws establishes that in this Collection are also announced judgments of the CC, prescribes the Act on the CC and the notifications/standpoints of the CC, and decides the CC on their pronouncement.

Art. 57 para. 1 of the Act on the CC of the Czech Republic provides that the Court's judgments have to be published in the Collection of Laws if they concern: petitions proposing the annulment of a statute or some other enactment, a constitutional charge against the President, a petition by the President seeking the annulment of a concurrent resolution of the Assembly of Deputies and of the Senate and on petitions for adjudging the conformity of a treaty with the constitutional order.

The responsible employee of the registry hands over the copy of judgments of determined by the CC to the publication in the Collection of Laws to the President and the Vice-President of the Court. The Vice-President transfers them to the employee, who is engaged in the preparation of the court's judgments for publication.

The employee reads the judgment. On the basis of a stipulation of the Act on the CC, information concerning the identity of the parties and the secondary parties, their representatives, witnesses, and experts may not be published. For this reason the names of natural persons or legal entities remain anonymous. The indication of state bodies, courts and other institutions is not changed.

In this way completed decision is then sent to the publisher of the Collection of Laws. Within a week a correction is made which is then consulted with a representative of the Court.

In the Collection of Laws publishes the Court the statement of the judgment and so much of the reasoning as makes clear the legal principle relied on by the Court, as well as the reasons which led to it. That means that advice concerning appeals is not published. Anyway, is possible to publish all text of the reasoning, if the Court considers it in the individual case necessary.

The Court may decide not to publish in the Collection of Laws the reasoning of a judgment in a matter annulling a statute or other enactment, or individual provisions thereof, if such statute or other enactment was not promulgated in the Collection of Laws or in the analogous preceding Collection. It concerns generally binding ordinances or enactment issued by municipalities and regions. The enactment is important only for the given region. The Court decided a lot of petitions proposing the annulment of such enactment submitted by the head of a county office.

If a proposition of law, announced by the Court in a judgment of the type that is not generally published in the Collection of Laws, is of general significance, the Court may decide to publish this proposition of law in the Collection of Laws. The CC is the only judicial body responsible for the protection of constitutionality in the Czech Republic. The Act on CC enables to the Court, finds it necessary, to publish its legal opinion and to ensure to public bodies and to the public the opportunity to acquaint themselves with the opinions of the Court and to respect it in their other activity. The legal opinion should be important not only in the given case, but of generali significance. The Court took advantage of the possibility in the judgment concerning constitutional complaints {No. 293/1996 Col.} and in the judgment concerning proceedings in remedial actions against a decision concerning the certificate of the election of a Senator {No 70/1999 Col.}.

All judgments of the Plenum are published. A judgment of the Panel can be published, if the Plenum decides so. In fact, there were some cases, when their judgment was published.

The speed of publication is very important in the case of derogation judgment, if the unconstitutional provision shall be annulled on the day the judgment is published in the Collection of Laws, that is the day date when the relevant number of the Collection of Laws is

sent out. It is possible to say that average duration from receipt a decision till its publication takes 3 weeks. But when necessary, on the base of the written request, this period can be shortened to 14 days. In brief, the cooperation of the Court with the publisher of the Collection of Laws is very good.

Collection of Judgments and Rulings of the Constitutional Court

Art. 59 para. 1 of the Act on the CC of the Czech Republic provides that every judgment adopted by the Court in a calendar year shall be published in the Collection of Decisions, which the Court shall issue annually, for the use of the public, after the end of each calendar year. The Collection of Decisions may be published in installments during the course of the year. All judgments and the chosen rulings are published in the Collection of Decisions.

According to some opinions most part of the ruling have no practical significance for the public and therefore are not published. According to the Office and file order of the CC the chairman of a Panel or Justice Rapporteur proposes to the Vice- President at the end of every month rulings to be published in the Collection of Decisions and marks its head notes. The Vice-President provides his opinion and asks the Plenum for its standpoint. If the Plenum agrees with the publication of the ruling, it is placed in the Collection.

A Justice who disagrees with the decision of the Plenum or of the Panel has right to have his/her dissenting or concurring opinion that forms a part of the decision. Such opinions are also published in the Collection of Decisions.

Finally, the standpoints of the Plenum are published it the Collection of Decisions. The standpoints have direct binding effect only for the CC.

The secretary of the Vice-President makes a list of judgments in the order in which they were announced, and she numbers them consecutively. Once every three months she meets the registrar and they together approve the list.

All judgments adopted during the determined period - a quarter, are then copied and handed over to the competent employee who makes the name of natural persons or legal entities anonymous. She also complements it {number of decision, number and name of laws, small typing errors}. All corrected decisions are sent to the publisher of the Collection of Decisions, the company C.H.BECK. Its employee reads all decisions, prints the whole volume and send it for the second correction. The Collection is then printed.

In the Collection of Decisions the Court publishes statement of the judgment and so much of the reasoning as makes clear the legal principle relied on by the Court, as well as the reasons which led to it.

The Court sends every volume to the Prime Minister and to all Ministers, the President of the Republic, the Chairpersons of the Assembly of Deputies and of the Senate, the Chief Justice of the Supreme Court, the President of the Constitutional Court of Slovakia and to other institutions.
At the beginning of the Court's activity only 1 volume per year was published and the time between the pronouncement of a decision and its publication was really very long. Nowadays, the Collection is published 4 times yearly. 23 volumes have been already published. This volume contains judgments and rulings from July to September 2001. Volume No 24 is being prepared for printing and volume no 25, has been corrected. A CD containing a list of all decisions published in each volume is attached.

However, we cannot be satisfied with this situation, because the individual volumes are published with considerable delay.

Pursuant to the Act on the CC, the Court makes available the final version of a judgment, or a ruling chosen for publication in the Collection of Decisions, at the Court for perusal by any person. It concerns the period when the Court receives confirmation of receipts by all parties to a proceedings until the publication of a decision. Decisions inspection is held in the building of the Court.
On the basis of a written request the Court can send to the party the final version of a decision, that was not published either in the Collection of Decisions or on the Internet. The Vice-President decides about the request.

ASPI

The Court also ensures publication of its judgments and the chosen rulings in ASPI, which is one of the largest legal databases in the Czech Republic. Its users are public authorities, self-governing units, courts, state prosecutor, lawyers, attorneys, notaries etc. The author of the program is the company ASPI Publishing Lmt.

After the Court receives confirmation that all parties have received a copy of a judgment or a ruling the employees of registry inform persons, in contact with the company, and send them a copy of a judgment or a ruling. The company then makes it public on the same day or the following day at the latest. It depends on the user what period he chooses for updating. The shortest period takes a week. But in the meantime, the user can be connected on line with the company' s server.

Two secretaries were uncharged with this task.

Internet

The Court has concluded an agreement with a company that makes also public the judgments and chosen rulings on the Internet. The Court sends the decision to be placed at Internet to the company after receiving of the confirmation of all signed receipts.

The Czech version of our Internet page contains a description of the Court, short CV of the Justices, the Constitution, the Act on the CC, hearing program, instructions for submitting a constitutional complaint, contact to the Court and information necessary according to the act on access to information.

The English version consists of the most important decisions translated into English, a description of the Court, a short CV of the Justices, the Constitution and the Act on the CC.

Decisions of the CC of the Czech Republic

One of the most important ways to enlarge publicity of the Court was the decision to publish the most important decisions of the CC in English. Nowadays, the first book from the series entitled "Decisions of the CC of the Czech Republic" is prepared for printing. It contains the most important decisions adopted by the Plenum and by individual Panels from the beginning of the court's activity that means from 1993 to the beginning of 2001. These decisions are also available at the Internet page of the Court.

In the meantime Justices chose other decisions. The Vice-President, who is responsible for international relations of the Court, has intention to publish a book with the most important decisions yearly.

Judikatura Ústavního soudu České republiky

Other, less official manner of the publicity of the Court's decision is the periodical "Jurisprudence of the Constitutional Court of the Czech Republic". The periodical is printed once every two months and consists of two parts. The first part contains description of the chosen judgments and rulings, their finding and summary of the reasoning. In the second one there is a survey with a short description of all decisions pronounced during determined month

A Justice and two assistants prepare contributions to the periodical.

Lotus - Notes

It is a document-oriented system of date for submissions registration. The system is available only for the Justices and the employees of the Court. After signing decision by the Justice Rapporteur inserts his/her secretary the text of the decision in the program and on the hard disc of court's server.

It is possible to summarize shortly that the Court tries to meet its duty concerning publishing of decisions but there are yet a lot of problems to be decided. Of course, we are not satisfied with the time. All decisions are first delivered to the parties and only as soon as all signed return receipts are returned the decision is made public. The most rapid manner is the publication of the decisions in Lotus Notes, it follows Internet, ASPI and Collection of Decisions.

Press

The Court has neither press a department nor a press agent. The organizational department regularly provides through e-mail information on the program of hearings for the next days to a chosen circle of the press. Otherwise, the President and the Vice Presidents of the Court meet journalists. The Court pronounces a judgment, which concerns a petition proposing the annulment of a statute or constitutional complaint, that could be interesting for public, the Justice Rapporteur or the Vice-President meets the pressmen present, comments the judgment and answers questions.

Execution of judgments

Art. 89 para. 1 of the Constitution of the Czech Republic provides that Constitutional Court decisions are enforceable as soon as they are announced in the manner provided for by statute, unless the Constitutional Court decides otherwise concerning execution of judgments. We can distinguish enforceability from the legal force of a decision, which in the formal sense means that a decision can no longer be contested in an appellate proceeding. Since no appellate proceedings are admissible against a decision of the Constitutional Court, its decision gains legal force upon delivery.

The enforceability of Czech Constitutional Court decisions is provided for in more detail in § 58 of the Act on the Constitutional Court. The enforceability of judgments differs for the individual types of judgments falling under the Constitutional Court's jurisdiction, which can be categorized as follows:

Judgments in matters concerning petitions for the annulment of statutes or other regulations. These judgments are enforceable on the day they are published in the Collection of Laws, unless the Court decides to delay enforceability. In some cases the Constitutional Court has decided to postpone the enforceability of a decision in order to give Parliament sufficient time to adopt legal provisions replacing the ones annulled. The period of the enforceability delay took from 2 till 18 months.

It is theoretically possible that the Constitutional Court annuls an act ex tunc, however the Court has not yet come to such decision.

„Presidential" judgments, that is judgments in matters of a constitutional charge brought by the Senate against the President of the Republic for high treason and judgments in matters of a petition by the President of the Republic seeking the annulment of certain resolutions of the Assembly of Deputies and Senate. This issue concerns a resolution deciding that the President is for serious reasons incapable of performing out his duties, so that during such a period certain of the President's duties devolve upon the Prime Minister and others upon the Chairman of the Assembly of Deputies.

Electoral judgments are judgments in which the Court decides on remedial actions from decisions concerning the verification of the election of a Deputy or Senator and judgments in which the Court decides in cases of doubt concerning a Deputy or Senator's loss of eligibility or the incompatibility of some other position or activity (for example, President or judge) with holding that office.

These Judgments are enforceable when they are announced by the Constitutional Court, which announcement must be made publicly.

The Court's judgments on constitutional complaints or natural or legal persons who allege that their fundamental rights and basic freedoms guaranteed by a constitutional act or international treaty concerning human rights and fundamental freedoms have been violated as a result of the final decision in a proceeding, a measure, or some other action by a public authority.

This group also includes constitutional complaints by the representative body of a self-governing region against an unlawful interference by the state, further petitions by political parties directed against unconstitutional or illegal decisions concerning its dissolution, and finally jurisdictional disputes between state bodies, between a state body and a body of a self-governing region, and between bodies of self-governing regions.

Judgments in these matters are enforceable upon the personal delivery of a copy of the final written version of it to each party to the proceeding before the Court.

Article 89 para 2 of the Constitution states that all judgments of the Court are binding on all governmental bodies and persons. That means that the binding judgments of the Constitutional Court affect not only to a party to a proceeding inter partes effect, but also to all bodies and persons (erga omnes effect).

The decision to annul that statute or other enactment has effects *erga omnes* and *ex nunc*. The decision has effects on all state bodies, including courts, which would otherwise have to apply the annulled provision in a proceeding before them. Due to the Constitutional Court's decision, the provision no longer governs legal relations and may no longer be applied by state bodies.

If the Constitutional Court has rejected the petition seeking annulment of an enactment, that decision also has *erga omnes* effects, in that the decision is *res judicata*, and a new petition concerning the very same issue should be rejected as inadmissible.

I think that the Parliament respected nearly all judgments annulling a statute. The only exception concerned the Act on Association in Political Parties {PL. ÚS 53/2000}.

Judgments of the CC in the proceedings concerning constitutional complaints have *inter partes* effects. It is binding on the parties, which include the court or other state body whose decision or action is being contested. If the complaint is granted, the case is remanded and the ordinary court must decide in conformity with the Constitutional Court's judgment. Not only the statement of a decision is binding on the parties, but also the Court's reasoning.

In the past, the subject of some obscurity became the question, if is binding only a statement or also reasoning. The ordinary courts have refused to accord respect to the reasoning upon remand in the same matter. I think, that no sanction has been imposed for such conduct.

Nevertheless, at the present time is no doubt that the reasoning of Constitutional Court decisions in these proceedings has binding effects beyond the case in which they are announced.

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THE SECRETARY GENERAL AND TIME LIMITATION: HOW COMPLYING WITH CONSTITUTIONAL TIME REQUIREMENTS IF RELEVANT AND AT LEAST WITH THE EHRC REQUIREMENT OF A JUDGEMENT IN A "REASONABLE TIME"?

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I. The jurisprudence of the European Court of Human Rights that reviews the duration of proceedings before the Federal Constitutional Court (*Bundesverfassungsgericht*)

It was in a decision from 1988 that the European Court of Human Rights reviewed the duration of proceedings before the Federal Constitutional Court for the first time in accordance with Article 6 of the European Convention on Human Rights (EHRC)[1]; in 1993, the European Court of Human Rights performed the same review as regards the duration of proceedings before the Spanish Constitutional Court (Ruiz Decision)[2]. In the Deumeland v. Germany proceeding, the duration of proceedings was reviewed without dealing with the issue whether Article 6.1 of the European Convention on Human Rights (EHRC) is applicable to proceedings before a constitutional Court in the first place. In the Ruiz Mateos v. Spain decision, this issue was addressed, and the question was answered in the affirmative. In the case-law that evolved from these decisions in the following years, the decisive aspect for the applicability of Article 6.1 of the EHRC to proceedings before constitutional courts, and in particular before the Federal Constitutional Court, is that a decision in a constitutional complaint proceeding against the Federal Republic of Germany can have an effect on decisions of competent courts because the Federal Constitutional Court can overturn the competent courts' decisions if a fundamental right or a right that is equivalent to a fundamental right has been violated. In this context, the potential possibility of a violation is sufficient, which means that the duration of the admission procedure, which, in Germany, precedes the decision on the constitutional complaint itself, can also be reviewed because the admission procedure can potentially be followed by a granting decision.

This case-law of the European Court of Human Rights has, in the meantime, been followed by several decisions in which the Federal Republic of Germany was sentenced to pay compensation either on account of the duration of the entire proceeding in a specific case[3] or on account of the duration of the proceeding before the Federal Constitutional Court alone[4]. The European Court of Human Rights reviews the duration of proceedings independently of the type of procedure before the Federal Constitutional Court. The duration of proceedings is reviewed,

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1 *Deumeland v. Germany case, No. 9/1984/81/128, EuGRZ [Europäische Grundrechtszeitschrift] 1988, pp. 20 et seq. (at pp. 29 -30)*

2 *Ruiz - Mateos v. Spain No. 2/1992/347/420, EuGRZ 1993, pp. 453 et seq.*

3 *Klein v. Germany, NJW [Neue Juristische Wochenschrift] 2001 (Individual application No. 33379/16, pp. 213 et seq.)*

4 *Pammel v. Germany No. 48/1986/667/853, EuGRZ 1997, p. 310 (at p. 314, marginal number 52); Probstmeier v. Germany No. 125/1996/744/943, EuGRZ 1997, p. 405 (at p. 408)*

for instance, in the case of constitutional complaints[5]. The proceedings that have been handed down so far have always dealt with constitutional complaints that, *inter alia*, challenged decisions of other courts. It has remained open as yet whether the duration of proceedings will also be reviewed in cases in which the constitutional complaint directly challenges a statute, which is possible in Germany in exceptional cases. However, the duration of proceedings that involve the concrete review of statutes, i.e. in cases in which a court has referred the question of the constitutionality of a statute to the Federal Constitutional Court[6], is reviewed by the European Court of Human Rights in accordance with the standard of Article 6.1 of the EHRC. In a recent decision the European Court of Human Rights reviewed, incidentally, so to speak, the duration of proceedings of a completely different type.[7]

The facts of this decision (Goretzki v. Germany) were as follows: The proceeding before a Social Court, which concerned a disability pension, had been stayed without the Federal Constitutional Court's knowing because the complainant, and later on, the European Court of Human Rights, were of the opinion that parallel proceedings were pending before the Federal Constitutional Court. The suspension in view of the parallel proceedings had taken place upon the complainant's application. The parallel proceedings before the Federal Constitutional Court were pending for four year and eight months approximately (this applies to the oldest proceeding); they resulted in four major Panel decisions on pension issues the cause of which was German unification. The complainant's action before the Social Court was stayed anew by the complainant after the Federal Constitutional Court's decisions and after the notice of pension granted to the complainant had been amended on the basis of the Federal Constitutional Court's decisions because the complainant hoped for a more favourable regulation by the parliament on the basis of the Federal Constitutional Court's decisions; this means that the proceeding was not conducted any further in the Federal Republic of Germany in this respect. At the same time , the complainant brought a direct action before the European Court of Human Rights in Strasbourg. Although this proceeding was never ruled on by the Federal Constitutional Court, the duration of the other constitutional complaint proceedings and proceedings that involved the review of statutes that had been pending before the Federal Constitutional Court were reviewed by the European Court of Human Rights. In this case, the Federal Republic of Germany was not sentenced, but the Court stated the following: "The Court points out, however, that the Federal Constitutional Court must decide speedily as well and that a duration of proceedings of four years and eight months is at the limits of what is acceptable, even in view of the extraordinary circumstances in the context of German reunification"[8]. From this case-law, the following problem results for the Federal Constitutional Court: Without the Federal Constitutional Court's knowing, many proceedings at the competent courts can be stayed in view of proceedings that are pending at the Federal Constitutional Court, and in a specific case, it may not be possible for the Federal Constitutional Court or the competent courts to actually find out whether the pending proceeding is a parallel proceeding at all. Nevertheless, the duration of a completely different proceeding can, in such cases, result in the plaintiff in a different proceeding being indemnified.

A decision of the Fourth Section of the European Court of Human Rights is opposed to this decision of the Third Section. The basis of the H. T. v. Germany[9] case was also a national

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5 *Süßmann v. Germany Nr. 57/1995/563/649, EuGRZ 1996, p. 514 (at p. 518);*
Klein v. Germany, NJW 2001, pp. 213 - 214.

6 *for instance, in the proceeding Pammel v. Germany, EuGRZ 1996, p. 514 (at p. 518)*
und Probstmeier v. Germany, EuGRZ 1997, pp. 405 et seq.

7 *Goretzki v. Germany, Individual application 52447/99*
- not published as yet -

8 *Goretzki v. Germany, p. 9 of the French version*

9 *Individual application No. 38073/97*

proceeding before a Social Court that was stayed, upon the complainant's application, in view of proceedings pending before the Federal Constitutional Court. After approximately 6 years, the complainant requested of the Social Court to issue a ruling independently of the Federal Constitutional Court's decision, which was still pending. Approximately 1 1/2 years later, the Federal Constitutional Court issued its ruling, and another year later, the action was decided by the Social Court. When reviewing the duration of proceedings, the European Court of Human Rights regarded the period of time in which the proceeding had been stayed upon the complainant's application as an extension of the duration of proceedings that had been caused by the complainant; the European Court of Human Rights attributed this period of time to the complainant[10]. In the Goretzki proceeding in which the complainant had also applied for the proceeding to be stayed it is only mentioned that the complainant bears "a certain responsibility for the duration of the proceeding"[11]. Contrary to the Goretzki v. Germany decision, the duration of the "parallel" proceedings were not mentioned at all in the H.T. v. Germany decision although the Federal Republic of Germany was sentenced in this case.

II. The particularities of the proceedings before the Federal Constitutional Court that are taken into account by the European Court of Human Rights

Under the consideration that the European Court of Human Rights "does not misjudge the special role and position of a constitutional court which in the states that have introduced the right of filing an individual application provides the citizens with an additional domestic protection of their fundamental rights that are guaranteed by the Constitution"[12], the European Court of Human Rights has already developed an approach as regards the duration of proceedings before the Federal Constitutional Court that takes the individual circumstances into account. In Germany, the following particularity exists in the case of pending proceedings before the European Court of Human Rights:

In principle, action is brought against the Federal Republic of Germany. The Federal Republic of Germany appoints an authorised representative for the proceeding who is a government official in the Federal Ministry of Justice. The Federal Ministry of Justice notifies the respective *Länder* (state) governments of the pending proceeding, and asks them to give their opinions and to submit their files. To the extent that the individual application proceeding was preceded by a proceeding before the Federal Constitutional Court, the Federal Constitutional Court is also notified of the individual application proceeding and asked to give its opinion for the Federal Republic of Germany's reply. Especially as regards the issue of the duration of proceedings before the Federal Constitutional Court, the Federal Constitutional Court itself is called upon to give the reasons for the duration of the specific proceeding. The reasons often do not result from the circumstances of the specific case but also from other general facts that are connected with the organisation of the court or with the fact that the specific case competes with other, possibly more urgent proceedings. Here, the case-law of the European Court of Human Rights provides various standards that are taken into account by the European Court of Human Rights, and that are described hereinafter:

1. Complexity of the legal matter

General standards for the review of the duration of proceedings, i.e. also for the adequacy of the duration of proceedings, in the case-law of the European Court of Human Rights, which are

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[10] *H.T. v. Germany, marginal number 34*

[11] *Goretzki v. Germany, p. 9 of the French version*

[12] *Süßmann v. Germany, EuGRZ 1996, p. 514 (at p. 518, marginal number 37)*

not only essential as concerns the duration of proceedings before the Federal Constitutional Court, are the particular circumstances of the case, in the framework of which the complexity of the case, the behaviour of the complainants and of the competent authorities / courts as well as the special importance of the proceeding for the applicant[13] are taken into account. Especially the complexity of the case is to a certain extent determined in an abstract manner on account of the legal matter that is the basis of the case; in this context, the proceeding before a constitutional court is also taken into consideration. This is the case in the Pammel v. Federal Republic of Germany[14] decision, in this decision, the European Court of Human Rights held, for instance: "The Court, like the Commission, is of the opinion that the case was undoubtedly complicated. The extension of the review of constitutionality to another provision of the Federal Allotment Garden Act (*Bundeskleingartengesetz*) ... shows the judicial difficulty of the points that have been raised"[15]. In the Goretzki v. Federal Republic of Germany decision, the European Court of Human Rights stated: "The Court first of all points out that the case showed a certain degree of complexity because the Federal Constitutional had to review the delicate question of the constitutionality of legal provisions that had been adopted when the entire social security and pension system of the GDR had been incorporated in the system of the Federal Republic of Germany, and which referred to the treatment of the pensions of the numerous officials of the Ministry for State Security of the GDR"[16]. At the same time, the complexity of the case is also determined *ex ante* by making reference to the rulings that had been issued in the proceeding or in parallel proceedings that resulted in a precedent of the Federal Constitutional Court: In the Goretzki v. Federal Republic of Germany decision, the Court held, for instance: "The complexity of the case is also proved by the fact that the Federal Constitutional Court has pronounced four precedents in the matter ..."[17]

2. Principle of an ordered administration of justice

Under the aspect of the "principle of an ordered administration of justice", the European Court of Human Rights takes into account as an aspect that justifies a longer duration of proceedings that the Federal Constitutional Court consolidates several orders for suspension or referral and/or several constitutional complaints that refer to the same matter in order to gain a comprehensive overview of the legal issues that concern a specific area of law or a specific statute.[18] Along these lines, the consolidation of proceedings is seen as a factor that is favourable for the Federal Constitutional Court and is therefore regarded as a circumstance that justifies a longer duration of proceedings in a permissible manner. In the Süßmann case, for instance, the court held as follows: "It also seems reasonable that the Federal Constitutional Court has consolidated the 24 cases that were pending before the Court in order to gain a comprehensive overview of the legal issues that are raised by pension cuts for public service employees"[19]. This was different, however, in the Pammel v. Federal Republic of Germany case; in this decision, the fact that a similar case was pending, which was decided at the same time as the case of the complainant, Mr. Pammel, but which had been submitted to the Federal Constitutional Court approximately two years earlier in a proceeding that involved the review of a statute, was regarded as a negative factor. In this decision, the European Court of Human Rights held: "Apart

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13 *Süßmann v. Germany, EuGRZ 1996, p. 514 (at p. 519, marginal number 49),*
Pammel v. Germany, EuGRZ p. 310 (at p. 315, marginal numbers 61 et seq.),
Probstmeier v. Germany, EuGRZ p. 405 (at p. 408, marginal numbers 56 et seq.)

14 *EuGRZ 1997, p. 310 (at p. 315, marginal number 63)*

15 *Pammel v. Germany, EuGRZ 1997, p. 310 (at p. 314, marginal number 63)*

16 *Goretzki v. Germany, Individual application No. 52447/99,*
p. 8 of the French version of the decision

17 *Goretzki v. Germany, p. 8 of the French version of the decision*

18 *Goretzki v. Germany, Individual application No. 52447/99, p. 9 of the French version of the decision*

19 *Süßmann v. Germany, EuGRZ 1996, p. 514 (at p. 520, marginal number 59)*

from this, the Federal Court of Justice (*Bundesgerichtshof*) had referred the same issue to the Federal Constitutional Court in the Probstmeier case, in May 1995 already, i.e. two years before the referral from the Higher Regional Court (*Oberlandesgericht*). The duration of the constitutional proceeding therefore cannot comply with the requirement of "reasonable time" set forth in Article 6.1 in spite of the complexity of the matter"[20].

3. Particularities of the proceeding before the constitutional court

Although the obligation of taking decisions within a reasonable time also applies, pursuant to the European Court of Human Rights, also to constitutional courts, the European Court of Human Rights states expressly at the same time that Article 6.1 of the EHRC cannot be interpreted with constitutional courts in the same manner as with ordinary courts. The constitutional court's role, as the European Court of Human Rights puts it, "as the guardian of the constitution makes it sometimes necessary for the court (*i.e. the constitutional court*) to take other considerations than the mere chronological order of incoming proceedings into account, like, for instance, the nature of the case and its political and social importance"[21]. Under this aspect, the European Court of Human Rights sometimes also discusses the standard of consolidating different proceedings, which has already been applied sometimes. This aspect, however, also takes into account that constitutional complaints may be postponed and sometimes, later on, dismissed as being unfounded when the relevant constitutional issues have been decided in a precedent. Moreover, it is also considered under this aspect that the decision not to admit a case for decision can, due to the existence of "precedents" that have been issued at the same, or a very near, point in time[22], concern a complex legal matter, although it gives little or no reasons.

On account of the constitutional court's special role as the "guardian of the Constitution", the European Court of Human Rights also regards it as permissible to take "the nature of the case and its political and social importance into account"[23] when selecting the cases to be decided. Also under this aspect, the European Court of Human Rights takes into consideration that in a given period of time "innumerable complaints" that were filed with the Federal Constitutional Court as a result of German reunification in October 1990 caused a delay[24]. With regard to this particular political situation, the European Court of Human Rights also considers it permissible to give priority to proceedings and to postpone other proceedings in this context.[25] The work schedules of the Federal Constitutional Court's panels that are submitted to the European Court of Human Rights by the Federal Republic of Germany are also of importance for the assessment by the European Court of Human Rights. In this respect, the European Court of Human Rights stated in the proceeding Gast and Popp v. Federal Republic of Germany: "As regards the other cases that were referred to the Second Panel in the legally relevant period of time, the Court, like the Commission, comes to the conclusion, weighing, on the one hand, what was at stake for the numerous persons who had been sentenced to imprisonment for espionage or fraud, and, on the other hand, the serious political and social consequences of the other cases, that the Federal Constitutional Court could reasonably give priority to the other cases"[26]. It must, however, be stated that in other, comparable situations in which the Federal Constitutional Court's workload

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[20] *Pammel v. Germany, EuGRZ 310 (pp. 314 - 315, marginal numbers 71 - 72)*

[21] *Gast und Popp v. Germany, Individual application No. 20357/95, marginal number 75, also already in Süßmann, EuGRZ 1996, p. 514 (at p. 519, marginal number 56)*

[22] *Gast und Popp v. Germany, marginal numbers 63 et seq.*

[23] *Goretzki v. Germany, p. 9*

[24] *Süßmann v. Germany, EuGRZ 1996, p. 514 (at p. 520, marginal number 60), Goretzki v. Germany, EuGRZ 1996, p. 514 (at p. 518, marginal number 56), Goretzki v. Germany, p. 9)*

[25] *Süßmann, loc. cit.*

[26] *Gast und Popp v. Germany, marginal number 79*

and internal organisation were explained, the European Court of Human Rights did not take into account the priorities of the Federal Constitutional Court to the same extent[27].

The European Court of Human Rights has taken the political situation of German reunification and the increased workload of the Federal Constitutional Court that resulted from it accordingly into account when stating in the Süßmann v. Germany case: "All the same, in the unique context of German unification and with a view to the serious socio-political background of litigations that penalise the termination of employment relationships, the Federal Constitutional Court was entitled to decide that it had to give priority to these cases"[28]. This case was pending before the Federal Constitutional Court from 1988 to 1991. A similar reasoning can be inferred from the Gast and Popp v. Germany case[29], which was pending before the Federal Constitutional Court from 1992 to 1995. There are similar statements also in the Goretzki v. Germany proceeding[30], in this proceeding the duration of the proceeding at issue was from 1994 to 1999. Contrary to this, the European Court of Human Rights stated very briefly in the Klein v. Germany case, in which the relevant duration of the proceeding was between mid-1986 and mid-1994: "Other than in the Süßmann case and in the Gast and Popp case, German reunification can, in the case at hand, only have played a secondary role because when the Unification Treaty came into force on 3 October 1991, the Klein case had been pending before the Federal Constitutional Court for more than four years already"[31]. Correspondingly to the Gast and Popp proceeding, reunification should have been taken into account at least from 1992. Thus, the remaining duration of the proceeding between 1986 and 1991 should be regarded as within the limits of what is acceptable, because in the Klein v. Germany case, a Panel decision[32] was passed that resulted in the Act to Further Ensure the Use of Community Coal in Electricity Generation *(Gesetz über die weitere Sicherung des Einsatzes von Gemeinschaftskohle in der Elektrizitätswirtschaft)* being declared unconstitutional. This would apply at least if the duration of proceedings at the European Court of Human Rights' own proceedings were taken as a standard, like, for instance, the recently decided Stambuk v. Germany proceedings[33], with a duration of proceedings in Strasbourg of just under 5 years, and Thieme v. Germany[34] with a total duration of proceedings of just under 6 years.

4. Summary

All in all, the Federal Republic of Germany, as a general rule, substantiates in detail and in consideration of case-law why the duration of proceedings has been longer with specific proceedings. These aspects are not always taken into account to the same, calculable and sufficient extent; this results in the particularities of the proceedings before the constitutional court not being taken sufficiently into consideration. In addition, it seems that the European Court of Human Rights assumes that specific basic facts at the Federal Constitutional Court still apply, when repeating, time and again, the wording of an earlier decision[35] that a "chronically excessive workload" that has existed at the Federal Constitutional Court since the end of the 1970s, does

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27 *Klein v. Germany, NJW 2001, p. 213 (at p. 214, marginal numbers 45 et seq.)*

28 *Süßmann v. Germany, EuGRZ 1996, p. 514 (at p. 520, marginal number 60)*

29 *Gast und Popp, marginal number 79*

30 *Goretzki v. Germany, pp. 9 - 10, in which it says in this context: "Moreover, the cases are to be seen in the context of innumerable complaints that were filed with the Federal Constitutional Court subsequently to German reunification in October 1990".*

31 *Klein v. Germany, NJW 2001, p. 213 (at p. 214, marginal number 45)*

32 *BVerfGE [Decisions of the Federal Constitutional Court] 91, pp. 186 et seq.*

33 *Individual application No. 37928/97, decided 17 October 2002, filed 30 October 1997.*

34 *Individual application No. 38365/97, filed - still with the Commission - 27 December 1996, decided 17 October 2002.*

35 *Pammel v. Federal Republic of Germany, EuGRZ 1997, p. 310 (at p. 315, marginal number 69)*

not justify an excessively long duration of proceedings[36]. But even if in individual cases, it is stated that an extraordinary reason and not a chronically excessive workload, have caused the long duration of proceedings, like, for instance, the loss of a file during the proceeding that went unnoticed because the complainant himself did not engage in any activities to further the proceedings, cannot prevent a sentence for excessive duration of proceedings[37].

As I have already mentioned, it is still open whether a claim to a decision within a reasonable time can be asserted even if there is no court proceeding on which the claim can be based. This possibility exists in Germany if a complainant directly challenges a law. Such a decision can affect innumerable potential proceedings, however, as a general rule, the constitutional complaint proceeding in question is not based on a specific court proceeding. Several proceedings that show these characteristics are pending before the European Court of Human Rights, and it remains to be seen whether the European Court of Human Rights will all the same take Article 6.1 of the EHRC as a standard for reviewing the length of these proceedings.

III. Criticism of the jurisprudence of the European Court of Human Rights

Unfortunately, it was only after the precedent Süßmann v. Federal Republic of Germany that the Federal Republic of Germany, in pending proceedings, presented the fundamental arguments against the applicability of Article 6.1 of the EHRC to constitutional complaint proceedings. These arguments, unfortunately, did not result in a change of jurisprudence. However, they still remain valid, and I will briefly present them in the following:

1. Structural aspects

It is incompatible with the meaning and the purpose of the EHRC to apply Article 6.1 of the EHRC to constitutional complaint proceedings. The Federal Republic of Germany could only ensure that all constitutional complaints are dealt with immediately, and in an adequate manner, if the Federal Constitutional Court's capacities were considerably increased. As things stand, this could only happen by way of an increase in the number of judges, which would possibly mean to complement the Court by a Third Panel. This, however, is not possible for structural reasons.:

The interpretation and application of the Constitution by a constitutional court whose decisions have the power of law must be uniform. The authoritative power and the acceptance of a decision would be negatively affected if the public gained the impression that certain questions are answered differently by different panels. Even if there are only two panels, this impression cannot always be avoided. Therefore, an increase in the number of panels is out of the question. For reasons of efficiency, there are also strict limits to an enlargement of the existing panels by an increase in the number of judges. At any rate, this approach would also not increase the Federal Constitutional Court's capacity to an extent that would comply with the requirements of Article 6.1 of the EHRC for all constitutional complaint proceedings. If Article 6.1 of the EHRC continued to be applied to constitutional complaint proceedings, the Federal Republic of Germany would therefore have no other choice than to strongly restrict the possibility of filing constitutional complaints, or to abolish the constitutional complaint altogether. This, however, would considerably weaken the protection of human rights in the Federal Republic of Germany. It would be paradoxical if this approach would have to be followed in order to comply with the EHRC.

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[36] *Gast and Popp v. Federal Republic of Germany, marginal number 75,*
Klein v. Federal Republic of Germany, NJW 2001, p. 213 (at p. 214, marginal number 43)

[37] *Becker v. Germany, Individual application No. 45488/99*

2. Limited effects of decisions of the Federal Constitutional Court to the decisions of the competent courts

Also to the extent that Article 6.1 of the EHRC serves to provide the parties to a proceeding within a reasonable time, this aspect exactly justifies a special treatment of constitutional complaint proceedings that goes beyond the extent that is already contained in the European Court of Human Rights' case-law (in particular as compared to proceedings that involve the concrete review of statutes). When proceedings before the ordinary courts or other competent courts have been brought to a close, this provides the parties to a proceeding, in principle, with a decision that settles the matter; in the respective proceedings, the decision may contain an enforceable title. The filing of a constitutional complaint does not impede the effect of such decisions. This means that basically, legal certainty and legal clarity exist even though a constitutional complaint has been filed. As concerns the duration of proceedings, this is also a point in favour of, only regarding the proceedings before the ordinary courts and other competent courts as relevant for the decision on the duration of proceedings pursuant to Article 6.1 of the EHRC.

3. Contradictory effects of the European Court of Human Rights' jurisprudence

The European Court of Human Rights' jurisprudence itself leads to contradictory effects. On the one hand, the constitutional complaint is regarded, pursuant to Article 35.1 of the European Convention on Human Rights, as one of the domestic remedies that have to be exhausted; this has the effect that constitutional complaints are filed, and must be filed, in order to make a proceeding before the European Court of Human Rights admissible. At the same time, the European Court of Human Rights applies the standard of Article 6.1 of the EHRC to the duration of proceedings before the Federal Constitutional Courts and states that a constitutional court's chronically excessive workload is not an exculpatory argument for an excessive duration of proceedings. Ultimately, this jurisprudence contributes to an increase in the number of proceedings before the Federal Constitutional Court. There are constitutional complaints that are filed although the time-limit for filing has obviously run out because the complainant was informed by the European Court of Human Rights that he or she had not exhausted all domestic remedies. Such "pro forma constitutional complaints", whose lack of success, normally because the time-limit for filing has run out, is, so to speak, "written all over their face", are filed, and, as the case may be, their non-admission for decision is decided without reasons needing to be given, just in order to induce the European Court of Human Rights to issue a ruling.

4. Disregard of the domestic legal system

In principle, Article 6.1 of the EHRC is only applicable to proceedings before courts that are competent to "make decisions concerning civil-law claims and obligations or concerning the validity of the charge under criminal law that is brought against the applicant". Along these lines, the Commission decided in its earlier decisions in particular as concerns claims under private law that constitutional courts are not competent to decide litigations about claims under private substantive law on the basis of the relevant law, but that they are competent to decide litigations about the compatibility of acts of public authority or legal provisions with valid constitutional law[38], and that therefore Article 6.1 of the EHRC is not applicable to proceedings before constitutional courts. The European Court of Human Right's case-law during the past 15 years, which I have presented in part I. of my paper, and which is aimed at ascertaining whether the Federal Constitutional Court's decision could potentially influence the decisions of the competent

[38] *cf. the detailed explanations in Frohwein/Peuckert, Europäische Menschenrechtskonvention, EMRK-Kommentar, 2nd edition 1996, Art. 6, marginal number 25*

courts and thus the relationship between the parties in litigation, overlooks this important principle. As I have already explained in part III.2., the decisions of the competent courts gain administrative finality even if a constitutional complaint has been filed that challenges them. This is only different in the case of proceedings that involve the concrete review of statutes because during the time in which the proceeding is dealt with by the Federal Constitutional Court, the proceeding keeps pending before the referring court.

An overall assessment of all the aspects that have been presented above under III.2. shows that the European Court of Human Rights does not sufficiently take into account that the constitutional complaint, according to domestic doctrine, is not at all a "domestic remedy" under the terms of Article 35 of the EHRC. In the structure of German law, a distinction is made between an appeal *(Rechtsmittel)* and a legal remedy *(Rechtsbehelf)*. Whereas the appeal, as a general rule, impedes the enforcement of the decision that was passed before, the legal remedy does not do so. The constitutional complaint is an "extraordinary legal remedy" *(außerordentlicher Rechtsbehelf),* which, as I have explained in part III. 2., does not impede the legal force and thus the enforceability of the decision taken in the last instance of the competent courts. If the European Court of Human Rights took this aspect into account, it would, properly speaking, not be in a position to regard the constitutional complaint as one of the domestic remedies under the terms of Article 35.1 of the EHRC, and it would also not be in a position to apply the standard of Article 6.1 of the EHRC to the duration of proceedings. It must be conceded, however, that also the Federal Constitutional Court itself in its decisions on the exhaustion of the recourse to the courts regards legal remedies as being part of the recourse to the courts[39].

5. Consideration of the federative legal system of the Federal Republic of Germany

A look a the evolution of the federative legal system of the Federal Republic of Germany lends force to the arguments in favour of a separate assessment of the duration of constitutional complaints that I have dealt with before. The amendment of the constitutions in many *Länder* (states) and the respective rules of procedures of the *Länder* constitutional courts, a "double-track" system of constitutional complaints has evolved because meanwhile, several *Länder* provide constitutional complaint proceedings before their constitutional courts. This means that after an ordinary proceeding before all instances of the competent courts has come to a close, it is possible to file a constitutional complaint before the constitutional court of the respective *Land* (state) and before the Federal Constitutional Court, if at the same time, the violation of fundamental rights, and of subjective rights with the same content that are provided in the *Land* constitution, by the state authority of a *Land* can be alleged. A constitutional complaint before the Federal Constitutional court can be filed already after the end of the ordinary proceeding before the competent courts, the complainant need not wait for the decision of the constitutional court of the *Land.* If a complainant opts for this "two-track" approach, this can result in a decision by the Federal Constitutional Court, but also in a decision by the constitutional court of the *Land.* After the end of the proceeding before the constitutional court of the *Land,* however, another "act of public authority" under the terms of Article 93.1, number 4a of the Basic Law exists, so that the jurisdiction of the Federal Constitutional Court can be invoked again by way of a constitutional complaint.

This evolution in a federative state will give rise to new questions as concerns the interpretation of Articles 35.1 and 6.1 of the EHRC if the constitutional complaint proceeding is affected by this regulation, like, for instance:

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[39] *BVerfGE 73, pp. 320 et seq.*

- Does a decision by the constitutional court of a *Land* that concerns a constitutional complaint that was dealt with by this court also constitute the exhaustion of all domestic remedies?

- Is it of importance for the question of the duration of proceedings pursuant to Article 6.1 of the EHRC whether a constitutional complaint proceeding is decided by the Federal Constitutional Court after the end of ordinary proceedings before the competent courts and then again after the decision in a proceeding before the constitutional court of a *Land*?

6. Duration of proceedings before the European Court of Human Rights

Apart from such criticism of the jurisprudence of the European Court of Human Rights, which refers to fundamental aspects, the European Court of Human Rights' case-law as concerns the duration of proceedings in the Federal Republic of Germany does, all in all, not seem convincing in view of the legal situation and the special circumstances in the Federal Republic of Germany, for the very reason that the European Court of Human Rights itself seems to suffer from a "chronically excessive workload", as it has formulated with respect to the Federal Constitutional Court, which, however, pursuant to the same case-law, cannot justify an excessive duration of proceedings. In part II.3. I have already cited the recent decisions of the European Court of Human Rights that, with a duration of proceedings of 5 or 6 years, respectively, markedly transgress what the European Court of Human Rights has regarded as "at the limits of what is acceptable" in the case of 4 major Panel decisions of 5 proceedings that involved the concrete review of statutes and 4 constitutional complaint proceedings on legal issues from social security law that were raised in the context of German unification; here, the European Court of Human rights referred to a duration of proceedings of 4 years and 8 months.[40].

I would like to cite the recent Thieme v. Germany[41] decision as an example. It is true that in the final decision of 17 October 2002 it is stated under Procedure 4. that the individual application was filed on 1 November 1998 before the European Court of Human Rights; the individual complaint, however, was filed on 27 December 1996 already ; it was registered with the European Commission on Human Rights on 27 December 1996. This means that the total duration of this proceeding in Strasbourg was 5 years and 10 months. If the duration of the proceeding is calculated from the date of the new regulation of the rules of procedure, 1 November 1998, the duration of this proceeding, which dealt with the review of the length of proceedings alone, at the European Court of Human Rights was 4 years. Interestingly enough, in this proceedings, a length of proceedings of 6 years and 4 months before 3 different courts (Labour Court *[Arbeitsgericht]*, Higher Labour Court *[Landesarbeitsgericht]* and Federal Constitutional Court) is regarded as too long. Such case-law of the European Court of Human Rights, and the length of its own proceedings in decisions that are not very complex - in the Thieme v. Federal Republic of Germany case, the decision comprises slightly more than 8 pages - is neither convincing, no can it promote the understanding of why the European Court of Human Rights applies such strict standards when reviewing the duration of proceedings before national courts.

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[40] *Goretzki v. Germany, p. 9 of the French version.*

[41] *Individual application No. 38365/97*

III. Possibilities of influencing the duration of proceedings in single constitutional complaint proceedings

Pursuant to § 22.3 of the Federal Constitutional Court's Rules of Procedure, the reporting judge is responsible for the furthering of the course of a proceeding, in particular for orders that affect the subject matter. This legal norm is ultimately a concretisation of the judicial independence provided by Article 97.1 of the Basic Law. Even the Chairman of the Panel can, *ipso iure,* not influence the responsibility for taking decisions for the furthering of a proceeding, which lies entirely in the reporting judge's hands. The choice of the reporting judge can also not be influenced by the President of the Court or another person because the decision about who will be the reporting judge has an effect on the right to one's lawful judge (due to the possibility of a Chamber decision) and because the lawful judge is determined, pursuant to Article 101.1 of the Basic Law, by way of general norms, and more specifically, by way of the plan of assignment of business, which is adopted annually, and not by the President or the Chairman of the Panel.

In principle, all judges of the Federal Constitutional Courts have a schedule of all proceedings that are pending in their department; the schedule also shows how long a proceeding has been pending. To that extent, neither the President nor the Director (Secretary General) of the Federal Constitutional Court is in a position to influence the duration of proceedings. It must be conceded, however, that through the decisions of the European Court of Human Rights and through the assisting documents that are submitted by the Federal Constitutional Court to the Federal Republic of Germany's authorised representative for the proceeding, the importance of the duration of proceedings becomes apparent. To the extent that proceedings are opened against the Federal Republic of Germany before the European Court of Human Rights, in particular on account of the duration of proceedings, and if, a proceeding before the Federal Constitutional Court has been contributory in this context, the respective Panel and the respective reporting judge is informed about this proceeding.

- XIV -

BRÈVES NOTES SUR LE RÉGIME BUDGÉTAIRE ET FINANCIER DU TRIBUNAL CONSTITUTIONNEL PORTUGAIS

Rapport établi par:
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Secrétaire Général
Tribunal Constitutionnel
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1. Toute entité, publique ou privée, a besoin de ressources pour son fonctionnement normal. Le Tribunal Constitutionnel portugais n'échappe pas à cette règle.

Puisqu'il s'agit d'un organe de l'État – le Tribunal Constitutionnel est vraiment un organe de souveraineté – son financement devra naturellement être assuré par les "finances publiques", c'est-à-dire par le Budget de l'État.

2. La Constitution de la République portugaise ne se prononce pas sur la matière financière et budgétaire du Tribunal Constitutionnel.

La Constitution (article 224, alinéa 1) se borne à charger la loi d'une manière générale la tâche de déterminer *les règles relatives au siège, à l'organisation et au fonctionnement du Tribunal Constitutionnel*. Mais la discipline financière étant un élément fondamental de la structuration organique et du fonctionnement des services, elle devra être interprétée comme faisant aussi partie de cette référence générique à "l'organisation et au fonctionnement du Tribunal Constitutionnel".

C'est donc dans le développement de ladite norme, mais déjà à un niveau infra-constitutionnel, que la Loi n.º 28/82 du 15 novembre s'occupe de *l'organisation, du fonctionnement et de la procédure du Tribunal Constitutionnel*[1]. Cette loi, communément appelée la Loi sur le Tribunal Constitutionnel (LTC), est une "loi organique", laquelle en vertu de la Constitution s'est vue reconnaître une "valeur renforcée".

La Loi sur le Tribunal Constitutionnel (LTC), en sus d'établir la discipline régulatrice du fonctionnement du Tribunal Constitutionnel en tant qu'organe juridictionnel, ainsi que les règles de la procédure au sein de cette juridiction, établit aussi d'une manière détaillée sa structure financière en définissant les "principes fondamentaux" de la structure organique de ses services.

[1] *La Loi nº 28/82 du 15 novembre, successivement modifiée par la Loi nº 143/85 du 26 novembre, la Loi nº 85/89 du 7 septembre, la Loi nº 88/95 du 1 septembre et la Loi nº 13-A/98 du 26 février, est appelée la Loi sur le Tribunal Constitutionnel (LTC), ensemble normatif qui établit l'organisation, le fonctionnement et la procédure du Tribunal Constitutionnel.*

3. La LTC (article 5) définit le régime administratif et financier du Tribunal, d'une part, au moyen de l'attribution d'autonomie administrative et, d'autre part, en le dotant d'un budget autonome qui devra être inscrit au budget des charges communes de l'État.

Jusqu'en 1998 c'était tout ce que la LTC contenait sur le sujet. Un autre texte légal (décret-loi n.º 172/84) portant sur la création du Conseil administratif du Tribunal, la définition de sa composition et de ses compétences, aussi bien que celles du Tribunal, en matière de budget et de dépenses, et l'attribution au Tribunal Constitutionnel du pouvoir d'organiser son propre compte de gestion, lequel devra être soumis directement à l'appréciation de la Cour des comptes comportait le restant.

Cependant, à partir de 1998, ce sujet a été inscrit dans la LTC, plus précisément dans les six articles du chapitre IV, intitulé *Régime Financier*, pour que la réglementation détaillée du régime financier du Tribunal soit désormais déterminée par une loi avec "valeur renforcée".

4. Le régime financier du Tribunal, réglé par la LTC, en sus d'accueillir les principes et les règles qui avaient été jusqu'alors en vigueur, consacra désormais d'autres principes à caractère innovateur.

En ce qui concerne le sujet dont il s'agit à présent, un des principes innovateurs consista dans l'attribution de ressources propres au Tribunal Constitutionnel et la création aussi d'un régime spécifique pour ce qui est de sa budgétisation (inscription dans son propre budget) et des dépenses qui peuvent être couvertes par ces mêmes ressources.

Et pourtant l'introduction de ressources propres (et par conséquent l'existence du budget de "ressources propres") ne modifia ni élimina le régime d'inscription au budget de l'État du montant approuvé et inscrit au budget du Tribunal, qui avait était été en vigueur jusqu'à cette période.

Dès lors il y a eu deux budgets: celui du Tribunal Constitutionnel, qui doit être inscrit au Budget de l'État, et celui des "ressources propres".

5. Le régime financier du Tribunal est caractérisé comment en ce qui concerne son financement par le Budget de l'État?

À ce propos, la loi détermine que le Tribunal Constitutionnel approuve *le projet de son budget et le présente au Gouvernement dans les délais définis pour l'élaboration du projet de loi de finances, qui devra être soumis au Parlement, devant aussi fournir les éléments que celui-ci lui demande sur la matière* (article 47-A de la LTC).

On peut extraire du texte légal quelques notes caractéristiques de ce régime.

En premier lieu, la loi attribue au Tribunal Constitutionnel le pouvoir d'élaborer son propre projet de budget. Celui-ci reflète l'aspect financier de son activité.

S'il résulte de cette affirmation, d'une part, que la prévision et le calcul des montants nécessaires au fonctionnement du Tribunal relèvent uniquement de la compétence du Tribunal lui-même (et pas d'aucun autre organe ou entité extérieure, notamment gouvernemental(e)), d'autre part et en conséquence, il en résulte que la prévision de ces montants ne peut pas être incorporée ou faire partie du projet de budget d'aucun autre organe de l'État.

En deuxième lieu, le Tribunal Constitutionnel approuve au préalable le projet de son budget qui devra être présenté au Gouvernement pour inscription au projet de loi de finances.

Le Tribunal Constitutionnel ayant approuvé le projet de budget, sa valeur globale doit être inscrite au projet de loi de finances. En d'autres mots, le Gouvernement ne doit pas, de sa propre initiative, modifier le montant approuvé (notamment en le baissant). L'inscription d'un autre montant que celui qui fut approuvé par le Tribunal au projet de loi de finances oblige le Gouvernement, du moins du point de vue politique et constitutionnel, à transmettre au Parlement le projet de budget approuvé par le Tribunal et qu'il décida de rejeter.

En dernier lieu, dans le cadre de la procédure d'approbation du budget de l'État, le Parlement peut s'adresser directement au Tribunal Constitutionnel et lui demander des éclaircissements sur son budget. Pour lui répondre le Tribunal Constitutionnel peut de même s'adresser directement à lui.

La loi accorde ainsi au Tribunal Constitutionnel la faculté de s'adresser directement au Parlement en le libérant de la médiation du Gouvernement. Ceci représente une restriction du principe selon lequel il revient au Gouvernement de présenter le Budget de l'État et de donner au Parlement les éclaircissements que celui-ci lui demande sur la matière.

Quant au Budget de l'État, ceci est en gros le cadre légal des pouvoirs conférés au Tribunal Constitutionnel en matière budgétaire.

Dans la pratique et jusqu'à présent tout le procès de l'élaboration du budget s'est découlé dans un climat de bonne entente entre le Tribunal Constitutionnel et le Gouvernement, notamment en ce qui concerne la compréhension mutuelle des besoins de chaque instant.

Nonobstant le fait qu'en matière budgétaire les pouvoirs du Tribunal Constitutionnel n'ont jamais cessé d'être exercés, le dialogue entre le Gouvernement et le Tribunal a toujours été profitable et ouvert, chaque fois qu'il s'agit de faire des ajustements dans les deux sens au regard des montants budgétaires.

6. Ainsi qu'il a été précédemment indiqué, le Tribunal Constitutionnel, en sus des dotations du Budget de l'État, a encore d'autres sources de recette attribuées par la loi. Elles sont appellées "ressources propres".

Les "ressources propres" du Tribunal sont *le solde du compte de gestion* (de la dotation du Budget de l'État) *de l'année précédente, le produit des frais et des amendes, le produit de la vente des publications éditées par lui ou des services rendus par son centre d'aide documentaliste et encore toutes celles qui lui sont attribuées par la loi, contrat ou à tout autre titre* (article 47-B, alinéa 1 de la LTC).

Ces "ressources propres" sont regroupées en un budget distinct, approuvé par le Tribunal, dans lequel les dépenses correspondantes sont inclues selon un régime de compensation en recette (article 47-A, alinéa 2 de la LTC).

La loi définit avec un certain degré de précision les dépenses que les ressources propres peuvent couvrir. Elle les énumère sous l'article 47-B, alinéa 2 de la LTC: (1) *dépenses ordinaires et en capital qui, chaque année, ne peuvent pas être couvertes par les montants inscrits au Budget de l'État;* (2) *dépenses provenant de l'édition des publications ou de services rendus par le centre d'aide documentaliste;* (3) *dépenses découlant de la réalisation d'études, analyses et d'autres travaux extraordinaire, y compris la rémunération respective du personnel effectif ou à terme.*

Si les ressources propres ne pouvaient pas couvrir les dépenses ordinaires et en capital que le montant du Budget de l'État ne couvre pas, on pourrait dire qu'il s'agissait ici d'une espèce d'affectation des recettes, dans la mesure où la loi fait un classement typologique des dépenses qui peuvent être couvertes par les ressources propres et, ce faisant, se rapproche de l'affectation typique recette/dépense, caractéristique du régime de recette affectée.

7. En conséquence de ce qui a été déjà dit, le budget des "ressources propres" est un budget différent et indépendant de celui qui forme le projet de budget du Tribunal Constitutionnel qui devra être inclus dans le budget de l'État. On peut dire qu'il se rapproche de ce qu'on appelle "caisse privative": un ensemble de ressources propres affectées à un ensemble de dépenses "propres".

Un des aspects qui confirme cette classification de "caisse privative" est le fait que la loi accorde la faculté (et n'impose pas) d'utiliser ses recettes pour *réaliser des dépenses ordinaires et en capital qui, chaque année, ne peuvent pas être couvertes par les montants inscrits au Budget de l'État* tout en limitant cependant, dans ce cas, son utilisation à l'impossibilité de la dotation du Budget de l'État couvrir les dépenses.

Même si implicitement, ce régime légal peut aussi contenir le principe selon lequel le Budget de l'État doit toujours prévoir une dotation capable de couvrir les dépenses de fonctionnement du Tribunal Constitutionnel. Néanmoins le recours au budget des "ressources propres" n'est admissible qu'après l'épuisement de cette dotation et en raison de l'impossibilité de la consolidée.

Compte tenu de ce qui a été dit, on peut définir le type de comptabilisation entre les deux budgets: il revient au Budget de l'État, toujours et en premier lieu, de couvrir la dotation financière adéquate et suffisante pour le plein fonctionnement du Tribunal Constitutionnel. Le budget des "ressources propres" ne devra intervenir dans cette matière que d'une manière subsidiaire ou résiduelle.

8. Pencheons nous maintenant sur la procédure d'élaboration interne des deux budgets.

En ce qui concerne le budget du Tribunal Constitutionnel (qui devra être inscrit au budget de l'État), la première étape de la procédure de l'élaboration relève de la compétence du Secrétaire général qui doit, par la Division Administrative et Financière, élaborer un projet de budget.

L'estimation des montants financiers du projet de budget est, en général, fondée sur la prévision des besoins financiers pour l'année à laquelle le projet se rapporte. Elle prend en considération fondamentalement le personnel qu'on prévoit ira faire partie du Tribunal durant l'année concernée, aussi bien que les coûts qu'on prévoit être nécessaires à son fonctionnement. Ces besoins sont aussi évalués en tenant compte du budget de l'année en cours et de son exécution. En outre sont aussi prises en considération, dans la mesure du possible, les indications financières fournies par le Gouvernement.

Du point de vue technique et budgétaire, le projet de budget est élaboré en respectant d'une part les normes générales sur le budget, la comptabilité publique et l'organisation financière, et d'autre part, les instructions du Ministère des Finances sur cette matière et applicables au univers des organismes de l'État. Il n'y a donc pas de normes spéciales applicables au Tribunal dans cette matière.

Le projet de budget étant conclu, le Secrétaire général le soumet à l'appréciation du Conseil administratif du Tribunal, lequel peut introduire des modifications.

Après l'appréciation faite par le Conseil administratif, le projet de budget est soumis par le Président du Tribunal à l'appréciation de l'assemblée plénière du Tribunal pour approbation.

Au cas où il ne soit pas approuvé par l'assemblée plénière du Tribunal – ce qui n'est jamais arrivé – le projet de budget devra à nouveau être apprécié par le Conseil administratif. Celui-ci devra le refaire en tenant compte des objections soulevées par l'assemblée plénière du Tribunal.

L'assemblée plénière du Tribunal ayant approuvé le budget du Tribunal, il est présenté au Gouvernement pour inscription au projet de budget de l'État, qui devra être soumis à l'appréciation et à l'approbation du Parlement.

Quant au budget des ressources propres, la procédure d'élaboration et d'approbation suivie est semblable à celle du budget du Tribunal, mais il n'est pas inclus dans le projet de budget de l'État (et, par conséquent, il n'est pas transmis au Gouvernement).

Dans ce projet de budget sont pris en considération les ressources propres attendues, provenant fondamentalement du solde du budget du Tribunal de l'année précédente, des frais et des amendes de procédure, et du solde reporté du budget des ressources propres.

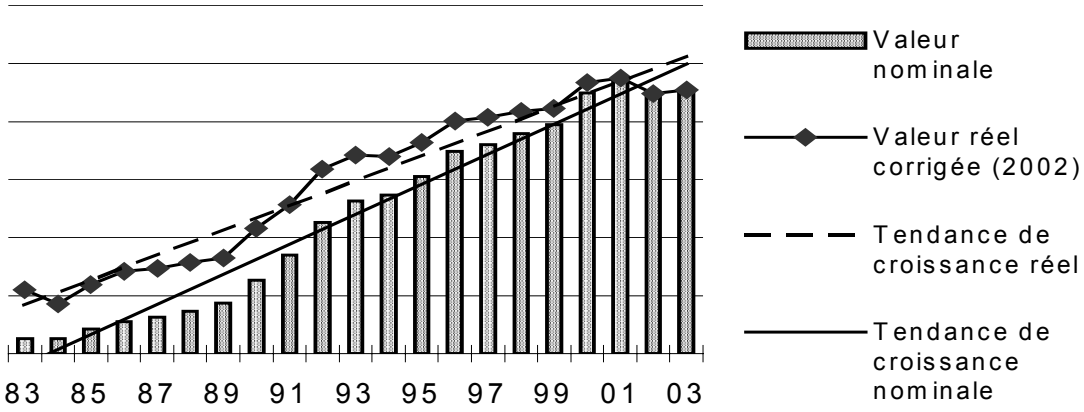
Les charges sont calculées en tenant compte de la recette attendue, mais leur valeur n'est jamais équivalente à cette dernière ce qui jusqu'à présent a permis l'existence de soldes positifs.

9. Le montant total du budget du Tribunal Constitutionnel a augmenté progressivement depuis 1983, l'année de l'élaboration de son premier budget.

Cette augmentation, régulière et sans grandes oscillations, traduit d'une part la croissance du Tribunal et l'expansion de son activité. Mais, d'autre part, elle reflète également une gestion précise et équilibrée, qui suit des critères d'économicité.

Au long de plus de 20 ans, la croissance budgétaire, qui suit de près la ligne de tendance, n'a subi qu'une légère inversion durant cette année (2002) dû à la nécessité de réduire la dépense publique.

Pour 2003 on prévoit déjà une petite augmentation du budget du Tribunal par rapport à l'année en cours, restant toutefois encore au dessous de la ligne de tendance de la croissance.



Évolution du Budget du Tribunal Constitutionnel – 1993/2003

En relation à la répartition des dépenses budgétaires et parce que, du point de vue des "moyens de production", le Tribunal Constitutionnel peut être classifié comme "main-d'œuvre intensive", le gros de la dépense concerne évidemment les ressources humaines du Tribunal.

Au cours des années récentes, les dépenses de personnel (y compris les rémunérations, les allocations, et les charges sociales de l'univers humain du Tribunal) ont représenté environ 85% du budget du Tribunal.

Le Tribunal Constitutionnel dispose encore de montants regroupés en un budget spécial, même si intégré dans le Budget de l'État, appellé PIDDAC (Programme d'Investissement et de Dépenses de Développement de l'Administration Centrale), destiné au financement d'initiatives structurantes, de développement et de modernisation de l'État et de l'administration.

Ce budget se développe par des programmes/projets d'une durée limitée et ayant des objectifs bien spécifiques. Les montants du budget PIDDAC ne peuvent pas être utilisés pour financer le fonctionnement courant des institutions. D'ailleurs ces montants sont attribués séparément des budgets des institutions dont ils ne font pas partie.

Au cours des années récentes,, le Tribunal a inscrit au budget du PIDDAC un ensemble de programmes concernant la réalisation des travaux d'envergure dans ses bâtiments.

Le budget des ressources propres a été utilisé pour payer quelques-unes des publications éditées par le Tribunal, tout en couvrant aussi, même si d'une manière résiduelle, d'autres dépenses pour lesquelles le budget du Tribunal n'a pas de couverture suffisante. En tout cas et jusqu'à présent, ces charges n'ont jamais conduit à l'épuisement du budget, permettant l'existence de soldes budgétaires positifs.

10. Parlons maintenant des pouvoirs du Tribunal Constitutionnel en matière financière.

Quant à l'exécution de son budget, la loi (article 47-C de la LTC) attribue au Tribunal la compétence ministérielle commune en matière d'administration financière. Ce pouvoir peut être transféré au Président du Tribunal.

Ce pouvoir permet au Tribunal ou à son Président, en cas de délégation, d'apporter des modifications au budget du Tribunal pourvu qu'elles n'affectent pas sa valeur globale. Ils ont ainsi, dans cette matière, la compétence attribuée, en général, aux ministres (celui des Finances excepté).

Par rapport à l'exécution du budget des ressources propres, le Tribunal gère celui-ci librement. Ce pouvoir se traduit spécialement par le fait que le Tribunal peut librement modifié ce budget au cours de son exécution.

La loi accorde au Président du Tribunal le pouvoir d'autoriser l'exemption du régime duodécimal aussi bien que l'avance de douzièmes.

Au niveau des disponibilités financières, le Tribunal peut demander tous les mois au Ministère des Finances les montants nécessaires à titre de sa dotation globale inscrite dans le Budget de l'État.

En ce qui concerne la dépense, il revient au Président du Tribunal de l'autorisée jusqu'à au montant de € 199.519.

Ce pouvoir peut être transféré au Secrétaire général ou au chef de cabinet du Président pour les dépenses et jusqu'au montant définis dans la délégation de compétence.

Toutes les dépenses excédant le montant défini dans la délégation de compétence attribuée au Président sont autorisées par l'assemblée plénière du Tribunal.

L'ordonnancement relève de la compétence du Conseil administratif. Aux termes de la loi ce dernier est formé par le Président du Tribunal, deux juges désignés par le Tribunal, le Secrétaire général et le chef de la Division Administrative et Financière.

Il revient aussi au Conseil administratif – l'organe de contrôle de la gestion financière du Tribunal – d'approuver le compte de gestion et de le soumettre à l'appréciation de la Cour des comptes.

11. Le régime budgétaire et financier – ici brièvement décrit – présente un ensemble de caractéristiques qui traduisent l'ample pouvoir de gestion financière dont dispose le Tribunal Constitutionnel portugais.

En réalité, étant donné qu'au sein de l'organisation constitutionnelle de l'État portugais, le Tribunal Constitutionnel est un organe de souveraineté – et pour cette raison définitive pas sous la tutelle ou la dépendance d'un autre organe de l'État -, la loi lui accorde des pouvoirs étendus au niveau de sa gestion budgétaire et financière.

L'existence d'un régime de ressources propres (qui comportent le solde du compte de gestion) inscrites dans un budget autonome, les pouvoirs budgétaires du Tribunal (en ce qui concerne soit son élaboration, soit son exécution, notamment le pouvoir de modifier le budget), le pouvoir du Tribunal d'autoriser toutes les dépenses (quel qu'en soit le montant), le principe de la demande mensuelle de montants à titre de la dotation globale inscrite dans le Budget de l'État, le pouvoir du Tribunal de décider sur l'exemption de régime duodécimal et de demander l'avance des douzièmes, l'existence d'un Conseil administratif (compétent pour ordonnancer des dépenses et pour approuver le compte gestion du Tribunal, qu'il présente directement à la Cour des comptes) forment un régime financier spécifique dont les principes sont typiques du régime d'autonomie administrative et financière, lequel la loi – il n'y a aucun doute – a voulu attribué au

Tribunal Constitutionnel, même si elle n'est pas explicitement inscrite dans aucune norme de la LTC.

Le fait qu'aucune norme mentionne d'une manière explicite l'attribution du régime d'autonomie administrative et financière au Tribunal aboutit parfois à ce que les services financiers gouvernementaux aient une certaine difficulté à appliquer ce régime spécifique qui dans cette matière s'écarte de la règle. C'est pourquoi on vérifie parfois, dans certains aspects, des petites restrictions au régime décrit, mais qui ne l'altère pas.

Néanmoins, indépendamment de ce cadre de pouvoirs, le Tribunal a toujours démontré la volonté réelle de coopérer avec les autres organes et services de l'État qui interviennent dans le procès budgétaire, notamment le Gouvernement, s'efforçant toujours de répondre aux réalités financières de chaque instant tout en affirmant son autonomie.

Et, en dépit de pouvoir dire que "l'argent est le seul bien vraiment économique parce qu'il n'est jamais suffisant", le Tribunal Constitutionnel a eu jusqu'à présent les moyens financiers adéquats à un fonctionnement sans problèmes.

- XV -

PUBLICITY OF DECISIONS OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN

Report by
Mr H.A. ABISHEV
Member of the Constitutional Council
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The constitution of Kazakhstan, which was accepted on August 30, 1995 on a republican referendum, contains basic norms establishing constitutional control in the Republic, which realization is assigned to the Constitutional Council. It is not included into the judicial system, and it is a state body providing supremacy of the Constitution as the fundamental Law of the state in all territory of Kazakhstan.

The constitution has established a circle of authority of the Constitutional Council including: rule in case of dispute of a question on correctness of elections of the President of the Republic, members of Parliament and carrying out of a republican referendum; examination before signing by the President of the laws accepted by Parliament to their conformity to the Constitution; examinations before ratification of the international agreements of the republic to conformity of them to Constitution; official interpretation of norms of the Constitution; giving a conclusion in case of consideration by Parliament of questions on prescheduled release post of the President through illness and dismissal from a post in case of state treason.

The constitutional execution of the above-stated questions may be lodged only under appeal of the President, Chairmen of Chambers of the Parliament, not less than one fifth from the total number of deputies of Parliament, the Prime Minister.

According to the Constitution if the court will see, that the law or other normative legal act, subject to applying, restrains rights and freedom of the person and the citizen fixed by the Constitution, it is obliged to stop execution of case and to address to the Constitutional Council with representation about a recognition of this act as unconstitutional.

In Kazakhstan is operating the European model of the constitutional control, being centralized abstract, frequently carrying out preliminary character, as the Constitutional Council takes out final decisions concerning the law or other normative legal act irrespective of all other proceedings trials, and also controls the laws which have yet not entered valid.

The Constitutional Council examines proceeding appeals and makes decisions on them by order of the constitutional execution. The constitutional execution, which is carried out by Council, is one of institutes of a constitutional - procedural law, and it has principles, criteria and parameters of realization of processual actions.

Principles of realization of the constitutional execution in the legislation, regulating activity of the Constitutional Council, are not allocated with special section or article as in processual codes. However, the law "About the Constitutional Council of the Republic of Kazakhstan" and the

Rules of the Constitutional Council contains all provisions inherent to principles of procedural right.

One of such provisions is publicity of rule of the Constitutional Council. Constitutional-legal bases of publicity of rule are established in the Constitution and in the law "About the Constitutional Council of the Republic of Kazakhstan», and also in the Rules of the Constitutional Council. Publicity of rule of the Council determine: an openness of its sessions, public announcement of the decisions adopted by it; dispatch of final decisions (obligatory and as agreed); publication of final decisions in official and other mass media; release of the Bulletin of the Constitutional Council; speeches and publications of members of the Council and staff of the apparatus. Publicity, is it an opportunity of receiving by people of authentic data on methods and results of activity of the state and public bodies.

The openness of examination of the proceeding appeals and adoption decisions on them are the important constituting principles of maintenance the supremacy of the Constitution in activity of the Constitutional Council. Session of the Constitutional Council, in which its final decisions are made, is openly carried out, on a collective basis, and equal participation of all members of the Council. All members of Council, participating in session, have equal rights.

The constitutional execution on final rule of the Council is carried out with participation of those subjects, which are specified in the law "About the Constitutional Council of the Republic Kazakhstan". These are: persons and organs by which appeals the constitutional execution is lodged; the state bodies and officials, which constitutionality of acts are checked. In necessary cases the specified subjects may have representatives in the Constitutional Council which authorities are made out in the order stipulated by the civil processual legislation. At adoption of additional decisions persons and bodies, which are obliged to execute the basic decision of the Council may also participate in the constitutional execution. All subjects of the constitutional execution have same procedural rights and duties specified in the legislation for all participants of the constitutional execution.

Furthermore, at the final rule in the constitutional execution may participate officials, representatives of the state bodies and public organizations, representatives of mass media. The list of the persons participating in the constitutional execution is determined by a member of the Council - the reporter and responsible for the constitutional execution, appointed by order of the Chairman of the Constitutional Council. The legislation does not stipulate term of the notification of participants of the constitutional execution. However persons participating in the constitutional execution are notified before about date of examination of the appeals, in written form.

Session of the Constitutional Council on decision-making, which is a stage of the constitutional execution, is openly held. Only a meeting of members of Council and the final rule is made without participation of other persons, except the Chairman and members of the Council. Final decisions of the Council are accepted by the majority of voices from the total number of members of the Council by open voting. Even on demand of one member, the final decision is accepted by ballot. Anybody from members of the Council has no right to abstain or not participate in voting. In all cases the Chairman of the Constitutional Council submits the voice to the last. At division of voices fifty-fifty, the voice of the Chairman is deciding. The person replacing the Chairman has no such right; therefore in similar cases voting is repeated with participation of the Chairman or a member of the Council, who was absent in the first voting. The member of the Council, not agreeable with the final decision, has right to state a special opinion in written form, which is attached to materials of the case.

In the law is not specified basis of examination of appeals in a closed meeting, which takes place in legal proceedings. We believe, that it is possible in examination of case by the Council that has data of confidential character.

The Chairman or a member of Council, who is replacing him, in front of all participants of the constitutional execution, and also presenting in a hall of session to other persons, publicly discloses the final decision of Council at once after it was accepted.

Decisions of the Council are subject to promulgation. Forms of promulgation of decisions of the Council are a sending to the state bodies, officials and other organizations of the text of the adopted final decision, publishing in media, and also placing of the text of decisions in electronic information systems.

Final decisions of the Council within two days after acceptance must be send to the subject of the appeal, to the President of the Republic, to Chairmen of Chambers of the Parliament, the Supreme Court, the General Public Prosecutor and Minister of Justice of the Republic of Kazakhstan within two days after decision. Furthermore the Council dispatches the final decisions to other persons by their coordination with the Chairman of the Constitutional Council.

Final decisions of the Constitutional the Council are published in official republican published editions, and also in periodic legal publications.

Normative decisions of the Constitutional the Council are also available in a database of the Republican center of the legal information of the Ministry of Justice "Legislation" and in the information legal system "Lawyer"

Furthermore, the Constitutional Council annually publishes the Bulletin, where its final decisions and annual messages to Parliament "About condition of the constitutional legality in country" are published. Bulletins also contain other information concerning activity of the Constitutional Council, the information on change of its structure, texts of Decrees of the President and orders of Chairmen of Chambers of the Parliament about assignment of members of the Council, their curriculum vitae, some speeches of the Chairman of the Council, the information of actions held by the Constitutional Council, including a participation of the Chairman and members of Council in the international and republican conferences, seminars and "round tables".

The Chairman and members of the council frequently have speeches in the international and republican conferences, are published in both republican and foreign newspapers and magazines. In their statements and publications they basically mention issues of activity of the Council, the state and constitutional construction of the republic, questions of concerning constitutional rights and freedom of the person and citizen.

According to the Constitution the decisions of the Constitutional Council inure from the date of their adoption, and are obligatory in all territory of the Republic, final and are not subject to the appeal. Normative decisions, which are one of types of decisions of the Council, according to the Constitution, are included into system of the law in force of the Republic of Kazakhstan. On their legal nature final decisions of the Constitutional Council are created a case law. A number of decisions of the Constitutional Council, in parallel with law-explaining positions, may contain the positions, invoked to facilitate direct constitutional regulation of the situations directly

concerning the execution of the constitutional norms, to resolve some kind of competence collisions between civil service bodies. And consequently carry special, law-forming character.

Furthermore, to the acts of the Constitutional Council is acted the mode conformity to the Constitution and this mode covers full execution of the constitutional process, which is carried out by the Council. The fact of accomplishing the constitutional process, within the framework of established by the Constitution and the constitutional law of execution, provides a presumption of constitutionality of final decisions of the Constitutional Council.

Final decisions of the Council are subject to execution by the state bodies and officials after acceptance at once. The legislation does not establish any order of execution of final decisions of the Council. The law "About the Constitutional Council " assigns order of execution of decisions to the Constitutional Council. The Constitutional Council itself has the right to determine an order of execution of the decisions accepted by it. The appropriate state bodies and officials should inform about work that done in order to execute of decisions of the Council in term established by the Constitutional Council.

Appropriate execution of final decisions of the Council is one of the actual sides of activity of the Constitutional Council. Duly and appropriate execution of final decisions of the Council is the logic end of the constitutional - legal disputes, which have arisen between the state bodies, officials of republic, disputes on constitutionality as laws in force and other normative legal acts, and again accepted laws before their promulgation and the international agreements of republic, subjects to ratification.

In many cases as a consequence of acceptance by the Council of the final decision, changes and additions are made to the law in force of the republic. A legal force of decisions of the Constitutional Council determines such attributes as finality, a spontaneity and momentariness of decision-making on the same dispute. Furthermore final decisions of the Council imperatively influence the legislation, that specified in decisions of the Council provisions have obviously a binding force for all participants of constitutional - legal relations.

In the final decisions, the Council frequently pays attention to necessity of coercion of conformity to the Constitution of norms of separate working acts, which are not subjects of the examined appeals.

In activity of the Constitutional Council there is an acute question on appropriate execution of final decisions of the Council. Unfortunately, despite of aspiration of founders of the Constitution and clear desire of the Council not all state bodies and officials objectively concern to the law making of the Constitutional Council and to its legal consequences. Some subjects count decisions of the Council acts of minor value. Presence of norm in the Law "About normative legal acts» where it is told, that normative decisions of the Constitutional Council are outside of hierarchy, derivates a negative position both among law-users and among subjects of law-making. Some understand so, as acts of the Constitutional Council outside of hierarchy, so they means below. Such wrong estimation unequivocally results in infringement of a principle of the constitutional legality in the country. Acts of bodies of the constitutional control on the nature are organic continuations of norms of the Constitution. Accordingly, ignoring of acts of the constitutional control is direct infringement of norms of the Constitution.

I think, it is time to mission legislatively Office of Public Prosecutor, according to the Constitution obliged to protest laws and other normative legal acts contradicting Constitutions, to

control the execution and application of acts of the Constitutional Council and to give the right of entering of prosecutor's reactions acts, in case of infringement and default by subjects of acts of the constitutional control.

The Constitutional Council frequently addresses with the initiative about appropriate execution of the final decisions by the state bodies and officials, especially be subjects of law making. So, in messages to the Parliament of the Republic "About conditions of the constitutional legality in country" the Council frequently pays attention to issues of execution of the decisions. For example, in the message of the Republic sounded in Parliament 2002 year, the Council has paid attention subjects of the legislative initiative (in Kazakhstan these are deputies of Parliament and the Government) to necessity of execution of article 92 of the Constitution providing two-year-old term from the moment of acceptance of the Constitution for coercion of the legislation in conformity with it. In May of this year under the initiative of the Constitutional Council, with participation of heads and other representatives of all supreme state bodies, in Presidential Administration of the Republic, there was a meeting on problems of execution of decisions of the Council. As reason for initiation by the Constitutional Council of such meeting has served the question on appropriate execution of decisions of the Council. There were discussed urgent questions proceeded from final decisions of the Council. To heads of the state bodies, by presiding of sessions were given concrete orders, with the indication of term of their execution. In protocolary decisions of meeting to persons there were put specific targets concerning executions of final decisions of the Constitutional Council.

Legal self-sufficiency of final decisions of the Constitutional Council, fixed in the Constitution and the constitutional law, "About the Constitutional Council " and in the law "About normative legal acts", and also in a number of other acts is criterion of their immediate execution, at once after acceptance. Nevertheless frequently there is a question on the order, term and quality of decisions of the Council. I believe, that questions of execution of decisions of bodies of the constitutional control, both in Kazakhstan and in other states, should not depends on any cases, a situation and expediency, and also economic, political and social statuses in the country. Therefore I assume, that in future is it necessary not only base on conscientiousness of executors of decisions of bodies of the constitutional control, but also legislatively authorize bodies of Office of Public Prosecutor with special function of supervision - on appropriate execution of decisions of bodies of the constitutional justice. Furthermore, it is also necessary to develop other mechanisms of an embodiment to legal life of the state of establishments and requirements of final decisions of bodies of the constitutional justice. For example, it is possible to introduce in legal educational institutions of special courses on studying practice of the constitutional courts (councils). To pay attention, in preparation of judges of courts of the general jurisdiction, to knowledge of experience and practice of the constitutional control. To widely publish the activity of bodies of the constitutional control in mass media. Also important value has a creation of the international non-governmental center on cooperation and mutual relation between bodies of the constitutional justice of the post communistic countries.

Execution of final decisions of bodies of the constitutional control has essential value in the former countries of socialist camp, where such institute has small historical experience. Problems that arising at executions of decisions of bodies of the constitutional control demands the admittance in view of democratic standards, national legal tradition and positions of Fundamental Laws acting in these countries.

- XVI -

PUBLICITÉ DES DÉCISIONS ET PRATIQUE EN MATIÈRE DE PUBLICATION DU TRIBUNAL FÉDÉRAL SUISSE

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I. Bases légales pour la publicité des jugements

I. 1. Le droit au prononcé public du jugement selon la Constitution fédérale (Cst.) et la Convention européenne des droits de l'homme (CEDH)

I. 1.1. Prononcé du jugement selon la Constitution fédérale et la CEDH

L'art. 30 al. 3 Cst. dispose: „L'audience et le prononcé du jugement sont publics. La loi peut prévoir des exceptions." L'introduction du principe de la publicité de l'audience et du prononcé dans la nouvelle Constitution fédérale du 18 avril 1999 est essentiellement due à l'art. 6 par. 1 CEDH. D'après la teneur du texte, le champ d'application de l'art. 30 al. 3 Cst. semble plus étendu que dans la CEDH, car il se rapporte à une procédure judiciaire en général et renonce à des restrictions telles que „droit de caractère civil" et „accusation en matière pénale" (HÄFELIN/HALLER, Schweizerisches Bundesstaatsrecht, 5e éd. 2001, n. 857). Toutefois, il ressort des travaux préparatoires que, pour des raisons d'uniformité de la terminologie constitutionnelle, on a renoncé à reprendre l'usage international (FF 1997 I 183; Bulletin officiel du Conseil national 1998 885 et 1423, Bulletin officiel du Conseil des États 1998 49 s.). Vu sous cet angle, le champ d'application de l'art. 30 al. 3 Cst. n'est pas plus étendu que celui de l'art. 6 par. 1 CEDH. D'après la teneur de l'art. 6 par. 1 deuxième phrase CEDH, le principe du prononcé public du jugement n'a pas de limitation, contrairement à celui de l'audience publique.

Le prononcé du jugement lui-même doit ainsi avoir lieu publiquement même si la publicité de l'audience était exclue (FROWEIN/PEUKERT, EMRK-Kommentar, n. 119 ad art. 6 CEDH; RASELLI, Das Gebot der öffentlichen Urteilsverkündung, in Recht – Ethik - Religion, Mélanges pour Giusep Nay, Lucerne 2002, p. 24 et 27). Dès lors que le législateur constitutionnel voulait reprendre le standard international dans l'art. 30 al. 3 Cst. et que cela correspond à la teneur de la disposition, la validité illimitée du prononcé public du jugement découle également de la Constitution fédérale. Il en résulte que le champ d'application des deux dispositions ne doit plus être discuté ici. Il n'y a pas non plus lieu d'entrer en matière sur la règle du prononcé public de l'art. 14 al. 1 du Pacte ONU II sur les droits civils et politiques (RS 0.103.2). Il suffit de constater que dans le contexte suisse, la règle du prononcé public du jugement est toujours valable, non seulement en vertu de la Constitution fédérale mais encore en vertu de la CEDH, directement applicable selon le système moniste.

I. 1.2. Succédanés du prononcé public du jugement

Le droit au prononcé public du jugement n'exige pas, selon la jurisprudence de Strasbourg, que le jugement soit lu de vive voix au public. La Cour européenne des droits de l'homme dit qu'il suffit que le jugement soit rendu accessible au public, par exemple par son dépôt dans une chancellerie ou lorsque les intéressés peuvent s'en faire délivrer des copies (FROWEIN/PEUKERT, loc. cit., n. 119 ad art. 6 CEDH; WYSS, Öffentlichkeit von Gerichtsverfahren und Fernsehberichterstattung, EuGRZ 1966, p. 7). En principe, le Tribunal fédéral suisse s'est rallié à cette pratique. Si la jurisprudence du Tribunal fédéral exige qu'un intérêt légitime, respectivement sérieux soit invoqué, il faut des raisons impérieuses pour limiter ce droit (ATF 124 IV 234 consid. 3d p. 239 s.; 115 V 244 consid. 4d p. 255; pour un accès sans conditions: RASELLI, loc. cit., p. 33 s.). D'après la conception du Tribunal fédéral, il suffit ainsi que le rubrum et le dispositif - c'est-à-dire le nom des parties, l'objet du litige et le verdict du jugement – soient publiés, respectivement rendus accessibles au public, et que cet accès soit combiné avec un droit à la consultation du jugement anonymisé (décision de la Conférence des

présidents du Tribunal fédéral du 22 mai 2002; critique à l'égard de la seule consultation du rubrum et du dispositif: RASELLI, loc. cit., p. 34, voir aussi les p. 27 et 34 relatives aux problèmes de l'anonymisation lors de la consultation des jugements). Le droit à la consultation du jugement - le cas échéant anonymisé - remplace la nécessité d'un résumé sommaire de l'arrêt lors du prononcé public du jugement (FROWEIN/PEUKERT, loc. cit.).

I. 1.3. Devoir de publication selon la doctrine et pratique du Tribunal fédéral

Dans le monde juridique, on exige depuis longtemps déjà que la pratique de publication ne soit pas uniquement laissée à la guise des tribunaux. Déjà HIRTE (Mitteilung und Publikation von Gerichtsentscheidungen, NJW 1988, p. 1698 ss) a prouvé avec une motivation convaincante pour le droit allemand qu'il ne se justifie pas de priver de la publicité générale les jugements anonymisés.

La nécessité de connaître le droit jurisprudentiel en vigueur exige, selon l'opinion justifiée de cet auteur, une remise des décisions judiciaires à la presse spécialisée et aux tiers intéressés. Elle trouve sa justification dans les principes de la publicité des débats, de la sécurité du droit et de l'obligation de motiver les décisions judiciaires ainsi que dans la règle de la publicité de l'action de l'État en général. Le contrôle initial par la publicité dans la salle de tribunal doit être remplacé, respectivement complété, en raison de l'abondance de la jurisprudence, par un contrôle public des décisions judiciaires écrites. Le devoir de publication incombe à l'administration du tribunal qui, à l'aide de la collaboration indispensable des juges, doit compléter la publication officielle ordonnée par ceux-ci en remettant des jugements (voir aussi à ce sujet ALBRECHT, Veröffentlichung von Gerichtsentscheidungen, in Computer und Recht, 1998, p. 373 ss, spécialement p. 374). Dans la mesure où les droits des parties à la procédure sont protégés au moyen d'une anonymisation appropriée, seule l'importance de l'intérêt du demandeur d'information est déterminante pour la remise du jugement. Il ne peut pas en aller différemment pour le droit suisse. Le Tribunal fédéral a tenu compte de ce principe fondamental dans les directives du 28 octobre 1999 sur la communication aux tiers de ses arrêts non publiés. Elles permettent presque toujours, sur demande, la communication des arrêts. Certaines exceptions sont commandées par une interprétation étroite de la loi d'aide aux victimes d'infractions (art. 5 al. 2 LAVI). La procédure d'autorisation sert en premier lieu à préserver les droits des parties de manière appropriée. Ce sont avant tout les nouvelles possibilités technologiques des dernières années qui ont permis l'apparition de cette transparence quasi totale (voir à ce sujet en particulier chiffre II ci-après).

I. 2. Délibérations publiques et votations dans la procédure devant le Tribunal fédéral ainsi que ses effets sur la pratique de publication

I. 2.1. Délibérations publiques et votations

La loi fédérale d'organisation judiciaire (OJ, RS 173.110) ajoute au principe de la publicité un élément important. Selon l'art. 17 OJ, les délibérations et les votations du Tribunal fédéral sont également publiques. Sont exclues de la publicité les délibérations et votations des cours pénales, de la Chambre des poursuites et des faillites et, lorsqu'il s'agit d'affaires disciplinaires, des cours de droit public. En matière d'impôts, les parties et leurs mandataires peuvent seuls assister aux débats, délibérations et votations (publicité que pour les parties). L'art. 17 OJ permet encore d'ordonner le huis clos total ou partiel dans l'intérêt de la sûreté de l'État, de l'ordre public ou des bonnes moeurs, ou lorsque l'intérêt d'une partie ou d'une personne en cause l'exige. Aucun

moyen de droit n'est à disposition pour contester une telle décision du tribunal (Poudret, Commentaire de la loi fédérale d'organisation judiciaire, Berne 1990, p. 83).

Selon cette disposition, le public et la presse peuvent ainsi, sous réserve des cas précités, non seulement participer aux débats des parties et ensuite connaître le résultat de la délibération des juges, c'est-à-dire le verdict, mais également assister eux-mêmes aux délibérations et aux votations des juges fédéraux. Cette publicité va très loin. Elle est valable en Suisse devant quelques tribunaux cantonaux et devant le Tribunal fédéral. Pour la procédure devant le Tribunal fédéral en tant que Cour suprême, elle est, selon la conception suisse, partie intégrante du contrôle démocratique du troisième pouvoir étatique. S'agissant de cette question essentielle, le législateur fédéral a préféré un autre ordre de valeurs que la plupart des pays européens, dans lesquels le droit des juges à une délibération et une votation secrètes fait partie intégrante de leur indépendance judiciaire.

I. 2.2. Conséquences sur la pratique de publication

La publicité étendue du droit jurisprudentiel, suivant laquelle le public peut assister en direct aux délibérations ainsi qu'aux votations et la presse faire un compte rendu du déroulement de la délibération, n'est pas sans influence sur la pratique de publication du Tribunal fédéral. Celui-ci ne se limite pas au contenu minimal du droit au prononcé public du jugement selon les art. 30 al. 3 Cst. et 6 par. 1 CEDH. En principe, il publie non seulement le rubrum, le dispositif et un bref résumé des arrêts, mais également - sous forme anonymisée - l'état de fait et les considérants, dont le public et la presse peuvent sans autre avoir connaissance dans le cadre des délibérations du tribunal.

La publicité directe, concrétisée par la présence personnelle dans la salle d'audience, est encouragée par la politique d'information active du Tribunal fédéral. Les séances publiques du Tribunal fédéral sont annoncées aux parties et aux journalistes accrédités. Il arrive que la radio suisse mentionne dans les nouvelles matinales les séances importantes du Tribunal fédéral. Dès 2003, celui-ci publiera en outre les séances publiques sur Internet. Chacun est libre d'assister aux délibérations et votations des juges, tant qu'il y a assez de place dans la salle. Toutefois, en règle générale, seules les parties et, comme succédané de publicité, quelques journalistes accrédités suivent les délibérations (voir au sujet de l'accès de la presse en cas d'exclusion du public: ATF 117 Ia 387 consid. 3 p. 390 ss = EuGRZ 1992, p. 202; au sujet du rôle de la chronique de l'activité judiciaire dans la sauvegarde de l'intérêt à l'information comme succédané de publicité : ATF 119 Ia 99 consid. 4a p. 104 = EuGRZ 1994 p. 59 ss; ATF 108 Ia 90 consid. 3a p. 92 = EuGRZ 1982, p. 109). S'agissant des cas particulièrement intéressants en matière politique, sociale ou régionale, l'affluence du public peut être plus importante. Dans de rares cas, il y a lieude refuser l'accès aux délibérations à une partie du public faute de place.

I. 2.3. Accès public à la salle et publicité écrite

En revanche, la publicité est limitée de manière essentielle d'un double point de vue. D'une part, l'art. 17 OJ ne prévoit qu'un accès public à la salle. Celui-ci est éphémère et empreint d'une connaissance personnelle directe. Ce caractère éphémère est accentué par l'interdiction de tout enregistrement dans la salle de tribunal. L'art. 17 des directives concernant la chronique de l'activité judiciaire du Tribunal fédéral (RS 173.111.18) qui prévoit une procédure d'autorisation est, selon la décision de la Conférence des présidents du 12 mars 2001, interprété restrictivement dans le sens d'une interdiction absolue de films et d'enregistrements sonores dans la salle de

tribunal, contrairement à une pratique antérieure plus large qui permettait au moins occasionnellement de filmer l'ouverture des débats . Seules sont autorisées des croquis et des notes manuscrits. La proposition de laisser filmer la proclamation du jugement dans certains cas a été expressément refusée. Ce caractère éphémère s'oppose aux publications écrites - électroniques ou imprimées - des arrêts par le Tribunal fédéral: de telles publications sont destinées à la mémoire à long terme. Afin de sauvegarder la protection de la personnalité et des données, elles se font en principe sous forme anonymisée, également lorsque les noms des parties à la procédure pouvaient être connus sans limitation dans la salle de tribunal.

D'autre part, en raison de l'importante charge de travail, le TribunaI fédéral a de plus en plus souvent opté pour une procédure purement écrite. Depuis la novelle du 4 octobre 1991, en vigueur depuis le 15 février 1992, le TribunaI fédéral peut, selon la règle prévue par l'art. 36b OJ, statuer par voie de circulation en cas d'unanimité. En 2001, le Tribunal fédéral n'a conduit une délibération publique que dans 122 affaires. Autrement dit, il était unanime dans 97,6 % des cas. Le principe de la délibération publique du jugement selon l'art. 17 OJ menaçait ainsi d'être vidé de sa substance. Dès lors, la Conférence des présidents a décidé le 23 octobre 1995 qu'en principe la possibilité de statuer par voie de circulation selon les art. 36a et 36b OJ ne changeait rien au principe de la publicité de la procédure. Il n'est bien entendu pas possible dans une procédure par voie de circulation de garantir une connaissance directe de la délibération des juges comme en cas de présence dans la salle. Par contre, la publication ultérieure des arrêts peut, elle, en vertu de l'ouverture et de la publicité de la jurisprudence du Tribunal fédéral qui sont à la base de l'art. 17 OJ, contribuer à une politique d'information transparente. En ce sens, la décision de la Conférence des présidents du 23 octobre 1995 a constitué une orientation déterminante. En résumé, on peut affirmer que le principe du prononcé public du jugement selon la Constitution fédérale et la CEDH est confirmé par l'art. 17 OJ qui élargit même partiellement ce principe.

II. La pratique de publication du Tribunal fédéral

Après avoir présenté les fondements juridiques, il convient d'exposer dans le secondchapitre l'application concrète par le Tribunal fédéral du principe de la publicité.

II. 1. Les exigences d'un environnement en constante évolution

La pratique de publication du Tribunal fédéral s'est considérablement modifiée au cours des dix dernières années, car le contexte a beaucoup changé. Parmi les explications envisageables, celles qui suivent devraient suffire:

II. 1.1. Masse d'informations

Le développement technique permet aujourd'hui l'accès rapide à une multitude d'informations quasi illimitée, également dans le domaine juridique. La pression accrue de notre époque - expression de l'esprit du temps et conséquence de la complexité croissante de la société et du droit - n'est pas étrangère à ce phénomène.

II. 1.2. Densité normative

La forte croissance de la densité normative permet toujours moins de régler un cas sur la base de principes juridiques généraux. L'accès à une jurisprudence spécialisée est fréquemment la condition inéluctable à la solution correcte d'une affaire.

II. 1.3. Accessibilité

La jurisprudence doit être rapidement accessible; elle vieillit d'ailleurs plus vite qu'auparavant, particulièrement en droit public.

II. 1.4. Égalité des armes

Des services administratifs et des organisations bien équipées - par exemple des compagnies d'assurance - pourvoient depuis longtemps à leurs besoins en jurisprudence au moyen de leurs propres banques de données spécialisées dans lesquelles sont saisis tous les jugements pertinents pour eux. Or, lors de la consultation du droit en vigueur, les mêmes conditions doivent être offertes à tous les justiciables. L'égalité des armes devait dès lors être restaurée au moyen de nouvelles offres publiques, proposées en matière de jurisprudence sur le plan fédéral par le Tribunal fédéral lui-même.

II. 2. Les cinq piliers de l'information juridique du Tribunal fédéral

Le Tribunal fédéral remplit de nos jours son devoir d'information du public de la manière suivante:

II. 2.1. Le Recueil officiel des arrêts du Tribunal fédéral

Le pilier le plus important demeure le Recueil officiel des arrêts du Tribunal fédéral sous forme imprimée et, dès 1997, également sur INTERNET.

Le Recueil officiel contient sur une moyenne de plusieurs années environ 5% de tous les arrêts. Sont publiés les arrêts de principe ainsi que la confirmation ou les changements de jurisprudence, des jugements contenant un résumé de la jurisprudence, ainsi que, dans certains domaines, des jugements à caractère singulier en vue d'illustrer la jurisprudence. Pour le développement ultérieur de la jurisprudence, ce sont en premier lieu ces arrêts-là qui font foi. Le Tribunal fédérals'en tient toujours à cette pratique.

Ce recueil va conserver son importance grâce à la sélection relativement sévère des arrêts retenus. Des répétitions inutiles d'une jurisprudence appliquée de façon identique et constante sont évitées. Par ce biais et grâce à un répertoire général performant qui récapitule l'ensemble de la matière, un accès rapide à la jurisprudence en vigueur est assuré à l'utilisateur disposant de connaissances juridiques. C'est un avantage décisif à une époque de pléthore d'informations.

II. 2.2. La remise aux revues spécialisées et aux tiers

Toutes les revues juridiques spécialisées qui en font la demande reçoivent peu après les parties les jugements destinés à la publication afin de leur permettre de commenter rapidement la jurisprudence du Tribunal fédéral. Cette transmission préalable par le Tribunal fédéral leur permet en principe de publier le commentaire peu après la parution des jugements dans le Recueil officiel. En outre, des publications de type B, soit des jugements qui n'ont pas leur place, en vertu de leur contenu spécifique, dans le Recueil officiel, mais qui sont néanmoins susceptibles de présenter un intérêt pour un public spécialisé, leur sont également remises. Hormis les arrêts publiés officiellement par le Tribunal fédéral, les revues spécialisées publient environ encore 5% d'arrêts supplémentaires.

Sur demande expresse, même des arrêts officiellement non publiés sont remis à des tiers intéressés (particuliers, revues spécialisées, services de l'administration, etc.). La nécessité de connaître le droit jurisprudentiel impose en effet une remise illimitée des décisions judiciaires à la presse spécialisée ou aux tiers intéressés (voir ci-dessus ch. I, 1.3). Le Tribunal fédéral renonce aujourd'hui à la condition de l'intérêt légitime. Jusqu'à ces dernières années, la chancellerie du Tribunal fédéral remettait ainsi environ 2'500 arrêts par année. Ce chiffre est heureusement à la baisse grâce à la banque de données internet.

II. 2.3. La remise à la presse des arrêts du Tribunal fédéral et leur publication sur internet

Environ 50% des arrêts du Tribunal fédéral sont remis à la presse. La presse a refusé avec véhémence l'accès à tous les arrêts, interprétant cela comme un déni d'information. Elle a en effet considéré que l'examen des 5000 arrêts rendus par année était trop important et que la moitié des arrêts qui n'étaient pas mis à disposition ne présentaient aucun intérêt (en principe, les radiations, les décisions d'irrecevabilité types, ainsi que les arrêts soumis à la procédure simplifiée selon l'art. 36a OJ). La presse publie environ 5 à 10% du 50 % des jugements mis à sa disposition.

Le même 50% des arrêts mis à disposition de la presse a été rendu accessible dans une banque de données spécifique sur internet dès avril 2001 avec effet rétroactif au 1er janvier 2000. Cette nouvelle banque de données poursuit deux objectifs: en premier lieu, elle contribue à la transparence de la jurisprudence. Le Tribunal fédéral veut ainsi priver de tout fondement le reproche d'occulter une partie de ses arrêts. En second lieu, le public intéressé doit pouvoir lire le texte original de l'arrêt le jour de la parution du compte rendu dans la presse. Les simplifications ou omissions du compte rendu sont ainsi immédiatement reconnaissables par les cercles intéressés. Par ce biais, le Tribunal fédéral exerce une sorte de contrôle de la presse qui, de façon notoire, prétend contrôler le travail du Tribunal fédéral.

Dès fin 2002, une banque de données spécifique, protégée par un mot de passe, va être ouverte sur internet pour répondre aux besoins particuliers de la presse. Des communiqués de presse du Tribunal fédéral, des résumés d'état de fait pour la préparation des séances publiques du Tribunal fédéral, ainsi que des arrêts en texte original, avec mention complète des noms, et qui devront être anonymisés dans les banques de données accessibles au public en raison de la protection des données et de la personnalité, seront ainsi mis à disposition de la presse durant une durée limitée, soit aussi longtemps qu'ils sont d'actualité.

II. 2.4. Les relations publiques

Les relations publiques en général constituent le quatrième pilier. Cet aspect ne peut être approfondi dans le cadre du présent rapport.

II. 2.5. La mise à disposition de tous les arrêts

La mise à disposition au Tribunal fédéral de tous les arrêts sous forme papier, avec rubrum et dispositif, pendant quatre semaines, constitue le cinquième et dernier pilier. Cette mise à disposition interviendra à fin 2002.

Jusqu'ici, le Tribunal fédéral respectait le principe de la publicité au sens de l'art. 30 al. 3 Cst. et de l'art. 6 par. 1 CEDH en premier lieu par la remise des arrêts sur requête individuelle comme déjà mentionné. Toute critique devrait désormais être écartée par la mise à disposition du rubrum

et du dispositif de l'ensemble des arrêts sous forme non anonymisée. Dès fin 2002, tous les arrêts sans exception seront rendus publics. Le problème de l'anonymisation pour la chronique judiciaire perdra par conséquent de son acuité, car la presse, comme tout autre tiers, pourra avoiraccès à tous les noms par le biais de la mise à disposition du rubrum et du dispositif sous forme papier. Le reproche de dissimuler injustement à la presse le nom des parties ne pourra plus être adressé au Tribunal fédéral.

II. 3. Les publications sur internet

II. 3.1. Le recueil officiel sur internet: „arrêts de principe dès 1954"

Au vu de ce qui a été exposé précédemment, il apparaît clairement que le Recueilofficiel des arrêts du Tribunal fédéral devrait être la source de droit la plusimportante pour le juriste, et ce, également sur internet. Cette banque de donnéesrépond aux besoins du public spécialisé. Celui qui est capable de tenir un raisonnement juridique obtient, en particulier à l'aide du répertoire général informatisé, les réponses les plus pertinentes. Le Recueil officiel et le répertoire général informatisés ne sauraient guère être supplantés par des banques de données plus vastes. Au vu de la pléthore de données, des systèmes qui permettent une recherche ciblée et disposent d'un outil rigoureux pour accéder à l'information deviennent au contraire plus attractifs. Des outils tel que le répertoire général nécessitent cependant un traitement intellectuel et sont dès lors coûteux.Un traitement purement automatique offre d'autres avantages, mais ne présente en revanche pas la qualité juridique d'un travail effectué par l'homme.

II. 3.2. La banque de données complète anonymisée des arrêts dès l'an 2000: „arrêts dès 2000"

Dès le 1er janvier 2000, la banque de données complète anonymisée des arrêts offre tous les arrêts qui sont remis à la presse, soit environ 50% de tous les arrêts.

Cette banque de données fonctionne avec un moteur de recherche purement automatique, qui détermine une échelle de pertinence et l'affiche. Elle est particulièrement appropriée aux buts suivants: en premier lieu, pour déceler des arrêts que le Tribunal fédéral ne considère pas, au vu de circonstances particulières, comme arrêts de principe et qui ne figurent dès lors pas dans le Recueil officiel; en second lieu, pour permettre la consultation de la jurisprudence la plus récente sur un domaine juridique déterminé, la recherche pouvant être restreinte par avance à une sous-collection et limitée à une période récente. Cette banque de données sert aussi, vu la quantité d'arrêts qu'elle contient, la science juridique. Elle ne convient en revanche que de manière limitée à une recherche ciblée effectuée par un juriste, particulièrement si ce dernier - en tant qu'avocat ou notaire par exemple - doit facturer ses frais à un tiers. Cette constatation se confirme de plus en plus. La banque de données compte à ce jour environ 6'000 arrêts, soit une masse encore consultable. Compte tenu d'une augmentation d'environ 2'500 arrêts par année, la limite de 20'000 arrêts sera dépassée dans quelques années. Dès lors qu'il n'y a pas de tri intellectuel, de nombreux arrêts répétitifs figureront dans ladite banque de données et seront également affichés lors d'une recherche correspondante. Qui donc a le temps de lire vingt arrêts au contenu plus ou moins identique?

Cela ne trouble pas le Tribunal fédéral, car ladite banque de données n'a pas été spécifiquement conçue pour permettre une recherche juridique matérielle ciblée. Elle assure plutôt la transparence et la recherche rapide à l'aide d'un numéro de dossier sur la base d'un compte rendu de presse. Et finalement, on doit pouvoir compter sur une certaine intelligence de l'utilisateur lors de la recherche. Celui qui utilise un moteur de recherche doit s'en approprier les avantages et

adapter sa stratégie de recherche. En ce sens, on ose affirmer qu'il est possible, grâce à une stratégie de recherche intelligente, d'obtenir un résultat tout à fait utilisable dans la banque de données complète des arrêts anonymisés du Tribunal fédéral dès l'an 2000.

II. 4. La délimitation entre la desserte de base publique et l'offre du secteur privé

Cette seconde banque de données, comprenant 50% de tous les arrêts, n'est pas indexée intellectuellement, contrairement au Recueil officiel. Deux raisons principales justifient ce choix: la première est l'investissement énorme en personnel que représenterait un tel projet, investissement que le Tribunal fédéral lui-même ne saurait être en mesure d'assumer; la délimitation entre la desserte de base publique et l'offre du secteur privé constitue la deuxième raison, qu'il convient ici de préciser brièvement:

II. 4.1. La situation juridique

Selon l'art. 4 al. 1 de l'Ordonnance concernant la publication électronique de données juridiques (RS 170.512.2), la Confédération se borne à publier des données juridiques, y compris les principaux outils d'accès, tels que les répertoires, les indexes et la recherche en texte intégral, ainsi que des commentaires de données juridiques destinés au public (desserte de base).

Pour répondre à un besoin de la société ou à un intérêt général qui n'est pas satisfait par le secteur privé (conditions cumulatives), les services fédéraux peuvent aussi, aux termes de l'art. 4 al. 2, publier des ouvrages dans lesquels des données juridiques de la Confédération:

a. sont assorties de commentaires de particuliers ou d'adjonctions analogues;

b. sont interconnectées avec des publications du secteur privé;

c. sont intégrées dans des systèmes facilitant la prise de décisions.

La conception qui sous-tend la définition de la desserte de base est la suivante: la production d'ouvrages présentant une plus-value intellectuelle ("ouvrages dérivés"), sous réserve des exceptions susmentionnées, doit être réservée au secteur privé.

Bien entendu, le Tribunal fédéral n'est pas soumis au champ d'application de cette ordonnance (art. 2), puisqu'il ne constitue pas une unité de l'administration fédérale, mais bien le troisième pouvoir indépendant. La définition de la desserte de base repose cependant sur un large consensus: elle a été établie en 1996/97 dans le cadre de l'Étude d'une conception fédérale pour un système suisse d'informations juridiques, à laquelle le Tribunal fédéral a participé. De ce fait, ce dernier respecte aussi cette délimitation entre la desserte de base publique et l'offre privée d'"ouvrages dérivés".

II. 4.2. L'apport d'une plus-value intellectuelle: "l'ouvrage dérivé"

Qu'entend-on par l'apport d'une plus-value intellectuelle à des données juridiques? Les opinions divergent dans une large mesure à ce propos. Lors du développement de ses banques de données, le Tribunal fédéral a, quant à lui, toujours défendu le point de vue selon lequel tout ce qu'un moteur de recherche peut techniquement réaliser relève de la desserte de base publique. En revanche, un travail d'analyse intellectuel, un travail scientifique, en d'autres termes tout ce qui

permet d'apporter une plus-value intellectuelle, caractérisent un "ouvrage dérivé". C'est cette opinion qui s'est imposée comme la conception dominante ces dernières années.

Divers motifs justifient cela: ce qui aujourd'hui est révolutionnaire, est, deux à trois ans plus tard, déjà intégré dans les moteurs de recherche ordinaires. Suivre la conception minoritaire, qui soutient que des moteurs de recherche performants doivent être considérés comme des "ouvrages dérivés", ne ferait que retarder la mise en place d'une desserte de base publique efficiente, ce qui n'est pas convaincant. S'ensuivrait la nécessité de distinguer, parmi les moteurs de recherches, quels sont ceux qui possèdent des standards techniques ordinaires et ceux qui sont plus performants. Une telle distinction serait problématique.

II. 4.3. Le moteur de recherche Eurospider

La concurrence privée a souvent reproché au moteur de recherche Eurospider utilisé par le Tribunal fédéral d'être un "ouvrage dérivé", parce qu'il serait particulièrement performant. La mise en place d'un assistant de recherche, d'une recherche multilingue et de deux thésauri corroborent cette critique. A cette argumentation, le Tribunal fédéral oppose le fait que les juristes reprochent souvent à ce moteur de recherche son imprécision. Cela tient à la particularité d'Eurospider qui décompose les termes de recherche en notions de base (notamment en allemand, l'usage de mots composés y étant usuel). Celui qui, par exemple, recherche le mot "Schuldbetreibung" (poursuite pour dettes) génère une recherche avec les notions de base "Schuld" (poursuite) et "Betreibung" (dette). Il est clair que la notion juridique très fréquente de "Schuld" (dette), qui apparaît dans de nombreux arrêts du Tribunal fédéral, ne ressortent pas tous au domaine de la poursuite. L'agacement de l'utilisateur qui trouve parmi les résultats de nombreuses données non pertinentes est compréhensible.

Avec l'amélioration en cours du moteur de recherche, le Tribunal fédéral vise trois objectifs :

Premièrement, les termes juridiques contenus dans le thésaurus juridique ne sont plus décomposés en notions de base lors d'une recherche; cela permet uniquement de supprimer une faiblesse inhérente au moteur de recherche et ne constitue pas un "ouvrage dérivé", domaine réservé au secteur privé.

Deuxièmement, les termes de recherche qui se trouvent dans le thésaurus sont traduits dans les autres langues nationales, ce qui permet d'étendre la recherche aux trois langues officielles de la procédure. Dans un pays connaissant trois langues officielles traitées sur un pied d'égalité, c'est une exigence absolue.

Troisièmement, l'assistant de recherche aide l'utilisateur à formuler ses questions de manière appropriée. Cela constitue également une aide purement technique: l'assistant communique à l'utilisateur quelles recherches le moteur est en mesure d'effectuer.

II. 4.4. La proximité avec les citoyens

Le Tribunal fédéral recherche une proximité avec les justiciables grâce à son offre en ligne, c'est pourquoi elle restera gratuite pour les utilisateurs privés. L'expérience démontre en effet que le taux de consultation d'une banque de données internet chute drastiquement dès que l'accès en devient payant.

Cependant, le citoyen qui veut exceptionnellement consulter un arrêt du Tribunal fédéral, suite par exemple à la lecture d'un compte-rendu dans la presse, doit aussi pouvoir accéder à l'arrêt original sous forme anonymisée. Cela n'est possible que grâce à des prestations gratuites en ligne. On peut regretter qu'elles concurrencent les fournisseurs privés, mais rien ne permet de s'écarter de cette pratique.

II. 4.5. La concurrence privée

Au regard de la concurrence privée, il faut admettre que le marché a été fortement modifié par l'offre gratuite publique en ligne du Tribunal fédéral. Le fournisseur privé qui propose des données accessibles au public sans prestations complémentaires, donc sans plus-value intellectuelle, ne gagne aujourd'hui presque plus d'argent. Le changement de contexte économique frappe particulièrement des entreprises telles que Swisslex. Dans les années quatre-vingt et jusqu'au début des années quatre-vingt-dix, les milieux juridiques suisses ont dû relever le défi presque insurmontable de saisir les données juridiques dans les trois langues officielles et d'en garantir l'accès au public. La Confédération a donc passé un contrat d'exclusivité avec Swisslex, une société privée. Depuis, ce contrat a été résilié. Swisslex a dû complètement réorganiser sa stratégie et faire face à des pertes financières importantes pour repartir sur de nouvelles bases.

Comme nous venons de le mentionner, la concurrence est rude. Le Tribunal fédéral lui-même y est soumis et doit continuellement reconsidérer son offre. Il tient cependant beaucoup à ce que l'on ne supprime pas les débouchés économiques des fournisseurs privés pour leur production scientifique et il ne souhaite pas, de ce fait, proposer d'"ouvrages dérivés". Les fournisseurs privés, malgré l'offre en ligne du Tribunal fédéral, peuvent demeurer sur le marché s'ils offrent des informations ciblées, traitées intellectuellement, et ce, pour les besoins
du monde juridique.

III. Conclusions

III. 1. La règle du prononcé public

Le Tribunal fédéral respecte la règle du prononcé public exigé par la Constitution fédérale et la CEDH en rendant publics le rubrum et le dispositif de tous ses arrêts tout en ménageant parallèlement, à la demande, un droit de consultation presque illimité des arrêts qui sont anonymisés si nécessaire.

III. 2. Mise sur un pied d'égalité de la publication sur support papier et de la publication électronique

La desserte de base publique exige aujourd'hui de traiter de manière équivalente la publication papier et la publication électronique, en particulier sur internet. Ces deux modes de publication sont complémentaires. Le Recueil officiel des arrêts du Tribunal fédéral, qui contient les arrêts de principe, gardera toute son importance quelle que soit sa forme de publication.

III. 3. Transparence de la jurisprudence

Avec sa banque de données internet étendue, le Tribunal fédéral vise avant tout la transparence. Quant à savoir si la masse d'arrêts mise ainsi à disposition rend chaque fois effectivement service

au monde juridique, c'est une toute autre question. Le problème du flux d'informations doit être appréhendé par d'autres instruments tels que des moteurs de recherches et un Recueil officiel des arrêts bien conçu.

III. 4. Gratuité des prestations

Abonnement auprès d'une banque de données juridiques privée doit pouvoir, en tant que citoyen de ce pays, accéder facilement à la jurisprudence de la plus haute instance judiciaire. Cela requiert par conséquent une offre en ligne gratuite.

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COMMUNICATION OF THE COURT

Report by:
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1. What is the aim of "Communication of the Court"?

Recently, an interview given by Ludwig Adamovich, President of the Austrian Constitutional Court since 1984, in a daily newspaper[1] had the following headline: "The public is unable to understand the judgements of the Court. - Adamovich pleads for more efficient public relations work for the Constitutional Court."

In the course of the interview he brings the problem to the point: "After nineteen years of professional experience at this Court one thing has become very clear to me: More and more it turns out to be a problem that the public is not in a position to understand our judgements. Complex reasons are responsible for this fact. All proceedings before the Court require a certain formalization, which is difficult to understand for non-experts. ..... Often very subtle questions have to be answered. The present situation is that the citizen is confronted with the result and is amazed because he is unable to reconstruct the train of thought that has lead to this result. ..... It will never be possible to write judgements in a manner that everybody will be able to understand them, however, we should try hard to provide them with a maximum of comprehensibility. .....

The second thing is: According to my opinion the Constitutional Court needs professional public relations work in order to react in future properly to misunderstandings in press reporting - as they have occurred in the past - and in order to make the jurisprudence of the Court more transparent. By means of nothing more than a dry, juridical language this goal cannot be achieved. ..... Certainly, the whole complex is partly also too much for the media. Sometimes it even causes me physical pain to note to what extent certain issues can be misunderstood. For this reason we would need a person whose main occupation is the function of a press officer and who speaks the language of journalists."

2. The Development of Public Relations Work in the Austrian Constitutional Court

The problems the Austrian Constitutional Court faces at present in connection with public relations work could not be better described. What are the reasons for this situation?

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[1] *Wiener Zeitung, August 19, 2002 ("Adamovich will bessere Pressearbeit für VfGH - Öffentlichkeit versteht die Erkenntnisse nicht"*

2.1. The Austrian Constitutional Court has been founded in 1919/1920. During the first sixty years of its existence apparently neither much effort has been made nor was considered necessary to think of active public relations work.

In the early eighties the official position of the Court *vis à vis* the media was still very restraint and cautious. No Member or other Court official would give any comment or interpretation on the contents of Court judgements, on the grounds that "everything the Court had wished to express could be found in the judgement itself". The reason for this attitude might have been the fact that the judgements were methodically largely influenced by the "Wiener Rechtstheoretische Schule" and were considered to reflect the smallest achievable common denominator after controversial discussions. It is certain that at that time the Court had no intention to be present in the media.

2.2. Mid of the eighties - partly due to a gradual change of the theoretical position of the Court - things slowly began to change. The delivery of judgements of great public interest was accompanied by a press release, consisting of a shortened version of the judgement, edited under the responsibility of the Secretary General. The press release was sent to the Austria Press Agency (APA) and to journalists of some selected newspapers on some occasions, such an accompanying press release was also made in complex and complicated cases in order to prevent foreseeable misunderstandings.

From 1985 until about 1995 a steadily increasing number of press releases had been issued every year. The attitude of the Court with regard to questions concerning the interpretation of judgements, background information etc. remained, however, unchanged, with the only exception that the "standing answer" (see 2.1. above) to such questions could be enriched by the reference to the press release.

It was strictly forbidden to give any information on pending cases. Contacts with journalists were strictly limited to the President (and the Members of the Court) and the Secretary General.

Until mid of the nineties the Court did not actively seek a rapport with the press, it even appeared that there was some fear of contact. Public relation work (if it deserved this name at all) consisted - besides the mentioned press releases - primarily in mere reactions to incorrect reporting.

On the other hand, more and more frequently judicial review cases were brought before the Court in matters where a political agreement in Parliament could not be achieved (e.g. tax law, retirement age, etc.), thus assigning the Court the role of an arbiter. Consequence thereof was of course that the respective "loosing party" was not reluctant to criticise the Court more or less heavily. Public interest in the work of the Constitutional Court was growing.

2.3. In 1995 the President of the Constitutional Court held - for the first time - a press conference. The reason thereof was frequently occurring incorrect reporting and misunderstanding of judgements at that time. (A second press conference was organized in the same year on the occasion of the visit of the President of the European Court of Justice.)

In its Activity Report on the year 1995 the Court took - for the first time - ways of improving public relation work into consideration, above all under the following aspect: The Court presumed that its decisions were that often misinterpreted, because public and press evidently primarily interested in the result of the proceedings and not in the - often complicated and therefore for non-experts hardly understandable - juridical considerations that had lead to this

result. For an adequate assessment of a decision it is, however, necessary to understand also the reasons for the judgement. As a consequence, journalists were provided with a little bit more information.

2.4. Increasing public interest in the Court itself and its jurisprudence, technical developments and some other factors lead to an important change in the Court's information policy in 1997.

It is important to note that the Austrian Constitutional Court is - contrary to the courts of the ordinary jurisdiction and the Administrative Court - not sitting permanently, but is - since the beginning of its activities - gathering several times a year for Court sessions. Over the past decades the Court has regularly come together four times per year for a three weeks period to hear, deliberate and decide the cases which have been prepared between the Court sessions.

Mid of 1997 the President and the Vice President decided in accordance with all other Court Members to hold common press conferences before each Court session with the aim to present and explain selected cases to the public ready for deliberation during the following Court session. From the very beginning, the response of the media to these press conferences - in which journalists get answers to their questions from the most competent authorities - has been extraordinarily fruitful and they have turned out to make an important contribution to an improvement in quality and correctness of press reporting on all events concerning the Constitutional Court.

At the same time the website[2] of the Court had been created. Besides general information (on the Court Members, basic legal provisions, competences. organization, proceedings, the agenda of public hearings during Court sessions, etc.) all press releases as well as the full-text version of the respective judgements were made available there to the public. Furthermore, selected interesting judgements, especially those taken in all the cases presented at the press conference, were made available to the public in the full-text version, even if their delivery had not been accompanied by a press release.

Upon request, the press was given more information than ever before: e.g. whether or not a specific case is projected for deliberation during the next Court session, whether a case had already been treated or whether a final decision has been taken. The result of the proceedings, however, was made public only after delivery of the judgement to the parties of the proceedings.

This more open-minded public relations work provoked, of course, a broader interest in the work of the Constitutional Court. Although it was a great relief for the Secretary General to refer journalists to the judgements published on the website instead of submitting the judgements by telecopy or explaining complicated details to persons who did not have the text in front of them, the increasing number of enquiries made another important step necessary. The strict limitation of press contacts to the President and the Secretary General was given up and also experienced scientific assistants of the Justices were allowed to answer frequently asked questions of journalists to a certain extent. Sensitive or tricky matters still had to be referred to the Secretary General.

This system worked quite well until the end of the year 2001 when a really exceptional situation occurred.

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[2] *http://www.vfgh.gv.at*

3. Recent Developments

In December 2001 the Court had orally pronounced a judgement in sensitive case[3] concerning the right of the Slovene minority in an Austrian Province to bilingual topographic place-name signs granted in the 1955 Vienna State Treaty.

In the course of the following days a high State Organ heavily attacked the judgement, the Court as an institution and the President personally in the media.

He reproached the Court for being "politically corrupt", declared the decision for wrong and therefore "nil and void" (!) and questioned the independence of the Judges of the Constitutional Court because of the proceedings leading to their nomination[4]

The intensity of these attacks culminated in reproaching the President for "dishonourable conduct" (This is one of the facts laid down in the Law on the Constitutional Court that may lead to proceedings to remove a Judge of the Constitutional Court from his office. The judgement can only be taken by the Court itself.) This development caused the President to convince the Court that examinations should be initiated aiming at a decision of the Court itself whether proceedings to remove him from office should be set in motion or not. The proceedings were terminated with a judgement holding that the Court could not find any reason to set in motion such proceedings against the President.[5]

These events made quite clear that from one day to the other Court and President had been dragged into a highly political dispute and suddenly had to act in a scenario and on a stage they were not familiar with. The "opponents" encountered on different levels and spoke different languages. It appeared to be foil fencing against an anti-tank rocket launcher.

At this point in time it became evident that the instruments the Court disposes of in its public relation work were ineffective and insufficient in such a situation. It turned out that (written) press releases are too cumbersome, and the Secretary General - as a high ranking civil servant - is not the appropriate organ to act as a speaker of the Court in a politically sensitive situation.

A further analysis of the situation came to the conclusion that one of the main reasons for mentioned events was the fact that in the judgement concerning the topographic signs the Court was confronted with a politically sensitive topic combined with difficult legal questions that needed complicated answers. The result was that the public did not understand the decision. Especially in the Austrian Province primarily affected by the judgement, politics had an easy game to emotionalize the population.

Since that time the Court has the intention to professionalize its public relations work by employing an experienced, full-time press officer, in order to guarantee an adequate transportation of the judgements and the interests of the Court by way of adequate means and in a language the public would understand.

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[3] *Judgement G 213/01 ago. as of December 13, 2001; EuGRZ 2002, p. 168 ff.*
[4] *See Art. 147 Bundes-Verfassungsgesetz.*
[5] *Judgement DV 1/01 as of January 6, 2002; EuGRZ 2002, p. 165ff.*

4. How far is criticism of Constitutional Court judgements allowed to go?

It is evident that a Constitutional Court whose judgements are never confronted with criticism must have a problem. Either there is some barrier in the legal system which prevents important and controversial issues from reaching the Court, or the Court is - for whatever reason - unable to fulfil its role as the guardian of the constitution in a democratic society.

The possible range of criticism is wide, depending on the degree to which the "losing party's" interests have been affected. In a pluralistic democratic society the range of different interests is equally wide.

What are the main general items of criticism? The former President of the German Bundesverfassungsgericht Jutta Limbach has observed[6] that the Court has become the object of criticism over the past years above all because critics alleged that it had more and more taken over the role of the legislator or the role of a supra-government. Others have conceded that this impression might be caused by a weakness of politicians who tend to shift the responsibility for conflicts to the Constitutional Court when they are too reluctant or too far apart to solve the conflicts themselves.

If and when the need arises, it has become fashionable to bring expert opinions into attack against Constitutional (and other) Court judgements if the result is not satisfactory for a specific group. Difficult juridical questions will always be open to different solutions and opinions. Bearing this in mind, the more important is the role of the Constitutional Court as the finally deciding organ. Its judgements cannot simply be considered as mere opinions among many other opinions. As a matter of fact, in a Constitutional Court the decision-making process is long and controversial. This shows that the judgements are the products of intense considerations and that finally the decisions are not taken carelessly. Therefore, one has always to bear in mind that it is precisely the main task of a Constitutional Court to decide ultimately and in a definite manner a conflict between various possible positions.

Polemic critics which take unpopular judgements as an opportunity to warn of the dangers of a "Richterstaat" (a state in which the judicial power is predominant over the other - especially the democratic - state powers) and even propose to introduce the "revision" of Constitutional Court judgements by means of direct democratic instruments, arguing that in a democratic society the people is the sovereign, are more than dangerous. What sounds simple completely disregards the system of Constitutions based on the principles of Separation of Powers and Checks and Balances.

Although the dividing-line is blurred between objectively justified critics ("sachlich gerechtfertigte Kritik") and unobjective insults, an attempt has to be made to distinguish between these two principal forms of criticism. The firstly mentioned type is necessary, must be allowed and can be constructive although it may be considered as unpleasant at times. It needs either no or - if at all - some sort of clarifying reaction. The second type of polemic criticism is well in a position to cast doubt on the institution itself and is highly dangerous, since Constitutional Judiciary forms an important part of the Rule-of-Law-Principle. This sort of criticism needs therefore an adequate reaction.

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[6] *Limbach, Mißbraucht die Politik das Bundesverfassungsgericht?, Köln 1997*

In its Activity Report 2001 the Constitutional Court has tried to make this distinction clear: "....
Also in the past it has occurred that different political groups have unjustifiably blamed the Court for acting in a purposeful manner with regard to politics and for acting legally incorrectly. New is, however, the choice of words that has exceeded by far the area of objectively comprehensible criticism and lead to blunt and personal insult. New are also polemic allegations with regard to the decision-making process as well as the relevant proceedings which cannot remain unchallenged. ....."

5. Accessibility of Constitutional Court Judgements

In order to enable the public to "understand" Constitutional Court judgements it is important to create the relevant conditions.

The first condition is the easy and uncomplicated accessibility of the jurisprudence of the Constitutional Court. New technologies, especially the Internet, have facilitated this a lot over the past years.

In Austria, all judgements with the exception of merely formal decisions are available to everyone - free of charge - on the website of the "Rechtsinformationssystem des Bundes - RIS"[7] (Legal Information System) established with the Federal Chancellery. The Court itself presents a selection of the most important judgements on its website, together with press releases which might facilitate their understanding.

The availability of information is, however, only the basic step towards understanding.

The next step into the right direction could be an attempt of the Court to provide its judgements with a maximum of comprehensibility. If and when this demanding goal can be achieved, the matter is still difficult enough.

Still more support is needed when the comprehensibility of those judgements is at stake which play a role in the process of the formulation of political demands and objectives. Here, the sphere of activity for demagogues is wide, and it is difficult to oppose those activities. Nevertheless, the following has to be emphasized: Only once the public has been put in a position to comprehend the judgements it will be able to distinguish between necessary, objectively justified criticism and dangerous and destructive polemics.

In any case, it is the task of the Constitutional Court itself to do something about this situation by means of a suitable concept of public relations work - not by propaganda, a means of expression political parties often use and are familiar with.

[7] http://www.ris.bka.gv.at

- XVIII -

COMMUNICATION OF THE CONSTITUTIONAL REVIEW CASES IN SUPREME COURT OF ESTONIA – NEW CHALLENGES

Report by
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Secretary General
Constitutional Review Chamber
Supreme Court of Estonia

Constitutional Review Procedure

The norms of central importance for constitutional review are to be found in various chapters of the Constitution. Two central provisions are Articles 15 and 152. There is no separate constitutional court in Estonia, the Supreme Court also functions as the court of constitutional review (§ 149(3) of the Constitution). And the following institutions have the right to submit petitions for constitutional review to the Supreme Court:

- the President of the Republic - for preventive review of constitutionality of parliamentary Acts (§ 107(2))
- and the Legal Chancellor - for *a posteriori* review of legislation of general application (§ 142(2)).
- the courts (§ 15 and § 152(1).
-

The legislator has opted for the concentrated model of review in the Constitutional Review Court Procedure Act. It was so in the first Constitutional Review Court Procedure Act of 1993, and is in the second one, adopted in 2002.

According to the 1993 Act - in addition to the President of the Republic and the Legal Chancellor - the right to initiate constitutional review proceedings in the Supreme Court was given also to all courts. Each court, if it found upon adjudicating a case, that an applicable law (Act) is in conflict with the Constitution, had an obligation not to apply the Act, had to declare it unconstitutional and send the pertinent judgment to the Supreme Court. The judgment of an ordinary court, declaring an Act unconstitutional, had thus only *inter partes* effect, i.e. it was binding only on the parties of the concrete case. Only the Supreme Court was competent to declare an Act invalid. That judgment had *erga omnes* consequences.

The regulation in the new Constitutional Review Court Procedure Act of 2002 has remained rather similar to that of the old Act. The most central change has been extending the circle of persons entitled to initiate constitutional review. Pursuant to the new Act also local governments can submit constitutional review requests to the Supreme Court. They can do it when a legislation of general application is in conflict with the constitutional guarantees of local governments.
The access of individuals to constitutional review has also been made possible to minimal extent. An individual may submit constitutional complaints to the Supreme Court against resolutions of the Riigikogu if these violate his or her rights. Also, an individual may file a complaint against the decision of the President of the Republic concerning appointment to or release from office of an official, if this violates person's rights. And lastly, a full or alternate member of the Riigikogu

or a Riigikogu faction may, in certain cases, submit complaints against the resolutions of the Board of the Riigikogu. The latter case is not so much an individual complaint as a dispute between organs.

Another novelty of the new Constitutional Review Court Procedure Act is the review of electoral complaints. These are complaints against decisions or procedures of an electoral committee, that violate the rights of a political party, election coalition or a person. The Supreme Court must resolve electoral complaints within three working days. As compared to some judicial disputes within the administrative court system a few years ago that lasted for years, the three-day term of resolving electoral complaints constitutes an important step towards ensuring effective legal remedies to persons.

The banning of the activities of political parties is, under the new Act, also a matter of constitutional review. A pertinent petition may be submitted by the Government of the Republic. Article 48 of the Constitution serves as the constitutional basis for the court to terminate of activities of a political party the aims or activities of which are directed at changing the constitutional order of Estonia by force. Up to know the pertinent procedure was not regulated.*So called "special procedure"*: decision that an official[1] is incapable of performing his or her duties for an extended period, termination of authority of a member of the Riigikogu, giving consent to the Chairman of the Riigikogu acting as President of the Republic.[2] The competence of the Supreme Court to examine the majority of the so-called special procedure matters is derived from the Constitution. In this field, too, pertinent procedure had not been established previously.

The new Constitutional Review Court Procedure Act introduces the following changes into the procedure before the Supreme Court:

1) the role of the Supreme Court *en banc* increases;

2) the parties to the original court case are also parties of the constitutional review proceedings before the Supreme Court;

3) as a rule, the procedure shall be written.

In the new, all-encompassing procedure, the participants are those, who are parties to the constitutional review case (representative of the body who passed legislation, the Legal Chancellor, the Minister of Justice and a Minister representing the Government of the Republic), as well as those, who are parties in the ordinary proceedings. In the context of the aforesaid -- if a constitutional matter arises within the Supreme Court, the whole matter in regard to general legal issues and constitutional aspects shall be referred to the Supreme Court *en banc.*

Pursuant to the New Constitutional Review Court Procedure Act a constitutional review case is reviewed -- as a rule -- in a written proceeding. This seems to be a well-justified innovation. During the validity of the old Act the parties to the proceeding usually submitted their positions in writing before the court hearing, and at the hearing usually no substantial changes to these were made.

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[1] *§ 25 of the Constitutional Review Court Procedure Act refers to the following persons: the Legal Chancellor, State Auditor, member of the Riigikogu and President of the Republic.*

[2] *§ 27 of the Constitutional Review Court Procedure Act speaks of a consent to declare extraordinary elections or to refuse to proclaim laws.*

Status of the Secretary General of the constitutional Review Chamber

Constitutional review chamber is one of the 4 chambers of the Supreme Court. The Chamber has currently 7 judges (2 from each chamber and the Chief Justice of the Court). The Supreme Court has a Secretary General responsible for the whole court and director.

The Secretary General of the Constitutional Review Chamber has besides the administrative responsibilities also semi-judicial functions. He or she has to be qualified in law in order to prepare the documents of the case, decide on asking expert opinions etc.

With the adoption of the new Constitutional Review Procedure Act, the functions of the Secretary General have increased specially in relation to communication between the court and the applicants and court and the Public.

Communication on the Cases

The number of the constitutional review cases has not been very high (approx. 10 cases each year) and therefore the providing of legal support to the judges of the constitutional review chamber has been the most important task of the Secretary General.

Under the 1993 Constitutional Review Procedure Act, the number of participants of the proceedings was very limited. Thus, the practical communication of the cases between the participants was considerably easier than the current procedure act foresees.

Compared to the case law of the other chambers of the court, the number of cases is very low.

	1993	**1994**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**
Admin.	8 / -	81 / 19	199 / 46	244 / 46	274 / 37	316 / 42	294 / 53	412 / 61	401 / 76
Criminal	8 / 1	957 / 172	709 / 180	761 / 243	982 / 264	958 / 212	771 / 189	683 / 194	771 / 211
Civil	83 / 7	331 / 103	451 / 153	592 / 187	637 / 168	697 / 161	677 / 121	764 / 160	896 / 163
Constitut. Review	4	11	4	4	3	11	4	10	7
Total	**103 / 8**	**1380 / 305**	**1363 / 383**	**1601 / 480**	**1817 / 472**	**1971 / 406**	**1742 / 367**	**1859 / 425**	**2068 / 458**

The procedure for all other three chambers is similar – the appeals for cassation or review are registered separately and are examined by the appeals selection committee, which grants leave to appeal.

Constitutional review cases do not follow the same procedure and the administration of these cases in organized by the constitutional review chamber and its secretary general.

Registration of the cases

In the constitutional review matters, there is no preselection and all the applications that satisfy the requirements of the Constitutional Review Procedure Act are admitted for review.

All the constitutional review cases are registered in the central information system of the Supreme Court and are given its identification number. The registration number of the petitions look as follows:

3 - number of the chamber - number of the procedure - number of the case – year. For example, the 5th application for constitutional review this year carries a number of 3-4-1-5-02. This numbering is used in all the communication between the court and the participants and this number is also given to the decision of the case and is also shown in the publication of the case in the Official Gazette.

Admissibility

When there are some deficiencies in the application it is the duty of the secretary general to notify the applicant and ask for additional information. It has to be noted, that as all the possible applicants under the old law were either involved in the legislation procedure or were conducting the constitutionality review in other ways, there were seldom any formal deficiencies in the applications.

As the 2002 Constitutional Review Act widened the competence of the constitutional review chamber and introduced a number of individual constitutional complaints that could be directly submitted to the Supreme Court, the formal procedure of admissibility is being introduced.

Overview of the structure of the applications and decisions from 1993 till 6.11.2002 of the Constitutional Review chamber.

Year		**1993**	**1994**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**	**2002**	otal
Applicant	President	2	3	-	1	-	2	-	-	-	-	**8**
	Legal Chancellor	2	6	-	1	-	3	-	3	-	1	**15**
	Courts	-	2	4	2	3	5	3	6	7	11	**36**
	Other	n.a	n.a	n.a	n.a	n.a	n.a	n.a	n.a	n.a	4	
No. of Decisions		**4**	**11**	**4**	**4**	**3**	**10**	**3**	**9**	**7**	**11**	**66**
Disputed legislation	Legal act	2	7	3	2	-	7	2	4	4	4	**35**
	Regulation of Government	-	2	-	2	2	3	1	2	3	-	**15**
	Regulations of Ministers	-	1	1	-	-	1	-	-	-	-	**3**
	Regulations of local government	2	2	-	-	1	1	-	2	-	3	**11**
Judgment	To declare unconstitutional and invalid	3	9	2	3	2	10	2	5	5	4	**45**

	Legal act had already been declared invalid by the time of judgment	-	2	-	1	-	2	1	3	1	2	**12**
	Uphold the constitutionality and validity of the legal act	1	1	2	1	1	-	1	2	1	1	**11**
	Inadmissible	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	1	

The first inadmissibility decision over an individual complaint has already been made. In the mentioned complaint, the bases for the complaint came from the provisions of new Constitutional Review Procedure Act and concerned the decision of the Parliament, but the decision of the Parliament was adopted prior to the enforcement of the Constitutional Review Procedure and was, therefore, the complaint was declared inadmissible.

The secretary general makes the preliminary admissibility decision on the complaint and only the decision of inadmissibility is formalised by the decree of the chamber. When the complaint or the petition is admissible, the case is simply being reviewed on merits by the constitutional review chamber.

The introduced admissibility decision concerns the formal requirements of the complaint and petition; the decision cannot concern the merits. Also, there is no right of the court not to take a case into review other than formal requirements set forth by the law. It again has to be stressed, that the above described admissibility decision is not formalised in the law or the internal documents of the court but is rather introduced through the practice of the court.

Participants

In the ordinary constitutional review cases, there are no parties to the case. All the participants of the cases are considered at the equal level.

After admitting the case, it is the duty of the secretary general to organise the communication with the parties and ask all the participants to submit their written opinions of the petition.

The 1993 procedure foresaw, that in all constitutional review cases, the opinion of the Parliament, the Minister of Justice and the Legal Chancellor was to be taken into account. The 2002 procedure widened the number of participants and in the cases where the constitutionality procedure was initiated by the courts, included the parties of the case also to the constitutionality procedure.

This amendment has complicated the work of the secretary general, because there are number of principal decisions that have not been either regulated or decided through practice.

In the initial proceedings in the ordinary courts, the number of parties is not limited. Also, there is a possibility to be involved in the procedure as a third person. There is no consensus on whether all the persons who were involved in some way in the preliminary procedure should also be involved in the proceedings before the court.

To date, there have been two cases that have been initiated by the courts under the new law.
The first case was an administrative law case, which was decided by the Tallinn administrative court. In these proceedings, there were 11 applicants that were fortunately presented by one advocate. In this case, the secretary general informed all the 11 applicants (of whose some lived abroad) that the constitutionality review was started before the Supreme Court and that the further communication is made through the advocate. There were no objections to this practice from the parties and the advocate submitted one opinion on behalf of all the applicants and represented them also in the hearing.

The second case concerned the administrative court proceedings on the validity of decision of the investigator. In the proceedings before the Supreme Court, the applicant, the investigator and the public prosecutor were involved and asked for opinions.
The question of parties in relation to possible constitutional review disputes arising from civil procedure and criminal procedure have not touched upon yet. Thus, it is not clear whether the victims of a crime should be considered parties or not etc.

Opinions
Thus, the first procedural act is to ask all the participants to give their opinions on the petition and to state whether they are satisfied with the written procedure or require an oral hearing of the case.

The time for the opinion varies between 2 to 3 weeks and depends on the complicality of the case. The parties are also sent all the materials that the initiator of the constitutional review has provided. Practically, the materials are sent both through fax and via mail.

All the opinions are communicated also to all other participants of the case and they are given a possibility to submit either written comments on them or in the case of oral hearing, submit their additional opinions orally.

There is no common understanding on whether the participants have an obligation to submit opinions or whether the court can decide the case without some of the required opinions.

Obligations of the secretary general during the court proceedings on merits

The 1993 constitutional review act did not foresee the written proceedings, the currently applicable law on the other hand requires that the cases be generally decided through written procedure.

During the oral proceedings, it is the obligation of the Secretary General to ensure all the practical sides of the hearing (recording of the hearing, materials distribution etc.) and has to ensure the communication with the press and the people wishing to listen the hearings.

Communication of the judgment

As a rule, the judgment of the court is not sent to all the participants. The decision is published on the web page of the court and on the Official Gazette. This means that the obligation of the Secretary General is to ensure that the right decision is published and to provide comments on the decision.

- XIX -

COMMUNICATION OF THE COURT WITH THE MEDIAS AND THE PRESS

Report by
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The Constitutional Court of the Republic of Bulgaria was instituted by the Constitution of 1991 and its experience in communication with the media is short but sufficient to be analyzed.

Initially a press conference was called where a spokesperson made a statement. He was one of the Constitutional Court justices and was not replaced from case to case. Afterwards it was deemed appropriate that the justice – rapporteur whose case was considered should speak to the media. However, it appeared the journalists focused on minor issues or on matters that were unrelated to the case; they gave wrong interpretations to complicated matter and in some cases created confusion.

The practice was abandoned accordingly and a press release began to be dispatched to the media at every stage of the case the Court considered.

Now when a case is filed the media are informed of who the applicants are, what they petition, the case file number and the name of the justice who has been appointed to report.
After the admissibility decision (the first phase of the case) the media are informed whether the case has been found admissible or non-admissible, who the parties concerned are and the term within which they have to present their opinion in writing.

After the case decision is adopted (the second phase), the unabridged text of the decision is sent to Durzhaven Vestnik (the State Gazette), to the applicants and to the parties concerned. The media receive a hard copy of the decision. Within the next one or two hours after the sitting the decision is e-mailed to the Bulgarian News Agency, the Bulgarian National Television, the Bulgarian National Radio, the other broadcasters and printed media. The decision is also released on the Constitutional Court's Internet site. Urgent telephone calls asking for relevant information are answered accordingly.

If the Court has a public sitting, a press conference is organized to which the petitioners, the parties concerned, experts and journalists are invited. The press conference is also open to the general public. The information provided is oral. However the press release will come out with or without a press conference.

Under the Radio and Television Act the Constitutional Court has the privilege of air time (usually between 3 and 4 minutes) for the live broadcast of a message by a Constitutional Court justice or some other Court official. This is done if a case has elicited large public interest and in order to prevent the distortion of information.

Meetings with journalists are organized on a case-by-case basis to cover the visit of a foreign delegation, publicize changes in the Court, and attend the ceremony of new justices being sworn in or the election of a new Chair.

The Constitutional Court publishes a brochure describing its institution, powers, modus operandi and composition and structure, biographies of the incumbent justices, their photos and a list of the previous bodies of justices. Every year the Constitutional Court releases a volume containing the unabridged texts of all decisions and summaries in English, French and German. Individual justices will not refuse to be interviewed by the media on issues that the media express an interest in.

What is the assessment to make of the Constitutional Court's relations with the media in the course of the last eleven years?

The media have unflagging interest in the Constitutional Court's work. On the whole their information, comments and criticisms are justified while they have respect for the institution. This is also evident from the fact that so far there has been no instance of non-compliance by an institution, public organization or citizens. The press release guarantees that the information released is trustworthy and that it reaches the media immediately. Perhaps the personal contact between the justices and the Court as a whole and the media is not sufficient. Not all journalists are competent enough to understand and interpret the difficult judicial matters; they ask to retell the text in a language that the general public will understand. If the justices insist on accuracy and thoroughness, they cannot do that all the time.

The Constitutional Court is one of the supreme institutions of the Bulgarian State. Its calling is to serve the public interest by decisions on very essential matters concerning the functions of a State committed to the rule of law and the protection of civil rights. The printed media and the broadcasters play a crucial role in informing the public about the Court's decisions. Despite sporadic weaknesses in the Court's relations with the media, the communication is efficient and mutually satisfactory.

- XX -

THE CONSTITUTIONAL COURT OF ROMANIA WAYS OF ENHANCING PUBLICITY OF THE CONSTITUTIONAL COURT

Report by
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Constitutional Court of Romania

One of the instruments largely used to gauge the impact of a constitutional court's activity on the general public is the degree of acceptance of its decisions which goes hand in hand with the public awareness about the court's exact competence and role. If this is the kind of typical assertion which hardly requires any further substantiation where it comes to a constitutional court which enjoys both long-established tradition and wide-spread public knowledge, it will appear less manifest where we are dealing with a court of quite recent existence.

In this context, whether or not the Constitutional Court of Romania should be counted among the best publicized institutions in the democratic landscape enthroned in this country after the 1989 Revolution is not necessarily the issue at stake, but rather an overture.

1. As is known, the Constitutional Court of Romania was created - at least from institutional viewpoint – pursuant to the provisions under "Title Five" of the Constitution approved by referendum on 8 December 1991. However, even before the Basic Law was adopted by the Constituent Assembly, on 21st November 1991, and subsequently taken to a referendum, the Constitutional Court's purported prerogatives, role and aims in the newly-established democratic State governed by rule of law were largely publicized by the media, as part of the process which cradled public debate on the primary Theses, followed by the Draft Constitution, both of which had been prepared by the Constitutional Drafting Committee set up within the Parliament elected in May 1990. At that time, certain points of criticism were made, in particular against the idea of creating new institutions rather than having traditional ones put back into place after their 50 years' discontinuance under the totalitarian regimes. In the eyes of its then opponents, the Constitutional Court appeared as a breakaway from the country's history of constitutionalism inaugurated in the early days of the 20th century, when Romania had known a concrete constitutional review conducted by the courts of law. Seen against this background, the referendum held on 8th December 1991 on the Constitution appears not only as a specific arrangement for the democratic exercise of the people's sovereign will, but also as a first public acceptance of the Constitutional Court powers and jurisdiction, as embodied by the Basic Law.

Subject to the Constitution, the powers vested in the Constitutional Court embrace a wide ambit: the constitutional review, which includes the abstract *a priori* review of laws and *ex officio* review of initiatives for revision of the Constitution [Article 144 subpara. a)], the abstract review of the standing orders of Parliament [Article 144 subpara. b)], and the concrete *a posteriori* review of laws and of ordinances issued by the Government [Article 144 subpara. c)]; the supervision of the observance of the procedure for the election of the President of Romania, and the confirmation of the ballot results [Article 144 subpara. d)]; the ascertaining of circumstances which justify the interim in exercise of the office of the President of Romania

[Article 144 subpara. e)]; the issuance of an advisory opinion on the proposal to suspend the President of Romania from office [Article 144 subpara. f)]; the supervision of the observance of the procedure for the organisation and holding of a referendum, as well as the confirmation of the poll returns [Article 144 subpara. g)]; the verification of compliance of a citizens' legislative initiative with the terms for its exercise [Article 144 subpara. h)]; and the settlement of challenges dealing with the constitutionality of a political party [Article 144 subpara. i)].

2. Concerning publicity of the Court acts[1], Article 145 para. (2) of the Constitution stipulates that: *"Decisions of the Constitutional Court shall be binding and effective only for the future. They shall be published in the Official Gazette of Romania"*.

Publicity of the Court is therefore primarily ensured by virtue of the constitutional text, which gives non-retrospective, binding effects to the decisions rendered, but also provides for their compulsory publication in the official journal. The Court acts are published in Part I of the Official Gazette of Romania (which is reserved for the publication of normative acts). Moreover, according to the practice established by the Court itself, they include, as the case may be, separate and/or concurrent opinions.

But publicity is also a principle governing the conduct of trial proceedings in the court, as enshrined by the Constitution Article 126 and required under Article 6 of the European Convention on Human Rights (a public hearing being inherent in anyone's *right to a fair trial*). Accordingly, Article 14 para. (1) of the Law no. 47/1992, republished, stipulates that trial proceedings are public, save for the cases where, because of well-founded reasons, the plenary decides to sit in a closed session, while Article 20 of the Constitutional Court Rules of Procedure provides that summons to the parties are sent out where the Court acts by virtue of its powers stipulated under Article 144 subpara. c), and i) of the Constitution (adjudication of pleas of unconstitutionality raised in the courts of law, and of challenges dealing with the constitutionality of a political party, respectively). Nonetheless, the President of the Court may invite anyone whose presence is deemed necessary, to give clarification[*]. Furthermore, Article 21 contains explicit regulations[2] on the access and attendance of the Court proceedings by the public.

3. Beyond its materialization through the prism of the above-mentioned constitutional, legal, and regulatory provisions, publicity of the Court is also an imperative duty to be fulfilled in the pursuance of its goal to "guarantee the supremacy of the Constitution", as stipulated by Article 1 para. (3) of the Law no. 47/1992, republished.

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[1] *In conformity with the distinctions made by Article 13 of the Law no. 47/1992, republished, the Court passes: A.* ***decisions****, in the exercise of its powers under Article 144 subpara. a), b), c), and i) of the Constitution; B.* ***rulings****, in exercising the prerogatives under Article 144 subpara. d), e), g), and h) of the Constitution; issues C.* ***advisory opinions*** *subject to Article 144 subpara. f) of the Constitution.*

[*] *As amended by Article I paragraph 1 of Resolution no.19 of 17 October 2000 of the Plenary of the Constitutional Court, published in the Official Gazette of Romania, Part I, no.509 of 17 October 2000.*

[2] ***Article 21.*** *– The access of the public is restricted to the number of seats in the session room. The Secretary General shall take measures in order to ensure public access into the session room.*

For purposes of ensuring the solemnity of sessions, the utilisation of any sound or video equipment for the taking, recording, or broadcasting of voice and/or picture in the courtroom shall be allowed only before commencement of proceedings, with prior authorization of the President of the Court.

Any kind of propaganda, either viva voce or by posters, placards or other similar materials shall be strictly forbidden, under the sanction of being removed from the courtroom and having police called in, if so deemed necessary by the President, in regard of the gravity of such activity.

Provisions under Articles 122 and 123 of the Code of Civil Procedure shall apply accordingly.

Not always has the publication of the Court decisions been followed by their acceptance as such. There have been, and still are (although significantly much fewer) cases when the ordinary courts of law simply chose to ignore them. If in the early days of the Court such ignorance could be accounted for insufficient knowledge about the newly ordained institutions, given the personal background and variable degrees of openness towards the values and principles enshrined by the 1991 Constitution, things appeared in a different light after several years of operation. In the attempt to justify a certain reluctance towards the observance of the "*erga omnes*" binding effects of the decisions rendered by the Constitutional Court, some expert opinions sought inspiration in various doctrines, but also in the constitutional phrase under Article 145 para. (2), purportedly interpreted as ensuring their effectiveness only *"inter partes litigantes"*. Bluntly speaking, while trying to shun from the common logic underpinning the principles of the rule of law and judicial organisation, these arguments have also pulled a signal that the constitutional text in question needs more accurate wording. As a matter of fact, this is one of the issues on which the members of the Commission for the elaboration of the legislative proposal on the revision of Constitution, set up by the Parliament resolution of Decision of June 25th 2002, have already agreed.

4. A prime echelon interested in the Constitutional Court decisions, that is magistrates and lawyers, in general, are also the main beneficiaries of the various publications regularly prepared by the Court:

- *Jurisprudence of the Constitutional Court*, in Romanian;
- *Decisions and Rulings of the Constitutional Court*, in Romanian;
- *The Constitutional Court Bulletin*, in three languages: Romanian, French, and English.

This kind of publicity is intrinsically associated with a considerable financial effort as is taken for the preparation of the Court publications and their distribution to a variety of courts of law, prosecutor's offices, the National Institute for Magistrates, the Ministry of Justice, Bar & Lawyers Associations, etc.

Donations to public libraries (the National Library, the Central University Library) or to the Schools of law set up in major cities throughout the country have also been seen as a means to foster publicity of the Court.

5. Attendance of the Court public sessions by junior magistrates from the National Institute for Magistrates, whose curriculum includes a course on Constitutional Law and Constitutional Justice, has now become a regular programme, after its successful implementation throughout the academic year 2001/2002. It will continue in the same format, by groups of maximum 20 participants.

A similar, yet less extensive programme is now being prepared for 94 students of the Faculty of Law at the University of Bucharest. Regrettably, this kind of initiative has its objective limitations, therefore is unlikely to be further on expanded.

6. By the Law no. 120/1995, the Parliament of Romania has proclaimed 8th December as *The Day of the Constitution of Romania*.

In celebration of this event, the Constitutional Court has regularly organised various seminars or roundtables on themes drawn from subject-areas specific for Romania's constitutional system.

As a rule, the circle of participants has brought together high officials, representatives of public authorities, lawyers, but also human rights experts, researchers, academics.

The organisation of the so-called *"French-Romanian Constitutional Days"* has scored its 6th edition in October 2000.

Reports and other contributions presented on the occasion of these periodical events are later on published as volumes under the Court's aegis.

7. But courts of law, judges and lawyers, in general, on the one hand, and public authorities, on the other hand, are not the sole "addressees" of the Constitutional Court decisions. First and foremost, the Court publicity concerns the public at large, which ultimately means the individual, in other words, any individual, no matter how far away from the Capital city he or she may be living. The way in which the Court decisions may become more knowledgeable to as many people as possible, this remains a perpetual challenge. A consolidated public awareness about the existence of a Constitutional Court acting as a resolute guardian of individual constitutional rights and freedoms, whose powers betrothed upon stand as a firm safeguard against the legislature's *dérapage* from the values and principles enshrined by the Basic Law is but a prerequisite of a functional democracy.

8. Undoubtedly, the most efficient vehicle for ensuring the mass communication of the Court decisions is the media. Apart from press releases, distributed through central media channels, including national news agencies and international press agencies based in Romania, the communication efforts deployed by the Court have occasionally materialized in the organisation of press conferences.

As far as the interest shown by the media is concerned, the most significant, therefore best covered events have been up to now related to the unfolding of Presidential elections, in which the Constitutional Court fulfils the prerogatives of an electoral adjudicator supervising the observance of the procedure for the election of the President of Romania, as prescribed by Article 144 subpara. d) of the Constitution and regulated under the Law no. 69/1992 on the Election of the President of Romania. Accordingly, the Court resolves the appeals directed against the registration or non-registration of the candidates running for the highest official position in the State, and finalizes the election process by issuing a report on the election results and by passing the validation of the President elect.

As an illustration to this statement, it is worth mentioning that in the course of the Presidential elections held in late 2000, the Court made **53 rulings**, all of which were publicized by the media.

Subject to the law, the first stage of the Presidential election process involves a binary operation of a Central Election Bureau and the Constitutional Court, given the former's competence to take in and register candidatures, as well as the lists of signatories in support of a candidate's file (no less than 300,000 for each of them!), and the latter's power to resolve appeals against such registration (or non-registration). However, since the Constitutional Court, unlike the Central Election Bureau, is not bound by any legal provisions which restrict the access of the media to only accredited delegates, the bulk of requests for information concerning the registration of candidatures and appeals filed against them fell on the Court. That is why first-hand information was readily made available, whether by phone, by fax, or – later on – by press releases publicized on the Internet.

All throughout the election process, the press releases were drafted and transmitted immediately after the Court had made its ruling in a case, while the circle of "regular" addressees, such as news agencies, central daily or weekly publications, public or private TV or radio stations was notably enlarged so as to encompass even *ad-hoc* requests. The pressure for getting information on the spot sometimes reached dramatic heights, however flexible solutions were found in order to provide all necessary resources involving human, and logistical back-up.

If the first press releases launched were practically taken over by every media, their impact gradually lessened as the Court continued to pass its rulings.

A fresh peak of publicity for the Constitutional Court was reached on the day of the press conference organised in connection with the rulings rendered in the resolution of the appeals against the registration or non-registration of candidates running in the Presidential election.

The last sequence in this process was the Court public session for validation of the election procedure for the President elect, also attended by the incumbent President. Once again, the media was granted unrestricted access (without ***any accreditation in advance***), which simply poured an impressive number of journalists, reporters and cameramen into the public session hall. In spite of the jam-packed presence of politicians side-by-side with journalists, reports on the event were unquestionably favourable.

Along the 10-years' history of the Constitutional Court, there have been several other instances which arouse an obvious interest in the Court proceedings, whether it was because of the many parties directly affected by its decision, or because the issue submitted for adjudication by the Court had already had a massive impact on the general public. Where proceedings were carried out in a public hearing, such as when the Court was settling pleas of unconstitutionality raised before an ordinary court of law, subject to Article 144 subpara. c) of the Constitution and Article 23 of the Law no. 47/1992, republished, the media was given free access to the Court proceedings in a public session, but "live" or "recorded" broadcasting was only allowed before the commencement of the proceedings, as instructed by the President of the Court, in conformity with Article 21 of the Constitutional Court Rules of Procedure (see above). No such restriction exists for reports being written down or by shorthand.

9. Requests and petitions from individuals and organisations addressed to the Court represent just another possibility, albeit of significantly lesser resonance, for enhancing publicity. A point of critical importance in this respect is that the Constitutional Court in Romania, unlike other similar authorities of constitutional jurisdiction in Europe, cannot be referred to directly by means of a so-called "constitutional complaint" but only through the indirect avenue of a "plea of unconstitutionality" raised before a court of law hearing the main action in a case. Accordingly, the term *request* or *petition* is herein used in the meaning of any kind of application submitted in writing, whereby the applicant asks for the resolution, satisfaction or approval of a particular demand, grievance, or interest, or for the communication of specific information related thereto, where such application does not fall under the jurisdiction and competence of the Constitutional Court, therefore should be handled by administrative channels or redirected to the competent authority, subject to the legislation in force, as prescribed by a recent normative act (the Government Ordinance no. 27/2002, as approved by the Law no. 233/2002).

Even prior to the prescription of specific rules for the handling of such petitions and requests, the Constitutional Court made efforts, notably over the past two years, in order to provide sufficiently reasoned replies to the petitioner(s) concerned, also giving full explanation of the Court powers and procedure, including of its **relevant case-law**, where appropriate.

If account is taken of how many such petitions and requests have been addressed to the Court during its 10 years' existence, namely 3,997, that is almost 4,000 petitions as against 3,263 reference acts submitted to the Court from its foundation until 31 October 2002, then the handling of petitions shows itself as a significant component in the active dissemination of general information about the Court, into the public at large.

Some 40% of all petitions and requests received at the Court were rooted in a still enduring misperception of the Constitutional Court being situated at the top of the judiciary, therefore competent to reverse rulings made by the courts of law, to strike down decisions of administrative authorities, or even to determine the prosecutor to initiate or, as the case may be, discontinue the conduct of proceedings in a criminal case.

A considerably lesser quota (below 8%) of the petitions falling outside the Court jurisdiction is drawn from applicants who believe that they actually enjoy direct access to the Court.

In other cases, applicants seek for some legal advice or interpretation of a legal text, in order to produce an authorized opinion before the court hearing the main action or before some administrative authority dealing with their case.
Of course, a certain amount of incoherent or vexatious phraseology is now and then put on paper and also sent to the Court.

Once the Law no. 544/2001 on the freedom of access to information of public interest entered into force, by the end of last December, individual requests for information of public interest, defined by the law as "*any information which concerns the activities or results from the activities carried out by any public authority or institution, regardless of the support, or form, or articulation of such information*", have been mainly targeted at finding out whether the Court has declared unconstitutional certain legal provisions.

It should also be mentioned that, in exercising the rights provided by this recently enacted piece of legislation, which stipulates that anyone aggrieved in his or her being granted access to information of public interest may file a complaint with the administrative review section of the competent court of law, in order to obtain the information sought and also to be paid non-pecuniary and/or pecuniary damage, one of the central newspapers has simply "booby-trapped" a number of public authorities or institutions that failed to comply within the legal deadline.
The summary account published as special issue[3] reports of the Constitutional Court as "having taught a commendable lesson of transparency to other '*junior*' colleagues", by its impeccable answer.

10. The Internet Homepage (http://www.ccr.ro) has lately become an essential tool for publicizing the Court. As a matter of fact, the access to Internet and the implementation of a network have been a major preoccupation in the efforts to integrate the Court in the IT world.

[3] *"**ZIUA"**, issue no. 2545 of Friday, October 25, 2002.*

If in an earlier stage, the Court network was managed under the umbrella of the Chamber of Deputies, including the Court e-mail address (as ccr@cdep.ro), because of a rather reticent approach towards the IT as such, but also because of the scarce equipment available, in the year 2001 the Court embarked upon a new pathway, in line with the challenges being posed on the IT current frontline: an e-mail server and domain of its own, modern equipment and software, including specific applications, an Intranet with 60 working stations, and two ambitious projects.

For the implementation of the first project, the Court received financial assistance from the German Foundation for International Legal Cooperation (*Deutsche Stiftung für internationale rechtliche Zusammenarbeit***)**, based on which the Project has been devised in cooperation with a team of experts from the Centre for Computer Technology in the Saarbrücken University, and from the Federal Constitutional Court in Karlsruhe. The "German" Project is intended to provide an all-inclusive data basis of the Constitutional Court decisions, with 'search' functions for key-words and/or date of publication. Although temporarily halted because of some technical "tricky" points, such as diacritics and spelling in Romanian, the Constitutional Court is totally dedicated to commissioning the project no later than by early next year, which would undoubtedly take the Court to a leading position among the public authorities in Romania as far as the publicity of their respective activities is concerned. This project is also aimed as an incentive for those who are much more versatile in navigating on the Internet rather than visiting lecture rooms.

A second project envisaged by the Constitutional Court is the creation of a virtual library, but it still requires more in-depth preparation.

The content of the Homepage (notably the statistical data on the Court activity and decisions) is being updated **every 15 days**, a tempo intended to meet the highest exigencies.

It is also worth mentioning that the Romanian Constitutional Court has so far managed to maintain its Homepage in three languages: Romanian, French, and English, while keeping the version in international languages to a reasonable 75% of the amount of information supplied in Romanian. Of course, language barriers are not always easy to tackle with, sometimes the specifics of the Romanian language turn into insurmountable obstacles.

11. Education and a special chapter in the school curriculum should be seen as resourceful ways for spreading out information about the Court, in its capacity as being the "guarantor of the supremacy of the Constitution" and a guardian for the protection of human rights.

12. Statistics will finally reveal whether such means and ways for enhancing publicity of the Court have been successful on medium- and long-term. One instrument readily at hand is to determine the Court caseload within the concrete *a posteriori* constitutional review prescribed by the Constitution Article 144 subpara. c) (pleas of unconstitutionality raised before courts of law), as against the amount of petitions outside jurisdiction, over a period of 10 years (1992 – 31 October 2002). To anyone interested in reading figures, rather than descriptive explanations, the Annex herewith enclosed may serve as a useful tool.

At this end of this exposé, let us still bear in mind a famous cue that could be rephrased as: "*the rest is ... publicity*".