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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REVISED REPORT ON INDIVIDUAL ACCESS TO CONSTITUTIONAL JUSTICE

Adopted by the Venice Commission on 11 December 2020
at its
125th online Plenary Session
(11-12 December 2020)

on the basis of comments by

Mr Gagik HARUTYUNYAN (Member, Armenia)
Ms Angelika NUSSBERGER (Member, Germany)
Mr Peter PACZOLAY (Honorary President)

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I. GENERAL REMARKS

1. Over the past 70 years, a fundamental shift in the importance of constitutional protection of human rights has occurred in Europe and beyond. Respect for human rights is now considered to be an essential part of any democratic society.[1] As a result, mechanisms that allow individuals to directly or indirectly invoke these rights conferred upon them by constitutions are becoming increasingly important. This report provides an overview of the ways in which individuals may access constitutional courts in order to adjudicate violations of their human rights in the Venice Commission's member and observer States.[2] It does so in order to contribute to a better understanding of the great variety of adopted solutions.[3]

2. The report draws on the constitutions and legal texts contained in the Venice Commission's CODICES database.[4] The Venice Commission is grateful to its liaison officers for their contribution to the e-Bulletin on Constitutional Case-law, the CODICES database as well as to the updating of the present report.

3. This report is divided into nine sections. Following some general and introductory remarks (Sections I and II), Section III clarifies the general framework of this comparative analysis by offering an overview of the historical background and the evolution of constitutional review as well as on the different types of constitutional review and recent trends and developments. Section IV analyses the different types of access to constitutional review and identifies the different actors, who may initiate constitutional review proceedings. Section V describes restrictions of access and their role in balancing individual access with the risk of overburdening constitutional courts. Section VI analyses the remit of constitutional justice, including the rights protected, the different procedural safeguards, the potential extensions of the scope of review and discontinuation of proceedings. Section VII analyses the effects of constitutional review, including preliminary decisions and the different effects of final decisions. Finally, Section VIII analyses the role of the European Court of Human Rights in enabling individual access to constitutional justice at the domestic level. This report concludes by summarising the main findings and recommendations.

II. INTRODUCTION

4. By letter of 21 April 2009, the Permanent Representative of Germany to the Council of Europe, Mr Eberhard Kölsch, requested on behalf of the German Government, an opinion on individual access to constitutional justice. He pointed out that "such a study could be a valuable contribution to the promotion of national remedies for human rights violations and could thereby essentially help to guarantee the long-term effectiveness of the European Court of Human Rights". Mr Harutyunyan, Ms Nussberger and Mr Paczolay acted as rapporteurs. The present report is prepared on the basis of their contributions and those of the liaison officers with the constitutional

[1] Venice Commission, CDL-STD(1995)015, "The protection of fundamental rights by constitutional courts", *Science and Technique of Democracy*, no. 15.

[2] Countries included in this report: Albania, Algeria, Andorra, Argentina (Observer state), Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria (Associate member), Canada (Observer state), Chile, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan (Observer state), Kazakhstan, Korea (Republic of), Kosovo, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Moldova (Republic of), Monaco, Montenegro, Morocco, Netherlands, North Macedonia, Norway, Palestine (Special status), Peru, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, South Africa (Special status), Spain, Sweden, Switzerland, Tunisia, Turkey, Ukraine, United Kingdom, United States of America, Uruguay (Observer state).

[3] This report does not examine the relationship between EU legislation and national law of the member states, even if some elements of the review of the Court of Justice of the European Union are similar to the review exercised by constitutional courts.

[4] CODICES can be found online at www.codices.coe.int.

courts in the member and observer States of the Venice Commission, as well as those by the members who were called upon to verify the correctness of the information on their own legal systems.

5. A first draft of the original study (CDL-AD(2010)039rev.) was discussed at the 9th meeting of the Joint Council on Constitutional Justice of the Venice Commission (Venice, 1-2 June 2010). The Commission invited the liaison officers to provide their remarks on this text and replies to a questionnaire by the end of September 2010. The original study was adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010). In 2019, the Venice Commission turned to the liaison officers once again for the latest developments and changes for the revised and updated version of this report. The Venice Commission is grateful to the liaison officers for their valuable help.

6. *This revised report was adopted by the Venice Commission at its 125th Plenary Session (Venice, 11-12 December 2020).*

III. HISTORICAL BACKGROUND

A. Evolution of constitutional justice

7. The idea of constitutional review goes back to the activity of the Privy Council of Great Britain at the beginning of the 18th century, which invalidated the acts of colonial legislatures if they contradicted the common law or the laws adopted by the British Parliament for those colonies. The first country to introduce constitutional review was the United States in 1803. *Marbury v. Madison*, a landmark US Supreme Court case, empowered citizens to apply to American courts to review and potentially invalidate laws, statutes, and some government actions if they violated the Constitution of the United States. In postcolonial United States, the concept of natural law, and thus of a hierarchy of legal norms with individual rights at the top, and the idea of a social contract where the citizen may demand that their government fulfil its obligations towards them, were very present. On a more institutional basis, the threat of future institutional conflicts and deviations in a system of vertical and horizontal separation of powers revealed the necessity of constructing a framework that could avoid or resolve such conflicts. Since *Marbury v. Madison*, the United States Supreme Court has established itself as the final authority on interpreting the Constitution.

8. In Europe, the German Constitution of 1849 (*Paulskirchenverfassung*) was the first to explicitly provide for individual constitutional complaints.[5] However, it never entered into force. In Belgium, France and Switzerland, similar models were also discussed, but not implemented. In 1867, Austria enabled the *Reichsgericht* (the "Imperial Court") to adjudicate citizens' complaints based on violations of their constitutionally guaranteed rights.[6] The Supreme Court of Norway, in 1866, declared itself competent to review the constitutionality of laws[7] (now reflected in the Norwegian Constitution[8]), as did the Romanian Court of Cassation in 1912.[9] In Monaco, this role was attributed to the Supreme Court, the establishment of which was foreseen by the Constitution of 1911 and it was eventually set up in 1919 to deal with infringements of the rights and freedoms enshrined in its Constitution.

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[5] Art. 126 lit. g.

[6] Staatsgrundgesetz über die Einrichtung eines Reichgerichtes, Art. 3 lit. b.

[7] Holmøyvik, E., "Årsaker til utviklinga av prøvingsretten i Noreg og Danmark", *Tidsskrift for Rettsvitenskap*, no. 5 2007, pp. 718-779; Bruzelius, K.M., "Judicial Review within a Unified Country", World Conference on Constitutional Justice in Cape Town, 2009.

[8] See Art. 89 of the Norwegian Constitution, adopted on 1 June 2015.

[9] See Conac, G., "Une antériorité roumaine: le contrôle juridictionnel de la constitutionnalité des lois", *Mélanges Slobodan Milacic, Démocratie et liberté: tension, dialogue, confrontation*, Bruylant, Belgique, 2007.

B. Two types of constitutional review: diffuse vs. concentrated

9. Historically, the main type of constitutional review is carried out by ordinary judges through diffuse review. For instance, the oldest constitutional review model, which is the American one, is characterised by a system of diffuse review. On this model, individuals can challenge the constitutionality of any norm or individual act before ordinary courts, which are then entitled to assess these issues. In principle, any legal norm or individual act that is relevant to a concrete case, may be challenged. In other words, the individual may question the constitutionality of any law that should be applied in a proceeding in which the individual is a party.

10. The main advantage of diffuse constitutional review for complainants is that individuals do not have to exhaust remedies before raising issues of constitutionality. Diffuse review may be conducted at any stage of any type of ordinary proceedings by any ordinary judge. It does not require the individual to lodge a specific constitutional complaint before a constitutional court. Access to constitutional review is therefore open to any person who has standing in ordinary proceedings.

11. A potential downside of this approach is that different ordinary courts may interpret the constitutionality of the same norm differently. This may lead to conflicting decisions, incoherence and uncertainty. At the same time, it may also encourage experimentation and legal pluralism – like all diffuse systems arguably do – which may ultimately lead to better law. Another downside is that appealing the decisions all the way to a constitutional court may lead to lengthy and costly appellate proceedings. If litigants choose not to appeal, the law is left in an uncertain state with no judgment providing a definitive interpretation of the constitution.[10] Nonetheless, diffuse review remains a perfectly valid form of constitutional justice.[11]

12. The effectiveness of this type of review relies both on the individual's capacity and willingness to defend their rights in court and on the ordinary judge's capacity and willingness to investigate violations of fundamental rights. Both conditions may not always be present.[12] This system works well where it is well-rooted in the legal culture in countries such as the United States, Canada, Ireland or Norway.

13. In the 20th century, in contrast to the diffuse model, Hans Kelsen developed the model of concentrated review, as exemplified by the Austrian Constitution of 1920.[13] In a concentrated system, a separate court, usually placed outside the ordinary court system, is given the power to review the constitutionality of normative acts and potentially to remove unconstitutional acts from the legal order. Constitutional review in such a system is carried out by a constitutional court or a single supreme court which has, in addition to its ordinary appellate jurisdiction, competence to carry out constitutional review (e.g. Estonia).

14. The concentrated model has two main advantages. First, it leads to greater unity of jurisdiction. Second, it fosters greater legal certainty because it prevents divergent decisions on issues of constitutionality, which would render the application of a law unclear, from arising.

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[10] Kau, M., *Bundesverfassungsgericht und US Supreme Court: Die Bedeutung des United States Supreme Court für die Errichtung und Fortentwicklung des Bundesverfassungsgerichts*, Springer, Berlin/Heidelberg, 2007, p.304. f.

[11] Venice Commission, CDL(1998)059, Opinion on the reform of Constitutional Justice in Estonia, p.3.

[12] See Philippe, X., "Le contrôle de constitutionnalité des droits fondamentaux dans les pays européens", *L'effectivité des droits fondamentaux dans les pays de la communauté francophone*, AUPELF-URFF Montréal, p. 412.

[13] The first Constitutional Court, however, was not set up in Austria, but in Czechoslovakia in February 1920 (Constitutional Act no. 121/1920 Coll.). The Austrian Court followed a few months later in October 1920. The Constitutional Court of Liechtenstein followed a year later in October 1921.

15. The main downside of concentrated constitutional review are the tensions and even conflicts it may create between ordinary courts and the constitutional court. When constitutional courts review the decisions of ordinary courts they interfere in concrete cases, evaluating the application and interpretation of statutes by ordinary courts. The fact that a constitutional court is competent to review laws not only on an abstract, but also on an incidental basis, and that its interpretations touch almost every legal branch, infringes on the traditional role of ordinary courts to interpret "their" laws and limits their scope of action when applying a provision.

16. Countries with a system of concentrated review often have constitutional review of laws or equivalent acts having the force of law. This is consistent with one of the traditional objectives linked to the introduction of concentrated constitutional review, namely the protection of the constitutional order. In light of the rising recognition of the importance of protecting individual rights, the prevalence of the review of individual acts has also been increasing.

17. The twin aims of protecting the constitutional order and individual rights also made the concentrated review model an attractive choice for countries which transitioned to democracy from authoritarian rule.[14] It was, for instance, adopted by Germany and Italy after the Second World War; by Spain[15] and Portugal at the end of the 1970s. It was also adopted by almost all Central and Eastern European States after the fall of communism, with the exception of Estonia.

18. Today, the majority of countries have a system of concentrated review (e.g., Albania, Algeria, Andorra, Armenia,[16] Austria, Azerbaijan, Belgium, Belarus, Croatia, the Czech Republic, France, Georgia, Germany, Hungary, Italy, Republic of Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Morocco, North Macedonia, Poland, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Tunisia, Turkey and Ukraine). Only some countries have systems of constitutional review that are entirely diffuse (e.g., Canada, Denmark, Finland, Iceland, Norway, Sweden and the United States of America). Some Latin American countries follow the American model with diffuse review and a strong supreme court (e.g., Brazil, Mexico), and others have opted for a specialised constitutional court (e.g., Peru, Chile).

19. Classifying a legal system as diffuse or concentrated can be difficult at times. For instance, in South Africa, an ordinary court may declare any law unconstitutional, but such a declaration must be confirmed by the Constitutional Court before it becomes effective.

C. Recent developments and trends

20. With the growing importance of the protection of fundamental rights after World War II, there has been a clear paradigm shift towards introducing mechanisms that protect individual fundamental rights through constitutional courts and allow individuals to access constitutional courts. More specifically, these mechanisms enable individuals to question the constitutionality of a normative or individual act that may harm their fundamental rights before a constitutional court.

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[14] As Garlicki L. puts it, "following a period of authoritarian rule, the existing courts were unable to offer adequate guarantees of structural independence and intellectual assertiveness." (See Garlicki, L., "Constitutional courts versus supreme courts", *International Journal of Constitutional Law,* vol. 5(1), 2007, p. 45, available at: http://icon.oxfordjournals.org/cgi/content/full/5/1/44#FN59#FN59).

[15] It should be noted that Spain had a constitutional court before 1978: the Tribunal of Constitutional Guarantees. It was established under the 1931 Second Republic Constitution and lasted until 1936, when the Spanish Civil War broke out leading to military dictatorship in Spain, which ended in 1978.

[16] All references made to the Constitution of the Republic of Armenia and the Law of the Republic of Armenia on the Constitutional Court are based on the text in force at the time of this revised report. However, constitutional reforms are ongoing, and some references and conclusions made in this report regarding the legal regulations in the Republic of Armenia may have changed as a result.

21. Since constitutional courts can invalidate acts of parliament without being directly elected and accountable to the electorate, the rise of constitutional review challenges parliamentary authority and might lead to the fear of a government by unelected and unaccountable judges. However, the twin aims of protecting the constitutional order and individual rights, in addition to the fact that their composition is often determined by the democratically elected and accountable branches, generally give constitutional courts sufficient legitimacy to overrule the acts of parliaments. Consequently, even States that have traditionally been reluctant to introduce constitutional review of parliamentary legislation in order to preserve parliamentary authority increasingly enable constitutional review.

22. In 2008, France has introduced *a posteriori* review alongside their existing *a priori*[17] review of the constitutionality of acts. In France, the Council of State (*Conseil d'Etat*) could only review the constitutionality of acts below the level of statutory acts. France veered away from its traditional reluctance towards judicial review of legislation, introducing the *Priority Preliminary Ruling* procedure (*Question Prioritaire de Constitutionalité*, or "QPC").[18] This procedure allows any individual to challenge, before an ordinary judge, the constitutionality of a legislative act which allegedly restricts their rights and freedoms guaranteed by the Constitution. The judge will then decide whether or not to refer the question to the Council of State or the Court of Cassation, which will then decide whether to refer this question to the Constitutional Council (*Conseil constitutionnel*) for constitutional review. Algeria[19] and Morocco[20] have also introduced this procedure in their respective constitutions.

23. For instance, the UK has traditionally accorded parliament supremacy over the other branches of government. The doctrine of parliamentary sovereignty renders the UK Parliament the supreme legal authority of the country, which can create or "end" the validity of any law. Generally, courts cannot invalidate its legislation and no parliament can pass laws that future parliaments cannot change. However, since the introduction of the UK Human Rights Act 1998, higher courts may examine the compatibility of ordinary UK legislation[21] with those human rights protected by the European Convention on Human Rights.[22] Judicial protection of fundamental rights is gaining importance in the UK and the court's declaration of incompatibility can have a persuasive effect on Parliament. Still, even if a court declares a law incompatible with these rights, the law remains in force and it is entirely left to parliament to amend or repeal it.[23] Moreover, courts have developed a complex system of judicial review of administrative acts which includes review of lawfulness and conformity with Convention rights.

24. The Netherlands is the only country that expressly prohibits constitutional review of its legislation. The Dutch constitution does not provide any means for an individual to question the constitutionality of statutory laws, not even indirectly through a preliminary request. Article 120 of

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[17] *A priori* review may only be initiated by specific bodies designated in the constitution or in any law which establishes a constitutional court as having the power to do so. It cannot be initiated by individuals.

[18] See French Constitutional Law of 23 July 2008.

[19] Art. 195 of the Algerian Constitution as amended on 1 November 2020. It should be noted that according to the constitutional amendment of 1 November 2020, the Constitutional Council will be established as the Constitutional Court.

[20] Art. 133 of the Moroccan Constitution.

[21] The review of legislation based on the Human Rights Act extends to the devolved legislatures in Scotland, Wales and Northern Ireland. In the case of these legislatures, legislation that is incompatible with a Convention right may be held to be *ultra vires*, outside the competence of the legislature in question.

[22] See Human Rights Act 1998 section 4, available at: https://www.legislation.gov.uk/ukpga/1998/42/contents. The effects of Brexit on this issue remain to be seen.

[23] Kavanagh, A., *Constitutional Review Under the UK Human Rights Act*, Cambridge University Press, Cambridge, 2009, pp. 455.

the Dutch Constitution provides that "[t]he constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts." In this sense, the legislature remains the final authority on the constitutionality of statutory laws. However, courts can to a certain extent review the constitutionality of acts below the level of acts of parliament. Moreover, courts are obliged to review domestic law, including Acts of Parliament, for their conformity with self-executing provisions of international treaties and decisions of international organisations. If they find that a domestic law violates international law, that law may not be applied in the specific case at hand. Since many of these international law provisions have their equivalent in Dutch constitutional law the Netherlands may be considered to indirectly provide for constitutional review.

25. Since the original study was adopted in 2010, several countries have expanded individual access to constitutional justice. Hungary has introduced individual complaints before the Constitutional Court in 2012, replacing the previous existing *actio popularis*. In the same year, Turkey's Constitutional Court received its first individual complaints after having introduced the individual complaint procedure in 2010. Most recently, Ukraine empowered individuals to lodge normative constitutional complaints before the Constitutional Court in 2016,[24] as did Lithuania in 2019.

IV. TYPES OF INDIVIDUAL ACCESS TO CONSTITUTIONAL REVIEW

26. Specialised constitutional courts may generally be approached either by individuals or by different state bodies. Regarding individual access to justice, the present report distinguishes between direct and indirect access. Direct access comprises all legal means given to individuals to directly petition a constitutional court without the intermediary of a third body. By contrast, indirect access refers to the means by which an individual question reaches the constitutional court through the intermediary of another state body. Most countries under review provide for some form of direct access to constitutional justice to individuals. Many countries have a mixed system combining both direct and indirect means of access.

27. Different types of legal acts can be reviewed to ensure their conformity with constitutional norms. For the purposes of this report, the Venice Commission distinguishes between individual acts and normative acts. Individual acts, as understood here, are any kinds of actions by a state actor (an administrative body or a court) deciding in a concrete case.[25] Normative acts, by contrast, are general laws and rules that have the force of law, including international treaties,[26] decrees and regulations by the executive, general rules of local self-governing bodies that have a generally binding effect, i.e. without distinct or distinguishable addressees.

A. Direct access

28. In many countries, applicants may directly petition a constitutional court either to review a normative or individual act with reference to their specific case, or to review a law abstractly through an *actio popularis*.

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[24] Venice Commission, CDL-AD(2016)034, Opinion on the draft Law on the Constitutional Court of Ukraine, paras. 67-68.

[25] Typically, individual acts refer to: "final judgments of ordinary courts and decisions of public authorities, the latter provided that they cannot be reviewed by administrative courts; measures, i.e. legal acts or other acts issued by the relevant authorities, which do not fulfil the formal criteria of a decision, but which directly affect or may affect the rights, legally protected interests or duties of individual persons and legal entities; as well as in some systems, acts designated as laws that are not general norms but that specifically address only one person or set of facts ("individual law")." (Venice Commission, CDL-AD(2018)012, Georgia - Amicus curiae brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, para. 25).

[26] International treaty provisions only amount to normative acts if they have infra-constitutional value.

29. Different categories of applicants may be entitled to have direct access to constitutional courts. Most countries allow a natural person to lodge a constitutional complaint as long as they have standing. Several countries also confer legal standing on legal persons (e.g., Austria, Armenia, Belgium, Germany, Spain, Slovenia, Lithuania, Montenegro, Switzerland, Serbia, Kyrgyzstan, Russia and Turkey). Some even allow municipalities to lodge constitutional complaints (e.g., Germany and Russia). Only a few countries restrict individual access to constitutional justice to citizens (e.g., North Macedonia and Russia).

1. Individual complaints

30. Individuals may lodge two types of constitutional complaints related to their specific case: "full constitutional complaints" and "normative constitutional complaints".[27] Full constitutional complaints concern the constitutionality of individual acts and any underlying normative acts, while normative constitutional complaints concern the constitutionality of normative acts alone.

31. Diffuse review is necessarily related to a specific case. Diffuse review systems typically provide for full constitutional complaints. That is, any act, individual or normative, that is relevant to a concrete case, may be challenged. This is consistent with their traditional objective of protecting the rights of the individual. By contrast, concentrated review can be both abstract and related to a specific case.

a. Full constitutional complaint

32. An individual may lodge a full constitutional complaint against any individual act by a public authority that violated their fundamental rights. Unconstitutional individual acts may result from the unconstitutional application of a perfectly constitutional normative act, but they may also be based on unconstitutional normative acts. In case of the latter, the full constitutional complaint may also be directed against the underlying normative act.

33. In practice, human rights violations are often not the result of the "technically correct" application of an unconstitutional law but are frequently the result of an unconstitutional individual act, which can be – but is not necessarily – based on a law, which is in conformity with the constitution. Therefore, there is a clear tendency towards opening constitutional review of individual administrative acts and decisions of the judiciary to applications by an individual,[28] as human rights violations are often the result of unconstitutional individual acts based on constitutional normative acts.[29] **The Venice Commission favours the full constitutional complaint because it provides the most comprehensive form of individual access to constitutional justice and hence the most thorough protection of individual rights.**[30]

34. The possibility of full constitutional complaints exists, for example, in Albania, Andorra,

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[27] The term used in German is "unechte Grundrechtsbeschwerde*"* (Venice Commission, CDL-JU(2001)022, Report "*Der Zugang des Einzelnen zur Verfassungsgerichtsbarkeit im europäischen Raum"*, p. 26).

[28] Venice Commission, CDL-AD(2011)040, Opinion on the Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey, para. 7; Venice Commission, CDL-AD(2004)24, Opinion on the draft constitutional amendments with regard to the Constitutional Court of Turkey, para. 4.

[29] Venice Commission, CDL-AD(2008)029, Opinion on the draft laws amending and supplementing 1) the Law on Constitutional Proceedings and 2) the Law on the Constitutional Court of Kyrgyzstan, para. 23; Venice Commission, CDL-AD(2011)018, Opinion on the draft constitutional law on the constitutional chamber of the Supreme Court of Kyrgyzstan, paras. 27-28; Venice Commission, CDL-AD(2015)014, Joint Opinion on the draft law "On introduction of changes and amendments to the Constitution" of the Kyrgyz Republic, paras. 88-89.

[30] Venice Commission, CDL-AD(2013)034, Opinion on Proposals Amending the Draft Law on the Amendments to the Constitution to strengthen the independence of judges of Ukraine, para. 11.

Austria, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, the Czech Republic, Germany, Liechtenstein, Malta, Montenegro, Peru, Republic of Korea,[31] Serbia, Slovenia, South Africa, Spain,[32] Switzerland and Slovakia.

b. Normative constitutional complaints

35. Normative constitutional complaints are directed against the application of unconstitutional normative acts. An individual may lodge a complaint to a constitutional court concerning the violation of his or her fundamental rights through an individual act that is based on a normative act by challenging the constitutionality of the latter.[33] Thus, while the review is related to a specific case, the only subject matter of the complaint is the normative basis for the individual act and not the constitutionality of the latter itself. As a result, the individual act applying a normative act cannot be attacked before the constitutional court, and the constitutional court cannot address issues that arise in the context of the implementation of the normative act.

36. The main rationale for normative constitutional complaints is to protect the constitutional order rather than individual rights. Moreover, they mitigate the risk of overburdening the constitutional court. Theoretically, at least, the relationship between the constitutional court and ordinary courts is less likely to be conflict-ridden with normative constitutional complaints than with full individual ones because the constitutional court does not directly review the application of a normative act by the ordinary court.[34] However, since most human rights violations are the results of unconstitutional individual acts rather than unconstitutional normative acts, many human rights violations escape the normative complaint. Consequently, **a normative constitutional complaint is not an effective remedy if the unconstitutionality resides in the application of the norm, but not in the norm itself.**[35]

[31] According to Art. 68 (1) of the Constitutional Court Act: "Any person whose fundamental rights guaranteed by the Constitution is infringed due to exercise or non-exercise of the governmental power, excluding judgment of the courts, may request adjudication on a constitutional complaint with the Constitutional Court: *Provided*, That if any remedial process is provided by other statutes, no one may request adjudication on a constitutional complaint without having exhausted all such processes."

[32] Spain's writ of *amparo* should be regarded as a full constitutional complaint. It takes place as a last instance recourse before the Constitutional Court. Notably, the 2007 reform set out a new admissibility condition to grant the *amparo*, requiring that the issue raised in the case be "constitutionally relevant". The Spanish writ of *amparo* should not be confused with the specific *recursos de amparo* that exist in most Latin American countries (such as Chile, Peru, Argentina and Mexico). These *recursos de amparo* are a different type of constitutional complaint where the individual is granted a specific action to defend his or her rights before ordinary courts rather than a constitutional court, although they may ultimately reach a constitutional court in the last instance.

[33] Venice Commission, CDL-AD(2018)012, Georgia - Amicus curiae brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, para. 30.

[34] See Sadurski, W. (ed.), *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, (2nd ed.), Springer Netherlands, Dordrecht, 2014, p.36.

[35] Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court, para. 38; Venice Commission, CDL-AD(2018)012, Georgia - Amicus curiae brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, para. 31.

37. Normative constitutional complaints exist (often together with other forms of constitutional complaints) for example in Armenia,[36] Austria, Belgium,[37] Estonia,[38] Georgia, Hungary,[39] Poland, Latvia, Luxembourg, Russia, Romania and Ukraine. The normative constitutional complaint in Ukraine requires the Constitutional Court and ordinary courts to cooperate with one another in order to provide the individual with an effective remedy. If the Constitutional Court finds that the challenged normative act is constitutional, but its application was unconstitutional, it shall indicate so in the operative part of its judgment. This judgment, in turn, can be used by the individual to address the ordinary court in order to reopen his or her case for review of the final judgment. In this sense, it comes close to a full constitutional complaint.[40] However, this process requires enhanced cooperation and mutual understanding between the Constitutional Court and ordinary courts. Any further complaints on the same provision will be inadmissible.[41]

2. *Actio popularis*

38. In addition to reviewing specific laws or regulations in relation to a specific case, a constitutional court may also review them in the abstract. Abstract review generally takes the form of *actio popularis*. Because abstract review proceeds without reference to a specific case or set of proceedings, typically exists in systems of concentrated review.

39. An *actio popularis* entitles any person to lodge a complaint against a normative act after its enactment, without having to prove that he or she is currently and directly affected by that act. An *actio popularis* is the broadest means of individual access to the constitutional court, as it allows any individual to petition the constitutional court.[42] The *actio popularis* allows every citizen to become a guardian of the constitution For instance, in South Africa, an individual may approach the Court in order to defend the public interest.[43]

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[36] According to Art. 169 (8) of the Constitution of Armenia, "everyone — under a specific case where the final act of court is available, all judicial remedies have been exhausted, and he or she challenges the constitutionality of the relevant provision of a regulatory legal act applied against him or her upon this act, which has led to the violation of his or her basic rights and freedoms enshrined in Chapter 2 of the Constitution, taking into account also the interpretation of the respective provision in law enforcement practice" may apply to the Constitutional Court.

[37] Venice Commission, CDL-JU(2008)032, Report on the "*Introduction of a Constitutional Review of Laws: Benefit, Purpose and Modalities*", para. 7.

[38] Unlike most former Communist countries, Estonia did not establish a separate constitutional court. The Constitution adopted in 1992 vested the Supreme Court (*Riigikohus*) with the double-function of a court of cassation and a constitutional court. There is a separate Constitutional Review Chamber on that Court. Individuals may only challenge certain only some of the individual acts by the president and the board of the parliament directly before the Supreme Court. However, individuals may seek review of other individual acts through the Supreme Court's cassation procedure challenging decisions of administrative courts.

[39] Venice Commission, CDL-AD(2012)009, Opinion on Act CLI of 2011 on the Constitutional Court of Hungary, para. 26.

[40] Venice Commission, CDL-AD (2018)012-e, Georgia - Amicus curiae brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, para. 33.

[41] Venice Commission, CDL-AD(2016)034, Ukraine – Opinion on the draft Law on the Constitutional Court, para. 45.

[42] Van Aaken, A., "Making International Human Rights Protection More Effective: A Rational-Choice Approach to the Effectiveness of Ius Standi Provisions", Preprints of the Max Planck Institute for Research on Collective Goods, no. 2005-16, 2005, p. 14, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=802424.

[43] In Belarus, individuals may approach the Constitutional Court in order to seek elimination of "legal gaps, collisions and legal uncertainty in normative legal acts" (Art. 158 of the Law on Constitutional Proceedings; see, e.g., Decision D-1101/2017, available at http://www.kc.gov.by/document-47153 and in CODICES). However, they cannot directly access the Constitutional Court regarding a violation of their constitutional rights (see also para. 66 below). In any case, the power of the Constitutional Court

40. On the other hand, *actio popularis* can attract abusive complaints. For this reason, most countries do not provide for an *actio popularis*. In practice, countries that allow it, require several conditions to be met in order to file an *actio popularis* in order to guard against overburdening their constitutional courts (e.g., Liechtenstein,[44] Malta[45] and Peru). Some countries have devised alternative proceedings similar to *actio popularis*. In addition, various human rights organisations and other organisations may file a petition as "public petitioners" seeking to further general public interests. These groups are not required to show a personal interest in the petition, although they may file a petition on behalf of private petitioners that were directly affected by a governmental or normative act. In San Marino, citizens (by popular initiative supported by 1.5% of the voters) may directly request the Constitutional Court to verify whether a newly introduced act respects the Constitution within 45 days of its entry into force.[46]

41. The Venice Commission would like to stress that **the availability of an *actio popularis* in matters of constitutionality cannot be regarded as a European standard and even warns against the introduction of *actio popularis*.**[47] The Commission refers, in this context, *inter alia* to the Croatian experience, where the *actio popularis* has led to the overburdening of the Constitutional Court, an issue on which the Venice Commission has pronounced itself critically.[48] The Venice Commission has always advised States to **make clear that only victims of violations have the right to raise a constitutional complaint before a court.**[49]

B. Indirect access

42. Within the context of indirect individual access, different state bodies may be entitled to challenge the constitutionality of a norm on their own initiative or on behalf of or at the request of individuals. The most common ones are ordinary courts and ombudsman institutions.[50]

1. Ordinary courts

43. Ordinary courts may raise constitutional issues before constitutional courts by referring preliminary questions in order to clarify the constitutionality of a provision which they need to apply in a particular case. Preliminary requests constitute the most common method of indirect

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to conduct constitutional review is limited since it cannot annul an unconstitutional law, but it may recommend to the Council of Ministers to prepare legislative amendments.

[44] There is a possibility for an *actio popularis* for ordinances. According to Art. 20(1)(c) of the Constitution Court Act, the Constitutional Court shall decide on the compliance of ordinances or individual provisions thereof with the Constitution, statutory laws and international treaties, following an application of at least 100 citizens eligible to vote, if the application is submitted within one month after publication of the ordinance in the Liechtenstein Legal Gazette.

[45] Venice Commission, CDL-JU (2001)22, Report on *"Der Zugang des Einzelnen zur Verfassungsgerichtsbarkeit im europäischen Raum"*, p. 35.

[46] Law 26 February 2002, no. 36, Art. 7.3.a) and Qualified Law 25 April 2003, no. 55, Art. 12.

[47] Venice Commission, CDL-AD(2008)030, Opinion on the Draft Law on the Constitutional Court of Montenegro, para. 11; Venice Commission, CDL-AD(2011)001, Opinion on three legal questions arising in the process of drafting the new Constitution of Hungary, paras. 55-69.

[48] Venice Commission, CDL-AD(2008)030, Opinion on the Draft Law on the Constitutional Court of Montenegro, para. 11; Venice Commission, CDL-AD(2012)009, Opinion on Act CLI of 2011 on the Constitutional Court of Hungary, para. 49.

[49] Venice Commission, CDL-AD(2014)026, Opinion on the Seven Amendments to the Constitution of "The former Yugoslav Republic of Macedonia" concerning, in particular, the Judicial Council, the Competence of the Constitutional Court and Special Financial Zones, para. 87; Venice Commission, CDL-AD(2014)020, Opinion on the Draft Constitutional Law on Introduction Amendments and Additions to the Constitutional Law on the Constitutional Chamber of the Supreme Court of Kyrgyz Republic, para. 10.

[50] Some countries also enable members of parliament to bring questions to the constitutional court based on a petitions by individuals. However, this possibility will not be discussed in this report.

individual access. There is a large variety of models. Depending on the model, the preliminary request can be initiated by one of the parties or by the ordinary judge him/herself. This type of review is quite unusual in systems with diffuse review of constitutionality where ordinary courts are entitled to decide questions of constitutionality themselves (e.g., Canada, Denmark, Finland, Iceland, Norway, South Africa, Sweden, Switzerland and the United Kingdom). The United States constitutes an exception: All courts of appeals may request instructions from the US Supreme Court regarding any question of law, and the Supreme Court may give binding instructions or require the entire record in order to decide the matter in controversy itself. Only few concentrated systems do not provide for preliminary requests (e.g., Latvia, Monaco and Serbia).

44. Enabling ordinary courts to refer preliminary questions to a constitutional court recognises their position at the frontlines of protecting constitutional law. They are the first to be confronted with a potential constitutional problem that may result from their application of a law. Therefore, their understanding of constitutional provisions crucially determines the overall quality of protection afforded by the constitutional order. Ultimately, preliminary rulings by constitutional courts may enable ordinary courts to alleviate the harm done to an aggrieved individual more quickly and directly since the constitutional court may be resolve constitutional issues as soon as they arise.

45. The benefit of preliminary requests is that ordinary courts are well-informed and capable of making valid requests. Ordinary courts serve as an initial filter and can help minimise the number of abusive or repetitive requests. Furthermore, preliminary ruling procedures facilitate review arising from concrete situations in which a provision is applied or should be applied.[51] However, there are also drawbacks. The effectiveness of preliminary requests heavily relies on the capacity and willingness of ordinary judges to identify potentially unconstitutional normative acts and to refer preliminary questions to the constitutional court. Depending on the model, it relies, to a lesser extent, on the ability of individuals to invoke this procedure.

46. Preliminary requests exist in most states with concentrated constitutional review systems, except for Portugal and Switzerland. In some countries, preliminary requests constitute the only type of individual access to constitutional courts (e.g., France). In states with diffuse constitutional review systems, preliminary requests are uncommon leaving ordinary courts to assess issues of constitutionality themselves.

47. In many countries, all ordinary courts are competent to refer preliminary questions to a constitutional court (e.g., Albania, Andorra, Armenia, Austria, Belgium, Bosnia and Herzegovina, Chile, Croatia, the Czech Republic,[52] Georgia, Germany, Hungary, Italy, Kazakhstan, Republic of Korea, Liechtenstein, Lithuania, Luxembourg, Montenegro, Morocco (since 2011),[53] North Macedonia, Poland, Romania, Russia, San Marino, Slovakia, Slovenia, Spain, Turkey, Ukraine and Uruguay). In Chile, ordinary judges may submit a writ of inapplicability due to unconstitutionality before the Supreme Court, if they believe that a statute be unconstitutional. The Supreme Court may then declare the provision inapplicable in that particular case because it violates the Constitution.

48. Some countries impose restrictions on which courts may refer preliminary questions. In Azerbaijan, Belarus, Bulgaria, Greece, the Republic of Moldova and Russia only the highest courts are authorised to bring preliminary requests in order to ensure the quality of the

[51] Venice Commission, CDL-INF(1996)010, Opinion on the draft Law on the Constitutional Court of the Republic of Azerbaijan, p. 4.

[52] Although there is no special preliminary question procedure for ordinary courts to challenge the constitutionality of a norm, ordinary courts can submit a petition proposing the annulment of a statute or individual provisions thereof to the Constitutional Court if they believe that the statute that is relevant to the resolution of the matter before them conflicts with the constitutional order.

[53] The preliminary request procedure has not yet been implemented in Morocco.

submissions. In France, the *Priority Preliminary Ruling* procedure provides a two-level filter system for referring preliminary questions has been put in place. First, any ordinary judge, only at the request of one of the parties to the case, may refer the preliminary question to the highest court. In a second step, the highest court may bring the question before the Constitutional Council. In Cyprus, only courts that have jurisdiction in family matters may refer preliminary questions.

49. Whilst imposing restrictions on which courts may refer preliminary questions to the constitutional court is an effective tool to reduce the number of preliminary requests and consistent with the logic of the exhaustion of remedies (the individual should follow the ordinary sequence of courts), this leaves the parties to the proceedings in a potentially unconstitutional situation for a long period of time if lower courts are obliged to apply the law even if they have serious doubts as to its constitutionality. **The Venice Commission is of the opinion that, from the viewpoint of human rights protection, it is more expedient and efficient to give courts of all levels the possibility to directly refer preliminary questions to the constitutional court.**

50. Preliminary questions may be referred on the initiative of the judge presiding the proceedings in an ordinary court. Alternatively, parties to these proceedings may also request the ordinary judge to refer a preliminary question to the constitutional court.

a. Preliminary requests on the ordinary judge's initiative

51. If an ordinary judge has doubts about whether a normative act applicable in a concrete case violates the constitution, he or she (*iudex a quo*) can decide to refer a preliminary question concerning the constitutionality of this act before a constitutional court (*iudex ad quem*).

52. Different regulations exist regarding whether and when ordinary courts should or must refer preliminary questions before a constitutional court. In some countries, ordinary courts are obliged to refer preliminary questions whenever they detect issues that could create doubts concerning the constitutionality of a provision which they need to apply in a given case (e.g.. Albania, Austria, Belgium, Bosnia and Herzegovina, Republic of Korea,[54] Lithuania, North Macedonia, the Republic of Moldova and Romania). In other countries, judges may refer a preliminary question to the constitutional court only if they are convinced that a normative act is unconstitutional and that there is no interpretation that could render it constitutional (e.g., Bulgaria, the Czech Republic, Germany, Hungary, Luxembourg, Malta, Russia, San Marino, Slovakia, Slovenia and Turkey). In France, ordinary judges may refer preliminary questions to the Constitutional Council only if they have serious doubts about the constitutionality of a norm. Where the issue is urgent, the ordinary judge may rule on the case, even if the Constitutional Council has not yet given its answer. By contrast, in Italy and in San Marino, the court which refers a preliminary question to the constitutional court need not be convinced that the normative act is unconstitutional, but only that the issue raised is not evidently groundless.[55]

53. The Venice Commission considers that **ordinary courts should be able to request preliminary decisions to challenge a norm before the constitutional court, when they are convinced of the unconstitutionality of a provision.** The Commission further notes that, **when individuals have no direct access to a constitutional court, it would be too high a threshold condition to limit preliminary requests to circumstances in which an ordinary judge is**

[54] According to Art. 41 (1) of the Constitutional Court Act: "If resolving the issue of whether or not a law is constitutional is precondition of adjudication of a court case, the court which takes charge of the case (including the military court; hereinafter the same shall apply) shall request, ex officio or by decision upon a motion by the party, an adjudication on the constitutionality of a law, to the Constitutional Court."
[55] For Italy, see Art. 23 of Law 87/1953. See also Judgement 42/2017 of the Italian Constitutional Court.

convinced of the unconstitutionality of a provision. In these circumstances, serious doubt should suffice.[56]

b. Preliminary requests on the parties' initiative

54. In many countries, parties to proceedings before an ordinary court may also lodge a request with the ordinary judge to submit a preliminary question[57] to the constitutional court where they have doubts concerning the constitutionality of a law that is to be applied in those proceedings (e.g., Albania, Algeria,[58] Andorra, Armenia, Austria, Belgium, Bulgaria, Croatia, the Czech Republic, France, Hungary, Italy, Luxembourg, Lithuania, the Republic of Moldova, Poland, San Marino, Slovakia, Spain, Turkey and Ukraine). The judge is usually obliged to consider it and justify any refusal to refer the question to the constitutional court.[59]

55. Ordinary judges usually retain the discretion to reject or accept suggestions to refer a preliminary question (e.g., Algeria, Andorra,[60] Belgium, Belarus, the Czech Republic, France, Hungary, Italy, Luxembourg, Malta, Poland, Slovakia, Spain, Romania and Ukraine). The ordinary judge's power to decide not to pose a preliminary question after a request by a litigant to do so underlines the former's autonomy. Refusals to refer can only validly be made, however, on a certain limited number of grounds (e.g., the preliminary question is clearly unfounded etc.[61]). Some countries, however, make it a mandatory requirement to submit a question under such circumstances (e.g., Belgium, North Macedonia and Romania).

56. The ordinary judge's decision is usually final and cannot be appealed (except for lack of reasoning or some formal mistakes). In Uruguay the parties may directly appeal against the refusal of the court.

57. Still, an ordinary judge's refusal to refer a preliminary question need not impede the petitioner's right to demand a referral of the preliminary question on appeal. For instance, in Italy, if a court rejects a preliminary request on the initiative of parties as manifestly irrelevant or groundless, the same plea may be filed again at the beginning of proceedings at every instance thereafter.[62] Similarly, in Turkey, if during a hearing an ordinary court decides not to refer a preliminary question to the constitutional court, this decision can be appealed together with the final judgment by the parties to the case.[63]

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[56] Venice Commission, CDL-INF(2001)28, Interim Opinion on the Draft Law on the Constitutional Court of the Republic of Azerbaijan, p. 5.

[57] This procedural remedy is sometimes referred to as the "exception of unconstitutionality" or "concrete review".

[58] Organic Law No. 18-16 of 2 September 2018.

[59] In Spain, the judge is entirely free and merely should justify his or her decision to refuse to refer the question to the Constitutional Court (see Art. 35 (2) of the Organic Law on the Constitutional Court).

[60] Art. 2 of the Law on Transitory Judicial Proceedings establishes an adversarial accelerated procedure prior to the decision rendered by the ordinary court on the submission of the preliminary request to the Constitutional Tribunal. When the Constitutional Tribunal refers a preliminary question *proprio motu*, or when it receives the request from one of the parties to the process, the Tribunal must follow Art. 53(3) of the Law on the Constitutional Tribunal and Art. 2 of the Law on Transitory Judicial Proceedings. According to these two provisions, the ordinary tribunal issues a decision containing the legal reasoning and the context of the preliminary request to be submitted to the Constitutional Tribunal. The parties to the proceedings and the Public Prosecutor may send their considerations, following which the ordinary court may decide either not to submit the preliminary request or to submit it as it was announced in its first decision, or to submit it with modifications.

[61] In France, for example, the priority preliminary ruling needs to meet several requirements: the question has to be (i) serious, (ii) new (a question that the Constitutional Council has not yet answered) and (iii) applicable to the specific case.

[62] Section 24 of law no. 87 of 11 March 1953. See also San Marino: Art. 13(5) of the Qualified Law, 25 April 2003, no. 55.

[63] According to Art. 152 of the Turkish Constitution (as amended on April 16, 2017; Act No. 6771): "If a

58. **The Venice Commission thus considers preliminary requests on the initiative of parties to be a very effective means of achieving individual access if the ordinary court is obliged to refer the preliminary question to the constitutional court.**

2. Ombudsman Institutions

59. Most of the Venice Commission's member and observer States have an ombudsman institution (mediator, parliamentary commissioner, human rights defender, etc.).[64] According to the Venice Commission, the most widely followed model is that of "an independent official having the primary role of acting as intermediary between the people and the State and local administration, and being able in that capacity to monitor the activities of the administration through powers of inquiry and access to information and to address the administration by the issue of recommendations on the basis of law and equity in a broad sense, in order to counter and remedy human rights violations and instances of maladministration."[65]

60. In addition to the traditional ombudsman powers of investigation, reporting and recommendation, it has become increasingly accepted that ombudsmen should have the power to intervene before courts and tribunals and even to initiate proceedings with regard to violations of fundamental rights.[66] For instance, in 2011, the powers of the French Ombudsman (*Défenseur des droits*) have been expanded and he now has the right to intervene in specific cases before civil, administrative and criminal courts.[67] Still, his role in constitutionality review remains limited since he has not been granted the power to intervene on matters of constitutionality before the Constitutional Council.

61. In diffuse review systems, ombudsmen who have been vested with the power to initiate judicial proceedings must do so before the competent ordinary court – not before the constitutional court (e.g., the specialised Ombudsman in Finland). In Brazil, although not strictly a diffuse review country, the Public Defender can also initiate legal proceedings before ordinary courts in order to protect constitutional rights.

62. By contrast, in concentrated constitutional review systems, the ombudsman typically has the power to initiate constitutional review proceedings directly before the constitutional court (e.g., Albania, Armenia, Austria, Azerbaijan, Croatia, the Czech Republic, Estonia, Hungary, Latvia, the Republic of Moldova, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, South Africa, Spain and Ukraine). In many of these countries, the ombudsmen may initiate the abstract review of normative acts without there having to be a concrete case. For instance, since 2011, the Hungarian Ombudsman has the power to initiate abstract review of normative acts.[68] In some countries this normative act must still relate to a concrete case with which the ombudsman is dealing at the time (e.g., Azerbaijan, Peru and Ukraine).

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court which is trying a case, finds that the law or the decree having the force of law to be applied is unconstitutional, or if it is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it shall postpone the consideration of the case until the Constitutional Court decides on the issue. If the court is not convinced of the seriousness of the claim of unconstitutionality, such a claim together with the main judgment shall be decided upon by the competent authority of appeal."

[64] Venice Commission, CDL-AD(2019)005, Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), p. 2.

[65] Venice Commission, CDL-AD(2007)020, Opinion on the possible reform of the Ombudsman Institution in Kazakhstan, para 12.

[66] Linda Reif, "Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman" (2011) 31 *Boston College Third World Law Journal* 269, at pp. 302-307.

[67] Art. 33 (1) of the Organic Law no. 2011-333 of 29 March 2011 on the French Ombudsman.

[68] Art. 24(2) of the Act CLI of 2011 on the Constitutional Court.

63. In countries where ombudsmen can apply to courts, they may still face restrictions. Sometimes the constitutional complaint may only be lodged with the consent of the person whose human rights or fundamental freedoms the institution of the ombudsman is protecting in an individual case. For instance, in Azerbaijan, the ombudsman has standing to initiate review of unconstitutional court decisions only following the petition of the affected individual. In these cases, the ombudsman's rights do not, in principle, exceed the individual's rights.[69] By contrast, the Spanish Ombudsman may lodge a claim of *amparo* against all acts of public authorities on behalf of any individual who, to their knowledge, has been affected by the challenged act in order to include him or her in review proceedings.

64. The advantage of allowing ombudsmen to apply to constitutional courts on behalf of individuals is that, through their legal expertise, they may help to improve the quality of the petitions (e.g., Bosnia and Herzegovina, and Russia). This is true even where the individual would have the possibility to directly raise their case with a constitutional court. Moreover, providing access to courts through ombudsmen is likely to enhance effective human rights protection because "it is always easier for an individual to get in touch with an Ombudsman than with a judge".[70]

65. From the perspective of human rights protection, the Venice Commission recommends that **"[f]ollowing an investigation, the Ombudsman shall preferably have the power to challenge the constitutionality of laws and regulations or general administrative acts. The Ombudsman shall preferably be entitled to intervene before relevant adjudicatory bodies and courts."[71] When a constitutional court is competent to review the constitutionality of individual acts, the ombudsman should also be granted the right to bring individual cases to the constitutional court.**

C. Mixed solutions

66. As the previous sections have shown, the existing choices are very broad, and many possibilities coexist. Indeed, most countries have a mixed system, with both direct and indirect means of access to constitutional justice. Some countries, in particular ones with diffuse systems of constitutional review, provide direct means of access. Very few countries provide only indirect access to constitutional courts (e.g., Belarus, Bulgaria and France).

67. Both direct and indirect access to constitutional justice are very important tools in ensuring the respect for individual human rights at the constitutional level. In some of these cases, the mechanisms of indirect access give individuals the possibility to reach the constitutional court, albeit indirectly, in situations where they would normally have no access to it. For instance, the

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[69] Art. 50(2) and Art. 52 (2) of the Slovenian Constitutional Court Act. In addition, the Ombudsman has the possibility of initiating review proceedings regarding the constitutionality or legality of regulations or general acts issued for the exercise of public authority, if he or she deems that the act in question inadmissibly interferes with human rights or fundamental freedoms (Art. 23(a) of the Constitutional Court Act).

[70] Council of Europe, Parliamentary Assembly, Report - Ombudsman institutions in Europe - the need for a set of common standards, Doc. 14953, 20 August 2019, para. 50, available at: https://pace.coe.int/pdf/2d710f462da53cbe00048d3ed86a193ac9fedd3f3326667a8259ffe25682ae848428feba12/doc.%2014953.pdf.

[71] Venice Commission, CDL-AD(2019)005, Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), Principle 19. As the Venice Commission observes elsewhere it is recognised as desirable that the mandate of the Ombudsman should include the possibility of applying to the constitutional court of the country for an abstract review of laws and regulations or general administrative acts which raise issues affecting human rights and freedoms. The Ombudsman should be able to do this of his or her own motion or following a complaint by an individual (see Venice Commission, CDL-AD(2007)020, Opinion on the possible reform of the Ombudsman Institution in Kazakhstan, para. 14).

ombudsman may open new ways of access. Still, indirect access cannot replace direct access. Instead, it must be seen as a complementary process. The choice between the different mechanisms or whether to create parallel options will depend on the legal culture of a given country. Generally, **the Venice Commission recommends individual complaints before constitutional courts, and especially full constitutional complaints, as an effective constitutional remedy.** In particular, the Commission stresses that **the right to complain to an ombudsman is an addition to the right of access to justice through the courts.**[72] As the Commission stresses in the Preamble to the Venice Principles, **"the right to complain to an ombudsman is an addition to the right of access to justice through the courts".**[73]

68. At the same time, they both have certain advantages and disadvantages. An advantage of indirect individual access is that judges and ombudsmen filing complaints are usually well-informed and have the required legal skills to formulate a valid request. Even when judges are obliged to pass on to the constitutional court requests by the parties, they should be able to formulate their opinion on the request. This may help the constitutional court in identifying request that lack merit or that are abusive or repetitive. Finally, indirect access plays a vital role in the prevention of unnecessarily prolonging rather obvious unconstitutional situations because it does not require the exhaustion of legal remedies.

69. However, indirect access has a clear disadvantage, as its effectiveness is heavily reliant on the capacity of these bodies to identify potentially unconstitutional normative acts and their willingness to submit applications before the constitutional court or equivalent bodies. Therefore, **the Venice Commission sees an advantage in combining indirect access with direct access, to balance the advantages and disadvantages of different mechanisms.**

V. RESTRICTIONS ON ACCESS

70. The main argument against broad individual access is that it may overburden constitutional courts. This risk is especially high with regard to full constitutional complaints, which quickly make up the majority of the cases of the constitutional court, sometimes representing more than 90 per cent of the caseload. As a result, the constitutional court may be overburdened by cases which lack any constitutional dimension, only because the parties are dissatisfied with the judgment of the ordinary court. In order to deal with the heavy case-load, in countries with a full constitutional complaint to the constitutional court, there usually are a number of filters in place.[74] In addition, some constitutional courts practice greater selectivity in deciding which cases to hear or decide cases in smaller chambers.

71. The risk of overburdening constitutional courts must be balanced against the need to ensure effective individual access to constitutional justice. States have addressed this dilemma in various ways. Some countries opted against the possibility of lodging individual complaints from the outset. Others have introduced procedural "filters". In addition, joinder of similar cases as well as greater selectivity by constitutional courts can serve to alleviate the court's caseload.

72. In general, the Venice Commission recommends that **as a guarantee for the protection of human rights, access to the Constitutional Court should be simplified. While the Venice Commission supports the objective of avoiding overburdening constitutional courts, constitutional courts should be required to provide a reasoned decision, even in**

[72] *Ibidem*, p. 2.
[73] *Ibidem*, p. 2.
[74] Venice Commission, CDL-AD(2018)012, Amicus Curiae Brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, para. 29.

standardised form, when rejecting an application, unless the application is obviously abusive.[75]

A. Conditions for opening proceedings ("filters")

73. Many countries defined formal procedural conditions for opening proceedings. In countries that allow for full constitutional complaints, there usually are a number of filters in place in light of the risk of overburdening constitutional courts.[76]

74. While these filters serve to alleviate the constitutional court's caseload, there is also the risk that they overly reduce access to the constitutional court. Therefore, the need to ensure effective individual access to constitutional justice must be carefully balanced against the risk of overburdening.

1. Time-limits for applications

75. There is a broad variety of time-limits for different types of applications. Time-limits serve the purpose of legal certainty, as they ensure that, after a certain period of time, an act's validity becomes unassailable.

76. Most States under review give applicants a time-limit of two months from the day the final decision of the last instance court comes into effect. Shorter time-limits – ranging from 20 days to 1,5 months – are common in countries with full model of constitutional review (e.g., ,Austria, Croatia, Germany, Serbia and Spain[77]). By contrast, longer time-limits – ranging from three months to one year[78] – are characteristic for countries with normative constitutional complaint mechanisms (e.g., Poland, Lithuania, Latvia, Russia, Kyrgyzstan and Ukraine).

77. While these time-limits should not be too long, they must be reasonable in order to enable the preparation of any complaint by an individual personally, or to enable a lawyer to be instructed to represent the individual (as in some countries, legal representation is obligatory for individual complaints). The Venice Commission recommends, with regard to individual acts, that **the court should be able to extend the deadlines in cases where an applicant is unable to comply with a time-limit due to compelling reasons.**[79] In addition, Principle No. 19 of the Venice Principles states that **"the official filing of a request to the Ombudsman may have suspensive effect on time-limits to apply to the court, according to the law."**[80]

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[75] Venice Commission, CDL-AD(2017)011, Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, para. 61.
[76] Venice Commission, CDL-AD(2018)012, Amicus Curiae Brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, para. 29.
[77] In Spain, according to Art. 42 of the Organic Law on the Constitutional Court, applicants exceptionally have a time-limit of three months to challenge decisions or enactments without the force of law taken by the Spanish Parliament or any of its organs or by the legislative Assemblies of the Autonomous Communities or their organs. In all other cases, which are more common, the time-limit ranges between 20 days and a month (Art. 43 and 44 of the Organic Law on the Constitutional Court).
[78] The complaint must be filed within one year after the adoption of the final court decision, which exhausts domestic remedies (Art. 97, the Federal Constitutional Law "On the Constitutional Court of the Russian Federation" of 21 July 1994).
[79] E.g., Germany, Law on the Federal Constitutional Court, Art. 93(2); Slovenia, Constitutional Court Act, Art. 52(3).
[80] Venice Commission, CDL-AD(2019)005, Public Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), Principle 19.

2. Obligation to be legally represented

78. Legal representation is intended to help the applicant and to raise the quality of his or her complaint.[81] However, legal representation has significant financial implications. Therefore, especially if legal representation is mandatory, the denial of financial assistance or free legal aid could amount to the denial of effective access to a court.[82] The Venice Commission considers that **free legal aid should be provided to applicants if their material situation so requires in order to ensure their access to constitutional justice.**

79. Legal representation is mandatory, for instance, in Andorra, Austria, Azerbaijan, Chile, the Czech Republic, Italy, the Republic of Korea,[83] Luxembourg, Monaco, Poland, Portugal, San Marino, Slovakia and Spain. In Switzerland, the individual only needs legal representation if he or she is "clearly unable" to represent him- or herself. Before the German Federal Constitutional Court, legal representation is only required in oral pleadings. By contrast, no obligation exists, for instance, in Albania, Armenia, Croatia, Georgia, Hungary, Latvia, Liechtenstein, Lithuania, Romania, Russia, Slovenia, South Africa,[84] Switzerland and Ukraine.

3. Court fees

80. Court fees for proceedings before the constitutional court are exceptional amongst the states under consideration in this report. However, in the United States, there is a fee of $300 for lodging a petition to grant a writ of *certiorari* before the Supreme Court,[85] in Switzerland it is a minimum of 200 CHF and a maximum of 5,000 CHF,[86] and in Austria, the fee presently amounts to 240 Euros. In Russia, the fee amounts to one minimum wage and in Armenia to five. In Israel, there is a fee of approximately $400 to file a petition with the Supreme Court, sitting as the High Court of Justice, but the petitioner is entitled to file a request, supported by special circumstances, to receive a waiver or reduction of fees.

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[81] See also Venice Commission, CDL-AD(2002)016, Opinion on the Draft Law on the Constitutional Court and Corresponding Amendments of the Constitution of the Republic of Moldova, para. 57.
[82] Venice Commission, CDL-JU(2008)012, Report on "*European Standards and the Right to Legal Defence in Civil Matters*", p. 3.
[83] According to Art. 25 (3) of the Constitutional Court Act: "In any proceeding, unless a natural person who is a party selects an attorney-at-law as an agent, he shall not request for an adjudication or pursue an adjudication: Provided, That this shall not apply in case where such party is an attorney-at-law." Art. 70 (1) of the Constitutional Court Act provides for free legal aid: "If a person who intends to request on a constitutional complaint has no financial resources to appoint an attorney as his or her counsel, he or she move the constitutional court to appoint a court-appointed counsel. In this case, time limit for requesting adjudication on a complaint as prescribed in Article 69 shall run from the date on which such motion is filed."
[84] In South Africa, Rule 4(11)(a) of the Rules of the Constitutional Court, states that if it appears to the Registrar of the Court that a party is unrepresented, he or she shall refer the litigant to a body or institution that may be willing and in a position to assist the litigant. In criminal matters, Section 35(2)(b) of the Constitution of South Africa recognises the right of arrested and detained persons to consult with a legal practitioner of their choice and the Criminal Procedure Act 51 of 1977 further states that if substantial injustice occurs that an accused will receive legal representation at the state's expense. Section 28(1)(h) of the Constitution entitles a child in civil proceedings to be provided with a state assigned and paid legal practitioner if substantial injustice will occur. Legal Aid South Africa provides state funded legal representation under certain circumstances and is governed by the Legal Aid South Africa Act 39 of 2014.
[85] Rule 38 of the Rules of the Supreme Court of the United States.
[86] The Federal Court may also refrain from imposing fees (Art. 66(1) of the Federal Court Act). This is the case even if the Confederation, a canton, a commune, an organisation entrusted with public law tasks, or an individual act as complainant, and if the dispute submitted to the Federal Supreme Court is of no financial interest and relates to the official activity of the concerned public entity (Art. 66(4) of the Supreme Court Act).

81. The Venice Commission recommends that, **if fees for bringing a case exist, they should be relatively low and even then the Court should be able to make exceptions for people who do not have the means to bring a claim, which is not manifestly ill-founded.**[87] **The primary aim of fees should be to deter obvious abuse.**[88]

4. Written form

82. Applications to the constitutional court must be made in writing, and sometimes they must even follow very strict formal rules. For instance, in the United States, the length of the application in terms of pages and even the colour of the document's cover are determined by the Supreme Court's rules.

83. These formal rules pursue the goals of transparency and traceability. However, **an applicant needs to be given the possibility to correct or complete a submission within a reasonable time-limit.** This is especially important when formal requirements are very strict. It is even more important where legal representation is not mandatory (e.g., Croatia,[89] Estonia,[90] North Macedonia and Slovenia[91]). Overall, it diminishes the risk that review would be refused on purely formalistic grounds.

5. Manifestly ill-founded, frivolous, abusive or repetitive applications

84. Parties are under a duty to exercise their procedural rights in a *bona fide* manner.[92] When an applicant abuses his right to access a constitutional court, the effectiveness of constitutional justice overall is distorted. Although the individual complaint procedure is very important for the protection of human rights, abuse of this procedure is prejudicial to the constitutional order. **The Venice Commission considers that constitutional courts must be given the tools to refuse to accept manifestly ill-founded, frivolous, abusive or repetitive complaints.**[93]

85. The countries under review have different ways to deal with abusive applications. For example, in Russia, if the applicant repeats an application on an issue on which the Constitutional Court has already rendered a decision, a copy of the decision is sent to the applicants once again, informing them that correspondence with them on this issue is terminated. Further complaints by the same individual on the same issue will remain unanswered.[94] Other countries allow courts to fine abusive applicants (e.g., Germany[95]).

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[87] Venice Commission, CDL-AD (2008)029, Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan, para. 45.
[88] Venice Commission, CDL-AD(2008)029, Opinion on the draft laws amending and supplementing (1) the Law on constitutional proceedings of Kyrgyzstan and (2) the Law on the Constitutional Court of Kyrgyzstan, para. 45; see also Venice Commission, CDL-AD(2014)017, Opinion on the Draft Constitutional Law on the Constitutional Court of Tajikistan, para. 46.
[89] See Art. 19(2) of the Constitutional Act on the Constitutional Court of the Republic of Croatia.
[90] Para. 20 of the Constitutional Review Court Procedure Act.
[91] Only when filing a constitutional complaint. See Art. 55(1) of the Constitutional Court Act.
[92] E.g., Art. 48(5) of the Armenian Constitutional Law on the Constitutional Court; Art. 21 of the Law on the Constitutional Council of Kazakhstan.
[93] See Venice Commission, CDL-AD(2002)005 ,Opinion on the Draft Law on the Constitutional Court of the Republic of Azerbaijan, para. 8.
[94] Para. 9.4 of the Rules of Procedure of the Russian Constitutional Court.
[95] For example, according to Art. 34(2) of the Law on the Federal Constitutional Court of Germany, the Court may impose a fine of up to € 2600 if the lodging of a constitutional complaint or of a complaint in proceedings involving the scrutiny of elections constitutes an abuse or if an application for the issuing of a temporary injunction is made in an abusive manner.

6. Exhaustion of remedies

86. Typically, the individual can bring a full or normative constitutional complaint only after having exhausted all other legal remedies (e.g., Albania, Andorra, Armenia, Azerbaijan, Brazil, Croatia, the Czech Republic, Germany, Hungary, Republic of Korea, Latvia, Liechtenstein, Malta, Montenegro, North Macedonia, Poland, Portugal, Slovakia, Slovenia, Spain,[96] Switzerland and Turkey). The powers of the constitutional court are thus limited by the principle of subsidiarity, i.e. the constitutional court may decide on challenged acts only after all instances of the ordinary courts have pronounced themselves or when no appeal to an ordinary court is possible.[97] The exhaustion of remedies can have different meanings in light of the specific domestic legal context.

87. The precondition of exhaustion for raising a constitutional complaint only exists in countries with concentrated review systems. In countries with diffuse review, an individual may challenge an individual or normative act on the grounds of a violation of the constitution at any stage of the proceedings.

88. In cases where requiring the exhaustion of all remedies could cause irreparable damage to the individual, exhaustion of remedies is usually not required (e.g., Austria, Azerbaijan, Croatia, the Czech Republic, Germany, Latvia, Montenegro, Slovakia, Slovenia and Switzerland). The Venice Commission considers that **an exception to the requirement for the exhaustion of legal remedies should be provided for all cases where adhering to this rule could cause irreparable damage to the individual.**[98]

7. Direct and immediate harm

89. In most states, a breach of a fundamental right must constitute a disadvantage to the applicant in order for him or her to have standing to lodge an individual constitutional complaint. This requirement exists in countries that allow constitutional review in relation to a specific case.

90. Many countries require that the applicant must show that the harm they suffered was sufficiently concrete and had been caused by the unconstitutional act. For instance, in the United States, the applicant must have suffered an injury of a legally protected interest which is both concrete and particularised, and actual or imminent. Moreover, there must a causal connection between the injury and the action brought before the court.[99] Some national laws even require that the harm be sufficiently important (e.g., Slovenia[100]).

91. However, some countries allow persons other than the victim to lodge a constitutional complaint on his or her behalf. For instance, legal representatives (e.g., relatives, tutors, but also

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[96] Exceptionally, decisions or enactments without the force of law taken by the Spanish Parliament or any of its organs or by the legislative Assemblies of the Autonomous Communities or their organs, which violate rights and freedoms protected by the Constitution, may be directly challenged before the Constitutional Court (Art. 42 of the Organic Law on the Constitutional Court).

[97] Venice Commission, CDL-AD(2018)012, Amicus curiae brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, para. 26.

[98] Venice Commission, CDL-AD(2012)009, Opinion on Act CLI of 2011 on the Constitutional Court of Hungary, para. 54(4); Venice Commission, CDL-AD(2008)03, Opinion on the Draft Law on the Constitutional Court of Montenegro, para. 60.

[99] *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

[100] First paragraph of Art. 55(a) of the Constitutional Court Act states that a constitutional complaint is not admissible if the violation of human rights or fundamental freedoms did not have serious consequences for the complainant.

public institutions[101]) may act on behalf of a person who lacks legal capacity. The South African standing provisions authorise anyone to act in the name of the aggrieved person. In some countries, if the individual is not immediately and directly aggrieved by an act, their application may initiate an abstract review of the normative act (*actio popularis*, see above).

8. Redressability

92. If the constitutional review proceeding will not substantially change the applicant's situation, an application may be refused (e.g., France,[102] Germany[103] or South Africa[104]). For instance, in the United States, it must be likely, rather than speculative, that a favourable decision by the court will redress the injury suffered by the applicant in order for him or her to have standing.[105]

93. This evaluation is sometimes difficult to conduct during preliminary proceedings. Therefore, **lack of redressability should only lead to the denial of review in cases where it is manifest that the constitutional court's decision will be ineffective as a means of providing redress**.

9. Filters for preliminary requests

94. Preliminary requests are brought to constitutional courts by ordinary courts. As discussed above, ordinary courts may serve as filters for preliminary requests to constitutional courts. Specific regulations exist concerning the admissibility of questions.

95. Typically, the constitutional court can reject a preliminary request on the grounds of procedural errors or the lack of competence of the constitutional court (e.g., Andorra, Azerbaijan, Belarus, the Czech Republic, Georgia and the Republic of Moldova). In other countries, the constitutional court must return the request to the ordinary court in order to give the latter the opportunity to reformulate its question (e.g., Albania, Chile, Lithuania and North Macedonia). By contrast, in Germany, the constitutional court is not allowed to return a defective request to the ordinary court for amendment. Many constitutional courts will reject a preliminary question if the resolution of the specific case does not depend on the constitutional court's answer (e.g., Germany, Italy, Poland and San Marino).

96. The Venice Commission considers that **these filters for preliminary requests are acceptable since ordinary courts entitled to initiate preliminary question proceedings may be expected to formulate a valid question when the outcome of their decision depends on the constitutionality of a legal provision that they have to apply in a given case.**

10. Joinder of similar cases

97. In some countries, applications relating to the same question may or must be dealt with in one single proceeding (e.g., Armenia, Austria, Chile, the Czech Republic, Latvia,[106] Lithuania, North Macedonia, Russia, Slovakia, Slovenia, South Africa,[107] Ukraine and the United States of

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[101] See, for instance, Art. 59 Law on the Constitutional Court of Montenegro and Section 38 of the South African Constitution.
[102] Refusal of an application in this case cannot be appealed.
[103] A case may be dismissed, if a successful application would not alter the applicant's situation. However, generally, requirement of redressability (the so-called *Rechtsschutzbedürfnis*) is presumed to be fulfilled.
[104] See *S v Shaik and Others*, CCT 86/06, 02 October 2007, ZACC 19, in CODICES.
[105] *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).
[106] Section 22(6) of the Constitutional Court Law: "To promote the comprehensive and timely adjudication of a case, the merging of two or more cases into one case shall be permissible as well as the division of one case into two or more cases."
[107] See Constitutional Court of South Africa, Decision CCT 24/08 and CCT 52/08, 21 January 2009, in CODICES.

America). In Israel, petitioners may ask the Court to join their petition with a different one addressing similar claims.

98. **If there is a large quantity of quasi-identical cases, the court should be able to decide one or more paradigmatic cases and simplify the procedure for similar claims both concerning inadmissibility and the legal justification**.

B. Selection of cases by constitutional courts

99. In addition to formal procedural rules limiting the number of complaints, constitutional courts have various degrees of discretion in selecting their cases. One side of the spectrum is the United States Supreme Court, which has complete discretion in deciding which cases to admit for review. An individual cannot, as a matter of right, appeal to the US Supreme Court. Instead, he or she must file a writ of *certiorari*. The Court will pick the cases it deems relevant for protecting the constitutional order or for developing its case-law.[108] These writs of *certiorari* are also applied in other countries such as in Argentina.[109]

100. At the opposite end of the spectrum are countries which grant their constitutional courts relatively little discretion in dismissing cases. Still, Germany,[110] Hungary,[111] Slovenia[112] and Spain[113] enable their constitutional court to dismiss complaints that do not raise questions of constitutionality of sufficiently general significance. The Spanish Constitutional Court has interpreted this provision broadly, thereby widening its discretion to dismiss cases. In this respect, the German practice is remarkable. Applications that are at first sight not identified as constitutional complaints are put into a "general register", and not directly into the proceedings register. The applicant is then contacted through an informal letter informing him or her of the possibility of requesting that the application be further dealt with by the Constitutional Court. If the applicant insists on a decision by the Court, the request will be placed in the proceedings register, if not, it remains in the general register.[114] As a consequence, many applications can be dealt with without actually rejecting the complaints and without the need of involving a judge at this stage of the proceedings. In South Africa, the Constitutional Court may hear a direct access

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[108] US Supreme Court Rule 10: "Review on a writ of *certiorari* is not a matter of right, but of judicial discretion. A petition for a writ of *certiorari* will be granted only for compelling reasons."

[109] Art. 280 of the Civil and Commercial Procedure Code.

[110] Art. 93(a) of the Law on the Federal Constitutional Court states that "(1) A constitutional complaint shall be subject to admission for decision. (2) It shall be admitted a) in so far as it has general constitutional significance, b) if it is appropriate to enforce the rights referred to in § 90(1); this may also be the case if the complainant would suffer a particularly severe disadvantage if the Court refused to decide on the complaint."

[111] According to Section 29 of the Act CLI of 2011 on the Constitutional Court: "The Constitutional Court shall admit constitutional complaints if a conflict with the Fundamental Law significantly affects the judicial decision, or the case raises constitutional law issues of fundamental importance."

[112] Art. 55(b)(2) of the Constitutional Court Act states that: "The constitutional complaint is accepted for consideration:

− if there is a violation of human rights or fundamental freedoms which had serious consequences for the complainant; or

− if it concerns an important constitutional question which exceeds the importance of the concrete case."

[113] According to Art. 50(1) of the Organic Law on the Constitutional Court: "The Section, by unanimous vote, shall agree the admission of the appeal in whole or in part by non-reasoned order (*providencia*), only where the following requirements concur: … b) That the case in appeal justifies a decision about the content by the Constitutional Court because of its special constitutional significance (*especial transcendencia constitucional*), which shall be seen in terms of its relevance for the interpretation and application of the Constitution, or for the effectiveness thereof, and for determining the content or scope of fundamental rights."

[114] See *Merkblatt über die Verfassungsbeschwerde zum Bundesverfassungsgericht*, available at: http://www.bundesverfassungsgericht.de/DE/Homepage/_zielgruppeneinstieg/Merkblatt/Merkblatt_node.html.

application or an appeal if it raises a constitutional issue or contains some other arguable point of law of general public importance, which the court ought to hear.[115] Enquiring into whether the Constitutional Court should admit a case involves a number of sub-enquiries, including: the prospects of success; the interest of the public in the matter; and whether the Supreme Court of Appeal has had the opportunity to pronounce its views on the matter. In some of these countries there is an on-going discussion on whether the constitutional court should be granted more discretion in deciding which cases to review (e.g., Slovenia).

101. The advantage of writs of *certiorari* is that constitutional courts can control their caseload (docket) and rarely run the risk of being overburdened. The obvious downside of writs of *certiorari* is the diminished effectiveness of the legal remedy with regard to the protection of individual rights. However, in the absence of *certiorari* or an equivalent an unmanageable workload may lead the constitutional court to create alternative mechanisms limiting its caseload (e.g., a very extensive handling of the requirements of admissibility). The use of such mechanisms will usually be clandestine and may even be denied by the courts. Hence, if the workload becomes unbearable, a way to select those cases, which deserve a thorough analysis by a constitutional court, could be provided for without giving up on the principle of individual human rights protection.

C. Adjudication in chambers

102. A system of division of labour between the plenary, panels and chambers of different sizes may further help to alleviate the risk of overburdening constitutional courts.[116] Smaller panels of judges may decide admissibility decisions, while the size of the panels could increase with the importance of the substantive issues of a case. The Venice Commission considers that **there need to be clear rules to avoid any possibility of bias in the allocation of cases to the chambers or in the composition of panels. Automatic case allocation is the best means of achieving this because it can take into account the specialisation of the chamber or of the judges.**[117]

103. In States where individuals have a right to apply to the constitutional court, very often, smaller panels of judges decide admissibility issues. These panels then deny review if the application has any prospect of success (e.g., Austria, Germany and Slovenia) or does not fulfil any of the more formal admissibility requirements (e.g., Chile). For instance, in Israel, a panel of three justices may dispose of a petition if it finds that it is without merit or groundless on its face.[118] This leads to an immediate reduction in the constitutional court's workload because admissibility proceedings require a lesser degree of formality. In Germany, the individual complaints require acceptance by a chamber of three judges (or by one of the Senates) under § 93 a of the Federal Constitutional Court Law. The smaller chamber is entitled to decide on the case according to § 93 c (1), if it is clearly justified and the constitutional issue determining the case has already, in principle, been decided upon by one of the larger Senates.

104. The sizes of the panels of judges differ significantly across the constitutional courts considered in this report. Panels may range from three to eleven judges. In many countries, panels consist of up to six judges (e.g., Austria, Bosnia and Herzegovina, the Czech Republic,

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[115] Section 167(3) of the Constitution provides that the Constitutional Court may decide only constitutional matters and issues connected with decisions on constitutional matters. The Court itself makes the final decision whether a matter is a constitutional matter.

[116] This report only discusses the bodies (e.g., plenary, panels, chambers) deciding matters related to individual access.

[117] Venice Commission, CDL-AD(2011)040, Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey, para. 39.

[118] Art. 5 of the High Court of Justice Procedural Regulations.

Croatia, Estonia, Georgia, Hungary, Luxembourg, Malta, Monaco, Montenegro,[119] Norway, Poland, Slovakia, Spain, and Switzerland). In some states, the constitutional court will take all decisions in the plenary (e.g., Albania,[120] Armenia, Chile, Cyprus,[121] Greece, Latvia, Liechtenstein, North Macedonia, Romania and Slovenia[122]). In other States, the size of the panel varies based on the importance of the case. For instance, in Israel, the Supreme Court usually sits in panels of three judges, unless the President of the Supreme Court or the Deputy President finds it necessary, prior to the oral argument, to expand the panel to any uneven number of judges. In addition, each panel has the power to decide to expand its size if it finds that the petition raises important or precedential issues. In Portugal, when the Constitutional Court is not sitting in plenary, its chambers are composed of one, three, or five judges.

105. The Venice Commission considers that **the creation of smaller panels of judges deciding cases on their merits can be a useful method for alleviating the court's caseload, where the plenary only acts if new or important questions need to be decided.**[123] **Importantly, the law establishing the constitutional court should provide for the possibility of a decision by the plenary if there are conflicting decisions by the chambers.**[124] In this way, decisions by a plenary ensure that the unity of the constitutional court's jurisprudence is preserved. However, the Venice Commission recommends that **a chamber be able to transfer a case to the plenary session if it relates to an issue of major constitutional significance. The plenary session should however be able to reject such a request from a chamber.**[125]

D. Appeals against inadmissibility decisions

106. Appeals against inadmissibility decisions may be beneficial for establishing a common approach with regard to the admissibility criteria. However, the Venice Commission is aware that such appeals could lead to an overburdening of the constitutional court.

107. **One means to avoid overburdening constitutional courts with appeals could be to provide that the petition may be declared inadmissible only with unanimous vote of a**

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[119] Art. 151 of the Constitution of Montenegro. See Venice Commission, CDL-AD(2014)033, Opinion on the draft Law on the Constitutional Court of Montenegro, paras. 39-40.

[120] According to Art. 31 of the Law on the Constitutional Court: "(1) The application is preliminary discussed at a panel composed of 3 (three) judges of the Constitutional Court, including the one who relates the case. […] (3) When the application is presented by a legitimate entity and it is within the powers of the Constitutional Court, the panel decides to present it to the hearing session. If the application is not under the powers of the Constitutional Court, the panel decides to reject the application from the hearing session. In any case, if either of the judges of the panel presents a descending opinion, the application is to be presented to the preliminary meeting of all the judges, which then, on majority of votes decides to accept or reject the application from the hearing session."

[121] When the president of the Republic of Cyprus refers a law to the Constitutional Court prior to its promulgation in order to assess its constitutionality, the Constitutional Court sits in plenary session. Similarly, in important cases involving constitutionality issues, all the members of the Supreme Court hear the case. In other cases (e.g., appeal cases), the Supreme Court sits in panels of three or five judges.

[122] However, a panel of three judges decides whether to accept a constitutional complaint for consideration on the merits (Art. 55(c) of the Constitutional Court Act).

[123] Venice Commission, CDL-AD(2011)010, Opinion on the draft amendments to the Constitution of Montenegro, as well as on the draft amendments to the law on courts, the law on the state prosecutor's office and the law on the judicial council of Montenegro, para. 25; Venice Commission, CDL-AD(2004)024, Opinion on the draft constitutional amendments with regard to the Constitutional Court of Turkey, para. 14; Venice Commission, CDL-AD(2018)012, Amicus curiae brief for the constitutional court of Georgia on the effects of constitutional court decisions on final judgments in civil and administrative case, para. 29.

[124] Venice Commission, CDL-AD(2004)024, Opinion on the draft constitutional amendments with regard to the Constitutional Court of Turkey, para. 13.

[125] Venice Commission, CDL-AD(2017)001, Opinion on Questions Relating to the Appointment of Judges of the Constitutional Court of Slovak Republic, para. 42.

panel of judges and providing a requirement to transfer the case to the Chamber if the judges disagree on the issue.[126] The Venice Commission considers that **countries should only remove the possibility to appeal against inadmissibility decisions if the number of petitions and appeals is so high as to paralyse the operation of the constitutional court.**

VI. REMIT OF CONSTITUTIONAL JUSTICE

108. Constitutional review proceedings triggered through individual access are exclusively, or at least primarily, focused on individual rights provided for by the constitution. In order to guarantee the protection of these rights, various laws on constitutional courts provide for certain procedural safeguards. Constitutional courts may sometimes decide to broaden the scope of their review in order to provide for a better implementation of constitutional provisions beyond the individual case. Proceedings may be discontinued if the petition is withdrawn, if the challenged act loses its validity, or if a time-limit for taking the decision has passed.

A. Substantive rights

109. Insofar as individual access to constitutional justice is concerned, constitutional review is exclusively, or at least primarily, focused on fundamental rights. All constitutions considered in this report contain a number of fundamental rights or refer to a catalogue of fundamental rights that are given constitutional, or at least supra-legislative, status. As stated in the French Constitution of 1791, in order to be relevant for individual access, the constitutional texts must necessarily set out, either as part of the text or as an appendix, a number of defined human rights.

110. However, not all rights entrenched in constitutions serve as review standards in all cases. Parts of the rights catalogues are of a programmatic nature, which means that individuals are not given a judicial remedy against the violation of such programmatic norms or national objectives. This has traditionally been the case for economic, social and cultural rights, which have been often considered to be non-justiciable as a result. However, courts have increasingly found ways to assess the progressive realisation of these rights.[127] For instance, the South African Constitutional Court assesses whether the State is meeting its obligations towards progressive realisation by considering whether the steps taken by the Government are *reasonable*.[128] In line with this recent trend towards greater judicial enforcement of economic, social and cultural rights, the newly introduced individual complaint mechanisms in Ukraine and Lithuania allow individuals to initiate constitutional review with regard to all rights contained in the constitution, including social and economic rights.

111. Protected rights are not necessarily inscribed in the Constitution[129] or designed to be judicially enforceable but can be a product of jurisprudential creativity. The fundamental importance of a provision can be "discovered" by jurisprudence. Here, the approach of the French Constitutional Council is particularly noteworthy: It enlarged the circle of protected rights by

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[126] Venice Commission, CDL-AD(2014)020, Opinion on the Draft Constitutional Law on Introduction Amendments and Additions to the Constitutional Law on the Constitutional Chamber of the Supreme Court of Kyrgyz Republic, paras. 15-16.

[127] International Commission of Jurists (ICJ), *Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative Experiences of Justiciability*, 2008, Human Rights and Rule of Law Series No. 2, available at: https://www.refworld.org/docid/4a7840562.html; Langford, M. (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge University Press, 2008.

[128] See, for instance, Constitutional Court of South Africa, *Mazibuko and Others v City of Johannesburg and Others*, CCT 39/09, 08 October 2009, ZACC 28, in CODICES.

[129] In several countries, the catalogue of human rights is not exclusive but open-ended, e.g., according to Art. 55 of the Russian Constitution, the list of fundamental rights and freedoms in the Constitution shall not be interpreted as a denial of or derogation from other universally recognised human and civil rights and freedoms.

attributing constitutional value to texts that had been merely declaratory before, such as the Declaration of the Rights of Man and of the Citizen of 1789 or the Preamble to the 1946 Constitution.

112. International Human Rights treaties,[130] and in particular the European Convention on Human Rights for member States of the Council of Europe, enjoy different legal ranks in the countries included in this report. For instance, in Austria, the European Convention on Human Rights has a constitutional status. The same applies to San Marino. In France, Italy,[131] Liechtenstein, North Macedonia[132] and Slovenia the European Convention has infra-constitutional, but supra-legislative rank. In Germany, the European Convention and its protocols merely have the status of federal German laws (*Gesetzesrang*). However, European Convention and the European Court of Human Rights' case-law serve as interpretive aids for determining the content of constitutional rights and principles and observing them is considered to be part of rule of law.[133]

113. By contrast, in the Netherlands, Acts of Parliament (as opposed to other acts of legislation), which cannot be reviewed as far as their constitutionality is concerned, may be reviewed in the light of international treaties, including the European Convention on Human Rights. Thus, reference to international human rights treaties constitutes the only way for individuals to have legislation reviewed for its impact on their fundamental rights.

114. The openness of most Latin American constitutions to international laws and to human rights treaties, such as the American Convention on Human Rights, has sometimes led their courts to consider that international treaties are even above their constitutions (e.g., Colombia[134]). In Bosnia and Herzegovina, the European Convention on Human Rights "shall prevail over all laws",[135] which could mean that it stands above the Constitution.[136] So far, the Bosnian Constitutional Court has not rendered a final judgment on this question.[137]

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[130] Art. 16(2) of the Portuguese Constitution reads: "The provisions of this Constitution and of legal precepts concerning fundamental rights shall be interpreted and completed in accordance with the Universal Declaration of Human Rights". The status of an interpretative standard in matters concerning fundamental rights is therefore attributed to the Universal Declaration of Human Rights and not the European Convention on Human Rights. Unlike the latter, the Universal Declaration of Human Rights is not an international treaty. In Portugal, the position taken by both doctrine and jurisprudence is that fundamental rights must be interpreted in accordance with the various international human rights instruments, on condition that the preference accorded to the rules set out in the latter results in the primacy of rules which enshrine a superior level of protection for fundamental rights.

[131] See decisions nos. 348/2007 and 349/2007 of the Italian Constitutional Court, after the 2001 amendment to Art. 117 of the Italian Constitution.

[132] Art. 118 of the Macedonian Constitution states: "international agreements ratified in accordance with the Constitution are part of the internal legal order and cannot be changed by law". See also Spirovski I., "Constitutional Validity of Human Rights Treaties in the Republic of Macedonia: The Norms and the Courts", World Conference on Constitutional Justice in Cape Town, 2009.

[133] BVerfGE 111, 307, 14 October 2004, 2 BvR 1481/01.

[134] Art. 93 of the Constitution of Colombia states that: "International treaties and conventions ratified by Congress, which recognise human rights and prohibit their limitation in states of emergency, prevail in the domestic order. The rights and duties enshrined in this Charter shall be interpreted in accordance with the international treaties on human rights ratified by Colombia".

[135] Art. II.2 of the Constitution.

[136] See Marko, J., "Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance", *European Diversity and Autonomy Papers,* Vol. 7/2004, 2004, p. 11, available at: http://www.eurac.edu/documents/edap/2004_edap07.pdf.

[137] Venice Commission, CDL-AD(2008)027, Amicus curiae brief in the cases of ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* (Applications no. 27996/06 and 34836/06).

115. In some states (e.g., Belgium, Brazil, Germany, Hungary,[138] Liechtenstein, North Macedonia Peru, Poland, Slovenia and South Africa), the constitutional court may – following an individual application – address violations resulting from omissions[139] or fill a legislative gap through constitutional interpretation.[140]

B. Procedural safeguards

116. In order to ensure that individuals have effective access to constitutional justice and that their substantive rights are guaranteed, various laws on constitutional courts codify certain procedural safeguards. The most common ones are adversariality, publicity and the conduct of oral proceedings.

1. Adversariality

117. Constitutional proceedings can be either adversarial or inquisitorial. Various laws on constitutional courts provide that the proceedings before that court are adversarial (e.g., Andorra, Austria, Azerbaijan, Chile, the Czech Republic, France, Italy,[141] Georgia, Lithuania, Luxembourg, Poland, Russia, San Marino, South Africa, Ukraine and United States).

118. The advantage of an adversarial approach in constitutional proceedings is that the court can take note of different viewpoints and consider opposing arguments. It should be noted, however, that constitutional proceedings are often not adversarial enough for these benefits to come into effect. As the Venice Commission observes, state organs may not always be an appropriate adversarial party because they might not have a real interest in defending the constitutionality of the adopted act due to political reasons. Therefore, some constitutional justice systems work in an inquisitorial way, with the Constitutional Court establishing arguments in favour and against constitutionality of the challenged provision.[142] Still, even in inquisitorial proceedings, the parties of the original conflict as well as representatives of interest groups, experts and representatives of the executive and the legislature may be given the opportunity to present their opposing views. Alternatively, the constitutional court may to carry out an investigation on its own motion by going beyond the arguments put forward by the parties in order to determine the truth.[143]

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[138] See Section 46 of the 2011 Constitutional Court Act: "If the Constitutional Court, in its proceedings conducted in the exercise of its competences, declares an omission on the part of the law-maker that results in violating the Fundamental Law, it shall call upon the organ that committed the omission to perform it task and set a time-limit for that."

[139] This can cause conflict with parliament, as the constitutional court reviews to what extent parliament has failed to implement legislation. Thus, in Portugal, individual complaints against omissions are excluded, even if the Constitutional Court has the power to conduct abstract review on omissions (see Art. 283 of the Portuguese Constitution). See General Report of the XIVth Conference of European Constitutional Courts, available at: https://www.venice.coe.int/files/Bulletin/SpecBull-legislative-omission-e.pdf.

[140] The ability of constitutional courts to take up an unconstitutional inactivity of the legislature and at least fill a gap through interpretation exists, e.g., in Liechtenstein.

[141] In the proceedings before the Italian Constitutional Court, the parties to the original proceeding may stand before the Court. The State is represented by the Advocate General who, as a rule, defends the law.

[142] Venice Commission, CDL-AD(2014)017, Opinion on the Draft Constitutional Law on the Constitutional Court, of Tajikistan, para. 35.

[143] Venice Commission, CDL-AD(2002)005, Opinion on the draft Law on the Constitutional Court of Azerbaijan.

119. **The Venice Commission considers it to be important that an applicant[144] or an initiator of inquisitorial proceedings[145] be given the possibility to address the constitutional court. The Venice Commission is also in favour of the provisions in Germany[146] and Spain, according to which, in cases where the constitutional complaint is directed against a court decision, the court should give the party in whose favour the decision was taken an opportunity to make a statement**.[147] Courts, on the other hand, do not need to be heard if their decision is being reviewed, as their judgment reflects their position, but they are sometimes assimilated to parties in preliminary ruling proceedings (e.g., Austria, Poland, Slovakia and Slovenia).

120. Adversariality does not necessarily require oral hearings. Constitutional complaint proceedings most commonly take place in written form, with each party submitting its arguments in writing.[148]

2. Publicity

121. Oral hearings in constitutional proceedings are usually public, unless other legitimate public and party interests outweigh the requirement of publicity (e.g., Albania, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Chile, Croatia, Cyprus, the Czech Republic, Denmark, France, Georgia, Germany, Hungary, Israel, Italy, Latvia, Liechtenstein, Lithuania, Kosovo, North Macedonia, the Republic of Moldova, Poland, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, South Africa, Switzerland and Turkey).

122. The requirement of publicity is intended to enable public scrutiny in order to protect individuals against arbitrariness in the administration of justice. From the perspective of human rights protection, **any oral proceedings before the constitutional court should be public, subject to restrictions only in narrowly defined cases.**

3. Oral proceedings

123. In the countries under review in this report, proceedings are either entirely written or are partially written and partially oral. For instance, in Portugal, there are written proceedings only.[149] In many countries, constitutional courts may decide whether to have partially oral proceedings. For instance, in South Africa, the Constitutional Court may decide an application on the basis of the parties' sworn submissions or written argument only and directions will be issued if an additional oral argument is required. In practice, constitutional courts often dispense with oral proceedings.

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[144] Venice Commission, CDL(1997)018rev, Opinion on the Law on the Constitutional Court of Ukraine, para. 4.

[145] Venice Commission, CDL-STD(1993)002, "Models of constitutional jurisdiction", *Science and Technique of Democracy*, no. 2, p. 14.

[146] Art. 94(3) Law on the Federal Constitutional Court: "If the constitutional complaint of unconstitutionality is directed against a court decision, the Federal Constitutional Court shall also give the party in whose favour the decision was taken an opportunity to make a statement."

[147] Venice Commission, CDL-AD(2008)030, Opinion on the Draft Law on the Constitutional Court of the Republic of Montenegro, para. 42. Moreover, in Albania, Andorra, Austria, Belarus, Belgium, Cyprus, Czech Republic, Germany, Italy, Latvia, Romania and North Macedonia, the parties in the ordinary proceeding can become parties in the review proceeding.

[148] Venice Commission, CDL-AD(2004)035, Opinion on the Draft Federal Constitutional Law "On Modifications and Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation", para. 10.

[149] In Portugal, there is only one exception to this rule for cases when the Constitutional Court is asked to declare that an organisation expounds a fascist ideology: If the organisation is abolished, a trial hearing must be held.

124. In some countries, on the other hand, proceedings are both written and oral (e.g., Albania, Austria, Azerbaijan, France in the context of *a posteriori* review, Israel, Italy, Latvia, Liechtenstein, the Netherlands, North Macedonia, Slovenia, South Africa, Ukraine and the United States). In countries with diffuse constitutional review, it is not surprising that proceedings are usually oral, as ordinary procedural rules apply (e.g., Denmark and the United States). In the Czech Republic, Germany,[150] Hungary, Slovenia,[151] Sweden and Switzerland, proceedings before the constitutional court may be oral, but are mostly written.

125. The advantage of oral hearings is the direct involvement of the parties, enables their direct contact with the judges and a more direct confrontation of viewpoints. Moreover, it is sometimes easier for a person to express his or her position orally, without having to comply with the strict formal rules applicable to written proceedings. As a result, they can improve the quality of judicial decision-making because the judges obtain a more immediate impression of the facts, of the parties and of their divergent legal opinions. Oral hearings also serve the core democratic value of transparency. They serve as a form of democratic control of the judges by public supervision. Oral hearings thereby reinforce the confidence of the citizens that justice is dispensed independently and impartially.[152] On the other hand, as it is important in oral proceedings for the parties to be given an effective possibility to present their viewpoints, oral proceedings are very time-consuming.

126. The Venice Commission notes that **the possibility is widely accepted for a constitutional court to suspend or limit oral proceedings if this is necessary to safeguard the parties' or the public interest such as procedural efficiency** (time and costs of proceedings).[153] **In countries with concentrated review, the constitutional court should be able to decide whether to hold oral hearings in order to avoid an overburdening of the court with individual complaints.**[154]

C. Scope of review

127. In most systems studied here, constitutional courts have some discretion regarding how they conduct reviews. Once the constitutional court has admitted a petition (all or in part), the scope of review cannot be reduced. In order to review the constitutionality of a norm, constitutional courts must first determine its content. Once they have done so, they may decide to extend the scope of review beyond the explicit terms of the request or they may extend the range of norms applied as review standards beyond those mentioned in the constitutional complaint. Individual cases often serve as means to learn about shortcomings of the constitutional order more generally. Therefore, granting constitutional courts the ability to extend

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[150] Jaeger, R. and Broß, S., *"Die Beziehungen zwischen den Verfassungsgerichtshöfen und den übrigen einzelstaatlichen Rechtsprechungsorganen, einschließlich der diesbezüglichen Interferenz des Handelns der europäischen Rechtsprechungsorgane"*, Report for the XII[th] Conference of European Constitutional Courts, p. 22.

[151] Art. 57 of the Constitutional Court Act states: "If a constitutional complaint is accepted, as a general rule it is considered by the Constitutional Court at a closed session, or a public hearing may be held."

[152] Venice Commission, CDL-AD(2004)035, Opinion on the Draft Federal Constitutional Law 'on modifications and amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation', para. 4.

[153] *Ibidem*, para. 10.

[154] See, for example, Venice Commission, CDL-AD(2008)029, Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan, para. 44; see also Venice Commission, CDL-AD(2014)017, Opinion on the Draft Constitutional Law on the Constitutional Court of Tajikistan, para. 36.

the scope of review allows them to extend constitutional protections beyond the individual case.[155]

1. Interpreting the norm under review

128. Constitutional courts may take different interpretative approaches to the acts they are interpreting. The most common approach is the presumption of constitutionality (also called *"réserve d'interprétation"* or *"verfassungskonforme Auslegung"*).[156] According to this approach, the constitutional court presumes that a normative act is constitutional unless there is no reasonable interpretation of the provision that would render it so, and provides an interpretation of the act which renders it constitutional. In this way, judges may be understood to exercise judicial restraint by avoiding invalidating laws unless they are obviously unconstitutional. By contrast, the Italian Constitutional Court took the opposite approach and developed the concept of *"diritto vivente"* (living law). The constitutional judge interprets a contested legal provision as it is "usually" interpreted by the ordinary courts and decides that it is unconstitutional based on this common interpretation, even if the provision could also be interpreted in a constitutional manner.[157]

129. In the context of preliminary requests, constitutional courts either defer to the interpretation of the requesting court or they give their own interpretation. None of the constitutional courts considered in this report are strictly bound by the interpretation of the reviewed regulation given by the referring court, with the exception of Portugal, where the Constitutional Court has consistently stated that its review following preliminary requests is limited by the referring court's interpretation of the rule under consideration. The Austrian, Belgian and Spanish constitutional courts will, in principle, apply the interpretation contained in the referral, except if another interpretation could be in line with the Constitution. The German Federal Constitutional Court is bound to follow the decisions of the ordinary courts, unless there are errors on the face of the decisions which – apart from the prohibition of arbitrariness – are based on a fundamentally erroneous view of the meaning and scope of a fundamental right.[158] In addition, the German Constitutional Court is entitled to ask the highest federal and regional courts to submit information on the way they interpret the relevant norm and on the reasons given for their interpretation.[159]

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[155] Wojciech Sadurski argues that even if review is related to a concrete case, the continental European constitutional courts follow abstract considerations in assessing the law. Unlike, for instance, the US Supreme Court, European review techniques are based on Kelsen's idea of cleaning the legal order. Therefore, according to Sadurski, constitutional courts do not decide on the merits of the individual case (Sadurski W. (ed.) *Constitutional Justice East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*, Kluwer Law International, 2003, pp. 453 and Sadurski, W. (ed.) *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2nd ed.) Springer Netherlands, Dordrecht, 2014, pp. 470).

[156] In Armenia, for instance, Art. 69(10) of the Constitutional Law on the Constitutional Court states that: "The final judicial act issued in respect of the applicant in the cases referred to in this article shall be subject to review in the manner prescribed by law on the basis of a newly revealed circumstance in the event that the provision of the regulatory legal act applied to the applicant is found to be contrary to the Constitution and invalid, as well as when in its interpretation having recognised this provision as consistent with the Constitution, the Constitutional Court will simultaneously consider that it was applied in a different interpretation with respect to the applicant.
According to Art. 69(11) - Part 10 of this article also applies to persons who, as of the day the application was registered with the Constitutional Court, still retained their right to appeal to the Constitutional Court on the same issue, but did not appeal to the Constitutional Court."

[157] Thus, a law that has consistently been interpreted in an unconstitutional manner is annulled and Parliament is obliged to adopt a new law which will (hopefully) be interpreted in a constitutional manner.

[158] BVerfG, 1 BvR 1804/03 of 07 December 2004, para. 50.

[159] Art. 82 of the Law on the Federal Constitutional Court. According to Art. 82(4), sentence 1, this applies not only to the federal supreme courts, but also to the supreme courts of the *Länder*.

2. Extension of norms under review

130. In relation to requests to review normative acts, the constitutional court can decide to review the constitutionality not only of a challenged provision, but also, under certain conditions, the whole law or act, and it may decide to review other normative acts that are related to the original normative act under review (e.g., Croatia, Estonia,[160] Germany,[161] Hungary, Italy,[162] Liechtenstein, Lithuania,[163] North Macedonia, the Republic of Moldova, Romania, Serbia, Slovenia,[164] South Africa, Spain and Ukraine). In Turkey, the Constitutional Court may extend the scope of norms under review only in exceptional cases where the annulment of the originally challenged norms renders another norm or part of the norm meaningless or inapplicable.[165]

131. By extending the range of norms under review, constitutional courts combine the two functions of constitutional review: In addition to protecting individual rights, it takes the original application as an opportunity to carry out a more general review leading to clearing up the constitutional order by removing other unconstitutional provisions. For instance, according to Article 87 of the Russian Law on the Constitutional Court, a decision that a provision is unconstitutional will lead to the annulment of all other norms based on it or which reproduce or contain the same provision as the one held unconstitutional.[166]

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[160] E.g., Supreme Court judgment no. 3-4-1-7-08, available at: https://www.riigikohus.ee/en/constitutional-judgment-3-4-1-7-08.

[161] The Court may do so on the basis of Art. 78, sentence 2, of the Law on the Federal Constitutional Court, which applies to the abstract review of statutes.

[162] In Italy, the Constitutional Court has developed a wide range of so-called "interpretative decisions", very often rejecting claims which challenged a legal norm or act as unconstitutional, doing so on the basis of the incorrect interpretation of the law adopted by the judge *a quo*. The Constitutional Court established, then, that a different interpretation of the *legal* provision made it constitutional (these are the "*sentenze interpretative di rigetto*"). Interpretative decisions are formally binding only on the judge *a quo*, but not for the other courts and judges. Judges who do not want to follow the interpretation established by the Constitutional Court, may not, however, apply the same interpretation, which the Constitutional Court already considered unconstitutional. They must submit a new preliminary request to the Constitutional Court, explaining their different interpretation of the same norm. The Constitutional Court must, in these cases, decide whether this new interpretation proposed by the judge *a quo* is valid and constitutional and if it is, it delivers a "*sentenze interpretative di accoglimento*" (an interpretative decision accepting the different interpretation as in conformity with the Constitution). When the Constitutional Court rejects the interpretation proposed by the judge *a quo*, it issues a warning decision addressed to Parliament, in order to provide the legislator with guidance and suggestions on how to render the legislation compliant with the Constitution (and exclude possible unconstitutional interpretations). If the Court considers that the judge *a quo* was right and that the legal provision submitted is unconstitutional, the provision is no longer valid. The Constitutional Court can then "fill in" the lacuna itself (*sentenze additive*) or provide a general principle the judge *a quo* must apply to the specific case (*sentenze additive di principio*).

[163] The Court holds that "The Constitutional Court, having established that the provisions of a law the compliance with the Constitution of which is not disputed by the petitioner but by which the social relations regulated by the disputed law are interfered with conflict with the Constitution, must state so" (Rulings of 9 November 2001, 14 January 2002, 19 June 2002, 27 June 2007, 3 March 2009, 2 September 2009).

[164] Art. 59(2) of the Constitutional Court Act.

[165] Art. 43(4) of the Law on Establishment and Rules of Procedures of the Constitutional Court.

[166] Art. 87 of the Russian Law on the Constitutional Court states that: "The recognition of a federal law, a regulatory act of the President of the Russian Federation, a regulatory act of the Government of the Russian Federation, an agreement or individual provisions thereof as being inconsistent with the Constitution of the Russian Federation shall be the basis for annulment in due course the provisions of other regulatory acts or agreements based on a regulatory act or agreement deemed unconstitutional in whole or in part or reproducing them or containing the same provisions as those deemed unconstitutional."

3. Extension of the circle of grievances

132. In order to render its decision, the constitutional court must identify the impugned provision. Individuals with direct access often have difficulties in setting out the precise grounds on which they are bringing their application. In view of admitting a greater number of applications despite these errors, most constitutional courts may extend the circle of grievances by issuing decisions on another constitutional basis than the one invoked in the request (e.g., Albania, Austria, Bulgaria, the Czech Republic, Estonia,[167] Portugal, Slovenia and Spain).

133. Only some countries limit the constitutional court's scope of review to the original petition (e.g., Andorra,[168] Belgium,[169] Georgia,[170] Luxembourg, Montenegro,[171] Poland[172] and Switzerland[173]). This means that the constitutional court can invalidate an act only and with reference to the constitutional provision or principle that was mentioned in the petition. This can be problematic when inexpertly filed petitions do not clearly set out the basis on which an act is contested, or the challenged act itself, and thus have little chance of succeeding.

134. Extending the circle of grievances facilitates direct access since individuals often have difficulties in setting out the precise grounds on which they are bringing their application. Indeed, the applicant is generally not obliged to name the exact provision of the constitution. Instead, the violated norm must merely be identifiable on the basis of his or her complaint. This requirement can be stricter for legally advised complaints than for those brought by laypersons. The Venice Commission observes that **allowing constitutional courts to extend the circle of grievances enables them to better protect individual rights without overburdening constitutional courts.**

D. Discontinuation of the proceedings

135. Proceedings may be discontinued prior to reaching a final decision in three situations: i) if the petition is withdrawn; ii) if the challenged act loses its validity; or iii) if a time-limit for taking the decision has passed.

1. Discontinuation if the petition is withdrawn

136. Whether a constitutional court has the power to continue a case if the petition is withdrawn depends largely on whether the case concerns the constitutionality of an individual or a normative act. For individual acts, a simple withdrawal of the request by the applicant is usually sufficient for the case to be discontinued. However, the Constitutional Court of Slovakia has the power to refuse to permit a full constitutional complaint to be withdrawn. In Portugal, the view is that once a petition has been submitted, the petitioner no longer has the power to withdraw it.

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[167] E.g., Constitutional Court judgement, 3-4-1-11-08 of 25 February 2008, available at: https://www.riigikohus.ee/en/constitutional-judgment-3-4-1-1-08.

[168] Art. 7 Qualified Law on the Constitutional Court: "3. The decision or judgment determining a case, which has been declared admissible, may not contain considerations different from those submitted by the parties in their respective claims."

[169] C.A. n° 12/86, 25.03.1986, 3.B.1.

[170] Art. 26 Organic Law on the Constitutional Court: "The Constitutional Court shall not be authorised to discuss conformity of the whole law or other normative act with the Constitution, if the claimant or author of the submission demands only recognition of a particular provision of the law or other normative act as unconstitutional."

[171] Art. 75 of the Law on the Constitutional Court: The Constitutional Court decides on the violation of human rights or freedoms guaranteed by the Constitution cited in the constitutional complaint.

[172] Art. 66 of the Constitutional Tribunal Act: "The Tribunal shall, while adjudicating, be bound by the limits of the application, question of law or complaint."

[173] Art. 107 Federal Judicature Act: "*Le Tribunal fédéral ne peut aller au-delà des conclusions des parties.*"

137. In the case of the review of a normative act, the constitutional court does not necessarily discontinue proceedings if an application is withdrawn. The same applies to review of a normative act following a full constitutional complaint. If the constitutional court has the power to initiate a review of the normative act that underlies an individual decision or act, even if the individual complaint is withdrawn, the constitutional court may have the possibility to continue its review of the normative act. For normative acts, some laws on the constitutional court require the discontinuation of proceedings if the petition is withdrawn (e.g., Andorra, Austria,[174] Poland, Hungary, Russia, Serbia, Switzerland and Ukraine).

138. The Venice Commission considers that **the court should be able to continue to examine the case if this is in the public interest despite the application's withdrawal.**[175] This ability to continue expresses the autonomy of constitutional courts and their function as guardians of the constitution, even if the applicant is no longer party to the proceedings.

2. Discontinuation if the challenged act loses validity

139. There is no shared approach to whether a constitutional court should continue review proceedings when the act under consideration ceases to be valid. In some countries, the court terminates its review immediately (e.g., Andorra, Austria, the Czech Republic,[176] Belarus, France, North Macedonia,[177] Portugal, Slovakia,[178] Switzerland and Ukraine). In other countries, the decision to continue review proceedings in the face of an act's invalidity may be entirely at the court's discretion (e.g., Liechtenstein and Serbia) or it may be limited to certain circumstances only. For instance, in Poland and Russia, continuing review proceedings is permitted where this is necessary to prevent human rights violations. In Lithuania, the Constitutional Court is obliged to review any individual complaints or preliminary requests, regardless of whether or not the impugned law or other legal act is still in force.[179] In Italy, if the law under review has, in the meantime, been modified or substituted by another law, the case is returned to the judge who originally dealt with the question, who will then decide whether or not to re-submit the question of constitutionality, but this time in the light of the new law.

140. The Venice Commission considers that **the mere discontinuation of a case may not suffice to secure human rights protection in cases of preliminary requests or individual complaints if the human rights violation subsists.**

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[174] However, pursuant to Art. 139(2) and Art. 140(2) Federal Constitution Act, normative review proceeding initiated *ex officio* by the Constitutional Court on the occasion of other proceedings pending before it shall nevertheless be continued, even if the party of the proceedings that gave cause for the norm has received satisfaction.

[175] Venice Commission, CDL-AD(2011)050, Opinion on draft amendments and additions to the law on the Constitutional Court of Serbia, paragraph 41; Venice Commission, CDL-AD(2014)017, Opinion on the Draft Constitutional Law on the Constitutional Court of Tajikistan, para. 54.

[176] Art. 67 of the Constitutional Court Act.

[177] In the practice of the Constitutional Court in North Macedonia, the Court terminates the procedure if the act under consideration ceases to be valid. But, Art. 47 para 1, line 1 of the Rules of Procedure of the Constitutional Court contains the possibility the Court to continue the proceedings. It states that the Constitutional court will end the procedure "if during the procedure, the law, other regulation or common act ceased to be effective, and there are [*sic*] no basis for the assessment of their constitutionality, i.e. constitutionality and legality during the effectiveness" (available at: http://ustavensud.mk/?page_id=5211&lang=en).

[178] The Constitutional Court of Slovakia has admitted for the first time and contrary to its previous practice on this matter, the possibility for ordinary courts to challenge a normative act which is no longer a valid part of the legal order, but still has to be applied to a specific case. In Italy, the Constitutional Court will scrutinise the challenged law even if it has been annulled by a subsequent law, if it is still applicable *ratione termporis*.

[179] See the ruling of the Constitutional Court of 25 November 2019 concerning individual complaints and the Decision of the Constitutional Court of 27 March 2009, part I of the Court's reasoning, point 8, concerning preliminary requests.

3. Time-limits for taking the decision

141. In order to avoid significant backlog, some countries have opted for time-limits for the taking of decisions. For example, in Belgium, the Constitutional Court must decide cases within six months of their registration. This deadline can be extended to a maximum of one year.[180] However, the Venice Commission observes that "any imposition of an obligation to hold a hearing and to decide – in a strict chronological order risks not being in compliance with European standards. There must be room for the Constitutional Tribunal to continue and finish deliberations in certain types of cases earlier than in others".[181]

142. **Time-limits for the adoption of decisions, if they are established, should not be too short so as to provide the constitutional court with enough time to examine the case fully and should not be so long as to prevent the effectiveness of the protection of human rights *via* constitutional justice**. From the perspective of the effectiveness of constitutional justice, the complexity of a case and the time needed to settle it are often impossible to foresee. **The constitutional court should therefore be able to extend the mentioned time-limits in exceptional cases while still observing the duty to decide within a reasonable period of time**.[182]

VII. DECISIONS

143. The effects of final decisions issued by the constitutional court are quite varied. Constitutional courts may order different kinds of interim measures in addition to making final decisions. The decision can affect a different number of people depending on whether its effect is *inter partes* or *erga omnes* (*ratione personae* effect), it may go into effect at different points in time (*ratione temporis* effect) or it can resolve different types of issues (*ratione materiae* effect). The scope of the decision's effect as well as the possible retroactivity of a decision determines whether the grievance the individual is confronted with can be effectively removed. In principle, a constitutional court's decision of constitutionality is final.

A. Interim measures

144. In general, constitutional courts may order the adoption of different types of interim measures. In order to avoid further irreparable harm to the individual, courts may suspend the implementation of the challenged normative or individual act or order injunctive measures. Moreover, it may stay the ordinary proceedings where preliminary ruling procedures are initiated.

1. Injunctions and suspensions

[180] Venice Commission, CDL-AD(2016)001, Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, para. 66.
[181] *Ibidem*, para. 65. See also Venice Commission, CDL-AD(2016)034, Opinion on the Draft Law on the Constitutional Court of Ukraine, para. 48.
[182] For example, according to the Armenian Law on the Constitutional Court, the Constitutional Court adopts the decision no later than 6 months after registration of the appeal and provides a reasoned decision, the Constitutional Court may extend the time-limit for case examination, but for no longer than three months. In Chile, there are time-limits for almost every decision the Tribunal has to make. It must, within 10 days, deal with questions submitted by the President, any Chamber or a quarter of the members of any Chamber concerning any provision contained in a bill before its enactment. This limit is initiated by the resolution which declares the admissibility of the case. It may be extended for another 10 days for good reasons. Other time-limits are established in the Organic Law for other attributions. In all of them, the Tribunal must take a decision within 30 days, which may be extended by 15 days for good reasons.

145. In order to ensure that no further harm is done to the applicant, courts may either suspend the implementation of the challenged normative or individual act or they may order injunctive measures. Injunction in constitutional cases typically order public authorities to take positive action to ensure that no further harm is done to the applicant (e.g., Germany, Malta, Liechtenstein, South Africa and Switzerland).

146. Suspending the implementation of a challenged normative or individual act is a necessary extension of the principle of ensuring that individuals are protected from suffering irreparable damage. In many countries, the constitutional court has the power to impose such a suspension (e.g., Austria, Albania, Armenia, Austria, Belgium, Chile, Croatia, the Czech Republic, Estonia, Georgia, Germany, Latvia, Liechtenstein, North Macedonia, Montenegro, Poland, Serbia, Slovakia, Slovenia, Spain, Switzerland, Turkey and the United States). It may do so either *ex officio* or upon request of the applicant. In Russia, by contrast, the Constitutional Court may merely suggest to the relevant bodies that they suspend the implementation of a challenged act. Some countries, however, for the sake of legal security, do not allow the implementation of an act to be suspended (e.g., Algeria, Andorra, Azerbaijan, Belarus, Bulgaria, Cyprus, France, Luxembourg, the Republic of Moldova, Portugal, Sweden and Ukraine).

147. In countries with diffuse constitutional review, it is uncommon to suspend the implementation of a challenged normative or individual act (e.g., Denmark). In Lithuania, the Constitutional Court must suspend a challenged act following a request by the President of the Republic or the Parliament to investigate the constitutionality of the act,[183] but not where an ordinary court refers a preliminary question to it. In Italy, when the central state or a region request a preliminary ruling on the constitutionality of a law of the state or a normative regional act, the Constitutional Court may issue a reasoned order suspending the enforcement of the law if its implementation could be detrimental to the legal order or citizens' rights.[184]

148. **The Venice Commission favours giving constitutional courts the power to suspend the implementation of a challenged individual or normative act in cases where the implementation could result in irreparable harm.**[185] **The conditions for suspension should not be too strict.**[186] **However, especially for normative acts, the extent to which non-implementation could result in new damages and violations that cannot be repaired must also be taken into account.**

2. Stay of ordinary proceedings

149. In most countries, ordinary proceedings may be stayed where the ordinary court has referred a preliminary question with the constitutional court. In many countries, the submitting court stays its proceedings in any case (e.g., Albania, Andorra, Armenia, Austria, Belgium, Chile, Croatia, France, Germany, Georgia, Greece, Hungary, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, North Macedonia, San Marino, Slovenia, Switzerland, Turkey[187] and Ukraine).

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[183] Art. 26 of the Law on the Constitutional Court. The validity of the impugned act must be suspended once the Constitutional Court adopts the decision to accept the petition of the Parliament or the President of the Republic for consideration (see Art. 26 of the Law on the Constitutional Court of the Republic of Lithuania).

[184] Section 35 of law no. 87 of 11 March 1953, as amended in 2003.

[185] See, for instance, Venice Commission, CDL-AD(2004)024, Opinion on the draft constitutional amendments with regard to the Constitutional Court of Turkey, para. 47.

[186] Venice Commission, CDL-AD(2007)039, Comments on the Draft Law on the Constitutional Court of the Republic of Serbia, para. 23.

[187] In the case of Turkey, Art. 152 of the Constitution reads that "If a court which is trying a case, finds that the law or the decree having the force of law to be applied is unconstitutional, or if it is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it shall postpone the consideration of the case until the Constitutional Court decides on the issue. If the court is not convinced of the seriousness of the claim of unconstitutionality, such a claim together with the main judgment shall be

Some of these countries still allow ordinary courts to take decisions that would not be affected by the decision of the constitutional court or would not finally settle the issue and cannot be delayed until the decision of the Constitutional Court (e.g., Austria[188]).

150. In other countries, the proceedings before the ordinary court will not be interrupted unless it is necessary to resolve the constitutional issue in order to continue them. For instance, in Slovenia, the ordinary court is obliged to stay ordinary proceedings when the issue of constitutionality concerns a law, but in case of executive regulation ordinary courts may use the so-called *exceptio illegalis* and proceed with the case without applying the presumably unconstitutional provision that has a lower rank. Similarly, in Croatia, if the ordinary court has doubts about a law it is about to apply, it must stay the proceedings; if doubts concern an administrative regulation, the court applies the law on which the regulation is based directly without staying the proceedings, and refers the regulation to the Constitutional Court. In Andorra, the proceedings continue, but the possibility of rendering a judgment is limited: it must be established that the Constitutional Tribunal's decision will not affect the ordinary court's judgment.

151. In Spain, ordinary proceedings are not stayed. Instead, the ordinary court may submit the question only after the end of the proceeding and before deliberating on the judgment. Therefore, the judgment is still subject to a decision by the Constitutional Court, even if ordinary proceedings continued despite doubts as to the constitutionality of a provision. This method saves time and helps to reduce the total length of proceedings.

152. **It must be ensured that the ordinary judge does not have to apply a law, which he or she holds to be unconstitutional and the constitutionality of which is to be decided by the constitutional court with regard to the same case**.[189] The Venice Commission considers that **when preliminary questions are submitted to the constitutional court, ordinary proceedings should be stayed immediately or before the judgment of the ordinary court is adopted. The stay of proceedings can take place either *ipso jure* or by decision of the ordinary court.**

B. Final decisions

153. The effects of final decisions issued by the constitutional court are quite varied. The decision can affect a different number of people depending on whether its effects are *inter partes* or *erga omnes* (*ratione personae* effects). It can take different types of decision (*ratione materiae* effect) with different temporal effects (*ratione temporis* effects). The scope of the decision's effect as well as the possible retroactivity of a decision determines whether the grievance the individual is confronted with can be effectively removed.

1. Effects ratione personae

decided upon by the competent authority of appeal. The Constitutional Court shall decide on the matter and make public its judgment within five months of receiving the contention. If no decision is reached within this period, the trial court shall conclude the case under existing legal provisions. However, if the trial court receives the decision of the Constitutional Court before the judgment on the merits of the case is final, the trial court is obliged to comply with it."

[188] Section 62.3. Constitutional Court Act: "(3) If a court (an independent administrative panel, the Federal Public Procurement Office) has filed a request to repeal a statute or certain parts of it, only such action is allowed to be taken or decision to be rendered or ruling to be issued, which cannot be affected by the decision of the Constitutional Court or does not finally settle the issue or cannot be delayed until the decision of the Constitutional Court will be rendered and served."

[189] Venice Commission, CDL-AD(2011)040, Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey, para. 57.

154. The effects of constitutional court decisions can be either *inter partes* or *erga omnes*. Decisions with *erga omnes* effect bind everyone. By contrast, decisions with *inter partes* effect bind the parties of the concrete legal dispute. Decisions following a complaint against a normative act typically have an *erga omnes* effect, while decisions following a complaint against an individual act only usually have only *inter partes* effect. Still, the legal reasoning of the latter may also impact other cases.

155. In most countries, when the constitutionality of a norm is challenged, the constitutional court is entitled to remove it from the legal order. However, in some countries, the courts' powers are more limited, and the decision only has binding effect on the parties to the case (*inter partes* effect). In Malta, for instance, the Constitutional Court submits its decision to the legislator, who is free to either change the legislation in accordance with the Court's decision or to leave it as it is.[190] In countries with diffuse constitutional review, a challenged normative act usually merely becomes inapplicable although it remains formally "on the books". If a state agent tries to enforce the law or relies on the law when it takes an action, the person affected by that action can challenge it and the court will rule in the person's favour. In practice, state agents will almost always act as if the law did not exist (e.g., Denmark, Finland, Iceland, Malta, Norway, Sweden and United States).

156. In common law countries with diffuse constitutional review, the doctrine of precedent (*stare decisis*) ensures a large degree of coherence of the courts' decisions and comes close to the *erga omnes* effect in civil law systems. A lower court may sometimes refuse to apply the reasoning (*ratio decidendi*) of the higher court's decision but must explain why the current case differs from the precedent in order to justify its new decision (e.g., Canada, Cyprus,[191] Mexico, Peru,[192] South Africa and the United States). Notwithstanding the principle of *stare decisis,* the highest courts of common-law countries can overrule their own decisions by a majority of the judges hearing an appeal and with adequate reasoning. In some countries with a concentrated review system,[193] the constitutional court is bound by its own precedents but may overrule them through a reasoned decision of a certain majority of its members (e.g., Andorra[194]).

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[190] Venice Commission, CDL-AD(2018)028, Malta - Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement para. 76; Art. 242 Code of Organisation and Civil Procedure.

[191] The *ratio decidendi* of a case deriving of judgments of the Supreme Court in the exercise of its appellate jurisdiction or its original jurisdiction (exercised by the plenum of court) is binding on hierarchically subordinated courts.

[192] Art. VI Code of Constitutional Procedure states: "The judges interpret and apply the law or any norm with force of law and the regulations following the constitutional precepts and principles, in conformity with the interpretation of the latter undertaken in the resolutions passed by the Constitutional Tribunal." (*Los Jueces interpretan y aplican las leyes o toda norma con rango de ley y los reglamentos según los preceptos y principios constitucionales, conforme a la interpretación de los mismos que resulte de las resoluciones dictadas por el Tribunal Constitucional.*) Art. VII states: "The judgments of the Constitutional Tribunal which obtain the authority of *res judicata* become a binding precedent if the judgment so states, specifying the extent of its normative effect. If the Constitutional Court decides to deviate from the precedent, it must enunciate the factual and legal basis that underlies the judgment and the reasons why it deviates from the precedent."

[193] In Lithuania, which has a concentrated review system, there are nevertheless certain particularities concerning the *stare decisis* principle. According to the case-law of the Constitutional Court, the latter is bound by its precedents and by the constitutional doctrine which it has formulated, and which substantiates these precedents. It may be possible to deviate from Constitutional Court precedents and to create new precedents, but only where it is unavoidable and objectively necessary, constitutionally grounded and reasoned. This may be determined only by the circumstances which create the necessity to increase possibilities for implementing the innate and acquired rights of persons and their legitimate interests, the necessity to better defend and protect the values enshrined in the Constitution (Constitutional Court ruling of 24 October 2007).

[194] Art. 3 of the Qualified Law on the Constitutional Court: "1. The Constitutional Court is subject only to the Constitution and to this Law. The precedents laid down by the Constitutional Court bind the Court

157. The Venice Commission considers it to be the core task of a constitutional court to identify legal provisions that contradict the constitution and to invalidate these provisions, without any intervention by parliament. Unconstitutional laws, or parts of it, should be invalidated as of the date of publication of the constitutional court decision or later, if the court so decides.[195] **Therefore, the Commission strongly favours that the effects of constitutional court decisions invalidating normative acts should be *erga omnes*.**[196]

a. Invalidation of an individual act

158. The decision following a full constitutional complaint challenging an individual act usually has only *inter partes* effect. It only binds the applicant and possibly thirds parties in civil or commercial proceedings and the judicial or administrative body whose act was impugned. It may also be binding on those public bodies that may be concerned with the concrete question in the future as long as the concrete situation at the origin of the case has not changed (e.g., Austria). In some countries, the decision on an individual act may also have an effect that is not limited to the parties to the case although it does not amount to having *erga omnes* effect. For instance, in Montenegro, when the Constitutional Court decides on an individual act through which several persons' rights were violated, but only one or some of them complained to the Constitutional Court, the effect of the decision may be extended to all aggrieved persons.[197]

159. Even though decisions following a complaint against an individual act usually have only *inter partes* effect, their legal reasoning may also have an impact on other cases. In Germany, for example, the legal reasoning of the Federal Constitutional Court (not the pure *obiter dicta*) is binding on all state organs, including courts. Even the rejection of an application, which has *inter partes* effect, can have a wide impact in practice, as potential future applicants (especially ordinary courts) follow the constitutional court's decision and can already foresee whether or not their application will be successful.[198]

160. When a constitutional court invalidates an individual act it may take four different types of decision: It may (a) decide the case on the merits; (b) quash the individual act; (c) order the case to be reopened or (d) leave the reopening to an application to the individual to the ordinary court.

161. Often, a constitutional court will merely quash the individual act and/or order the case to be reopened or leave it to the individual to seek re-opening with the ordinary courts. If the

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in its subsequent interpretation of the Constitution; however, they may be amended by a reasoned decision taken by an absolute majority of its members. 2. For the purposes of the preceding paragraph, a precedent is presumed to exist where at least two identical cases have been resolved with the same decision and are based on the same doctrine."

[195] Venice Commission, CDL-AD(2018)012, Amicus Curiae Brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, para. 41; see also Venice Commission, CDL-AD(2009)014, Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, para. 27.

[196] Venice Commission, CDL-AD(2018)028, Opinion on constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement, para. 145.

[197] According to Art. 74 of the Law on the Constitutional Court: "Constitutional complaint shall be delivered to other persons whose rights and obligations may be affected by the decision of the Constitutional Court by which the constitutional complaint would be adopted, and these persons shall have the right to send their responses on the constitutional complaint within a period specified by the Constitutional Court."

[198] Jaeger, R and Broß, S., "*Die Beziehungen zwischen den Verfassungsgerichtshöfen und den übrigen einzelstaatlichen Rechtsprechungsorganen, einschließlich der diesbezüglichen Interferenz des Handelns der europäischen Rechtsprechungsorgane"*, Report for the XIIth Conference of European Constitutional Courts, p. 26.

constitutional court quashes a final court decision, it usually orders the case at hand to be reopened (e.g., Andorra, Bosnia and Herzegovina, Croatia, Czech Republic, Germany, Hungary, Liechtenstein, Portugal, Russia, Slovakia, Slovenia and Switzerland). If the constitutional court only sends a case back to the highest ordinary courts in order to reopen proceedings without actually quashing the unconstitutional decision (e.g., Azerbaijan), the sensitive question arises of whether the highest ordinary court will follow the orders passed by the constitutional court. For example, in Serbia, where the Constitutional Court suspends its proceedings to give the administrative or legislative body time to rectify a potentially unconstitutional situation will greatly depend on the body's willingness to follow such instructions. The situation is even worse for the individual if he or she has to make an application for a re-opening, without any action by the constitutional court, which would not even transmit its judgment to the last instance ordinary court.

162. In some countries, the constitutional court may rule on the merits of a case (e.g., Armenia, Brazil, Canada, Cyprus,[199] Estonia, Iceland, Ireland, Japan, North Macedonia, Slovenia,[200] Switzerland, South Africa, Spain and the United States). However, even in those countries, the constitutional court has the discretion to send the case back to a lower court for a decision on the merits, and in most of these countries it usually does so.[201]

163. While some constitutional courts can effectively give orders as to how the relevant body must act in order to be in conformity with the constitution and to execute correctly the decision at hand (e.g., the Czech Republic,[202] Germany, Malta, Slovakia,[203] Slovenia, Spain,[204] Ukraine[205]), in many countries, no such power to advise or order positive actions exists. This may result in a lack of effectiveness of the constitutional court's decision. Therefore, the Venice Commission considers that **when a constitutional court refers a case back to an ordinary court, corresponding provisions in the respective procedural code should oblige the ordinary court to act on this referral.**[206]

164. Moreover, constitutionality review is ineffective if the ordinary courts and administrative bodies do not follow the constitutional court's interpretation.[207] **Therefore, the Venice Commission prefers an explicit legislative – or better yet, a constitutional – provision obliging all other State organs, including ordinary courts, to follow the constitutional interpretation provided by the constitutional court. This is particularly important when the constitutional court provided constitutional interpretation of an otherwise unconstitutional legal provision.**

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[199] In the exercise of its administrative authority, the Supreme Court may confirm an administrative decision or declare it null and void. It is not within its authority to amend or modify the decision of the administrative organ. The Court is not empowered to reconsider the merits of administrative decisions and substitute those with its own decisions. Such an act would violate the strict separation of powers safeguarded by the Constitution. Decision-making in the field of administration rests entirely within the province of the executive branch of the government. The review is intended to scrutinise the legality of acts or omissions of the administration and not to evaluate their correctness from the judicial point of view.

[200] Art. 60 of the Constitutional Court Act.

[201] Venice Commission, CDL-INF(2001)009, Report on "*Decisions of constitutional courts and equivalent bodies and their execution*", p. 17.

[202] Art. 82 of the Constitutional Court Act.

[203] Art. 127(2) of the Slovakian Constitution.

[204] Art. 55(1)(c) of the Organic Law on the Constitutional Court.

[205] Art. 70 of the Law on the Constitutional Court.

[206] Venice Commission, CDL-AD(2018)012, Amicus curiae brief for the constitutional court of Georgia on the effects of constitutional court decisions on final judgments in civil and administrative case, para. 38.

[207] See Samuel, X., "Les réserves d'interprétation émises par le Conseil constitutionnel", available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/pdf/Conseil/reserves.pdf.

165. Re-opening a case in civil or criminal proceedings may lead to the outcome that the other party might win the case. This obviously affects the rights of this party, possibly acquired in good faith. The Venice Commission considers that **the fact that the legal provision on which the respective judgment was based is not constitutional should not be held against the party that previously won the case.** This does not mean that such a case should in no way be re-opened, but whether and how the case can be reopened will depend on the applicable system. The rights resulting from the original judgment merit consideration in the concrete case. The invalidation of a law will potentially affect a high number of cases.[208]

166. Exceptionally, when deciding full constitutional complaints against individual acts, the constitutional court might only have the power to invalidate the individual act. That is, it might be prohibited from removing the normative act that served as a basis for the individual act, even if this act is unconstitutional and the violation challenged in a full constitutional complaint resulted from the correct application of an unconstitutional normative act. The normative act thus remains valid, exposing other individuals to violations of their fundamental rights.[209] For instance, in Switzerland, the applicant cannot request the opening of normative review proceedings against federal legislation, but only against cantonal laws.

167. However, this approach is exceptional amongst the countries considered in this report. In Estonia, Liechtenstein and Lithuania, the constitutional court must annul the normative act in the same proceeding. In Germany, the Federal Constitutional Court may – but is not required to – annul the normative act. In Austria,[210] the constitutional court is obliged to open a second proceeding for abstract constitutional review. It is important to note that in Austria, the legal provision may only be declared null and void in its entirety when this does not run counter the applicant's interests. In Croatia, North Macedonia[211] and Slovenia the opening of a separate proceeding for abstract constitutional review is optional. In Spain, complaints concerning individual acts are usually dealt with by one of the smaller panels of judges. However, if this panel takes the view that the underlying normative act might be unconstitutional, it will refer the case to the Plenary, which will conduct both the abstract and concrete review in the same proceeding.[212]

b. Invalidation of a normative act

168. If a constitutional court considers a normative act to be unconstitutional, two possibilities arise. First, it may be obliged to invalidate the act with *erga omnes* effect. This normative act is then removed from the legal order and can no longer be applied. Alternatively, it may declare the act unconstitutional, and thus inapplicable in the specific case at hand, but refrain from (or not have the power to) removing it from the legal order.

169. In most of the countries examined in this report, a decision of unconstitutionality following a normative constitutional complaint, or a full constitutional complaint attacking a normative act, will have *erga omnes* effect (e.g., Algeria, Armenia, Austria, Azerbaijan, Bosnia and Herzegovina,

[208] Venice Commission, CDL-AD(2018)012, Amicus curiae brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, para. 22.
[209] The opposite situation is critical as well, i.e., when within the framework of the normative constitutional complaint, the Constitutional Court does not have the possibility to address the constitutionality of the individual act adopted on the basis of that norm.
[210] In Austria, the Constitutional Court opens, on its own motion, a new review proceeding of the normative act and stays the proceeding following the constitutional complaint. After having rendered a decision, in the abstract proceeding, it takes up the concrete case again.
[211] See Rules of Procedure of the Constitutional Court 56 and 14.
[212] Art. 55 (2) of the Organic Law on the Constitutional Court.

the Czech Republic, Estonia,[213] Germany, Hungary, Latvia, Liechtenstein, North Macedonia, Poland, Slovenia, Russia, South Africa and Spain). That is, the constitutional court will invalidate the normative act. This normative act is thereby removed from the legal order and can no longer be applied. In South Africa, an ordinary court may declare a normative act unconstitutional, but such a declaration must be confirmed by the Constitutional Court before it becomes effective. This results a combination of diffuse and concentrated constitutional review.

170. In a few countries, however, the constitutional court limits itself to declaring the inapplicability of a normative act to a concrete case (e.g., Argentina, Denmark, Finland, Japan, Norway and Sweden). In such a case, there is no formal guarantee of unity of legal practice by the courts. Therefore, there need to be strong informal norms ensuring coherence within the court system in order to avoid legal uncertainty through inconsistent decisions.

171. Where a preliminary request initiates the review of a normative act, the decision of the constitutional court will always have a binding effect on the parties and the ordinary court is obliged to apply the constitutional court's decision to their concrete case.[214] In many countries, the constitutional court's decision following a preliminary question will go beyond this finding of unconstitutionality *inter partes* and remove the challenged normative act with *erga omnes* effect (e.g., Albania, Andorra, Bulgaria, the Czech Republic, Greece, Italy, Lithuania, North Macedonia, Romania, San Marino and South Africa[215]).

172. In Turkey, the submitting court must only wait for the Constitutional Court's decision for five months. Otherwise, the submitting court must proceed with the case by applying the challenged law. Still, if the submitting court receives the decision of the Constitutional Court before the judgment on the merits of the case is final, the submitting court is obliged to comply with it.[216] In Portugal, even if the effect of the Constitutional Court's decision is limited to the case submitted, if it has issued three decisions in individual cases finding the same legal provision unconstitutional, the Constitutional Court can decide to open abstract review proceedings to examine the constitutionality of that provision. If the Court concludes that the provision is

[213] This is only the case if the decision has been taken by the Supreme Court. If ordinary courts decide that a norm is unconstitutional, their judgment has only *inter partes* effect, although, in those cases, an automatic procedure before the Supreme Court takes place, which in turn has *erga omnes* effect.
[214] See, for instance, Art. 57 of the Andorran Qualified Law on the Constitutional Court: "2. The decision of the Constitutional Court is binding on the court which referred the matter to it."
[215] In South Africa, if a normative act (statute) is found by a court to be inconsistent with the Constitution, it is declared invalid to that extent and, once this declaration of invalidity is confirmed by the Constitutional Court, the normative act (statute) no longer applies to any person.
[216] Art. 152 (3) of the Turkish Constitution.

unconstitutional that decision has *erga omnes* effect.[217] Similarly, in Brazil and Mexico,[218] the supreme or constitutional court may declare a law unconstitutional after five decisions concerning the same general act.

c. Decision confirming the constitutionality of an act

173. The effects of decisions in which the constitutional court confirms the constitutionality, that is, where it refuses to invalidate a normative or individual act, may have either *inter partes* or *erga omnes* effect. Decisions confirming the compatibility of an act with the constitution can have *inter partes* effect insofar as the constitutional court will not accept any future applications regarding the same law with respect to the same provision by one of the parties to the case (e.g., Romania, Spain and Switzerland). The decision thus prevents only the same parties from bringing the same case again, as other applicants could bring their case before the constitutional court.[219]

174. Second, decisions confirming the compatibility of an act with the constitution can have *erga omnes* effect (e.g., Andorra, Armenia, Austria, Belgium, Chile, France, Germany, Lithuania, the Republic of Moldova and Peru). This means that the question may no longer be raised by anyone. For instance, the ordinary judge in Peru must not consider questions of unconstitutionality put forward by a party if they concern a norm, the constitutionality of which has been affirmed by the Constitutional Tribunal in a previous decision. **In some countries, the same legal provision can be challenged only after a lapse of several years after a finding of constitutionality. Such a limitation may be too rigid as it prevents the Court from finding an unconstitutionality that is revealed in a completely different context.**

2. Effects *ratione temporis*

175. Decisions concerning the unconstitutionality of a normative act can have different temporal effects. This may give rise to different issues, which sometimes need to be mitigated.

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[217] In Portugal, the existence of three Constitutional Court decisions issued following a preliminary request, in which a given rule was held unconstitutional, is a mere precondition for the initiation of an autonomous review – this time of an abstract type – of the constitutionality of the rule in question. Given as the new review is autonomous, nothing prevents the new decision, now taken by the plenary, from being disagreeing with the earlier decisions, issued by five justice panels within individual Sections of the Constitutional Court. See Ruling no. 221/2009 of 5 May 2009, in which the representative of the Public Prosecutors' Office at the Constitutional Court asked the Court to declare, with generally binding force, the unconstitutionality of a rule contained in an Executive Law on charging the amount due for the provision of healthcare at an establishment or service belonging to the National Health Service (NHS), when the interested party had not displayed an NHS user card and had not, within the deadline laid down by the Executive Law, provided evidence that he either held such a card, or had asked the competent department to issue one. The Constitutional Court had already held the prevailing interpretation of this rule materially unconstitutional in three preliminary request proceedings. However, in Ruling no. 221/2009, the Plenary decided not to declare its unconstitutionality. It is worth adding that the Public Prosecutors' Office possesses the competence to request this process of rendering jurisprudence uniform, but that the process can also be initiated by any of the individual judges of the Constitutional Court itself. The request cannot be made by an individual.

[218] Ginsberg, T., "Comparative Constitutional Review", United States Institute for Peace Projects, 2008, p. 5, available at: https://www.usip.org/sites/default/files/ROL/TG_Memo_on_Constitutional_Review%20for%202011_v4.pdf

[219] Kucsko-Stadlmayer, G., "*Die Beziehungen zwischen den Verfassungsgerichtshöfen und den übrigen einzelstaatlichen Rechtsprechungsorganen, einschließlich der diesbezüglichen Interferenz des Handelns der europäischen Rechtsprechungsorgane"*, Report for the XIIth Conference of European Constitutional Courts, 2002, p. 23.

a. Ex tunc *and* ex nunc *invalidation*

176. Concerning the point in time at which the invalidation of an unconstitutional provisions takes effect, the Venice Commission observes that there are two schools of thought: "If a law which is incompatible with the constitution is thought to be null and void, the decision of the constitutional court, which finds a law unconstitutional, has an *ex tunc* (from the outset) effect. This is also called the doctrine of nullity. If a law which is incompatible with the constitution is thought to be effective until it is abolished, the decision of the constitutional court which finds a law unconstitutional has an *ex nunc* (from now on) effect."[220] In other words, if a law is invalidated *ex tunc*, then it will be treated as if it had never existed. A law that is invalidated *ex nunc* will only cease to be effective from the time of the decision but will remain valid regarding the past.

177. The invalidation of unconstitutional provisions *ex nunc* is the most common system with regard to the effects of decisions of constitutional courts (e.g., Albania, Andorra, Algeria, Armenia, Austria, Belarus, Brazil, Chile, Croatia, the Czech Republic,[221] France, Georgia, Greece, Hungary, Italy, Republic of Korea, Kosovo, Latvia, Liechtenstein, Lithuania,[222] Luxembourg, Mexico, the Republic of Moldova, Montenegro, North Macedonia, Peru, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia,[223] and Ukraine).

178. Several variants of *ex nunc* effects exist. In its strictest form, the legal provision that was found unconstitutional remains even applicable to facts that arose before the invalidation entered into force. Thus, decisions of the constitutional court do not influence legal relationships that had been finalised before the publication of the decision. The rationale for this solution is to prioritise legal certainty over the protection of individual rights.[224] If the court invalidates the norm with prospective effect only, the applicant's case will not be solved by the removal of the unconstitutional norm as the facts in his or her case took place in the past.[225] Therefore, applicants would have little incentive to pursue a constitutional complaint against a normative act as a finding of unconstitutionality would not change the outcome of their case. Therefore, in order to incentivise individuals to lodge complaints, some countries allow for the decision to apply to

[220] Venice Commission, CDL-AD(2018)012, Amicus Curiae Brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, para. 44.
[221] In the case of the Czech Republic, the Constitutional Court has never established *ex tunc* effects, but legal constitutional scholars do not exclude that the law can allow for such a possibility (see, for instance, Wagnerová, E., Dostál, M., Langášek, T., et al., *Zákon o Ústavním soudu s komentářem* [The Act on the Constitutional Court with Commentary], ASPI, Praha 2007, p. 206).
[222] In its decision of 19 December 2012, the Constitutional Court set out some exceptions in which its rulings might have an *ex tunc* effect. These exceptions include, for instance, cases where the law recognised as unconstitutional violated fundamental constitutional principles ("eternal clauses") such as independence, democracy, the republic as well as the innate nature of human rights and freedoms.
[223] When the Constitutional Court finds a law unconstitutional, it abrogates this law with an *ex nunc* effect. When it finds a regulation or general act issued for the exercise of public authority to be unconstitutional or illegal, it may decide to either annul it *ex nunc* or to annul it *ex tunc* (Art. 43 and 45 of the Constitutional Court Act.)
[224] Venice Commission, CDL-AD(2018)012, Amicus Curiae Brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, paras. 49-51.
[225] See also *ibidem*, para. 53.

the applicant's case as well – the so-called "premium for the catcher"[226] (e.g., Armenia,[227] Austria, Hungary and Liechtenstein).

179. Some countries have a moderate version of the *ex nunc* effect. In this form, the *ex nunc* effect means that only final court judgments remain unaffected by the invalidation of a provision on which they are based. The decision of the constitutional court invalidates the unconstitutional provision as of the date of the pronouncement of the decision. In principle, this provision remains part of the legislation prior to the decision. However, on-going cases and any new cases will be based on the result of the decision of the constitutional court and the unconstitutional provision will no longer be applied, even in cases relating to facts that occurred before the decision. As a consequence, no special rule for the instant case is necessary, because the applicants' final judgment by the ordinary court will be quashed and the new judgment will not be based on the invalidated legal provision.[228]

180. Only relatively few countries have introduced *ex tunc* effects to constitutional court decisions. For instance, Germany restricts the declaration of pre-existing nullity to acts other than final court decisions in order to preserve the legal certainty of court decisions.[229]

b. Managing the effects of invalidation

181. Both *ex tunc* and *ex nunc* invalidations may sometimes lead to consequences that need to be mitigated. Almost all countries enable courts to vary the point in time when an invalidation enters into force and its possible retroactive effect. The reasons for doing so include protecting the fundamental rights of individuals (e.g., Albania), repairing or preventing further damage (e.g., Armenia, Azerbaijan and Slovenia), or allowing the legislature or the executive to amend the statute or the governmental practice at issue (e.g., South Africa and Israel).

182. One possibility is to allow the constitutional court to decide when its decision enters into force. The German Federal Constitutional Court has the power to regulate the *ex tunc* effects of its judgements in a highly differentiated manner. In both *ex tunc* (e.g., Germany) and *ex nunc* systems (e.g., France), courts may delay the entry into force of decisions in order to give parliament time to fix the law. Similarly, in Morocco and Israel, the *ex nunc* decision enters into force on the day it is rendered by the constitutional unless the it suspends the invalidation for a certain period of time.[230] In San Marino, the effect of the invalidation of a normative act by the *Collegio Garante* is immediate for the parties involved only. With regard to everybody else, the decision enters into force six months later. Within this period Parliament may pass a new act in line with the Court's decision.[231] In South Africa, even ordinary courts declaring a normative act

[226] This term exists in Austrian doctrine ("Ergreiferprämie") (see also Venice Commission,CDL-AD(2008)029, Opinion on the draft laws amending and supplementing (1) the Law on constitutional proceedings of Kyrgyzstan and (2) the Law on the Constitutional Court of Kyrgyzstan, 2008, para. 27 and Venice Commission, CDL-AD(2014)017, Opinion on the Draft Constitutional Law on the Constitutional Court of Tajikistan, para. 61).
[227] Venice Commission, CDL-AD(2006)017, Opinion on Amendments to the Law on the Constitutional Court of Armenia, para. 7.
[228] Venice Commission, CDL-AD(2018)012, Amicus Curiae Brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, para. 58.
[229] According to Art. 79(1) and 79(2) Law on the Federal Constitutional Court, final decisions which are based on a statute that has been declared null and void remain unaffected even if a provision or a law is declared null and void *ex tunc*. Only in the case of a final conviction may new proceedings be instituted in accordance with the provisions of the Code of Criminal Procedure.
[230] Art. 27 of Organic Law no. 066-13 on the Constitutional Court of Morocco.
[231] Art. 16(7) of the Declaration of the Citizens' Rights and of the Principles of the San Marino Constitutional Order.

invalid on the ground of unconstitutionality have the power to make an order relating to the extent of its retroactive effect as well as suspending the order of invalidity for a period of time.

183. In particular, *ex tunc* invalidations may lead to significant legal uncertainty. That is why no country under review in this report has opted for this solution without leaving at least some room of manoeuvre for the constitutional court, because the annulment of an important normative act on which many individual acts are based could have vast consequences. **The Venice Commission advises against a rigorous application of *ex tunc* invalidation because it would lead to significant legal uncertainty.**[232] **In order to avoid legal gaps, the Constitutional Court could be empowered to postpone the entry into force of the repeal of the provision found to be incompatible with the Constitution by a specified period (typically up to one year).** This would allow Parliament to phase in new legislation before the unconstitutional provisions lose their force.[233]

3. Effects *ratione materiae*

184. Constitutional courts generally do not have the capacity to award damages. Instead, their decision will usually lead to an individual case being reopened, and a lower ordinary court may then decide to award damages according to the applicable procedural rules. Moreover, the constitutional court's scope of review should be clearly limited to constitutional matters.

a. *Reparations and damages*

185. Most of the constitutional courts under consideration in this report do not have the capacity to award damages to an individual whose rights have been violated either through an individual or a normative act. Notable exceptions include, for instance, Andorra, Chile, Croatia, Montenegro, Slovakia, South Africa and United States. **It is debatable whether the constitutional court should itself be allowed to award pecuniary compensation for the violation of a right in order to redress the breach of an individual's human rights**.

186. Instead, the constitutional court's decision will usually lead to an individual case being reopened (if an individual act was challenged or in the case of a "premium for the catcher"). For instance, Serbia and North Macedonia have provisions according to which individuals can request proceedings to be reopened in all cases in which a final decision was based on an invalidated normative act. A lower court may then decide to award damages according to the applicable procedural rules.

187. In common law countries, damages are a part of the law on torts; if a public authority infringes individual rights, the individual is entitled to satisfaction. In countries with diffuse review, in ordinary proceedings the individual may, under certain conditions, bring a claim for compensation against a state authority, the action of which violated the individual's rights. In

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[232] Venice Commission, CDL-AD(2018)012, Amicus Curiae Brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, para. 47; see also Venice Commission, CDL-AD(2008)029, Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan, para. 26; see also Venice Commission, CDL-AD(2008)030, Opinion on the Draft Law on the Constitutional Court of Montenegro, para.s 58, 67; see also Venice Commission, CDL-AD(2011)018, Opinion on the draft constitutional law on the constitutional chamber of the Supreme Court of Kyrgyzstan, para. 61.

[233] Venice Commission, CDL-AD(2018)028, Malta - Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement, para, 78; Venice Commission, CDL-AD(2018)012, Amicus Curiae Brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, paras. 43; see also Venice Commission, CDL-AD(2015)024, Opinion on the Draft Institutional Law on the Constitutional Court of Tunisia, para. 11.

South Africa, the individual is even entitled to the award of so-called "constitutional damages", based solely on the infringement of a constitutional right. The Constitutional Court is competent to grant such damages under the court's jurisdiction to grant "appropriate relief".[234] In Cyprus, when the Supreme Court quashes a decision taken by an administrative authority, the administrative authority is obliged to restore the situation which existed prior to the judicially annulled decision.[235]

b. Review competences

188. Theoretically, at least, the relationship between the constitutional court and ordinary courts is less conflictual with normative constitutional complaints than with full individual ones[236] because the constitutional court does not directly review the application of a normative act by the ordinary court. However, even in countries with normative constitutional complaints, frictions can arise. As the Venice Commission observes, "some constitutional courts having implemented the review of constitutional complaints faced the problem of interference with ordinary courts. The possibility to review the decisions of ordinary courts may create tensions, and even conflict between ordinary courts and the Constitutional Court."[237] **In order to avoid tensions and conflicts of competences, the Venice Commission recommends to avoid a solution in which the constitutional court would act as a "super-supreme court" or "fourth instance" interfering in the regular application of the law by ordinary courts and that it should only look into constitutional matters, restraining its scope *ratione materiae* thus also avoiding its own overburdening.**[238]

189. **Moreover, the constitutional court's relationship to "ordinary" high courts (e.g., supreme courts or courts of cassation) has to be determined in clear terms.[239] The constitutional court should only look into constitutional matters, leaving the interpretation of ordinary law to the general courts.[240]** The identification of constitutional matters can be difficult in the context of the right to a fair trial, where any procedural violation by the ordinary courts can be seen as a violation of the right to a fair trial. Some restraint by the constitutional court seems appropriate, not least in order to avoid its own overburdening, but also out of respect for the jurisdiction of ordinary courts. Only manifestly arbitrary procedural violations by the ordinary courts should be deemed as violating the constitution and the right to a fair trial.

4. Finality of constitutional rulings

190. In principle, a constitutional court's rulings on the constitutionality of normative or individual acts are final and binding. That is, there is no possibility of appeal. As the Venice Commission observes, **"[s]ince the decision of a Constitutional Court is regarded as final and respecting its decision is in conformity with the constitutional order and in the interest of**

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[234] See *Fose v Minister of Safety and Security*, CCT14/96, 05/06/1997, ZACC 6, in CODICES.
[235] Art. 146(5) of the Constitution of Cyprus. To sustain a civil action claiming damages under the provisions of Art. 146(6), damage must result from the voided act, decision or omission notwithstanding the restoration of legality.
[236] See Sadurski, W. (ed.) *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2nd ed.) Springer Netherlands, Dordrecht, 2014, p.36.
[237] Venice Commission, CDL-AD(2004)024, Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey, para. 44.
[238] *Ibidem*; Venice Commission, CDL-AD(2011)040, Opinion on the Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey, paras. 102-103.
[239] Venice Commission, CDL-AD(2004)024, Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey, para. 44.
[240] See also Venice Commission, CDL-AD(2009)014, Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, para. 25.

legal certainty, reviewing a judgment by a Constitutional Court must be an exception."[241] Moreover, complaints on the same issue will generally not be accepted again. In systems in which constitutional court interpretations are binding on all branches of government, constitutional courts retain the ultimate authority to determine the meaning of the constitution.

191. Exceptionally, it may be possible to reopen cases decided by a constitutional court. Typical situations for reopening cases are when new facts appear of which the parties could not have been aware,[242] to correct errors made by the constitutional court[243] or if the constitution has changed.[244] For instance, in the United States, decisions of the Supreme Court on constitutional issues are virtually final, and can be altered only by constitutional amendment or by a new ruling of the Court, both of which are very rare. The rules applicable in Slovenia and North Macedonia[245] take an intermediary position, as the constitutional court will not take up a question again if there are no reasons to believe that it will rule differently this time. If, on the other hand, there are reasonable doubts, it will admit an application. In Armenia and Turkey, the prohibition on raising questions of constitutionality again only holds for a certain period of time.

VIII. THE EUROPEAN COURT OF HUMAN RIGHTS

192. In principle, a constitutional court's decision of constitutionality is final and cannot be appealed. It is important to stress from the outset that the European Court of Human Rights (ECtHR) is not a court of appeal. Its powers are limited to verifying the contracting States' compliance with the human rights engagements they undertook in acceding to the Convention.

193. Still, it has influenced the individual's access to constitutional justice at the domestic level in at least three ways. First, in some countries domestic courts are required to interpret their constitutional rights in conformity of the European Convention on Human Rights. Second, the ECtHR may be understood as effectively protecting constitutional rights to the extent that they overlap with the Convention rights. Third, the ECtHR ensures that constitutional review

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[241] Venice Commission, CDL-AD(2019)028, Republic of Moldova – Amicus Curiae Brief on the criminal liability of the Constitutional court judges, para. 45.

[242] See, for instance, Art. 34 Austrian Law on the Constitutional Court. Contrary to *"nova reperta"* (newly discovered facts), "*nova producta"* – the raising of arguments after closure of (first instance) proceedings even if the parties could have been aware of these points before – is generally excluded.

[243] See US Supreme Court Rule 44: "1. Any petition for the rehearing of any judgment or decision of the Court on the merits shall be filed within 25 days after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time." See also Art. 121 of the Swiss Federal Supreme Court Act: "La révision d'un arrêt du Tribunal fédéral peut être demandée: a. si les dispositions concernant la composition du tribunal ou la récusation n'ont pas été observées; b. si le tribunal a accordé à une partie soit plus ou, sans que la loi ne le permette, autre chose que ce qu'elle a demandé, soit moins que ce que la partie adverse a reconnu devoir; c. si le tribunal n'a pas statué sur certaines conclusions; d. si, par inadvertance, le tribunal n'a pas pris en considération des faits pertinents qui ressortent du dossier."

[244] Art. 68(16)-(18) of the Constitutional Law on the Constitutional Court of Armenia: "(16). The Constitutional Court may review the decisions prescribed by clauses 1 and 2 of part 9 of this Article submitted in accordance with the procedure prescribed by this Law, where: 1) the provision of the Constitution applied with respect to the given case has been changed or 2) new perception of the provision of the Constitution applied with respect to the given case has emerged owing to which other decision of the Constitutional Court may be adopted with regard to the same issue, and where the given issue has a fundamental constitutional legal significance.
(17). The procedural decision of the Constitutional Court on accepting a case for consideration on the basis specified in clause 16 of this Article shall be taken by at least two-thirds of the total number of judges of the Constitutional Court.
(18). Consideration of cases referred to in part 16 of this Article may not be rejected on the basis of clause 3 of part 1 of article 29 of this Law, if there are grounds, prescribed in part 16 of this article, to review the decision of the Constitutional Court."

[245] See Art. 28 Rules of Procedure of the Constitutional Court.

proceedings fulfil the fair trial requirements of Article 6 of the European Convention on Human Rights.

A. Interpretation in conformity with the Convention

194. In countries in which domestic courts are required to interpret their constitutional rights in conformity with the European Convention on Human Rights – or where they do so without an explicit obligation –, the case-law of the ECtHR has affected the substantive rights that individuals may claim under their constitutions.

195. For instance, in Germany, the European Convention and its protocols have the status of federal German laws (*Gesetzesrang*). German courts must observe and apply the Convention in interpreting national law. On the level of constitutional law, the text of the Convention and the case-law of the European Court of Human Rights serve as interpreting aids in determining the contents and scope of fundamental rights and fundamental constitutional principles of the Basic Law, to the extent that this does not restrict or reduce the protection of an individual's fundamental rights under the Basic Law.[246]

B. The ECtHR as an alternative to constitutional review

196. Many of the rights protected in domestic constitutions overlap with the rights protected by the European Convention on Human Rights. Thus, with regard to these rights, the ECtHR may be seen as an effective alternative or addition to constitutional justice. In light of the subsidiary nature of the Convention mechanism, the individual must have exhausted all domestic remedies before applying to the ECtHR. Moreover, these remedies must have been effective in redressing the violation. In practice, only full constitutional complaints can constitute effective remedies. The existence of the ECtHR has led member States to expand the availability of effective remedies, in general, and of full constitutional complaints, in particular.

197. At the same time, full constitutional complaints also serve the function of a national "filter", limiting the number of cases that reach the ECtHR. This effect is especially relevant in view of the extremely heavy caseload of the ECtHR and the desirability to solve human rights issues on the national level.

1. Exhaustion of remedies

198. The powers of the ECtHR are limited by the principle of subsidiarity. That is, it may decide on challenged acts only after all instances of the domestic legal system have been exhausted. The Interlaken Declaration, which insists on the subsidiary nature of the Convention mechanism:

> *"4. The Conference recalls that it is first and foremost the responsibility of the States Parties to guarantee the application and implementation of the Convention and consequently calls upon the States Parties to commit themselves to:*
> *…*
> *d) ensuring, if necessary by introducing new legal remedies, whether they be of a specific nature or a general domestic remedy, that any person with an arguable claim that their rights and freedoms as set forth in the Convention have been violated has available to them an effective remedy before a national authority providing adequate redress where appropriate;*
> *…"*[247]

[246] BVerfGE 111, 307, 14 October 2004, 2 BvR 1481/01.
[247] High Level Conference meeting in Interlaken on 18-19 February 2010 at the initiative of the Swiss Chairmanship of the Committee of Ministers of the Council of Europe.

199. In addition, Protocol no. 15 (not yet in force) amending the European Convention on Human Rights also refers to the principle of subsidiarity in Article 1 amending the recital in the preamble of the Convention as follows: *"Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention"*.

200. Therefore, an important question regarding individual complaints to the constitutional court for human rights violations, is whether all domestic remedies must have been exhausted, in line with Article 35.1 of the European Convention on Human Rights, before an individual can appeal to the European Court of Human Rights.

2. Right to an effective remedy: Full constitutional complaints

201. In order to constitute an exhaustion in the sense of Article 35.1 of the European Convention on Human Rights, a national remedy must be effective according to Article 13 of this Convention. The question of how an individual complaint must be conceived in order to be an effective remedy is, however, a complex one. In general, the constitutional complaint can be considered as an "effective legal remedy" by the ECtHR only if the constitutional court has sufficient powers and can restore the rights breached.[248]

202. The answer will vary from country to country. Even for any given country, a constitutional complaint may be an effective remedy for some Convention violations, whereas according to the ECtHR's case-law, it may not be effective for other violations. In particular, a distinction has to be made between cases of alleged excessive length of proceedings and violations of "other" human rights.

203. Various elements must be taken into account when determining whether a remedy is effective in the sense of Article 13 of the Convention. Where an individual has an arguable claim to be the victim of a violation of a Convention right, he or she should have a remedy before a national authority. That authority does not necessarily need to be a judicial authority, but it must be one which has relevant powers to decide such claims and provide redress.[249] The contracting states are free to choose the remedy, which they provide and sometimes an aggregate of several remedies provided may be sufficient.[250]

204. In the case of an individual complaint to a constitutional court, the judicial nature of the national authority does not need to be discussed. However, it may be questioned whether in all cases the powers of a constitutional court will be sufficient. The court must be able to provide redress through a binding decision in the case. A mere declaratory decision on unconstitutionality will not be sufficient; the complaint must be "effective" in practice as well as in law.[251] If the violation of the Convention right, as well as the Constitution, concerns a positive obligation, the court should be able to order the state authorities to take the action, which they failed to take in the given case. The court must be obliged to hear the case or at least to consider the grievances submitted. The court must also be accessible: unreasonable demands relating to costs or

[248] Venice Commission, CDL-AD(2014)026, Opinion on the Seven Amendments to the Constitution of "The former Yugoslav Republic of Macedonia" concerning, in particular, the Judicial Council, the Competence of the Constitutional Court and Special Financial Zones, paras. 87-89.
[249] The individual also has to complain about the violation of the Convention right in the national proceedings. Failing to do so will result in a finding of non-exhaustion of domestic remedies by the European Court of Human Rights (see, for example, ECtHR, *Debono v. Malta*, 10.06.2004, no. 34539/02).
[250] See ECtHR, *Silver v. UK*, 25.03.1983, nos. 5947/72 and 6 others.
[251] See ECtHR, *Ihan v. Turkey* [GC], 27.06.2000, no. 22277/93, para. 58.

representation could, for instance, render an appeal "ineffective". When the consequences of measures would be irreversible, a constitutional court should be able to prevent the execution of such measures.[252]

205. In the framework of its Report on the Effectiveness of National Remedies in Respect of Excessive Length of Proceedings,[253] the Venice Commission discussed the remedial effectiveness of constitutional complaints. Based on the European Court of Human Rights' case-law,[254] the Commission found that "[t]he obligation to organise its judicial system in a manner that complies with the requirements of Article 6.1 of the Convention also applies to a Constitutional Court" itself.[255] This means that if a country intends to introduce a process of individual complaint to its constitutional court, this must be done in a way that does not excessively prolong the total length of the proceedings. Consequently, the court must have the capacity – and the resources – to deal effectively with the additional caseload.[256]

206. A main issue in the discussion of remedies against the excessive length of proceedings is a distinction between acceleratory remedies, i.e. those which have a positive effect on the termination of an on-going case, and compensatory remedies. Here, the Venice Commission found that *"in terms of the [Strasbourg] Court's case-law, it is an obligation of result that is required by Article 13. Even when none of the remedies available to an individual, taken alone, would satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may be considered as 'effective' in terms of this article."*[257] The Commission found that, in order to be effective, a remedy would have to have both acceleratory[258] and compensatory aspects:[259]

> *"182. In cases where the national legal system does not provide for acceleratory remedies (which is the case for most domestic legal systems), the individual is not afforded before his own authorities an equivalent redress to that which he may obtain in Strasbourg; there, the subsidiarity principle is deficient. Under these circumstances, the individual may argue not to have lost his status of victim even after obtaining (mere)*

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[252] See ECtHR, *Čonka v. Belgium*, 05.02.2002, no.51564/99, para. 79.
[253] Venice Commission, CDL-AD(2006)036rev, Report on the "*Effectiveness of National Remedies in Respect of Excessively Lengthy Proceedings*".
[254] See ECtHR, *Gast and Popp v. Germany,* 25.02.2000, no. 29357/95, para. 75.
[255] Venice Commission, CDL-AD(2006)036rev, Report on the "*Effectiveness of National Remedies in Respect of Excessively Lengthy Proceedings*", para. 33.
[256] Concerning doubts on the promptness of an individual complaint see ECtHR, *Belinger v. Slovenia*, 02.10.2001, no. 42320/98.
[257] Venice Commission, CDL-AD(2006)036rev, Report on the "*Effectiveness of National Remedies in Respect of Excessively Lengthy Proceedings*", para. 135.
[258] See ECtHR, *Slavicek v. Croatia*, 04.07.2002, no. 20862/02: "According to the new law everyone who deems that the proceedings concerning the determination of his civil rights and obligations or a criminal charge against him have not been concluded within a reasonable time may file a constitutional complaint. The Constitutional Court must examine such a complaint and if it finds it well-founded it must set a time-limit for deciding the case on the merits and it shall also award compensation for the excessive length of proceedings. The Court considers that this is a remedy which must be exhausted by the applicant in order to comply with Article 35 § 1 of the Convention." See also ECtHR, *Debono v. Malta*, 10.06.2004, no. 34539/02; ECtHR, *Andrásik v. Slovakia*, 22.10.2002, no. 57984/00 and ECtHR, *Fernandez-Molina Gonzalez and others v. Spain*, 08.10.2002, no. 64359/01.
[259] The compensation has to be in reasonable relation to what the applicant would have obtained from the Strasbourg Court (see ECtHR, *Dubjakova v. Slovakia*, 10.10.2004, no. 67299/01: "Whether the amount awarded may be regarded as reasonable, however, falls to be assessed in the light of all the circumstances of the case. These include not merely the duration of the proceedings in the specific case but the value of the award judged in the light of the standard of living in the State concerned, and the fact that under the national system compensation will in general be awarded and paid more promptly than would be the case if the matter fell to be decided by the [Strasbourg] Court under Article 41 of the Convention.")

pecuniary compensation in a domestic procedure and may challenge his need to exhaust the domestic remedy in question.

183. In conclusion, the Venice Commission considers that, in order to comply fully with the requirements of Article 13 of the Convention in relation to the reasonable time requirement laid down in Article 6 §1 of the Convention, Council of Europe member States should provide in the first place acceleratory remedies designed to prevent any (further) undue delays from taking place at any time until the proceedings are terminated.

184. In addition, they should provide compensatory remedies for any breach of the reasonable time requirement which may have already occurred in the proceedings (prior to the introduction of the effective acceleratory remedies)."[260]

207. In order to provide subsidiary redress against human rights violations at the national level, **the Venice Commission recommends the introduction of a full constitutional complaint where it does not yet exist**.[261]

208. **If a state intends to introduce a procedure of individual complaint to the constitutional court with the purpose of providing a national remedy or filter for cases that would otherwise reach the ECtHR – i.e. providing an effective remedy in the sense of Article 13 of the European Convention on Human Rights and to require its exhaustion under Article 35.1 of the European Convention on Human Rights – such a procedure should provide redress through a binding decision in the case. The constitutional court must be obliged to hear the case and there must not be any unreasonable demands as to costs or representation.**

209. **In cases of alleged excessive procedural length, an individual appeal to the constitutional court should enable it to effectively order the speedy resumption and termination of the proceedings before the ordinary courts or to settle the matter itself on the merits. In these types of cases, the constitutional court should be able to provide compensation equivalent to what the applicant would receive at the ECtHR**.[262]

3. Full constitutional complaints as a national "filter"

210. In the Council of Europe member States, many constitutional courts offer a full direct individual complaint mechanism against individual acts. Being the only effective remedy to a violation of Convention rights, the full constitutional complaint acts as a filter limiting the number of cases brought before the European Court of Human Rights because violations can be settled at the national level.[263] A parallel system can be found in the Latin American countries in respect of the Inter-American Court of Human Rights.

211. In countries where a specialised constitutional court exists, an individual complaint to that court seems a logical choice for such a remedy because, typically, such a complaint is also subsidiary on the national level and only arises after the exhaustion of appeals to ordinary courts. It is important that the last possible step on the national level be taken before applying to the European Court of Human Rights.

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[260] Venice Commission, CDL-AD(2006)036rev, Report on the "*Effectiveness of National Remedies in respect of Excessively Lengthy Proceedings*", paras. 182-184.
[261] Venice Commission, CDL-AD(2013)034, Opinion on Proposals Amending the Draft Law on the Amendments to the Constitution to strengthen the independence of judges of Ukraine, para. 11.
[262] See ECtHR, *Cocchiarella v. Italy [GC]*, 29.03.2006, no. 64886/01, paras. 76-80 and 93 to 97.
[263] See Stone-Sweet, A. and Keller, H. (Eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford University Press, 2008, ch. 10.

212. An *actio popularis* and normative complaints cannot form an effective "domestic remedy". An *actio popularis* is directed against a norm in the abstract and would not normally be an appropriate remedy against a concrete human rights violation. Likewise, normative individual complaints – directed only against a normative act, but not its application in an individual case – would not suffice as an effective remedy in most cases.[264]

213. Turkey offers an interesting example of a country that has introduced full individual complaints as a remedy in response to the overburdening of the European Court of Human Rights with Turkish cases. In view of the high number of Turkish cases before the European Court of Human Rights, the Constitutional Court of Turkey proposed, in 2004, to introduce an individual complaint to that Court relating to constitutional rights, which are also covered by the European Convention on Human Rights. The explanatory memorandum for these amendments explicitly states that *"*[t]*he introduction of constitutional complaint will result in a considerable decrease in the number of files against Turkey brought before the European Court of Human Rights".* Amended Article 148 of the Turkish Constitution stipulates that anyone claiming that one of their fundamental rights and freedoms, as protected by the European Convention on Human Rights and guaranteed by the Constitution, is breached by a public authority may apply to the Constitutional Court. This remedy is, however, only available where ordinary administrative and judicial remedies have been exhausted.[265] In 2013, in the case of *Hasan Uzun v. Turkey*, the ECtHR found that:

> *"it retained its ultimate power of review in respect of any complaints submitted by applicants who, in accordance with the subsidiarity principle, had exhausted the available domestic remedies, and that it reserved the right to examine the consistency of the Constitutional Court's case-law with its own. The present decision was not therefore a ruling on the effectiveness of the remedy in question. It would be for the respondent Government to prove that the remedy was effective, both in theory and in practice."*[266]

214. In 2014, in the case of *Koçintar v. Turkey*,[267] the European Court of Human Rights recognised individual access to the Constitutional Court of Turkey to be an effective constitutional remedy in respect of complaints by persons deprived of their liberty. In 2018, in the case of *Mehmet Hasan Altan v. Turkey*,[268] the ECtHR found that Mr Altan's continued pre-trial detention after his recourse to the Constitutional Court, raised serious doubts as to the effectiveness of the individual application to the Constitutional Court in cases concerning pre-trial detention – however, the ECtHR did not depart from its *Koçintar v. Turkey* finding. It did state, however, that it reserved the right to examine the effectiveness of the system of individual applications in cases brought under Article 5 ECHR (Right to liberty and security), especially in view of any subsequent

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[264] For example, regarding Hungary, the European Court of Human Rights has stated that it is not necessary to submit the application to the Constitutional Court before lodging a complaint before the European Court of Human Rights, ECtHR, *Weller v. Hungary*, 30.06.2009, no. 44399/05. However, in *Mendrei v. Hungary*, the European Court of Human Rights held that where the harm suffered could be redressed by the mere invalidation of an act, without the need for any additional compensation, normative individual complaints could be considered to provide an effective remedy (ECtHR, *Mendrei v. Hungary*, 05.07.2018, no. 54927/15, para 42). In this case, a teacher complained that he had become *ipso iure* a member of the National Teachers' Chamber. The normative complaint constituted an effective remedy because the removal of the impugned provisions would have, in all likelihood, terminated the membership, which was an *ipso iure* consequence of the law.

[265] See the Venice Commission's opinion welcoming this full constitutional complaint: Venice Commission, CDL-AD(2011)040, Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey, para. 76; see also Council of Europe, Supporting the Individual Application to the Constitutional Court in Turkey, Needs Assessment Report on the Individual Application to the Constitutional Court of Turkey.

[266] ECtHR*, Hasan Uzun v. Turkey*, 30.04.2013, no. 10755/13, para. 71.

[267] ECtHR, *Koçintar v. Turkey*, 01.07.2014, no. 77429/12.

[268] ECtHR, *Mehmet Hasan Altan v. Turkey,* 20.02.2018, no. 13237/17.

developments in the case-law of the first-instance courts, in particular assize courts, regarding the authority of the Constitutional Court's judgments.[269]

215. In its opinions on draft amendments introducing the individual complaint in Turkey (in 2004 and 2011), the Venice Commission found that they were "justified, and follow solutions already known in other European countries and they meet European standards."[270] The Commission thus recognised that an effective full constitutional complaint to a constitutional court can be a national filter for cases before they reach the ECtHR.[271] This has also been confirmed by a large number of studies and research on this issue, explaining, for instance, why the number of applications against the Germany or Spain is lower than against France.[272]

216. **The Venice Commission favours the full constitutional complaint not only because it provides for the most comprehensive protection of constitutional rights, but also because of the subsidiary nature of the relief provided by the European Court of Human Rights and the aim of settling human rights issues on the national level.** The discussion of this topic is especially relevant in view of the extremely heavy caseload of the Court (some 59 800 pending applications in June 2020[273]) and the need to solve human rights issues on the national level before they reach the ECtHR.

4. The ECHR as an alternative to constitutional review

217. In some countries, the European Convention on Human Rights has provided an alternative to constitutional review at the domestic level. For instance, in France, even before the reform that introduced the Priority Preliminary Ruling (the "QPC") in 2008, ordinary judges could carry out "conventionality control" although they were not allowed to carry out constitutional review. That is, they could establish the conformity of domestic legislation with international treaties, such as the European Convention on Human Rights. To the extent that the Convention rights overlapped with constitutional rights, conventionality control effectively amounted to constitutional review.

218. Similarly, in the Netherlands, self-executing provisions of the European Convention on Human Rights and decisions of the European Court of Human Rights may be directly referred to in court proceedings in which case the courts are obliged to review domestic law for their conformity with those provisions of international law and to withhold, in the specific case, the application of the Act or other domestic law provision that is in violation of international law. Therefore, although the Netherlands does not provide for constitutional review of its legislation, it is possible for individuals to claim the protection of their Convention rights before courts.

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[269] *Ibidem*, para. 142.

[270] Venice Commission, CDL-AD(2004)024, Opinion on the Draft Constitutional Amendments with Regard to the Constitutional Court of Turkey, p. 9. The Venice Commission, however, questioned whether the individual complaint should be limited to only those constitutional rights which were also covered by the Convention (Venice Commission, CDL-AD(2004)024, Opinion on the Draft Constitutional Amendments with Regard to the Constitutional Court of Turkey, para. 36; Venice Commission, CDL-AD(2011)040, Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey, para. 9). It seemed that the purpose of this limitation was to exclude social rights from the scope of the individual complaint. The reluctance to provide for the justiciability of social rights also seems to be the reason why the Austrian Constitution does not include a complete "bill of rights" and why instead the Convention has been ratified on the level of constitutional law.

[271] This part of individual complaint was part of a constitutional reform package adopted by referendum on the 12 September 2010.

[272] See, for instance, Stone-Sweet, A. and Keller, H. (Eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford University Press, 2008, pp. 852; see also Szymczak, D., *La Convention européenne des droits de l'homme et le juge constitutionnel national*, Bruylant, Bruxelles, 2007, pp. 872.

[273] https://www.echr.coe.int/Documents/Stats_pending_2020_BIL.pdf

C. The right to a fair trial under the ECHR

219. Under Article 6 of the European Convention on Human Rights, an individual has the right to a fair trial.[274] Although this provision does not guarantee access to a constitutional court, it does apply to constitutional review proceedings. Consequently, individuals can apply to the ECtHR if their constitutional review proceedings were not fair. Therefore, the ECtHR ensures that constitutional review proceedings fulfil the fair trial requirements of Article 6 of the European Convention on Human Rights.

220. The right to a fair trial requires constitutional courts to be established by law, independent and impartial. The requirement of lawfulness requires constitutional courts to determine matters within their competence on the basis of the rule of law and after proceedings conducted in a prescribed manner and in compliance with the particular rules that govern them.[275] Otherwise they would lack the legitimacy required in a democratic society.[276] The lawfulness of a court or tribunal encompasses its composition.[277] Constitutional courts have some discretion regarding the way in which they manage their proceedings (e.g., the assignment of a case). However, this discretion must be exercised in accordance with the requirements of independence and impartiality.[278] That is, the judges assigned to a case must be independent of the executive, and the assignment cannot be solely dependent on the discretion of the court.[279]

221. The requirement of independence refers to independence from the other branches of government[280] and independence from the parties.[281] Compliance with this requirement is assessed on the basis of statutory criteria, such as the manner of appointment and the duration of the term of office, or the existence of sufficient safeguards against the risk of outside pressures.[282] Moreover, the court must also appear to be independent.[283] Defects in the independence of the court cannot be remedied during the subsequent stages of the proceedings.[284] The independence of judges will be undermined, for instance, where the executive intervenes in a case pending before the courts with a view to influencing the outcome.[285] However, appointment and removal of judges by the executive or parliament does not per se amount to a violation of Article 6, as long as the appointees are free from influence or pressure when carrying out their duties.[286]

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[274] For a more detailed account of the ECtHR's case-law on Article 6, see Court's Guide on Article 6 of the European Convention on Human Rights (available at: https://www.echr.coe.int/documents/guide_art_6_eng.pdf).

[275] ECtHR, *Sramek v. Austria*, 22.10.1984, no, 8790/79, para. 36; *Cyprus v. Turkey* [GC], 10.05.2001, no. 25781/94, para. 233; *Sokurenko and Strygun v. Ukraine*, 11.12.2006, nos. 29458/04 and 29465/04, para. 24.

[276] ECtHR, *Lavents v. Latvia*, 28.11.2002, no. 58442/00, para. 81; *Biagioli v. San Marino*, 08.07.2014, no. 8162/13, para. 71.

[277] ECtHR, *Buscarini v. San Marino,* 08.07.2014, no. 8162/13.

[278] ECtHR, *Pasquini v. San Marino*, 02.05.2019, no. 50956/16, paras. 103 and 107.

[279] *Ibidem,* para. 110.

[280] ECtHR, *Beaumartin v. France*, 25.10.1994, no. 15287/89, para. 38.

[281] ECtHR, *Sramek v. Austria*, 22.10.1984, no, 8790/79, para.42.

[282] ECtHR, *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], 06.11.2018, nos. 55391/13 and two others, paras.153-156.

[283] *Ibid*. at para. 144; ECtHR*, Oleksandr Volkov v. Ukraine*, 06.05.2018, no. 21722/11, para. 103; ECtHR, *Grace Gatt v. Malta*, 08.10.2019, no. 46466/16, para. 85.

[284] ECtHR, *Denisov v. Ukraine* [GC], 25.09.2018, no. 76639/11, paras. 65, 67 and 72.

[285] ECtHR, *Sovtransavto Holding v. Ukraine*, 25.07.2002, no. 48553/99, para. 80; ECtHR, *Mosteanu and Others v. Romania*, 13.11.2012, nos. 45886/07 and two others, para. 42.

[286] ECtHR, *Clarke v. the United Kingdom*, 25.08.2005, no. 23695/02; ECtHR, *Flux v. Moldova* (no. 2), 03.07.2007, no. 31001/03, para. 27; ECtHR, *Sacilor Lormines v. France*, 09.11.2006, no. 65411/01, para. 67.

222. In determining whether a body can be considered to be "independent", the ECtHR looks, inter alia, to the manner of appointment of its members; the duration of their term of office; the existence of guarantees against outside pressures; and whether the body presents an appearance of independence.[287] The existence of impartiality depends on the personal conviction and behaviour of a particular judge (i.e. his personal prejudice or bias in the respective case), as well as the composition of tribunal itself and the existence of sufficient guarantees in order to exclude any legitimate doubt in respect of its impartiality.[288]

223. The proceedings themselves must be fair. The concept of a fair trial comprises the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations submitted, even by an independent member of the national legal service, with a view to influencing the court's decision.[289] This requirement may also apply before a Constitutional Court.[290] Moreover, there must be a "fair balance" between the parties, meaning that each party must be afforded a reasonable opportunity to present his or her case under conditions that do not place him at a substantial disadvantage regarding the other party.[291] Article 6 obliges courts to examine the applicant's main arguments,[292] and to give reasons for their decisions responding to these arguments.[293] National courts, including constitutional courts, are required to examine arguments concerning the applicant's fundamental rights and freedoms with particular rigour and care.[294] By contrast, Article 6 does not require a constitutional court to give more detailed reasoning when it simply applies a specific legal provision to dismiss an appeal on points of law as having no prospects of success, without further explanation.[295]

224. Constitutional courts are not generally required to conduct public hearings under Article 6. The absence of a hearing before a constitutional court may be justified by the special features of the proceedings, provided a hearing has been held at the first instance.[296] However, if constitutional courts do conduct oral proceedings, these proceedings should be public, subject to restrictions only in narrowly defined cases. Moreover, decisions of constitutional courts must be published.[297]

225. Generally, the proceedings must be conducted within a reasonable amount of time. The ECtHR has repeatedly stressed the importance of administering justice without delays in order

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[287] ECtHR, *Langborger v. Sweden*, 22.06.1989, no. 11179/84, para. 32; ECtHR, *Kleyn and Others v. the Netherlands* [GC], 06.05.2003*,* nos. 39343/98 and three others, para. 190.
[288] ECtHR, *Micallef v. Malta* [GC], 15.10.2009, no. 17056/06, para. 93; ECtHR, *Nicholas v. Cyprus*, 09.01.2018, no. 63246/10, para. 49.
[289] ECtHR, *Ruiz-Mateos v. Spain*, 23.06.1993, no. 12952/87, para. 63; ECtHR, *McMichael v. the United Kingdom*, 02.03.1995, no. 16424/90, para. 80; ECtHR, *Lobo Machado v. Portugal*, 20.02.1996, no. 15764/89, para. 31; ECtHR, *Kress v. France* [GC], 07.06.2001, para. 74.
[290] ECtHR, *Milatová and Others v. the Czech Republic*, 21.09.2005, no. 61811/00 paras. 63-66; ECtHR, *Gaspari v. Slovenia*, 10.12.2009, no. 21055/03, para. 53.
[291] ECtHR, *Regner v. the Czech Republic* [GC], 19.09.2017, no. 35289/11, para. 146; ECtHR, *Dombo Beheer B.V. v. the Netherlands*, 27.10.1993, no. 14448/88, para. 33.
[292] ECtHR, 09.12.1994, *Ruiz Torija v. Spain*, no 18390/91, para. 30; ECtHR*, Hiro Balani v. Spain*, 09.12.1994, no. 18064/91 para. 28; ECtHR, *Donadze v. Georgia,* 07.03.2006, no. 74644/01, para. 35.
[293] ECtHR, *Van de Hurk v. the Netherlands*, 19.04.1994, no. 16034/90, para. 61; ECtHR, *García Ruiz v. Spain* [GC], 21.01.1999, no. 30544/96, para. 26; ECtHR, *Jahnke and Lenoble v. France,* 29.09.2000, no. 40490/98; ECtHR, *Perez v. France* [GC], 12.02.2004, no. 47287/99, para. 81.
[294] ECtHR, *Fabris v. France* [GC], 07.02.2013, no. 16574/08, para. 72; ECtHR, *Wagner and J.M.W.L. v. Luxembourg*, 28.06.2007, no. 76240/01, para. 96.
[295] ECtHR, *Burg and Others v. France*, 28.01.2003. no. 34763/02; ECtHR, *Gorou v. Greece* (no. 2) [GC], 20.03.2009, no. 12686/03, para. 41.
[296] ECtHR, *Helmers v. Sweden*, 29.10.1991, no. 11826/85, para. 36 (but contrast with paras. 38-39); ECtHR, *Salomonsson v. Sweden*, 12.02.2003, no. 38978/97, para. 36.
[297] ECtHR, *Fazliyski v. Bulgaria*,16.07.2013, no. 40908/05, para. 69; *Moser v. Austria*, 21.12.2006, no. 12643/02, para. 101.

not to jeopardise its effectiveness and credibility.[298] However, the obligation to give a decision within a "reasonable time" does not apply in the same way to constitutional courts as it does to ordinary courts. As guardians of the Constitution, constitutional court must take into account considerations such as the nature of a case and its importance in political and social terms when determining the order in which they decide cases.[299] Furthermore, while Article 6 requires that judicial proceedings be expeditious, it also allows constitutional courts with sufficient time to ensure the proper administration of justice.[300]

226. Ultimately, the ECtHR's review of constitutional proceedings at the domestic level is limited to ensuring fair trial guarantees. The Court does not consider it its task to deal with errors of fact or law allegedly committed by a national court unless and in so far as such errors are manifest and infringed rights and freedoms protected by the Convention. That is, the Court will not determine the issue of constitutionality as such. Instead, the Court will only question the national courts' assessment on the grounds that their findings might be regarded as arbitrary or manifestly unreasonable. However, Article 6 does protect the implementation of final, binding judicial decisions.[301]

D. Reopening of cases at the national level

227. Although the ECtHR is not a court of appeal and may not order national courts to reopen cases, national law may require domestic courts to reopen cases where the ECtHR has found a violation of the European Convention on Human Rights, and where the judgment at the domestic level was based on this violation.[302] In some countries, the possibility of reopening cases following an ECtHR judgment was explicitly codified in the law (e.g., ,Austria,[303] Bosnia and Herzegovina,[304] Cyprus, Czech Republic, Estonia,[305] France, Germany,[306] Greece, Hungary,[307]

[298] ECtHR, *Scordino v. Italy* (no. 1) [GC], 29.03.2006, no. 36813/97, para. 224.
[299] Cf. ECtHR, *Süßmann v. Germany*, 16.09.1996, no. 20024/92, paras. 56-58; ECtHR, *Voggenreiter v. Germany*, 08.01.2004, no. 47169/99, paras. 51-52; ECtHR, *Oršuš and Others v. Croatia* [GC], 16.03.2010, no. 15766/03, para. 109.
[300] ECtHR, *Von Maltzan and Others v. Germany* [GC], 02.03.2005, nos. 71916/01 and two others, para. 132.
[301] ECtHR, *Ouzounis and Others v. Greece*, 18.04.2002, no. 49144/99, para. 21.
[302] Council of Europe, Steering Committee for Human Rights, Committee of Experts on the Reform of the Court, Compilation of written contributions on the provision in the domestic legal order for re-examination or reopening of cases following judgments of the Court, 31.03.2016, available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680654d4f.
[303] See sections 363(a)-363(c) of the Austrian Code on Criminal Procedure (Strafprozessordnung 1975-StPO).
[304] Art. 327(f) of the Criminal Procedure Code and Art. 231(a) of the Non-contentious Proceedings Act.
[305] See § 366(7) of the Code of Criminal Procedure, § 702(2)(8) of the Code of Civil Procedure and § 240(2)(8) of the Code of Administrative Procedure.
[306] Section 359 of the Code of Criminal Procedure and Section 580 of the Code of Civil Procedure.
[307] According to § 649 (4) of the Criminal Procedural Code a motion for review may be made in criminal cases if the judgment of the ECtHR found that the conduct of the proceedings or a final court decision violated a provision of the Convention.

Italy,[308] Lithuania,[309] Netherlands,[310] Norway,[311] Poland,[312] Portugal, Romania, San Marino, Slovenia,[313] Spain[314]). In other countries, domestic courts have interpreted existing provisions to include the possibility of reopening domestic cases following ECtHR judgments (e.g., Albania, Denmark,[315] Latvia, Slovakia and Sweden). For instance, in Latvia, it is generally possible to reopen criminal, civil and administrative proceedings on the basis of newly disclosed facts and circumstances in cases where a court's judgment or decision has already entered into force. Such newly disclosed facts and circumstances have been interpreted to include a judgment by the ECtHR holding that a ruling of the Latvian court that had entered into force is incompatible with the Convention.[316]

228. Generally, the possibility to reopen cases where the ECtHR has found a violation of the Convention is more common in the context of criminal proceedings than in the context of civil or administrative proceedings (e.g., Austria, Cyprus, Poland, Slovenia and Sweden).[317] For instance, the Austrian Supreme Court may reopen criminal cases following an ECtHR's ruling that an Austrian criminal court (including the Austrian Supreme Court ruling on criminal matters) has violated the ECHR. When deciding on whether to reopen a case the Austrian Supreme Court has to strictly adhere to the ECtHR's reasoning. Although there are no specific provisions providing for a reopening of civil proceedings in consequence of a judgment of the ECtHR, the setting aside of a judgment of a criminal court or the outcome of a reopened criminal proceeding based on a judgment of the ECtHR may lead to the reopening of a related civil proceeding under the general provisions of the Code of Civil Procedure on reopening of proceedings.[318]

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[308] In the context of criminal law, the possibility of reopening criminal proceedings following a judgment of the ECtHR was established through a *sentenza additiva* of judgement no. 113/2011 of the Italian Constitutional Court. In Italian law, the concrete effect of a *sentenza additiva* is to add to the text of the law the missing part that the Constitutional Court deems necessary in order to make the provision in question compatible with the Constitution. The decisions of the Italian Constitutional Court have an effect *erga omnes*, when they accept the question of constitutionality put to it.

[309] Art. 456 of the Lithuanian Code of Criminal Procedure of 2003, Art. 366 § 1 Item 1 of the Lithuanian Code of Civil Procedure of 2003 and Art. 153 § 2 Item 1 of the Law on Administrative Proceedings.

[310] Art. 457 § 1 (b) of the Code of Criminal Procedure.

[311] Section 391 para. 2 of the Criminal Procedure Act and Section 31-3 para. 1 lit. d of the Dispute Act.

[312] Art. 540 § 3 of the Polish Code of Criminal Procedure and Art. 272 § 3 of the 2002 Act on Proceedings before Administrative Courts.

[313] Art. 416 of the Code of Criminal Procedure.

[314] Organic Law 7/2015, of 21 July, amending Organic Law 6/1985, of 1st July, on the Judiciary. It should be noted that, prior to this law, the possibility of reopening cases following judgments of the ECtHR had been established by the Constitutional Court in judgment 245/1991 of 16th December, and further developed in its judgements on cases 96/2001, 240/2005, 313/2005 and 197/2006, as a consequence of several judgments of the ECtHR.

[315] See, for instance, *Jersild* (judgment of 23 September 1994, Resolution DH (95) 212), which has been reopened based on a provision that allows the reopening of cases "if special circumstances (særlige omstændigheder) strongly indicate that evidence has not been rightly judged" (Section 977 (1) of the Administration of Justice Act (retsplejelov)).

[316] Art. 655 § 2 (5) of the Criminal Procedure Law of 21 April 2005; Art. 479 § 6 of the Civil Procedure Law (following the 22 May 2008 amendments that entered into force on 25 June 2008) and Art. 353 § 6 of the Administrative Procedure Law.

[317] Council of Europe, Steering Committee for Human Rights, Committee of Experts on the Reform of the Court, Reopening of cases following judgments of the Court, available at: https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/echr-system/implementation-and-execution-judgments/reopening-cases.

[318] Council of Europe, Steering Committee for Human Rights, Committee of Experts on the Reform of the Court, Compilation of written contributions on the provision in the domestic legal order for re-examination or reopening of cases following judgments of the Court, 31 March 2016, available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168066b316

IX. CONCLUSION

229. Since the original study was published in 2010, Algeria, Hungary, Lithuania, Morocco, Tunisia, Turkey and Ukraine have introduced reforms expanding individual access to constitutional justice. Today, all member and observer States of the Venice Commission provide at least some form of access for individuals to their highest courts to question the constitutionality of normative or individual acts. Still, the Venice Commission observes that "there is no comprehensive set of standards that must be obeyed regarding constitutional justice. National systems are manifold and provide for a wide range of different solutions."[319]

230. A distinction may be drawn between direct individual access, where individuals are themselves given the possibility of challenging the constitutionality of a given law or act before a constitutional court (or body with equivalent jurisdiction), and indirect access, where individual questions concerning the constitutionality of a given law or act may reach a constitutional court (or body with equivalent jurisdiction) for adjudication only *via* other intermediary state bodies. Most countries have a mixed system with both a direct and an indirect means of access to constitutional justice. Some countries provide only direct access, while very few countries provide only indirect access.

231. There are three main mechanisms in the countries under review by which individuals can directly access constitutional courts: full constitutional complaints, normative constitutional complaints and *actio popularis*. Full constitutional complaints are directed against unconstitutional individual acts, which may be based on an unconstitutional law. Normative constitutional complaints are directed against an unconstitutional law only. The *actio popularis* entitles anyone to take action against a norm after its enactment, even without being personally affected. The Venice Commission favours full constitutional complaints because they provide the most comprehensive individual access to constitutional justice and hence the most thorough protection of individual rights. Normative constitutional complaints are not an effective remedy if the unconstitutionality resides in the application of the norm, but not in the norm itself. The Venice Commission advises against introducing the *actio popularis* because it creates the obvious risk of overburdening the constitutional court (or bodies with equivalent jurisdiction).

232. As concerns indirect access, there are several state bodies who may serve as intermediaries for individuals in the process of challenging the constitutionality of a norm. The most common among them are the ordinary courts, through preliminary requests, and the institution of the ombudsman. The Venice Commission is of the opinion that, from the viewpoint of an effective human rights protection, it is expedient and efficient to give courts of all levels the possibility to refer preliminary questions to constitutional courts, not only to the supreme court. Similarly, where ombudsman institutions exist, they should be given the possibility to apply to the constitutional court (or body with equivalent jurisdiction) for a judgment on questions concerning the constitutionality of laws which raise issues affecting human rights and freedoms. When a constitutional court (or body with equivalent jurisdiction) is competent to review the constitutionality of individual acts, the ombudsman should also be granted the right to bring individual cases to the constitutional court (or body with equivalent jurisdiction).

233. The Venice Commission favours direct access through individual complaints before a constitutional court (or bodies with equivalent jurisdiction), and especially full constitutional complaints, as the main constitutional remedy. While indirect access to individual justice is a very important tool for ensuring respect for individual human rights at the constitutional level, it should only be seen as a complementary process to direct access. The Venice Commission sees an advantage in combining indirect access with direct access, to balance the advantages and disadvantages of the different mechanisms.

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[319] Venice Commission, CDL-AD(2011)040, Opinion on the Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey, para. 13.

234. Since granting individuals access to constitutional courts (or bodies with equivalent jurisdiction) may create the risk of overburdening these courts, constitutional review proceedings typically comprise various procedural filters. Moreover, constitutional courts may be granted significant discretion in selecting cases. However, the risk of overburdening constitutional courts must be balanced against the need to ensure effective individual access to constitutional justice. In general, the Venice Commission recommends that as a guarantee for the protection of human rights, access to constitutional courts (or bodies with equivalent jurisdiction) should be simplified. At the same time, constitutional courts (or bodies with equivalent jurisdiction) must be given the tools to prevent frivolous, abusive or repetitive complaints.

235. The constitutional court (or bodies with equivalent jurisdiction) should be able to continue analysing the petition even after it was withdrawn if a public interest is at stake. However, if the challenged act loses its validity, mere discontinuation of a case may not be enough to protect human rights, if the human rights violation subsists.

236. Concerning interim measures, the Venice Commission is in favour of the possibility to suspend the implementation of a challenged individual or normative act, if the implementation could result in further damage or violation, which cannot be repaired once the unconstitutionality of a provision is established. The conditions for suspension should not be too strict. However, especially for normative acts, the extent to which their non-implementation could result in additional damages and violations that cannot be repaired must also be considered. When preliminary questions are referred to the constitutional court (or bodies with equivalent jurisdiction), ordinary proceedings should be stayed immediately or before the ordinary judgment is adopted. The ordinary judge should not have to apply a law, which he or she holds to be unconstitutional and the constitutionality of which is to be decided by the constitutional court regarding the same case. In cases of irreversible damage of individual rights, suspension of execution should be compulsory.

237. Time-limits for the adoption of decisions, if they are established, should not be too short so as to provide the constitutional court with enough time to examine the case fully and should not be so long as to prevent the effectiveness of the protection of human rights *via* constitutional justice. The constitutional court should be able to extend the mentioned time-limits in exceptional cases while still observing the duty to decide within a reasonable period of time. Moreover, whether constitutional courts (or bodies with equivalent jurisdiction) should be allowed to decide to award damages themselves remains an open question.

238. The effects of a final decision issued by a constitutional court (or body with equivalent jurisdiction) are also quite varied. The decision may have either *inter partes* or *erga omnes* effect, the latter resulting in the invalidation of a normative act or making it inapplicable to future cases. In most of the countries under review, when the constitutionality of a norm is challenged, the constitutional court (or body with equivalent jurisdiction) is entitled to invalidate it or at least to decide on its constitutionality, leaving the task to enact a new law to the legislator. The Venice Commission considers it to be the core task of a constitutional court to identify legal provisions that contradict the constitution and to invalidate these provisions. Therefore, the Commission strongly favours that the effects of constitutional court decisions should be *erga omnes*.

239. In Council of Europe member States, the European Court of Human Rights may influence the individual's access to constitutional justice at the domestic level in at least three ways. First, in some countries domestic courts are required to interpret their constitutional rights in conformity with the European Convention on Human Rights. Second, the European Court may be understood as effectively protecting constitutional rights to the extent that they overlap with Convention rights. Third, the European Court ensures that constitutional review proceedings fulfil the fair trial requirements of Article 6 of the European Convention on Human Rights. Under

certain conditions, findings of violations by the European Court may even lead to the reopening of a case at the national level.

240. Individual complaints to the constitutional court or equivalent body may also be considered by the European Court of Human Rights to be an effective remedy against a violation of the European Convention on Human Rights and may, in this way, function as a filter for cases before they reach the Strasbourg Court. In light of the Court's heavy caseload, the Venice Commission recommends that such complaint mechanisms be introduced to avoid overburdening the European Court of Human Rights.