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"THE ROLE OF CONSTITUTIONAL REVIEW BODIES IN ENSURING THE RULE OF LAW IN RULE-MAKING AND LAW-ENFORCEMENT"

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REPORT

"THE ROLE OF THE CONSTITUTIONAL COURT AND CONSTITUTIONAL RIGHT TO APPEAL"

By

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Introduction[1]

At the beginning of the 21st century a modern democratic state is based on human rights as the highest value of the rule of law. Human rights are protected in different ways in different legal systems: mostly through judicial control, through proceedings aimed at assessing the constitutionality and legality of different legal regulations, through constitutional action, through the work of the Ombudsman, through law practice, and through other forms of legal assistance. It is difficult to imagine a legal system of the continental type – with a written Constitution – without constitutional and judicial protection and without control of the constitutionality and legality of the legal system. A famous German philosopher on law Gustav Radbruch, put it this way: "The function of a judge is a daily portion of bread, water to drink and air to breathe to every court, law and justice which lie beneath the vault of the rule of law and a state based on the rule of law; and therefore the question of the independence of judges is not only a legal issue, it is also an issue of the general culture of a community."

Of all the above-mentioned methods and forms of protection of human rights, here we are particularly interested in the protection that can be provided by constitutional courts in this field. However, for a constitutional court to exist there must be a written constitution as the first prerequisite for the constitutional and judicial review of human rights protection.[2] This is a prerequisite for defining constitutional remedies for the protection of human rights and freedoms.

Therefore, bearing in mind the principle of direct regulation of human rights and freedoms, they must be clearly defined in the constitution of the state. Of all the Member States of the Council of Europe (now 47) only the United Kingdom has no written constitution. That Member State, however, adopted the Human Rights Act in 1998, which clearly states that the courts should take into account the compatibility of certain laws with this Act.[3]

The term constitutional judiciary in its narrower sense refers to the judicial control of the constitutionality and legality of regulations, and in a broader sense, also to the resolution of some other issues that have fundamental constitutional and legal significance (disputes over jurisdiction, the responsibility of the highest state authorities, in some constitutions opinions regarding the constitutionality of international treaties, constitutional complaints, etc.) This defines the concept of the constitutional judiciary in a material sense, while in a formal sense we assume the existence of a special body that performs solely a constitutional and judicial function.

At the national level, a constitutional court is the highest authority with regard to the protection of constitutionality and legality, but also with regard to the protection of human rights and fundamental freedoms in systems in which constitutional complaints are accepted (as in Armenia, Croatia, Germany, Italy, Moldova, Serbia, Slovenia, Macedonia, and some other countries). According to Professor Siegfried Bros, the Federal Constitutional Court of Germany, implementing the function of "an appellate court, has expanded the number of instances of Germany's jurisdiction (a total of five) so as to include a special constitutional and judicial instance for reviewing the constitutionality of judicial decisions."[4] The case law of the European Court of Human Rights has shown that the existence of constitutional complaints as an option for protecting human rights in the state is a very useful method.

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[1] Being a former judge of the European Court of Human Rights and a former judge of the Constitutional Court of the Republic of Macedonia, the real challenge for me is to write on a topic that will combine both experiences. In my approach I will try to remain within the limits of my impartiality.

[2] See, J.-F. Flauss, "Human Rights Act 1998: Kaléidoscope", in: Revue française de droit constitutionnel No 48 2001/4, P.U.F., Paris, p. 695 f., or P. Pernthaler, Allgemeine Staatslehre und Verfassungslehre, 2nd rev. ed., Springer Verlag, Vienna, 1996, p. 174

[3] (See Art. 4 of the Human Rights Act 1998: http://www.opsi.gov.uk/acts/acts1998)

[4] Dr Siegfrid Bros ""On the position of a Constitutional Court in a modern state under the rule of law - the experience of the Federal Constitutional Court of the Federal Republic of Germany" – Constitutional and Judicial Protection – Reality and Perspectives (Skopje) Obnova Kočani 2004

In modern states in which the rule of law and the development of democratic institutions are given pre-eminence, it is important to provide a mechanism for protecting individual rights, or more precisely, to ensure access to the guardian of constitutionality and access to the Constitutional Court for an individual who believes that his constitutionally guaranteed rights and fundamental freedoms have been violated. In its judgments, the European Court of Human Rights has always emphasised and continues to emphasise the importance of domestic legal remedies which would ensure access to justice within a reasonable time. Therefore, "slow justice equals no justice."

1. The effectiveness of domestic legal remedies

For the European Court of Human Rights, considering the content of the complaints and the actual situation in the States Parties to the Convention, took time to urge that domestic remedies for human rights be better elaborated, especially with regard to the length of proceedings.

Thus, in 2000 the Court changed its legal position and began linking the violation of the right to a reasonable duration of judicial proceedings under Article 6 (1) to Article 13 of the Convention. Article 13 provides that everyone has the right to an effective legal remedy before domestic bodies. The change in the legal viewpoint of the Court is embodied in the well-known judgment in the Kudla v. Poland case.[5]

In the case of Kudla v. Poland, the applicant complained about the unreasonable length of proceedings in a criminal case, in violation of Article 6 (1), and about the fact that the possibility of compensation for the unreasonable length of the proceedings did not exist in Poland at the time, which he believed was a violation of Article 13 of the Convention. Before the verdict in this case, the Court had held that the very fact that the appeal was considered in the context of Article 6 (1) of the Convention meant that there was no need to consider the violation in relation to Article 13 because Article 6 (1) constitutes a *lex specialis* in relation to Article 13. However, this case was different as the Court concluded that there were two separate issues: firstly, whether there had been an unjust delay in the proceedings; and secondly, whether the applicant had had an adequate and effective remedy against that delay.

The Court concluded that an appropriate remedy did not exist in Polish law and that this had resulted in the unreasonably lengthy duration of the proceedings before the national courts (Article 6 (1)), and in a violation of Article 13 because there was no effective remedy against the violation of Article 6 (1).

After that judgment, the Court applied the precedent established in the Kudla case to other judgments (e.g. Lukenda v. Slovenia), informing Member States that "to prevent future violations of the right to a trial within a reasonable time, the Court encourages the respondent State to either amend the existing range of legal remedies or to add new remedies so as to secure genuinely effective redress for violations of that right". The characteristics of an effective remedy are to be found in the Court's case law.

2. Constitutional complaint and the protection of human rights

The case of Kudla v. Poland is primarily linked to a legal remedy which concerns the effectiveness of domestic bodies. However, it is very important for the Court that states should have a clearly established system for the protection of the human rights and freedoms guaranteed by the Constitution and Convention. Therefore, given the experience of the High Contracting Parties to date, we now attach particular importance to constitutional complaints among the special procedures for protecting human rights and freedoms. In countries which

[5] Kudla v. Poland (Grand Chamber judgment 30210/96 of 26 October 2000): http://www.echr.coe.int

have accepted this method of protecting human rights and freedoms it represents a relatively new institution and a special legal instrument, and in most cases it has proved to be an effective legal means of protecting human rights and freedoms.

Typically, a constitutional complaint may be filed by any natural person or legal entity that believes that a certain legal act by state bodies, bodies of local self-government or holders of public office has infringed a right or freedom which is constitutionally guaranteed. A constitutional complaint may have a very wide scope and it can constitute the basis for proceedings before the Constitutional Court in connection with any constitutionally guaranteed right or freedom (Croatia, Germany, Serbia, Slovenia), or it may have a limited reach and apply only to rights and freedoms explicitly singled out in the Constitution (Macedonia).

As with proceedings before the European Court of Human Rights, a constitutional complaint cannot be filed at any stage in the proceedings taking place before other bodies or courts. The most common preconditions, except with regard to the length of proceedings, are as follows: before initiating proceedings before the Constitutional Court, all domestic remedies must be exhausted; proceedings may only be initiated within a certain period from the service of the final decision (in Slovenia within 60 days and in Macedonia within 2 months of the service of the final decision, but not later than 5 years after the date of the violation). A constitutional complaint must be submitted in writing, stating precisely the act that is being challenged and on which the complaint is based and which constitutes the basis for the human right violation.

According to a study done by the Venice Commission for Democracy through Law, constitutional courts dismiss over 90% of the appeals as inadmissible. [6] One such court is the Constitutional Court of the Republic of Macedonia, which, despite many years of implementation of this remedy has done little to increase its efficacy. The Constitutional Court itself has not helped to make this remedy popular with citizens. A constitutional court decision on a constitutional complaint refers to and affects only the case at the origin of the constitutional complaint. The scope of the decision issued on the basis of a constitutional complaint is limited only to that specific case, and it raises the issue, both in theory and practice, of "what would be the role and impact of such a decision". The decision is binding only on the applicant, the judicial or administrative authorities whose act has been challenged and also possibly on some other public body that might deal with the same issue in the future, until the specific situation that the case arose from has changed.[7]

Taking into account our experience in the matter to date, there are three ways in which the Constitutional Court may make its decisions with regard to constitutional complaints: it may issue a decision on the merits; it may set aside an individual act; or it may request that the proceedings be reinitiated or the decision changed without setting it aside. In Canada and Cyprus, the Supreme Court (which also has the jurisdiction of a constitutional court) may render decisions on the merits, but only with regard to court decisions. The Constitutional Courts of Slovenia and Spain also have such jurisdiction. However, in most Member States of the Council of Europe, deciding on the merits is not the rule, and the Constitutional Court may decide to return the case to the lower courts to render new decisions.[8]

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[6] See the documents:
CDL-AD(2004)043 Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the Constitutional Court) adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004);
CDL(1997)035 Opinion on the possibility of an individual complaint to the Armenian Constitutional Court and on interpretation of Article 7 of the Draft Law on Organisation of Judiciary of the Republic of Armenia.

[7] R.Jaeger, S. Broß, "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.27

[8] CDL-INF(2001)009 Decisions of constitutional courts and equivalent bodies and their execution

If the court decides to set aside the last court decision, it also requests that a new decision on the case in question be rendered. The constitutional courts in Austria, Bosnia and Herzegovina, Croatia, Germany, Portugal, Slovenia and Slovakia have the power to make such decisions.

If the Constitutional Court only returns the case to the highest ordinary court to reopen the proceedings, without setting aside the unconstitutional decision (Azerbaijan), it is questionable whether the highest ordinary court will follow the orders in the decision received from the Constitutional Court.

An important component of the Constitutional Court's decisions on constitutional complaint cases involves the following possibility: if the Constitutional Court finds that the cause of the human rights violation in a specific case is an unconstitutional provision of a law or by-law, the court may initiate the assessment of the constitutionality of that provision or quash or abolish it on the basis of the proceedings in question. In this way, based on an individual complaint, proceedings may end in a decision that has an *erga omnes* effect.

A decision on an individual complaint may in certain cases have an effect that is not limited to that case; for example, under Montenegro's Constitution, when the Constitutional Court rules on an individual act on the basis of which some right or freedom of a person has been violated and only one person has initiated proceedings before the Constitutional Court, the decision may apply to all those affected.

In some cases, the German Constitutional Court may decide that future administrative or judicial acts which are the same as the one quashed by the Constitutional Court should also be considered unconstitutional.[9] This approach is very important because in this way the Constitutional Court, while deciding on a specific act, still provides some general guidelines as to how courts or administrative authorities should approach a particular legal situation while acting in accordance with the Constitution.

2. The cooperation of the Constitutional Court and ordinary courts

In proceedings initiated by complaints and raising the issue of the protection of a specific human right or freedom, it is very important for the Constitutional Court to act quickly and correctly. That is why deadlines for deciding on constitutional complaints are usually shorter than deadlines relating to abstract constitutional and judicial jurisdiction. Therefore, cooperation between the Constitutional Court and ordinary courts is a very important dimension of the effectiveness of the protection of human rights and freedoms.

Ordinary courts apply laws on a daily basis and are able to compare laws and by-laws with the Constitution and note the existence of the unconstitutionality or irregularity of a regulation. In such cases, in the majority of the Member States of the Council of Europe, a judge with an ordinary court of any instance can stop proceedings in a specific case and initiate a procedure to determine the constitutionality of a law before the Constitutional Court. This possibility exists in Croatia, Germany, Italy, Serbia, Slovenia and Macedonia. This approach, based on the abstract jurisdiction of the Constitutional Court, plays a very important preventive role regarding the protection of fundamental rights and freedoms.

However, the main issue with regard to the Constitutional Court and ordinary courts is how to connect them while avoiding misgivings about a relationship of superiority and control. Garlicky believes that the tension between the Constitutional Court and the Supreme Court is more present and more noticeable in a system of concentrated constitutional authority.[10] As

[9] R. Jaeger, S. Broß, Ibid, p. 27

[10] L. Garlicki, "Constitutional courts versus supreme courts", International Journal of Constitutional Law 2007

specialized courts, constitutional courts are usually outside the remit of ordinary courts. With regard to constitutional complaints, constitutional courts not only have the role of evaluating constitutionality and legality, but they must also decide on specific cases, and sometimes a decision on a single complaint concerns the method of application of a specific regulation by courts of different instances. Commenting on these situations, the Venice Commission said: "The possibility to review the decisions of ordinary courts may create tensions, and even conflict between the ordinary courts and the Constitutional Court. Therefore it seems necessary to avoid a solution that would envisage the Constitutional Court as a 'super-Supreme Court'. Its relation to 'ordinary' high courts (Court of Cassation) has to be determined in clear terms."[11] In France "there is no hierarchy between the Constitutional Council and the other two high courts (the Court of Cassation and the Council of State). In addition, they have long played a major role in the protection of human rights and fundamental freedoms."[12] Each of these different judicial instances is inspired by the other two. However, one of the bases for possible conflict between the two highest courts in a state often arises from case overload and the constant "spillover" of complaints from one institution to another.

3. Problem of overburdening the Constitutional Court

The issue of overburdening the Constitutional Court often arises in systems where constitutional complaints have been accepted and introduced. States that have accepted this legal instrument use various working methods to overcome case overload. The most commonly used filters are those that allow the Court to separate, at the very beginning, applications that have no merit and which would end unsuccessfully from those applications that raise some important issue.

In systems where constitutional complaints are accepted, the methods used are primarily directed at the proper management of applications received. The United States Supreme Court has accepted jurisdiction to consider individual complaints, but has no obligation to review all of the complaints received and may choose applications which raise important issues relating to the protection of constitutional order. However, this method is quite different from the method of accepting all individual constitutional complaints, which is characteristic of European countries. The recommendation made by the European Court of Human Rights through its case-law is that, for the protection of human rights, states should have filter mechanisms that are as stable as possible.

The large number of constitutional complaints and the small number of constitutional judges who issue decisions on them are two related problems. Germany's practice shows that constitutional complaints which are considered as having no merit and little chance of success are entered in a separate "general register" and not in the records of the court. The applicant who submitted the constitutional complaint is notified. If the applicant expresses interest and amends or modifies evidence or submits new evidence in the proceedings which results in his constitutional complaint being regarded as having merit, the case is then transferred to the records of the court if it is not found to be inadmissible. This is the method chosen by that court. However, the most effective method of relieving caseload is the constant education of the courts below, and fostering awareness that the efficiency of the court is something that depends on each judge individually and on all of them together. Judges have to follow the case-law of the European Court of Human Rights and the case-law of the Constitutional Court and the Supreme Court. Otherwise, the number of cases will constantly be on the rise.

5(1), Oxford University Press, Oxford, in: http://icon.oxfordjournals.org/cgi/content/full/5/1/44#FN59#FN59, accessed 11 February 2009

[11] CDL-AD(2004)024 Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey

[12] Simone Veil, Ibid p. 42

One of the recommendations of the Venice Commission is to employ a larger number of people to assist the judges.[13] The secretariat of the court or its professional service may advise the court at the very beginning of proceedings relating to constitutional complaints and separate cases it believes to be without merit, so that the court spends less time on such proceedings. "Depending on the number and qualifications of the staff, the secretariat of the court may perform a first preliminary examination in order to weed out manifestly inadmissible complaints as far as possible. However, as judicial power cannot be delegated to the secretariat, its opinion can only be advisory."[14]

4. Constitutional complaints as effective legal remedies

Once it has been accepted and introduced into the legal system of a state, the constitutional complaint must be an effective remedy in order to benefit complainants and domestic courts, as well as the Strasbourg Court. It seems that the best model is the one in which a constitutional complaint is an accessible filter to its full extent and without major restrictions for the protection of human rights and freedoms

At the same time, as with the case-law of the Strasbourg Court, the use of constitutional complaints has shown how important it is to work on informing the public about the existence of constitutional complaints as a legal remedy. To that end, brochures and information on the web sites of the constitutional courts may perform an informative as well as an educational function. The work of the court may be greatly expedited and simplified by introducing instructions on the web site of the Constitutional Court as to what a constitutional complaint should look like. This practice has also been introduced by the European Court of Human Rights. The Court has developed Instructions for applicants in all of the languages of Member States, explaining exactly how to fill in an application and what makes it admissible or inadmissible even before they decide to file a complaint.[15]

Equally important are the education of legal representatives (attorneys) and the regular provision of information on proper access to and proper use of this remedy. Legal representatives and interested citizens must have access to regular information on the case-law of the Constitutional Court and the European Court of Human Rights. One of the most important moves is to set up a case-law data base that will be available to both legal representatives and future complainants, as well as to judges in ordinary courts.

The Strasbourg Court could not achieve much if it did not inform the public in the Member States of its recent decisions and changes in its case-law. The principle of transparency in the court's work and the transparency of information about completed cases is an important prerequisite in a state governed by the rule of law.

[13] CDL-AD(2008)030 Opinion on the Draft Law on the Constitutional Court of Montenegro
[14] CDL-STD(1995)015 The Protection of fundamental rights by the Constitutional Court, Science and Technique of Democracy no. 15, 1995
[15] http//: www.echr.coe.int