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REPORT

Determination and investigation of facts in constitutional cases initiated by individual complaints

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To prepare a short presentation on a topic like the one indicated in the title is not an easy task. It is much easier to be longwinded than brief, because leaving out certain elements requires selection and the correctness of the choice is rarely indisputable. However, since the Conference is to deal with the problem of investigating and determining facts in constitutional court proceedings, for the sake of brevity I try for an abstract approach to the problem. Omitting the description of the approaches of various constitutional courts will certainly make my presentation shorter.

1. I try to focus on the issues indicated in the title. It seems, however, unavoidable to make several general remarks relating to the traditional distinction of issues of law and issues of fact. It is necessitated by the fact that constitutional courts are not part of the regular administration of justice in the traditional sense of the term, where the problems related to this distinction are more or less clearly seen. As far as constitutional court proceedings are concerned, the picture is far more hazy.

All constitutional courts have the basic function of preserving the constitution they work under, but their authority and powers may be, in fact are, different. The model they follow determines the ways of performing this function and may serve as the basis for classifying them into various groups. For the purpose of our discussion and in order to simplify the issue, I mention only two types of court, namely those having norm control as their main line of activity and those having individual complaints to deal with in order to provide protection against the violation of constitutional rights.

In its "pure" form, norm control means measuring legal norms against the constitution. One could safely say issues of fact theoretically do not play a significant role in the proceedings. The pure norm control model may be described as one in which facts are not taken into consideration during the decision making process. Again, dealing with constitutional complaints in a "pure" form would not involve the constitutional assessment of norms. Actually norms other than those of the constitution theoretically should not be considered here, the process would be measuring facts (e.g. actions or omissions of authorities, agencies, courts etc.) from the point of view of constitutional rights.

Unfortunately (or perhaps fortunately), none of these "pure" forms exist in practice, constitutional courts consider both norms and facts when making their decisions.

2. Accepting the risk of being misunderstood, I offer for consideration the following proposition: It is impossible to logically think of a constitutional court exercising norm control without considering any facts. In other words, there is no issue of law that is completely unrelated to some issue of fact.

In our legally trained minds it is natural to distinguish these two types of issue, the distinction, however, is not always clear. In the process of the application of law, the determination of facts is followed by the determination of the provision(s) of law covering the particular set of facts and the decision is made accordingly. (E.g. the prosecutor knowing the facts decides with what offence to charge the defendant.) The process may be the opposite as well, when the norm, the provision of law is selected in advance and the question is whether there are facts meeting the norm. (E.g. when a person is accused of murder, the prosecutor selects the relevant norm, the statutory definition of an offence the defendant is charged with. The question for the court of justice is whether the defendant's conduct may be classified as such.)

In constitutional court practice of norm control these two elements also are present: the existence of a norm with particular contents is a fact (determined or to be determined by the constitutional court) and the process of subsumption relates to a provision (norm) of the constitution. Even if this is an abstract approach to the problem of distinguishing issues of law and fact, in my opinion it is not less correct than the traditional way of including them into exclusive classes. The demarcation line between the two classes is not a very clear one, in certain situations it is very difficult to tell the difference.

Constitutional courts practicing norm control, thus, simply cannot perform their obligations without the determination of certain facts, even if the facts in question are of a special character. Many of them relate to the norm subjected to constitutional scrutiny as external factors. They influence, sometimes even decide the issue of the constitutionality of the norm without manifesting themselves in its contents. The best example of that may be the invalidity of a norm or law caused by the legislative process - if the error in procedendo is significant enough the norm may be found unconstitutional independent of its contents.

3. If I mentioned two types of constitutional court in earlier parts of my presentation now I have to proceed with the classification in order to examine the possibilities of dealing with individual complaints.

Some courts handle individual complaints as a means of norm control. The review is based on the petitioner's claim of the unconstitutionality of the norm applied by an authority or an ordinary court in proceedings the petitioner was involved in, or a party to. The basic nature of the constitutional court proceedings in this form of norm control (concrete norm control as opposed to abstract norm control) is the same as in general. In other words the constitutional court examines the norm's constitutionality by measuring it against the constitution. In this scrutiny both material and formal constitutionality (contents of the norm and the legislative process) may be examined, subject, of course, to the competence granted to the court. As far as the determination of the issues of fact is concerned, in this respect no difference from abstract norm control may be seen: the determination of whether a norm is constitutional does not require any special method just because the proceedings are initiated by a constitutional complaint.

Yet, by their own nature, constitutional complaints require normally some factual examination, since constitutional complaints conceptually include a personal interest on the part of the petitioner. In certain systems abstract norm control may be initiated only by certain officials or organizations authorized to do so by law. In some others bringing a case before the constitutional court may be effected by actio popularis with no personal interest required on the part of the petitioners. In turn, the case of constitutional complaints the existence of personal interest must be shown by the petitioner.

The determination of the existence of personal interest normally is relatively easy. The involvement of the petitioner and the quality of that involvement in the particular case can be determined from the documents (records, protocols, decisions). Yet, the facts showing the personal interest require careful examination. And experience shows that commonly simple tasks occasionally involve difficulties.

Again, constitutional complaints normally should be filed with constitutional courts within a deadline. Missing the deadline may forfeit the right to file such a complaint. Thus, whether the complainant met the deadline also is a factual issue to be determined by the constitutional court.

Finally, a passing remark may, perhaps, be made about the inadmissibility of constitutional complaints when the law excludes the possibility of such a constitutional remedy. (E.g. when the law provides that an individual with a personal interest may bring a constitutional complaint to the court only after exhausting all ordinary remedies, the constitutional complaint concerning the first instance court decision is inadmissible before the regular appeal has been decided.) This may, again, be a fact to be determined.

One may say the three issues of fact mentioned here are the equivalent of the procedural rules known to ordinary administration of justice and I would not disagree. Also, I would admit without the slightest hesitation that the determination of this type of facts is not what should be considered a feature characterizing the fact-finding processes in individual complaint cases. My point, however, is still relevant: as I said earlier, norm control without the consideration of at least some issues of fact is an impossibility and it is true for both abstract or concrete norm control. I should add, the examples demonstrate as well that issues of law and issues of fact are sometimes difficult to distinguish: it could be argued that whether a person has the right to file a constitutional complaint as one having a personal interest is not an issue of fact but that of law.

4. I cannot resist the temptation of experimenting with an idea to show the intertwining nature of issues of law and fact. Let us suppose that the petitioner, dissatisfied with the final and non-appealable court decision claims that the law applied by the court is unconstitutional. Let us also suppose the constitutional court finds the norm in question perfectly constitutional. At the same time it comes to the conclusion that the judgment in fact violates a constitutional right of the petitioner - the same one that is claimed to be violated by the norm. Naturally, the constitutional court following the norm control model may only deny the petition, but it is a question what will happen to the petitioner's violated right. In the norm control model there does not seem to be a remedy - the ordinary court's decision is not subject to norm control. But the violation of a constitutional right (provided that the constitutional court is right and in constitutional matters - by its very nature - it is infallible) is now a fact, just "consequences" may not be attached to it (perhaps it may not even be declared) in the decision.

5. As far as individual complaints claiming the violation of the constitutional rights of the petitioner a way other than applying an unconstitutional law, or provision of law, are concerned, the investigation and determination of facts are part and parcel of the whole process. In such cases it must be clearly seen, what happened, what actions or omissions on the part of the alleged 'violators' (authorities, courts) form the basis of the claim.

In such cases, part of the relevant facts may be found in the documents and it is also conceivable that no other evidence is needed for making the decision. It is however, not uncommon, that evidence proving the claim must be sought for and the means of obtaining them may be different from court to court according to the procedural mode they follow.

6. In legal systems, where the constitutional court is some sort of a "super forum of appeal", i.e. cases decided by ordinary courts may be brought with a relative ease to it, the workload may be really heavy. Constitutional courts and experts studying their work keep repeating that an effective screening system is needed to have a manageable workload, but, unfortunately, reasonable screening systems are not easy to invent. Evidently, the limitation of the scope of constitutional court review may be another possible solution, and the limitation of the review of facts offers itself readily for that. One, however, must be careful with professing such views since it is quite often the facts that lay the foundation of the unconstitutionality.

At any rate, proceeding in constitutional complaint cases, where the claim is a violation of constitutional rights, involves the determination of facts far more often and to a greater extent than in other type of constitutional review. And, in connection with the mode of proceeding, one must see the difference between the systems where the decision is made on the basis of written documents and ones where oral presentation by the parties is involved in the process. The latter, being more of a "contradictorial" character than the former one, offers more possibilities for the parties to bring up issues of fact. It is so even when the parties are supposed to present only legal argumentation. Considering that alleging facts in any kind of legal dispute is a traditional way of trying to convince the court of something, factual statements may need supporting evidence. It is a question, how far the constitutional court may or should investigate whether the "facts" are true.

The answer to the question depends to a great extent on the procedural rules prescribed for the constitutional court. Experience shows that legislators quite often fail to recognize the importance of such regulation and omit making detailed procedural rules. As a consequence, sometimes surprisingly high-level uncertainty appears in matters of procedure and evidence. This goes occasionally so far that the proceedings of the constitutional court are more like to the operation of a black box than to anything else.

7. No doubt, the lack of detailed procedural and evidentiary rules and formalities may to a certain point be an advantage for the constitutional court because it allows considerable freedom in handling cases. There is, however, a serious disadvantage of such state of affairs. The credibility of the court depends to a significant extent on the transparency of its proceedings. The lack of the procedural and evidentiary rules acts against transparency, thus it may decrease credibility.

In my opinion, sufficiently detailed rules of procedure and evidence should be part of the law regulating the operation of constitutional courts. Of course, the rules should not be too detailed, because the court must have some latitude for determining its way of action. It is a question of the right balance, which is a difficult thing to find. Yet, in the absence of the necessary depth of regulation, even the constitutional court may try to initiate the appropriate legislative process to correct the situation. (I am somewhat hesitant at this point. Experience, again, shows that legislators sometimes are not very keen on implementing ideas coming from constitutional courts. The only example I mention is the Hungarian one: The Hungarian Parliament has failed to create the procedural rules for the constitutional court up to date, which is an unconstitutional omission on its part. The unconstitutional situation has remained the same for 15 years now, although the draft for legislation was submitted to the Parliament at a very early phase of the operation of the Constitutional Court. And I am hesitant for another reason as well. I have been told by some experienced people that legislators sometimes would rather hogtie a constitutional court instead of creating reasonable procedural and evidentiary rules. It is, however, in all probability, only one of those malicious rumors.)

8. I concentrated, as far as I could on the topic determined by the title of this presentation. There are two short comments, however, I would like to make now. I hope they are not completely out of context.

Firstly: Constitutional courts following the norm control model, tend, in my opinion, to over emphasize that their task is to decide solely issues of law, consequently judging issues of fact is not their competence. While I agree that they are not, and rightly are not, designed to deal with issues of fact, I believe one must see such issues may not be completely avoided. Instead of looking for ways of circumventing them if they occasionally arise, it might, perhaps, be possible

to form a more realistic attitude. It is a question whether it should be done and more importantly, if the answer is in the affirmative, what the impact would be on the norm control model. One may wonder what the right answer is.

Secondly: I deliberately avoided the discussion of the "extra" or "special" tasks given to constitutional courts, like being a real "forum of appeal" in cases like referendum or a "regular" court in an impeachment case, etc., where issues of fact are always present. But if not an answer, at least a question follows from my rambling about the need of procedural and evidentiary rules. In my opinion the question is whether separate rules for these "side" tasks should be adopted or the general rules should apply to them. In the latter case, the generally applicable regulations really need details.

I only tried to ask questions. And I hope someone has convincing answers.