

International Symposium organized under the Grants for the “Leading Graduate Schools”
And the “Excellent Graduate Schools” Programs in the Graduate School of Law
at Nagoya University

Institution Design for Conflict Resolution and Negotiation —Theory and Praxis—

Nagoya 1-2 February 2014

Individual Access to Constitutional Courts as an Effective Remedy against Human Rights Violations in Europe – The Contribution of the Venice Commission¹⁾

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1) This article reflects the views of the author only and does in no way engage the Council of Europe or the Venice Commission.

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1. Introduction

In countries, which have long standing constitutional traditions, institutional design is a gradual issue. However, in countries which undergo a radical change from an authoritarian system – hopefully – to democracy, institutional design and constitution drafting are a matter of urgency in order to pacify society.

The European Commission for Democracy through Law of the Council of Europe³⁾ (the “Venice Commission”), has been established in order to assist its member and observer states in Europe and abroad⁴⁾ in designing institutions in conformity with the basic principles of the Council of Europe which are democracy, the protection of human rights and the rule of law.⁵⁾

3) The pan-European Council of Europe has 47 member States and is not to be confounded with the European Union, which has 28 member states.

4) 59 member States: Albania, Algeria, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Chile, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Kazakhstan, Korea, Republic, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Republic of Moldova, Monaco, Montenegro, Morocco, Netherlands, Norway, Peru, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, “The former Yugoslav Republic of Macedonia”, Tunisia, Turkey, Ukraine, United Kingdom, United States of America; associate member: Belarus ; observers: Argentina, Canada, Holy See, Japan, Uruguay; special co-operation status: Palestinian National Authority, South Africa.

5) The European Commission for Democracy through Law - better known as the Venice Commission as it meets in Venice - is the Council of Europe's advisory body on constitutional matters. The role of the Venice Commission is to provide legal advice to

Democratic state institutions, which are able to balance diverging interests of various groups in society and to respect legitimate concerns of minorities, are a firm basis for peacefully resolving conflicts in any country. A country's Constitution provides not only the legitimacy but also the necessary framework and limitations for these institutions. The Venice Commission provides advice on how to draft constitutions and on how to design state institutions in conformity with international standards and the common constitutional heritage.⁶⁾

In Europe, human rights are protected both on the national level and through the system established by the European Convention on Human Rights. In view of the enormous case-load of that Court, the State parties undertook a series of measures to increase the efficiency of the Court and to reduce its docket. One of the tasks in this framework, envisaged in the Brighton Declaration, adopted at the High-level Conference on the future of the European Court of Human Rights (Brighton, United Kingdom, 18-20 April 2012)⁷⁾, is to improve within the member states the systems of human rights protection in order to settle human rights problems on the national level.

This paper will set out how the Venice Commission's Study on Individual Access to Constitutional Justice⁸⁾ can provide answers to the issue of efficient

its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with common standards and international experience in the fields of democracy, human rights and the rule of law. It also helps to ensure the dissemination and consolidation of a common constitutional heritage, playing a unique role in conflict management, and provides "emergency constitutional aid" to states in transition.

6) S. Bartole, *The Constitution as Instrument of Stability and Development*, CDL-JU(2013)021 (all documents referred to with a CDL reference number are available on the web-site of the Venice Commission www.Venice.CoE.int).

7) CDDH(2012)007, http://www.coe.int/t/dghl/standardsetting/cddh/cddh-documents/cddh_2012_007_en.pdf (accessed 22.1.2014).

8) Study on Individual Access to Constitutional Justice, adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010, CDL-AD(2010)039rev); see also P. Paczolay, Introduction to the Report of the Venice Commission on Individual Access to Constitutional Justice, Conference on Individual Access to Constitutional Justice, Arequipa, Peru, 30-31 May 2013 (CDL-JU(2013)003).

national human rights remedies, as called for in the Brighton Declaration. The Council of Europe steering committee, which is in charge of the implementation of the Brighton Declaration – CDDH, has indeed invited the Venice Commission to co-operate in the follow-up to the Brighton Declaration.⁹⁾

This paper first presents the problem of the overburdening of the European Court of Human Rights, introduces the idea of specialised constitutional review, sets out the main elements of the Venice Commission's Study on Individual Access to Constitutional Justice¹⁰⁾ and how they link to the reform of the European Court of Human Rights and will then present elements for making individual access to constitutional justice an efficient remedy.

2. Overburdening of the European Court of Human Rights and process for its reform

Since the enlargement of the Council of Europe to Eastern Europe, the European Court of Human Rights accumulated an ever increasing backlog of cases, culminating in some 160.000 cases in 2011¹¹⁾. The member States of the Council of Europe and the Court itself were increasingly worried about this problem, not least because the Court condemns the member states *inter alia* for the excessive length of procedures, while cases before the European Court itself took longer and longer to be settled. Since 2000, the Council of Europe and its member States took a number of steps to overcome this problem. Several high level conferences¹²⁾ dealt with this problem and came up with a number of proposals to reduce the Court's backlog. The main results of this process of reform are several Protocols (amendments) to the European Convention on

9) *Report of the 79th meeting of the CDDH* ([http://www.coe.int/t/dghl/standardsetting/cddh/cddh-documents/cddh\(2013\)r79_en.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/cddh-documents/cddh(2013)r79_en.pdf)).

10) Adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), CDL-AD(2010)039rev.

11) Annual Report of the European Court of Human Rights 2012, p. 6 (http://www.echr.coe.int/Documents/Annual_report_2012_ENG.pdf, accessed 22.1.2014).

12) European Ministerial Conference on Human Rights, Rome, 3-4.11.2000; High Level Conference at Interlaken, Declaration of 19 February 2010 ; High Level Conference of Izmir, Declaration of 27 April 2011.

Human Rights.

One of the major changes of Protocol no. 14 to the Convention¹³⁾ was the introduction of the possibility for a single judge to reject manifestly inadmissible applications¹⁴⁾ in order to weed out more efficiently the high number of inadmissible cases. In addition to explicitly introducing the important principle of subsidiarity, Protocol 15¹⁵⁾ mainly reduces the deadline to submit a case from 6 months to 4 months after the final national judgment. Protocol no. 16¹⁶⁾ introduces the possibility of requesting an advisory opinion from the European Court of Human Rights for highest courts and tribunals of the parties to the Convention in the context of a case pending before the national court. The idea behind Protocol no. 16 is that highest national courts should seek an advisory opinion from the Strasbourg Court when they are in doubt on how to interpret a provision of the Convention. By following the advisory opinion, the national court would avoid a later appeal to the European Court of Human Rights and a possible condemnation of the State by the European Court.¹⁷⁾

Paragraph 9.c.iii of the Brighton Declaration calls upon the States Parties to consider the introduction of new domestic legal remedies for alleged violations of the rights and freedoms under the Convention. In its Study, the Venice Commission already provided a comparative basis for the States to design their own systems. The mechanism of individual complaints to the Constitutional

13) For a prolonged period the Russian Federation did not ratify Protocol 14 (opened for signature on 15.5.2004), which could enter into force only after ratification by all 47 members states of the Council of Europe, which are also parties to the Convention. All other 46 members had finished the ratification process in 2006 and when it became clear that Russia would not ratify, they elaborated the so called "Protocol 14bis" (opening for signature 27.2.2009, entry into force 1.10.2009), which introduced the simplification of the procedure before the Court only for the member States having ratified it. Probably in view of the impossibility to prevent the reform of the Court, the Russian Federation finally ratified Protocol no. 14 on 18.2.2010. As a consequence, that Protocol entered into force on 1.6.2010 and Protocol 14bis ceased to be in force.

14) Previously, the admissibility had been examined by chambers of 3 judges.

15) Opened for signature on 24.6.2013, not yet entered into force.

16) Opened for signature on 2.10.2013, not yet entered into force.

17) It seems that several Courts are rather reluctant towards this mechanism, which has not yet been established.

Court can be the basis for a contribution of the Venice Commission to the process of reforming the European system of human rights protection. Before looking into this remedy, this paper examines the system of specialised constitutional review, which provides the framework for individual complaints.

3. Constitutional control

Today, there is general agreement that ordinary legislation has to be in conformity with the Constitution.¹⁸⁾ As a consequence, a large majority of countries have entrusted the control of the conformity of laws with the Constitution to courts, either the ordinary courts or specialised constitutional courts.

The idea of the constitutional review (or control) of ordinary laws originates in the USA where in 1803 the Supreme Court held that a legislative act that conflicts with the Constitution is void and cannot receive judicial application¹⁹⁾. This idea spread to Europe and already during the 19th century, the Supreme Courts in Monaco, Norway²⁰⁾ and Romania²¹⁾ asserted their jurisdiction not to apply unconstitutional laws.

Hans Kelsen, the drafter of the Austrian Constitution of 1920, was in favour of the idea of constitutional review but he also was of the opinion that the annulment of laws adopted by Parliament, elected by the sovereign people, should not be entrusted to the ordinary judiciary, which lacked sufficient democratic legitimacy. His novel idea was to entrust constitutional review to a

18) H. Steinberger, *Models of Constitutional Jurisdiction*, CDL-STD(1993)002, p. 3.

19) *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803), CODICES [USA-1803-S-001] (the CODICES database of the Venice Commission is available at www.CODICES.CoE.int).

20) K. M. Bruzelius, "Judicial Review within a Unified Country", http://www.venice.coe.int/WCCJ/Papers/NOR_Bruzelius_E.pdf.

21) G. Conac, *Une antériorité roumaine : le contrôle juridictionnel de la constitutionnalité des lois*, in *Mélanges Slobodan Milacic, Démocratie et liberté : tension, dialogue, confrontation*, Bruylant, Belgique, 2007.

specialised court – a negative legislator – which would draw its legitimacy from a specific constitutional mandate and from its special composition.²²⁾ In its Report on the Composition of Constitutional Courts, the Venice Commission examined how specialised constitutional courts are composed. The Venice Commission recommended a composition reflecting the composition of various tendencies in society.²³⁾

Between the two world wars specialised constitutional courts were established in Austria, Czechoslovakia and in Liechtenstein. Because of Kelsen's origin and because of his idea to establish a specialised Constitutional Court was first implemented in Austria, this mechanism is often referred to as the 'Austrian model', even though many of these courts differ considerably from the Austrian Constitutional Court. The original Austrian Court only existed for a short period between 1920 and 1933.²⁴⁾

Since the Second World War, specialised constitutional courts often have been introduced as a remedy against human rights violations after periods of dictatorship. We can discern three waves²⁵⁾ of the establishment of such courts: first in Germany and Italy, as a reaction to Nazism and Fascism, a second wave in Spain and Portugal after end of dictatorships in these countries and finally, after the fall of the Berlin wall in former communist countries of Eastern Europe, but also in other parts of the world.²⁶⁾

The establishment of specialised constitutional courts nearly always results in some form of tensions between the established ordinary judiciary and the

22) Hans Kelsen, *General Theory of Law and State*, New York (1961), p. 268.

23) Venice Commission, Report on the Composition of Constitutional Court, CDL-STD(1997)020.

24) The Liechtenstein Constitutional Court has the longest uninterrupted activity of all constitutional courts. The current law in force of 2003 replaced the Law of 5 November 1925 on the Constitutional Court, Liechtenstein Legal Gazette (*Landesgesetzblatt, LGBl.*) 1925 No. 8.

25) L. Solyom, *Comment*, in G. Nolte, ed., *European and US Constitutionalism*, Cambridge (2005), p. 210.

26) For example in Asia: South Korea (1988), Mongolia (1992), Indonesia (2003).

newly created Constitutional Court.²⁷⁾ Nonetheless, many countries have introduced specialised constitutional courts and this trend continues.²⁸⁾ There are two main reasons for this continued trend: hierarchy and human rights protection:

(a) The constituent power wants to ensure the supremacy of the Constitution over ordinary law and thinks, probably rightly, that a Constitutional Court is more likely to strike down laws because the Court has been set up for this very purpose. The main task for ordinary courts is to apply laws and not to annul them. Therefore, it is much more difficult for an ordinary judge to conclude that a provision of a law is constitutional.

(b) The constituent power wants to provide for efficient human rights protection in a situation of democratic transition after the end of an authoritarian regime. In such a situation, citizens often mistrust the judiciary because it had to accommodate with the previous regime. Many judges will have acquiesced with the undemocratic situation but reforming or renewing the whole judiciary is often a painfully slow process, even if it has to be addressed on a continuous basis. In such a situation, one specialised Constitutional Court, composed of judges who have an outstanding reputation, can be established relatively quickly.

This second reason calls for the introduction of an individual complaint to the Constitutional Court. By attributing individual access to a specialised Constitutional Court, this Court should be able to correct judgements of the ordinary judiciary. If this idea is to be implemented coherently, a so-called full constitutional complaint is required. A merely normative constitutional complaint, directed against unconstitutional laws only, as it was established in several Eastern European countries, cannot fulfil this purpose. The very

27) Sc. Dürr, *Individual Access to Constitutional Courts in European Transitional Countries*, in B. Fort, Bertrand, *Democratising Access to Justice in Transitional Countries* (Singapore 2006), pp 51-74.

28) Jordan, for example introduced a specialised Constitutional Court with a constitutional amendment in 2011 and the Constitutional Court Law no.15 for the year 2012.

establishment of a Constitutional Court raises high expectations in the population, which will be deceived when they find out that very often the Constitutional Court cannot help the victims of human rights violations, because the cause of those violations was not an unconstitutional law, which can be attacked before the Constitutional Court, but 'only' the unconstitutional application of a constitutional law. Such violations, which are much more frequent than violations due to unconstitutional laws cannot be remedied with the normative constitutional complaint. There is a serious danger - which turned into reality in some countries - that high expectations towards the new Constitutional Court as an efficient human rights protector turn into deception and a negative attitude of at least parts of the population towards that Court.

Following the logic of the Brighton Declaration, specialised constitutional courts should be entrusted with a full constitutional complaint, which would be seen as an effective remedy by the European Court of Human Rights. In this vein, the Venice Commission positively assessed the project to introduce a full constitutional complaint in Turkey²⁹⁾ and recently called on Ukraine to transform its normative constitutional complaint into a full constitutional complaint.³⁰⁾

4. The Venice Commission's Study on Individual Access to Constitutional Justice

The Commission's Study first distinguishes the various forms of individual access: diffuse vs. concentrated review³¹⁾, whereby diffuse control mostly exists

29) Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey adopted by the Venice Commission at its 59th Plenary Session (Venice, 18-19 June 2004, CDL-AD(2004)024), followed by the Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011, CDL-AD(2011)040).

30) Opinion on Proposals amending the Draft Law on the Amendments to the Constitution to strengthen the Independence of Judges of Ukraine, adopted by the Venice Commission at its 97th Plenary Session, (Venice, 6-7 December 2013), CDL-AD(2013)034, para. 11.

31) CDL-AD(2010)039rev, paragraph 34.

in Northern European countries and concentrated review is prevalent in Southern and Eastern Europe. However, it is difficult to make a clear distinction between these systems and some countries, like Portugal, have mixed systems, combining constitutional review by the ordinary courts with that of a specialised Constitutional Court.

Diffuse constitutional review remains a valid option.³²⁾ The introduction of such a specialised Constitutional Court necessarily results in questions of distribution of jurisdiction between the ordinary courts and the Constitutional Court and raises a series of questions, which the Study tries to address. Therefore, the Study points out that many of the issues it deals with only exist in countries with a specialised Constitutional Court.³³⁾

Another important distinction is *a priori* and *a posteriori* review.³⁴⁾ Abstract *a priori* review, that is before laws are enacted, was a typical feature of the French system. However, since the 2008 constitutional reform the priority question of constitutionality has provided for individual, albeit indirect access and it introduced an important shift towards the review of laws that are already in force. More and more, the Constitutional Council changes from a political to a judicial institution.³⁵⁾ In other countries, *a priori* control is known in order to examine the constitutionality of treaties before they are ratified. The reason for such *a priori* control is that once a treaty is ratified, it would be difficult to remedy, *a posteriori*, a finding of unconstitutionality because the State is bound to follow the treaty under international law. The Constitution of Belarus, which provides only very limited individual access (petitions, which the Court can take up at discretion), favours *a priori* access. At least in theory, *a priori* examination can avoid the enactment of unconstitutional legislation. However,

32) Opinion on the Reform of Constitutional Justice in Estonia (CDL(1998)059).

33) CDL-AD(2010)029rev, paragraph 26.

34) CDL-AD(2010)039rev, paragraph 44.

35) A removal of the former Presidents of the Republic from the membership of the Council would reinforce this process and would strengthen the Council's role as an independent judicial organ.

unconstitutional effects of legislation often are only discovered at the time of its application, in practice. Systems, which only provide for *a priori* review have to live with the absence of a remedy against unconstitutional laws if either those laws had not been submitted to *a priori* review or when the unconstitutionality only becomes evident during the application of the law.

a. Indirect access

The Venice Commission's Study continues to examine indirect access, foremost preliminary requests to the Constitutional Court³⁶⁾. When Italy established a Constitutional Court, the constituent power chose the preliminary request as a means for individual access. When ordinary judges have to apply a legal provision deemed unconstitutional, they stay the proceedings in the case before them and send a request for constitutional review of that provision to the Constitutional Court.³⁷⁾ The Constitutional Court either annuls the provision or upholds it as it constitutional³⁸⁾. When the requesting judge (the judge *a quo*) receives the reply from the Constitutional Court (the judge *ad quem*), the ordinary judge resumes the case and decides it on the basis of the decision of the Constitutional Court, (a) either applying the provision found constitutional, (b) applying it with an interpretation given by the Constitutional Court or (c) by disregarding the provision if it was found to be unconstitutional. Preliminary requests to the Constitutional Court exist in a number of countries, sometimes as the sole type of individual access (e.g. Italy, Lithuania, Romania³⁹⁾, France⁴⁰⁾), sometimes together with a direct individual complaint (e.g.

36) CDL-AD(2010)039rev, paragraph 56.

37) A. Quaranta, *Il giudizio incidentale di legittima costituzionale*, CDL-JU(2012)025.

38) The Constitutional Court of Italy has developed a number of intermediary types of judgement, which provide a specific interpretation of the law, which has to be applied to make the provision constitutional, A. D'Atena, *Interpretazioni adeguatrici, diritto vivente e sentenze interpretative della corte costituzionale*, http://www.cortecostituzionale.it/documenti/convegni_seminari/06_11_09_DAtena.pdf.

39) A. Zegrean, *L'exception d'inconstitutionnalité à la Cour constitutionnelle de la Roumanie*, CDL-JU(2012)023.

40) J. de Guillenchmidt, *La question prioritaire de constitutionnalité*, CDL-JU(2012)028.

Belgium⁴¹⁾, Germany, Spain⁴²⁾).

In some countries, all levels of the judiciary can make preliminary requests, whereas in France or now also in Jordan, lower instance judges have to send a request first to the supreme court(s) and it is the latter court(s) that finally decide whether or not to make a preliminary request to the Constitutional Court. Such a filter by the ordinary supreme court(s) has the advantage of reducing the case-load of the Constitutional Court. However, there is a serious danger that these courts take their filtering task too seriously so that important cases do not reach the Constitutional Court because the Supreme Court prefers settling the issue within the ordinary judiciary.

The Venice Commission recommends giving courts of all levels access to the Constitutional Court.⁴³⁾ In principle, preliminary requests are less of a danger for creating conflicts between the ordinary and the constitutional judiciary than individual complaints but the (excessive) filtering of preliminary requests can easily become the source of such conflicts.

A key issue is whether the judge *a quo* is obliged to make a preliminary request or whether s/he has discretion. The Study recommends that when there is no direct individual access to constitutional courts, it would be too high a threshold condition to limit preliminary questions to circumstances where an ordinary judge is convinced of the unconstitutionality of a provision; serious doubt should suffice.⁴⁴⁾

The Venice Commission's Study also examines requests to the Constitutional Court by the Ombudsperson and recommends introducing such access in

41) P. Nihoul, Les questions préjudicielles, CDL-JU(2012)027.

42) R. Arribas, "Cuestiones" posées par le juge ordinaire à la Cour constitutionnelle d'Espagne (et autres modes d'accès de l'individu à la Cour constitutionnelle), CDL-JU(2012)024.

43) CDL-AD(2010)039rev, para. 62.

44) CDL-AD(2010)039rev, para. 216.

parallel to preliminary requests or direct constitutional complaints. Through his or her work, the ombudsman has an excellent knowledge about the application of the laws and can easily identify unconstitutional laws. As a consequence, the ombudsman should also have the possibility to request the annulment of such laws by the Constitutional Court, either in abstract form⁴⁵⁾ or possibly by referring to a specific case.

b. Direct access

While Kelsen ‘invented’ specialised constitutional courts, he did not favour individual access. According to him, only State bodies should be able to appeal to the Constitutional Court⁴⁶⁾, except for the challenge of administrative acts⁴⁷⁾.

Various forms of direct access have been developed over time. Like Kelsen, the Venice Commission has a critical attitude towards the *actio popularis*, whereby any citizen can request the annulment of a law, even if the citizen is not affected by that law. Such a wide access can lead to a serious overburdening of the Constitutional Court. In Croatia, where an *actio popularis* exists, a single person, a retired judge, brought some 700 cases to the Constitutional Court, which had to deal with each request.⁴⁸⁾

The Commission’s Study focuses on the individual complaint to the Constitutional Court. This term covers quite different procedures. The normative constitutional complaint can be directed only against – allegedly – unconstitutional laws, whereas the full constitutional complaint is directed against unconstitutional individual acts, no matter whether these acts are based

45) CDL-AD(2010)039rev, para. 62.

46) Kelsen referred to the *actio popularis*: Hans Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit*, in: *VVdStRL* 5 (1929), S. 31-88 (68 f., 70, 74), available at : <http://www.hans-kelsen.de/gericht.pdf> (accessed 23.1.2014); see also V. Neumann, *Hans Kelsen und die deutsche Staatsrechtslehre*, *Humboldt Forum Recht*, 9/2012, p. 1. <http://www.humboldt-forum-recht.de/druckansicht/druckansicht.php?artikelid=269> (accessed 23.1.2014).

47) G. Brunner, *Der Zugang des Einzelnen zur Verfassungsgerichtsbarkeit im Europäischen Raum*, CDL-JU(2001)022, p. 15.

48) CDL-AD(2010)039rev, paragraph 74.

on an unconstitutional law or not. The normative constitutional complaint has been introduced mainly in Eastern European countries (e.g. Russia, Ukraine), whereas the full constitutional complaint has been developed first in Germany. The Spanish *amparo* is a full constitutional complaint as well.

In Germany, the horrors of the Nazi regime brought about the need to establish a constitutional court not only as a “State Court”, in charge of disputes between state authorities but also as a protector of human rights. The 1951 Law on the Constitutional Court of Germany introduced an individual complaint to the newly established Constitutional Court, even though the German Constitution, the Basic Law, remained silent on this issue. Only in 1969, the Basic Law was amended to provide for the individual complaint also on the constitutional level.

Most important from the viewpoint of providing an efficient multi-level human system of rights protection, the Commission’s Study examines whether individual complaints can function as a national filter for cases reaching the European Court of Human Rights. Starting from the need to address the heavy case-load of that Court, the Study provides advice on how to design an individual complaint so that it can be an “effective remedy” under Article 13 of the European Convention on Human Rights. The decisive criterion is, according to Article 35 of the Convention, whether the European Court of Human Rights insists on the exhaustion of a remedy or whether it accepts an application directly without insisting that such a remedy be exhausted before making an application to the Strasbourg Court.

The European Court of Human Rights will only recognise a national remedy as “effective” if this remedy can provide relief to the complainant. As a consequence, a constitutional complaint has to result in a binding judgement. A mere recommendation to Parliament to amend an unconstitutional law is obviously not sufficient. The Constitutional Court also must be obliged to hear the case, i.e. there cannot be discretion on whether the Court takes on a case,

and there must not be unreasonable demands as to the costs and representation by a lawyer for the party involved.⁴⁹⁾

Complaints against excessive length of procedure are a special case. Here, the Constitutional Court has to be able to order the speedy resumption of proceedings. This means that the Court has to provide not only a compensatory but also an acceleratory remedy.⁵⁰⁾

The Study continues to give advice on institutional design of individual complaints procedures by examining time-limits, which should be reasonable.⁵¹⁾ As concerns the obligation to be represented by a lawyer, the Commission insists on the availability of free legal aid also for constitutional proceedings⁵²⁾. Court fees should remain reasonable and it should be possible to reduce them in justified cases.⁵³⁾ When there is a complaint against a judgement that was decided in favour of a third party, that party should have the opportunity to make a statement also in the constitutional complaint proceedings.⁵⁴⁾

Complex questions arise in relation to interim measures. According to the Commission's Study, the Constitutional Court should be able to suspend a challenged provision if its implementation would result in further damage that cannot be repaired.⁵⁵⁾ Such powers are wide, especially given that in such a case Court has not yet decided on the constitutionality of the provision, but already suspends it with *erga omnes* effect pending the final judgement. Only serious irreparable damage can justify the suspension of legislation adopted by Parliament.

49) CDL-AD(2010)039rev, paragraph 93.

50) On this point see also the Venice Commission's Study on the Effectiveness of National Remedies in respect of Excessive Length of Proceedings adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006), CDL-AD(2006)036, para. 173.

51) CDL-AD(2010)039rev, paragraph 112.

52) CDL-AD(2010)039rev, paragraph 113.

53) CDL-AD(2010)039rev, paragraph 117.

54) CDL-AD(2010)039rev, paragraph 132.

55) CDL-AD(2010)039rev, paragraph 149.

c. Standard of review – “Convention friendly” interpretation of constitutional rights

Whatever the type of appeal to the Constitutional Court may be, typically the standard of control of legislative or individual acts will be the fundamental rights of the national Constitution and not the rights provided for in the European Convention on Human Rights. Therefore, numerous questions arise when the scope of constitutional rights and the Convention rights differ. Only few Constitutional Courts use the Convention itself as the relevant standard. The Constitutional Court of Austria does so because the Austrian Constitution does not contain a human rights catalogue. The major political parties could never agree on whether such a catalogue should also contain social rights and therefore they agreed to raise the European Convention on Human Rights to the constitutional level⁵⁶⁾. Also due to the fact that the so-called Dayton Constitution of Bosnia and Herzegovina was part of an internationally brokered agreement to end the civil war in that country, this Constitution provides that the European Convention on Human Rights is part of the Constitution to have some kind of human rights catalogue.⁵⁷⁾ Typically, all other specialised constitutional courts apply the human rights catalogue of their own Constitution as the standard of review. These rights can differ not only in their formulation, but also in the way how limitations are expressed, either in a specific or a general limitation clause.⁵⁸⁾ Even if the national rights and the Convention right seem to be close textually, the interpretation which is given to them by the

56) National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council, Austria, A/HRC/WG.6/10/AUT/1, para. 9.

57) Although this is unrelated to the issue of individual complaint, it is interesting to note that the supreme courts of the Netherlands (the Supreme Court and the State Council, which is the supreme administrative court) even use the Convention as the only standard of review in human rights matters because Article 120 of the Dutch Constitution explicitly excludes that any judge may disregard laws adopted by Parliament because the law is found to be contrary to the Constitution. Thus explicitly excluding any constitutional review, Article 120 is probably the most radical expression of parliamentary sovereignty, a remnant of the mistrust of the French revolution in the judges. Le juge « *la bouche qui prononce les paroles de la loi ; des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur* », Montesquieu, *De l'esprit des lois* (1748).

58) This issue was the subject XIIIth Congress of the Conference of European Constitutional Courts on the "Criteria for the Limitation of Human Rights in the Practice of Constitutional Justice" (Nicosia, 16-17 October 2005), http://www.venice.coe.int/WebForms/pages/?p=02_01_01_Regional_CECC_Cyprus.

national Constitutional Court and the European Court of Human Rights can differ substantially. Therefore, if the individual complaint is to serve also as an effective national remedy filtering cases before they are brought before the European Court, the national rights need to be interpreted in a “convention friendly”⁵⁹⁾ manner. This does not mean that the interpretation of these rights has to be the same for both courts. Without endangering the assessment as an effective remedy, the national complaint can be wider and can confer more freedom to the individual. However, the national interpretation should not be narrower than the European one. If the scope of the national right were considerably narrower than the Convention right, the European Court of Human Rights would probably find that this remedy is not effective and would accept complaints without insisting in the exhaustion of this remedy.

d. Effective execution / implementation

The term “effective remedy” implies that judgments of constitutional courts have to be implemented to be effective. The Study identifies the interpretation in conformity with the Constitution as an area where implementation can easily be a problem if the ordinary courts do not follow the constitutional interpretation given by the Constitutional Court but continue to apply an interpretation of the law, which was found to be unconstitutional. Therefore, the Venice Commission recommends introducing a provision in the Constitution, which obliges all other state powers to follow a provision’s interpretation given by the Constitutional Court.⁶⁰⁾

Unfortunately, several constitutional courts are faced with at least occasional non-implementation / execution of their judgements⁶¹⁾. While the non-respect

59) *Vallianatos and others v. Greece* (applications nos. 29381/09 and 32684/09, partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque.

60) CDL-AD(2010)039rev, paragraph 165.

61) P. Paczolay, “Experience of the Execution of Constitutional Court’s decisions declaring legislative omission in Hungary, Conference on “Execution of the decisions of constitutional courts: a cornerstone of the process of implementation of constitutional justice” (Baku, Azerbaijan 14-15 July 2008), CDL-JU(2008)029; Synopsis of the Conference on the “Execution of decisions of Constitutional Courts”

of judgements is certainly a problem of legal culture – or rather the absence of such a culture, the Courts themselves can contribute to overcome this problem. Several elements can be important: the Court should be coherent with its own case-law. There will always be new issues to be decided but to the extent possible, the case-law of a Constitutional Court should be predictable and the Court should not ‘surprise’ the state powers and the public. The better a judgement follows arguments expressed in earlier case-law, the better it will be accepted and, as a consequence, implemented. Courts can even construct their case-law by referring to important arguments as an *obiter dictum* in judgements where they are not decisive. In a later case, the Court can then already refer to its earlier case-law and the new case will become part of a coherent string of precedents.

Equally important is the use of clear language, for two reasons. Politicians who have to implement the judgements of the Constitutional Court are often no lawyers, or at least no constitutional lawyers. They may have objective problems to understand a judgement if it is not set out in clear language. Even if they have legal advisers who can provide such explanations, they are often ‘forced’ by media to react immediately to the news of a Constitutional Court judgement, which they may have difficulty to understand.

When a Constitutional Court annuls a legislative or executive act, the author of that act will often be upset and may - for political reasons, even if they understand the judgement - attack the Constitutional Court. In such cases, the main ally of the Court is the public. Again, in order to be convincing the public, not only the press release but also the judgement itself should be drafted in clear language. When it is necessary to use legal jargon, legal terms should be explained in the judgement and, most importantly, the reasoning of the judgement must establish a clear logical link between the facts / legal provisions on the one side and the decision taken on the other side. The more convincing

(Baku, Azerbaijan, 14-15 July 2008): Synopsis, CDL-JU(2008)051syn.

a judgement is, the more likely it will be accepted and implemented.

A more recent problem related to the effective execution of judgements, which was not yet examined in the Study, is that some Constitutional Courts have established a practice of announcing their judgement before delivering the judgement itself.⁶²⁾ Typically, a press release announces the operative part of the judgement (the decision on the constitutionality or unconstitutionality of the challenged provision). In cases of constitutionality, this does not create a major problem because all State bodies will continue to apply the provision. However, if the provision was struck down but also when the Constitutional Court gives an interpretation, which brings the provision in conformity with the Constitution, the short press release will not be sufficient for the other state bodies but also the interested public to fully understand why the provision was struck down and what needs to be done to comply with the judgement. Once the press release is reported on in the media, the public expects state authorities to react immediately, whereas this may be difficult for the government and or parliament without knowing the reasoning of the Constitutional Court, which sometimes follows only several weeks later. Occasionally, judges may even disagree with this reasoning even if they have agreed on the operative part of the judgement as expressed in the press release. The public perception of such internal disagreements between the judges following the publication of the press release can be very harmful for the reputation of the Court. Ideally, the press release should be published only once the full judgement is available on the web-site of the Court.

62) Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania, adopted by the Venice Commission at its 93rd Plenary Session (Venice, 14-15 December 2012), CDL-AD(2012)026, para. 66.

e. Constitutional matters

Finally, the Report on Individual Access to Constitutional Justice, examines the relationship between Constitutional Courts and ordinary courts and identifies the danger that the Constitutional Court becomes a 'super-Supreme Court' or the so-called '4th instance'. Therefore, it is necessary to give a narrow scope of the term 'constitutional matter'. The definition of this concept is crucial for finding a delimitation of competences between supreme courts and the Constitutional Court. The biggest danger stems from a wide interpretation of the right to a fair trial (Article 6 of the European Convention on Human Rights). If widely interpreted, any incorrect interpretation of the law by an ordinary court or a violation of procedural law can result in a violation of the right to a fair trial, and becomes a constitutional matter giving rise to a constitutional complaint. Sometimes, constitutional courts thus 'slide' into the interpretation of ordinary law, and (supreme) ordinary courts are – rightly – upset about such interference. There is no obvious or simple solution. Not each violation of ordinary law can be a constitutional matter but some violations certainly are.⁶³⁾ Here, the Study cannot provide a simple solution when it recommends: "The constitutional court should only look into "constitutional matters", leaving the interpretation of ordinary law to the general courts. The identification of constitutional matters can, however, be difficult in relation to the right to fair trial, where any procedural violation by the ordinary courts could 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 of the jurisdiction of ordinary courts."⁶⁴⁾

f. Organisational measures

The Study concludes by proposing organisational measures for the Court to be able to cope with the likely high number of individual complaints. The introduction of the individual complaint nearly always results in a very high number of applications, at least initially. The Constitutional Court of Turkey,

63) On this issue see Brunner, CDL-JU(2001)022, p. 20 seq.

64) CDL-AD(2010)039rev, para. 211.

which introduced the individual complaint following the 2010 constitutional amendments, thoroughly prepared for this onslaught. The Court sent delegations of rapporteur judges to the Constitutional Court of Germany, Spain, South Africa and South Korea in order to see how these Courts cope with the high numbers of applications. In co-operation with the Council of Europe not only the judges and the staff of the Constitutional Court were trained but also the other two supreme courts, the Court of Cassation and the State Council received human rights training. The Court also recruited significant numbers of rapporteur judges and assistant rapporteur judges to deal with the filtering of incoming cases. The Venice Commission's Study indeed recommends that judges be assisted by a sufficient number of legal advisers.⁶⁵⁾

Another key measure is to provide for the Court to sit in chambers rather than in plenary session only⁶⁶⁾. In its Opinion on Draft Amendments and Additions to the Law on the Constitutional Court of Serbia, for example, the Commission recommended the introduction of chambers to deal with individual complaints in Serbia.⁶⁷⁾ Necessarily, a constitutional complaint will result in a considerably higher work-load and a Court should prepare well in advance to manage the increased work-load.

5. Conclusion

The Venice Commission's Study on Individual Access to Constitutional Justice provides important elements for the design of efficient national remedies against human rights violations, as has been called for by the Brighton Declaration of the Council of Europe.

In this Study, the Commission showed that in countries with a specialised

65) CDL-AD(2010)039rev, para. 224.

66) CDL-AD(2010)039rev, para. 225.

67) Adopted by the Venice Commission at its 89th plenary session (Venice, 16-17 December 2011), CDL-AD(2011)050cor.

Constitutional Court, individual access to that Court is a key to the settlement of human rights issues on the national level before these cases are brought to the European level.

Preliminary requests from ordinary courts to the Constitutional Court provide an indirect access to the Court and are an import tool for human rights protection because this mechanism helps to remove unconstitutional laws from the legal order.

Individual complaints provide direct access to the Constitutional Court. Normative constitutional complaints, which exist in several Eastern European countries and which allow to challenge an allegedly unconstitutional legal provision are useful for removing unconstitutional legislation from the legal order. However, they are not a sufficient tool to remedy the majority of human rights violations because most often these violations result from the unconstitutional application of a constitutional law rather than an unconstitutional law. The introduction of a (normative) constitutional complaint raises high expectation in the population, which often the normative complaint cannot fulfil.

The most efficient remedy – also in the interpretation of Article 35 of the Convention by the European Court of Human Rights – is the full constitutional complaint, which allows challenging also unconstitutional individual acts. Countries, which have such a full individual complaint have significantly lower levels of condemnation by the Strasbourg Court than those with normative complaints.⁶⁸⁾

The introduction of a full constitutional complaint is therefore an efficient means of human rights protection. At the same time it reduces the work-load of the European Court of Human Rights. Therefore, the Venice Commission

68) CDL-AD(2010)039rev, paragraph 5.

recommends the introduction of full constitutional complaints in countries, which already have a normative complaint, like Ukraine, in countries which have a preliminary request to the Constitutional court, like was the case in Turkey and in countries, which have no individual access at all, like in Bulgaria.⁶⁹⁾

The Venice Commission will offer its advice in the process of the institutional design for national human rights mechanisms in the framework of the follow-up to the Brighton Declaration.

69) Opinion on the Constitution of Bulgaria adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008), CDL-AD(2008)009, para. 88.

