IMPROVING HUMAN RIGHTS PROTECTION ON THE NATIONAL AND THE EUROPEAN LEVELS – INDIVIDUAL ACCESS TO CONSTITUTIONAL COURTS

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Abstract

The recent move towards the individual access to constitutional justice is a progress for protection of human rights in Europe. The explicit purpose of these efforts is to settle human rights issues on the national level and to reduce the number of cases at the Strasbourg Court. Such individual complaints have to be designed in a way that makes them an effective remedy which has to be exhausted before a case can be brought before the European Court of Human Rights. This paper points out the current state of these improvements on the national level in a difficult context on the European level and the recommendations of the Venice Commission in this regard.

Keywords: *constitutional review; Constitutional Courts; European Court of Human Rights; Individual Access to Constitutional Justice*

I. Introduction

Following, the fall of the Berlin wall, Central and Eastern European countries wanted to join the Council of Europe as quickly as possible in order to become a member of the 'club' of democratic countries. Ratification of the European Convention on Human Rights together with the individual application to the European Court of Human Rights was a condition for such membership. Within a relatively short period, the Council of Europe expanded from 23 to 47 member states and the European Court of Human Rights was forced to follow this expansion with dramatic results. Given that the human rights protection in several of the new member states remained problematic in many respects, the number of applications

[1] This paper was written in a strictly personal capacity and does not necessarily reflect the official position of the Venice Commission or the Council of Europe. This text is based on presentations by the author at the Symposium on "Institution Design for Conflict Resolution and Negotiation – Theory and Praxis" (Nagoya, 1-2 February 2014) and Seminar celebrating the 25th anniversary of the Constitutional Chamber of the Supreme Court of Costa Rica (San José, 13-14 November 2014).

from these countries increased steadily and the European Court of Human Rights accumulated an ever increasing backlog of cases, culminating in some 160.000 cases in 2011[2].

The member States of the Council of Europe and the Court itself were increasingly worried about this problem, not least because the Court condemned 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.

The main remedy to this problem was Protocol No. 14, which brought about several procedural simplifications and notably a reduction of the number of judges for decisions of inadmissibility from three to one judges. Under Protocol no. 14, a single judge can reject manifestly inadmissible applications. However, this protocol was delayed for several years by the refusal of Russia to ratify it. The Russian Federation ratified Protocol 14 only when the other 46 member states agreed to go ahead without Russia and to establish the new system between them, whereas the old system – with three judges – would continue for Russia only[3].

Protocol 14 was indeed quite successful. The Court was able to reduce the number of cases from 160.000 to some 70.000 within three years. However, the number of 70.000 pending cases is still impressive and many reckon that easier cases have been settled more quickly and that the remaining number includes a higher percentage of complicated cases.

A further reform was brought about by Protocol 15[4], which explicitly refers to the principle of subsidiarity but also reduces the deadline to submit a case from 6 months to 4 months after the final national judgment.

In order to overcome the problem of the overburdening of the European Court of Human Rights, the “mother” organisation of the Court, the Council of Europe organised a series of conferences in Rome[5], in Interlaken[6], in Izmir[7] and in Brighton in order to further explore ways how to safeguard the system of the European Convention on Human Rights.

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[2] 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 January 2014); *http://www.google.fr/url?sa=t&rct= j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCIQFjAA&url=http%3A%2F%2Fwww.echr.coe.int%2FDocuments%2FAnnual_report_2012_ENG.pdf&ei=SSiVVZ_DGoLWU9mzgcAN&usg=AFQjCNGwTf8JQB2ydJyiwIO9BDwD6YhznQ&bvm=bv.96952980*.

[3] For a prolonged period the Russian Federation did not ratify Protocol 14 (opened for signature on 15 May 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 February 2009, entry into force 1 October 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 February 2010. As a consequence, that Protocol entered into force on 1 June 2010 and Protocol 14bis ceased to be in force.

[4] CETS no. 213, Opened for signature on 24 June 2013, not yet entered into force, available at *http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=213&CM=8&DF=27/06/2013&CL=ENG*, accessed 2 July 2015.

[5] European Ministerial Conference on Human Rights, Rome, 3-4 November 2000.

[6] High Level Conference at Interlaken, Declaration of 19 February 2010, available at *https://wcd.coe.int/ViewDoc.jsp?id=1591969*, accessed 2 July 2015.

[7] High Level Conference at Interlaken, Declaration of 19 February 2010; High Level Conference of Izmir, Declaration of 27 April 2011.

The latest Declaration, adopted in Brighton[8], insists on the necessity to improve within the member states the systems of human rights protection in order to settle human rights problems on the national level. Para. (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.

Following thorough reforms, the scope of further improvements of the procedures at the European Court of Human Rights seems rather narrow. Therefore, the Council of Europe and its member states turn to the question how human rights violations can be settled at the national level rather than cases being brought to Strasbourg[9].

One vector of this focus on human rights protection on the national level is Protocol no. 16[10], according to which highest courts of the member States can request advisory opinions from the European Court of Human Rights in the context of a case pending before the national court. The idea is that by following the advisory opinion, the national court would avoid a later appeal to the European Court of Human Rights and a possible condemnation by the European Court. In private discussions, constitutional judges seem are rather reluctant towards this mechanism, which has not yet been established.

In this wider context of national remedies, the Venice Commission has prepared a study on individual access to constitutional justice[11], which *inter alia* elaborated on the issue how such national remedies have to be designed in order to live up to the standards of the European Court of Human Rights, which would require their exhaustion before cases can be brought before the Strasbourg Court.

The Study tries to provide answers to the issue of efficient 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[12].

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[8] High Level Conference on the future of the European Court of Human Rights (Brighton, United Kingdom, 18-20 April 2012), CDDH(2012)007, available at *http://www.coe.int/t/dghl/standardsetting/cddh/cddh-documents/cddh_2012_007_en.pdf*, accessed 2 July 2015.

[9] The Council of Europe mandated two working groups to prepare proposals for a reform of the Court. With participation from the Venice Commission, the working group GT-GDR-F is preparing on the longer-term future of the Convention system (*http://www.coe.int/t/dghl/standardsetting/ cddh/reformechr/DOCUMENTS-GroupF_en.asp*). Another group, GT-GDR-G, prepares proposals for a change of the procedure for the amendment of the Rules of Court, giving the member States more influence over such amendments (*http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-G_en.asp*, accessed 2 July 2015).

[10] CETS no. 214, opened for signature on 2 October 2013, not yet entered into force, available at *http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=214&CM=8&DF=10/04/2014&CL=ENG*, accessed 2 July 2015.

[11] 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).

[12] Report of the 79th meeting of the CDDH, available at *http://www.coe.int/t/dghl/standardsetting/cddh/cddh-documents/cddh%282013%29r79_en.pdf*, accessed 2 July 2015.

Before entering the substance of this study, let me briefly present its author, the Venice Commission.

II. Venice Commission

Founded in 1990, the Venice Commission is an advisory body of the Council of Europe. It is composed of independent experts in the field of constitutional law. They are mainly university professors and judges of constitutional or supreme courts.

Being part of the Council of Europe, the Venice Commission is open to the participation of non-European countries and has a total of 60 member states, including all 47 member States of the Council of Europe.

The main activity of the Commission is providing advice for the preparation of constitutional reforms and para-constitutional legislation (electoral laws, legislation on the structure of the Judiciary etc.).

The Commission only acts upon request, which can come from the State concerned, the organs of the Council of Europe or international organisations that participate in the work of the Venice Commission (European Union, OSCE/ODIHR). In practice, most of the requests for advice come from Governments and Parliaments but the Commission also provides *amicus curiae* briefs to Constitutional Courts when they ask for them.

Since its establishment, the Venice Commission supported the idea of an international dialogue of constitutional judges. As a basis for this dialogue, the Venice Commission provides a permanent platform for exchange of information. Tools for this exchange are the CODICES database, which provides information about important cases of more than 80 Constitutional Courts, Constitutional Councils, Constitutional Chambers and Supreme Courts in Europe, Asia, Africa and the Americas, as well as from the European Court of Human Rights, the Court of Justice of the European Union and the Inter-American Court of Human Rights. All contributions are prepared by liaison officers appointed by the Courts themselves.

The liaison officers also have access to the confidential online Venice Forum, through which the courts can quickly exchange information and request assistance.

In cooperation with regional groups and linguistic groups uniting Constitutional Courts, Constitutional Councils and Supreme Courts[13], the Commission established the World Conference on Constitutional Justice for which has 94 Member Courts[14] and for which the Venice acts as the Secretariat.

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[13] Conference of European Constitutional Courts, the Association of Constitutional Courts using the French Language, the Southern African Judges Commission, the Conference of Constitutional Control Organs of Countries of New Democracy, the Association of Asian Constitutional Courts and Equivalent Institutions, the Union of Arab Constitutional Courts and Councils, the Ibero-American Conference of Constitutional Justice and the Conference of Constitutional Jurisdictions of Africa, Commonwealth Courts.

[14] *www.venice.coe.int/WCCJ*.

So far, the World Conference held Congresses in 2009 in South Africa, in 2011 in Brazil and 2014 in Korea[15]. The goal of the World Conference is to ensure long-term cooperation between constitutional courts, as well as exchanges of human rights case-law in order to strengthen democracy, human rights and the rule of law.

III. Constitutional control in Europe

Today, there is general agreement that ordinary legislation has to be in conformity with the Constitution[16]. 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 application[17]. This idea spread to Europe and already during the 19th century, the Supreme Courts in Monaco, Norway[18] and Romania[19] 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 specialised court – a negative legislator – which would draw its legitimacy from a specific constitutional mandate and from its special composition[20]. 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[21].

Between the two world wars specialised constitutional courts were established in Austria, in Czechoslovakia and in Liechtenstein. Because of Kelsen's origin and because of his idea to establish a specialised Constitutional Court was implemented in Austria, this mechanism is often referred to as the 'Austrian model', even though many of these courts

[15] The 4th Congress is scheduled for September 2017 in Vilnius, Lithuania.
[16] H. Steinberger, *Models of Constitutional Jurisdiction*, CDL-STD(1993)002, p. 3.
[17] *Marbury vs. 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*).
[18] K.M. Bruzelius, *Judicial Review within a Unified Country*, available at *http://www.venice.coe.int/WCCJ/Papers/NOR_Bruzelius_E.pdf*, accessed 2 July 2015.
[19] 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.
[20] H. Kelsen, *General Theory of Law and State*, New York (1961), p. 268.
[21] Venice Commission, Report on the Composition of Constitutional Court, CDL-STD(1997)020.

differ considerably from the Austrian Constitutional Court. For tragic historic reasons, the original Austrian Court only existed for a short period between 1920 and 1933[22].

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 waves[23] 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[24].

The establishment of specialised constitutional courts nearly always results in some form of tension between the established ordinary judiciary and the newly created Constitutional Court[25]. Nonetheless, many countries have introduced specialised constitutional courts and this trend continues[26]. There are two main reasons for this 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 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

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[22] 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.

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

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

[25] 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.

[26] 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.

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 above mentioned Brighton Declaration, specialised constitutional courts should however 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 Hungary[27], Turkey[28] and in Macedonia[29] and called upon Ukraine to transform its normative constitutional complaint into a full constitutional complaint[30]. Recently, the Venice Commission strongly recommended Montenegro not to weaken the existing constitutional complaint by replacing the Court's powers to repeal ordinary court decisions by a mere declaration of their unconstitutionality[31].

IV. 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 review[32], whereby diffuse control mostly exists in Northern European countries and various forms of concentrated review is prevalent in Southern and Eastern Europe. However, it is difficult to make a clear distinction between these systems.

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27 In Hungary, the constitutional complaint replaced an *actio popularis*. While criticizing other aspects of constitutional reform in Hungary, the Venice Commission welcomed the introduction of the constitutional complaint: CDL-AD(2012)009, Opinion on Act CLI of 2011 on the Constitutional Court of Hungary adopted by the Venice Commission at its 91st Plenary Session [Venice, 15-16 June 2012); CDL-AD(2011]001, Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary – Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011).

28 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].

29 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, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014).

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(2014)033, Opinion on the Draft Law on the Constitutional Court of Montenegro, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October), para. (52).

32 CDL-AD(2010)039rev, para. (34).

Some countries, like Portugal, have mixed systems, combining constitutional review by the ordinary courts with that of a specialised Constitutional Court.

In an opinion on Estonia, the Venice Commission recognised that the establishment of a Constitutional Chamber within a Supreme Court, like you have it in Costa Rica, is a perfectly valid option for establishing a democratic constitutional system[33]. Nonetheless most of the new democracies in the Central and Eastern Europe have opted for a specialised Constitutional Court. Such a choice 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 a number of issues it deals with relate to countries with a specialised Constitutional Court[34].

Another important distinction is *a priori* and *a posteriori* review[35]. A limitation to 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[36]. 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.

At least in theory, *a priori* examination can avoid the enactment of unconstitutional legislation. However, 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 Court[37]. When Italy, for instance, 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[38]. The Constitutional

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[33] Opinion on the Reform of Constitutional Justice in Estonia [CDL(1998)059].
[34] CDL-AD(2010)029rev, para. (26).
[35] CDL-AD(2010)039rev, para. (44).
[36] 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.
[37] CDL-AD(2010)039rev, para. (56).
[38] A. Quaranta, *Il giudizio incidentale di legittima costituzionale*, CDL-JU(2012)025.

Court either annuls the provision or upholds it as it constitutional[39]. 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, Romania[40], France[41]), sometimes together with a direct individual complaint (e.g. Belgium[42], Germany, Spain[43]).

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. We have seen this danger in France[44] and recently also in Jordan.

The Venice Commission recommends giving courts of all levels access to the Constitutional Court[45]. 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[46].

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[39] 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*, available at *http://www.cortecostituzionale.it/documenti/convegni_seminari/06_11_09_DAtena.pdf*, accessed 2 July 2015.

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

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

[42] P. Nihoul, *Les questions préjudicielles*, CDL-JU(2012)027.

[43] 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.

[44] M. Fatin-Rouge Stéfanini, *Le filtre exercé par le Conseil d'Etat, La QPC vue du droit comparé - Mars 2013*, available at *http://www.gerjc.univ-cezanne.fr/fileadmin/GERJC/Documents/COMMUNICATIONS/Le_filtre_exerce_ par_le_Conseil_d_Etat_1.pdf*, accessed 2 July 2015.

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

[46] CDL-AD(2010)039rev, para. (216).

The Venice Commission's Study also examines requests to the Constitutional Court by the Ombudsperson and recommends introducing such access in 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 form[47] 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 Court[48], except for the challenge of administrative acts[49].

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 over burdening 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[50]. Hungary replaced the *actio popularis* with an individual complaint.

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 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

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[47] CDL-AD(2010)039rev, para. (62).

[48] Kelsen referred to the *actio popularis*: H. 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 January 2014); see also V. Neumann, *Hans Kelsen und die deutsche Staatsrechtslehre*, in "Humboldt Forum Recht" no. 9/2012, p. 1, available at *http://www.humboldt-forum-recht.de/druckansicht/druckansicht.php?artikelid=269*, accessed 23 January 2014.

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

[50] CDL-AD(2010)039rev, para. (74).

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 Venice 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 become 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. For example, 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 legal representation by a lawyer for the applicant[51].

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[52].

The Study continues to give advice on institutional design of individual complaints procedures by examining time-limits, which should be reasonable[53]. As concerns the obligation to be represented by a lawyer, the Commission insists on the availability of free legal aid also for constitutional proceedings[54]. Court fees should remain reasonable and it should be possible to reduce them in justified cases[55]. 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[56].

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[57]. Such powers are

[51] CDL-AD(2010)039rev, para. (93).
[52] 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).
[53] CDL-AD(2010)039rev, para. (112).
[54] CDL-AD(2010)039rev, para. (113).
[55] CDL-AD(2010)039rev, para. (117).
[56] CDL-AD(2010)039rev, para. (132).
[57] CDL-AD(2010)039rev, para. (149).

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.

c. Standard of review – interpretation of constitutional rights according to the Convention

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 level[58]. 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[59]. 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[60]. Even if the national rights and the Convention right seem to be close textually, the interpretation which is given to them by the 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

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

[59] 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).

[60] 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), available at *http://www.venice.coe.int/WebForms/pages/?p=02_01_01_Regional_CECC_Cyprus*, accessed 2 July 2015.

Court, the national rights need to be interpreted in a "convention friendly"[61] 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[62].

Unfortunately, in Europe several constitutional courts are faced with at least occasional non-implementation/execution of their judgements[63]. While the non-respect 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.

[61] *Vallianatos and others vs. Greece* (applications no. 29381/09 and no. 32684/09), partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque.
[62] CDL-AD(2010)039rev, para. (165).
[63] 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 cornershone of the process of implementation of constitutional justice" (Baku, Azerbaidjan 14-15 July 2008), CDL-JU(2008)029; Synopsis of the Conference on the "Execution of decisions of Constitutional Courts" (Baku, Azerbaidjan, 14-15 July 2008): Synopsis, CDL-JU(2008)051syn.

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 become 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[64]. 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[65].

V. Conclusion – improvements on the national level in a difficult context on the European level

The recent move towards the introduction of full individual complaints is a progress for protection of human rights in Europe. Important member States of the Council of Europe like Turkey have introduced an individual complaint with the explicit purpose to settle human rights issues on the national level and to reduce the high number of cases at the Strasbourg Court. Such individual complaints have to be designed in a way that makes them an effective remedy which has to be exhausted before a case can be brought before the European Court of Human Rights.

The most efficient remedy – according to 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, like

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[64] On this issue, see Brunner, CDL-JU(2001)022, p. 20 et seq.
[65] CDL-AD(2010)039rev, para. (211).

Germany or Spain, have significantly lower levels of condemnation by the Strasbourg Court than those with normative complaints[66].

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 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[67].

These positive steps have to be seen in the context of serious conflicts between the European Court of Human Rights and some of its member states. Due to conflict between the Court and Russia the entry into force of Protocol 14 was delayed. The reason for this conflict are several judgements, which have displeased the Russian authorities, starting with *Ilaşcu vs. Moldova and Russia*[68], where Russia was held responsible for the acts of the *de facto* authorities in another country, in the region of Transnistria in Moldova. Even more resented was the *Kononov vs. Latvia* judgement[69]. Russia was not even a party in these proceedings but the European Court of Human Rights found no violation of the Convention when Latvia sentenced Mr. Kononov for war crimes, which he committed as communist partisan in 1944. While this paper goes to print a case is pending at the Constitutional Court of the Russian Federation, which can be decisive on whether the Russian Federation will reserve the right not to execute judgements of the European Court of Human Rights in certain situations.

Another – even more serious – conflict opposes the United Kingdom to the European Court of Human Rights. In the case *Hirst vs. UK*, the European Court held that the UK violated the Convention when it denied all prisoners without distinction the right to vote[70]. This judgement has not been implemented in the UK and – probably to avoid outright conflict – the Committee of Ministers postponed this execution to 2015[71]. In the general public, another judgement was even more contentious, *Abu Qatader vs. UK*, where the Court prevented expulsion of an Islamist hate preacher to Jordan because of the danger that he might be tortured in Jordan. This discussion is no longer limited to tabloids but also the UK Government wants to adopt a human rights bill, which would break the formal link between British courts and the European Court of Human Rights[72]. The discussion whether

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[66] CDL-AD(2010)039rev, para. (5).

[67] 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).

[68] ECtHR, *Ilaşcu and others vs. Moldova and Russia*, no. 48787/99.

[69] ECtHR, *Kononov vs. Latvia*, no. 36376/04; on this point, see Vermin, J, *Crossing the line*, Russian Law Online, available at *http://www.russianlawonline.com/content/crossing-line*.

[70] For arguments for and against implementation, presented to the House of Lords, *European Court of Human Rights rulings: are there options for governments?*, Vaughne Miller, International Affairs and Defence Section, House of Lords Library, Standard Note SN/IA/5941.

[71] Decision adopted by the Committee of Ministers at the 1208th meeting (23-25 September 2014), available at *http://www.coe.int/t/dghl/monitoring/execution/reports/pendingcases_EN.asp?CaseTitleOrNumber=hirst&StateCode=UK.&SectionCode*.

[72] Conservatives plan to scrap Human Rights Act – read the full document on *http://www.theguardian.com/politics/interactive/2014/oct/03/conservatives-human-rights-act-full-document*; *http://www.theguardian.com/law/2015/jun/01/ david-cameron-european-court-of-human-rights*, accessed 2 July 2015.

the United Kingdom should leave the European Convention on Human Rights[73], seems to have subdued, however.

Worrying is that even in Switzerland a wave of resentment against the European Court of Human Rights has built up, especially on the right wing of the political spectrum. This may be related to the traditional Swiss insistence on its independence and the rejection of the idea of "foreign judges". While it is unlikely that Switzerland would leave the European Convention on Human Rights, such discussions probably contributed to the insistence of Switzerland on 'subsidiarity' in the process of reform of the Court[74].

While the protection of human rights in Europe makes quite some progress in several members States of the Council of Europe, this progress has to be seen in the context of serious threats both on the national and the European level. Multi-level human rights protection is a complex system where many players interact. It should be in the interest of all actors to keep this system both coherent and efficient.

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[73] Th. May: *Tories to consider leaving European Convention on Human Rights*, available at *http://www.bbc.com/news/uk-politics-21726612*; see also arguments presented by Vaughne Miller, International Affairs and Defence Section, House of Lords Library, Standard Note SN/IA/6577 (*www.parliament.uk/briefing-papers/SN06577.pdf*, accessed 2 July 2015).

[74] Swiss Parliament: 13.3237 – Interpellation, *Kündigung der Konvention zum Schutze der Menschenrechte und Grundfreiheiten*, available at *http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20133237*; *La Suisse sera plus isolée si elle dénonce la Convention*, interview with Prof. Walter Kälin, available at *http://www.tdg.ch/suisse/La-Suisse-sera-encore-plus-isolee-si-elle-denonce-la-Convention/story/22597456/print.html*; *Bundesrat vehement gegen Kündigung der Menschenrechtskonvention*, available at *http://www.nzz.ch/aktuell/schweiz/bundesrat-vehement-gegen-kuendigung-der-menschen rechtskonvention -1.18082582*, all accessed 2 July 2015.