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**Working Group
on Human Rights and Fundamental Freedoms,
Judiciary and Prosecution Service**

**Roundtable Discussion
on Independence of the Judiciary,
Full Individual Access to Constitutional Court
and Prosecution Service Constitutional Setting**

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REPORT

**“FULL INDIVIDUAL ACCESS TO THE CONSTITUTIONAL COURT
AS AN EFFECTIVE REMEDY FOR HUMAN RIGHTS PROTECTION”**

**by
Ms Slavica BANIĆ
(Justice, Constitutional Court of Croatia,
Former Substitute Member of the Venice Commission)**

Ladies and gentlemen,

Dear colleagues,

I am thankful to Venice Commission for giving me opportunity to meet you all again and exchange the views with you about the constitutional complaint as an individual remedy against the violation of human rights.

Allow me to consider this meeting as a kind of follow up to our meeting from last July when I presented you different aspects of the constitutional complaint in Croatia and experience of the Constitutional Court in that regard. I wish I could not repeat things that I said then, but I am not sure I will be able to, since my experience as of the judge of the Constitutional Court who deals every day with constitutional complaints strongly speaks in favour of existence of the constitutional complaint in Croatian legal order.

Distinguished participants,

The aim of this presentation is to give you the overview on the basic issues in relation to the existence of the constitutional complaint within the legal order. By some simple but convincing examples related to some aspects of the functioning of the constitutional complaint in Croatia given in the course of discussion, I will try to bring you closer my position that the existence of the constitutional complaint changes the understanding of the citizens not only about their rights but also about true essence of democracy which does not exist without protection of human rights.

I am starting this presentation with emphasizing the standpoint of the Venice Commission which welcomes and promotes the introduction of the full constitutional complaint as an effective remedy for the protection of the human rights. The reasons for such approach lie in the first place because it provides for comprehensive protection of constitutional rights, but, in the second place because of the subsidiary nature of the relief provided by the European Court of Human Rights. A very good example of this attitude is Venice Commission's opinion on the draft constitutional amendments in the regard to the Constitutional Court of Turkey where it outlined role and importance of the constitutional complaint.

This view is confirmed in its very valuable document from 2010 on the Study on Individual Access to the Constitutional Justice. This Study provides an overview of mechanisms which exist in the Venice Commission's member and observer states with regard to the individual access to the constitutional justice. One of the ways of the individual access is the constitutional complaint. The aim of the Study is to contribute to a better understanding of the great variety of adopted solutions, but also to analyse the merits of the various systems of the member and observer states. It means that the Study did not just list the respective solutions but delivered a microcomparison of the individual access to the constitutional justice drawing conclusions at the end of all chapters.

The Study has emphasized the fact that there is a basic change in the history of constitutional courts in the recent decades. Namely, the constitutional adjudication can be described as a path from the review of the constitutionality of laws to the review of the application of laws which further means a shift from the review of legislature to the review of the judiciary.

This is for sure related to the constitutional complaint. The Study of the Venice Commissions shows how this remedy occurs in very different forms in the jurisdiction of European Constitutional Courts. Regardless of its notions or range, Venice Commission has outlined its main features as following:

1. It is a legal remedy of subsidiary character after the exhaustion of other legal remedies
2. It can be invoked on account of violation of basic rights and freedoms
3. It can be invoked against violation either from a law or a statute or an administrative act or a judicial decision forth even in the case of the omission of public authorities
4. It can be invoked by any person who pretends to be the victim of the violation of basic rights and freedoms.

Exhaustion of all other legal remedies before the filing the constitutional complaint is, I would say a usual formal requirement for the most countries which have the constitutional complaint. However, some countries allow the constitutional complaint before the exhaustion of remedies, in cases where adhering to this rule could cause an irreparable damage to the individual. This possibility can be found in Croatia, the Czech Republic, Germany, Latvia, Montenegro, Slovakia, Slovenia, and Switzerland. In Croatia, the rule is that all legal remedies have to be exhausted before filing the constitutional complaint. However, it is possible to file the constitutional complaint before the exhaustion of the remedies if an irreparable damage could be caused and if it concerns a severe violation of constitutional right. Allow me to illuminate you the latter situation. We had the case where the investor got the construction licence to build a complex of buildings in the urban area. The licence was final and he took a large credit to proceed with investments. However, the ministry of construction according to the Law on Administrative Procedure has the power under certain conditions to re-examine the licence even after the licence had become final. So they did it and annulled the licence claiming that it was illegally issued. The investor came to the Court claiming that his right to property was violated because he relied to finalty of the licence and upon that succeeded to get the credit from the bank to build a complex worth around one million Euros. The case was pending before the Administrative Court, but the Constitutional Court deemed that already in the stage before judicial protection was provided, complainant's right to property was violated because the state had no power unilaterally to interfere with the recognized rights by quashing them after they became final, if such quashing is not pursued in the interest of the Republic of Croatia and if for such abolishment the applicant is not reimbursed according to the Article 50. par. 1. of the Constitution. It meant that the Court even before the exhaustion of available remedies intervened in the interest of the protection of human rights.

With regard to invoking the violation of basic rights and freedoms it should be noted that constitutions contain some fundamental rights or refer to a catalogue of fundamental rights that are given constitutional, or at least supra-legislative, status. However, not all these rights serve as review standards in all cases. Parts of the rights catalogues are of a programmatic nature, which means that individuals are not given a remedy against the violation of such programmatic norms or national objectives. This is the case for social rights. For example, the Constitution of the Former Yugoslav Republic of Macedonia provides that the jurisdiction of the Constitutional Court covers "the freedoms and rights of the individual and citizen relating to the freedom of conviction, conscience, thought and public expression of thought, political association and activity as well as to the prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political affiliation".

When filing the constitutional complaint, an important issue is whether the Court should be bound by the expressed violations or has the autonomy to decide by itself. Often, individual applicants have difficulties setting out the precise grounds on which they bring their application. In view of admitting a greater number of applications despite these errors, the constitutional court may issue decisions on another constitutional basis than that mentioned

in the request (e.g., Albania, Austria, Belgium, Bulgaria, the Czech Republic, Estonia, Portugal, Russia, Slovenia and Spain). On the other hand, the applicant is not obliged to name the exact provision of the Basic Law, but the violated norm must be identifiable from his/her complaint. This requirement is wielded stricter with regard to legally advised complaints than to those brought by laymen. In Croatia situation is a bit problematic. Namely, our Constitutional Act on Constitutional Court explicitly determines that it will examine only the violations that are expressed in the complaint. However, the European Court's jurisprudence brought us to position to move away from this provision and to identify the violations upon the content of the objections.

Further on, there is no uniform approach among the member and observer states on the acts which are eligible to be the subject of the constitutional complaints proceedings. In Austria, for example, the constitutional complaint is allowed only against the administrative acts but not against the judicial decisions. On the other hand, in Bosnia and Herzegovina for example exists a form of the constitutional complaint, the "constitutional revision", where an individual is given a remedy against final decisions by ordinary courts, but not against individual administrative acts. Not only the acts are exposed to the constitutional complaint's proceedings. In Germany, for example, the constitutional complaint is allowed in the case of the omission of public authorities. The Constitutional Act on the Constitutional Court of the Republic of Serbia allows the constitutional complaint against the actions of the state authorities or other public authorities.

In Croatia there is a whole catalogue of the acts which are not eligible to be the subject of the constitutional complaint. However, this list is not exhausted due to development of the law and almost on daily basis we review whether the disputed acts fall under the issue of the act on the rights and obligations which might be disputed for violation of the constitutional rights.

When it comes to the issue of the person who pretends to be the victim of the violation of basic rights and freedoms, there are various solutions. Nevertheless, the in majority of the states it is asked for the applicant to be directly and currently affected by the violation. In that regards, the laws on constitutional proceedings for example, the South African, authorise anyone to act in the name of the aggrieved person. This means that while an action is still related to a concrete case, the applicant is not directly a victim. Also, legal representatives (relatives, tutors, but also public institution may act on behalf of a person who lacks legal capacity. Secondly, some laws contain details of the nature of the violation. In most states, breach of a fundamental right must constitute a disadvantage to the applicant, thus adversely affecting them. Some national laws require that the harm be sufficiently important as it is the case in Slovenia. Speaking of Slovenia, it is worth mentioning that Slovenia allows to ombudsman for human rights under certain conditions to lodge a constitutional complaint in connection with an individual case that he or she is dealing with. The ombudsman for human rights lodges a constitutional complaint with the consent of the person whose human rights or fundamental freedoms he or she is protecting in the individual case.

When talking about the applicant, it is worth to mention the issue of legal representation which is intended to help the applicant and to raise the quality of complaints. However, legal representation has strong financial implications. Therefore, especially if legal representation is mandatory, the denial of financial assistance or free legal aid could amount to the denial of effective access to a court. Therefore, Venice Commission is firm in the approach that **free legal aid should be provided to applicants if their material situation so requires in order to ensure their access to constitutional justice.** Legal representation is mandatory in Andorra, Austria, Azerbaijan, Brazil, Czech Republic, France, Italy, Luxemburg, Monaco, Poland, Portugal, Slovakia, Spain and Switzerland (if the individual is "clearly unable" to represent him- or herself where in Albania, Armenia, Belgium, Croatia, Estonia, Georgia,

Hungary, Latvia, Liechtenstein, Poland, Romania, Russia, Slovenia, South Africa, Sweden, Switzerland, The former Yugoslav Republic of Macedonia and Ukraine such obligation does not exist.

If to this issue could be added the question of court's fees, it should be noted that Venice Commission recommends that **in view of increasingly more comprehensive human rights protection, court fees for individuals ought to be relatively low and that it should be possible to reduce them in accordance with the financial situation of the applicant. Their primary aim should be to deter obvious abuse.**

In Croatia as I have mentioned the legal representation is not mandatory and there are no fees for filing the constitutional complaint.

In full constitutional complaint proceedings, the constitutional court will usually not decide on the merits of the case. Rather, it will consider its constitutional aspects only. In addition, the court will in principle not review whether the entire hierarchy of norms has been respected (e.g. review of legality of an individual act). The function of full constitutional complaint, in the first instance, is to protect individual's constitutionally guaranteed rights. Still, it should be noted that the constitutional court may decide on the substance, may quash an individual act, or order a proceeding to be reopened, or may change the administrative act, without annulling the act.

Situation in Croatia is that the Court quashes judicial or administrative decision and depending on detected violation it returns it to the respective body. It means if the violation has been already identified in the individual administrative case, it is not returned to the Administrative Court, but to the public authority to fresh the procedure.

As to the decision following a full constitutional complaint challenging an individual act, it is usual that it affects only the case or situation on the basis of which the proceedings were initiated. The question of the scope of a decision by the constitutional court however, raises fundamental problems concerning the role and effectiveness of constitutional complaints.

It only binds the applicant, and the judicial or administrative body whose act was impugned, and possibly also the public bodies concerned with the concrete question also for the future, as long as the concrete situation at the origin of the case has not changed, as it is the case in Austria, for example. In Germany, however, even decisions on individual acts are binding for all state organs. This is the case with Croatia as well.

However, the story of constitutional complaint being a successful remedy for protection of human rights has another side of medal. Last year I have quoted the words of Mr Pazcolay, a distinguished member of the Venice Commission and the former president of the Constitutional Court of Hungary who said how the constitutional complaint is the mixed blessing because of its double character: it has very important role in the protection of individual rights, but also gives a lot of problems to courts that has to be dealt with very cautiously in order to fulfil the original function of the constitutional court. In that regard, he also said that there is a double tendency in the world with regard to the full constitutional complaint. Namely, the countries which do not have it are seriously taking into consideration to introduce it, while the countries which already have it, consider to limit the possibility of the individual access exactly because of the overburden caused by this competence.

The problem of overburdening the Courts with constitutional complaint touched not only transitional countries, but also countries like Spain and Germany. In that regard, these states developed filters to sift requests that are deemed unserious or "manifestly" or "most probably" unsuccessful. German, Hungarian, Slovenian and Spanish Laws on the constitutional court allow for a preliminary control of the full constitutional complaint. A

complaint will be dismissed if it does not contain questions that are significant in terms of constitutionality.

Very often, a smaller body of judges is selected to examine applications and to deny review if the application has no prospect of success (e.g. Austria, Germany, Slovenia). This leads to an immediate reduction in the constitutional court's workload and the proceedings require a lesser degree of formality.

This was a problem that Croatia constitutional justice faced at one moment. In 2009 we had almost 9000 cases pending before the Court. With the similar approach as in Germany and Slovenia, we reduced it to around 3.500 cases.

There are many other issues which could be emphasized here and I would like to leave a floor for discussion by closing my presentation with the following question: does Georgian society need constitutional complaint? I am not Georgian and I cannot answer this question because it is you who know the best is your society ready for this remedy and how necessary it is in your legal order. However, I will answer this question as if it were posed to me as Croatian for Croatian society. I will not repeat my words from the last meeting when we talked about the similarities of our societies, legacy we have on our back and visions on how our society should look like because I believe you remember them. But, I feel free to underline again my point which did not change: I could not imagine Croatian society without the full constitutional complaint. It became an essential part of the promotion of human rights, and respect of the rule of law. Giving a possibility to an individual to learn about his or her position in society by defending certain constitutional right is nothing else than development of democracy in its full meaning. It contributes to building the confidence in the democratic institutions, at the same time giving the possibility to Court to develop what Habermas calls constitutional faith. Faith that the rights are not impractical and illusory but real and effective. Faith that the every citizen matters. Faith that rule of law is not just obedience to the law on the side of citizens but duty of the state powers as well. Constitutional Court is thus given the possibility to be the integrating factor within the society which aims to be considered as democratic.

Ladies and Gentlemen,

I trully hope that this introduction will open the floor for questions and discussions on different issues of the effectiveness of the constitutional complaint for which I am at your disposal.

Thank you very much for your attention.