Strasbourg, 3 March 1998
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CDL-INF (97) 7

Seminar organised in conjunction with the Constitutional Court of Georgia on "Contemporary problems of Constitutional Justice"

Tbilissi (Georgia), 1-3 December 1996

Proceedings

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THE ESTABLISHMENT OF A CONSTITUTIONAL COURT IN A PERIOD OF TRANSITION - THE EXAMPLE OF SLOVAKIA

by JUDr. Ján KLU_KA, Judge of the Slovak Constitutional Court, Member of the Venice Commission for Democracy through Law

According to Article 124 of the Constitution of the Slovak Republic (hereinafter known as "the Constitution" - No.460/1992 Coll.) the Constitutional Court of Slovakia is an independent judicial body empowered to protect constitutionality in the Slovak Republic. This task is fulfilled through various kinds of its proceedings *viz.*to review the constitutionality of generally binding legal regulations of the Slovak Republic (Article 125 letter a) until d) of the Constitution), to review the compliance of generally binding legal regulations of the Slovak Republic with international treaties which have been published in a Collection of Laws (Article 125 letter e) of Constitution), to resolve the conflict of competences between supreme organs of state (Article 126), to provide an official interpretation of constitutional acts provided that the dispute has arisen as regards this matter between disputing parties (Article 128 para. 1 of the Constitution), to review both the constitutionality and legality of an electoral process and election into state organs and self-governmental bodies (Article 129 of the Constitution), to protect basic human rights and freedoms through the proceedings about constitutional complaints and submissions (Article 127 and 130 para. 3 of the Constitution) and some other kinds of proceedings. Throughout the more than three and half years of its existence (the Constitutional Court started its activity on February l5, 1993) more than 2500 cases have been brought before the Constitutional Court. The relevant experiences have been acquired during this period allowing to identify at least some general (and common) problems (both legal and factual) each newly-established constitutional court which may have to be confronted.

1. Relationships of the Constitutional Court with the courts of general jurisdiction.

In a number of constitutions of Central and Eastern European countries adopted after 1989 (including that of the Slovak Republic) the newly-established Constitutional Courts represent qualitatively new "elements" inserted into their judicial systems and therefore there have been hardly any practical experiences with their decision-making process, their relationships with other courts of general jurisdiction, the new tasks of the constitutional courts *viz.* to protect the constitutionality of legal orders etc. Each constitution regulates the relationship between its constitutional court and ordinary court in its own way, but despite the differences in such regulations, the following general feature is common to all new constitutions. According to this feature the constitutional court is to be qualified as an independent judicial body neither subordinate nor superior to the system of ordinary courts. Whereas the Constitutional Court does not form an integral part of the judicial system of ordinary courts (it cannot be qualified as its next and new appellate court) it has naturally no competence to re-examine or even to cancel their valid judgments. The Slovak experience confirms, however, that the prevailing number of applicants (more than 70%) asked the Constitutional Court just to reopen its case (already finished before the ordinary court) or even to abrogate the valid judgments of ordinary courts (including some judgments of the Supreme Court of the Slovak Republic). Such proposals of applicants (either in the form of constitutional complaints or constitutional submissions) have therefore had to be rejected due to the lack of the competence of the Constitutional Court to deal

with them, whereas the need to respect the independence and impartiality of ordinary courts absolutely prevents such interference of the Constitutional Court.

1.1. Protection of basic rights or freedoms by the Constitutional Court and/or ordinary courts?

The constitutional and/or other kind of relevant legal regulations resolve, as well, the problem of which judicial body (ies) shall be entrusted with the competence to protect the basic (fundamental) rights and freedoms embodied obviously in the Constitutions or constitutional acts (in the Slovak Republic-Chapter 2. of the Constitution "Fundamental Rights and Freedoms"). In principle there are three possible ways of resolving this problem:

l) the protection of fundamental rights and freedoms shall be guaranteed exclusively by the Constitutional Court;
2) the protection of fundamental rights and freedoms shall be guaranteed exclusively by ordinary courts;
3) the protection of fundamental rights and freedoms shall be guaranteed by the Constitutional Court, unless the protection of such rights and freedoms falls under the jurisdiction of another (ordinary) court.

The Slovak legal regulations (both constitutional and other) confirm that the Slovak legislator was in favour of the third option of resolving these problems. In respect of the protection of basic human rights and freedoms, the Constitutional Court of the Slovak Republic is competent to deal with it, provided that the following requirements have been met:

a) the applicants (either natural or legal persons) have objected to the alleged violation of human rights or freedoms embodied in Chapter 2. of the Constitution;
b) ordinary courts or other state organs of the Slovak Republic are not able to provide effective protection (effective remedy) against the alleged violation of such rights or freedoms;

For the completeness it should be pointed out that the ordinary courts themselves are able (pending their proceedings) to violate the basic rights or freedoms of applicants, such as disputing parties (right to a fair trial, right to a public hearing in "reasonable time" etc.) not to providing (under specific conditions) at the same time any effective remedy against them. In some cases, therefore, as the defendants before the Constitutional Court of the Slovak Republic were representatives of the ordinary courts, and the Constitutional Court, in some cases, took the findings according to which the ordinary courts violated the basic "procedural" rights of applicants pending the judicial proceeding before them. The main purpose of the above-mentioned kind of legal regulations is to guarantee (within the framework of the domestic legal order of the concrete state) that no basic right or freedom can leave without effective judicial protection (either by the ordinary courts or constitutional court proceedings). If the fundamental rights or freedoms represent simultaneously a "constitutional transformation" of the human rights treaty provisions, such "internal" judicial proceedings may form a part of the process of exhaustion of local remedies *f.e.* according to Article 26 ECHR.

2. Ratione temporis principle in the activity of the newly-established Constitutional

Court.

As mentioned above, the new constitutional courts are obviously founded by the relevant provisions of constitutions, but they are not able (in practice) to start their activity immediately *viz.* from the day when the relevant constitution has entry into force. Next, legislative steps are regularly required to complete the legal "background" of such a new judicial body, it means the adoption of the special act about the Constitutional Court (in the Slovak Republic Act No.38/1993 Coll. in the wording of Act No.293/1995 Coll.), or the Rules of procedure of the Constitutional Court. In some cases, the process of electing (appointing) the first judges of the Constitutional Court and the practical problems connected with acquiring the appropriate building, hiring the staff of the Constitutional Court, represents a time-consuming process. The day when the Constitutional Court starts its decision- making process is therefore regularly different from the day when the Constitution has entry into force. The practical problem may therefore arise in respect of the "*ratione temporis principle"* in the practice of newly-established constitutional courts.

Resolving this problem in February 1993, the Slovak Constitutional Court took into account the fact that neither the Constitution nor the Act about the Constitutional Court of the Slovak Republic contain "retroactive" provisions allowing to deal with such applications (constitutional complaints or submissions) which have objected to the alleged violations of their basic rights or freedoms before February l5, 1993 (the day when the Act No.38/1993 Coll. about Constitutional Court entered into force). Only in the exceptional cases (the talk is about so-called *continuing violations* of human rights and freedoms) the Constitutional Court has declared to be competent to deal with such applications if the applicants objected to the alleged violation of their human rights after October 1st, 1992 - the day when the Constitution of the Slovak Republic entered into force. The same conclusion is valid for all other proceedings of the Constitutional Court as described above except those whose purpose is to review the constitutionality of generally binding legal regulations of the Slovak Republic (Article 125 letter a) until d) of the Constitution) or to review their conformity with international treaties (Article 125 letter e) of the Constitution). If there is still a valid legal regulation and if the other "admissibility" requirements of such a proposal have been met, the Constitutional Court of the Slovak Republic is competent to deal with such a proposal regardless of whether such a legal regulation has been passed before the entry into force of the Constitution or even in the former Czech and Slovak Federal Republic (before December 31, 1992). The Slovak legislator has made only one difference between the valid legislation of the former CSFR and the "new" Slovak legislation passed after January 1st, 1993 provided that their constitutionality has been objected to before the Constitutional Court.

Article 152 para. 2 of the Constitution (Transitory and Final Provisions) states, that: *"Laws and other generally binding regulations passed in the Czech and Slovak Federal Republic shall become inoperative on the ninetieth day after the publication of the decision made by the Constitutional Court of the Slovak Republic..."* and on the other hand Article 132 states (with regard to "Slovak" legislation) that : "*In cases where the Constitutional Court finds any contradiction in statutory rules as defined in Article 125...these rules parts or clauses thereof shall become ineffective after six months following the decision of the Constitutional Court".*

3. The practical application of international treaties in the decision- making process

of the Slovak Constitutional Court.

In the prevailing number of cases brought before the Slovak Constitutional Court above all the Constitution and other kinds of domestic legal regulations of the Slovak Republic have formed the relevant legal basis of decisions (findings) of Constitutional Court. It is useful, however, to note that such a "domestic" legal basis is not exclusive, and the sources of international law (international treaties) have, in some cases, had an important function before the Constitutional Court. The purpose of this part is therefore to identify the position of international treaties in the decision-making process of the Slovak Constitutional Court, taking into account the experiences with their practical application within the scope of the competences of the Constitutional Court, as listed above. Before turning to look at this topic in some detail, it may be worthwhile to characterize the position of international treaties within the framework of the domestic legal order of the Slovak Republic according to constitutional and other legal regulations of this topic.

3.1. International treaties in the legal order of the Slovak Republic.

After the dissolution of the former Czech and Slovak Federal Republic (January 1st, 1993) a number of international treaties (both bilateral and multilateral) have remained as an international law treaties "heritage" for both successor states, the Slovak Republic and the Czech Republic. The talk is about 1900 bilateral treaties and 980 multilateral treaties the state party of which has been (until December 31st, 1992) the former Czech and Slovak Federal Republic. Both new states have decided separately to which of them they make the succession according to the Vienna Convention on the Succession of States in respect of Treaties on August 23, 1978. Due to the application of the "automatic succession principle" (Article 34 para. 1 letter a) of the Vienna Convention) the Slovak Republic has notified its succession into treaties of the former CSFR and has declared to be bound by all bilateral and multilateral treaties of the former CSFR since January 1st, 1993. The Slovak Republic has made the succession into the reservations and declarations made to such treaties by the former CSFR. These treaties therefore became an integral part of Slovak legal order.

The Constitution contains neither a provision declaring the valid international treaties as a integral part of the domestic legal order of the Slovak Republic, nor a general "supremacy clause" determining the priority of international treaties over the domestic legal order. Generally speaking, the position of international treaties within the framework of the Slovak legal order is fixed by the relevant provisions of the Act on the Collection of Laws of the Slovak Republic (No.1/1993 Coll.). According to Article 1 para. 1 in conjunction with Article 3 para. 1 and Article 6 of the quoted Act, if the valid international treaty (either bilateral or multilateral) has been published in the Collection of Laws it has to be recognized as a generally binding legal regulation of the Slovak Republic. Any provision of this Act regulates, however, the legal conditions for the practical application of international treaties promulgated in the Collection of Laws. These conditions are regulated partly by the Constitution (Article 11 of the Constitution with regard to the application of international human rights treaties) and partly by the laws of the Slovak Republic ("supremacy clauses" in a number of Acts (either former "federal" or today's "Slovak") in respect of any other international treaties different from human rights treaties. Article 11 of the Constitution determines the "conditional supremacy" (priority) of the human rights treaty within the framework of the Slovak legal order, whereas the human rights

treaty shall be applied by the relevant organ of state only if it guarantees a "greater scope of basic human rights or freedom". If such requirement is met, the legal obligation of each public authority is to apply the relevant provision(s) of the human rights treaty instead of the "less favourable" domestic legal regulation. Other treaties have priority over the domestic legal order, unless provided otherwise in relevant domestic legal regulation, and if the latter includes a "supremacy clause" allowing the preferential application of such treaty.

3.2. International treaties before the Constitutional Court of the Slovak Republic.

Among the number of proceedings of the Constitutional Court as listed above, the following allow for the practical application of international treaties :

l. Proceedings reviewing the compliance of generally binding legal regulations of the Slovak Republic with the valid international treaty (Article 125 letter e) of the Constitution).

2. Proceedings reviewing the constitutionality of generally binding legal regulations of the Slovak Republic (Article 125 letter a) until d) of the Constitution).

3. Proceedings about constitutional complaints (Article 127 of the Constitution).

4. Proceedings about the constitutional submission both natural or legal persons objecting to alleged violation of their basic rights or freedom (Article 130, para. 3 of the Constitution).

It should be pointed out, however, that international treaties do not have the same position in all proceedings of the Constitutional Court mentioned above. As regards the proceedings under point l) the valid international treaty is in a position of the "higher" legal regulation, and the conformity of domestic legal regulations with such "higher" legal regulation is reviewed. With regard to the proceedings under points 2) to 4), the international treaty is applied as one of the sources enabling the proper interpretation of the relevant provision of the Constitution for the purposes of the concrete proceedings of the Slovak Constitutional Court.

l) In respect of proceedings to review the compliance of generally binding legal regulations of the Slovak Republic with international treaties (valid for Slovakia) these kinds of proceedings exceed the scope of "pure" constitutionality, whereas its purpose is to review the compliance of domestic legal regulations with valid international treaties. Proceedings before the Constitutional Court according to Article 125, letter e) of the Constitution represents, therefore, one of the ways to obtain in accordance the content of domestic legal regulations with the international treaty, the state party of which is the Slovak Republic. The case objecting to the non-conformity of the domestic legal regulations exclusively with the international treaty has not been brought (so far) before the Constitutional Court. In some cases, however, the subjects entitled to bring the case before the Constitutional Court have objected simultaneously to the non-conformity of domestic legal regulations with the Constitution as well as with the international treaty (human rights treaties most frequently-see below). Such a kind of Slovak legal regulation confirms the "top position" of international treaties within the framework of the Slovak legal order, whereas (and for the need of proceedings before the Constitutional Court) they have to be recognized as a legal regulation of "higher" degree,

and any other domestic legal regulation is in a "lower" degree position. The Constitutional Court has, therefore, no competence to review the "constitutionality" of international treaties valid for the Slovak Republic. On June 4, 1996 the Constitutional Court rejected the proposal of natural persons to review the "constitutionality" of the bilateral Czech-Slovak-Hungarian agreement on August 23, 1949 due to the lack of its competence to deal with such a case. (Pl ÚS 2/96-so far not published). In such proceedings of the Constitutional Court may be objected non-conformity any generally binding legal regulations of the Slovak Republic with any valid international treaty.

2) In respect of the practical application of international treaty law within the scope of proceedings about the constitutionality of generally binding legal regulation of the Slovak Republic, there is scope for their application in two kinds of cases :

a) subjects entitled to bring the case before the Constitutional Court have objected simultaneously to the non-conformity of domestic legal regulations, both with the Constitution and international treaties. In such a case (and if the Constitutional Court has found a contradiction between such legal regulations and the Constitution and international treaties) such proceedings have a "double" function, *viz.* to protect the constitutionality of the Slovak legal order and at the same time to bring domestic legal regulations in accordance with international treaties. So far, the Constitutional Court has not found any conflict between domestic legal regulations and international treaties within the scope of such proceedings. It is useful to add, however, that the number of international treaties which may be applied in such a case is restricted (in comparison with the proceedings of the Constitutional Court according to Article 125 letter e) of the Constitution) whereas it understands only such international treaties the provisions of which are "transformed" in the Slovak legal order by the Constitution. The talk is first of all about human rights treaties, the constitutional "transformation" of which is represented by Chapter 2 of the Constitution (Basic rights and freedoms).

b) subjects entitled to bring the case before the Constitutional Court requesting only a review of the constitutionality of the domestic legal regulations concerned. Before deciding on it, the Constitutional Court is obliged to interpret the content of the provision (Article) of the Constitution marked by the applicant. Provided that such a provision of the Constitution represents only a "constitutional" transformation of the international obligation issuing for the Slovak Republic from valid international treaties, the Constitutional Court has no legal or factual reason not to interpret such a constitutional provision using the method of interpretation of the international law of treaties (Articles 30-33 of the Vienna Convention of the Law of Treaties 1969) including (if it is necessary) the relevant case-law of international judicial or other organs (opinions of the European Commission of Human Rights and judgments of the European Court of Human Rights in respect of the European Convention of Human Rights 1950, the views of the Committee of Human Rights in respect of the International Covenant on Civil and Political Rights, 1966 etc.). Such an approach of the Slovak Constitutional Court to the interpretation of the Constitution is based on the fact that any of the reservations or declarations made by the former CSFR to the international treaties (treaties on human rights) does not prevent such a possibility of the interpretation of the Constitution. The Constitutional Court took this approach for the first time in the case when the claimant (the group of the deputies of the National

Council of the Slovak Republic) objected to the constitutionality of the Governmental Decree No. 196/1993 Coll. about the school textbooks with Article 42 para. 2 of the Constitution (right of free education on elementary schools). The Constitutional Court in its finding stated *inter alia* that : "there is no legal or factual reason...to interpret the term 'free education' from Article 42 para. 2 of the Constitution only on the basis of Constitution or any other domestic legal regulation if the valid international treaties regulate the same basic right and if it is possible to interpret such basic right through the method of interpretation of the rules of international law. Using only "domestic interpretation" rules of the basic right regulated by the international human rights treaty can lead to the violation of the latter and to the potential international responsibility of the Slovak Republic as well. The following international treaties have been used in the "free education case" by the Constitutional Court to interpret the term "free education" from Article 42 para. 2 of the Constitution: UNESCO Convention against Discrimination in Education 1960, International Covenant on Economic, Social and Cultural Rights, 1966 and Convention on the Rights of the Child 1989.[1]

The Constitutional Court has taken a similar approach in a number of other cases concerning the conformity of various kinds of generally binding legal regulations of the Slovak Republic with the Constitution. In a case when the claimant (military court) has objected to the contradiction of Act No.18/1992 Coll. about the civil service with Article 25 para. 2 of the Constitution (the right of conscientious objectors to refuse mandatory military service) the Constitutional Court has stated that : "In this case the Constitutional Court of the Slovak Republic took into account also the existing case-law of the Strasbourg organs and especially the resolution of the Committee of Ministers on June 29, 1967 67(DH) 1 in the Grandrath Case".[2]

3) As regards constitutional complaints (Article 127 of the Constitution) there are no obstacles to using international treaties in one of the ways mentioned above. It seems useful to emphasise that the Constitutional Court has practically no real competence to deal with such kinds of cases, whereas almost all valid decisions of state organs or self-governmental bodies (which forms the subject matter of the constitutional complaint) are subjected to judicial control by ordinary courts. This is maybe one of the reasons why the Constitutional Court has so far not applied international treaties within its proceedings about the constitutional complaints.

4) In respect of the proceedings about constitutional submissions of natural or legal persons objecting to the alleged violation of basic human rights or freedoms (Article 130 para. 3 of the Constitution) the Constitutional Court has applied, in two cases, international treaties to interpret relevant constitutional provisions. In the first case, the European Convention of Human Rights and International Covenant on Civil and Political Rights (including the judgments of the European Court of Human Rights and views of the Committee of Human Rights) was applied to interpret the content and scope of the right of privacy (including the data protection) from

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[1] Collection of the Findings and Decisions of the Constitutional Court of Slovak Republic, l993-l994, Košice l995, pp. l79-2l4.

[2] Ibidem, pp.70-74, see also Collection of the Findings and Decisions of Constitutional Court of Slovak Republic, l995, Košice, l996, pp. l7l-l89, and 38-5l.

Article 19 para. 1 of the Constitution[3] and in the second case has been applied to the same international treaties to interpret the term fair trial "within the reasonable time" [4].

For completion, it should be pointed out that the proceedings of the Constitutional Court about constitutional complaints and submissions may form a part of the process of exhaustion of local remedies according to Article 26 of the European Convention of Human Rights or Article 2 of the Optional Protocol to the Covenant on Civil and Political Rights. Today's valid legal regulation of the proceedings before the Slovak Constitutional Court therefore allows the practical application of international treaties (first of all human rights treaties) into the legal order of the Slovak Republic to the extent and mode described above. Through this kind of its decision-making activity, the Slovak Constitutional Court "imports" into domestic legal order the international standards of human rights protection and helps to get into conformity these parts of domestic legal regulations which are not compatible with such standards. Such decisions of Constitutional Court have *"erga omnes effect"* and are binding for all state organs.

4. Other Practical Problems.

Apart from the legal problems described above (their list is naturally not exhaustive) the newly-established Constitutional Court is confronted with a number of practical problems which have to be resolved in a very short time. One of them is how to organize its internal work to be able to deal with cases in reasonable time. Two points are decisive in this field:

l) whether the relevant legal regulation prescribes (fixes) the concrete terms, both for examining the case with respect of its "admissibility" and for taking the decision of the Constitutional Court on the merits.

2) who is responsible for preparing the case for the need of the "admissibility" decision and the decision in merits (judge rapporteur, collegium of the judges).

Relevant Slovak legal regulations fix any term, neither for the "admissibility" decision nor the decision on merits. The President of the Slovak Constitutional Court appoints a judge rapporteur for each case. The same rapporteur prepares the case both for admissibility decision and decision in the merits. A lot of cases brought before the Slovak Constitutional Court in 1993 (until December 31, 1993 more than 750 cases) raised the necessity to find an appropriate method of internal work of Constitutional Court with respect of such huge number of cases. A system of *"informal meetings"* has been inserted into the process of examining each concrete case before Constitutional Court (the talk is about so-called plenary cases). In the first stage of the activity of the Slovak Constitutional Court (approximately to the end of 1993) such informal meetings have fulfilled a "double" function. They helped, above all, to clarify and stabilize the content and conditions of the practical application of the "rules of procedure" of the Slovak Constitutional Court, including its "admissibility conditions" *face to face* to particularities of

[3] Collection of Findings and Decisions of the Constitutional Court of Slovak Republic, l995, Košice, l996, pp.82-104.

[4] Ibidem, pp.52-67.

each concrete case. The next (and main) function of such informal meetings, however, is to discuss *in advance* the legal questions presented by the judge rapporteur in its *preliminary report*. Depending on the complication and complexity of each concrete case, the informal meetings took place two, three or even four time before the plenary session of the Constitutional Court.

As regards the "external" problems of the newly-established Constitutional Court, one may mention its relationship with the mass-media (radio, TV, newspapers) whereas the correct and quick information about its decisions (findings) have great importance, not only for its "image" as an independent and impartial judicial body, but also for its confidence in society as a whole. Taking into account the special legal terminology and the structure of the decisions of the Constitutional Court, it seems, therefore, useful to co-operate closely with the circle of influential journalists ("opinion-makers") not only on a formal basis (press-conference, briefings) but also on an informal basis in discussions about the concrete and more detailed questions of the decisions of the Constitutional Court, about the case-law of the Constitutional Court in previous cases, the legal and doctrinal philosophy of the judgments, and the position of international treaties etc. Another question is how to inform regularly about the recent decisions of the Constitutional Court (press-release, press conference) and who should be entitled to give such information (judges, judge rapporteur, the president of the Constitutional Court, members of staff of the Constitutional Court).

PROBLEMS OF EFFECTIVENESS OF CONSTITUTIONAL SUPERVISION
by Mr Avtandil DEMETRASHVILI, Chairman of the Constitutional Court of Georgia

I must begin by congratulating Ján Klucka on his excellent report. In my opinion, one of the main strengths of his report is its consideration of problems of constitutional supervision not only in terms of general, abstract concepts (which of course is necessary and adds theoretical value to the report), but also the fact that it takes into account more concrete elements, namely space (Slovakia) and time (the period of transition to a democracy).

Why was constitutional supervision established in Europe only in the second half of the 20th century (whereas in the United States it took only 16 years after the adoption of their Constitution)? Can we talk about real constitutional supervision in post-soviet or post-communist states? – The essence of the answer to these questions is that constitutional supervision appears only where and when there is a social requirement for it, and the extent to which we can say that it has really been established is in direct proportion to the effectiveness of constitutional supervision.

There is a great temptation here to open up a discussion on the genesis of constitutional supervision right in front of this educated audience and to involve you in interesting opinions on the origin of constitutional supervision in organic or natural law doctrines. I am sure this would be of interest, but today I will restrict myself to speaking on another topic, namely on effectiveness of constitutional supervision. It should be noted from the outset that this is a very difficult and multifaceted problem; some issues will be discussed in detail, others simply mentioned.

Below I would like to answer the following questions:

- under what conditions,
- in what forms and
- by what means

will the activity of judicial bodies of constitutional supervision be effective, i.e. problems which existed before its creation will be resolved and the objectives aimed for in its creation be reached?

Guaranteeing the Constitution's supremacy and the protection of human rights and freedoms are considered as general strategic objectives in this report.

1. Of the two basic models of exercising constitutional supervision, which of them (or their variations) is more appropriate as regards the effectiveness of constitutional supervision? American? Austrian? French? German? Or maybe Georgian? Even without taking into consideration epoch and country, neither of them can be considered universally applicable. It seems fairly certain, however, that in countries where the constitutional jurisdiction is just being formed, the special body created for constitutional supervision i.e. the Constitutional Court will be more effective than older such Courts. The practice of common law countries, where the function of constitutional supervision is assumed by courts of common jursidiction, also seems valid.

For arguments' sake let us address one of the most reliable criteria: social practice. As has already been pointed out by Ján Klucka, in every post-soviet country, and if I am not mistaken in every post-communist country too, a special body of constitutional supervision – the Constitutional Court – has already been created or is being created. Thus the effectiveness of constitutional supervision is not directly connected with the nature of the bodies carrying it out – whether these are common courts or a specialised Constitutional Court. An investigation of other functions may prove more useful. Some authors, in particular Lorenca Karlacare from the University of Ferrari, note that the increasing number of Constitutional Courts is a characteristic feature of democratic development and represents a sign of rejection of the old, authoritarian regime of government.

2. Sharing this viewpoint, I would like to look at the relations existing between the Constitutional Court and democracy from the opposite perspective.

It is indisputable that the activity of the Constitutional Court should foster the development of democracy. In connection with this reciprocal relation, it is perhaps of greater importance to note that there is a direct relation between the level of development of democracy and the effectiveness of constitutional supervision. The experience of classic democratic countries proves this (USA, Germany, Italy); so too does that of newer democracies such as Russia, Belarus, Poland and Georgia.

Thus the second viewpoint – the effectiveness of constitutional supervision depends on the level of development of democratic institutions, regardless of the nature of the judicial body carrying out constitutional supervision – that is to say, regardless of whether the supervisory body is a common court or a specialised body.

3. Effectiveness of constitutional supervision varies in direct proportion with the existence of appropriate legislation in the country. Englishmen say: “to cook a rabbit stew, you should have a rabbit at least”. That is why constitutional supervision is necessary only where the Constitution exists as a single, systematic, normative act.

This is a necessary but not sufficient condition for the existence of a means of constitutional supervision. Activity of the body of constitutional supervision will only be of value if the legal framework for its activity has been created. The legal acts of Georgia which in my opinion compose this legal framework are as follows:

- the Constitution of Georgia
- the Organic Law on the Constitutional Court
- the Law on Constitutional Legal Proceedings
- the Law on Social Guarantees to the Members of the Constitutional Court, and finally
- the Regulations of the Constitutional Court of Georgia.

Thus, the third opinion: the quality of effectiveness of the Constitutional Court is connected with the existence in the country concerned of a legal base necessary for its functioning.

4. Other circumstances upon which the effectiveness of the body of constitutional supervision is dependent: the procedures envisaged concerning its composition and structure.

There are three main procedures used in forming the body of constitutional supervision:

- formation of the body by the Parliament alone
- formation by the Parliament and the Head of the State
- formation by all three branches of power.

Looking at recent trends, we can see that precedence has been given to the third procedure, which is termed “political” in literature. It is used, for example, in Italy, Bulgaria, Ukraine and Georgia.

The advantage of such a procedure is considered to be the capacity of various political powers to continue to function on a consensual basis during transitional periods. Involvement of the judicial branch in the formation procedure may also provide, for example, stricter protection of the procedural norms of activity of this body, etc.

As time is limited, I will not linger over the issues of the membership and structure of the supervisory body, though as three months' experience of the activity of the Constitutional Court of Georgia make apparent, its effectiveness is closely connected with its division into Chambers.

To name a specific problem, I would like to call your attention to the relations between the effectiveness of the Court’s activity and the criteria which must be fulfilled by members of the Court. The main criteria are age, professional experience and education.

5. Effectiveness of constitutional supervision depends on the competence of the body carrying out the supervision, that is to say which bodies and which acts of these bodies are subject to constitutional supervision. The principal goal of the Constitutional Court of Georgia is ensuring the constitutionality of normative acts. As to the work of the Court, individual claims are of the greatest importance to it. It might boldly be stated that the principal and indeed essential jurisdiction of all Constitutional Courts (in all countries) is the review of individual claims; and as this applies in general, so too it applies to countries in periods of transition. Using its authority to review individual claims, the Constitutional Court is given the opportunity to carry out direct supervision of the protection of human rights and freedoms.

It must be noted that often the Constitutional Court is the last hope of citizens on the way to the protection of their rights. This theme will be considered by Arne Mav_i_ later, so I will not discuss it here.

In some countries, Constitutional Courts are also charged with the function of interpretation of laws. In my opinion, such jurisdiction may be considered as detrimental to its most important role, in that it might hinder the essential work of the Constitutional Court, as the Constitutional Court is more a judicial body by its essence and incidental supervision is more characteristic to it.

I would like to say two words on the possibility of the Constitutional Court verifying court decisions from the point of view of their constitutionality. On the one hand, if it is possible that legislative or executive authorities issue acts which are in conflict with the Constitution, then

why is it impossible to imagine that courts may also adopt unconstitutional decisions? And if a court should adopt such a decision, why can the special body created for constitutional supervision not be authorised to decide on the constitutionality of a court's decision, when it is empowered to declare acts of the supreme legislative and executive authorities as unconstitutional, null and void?!

On the other hand, for countries in periods of transition, where the institution of constitutional supervision is only starting to gain strength and where there is not yet enough practical experience behind it, perhaps it would be wiser to refrain from allowing such questions to come within the jurisdiction of the Constitutional Court, for at least the first years of the activity of the Court.

I would like to say two words on preliminary and *ex post facto* forms of supervision. Flowing from the role of constitutional supervision, priority should be given to *ex post facto* supervision, although in connection with international treaties, the forms of preliminary supervision can also be used.

6. In connection with the effectiveness of the Constitutional Court, guaranteeing the execution of its decisions is of particular interest. In Article 25 of the Organic Law of Georgia on the Constitutional Court it is directly stated that "the decision of the Constitutional Court is final and its non-execution is punishable by law".

Decisions of common courts (civil, criminal) can be executed by force where necessary. In cases of non-execution of a decision of the Constitutional Court by the executive or legislative authorities there are actually no means to compel the execution of the decision. This is why scholars often conclude that the Constitutional Court should be an autonomous body, and in my opinion modernisation and the refinement of the Constitutional acts guaranteeing the execution of the decisions of the Constitutional Court are necessary.

On the one hand, the Constitutional Court directly performs the supervision of normative acts and hence supervises the body adopting them, and on the other hand, the Constitutional Court carries out the concretisation and development of the Constitution with the help of its decisions, which on their part serve towards a better understanding of the Constitutional Court. In both cases, the Constitutional Court should have a rationalistic influence, which is possible only if the Constitutional Court defends stable and clear principles of interpretation of norms while considering and deciding cases and as far as possible avoids general and indeterminate formulations of the law. This is of great importance for the effectiveness of the Constitutional Court.

7. In order to ensure the effectiveness of the Constitutional Court, independence of judges, existence of a legislative basis for their immunities, privileges and indemnities and their enforcement for life are of great importance. So too are separation of the budget of the Constitutional Court from the common state budget and independent distribution of this budget.

Great attention is paid by the Constitutional Court at the time of taking decisions to finding the golden balance between policy and justice, as the process of enforcement of the "political" decisions adopted by the Constitutional Court is complicated in the post-soviet countries and is somehow associated with more difficulties than in the countries having many years' experience

of constitutional supervision. For example, the activity of the Constitutional Court of Russia, which, giving too much weight to policy issues, questioned its own authority and put under suspicion its future effective activity. e.g. by the opinion of Serge Pashin: “interference of the Constitutional Court with political coalitions among the centre and federation’s subjects, legislative and executive authorities and even with certain groups of deputies is unavoidable.”

The very difficult conditions faced by the Constitutional Court in Belarus may also serve as an example. Therefore, the Constitutional Court as a kind of "negative legislator" should try to find a balance between policy and justice.

8. I would finally like to note the great role played by the people who serve the Constitutional Court and are directly involved in carrying out constitutional supervision. Their individuality, honesty and principles are of great importance, as nowhere in the world has such a perfect law yet been created that its effectiveness does not depend upon its executor.

Thank you for your attention.

FUNCTIONS OF A CONSTITUTIONAL COURT / ELECTION OF JUDGES

by Mr Cesare PINELLI, Professor at the University of Macerata, Italy

1. Introduction: The main features of constitutional justice in Eastern European countries

2. Regulations in the Georgian legal system:
a) on the appointments system for constitutional judges
b) on the functions of the Constitutional Court

1. In order to comment on Georgia's provisions about the structure and functions of the Constitutional Court, the best thing to do is to look first at the introduction of constitutional justice in Eastern European countries and in the now independent republics of the ex-Soviet Union, after the end of communist regimes.

Although Georgian problems are to a certain extent specific ones, the introduction of constitutional justice in this country can be related to tendencies common to those countries. It is possible to summarize them as follows:

a) the introduction of a Constitutional Court as a natural complement of the return or the foundation of democracy;

b) the choice for the Western European model of constitutional review;

c) the tendency towards a Court whose main task is to prevent or compose conflicts among political institutions, rather than to protect rights against political power's abuses;

d) the tendency to superimpose on each other different ways of access to the Court, different kinds of judgments and decisions.

a) Sooner or later, all the Constitutions of these countries have introduced a judicial authority of constitutional review. Also in the communist regimes there was a constitutional court, but it was only apparently an authority of constitutional justice. When you have a monolithic political power run by a central party, and members of the Court are appointed by Parliament that is itself an expression of the party, the Constitution cannot be the Higher Law, and there cannot be any real constitutional justice.

Nevertheless, one should remember that in Western Europe the wedding between democracy and constitutional justice has not been so easy, and there are very important countries where you don not find constitutional review of legislation, as in the United Kingdom, or you find it only to a certain extent as in France. In these countries, the tradition of parliamentary sovereignty is still held as the first value to preserve.

This means that separation of powers is a necessary but not sufficient condition to have an effective constitutional justice. You need an idea of constitution as the general frame where rights of individuals and minorities are granted against the will of the law or the will of the

political majority of the country. If this is so, constitutional justice becomes the necessary instrument of the Higher Law to be respected by everybody.

b) There are two different models of constitutional justice. According to the American system of judicial review of legislation, the ordinary judge who thinks the law contrary to the Constitution can decline to apply it, unless the Supreme Court has ruled in the opposite sense. According to the Western European system, which we find in Germany, Italy, Spain, Austria and other countries, the ordinary judge who thinks the law to be contrary to the Constitution is bound to ask the Constitutional Court to adjudicate upon it.

As I said before, constitutional provisions of the countries of Eastern Europe and of the ex-Soviet Union have chosen the Western European model.

This is not surprising. Wherever you have hard conflicts in the country, or you have a transition from an authoritarian regime to a democratic one, you need a concentration of constitutional review in order to assure the sovereignty of the Constitution over the law or the other expressions of political power. In my country, the Constitution of 1948 introduced the Constitutional Court, but the Court began to function only eight years later, because there was a delay in approving the laws on the Constitutional Court. Meanwhile, the Constitution had given to ordinary judges the power to decline to enforce the laws they thought contrary to the Constitution. But in that period, that is to say between 1948 and 1956, no such review took place, as ordinary judges continued to follow the old tradition of considering themselves bound by the laws. They viewed the Constitution only as a political document, that Parliament was free to enforce.

The Western European system of constitutional review is a concentrated one, in the sense that it does not allow the ordinary judges to enforce directly the Constitution without the previous intervention of the Constitutional Court. But this does not mean that the Court is concentrated in the sense that, when the Constitution recognizes self-government of local communities, or recognizes freedom of cultural, linguistic or ethnical minorities (and a democratic Constitution has to recognize both), the Court has to be considered the voice of the unitary State, or of the central political body, against the will of local government or of minorities.

The difference between the two meanings of the term “concentrated” is clear in the thought of Hans Kelsen, the father of the Western European model of constitutional justice. In writing his famous essays of 1920-1930, Kelsen never looked to the American model of constitutional review, as he knew too well that it could not be a good solution for countries where the sovereignty of the Constitution was still very hard to gain. He was a partisan of a concentrated model of constitutional review.

Nevertheless, looking at the very different provisions of the Austrian Constitution, which he had helped to write, and of Weimar’s Constitution, he was convinced that one of the main tasks of a Constitutional Court should have been to assure the supremacy of the Constitution over the will either of the central or of the local bodies, even when the central body claims that the local body’s behaviour threats the integrity of the Republic. He pushed his persuasion to the point of saying that the best solution to achieve this end, and to have a fair judgment, would be to let the members of the Court be appointed in part from the central and in part from the local bodies

(H.Kelsen, *Die Bundesexecution* (1927), in H.Kelsen, *La giustizia costituzionale*, Giuffrè, Milano 1981, 119).

c) Constitutional scholars have pointed out that constitutional provisions of Eastern Europe tend to see Constitutional courts as authorities of preventing or resolving conflicts among political institutions, rather than protecting rights against political power's abuses. They argue this tendency from the provisions about access to the court, which is always reserved to political institutions and more rarely to ordinary citizens, and also from the provisions about the acts which the Courts have to judge. And their conclusion is that the authors of these Constitutions have made their choice for constitutional justice so far it is maintained within the borders of the relations between the same powers to whom the drafting of the constitutional text can be related (see S.Bartole, *Riforme costituzionali nell'Europa centro-orientale*, Il Mulino, Bologna 1993, 207, and F.Fede, *La giustizia costituzionale nei Paesi dell'Est europeo*, in *Giurisprudenza costituzionale*, 1994, 730).

I agree with them, and one reaches the same conclusion looking at the constitutional provisions of the Republics of the ex-Soviet Union, including Georgia.

I think that this agreement leaves room for at least two *caveat*s. First, one has always to be careful of the unintended consequences, and constitutional justice is no exception. Second, this is even more true where, as the same scholars point out in their studies on constitutional justice of these countries, different kind of access, judgments and decisions are superimposed each other.
In the Western European experience, we must keep in mind two examples of constitutional courts conceived to resolve conflicts between State powers: the *Staatsgerichtbarkeit* of Weimar's Constitution and the *Conseil Constitutionnel* of the French Fifth Republic.

The first tribunal was conceived as an authority for resolution of conflicts between State powers or between the members of the Federation and the Federation itself. It was called to adjudicate upon the political substance of the conflict, without regard to the constitutional framework. The story of *Staatsgerichbarkeit* was a tragic one, since it decided the constitutional controversy between Prussia, run by the socialdemocrats, and the President of the Federation, whose decrees had repressed Prussian autonomy according to Article 48, 2 par., of the Constitution, in the sense that those decrees were legal. This decision helped Hitler in pretending his rise to power as a legitimate one.

The story of the *Conseil Constitutionnel* is very different. De Gaulle, Fifth republic's builder, wanted this authority mainly to preserve the space reserved by Article 38 of the Constitution to acts of government (*domaine du règlement*) against any interference of the laws. These straight limitations on the laws, and the interventions of the *Conseil*, were not conceived to let the supremacy of the Constitution prevail, but only to give a clear cut superiority of parliamentary sovereignty over the executive power. Nevertheless, in the first occasion to do so (1971), the *Conseil* began to behave differently from what the political majority expected from it, saying that its task was to assure the citizen's rights written in the Declaration of 1789 and in the Constitution of 1946. Notwithstanding its peculiarities, the *Conseil* seems now to function in a way which is more similar to that of other european Courts.

What do these very different examples teach us? They teach that historical situations are fundamental for the path of constitutional justice, and this seems well known, if not obvious. But they teach also that there is a 'magic moment' in the history of Courts, in which the culture and responsibility of constitutional judges, their will and skill in letting the Constitution prevail over the laws, or other expression of political power, play a prominent part. This moment can be 1802, as for the American Supreme Court, 1971, as for the *Conseil Constitutionnel* or 1956, that is to say the first decision of the Italian Constitutional Court. But, sooner or later, this moment arrives.
This is one reason why the model of constitutional justice the framers of the Constitution intended to introduce does not play a prominent role in the experience of the Courts, or, as it is said, in the living Constitution. The Constitution itself, provisions on the functions of the Constitutional Court included, needs always to be interpreted, and this is precisely the Courts' duty.

d) Another reason why I am sceptical about the self-sufficiency of the intent of the Framers, and even of constitutional provisions, in telling us what will a Court be is more specific to the countries we are now considering.

This reason belongs to the fact that the functions of the Courts are often drafted in a somewhat confused way. As I have said, many scholars have noticed that the Courts have competence for different kinds of constitutional review, especially the review prior to the enforcement of the law by judges and the review which is born by the application to the Court of an ordinary judge.

Confusion is surely a problem, but it leaves also on the shoulders of the judges the opportunity of clearing up their main tasks and their ultimate role in the constitutional framework.

It is only necessary to add that, the more prevails a constitutional review which is prior to the enforcement of the law, we call it a priori or abstract control, the more the Court remains near to the political questions the law may pose, and to the political matters at stake. And viceversa: the more prevails a review which depends on the ordinary judge's doubt about the constitutional legitimacy of the law, the more the Court grows in its independence and self-confidence, becoming a real judge. The experience of *Conseil Constitutionnel*, which has the first competence, compared to the experience of other Courts, must be kept in mind.

In some of these Constitutions (e.g. Article 125, par. 5, Constitution of Russia), Courts have also to give advice on the interpretation of the Constitution, if political institutions ask them to do so. This function is even more abstract than review a priori of the law, as it may be exercised in respect of any act, or even simple behaviour, of political institutions. I think that there is a real danger for the Courts. They may be involved in questions that should rely entirely upon the political institutions responsibility.

2. According to Article 88, par. 2, of the Constitution of Georgia, "The Constitutional Court of Georgia consists of nine judges. Three members of the court are appointed by the President, three members are elected by the Parliament by three fifths of the total number of deputies and three members are appointed by the Supreme Court". And par. 4 states that "A member of the Constitutional Court must be a citizen of Georgia who has attained the age of 35 years and has a

higher legal education". Articles 5, 6 and 7 of the law on the Constitutional Court repeat the content of those statements.

The mixed solution of appointing one third of constitutional judges by the President, one third by Parliament and one third by superior courts has been adopted by the Italian Constitution of 1948, and it plainly functions well.

Nevertheless, the Italian Constitution differs from the Georgian over the standards required in order to be appointed constitutional judge. In Italy, constitutional judges have to be chosen among judges of the superior courts, or University professors in law, or lawyers with at least twenty years professional background.

Obviously, I am not suggesting that this is the only possible solution. I can understand why, in a new democracy, the age standard is lower than in other countries. I just want to add that the "higher legal education" seems a too low standard. I think that here the institutions called to appoint the members of the Court can exercise very widely their discretionary power. And requesting quotas of different kind of legal professions improves the circulation of experiences inside the Court, its cultural standard and its independence.

Another impression touches the way constitutional provisions, including those regarding the structure and functions of the Constitutional Court, have faced the great problem of a peaceful coexistence between Georgians and the minorities living in the same Republic of Georgia.

From one side, according to Article 1 of the Constitution, "Georgia is an independent, unified and indivisible law-based state, ratified by the referendum carried out in March 31st, 1991 throughout the territory of the country, including the then Autonomous Soviet Socialist Republic of Abkhazia and the former autonomous oblast of South Ossetia", and Article 2, par. 1, forbids "the transfer of the territory of Georgia".

From another side, Article 2, par. 4, states that "Citizens of Georgia regulate matters of local importance through self government as long as this does not encroach upon state sovereignty. The right to create self governing bodies, their powers and their relationship with state bodies, is determined by organic law", Article 8 grants the integrity of Georgian and Abkhazian language in Abkhazia, and especially Article 4 states that "Once there are appropriate conditions and when self-governing bodies have been created over the whole territory of Georgia, Parliament will be formed with two chambers: namely the Council of the Republic and the Senate" (par 1), and that "The Senate will consist of members elected from Abkhazia, Adjaria and other territorial units of Georgia as well as five members appointed by the President" (par. 3).

These provisions seem to reflect the intent of building a Republic with large self-governing bodies, and even a representative chamber of these bodies, but also the conviction that this kind of Republic cannot be built now, and will not be built until the end of armed conflicts between the State of Georgia and the political movements that are contesting its legitimacy in some part of the land (see B.G.Hewitt, *Demographic Manipulation in the Caucasus (with Special Reference to Georgia)*, in *Journal of Refugee Studies*, Vol. 8, 1995, 48 ss.; J.Radvanyi, *La Géorgie aux prises avec ses archaismes*, in *Le Monde diplomatique*, 1995; A.G.Zdravomyslov, *National-Ethnic Conflicts and the Formation of a Russian State*, in *Russian Politics amd Law*, 1995, 8 ss.).

How does this kind of arrangement reflect itself on the composition and functions of the Constitutional Court?

We have seen that three constitutional judges are elected by three fifths of the total number of deputies. If the three constitutional judges elected by Parliament have to obtain the majority of three fifths of the total number of deputies, this means that also when the minorities will be represented in the Senate, they will not have any chance to be represented in the Court, unless the majority decides to vote for one minority candidate.

The solution envisaged by the authors of the Constitution for what concerns the Court's composition seems to deny any possibility for minorities to be represented in the Court, and this not only until the "appropriate conditions" of article 4 will appear, but also after. This solution is not surprising if we look at the constitutional provisions of countries where the tradition of the central State is stronger, but it appears less suitable where self-governing bodies are expected to be created, and are represented in the Senate.

It is worth adding that, according to Article 89 of the Constitution and to Article 34 of the law on the Constitutional Court, the representative bodies of Abkhazia and Adjana have a right of access to the Court against laws of the State which could infringe their autonomy.

I cannot say if the solution envisaged for the composition of the Court is the most suited from a political point of view.

What I can say is that the famous dictum "If you want peace, prepare war" does not apply to constitutions, whose promise is a promise not only of peace, but also of self-respect and mutual respect among different communities. The dictum of constitutions can only be: "If you want peace, prepare it".

3. If we now consider the functions of the Court, we have to compare constitutional provisions with the law on the Constitutional Court. Article 107, par. 3, of the Constitution states that "The organic law on the Constitutional Court is to be adopted before February 1st., 1996", and this deadline has been respected. There must have been a particular need for an immediately functioning Court. For this same reason, the law seems sometimes more fit for emergency than for giving a definite and organic settlement to Georgian constitutional justice.

For example, it is unclear to me the relationship between Article 20, that seems to give the court a general right to apply to the Constitutional Court during a process, and Article 39, according to which "legal persons and individuals of Georgia and other states" can submit to the Court the compliance of violation of the second chapter of Georgian Constitution by normative acts. These are two different ways of access to the Court on the same issues, since also the right of the court to apply to the Constitutional Court would concern violations of the second chapter of the Constitution. If that is so, the law does not choose among these different ways of access to the Constitutional Court.

The need to face emergency seems also to arise from the function of considering "questions of constitutionality of the creation and activity of political parties", reserved to the Constitutional

Court by Article 89, par. 1, c) of the Constitution and Article 19, c), of the law in the Constitutional Court.

This provision gives the Court a very delicate task. Article 26 of the Constitution states that "Citizens of Georgia have the right to create political parties or other political organisations in accordance with organic law and participate in their activities" and considers "impermissible" the creation and activities of parties whose goal is to overthrow or change the Georgian order by force, or violate the country's integrity or independence or attempt to induce ethnic, racial, social, national unrest.

These are the standards which the Court has to consider in the case of submission of such an issue of constitutionality, which, according to Article 35 of the law, can be introduced by the President and not less than one fifth of MP, and the state bodies of Abkhazia and Adjara.

The nearest comparison here is with Article 144, i), of the Constitution of Romania, which gives the Constitutional Court the power to resolve the issues of the constitutionality of a political party, while the Constitutions of other Eastern European countries as Poland and Hungary do not provide such a function, and even the new Russian Constitution of 1993 has abolished the provision of April 1992, which led to the famous decision of the Russian Constitutional Court of December 1993 on the constitutionality of the PCUS.

It is worth adding that Article 21 of the German Constitution gives to the Constitutional Court the power to declare unconstitutional parties whose goal is to damage or destroy the liberal and democratic order of the country.

Nevertheless, there is a big difference between the Georgian and the German provisions, since the latter presupposes a full freedom to create parties, whatever their ideology they may have. The power to declare unconstitutional a political party not by its activities, but by its creation, looks very different, especially if we look at Article 35 of the law, which gives central and local political institutions the right to submit this issue to the Court.

Through these questions, we touch the crucial point for the development of a really independent Constitutional Court.

Concern for the Court's independence is clear in Article 2 of the Law on the Constitutional Court, according to which "the Court performs its activities on the bases of legality, cooperation, openness, equality and adversary powers within the whole term of its authority on the basis of the independence, immunity and the tenure of members of the Constitutional Court".

Such an independence can be reached more by a profound and continuous dialogue between judges, citizens and the Constitutional Court, and, consequently, by the growth of a constitutional conscience, rather than by the prevention or the resolution of conflicts between political institutions, or the resolution of the issues of constitutionality of the creation of political parties. The latter competence contrasts sharply with the growth of an independent Court, since it necessarily involves it in partisan conflicts. In that regard, the difficulties met by the Russian Constitutional Court in the PCUS case should be particularly remembered.

Georgian constitutional order lives indeed a very delicate transition, and even the provisions I have mentioned can confirm it. But the Georgian Constitution and the Law on the Constitutional Court can surely be considered a good basis to have a well-functioning Court and, by this way, a democratic and peaceful development of the country.

INDIVIDUAL COMPLAINT PROCEEDINGS BEFORE CONSTITUTIONAL COURTS

by Mr Arne MAV_I_, Constitutional Court, Ljubljana

The Citizen as an Applicant Before the Constitutional Court

The proceedings before the Constitutional Court have the nature of proposed proceedings (*juridiccion voluntaria*). In principle, the Constitutional Court cannot itself initiate the proceedings; as a rule, the proceedings before the Constitutional Court are based on (restricted to) the corresponding application lodged by a special, duly qualified constitutional institution (the so-called legitimate petitioners). Initiation of constitutional review proceedings on the own initiative of the Constitutional Court (*ex officio*) is quite rare. Still it may most often be traced to the constitutional review systems of Eastern Europe; it is indeed strictly preserved in Croatia (Paragraph 2 of Article 15 of the Croatian Constitutional Court Act). Elsewhere, *ex officio* proceedings are not as frequent. The Austrian Constitutional Court, for example, may on its own initiative begin the proceedings for the constitutional review of a statute or a regulation only if it refers to a prejudicial question under the proceedings before the respective Constitutional Court. All the above cases may be referred to as objective forms of constitutional review.

On the other hand, some constitutional review systems also allow for the private individual's access to the Constitutional Court in the form of abstract or specific review, based on the constitutional complaint, on the *actio popularis* and on other forms of constitutional rights' protection. It involves the so-called subjective constitutional review, violation of individuals' rights and safeguard of individuals' rights against the state (in particular against the Legislature). In the states with diffuse constitutional review and in some states with concentrated constitutional review individual citizen is offered the possibility to request the constitutional review of statutes, administrative measures or judgments in special proceedings. Only after a complaint has been lodged the Constitutional Court will begin proceedings. Even then, as a rule, the complainant may withdraw his/her complaint in order to terminate the respective proceedings. The individual's standing as complainant before the Constitutional Court has been influenced by extensive interpretation of provisions relating to the constitutional complaint, as well as by ever more extensive interpretation of the provisions relating to the specific review (USA, Switzerland, Greece, Italy). In some systems the individual's access to Constitutional Courts has become so widespread that it already threatens the functional capacity of the Constitutional Court (Germany). Therefore, the Legislature are trying to find some way for Constitutional Courts to get rid of less important or hopeless proceedings (*e.g.* restriction of abstract review with standing requirements). All these proceedings envisage the condition that the complainant must be affected by a certain measure taken by the public authority. With the growth of the number of complaints the percentage of their efficiency decreases. Nevertheless, citizens have more possibility for protection of their constitutional rights. France is an exception among these systems, where private individuals have no access to the Constitutional Council, except with reference to elections. In France, the protection of individual's rights is, however, the task of the *Conseil d'Etat* acting on the basis of complaints against administrative acts.

The petition of an affected individual whose constitutional rights are claimed to have been violated is generally the basis of an appropriate procedure of protection in which protection of rights by the Constitutional Court is only one of a number of legal remedies for protection. Even

the bodies intended to provide protection are different, depending on the specific system in question.

I. RIGHTS MAY BE PROTECTED IN REGULAR COURT PROCEEDINGS

a) Some legal systems provide protection of rights predominantly in proceedings before Courts with general powers; for the most part these are States which have also adopted the so-called diffuse or American model of judicial review [5].

The following are specific forms of protection of rights by the regular Courts:

b) *Habeas corpus* procedure *i.e.* the protection from unjustified deprivation of liberty; an appropriate application is lodged with the regular Court having such jurisdiction. Such proceedings are characterised by speed, simplicity and openness.[6]

c) *Habeas data*, which is a sub-form of *habeas corpus* and was introduced in Brazil with the Constitution of 1988. It is a constitutional guarantee of a personal decision about information, in essence the protection of personal data.

d) Further proceedings are recognised mainly by states which have adopted the American model of judicial review. [7]

- the writ of *mandamus*, whereby it is possible to annul a mistake of a lower Court by order of a higher Court;

- prohibition, preventing the higher Court from usurping the jurisdiction of a lower Court;

- the writ of *certiorari*, as the right of a higher Court to resolve a case from the jurisdiction of a lower Court;

- *quo-warranto* preventing a specific person from performing a function of a public nature which she/he has usurped.

e) *Respondeat superior* is a compensation claim by an individual against the state (USA and on the American model, also Taiwan).

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[5] USA, Barbados, Guyana, Jamaica, Trinidad and Tobago, Iceland, Great Britain, Ireland, The Netherlands, Denmark, Sweden, Norway, Finland, Greece, Japan and Australia

[6] *Habeas corpus* is mainly used in the USA, Canada, Mexico, Cuba, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Colombia, Argentina, Brazil, Ecuador, Nicaragua, Panama, Paraguay, Peru, Bolivia, Chile, Uruguay and Venezuela as well as in the following Argentinean provinces: Chaco, Neuquen and Formosa; in Africa: Sierra Leone, Ghana, Nigeria, Uganda, Kenya, Tanzania, Malawi, Mauritius, Zambia, Zimbabwe, Botswana, Lesotho and Swazi; in Asia: Pakistan, India, Nepal, Sri Lanka, Bangladesh, Singapore, Malaysia, Indonesia, Philippines, Taiwan and Hong Kong.

[7] USA; in Africa: Sierra Leone, Ghana, Nigeria, Uganda, Kenya, Tanzania, Malawi, Mauritius, Zambia, Zimbabwe, Botswana, Lesotho and Swazi; in Asia: India, Nepal, Bangladesh, Sri Lanka, Philippines

2. A specific form of protection of rights which is reminiscent of constitutional complaint, is the so-called *amparo*. This is an universal and a traditional form of human rights' protection in the Hispanophone legal system: the protection of an individual from violations of constitutional rights by government acts of all categories. In the main, the Supreme Courts of the state in question are responsible for this form of protection. The aim of such proceedings is to restore the violated right to the state prior to its violation. It is also a characteristically fast procedure. Mexico is the classic *amparo* state. It is followed by many Central and South American States. [8]

3. Subsidiary *amparo* is still more similar to a constitutional complaint. This is a particular sub-species of *amparo*, in that the procedure takes place before the Constitutional Court (Spain, Colombia). This form of protection is also called *accion de tutela*. Colombian *accion de tutela* is comparable to the constitutional complaint. It was introduced by the Colombian Constitution of 1991. It is characterised by the fact that the circle of protected constitutional rights is explicitly defined. It is possible to annul legal or administrative acts (in addition to *actio popularis* and proceedings of *habeas corpus* in Colombia).

4. Brazil introduced a number of specific legal remedies for the protection of human rights in its Constitution of 1988, including:

- *mandado de seguranca*. A wider form of protection for which the Supreme Court is competent, for the protection of rights not covered by *habeas corpus*;

- *mandado de injuncao*, a special individual complaint for a case of negligence of the Legislature.

5. Chile introduced a special modified version of *amparo*, the so-called *recurso de proteccion* in the Constitution of 1980.

6. An *actio popularis* may, equally, be lodged by an individual, generally without restrictions (the exceptions are Slovenia and Hungary, where it is restricted by demonstration of standing by the complainant). It is a special, individual legal remedies for the judicial protection of rights, although intended for the protection of fundamental rights in the public interest (while a constitutional complaint is lodged in the interest of the individual). An *actio popularis* is normally directed against a general act (usually statute) which is considered to have violated a constitutional right. The Constitutional Court is generally the competent body for reaching a decision, which deals with the disputed act in the sense of an abstract review of rules. *Actio popularis* is less common in Europe (Bavaria-although in other German provinces and on a federal level there is no *actio popularis*, Hungary, Slovenia, Croatia, Liechtenstein, partly Czech Republic, Macedonia, Malta and FRY and within its framework, Montenegro). In Israel the *actio popularis* is common in cases arising within Israel proper, the right to standing is decided mostly by the Court's willingness to grant it. It is most extensive in Central and South America (Costa Rica, El Salvador, Panama, Colombia, Venezuela, Brazil, Peru, Paraguay, Argentina. [9]

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[8] Guatemala, El Salvador, Nicaragua, Costa Rica, Honduras, Panama, Colombia, Cuba, Haiti, Dominican Republic, Ecuador, Peru, Bolivia, Paraguay, Argentina, Uruguay, Venezuela and Seychelles

[9] Argentina is an interesting example, where there is no *actio popularis* on a federal level, but individual

actio popularis is a relatively rare approach in Africa (Benin, Congo, Gabon, Burkina Faso, Ghana, Niger, Sierra Leone-according to the 1991 Constitution) while in Asia, *actio popularis* is only recognised in Japan, and only in electoral matters (as a people's action or objective action) and in Iran (complaint before the Court of Administrative Justice).

7. A specific group of systems of constitutional law guarantees the individual only an indirect protection, such that the individual does not have direct access to the Constitutional Court or other body of constitutional review. These are systems that consider the protection of the rights of the individual are satisfied through:

- abstract review of rules (Poland, Belarus, Cambodia, Bulgaria, Italy, Belgium); or
- specific review of rules (Bulgaria, Kazahstan, Bosnia, Italy); or
- preventative abstract review of rules (France).

II. CONSTITUTIONAL COMPLAINT AND ITS EXTENT IN THE WORLD

A constitutional complaint is a specific subsidiary legal remedy against the violation of constitutional rights, primarily by individual acts of government bodies, which enables a subject, who believes that his/her rights have been affected, to have his/her case heard and a decision made by a Court authorised to provide constitutional review of disputed acts. Generally, the impugnment refers to individual acts (all administrative and judicial acts), in contrast to the *actio popularis*, although it may also indirectly (Slovenia, Spain) or even directly (Germany) refer to a statute.

Is constitutional appeal a right? The Slovenian Constitutional Court has taken the view that it is an institute of judicial proceedings, or a special legal remedy (Ruling No. U-I-71/94 of 6 October 1994, published in the Official Collection of Decisions No. 109/III).

The constitutional complaint is not an entirely new institute; its forerunner may be found in the Aragon law of the 13th to 16th Century (in the form of *recurso de agravios, firme de derecho, manifestacion de personas*); in Germany from the 15th Century onwards, incorporated in the institution *Reichskammergericht* of 1495, envisaged in the famous constitutional text, *Paulskirchenverfassung*, of 1849, and in Bavaria it was envisaged in the Constitutions of 1808, 1818, 1919 and 1946; while Switzerland introduced a special constitutional complaint (*Staatliche Verfassungsbeschwerde*) in the Constitution of 1874 and in the Statutes of 1874 and 1893.

The constitutional complaint is very common in systems of constitutional/judicial review. It is most widespread in Europe (Russia, Cyprus, Malta, Czech Republic, Slovakia, Hungary, Albania, Macedonia, Croatia, Slovenia, Austria, Andorra, Switzerland-Supreme Court, Germany, Spain, Liechtenstein (1992), Portugal and FRY-on the federal level and in Montenegro). In Germany, the constitutional complaint appears on the federal and on provincial

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provinces have introduced it: Buenos Aires, La Rioja, Entre Rios, Rio Negro, Chaco, Nequen and Santiago del Estero).

levels.[10]

Outside Europe, the following systems recognise constitutional complaint: **Georgia (the power of the Constitutional Court)**, Kirghizia (the power of the Constitutional Court), Mongolia (the power of the Constitutional Court since the Constitution of 1992), South Korea (the power of the Constitutional Court since the Constitution of 1987), Taiwan (Supreme Court), Papua-New Guinea (Supreme Court), Syria (Constitutional Court). It should additionally be noted that other Arabian countries, if they recognise judicial review at all, have in the main adopted the French system of preventative review of rules following the model of the French Constitutional Council of 1958, which does not recognise the right of the individual to direct access to specific constitutional/judicial review bodies. In Africa, only the following states recognise the constitutional complaint: Sudan (Supreme Court), Mauritius (Supreme Court), Senegal (Supreme Court) and Benin (Constitutional Court). The only example of constitutional complaint in Central and South America is the Brazilian *mandado de injuncao*, *i.e.* an individual complaint in cases of negligence of the Legislature (the power of the Supreme Court) unless we also count the Colombian *accion de tutela* (the power of the Constitutional Court) usually considered to be a subsidiary *amparo*.

The particularity of individual systems is that they recognise a cumulation of both forms, the popular and the constitutional complaint (Slovenia, Croatia, Macedonia, Bavaria, Hungary, Malta, FRY and Montenegro, Colombia and Brazil. The two forms may compete in their functions. The rationale for both forms is protection of constitutional rights, the *actio popularis* in the public and the constitutional complaints in the private interest. In both cases the plaintiff is an individual. As a rule the subject disputed is different: *actio popularis* refer to general acts and constitutional complaints refer to individual acts (except for the possibility of indirect impugning of the statute in Slovenia, Spain, FRY and Montenegro, and the direct impugning of the statute in Germany). The standing of the plaintiff or the personal effect the remedy might have upon the plaintiff is a precondition of constitutional complaint. Although it should be possible to exclude the standing of the appellant as a precondition for the *actio popularis*, individual systems do require it for *actio popularis* (Slovenia, Macedonia), such that both in the case of constitutional and in the case of *actio popularis*, the standing or the personal effect on an individual works as a corrective with the aim to prevent the abuse and overburdening of the Constitutional Court or other constitutional/judicial review body. In both cases the same aim may be pursued through the introduction of the payment of tax upon submission. It is, however, characteristic that in practice the number of constitutional complaints is increasing everywhere. Therefore, many Constitutional Courts have adapted the organisation of their work to this principle either in the form of specialised individual senates for constitutional complaints (*e.g.* the German Federal and the Spanish Constitutional Courts) or by the fact that decisions on constitutional complaints be taken by narrower units of the Constitutional Court (senates, sub-senates, *e.g.* in Slovenia).

The following are the elements of the institute of constitutional complaint:

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[10] - The federal constitutional complaint is the responsibility of the Federal Constitutional Court, and
- The provincial constitutional complaint is the responsibility of certain Provincial Constitutional Courts: Bavaria, Berlin, Hessen and Saarland.

- system of prior selection of complaints in the proceedings (integration of filters into the proceedings) most highly developed in the German system with intent to sift out potentially unsuccessful complaints, whereby the maneuvering space of the Constitutional Court in rejecting a frivolous complaint is extended. This, in fact, involves the narrowing of the constitutional complaint as a legal remedy in principle open to everybody. As a matter of fact, there is a general problem in Constitutional Courts as to how to sift the wheat from the chaff and at the same time secure the efficient protection of human rights as the symbol of the democratic system. Individual systems of constitutional review still present this dilemma: in certain systems the proposals for introduction of a constitutional complaint are of recent introduction; some of those familiar with this legal institution tend to introduce prior selection systems; on the other hand, certain systems tend towards the abolition of this legal institute;

- protection through constitutional complaint generally refers to constitutional rights and freedoms, and the circle of rights protected by constitutional complaint is less specifically defined in individual systems (*e.g.* Slovenia, Croatia, FRY and Montenegro, where "all" constitutionally guaranteed fundamental rights are supposed to be protected), while other systems mostly define (narrow) the circle of protected constitutional rights.

Special forms of constitutional complaint may also protect special categories of rights[11];

- as a rule, for acts disputed by constitutional complaint; the suspected sources of violations of constitutional rights and freedoms are individual acts, with some exceptions [12];

- those entitled to lodge a constitutional complaint are generally individuals but in Austria, Germany, Spain, Switzerland, FRY and Montenegro, also legal entities explicitly, while in the Croatian system a legal entity is explicitly excluded as a potential appellant; in some systems, the complaint may be lodged by the Ombudsman (Spain, Slovenia, FRY) or by the public prosecutor (Spain, Portugal).

- standing, or the personal effect the remedy might have upon the plaintiff, as a mandatory element though in the majority of systems the concept of standing is fairly loosely defined;

- the prior exhaustion of legal remedies as an essential precondition but with exceptions when the Constitutional Court may deal with a case irrespective of the fulfillment of this condition (Germany, Slovenia, Switzerland);

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[11] in Germany, Hungary and in the Czech Republic communes have standing for the protection of self-government the appellant in the latter so-called "communal" constitutional complaint being the commune (Germany recognises "communal" constitutional complaint on a federal level and on a provincial level in the provinces of Wuertemberg and North Westphalia). The German system also recognises a special constitutional complaint by an individual in relation to constitutional conditions for the nationalisation of land (*Sozialisierung*) in the province of Rheinland-Pfalz. A special form of constitutional complaint exists in Spain: there, the institute of citizen's legislative initiative is also protected by constitutional complaint

[12] in Switzerland and Austria a constitutional complaint can impugn only an administrative act, while in Germany, it can impugn acts of all levels (including a statute); in Spain, Slovenia, FRY and Montenegro a statute may also be an indirect subject of a constitutional complaint; legislative negligence may be directly impugned by constitutional complaint in Brazil, and also according to the practice of the German Federal Constitutional Court and the practice of the Bavarian Constitutional Court

- the time limit for lodging the application ranges from 20 days to three months with an average of one month beginning with the day of receipt or delivery of the final, legally binding act;

- the prescribed contents of the application, are prescribed in detail in the majority of systems: written form, sometimes language explicitly stated (Germany, Austria), citing of the particular state, the disputed act, definition of the violation of a constitutional right, *etc.*;

- the majority of systems envisage the issuing of a temporary restraining order or ruling (of the Constitutional Court) *i.e.* an order temporarily freezing the implementation of the disputed act till the adoption of a final decision;

- in some systems the payment of the costs of the proceedings is explicitly foreseen in cases of frivolous applications (Germany, Austria, Portugal, Spain, Switzerland);

- the effects of the decision: the Constitutional Court is limited in its decision to constitutional matters, to the violation of constitutional rights. However, where a violation is found, a decision may have a cassatory effect and as a rule *inter partes* (and *erga omnes* in a case in which the subject-matter of the decision is a legislative measure). The Constitutional Court here retains the position of the highest judicial authority. These Courts can be referred to as superCourts of cassation, because Constitutional Courts reviewing the decisions of the regular Courts act in fact as the third and the fourth instance. Although the Constitutional Court is not a Court of full jurisdiction, in specific cases it is the only Court competent to judge whether a regular Court has violated the constitutional rights of the plaintiff. It involves the review of microconstitutionality, maybe the review of implementation of the law, which, however, is a deviation from the original function of the Constitutional Court. Cases of constitutional complaint raise sensitive questions of defining constitutional limits. Anyway, the Constitutional Court in its treatment and decision-making is limited strictly to questions of constitutional law. The Slovenian system is specific in that the Constitutional Court may, under specified conditions, make a final decision on constitutional rights or fundamental freedoms themselves (Paragraph 1 of Article 60 of the *Slovenian Constitutional Court Act*, Official Gazette of the RS, No. 15/94).

The protection of fundamental rights and freedoms is an important function of the majority of Constitutional Courts, irrespective of whether they perform the function of constitutional judgment in the negative or positive sense. Whenever a Constitutional Court has the function of the "negative Legislature", constitutional review is strongest precisely in the field of fundamental rights. Even in other fields (concretisation of state-organisational and economic constitutional principles) in which the Legislature has the primary role even in principle, Constitutional Courts take care that fundamental rights be protected. Precisely in the field of the protection of rights, the Constitutional Court also has the function of the substitute "Constitution-maker" ("positive function"), which means that in specific cases Constitutional Courts even supplement constitutional provisions.

III. INTERNATIONAL FORMS OF INDIVIDUAL COMPLAINT

1. The concept of "constitutional complaint" is usually connected with the national constitutional protection of fundamental rights. However, certain international documents also

envisage a specific legal remedy of protection of fundamental rights and freedoms in the form of a complaint[13].

2. The *European Convention for the Protection of Human Rights and Fundamental Freedoms* of 4 November 1950 gives individuals the right to the so-called individual complaint (Article 25 of the Convention). An individual may lodge a complaint with the European Commission for Human Rights because of an alleged violation of rights guaranteed by the Convention. It is an explicit international legal remedy comparable with the national constitutional complaint. It fulfills its function of the individual complaint where national law does not guarantee any appropriate protection of rights. Individual complaint is a subsidiary legal remedy (preconditioned on the exhaustion of the national legal remedies), it is not a *actio popularis* and it does not have a retroactive or cassatory effect. It differs from the constitutional complaint in the way that, contrary to the latter, it leads merely to a finding (declaratory relief).

The position of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* in national law specifies whether an individual may refer to the Convention or even base a national constitutional complaint thereon. It further narrows the maneuvering space of the Constitutional Court itself in the interpretation of the provisions of the Convention. It has actually become a connection of the national Constitutional Court to the European bodies in cases in which a judicial decision as a final national outcome of decision-making becomes the subject of an individual complaint to a European forum.[14]

3. Slovenia signed the *European Convention for the Protection of Human Rights and Fundamental Freedoms* on 14 May 1993 and ratified it on 8 June 1994 (Official Gazette of the RS, International Contracts, No. 33/94). The Slovenian Constitution of 1991 resolves these

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[13] *e.g.* Article 2 of the Facultative Protocol of the General Assembly of the UN to the International Pact on Citizenship and Political Rights of 19 December 1966 (Resolution No. 2000 A (XXI)) since that the Council for human rights must accept and debate reports from individual persons who claim that they are the victims of the violation of any right defined in this Pact. The right to individual complaint is contained in the following: Article 23 of the Declaration on fundamental rights and freedoms of the European Parliament of 12 April 1989; section 18(2) of the Document of the Moscow meeting of CSCE of 3 October 1991; Article 25 of the American Convention on Human Rights of 22 November 1969; Article 28 of the Contract on the European Community of 1 February 1992; Statute of 1979 of the *Comision y la Corte Interamericanas de los Derechos Humanos*

[14] The European Convention for the Protection of Human Rights and Fundamental Freedoms:
- is of constitutional impact in Austria;
- is the basis for an internal national constitutional complaint in Switzerland where it has a status comparable with the constitutional level;
In both cases it is permissible to found the national constitutional complaint on the provisions in the Convention.

- it is higher than ordinary law (Belgium, France, Luxembourg, Malta, The Netherlands, Portugal, Spain, Cyprus);
- it is ranked as Common Law: Germany, Denmark, which introduced the national use of the Convention by special statute on 1 July 1992, Finland, Italy, Liectenstein, San Marino, Turkey;
- it does not have a direct internal state effect: Great Britain, Ireland, Sweden, Norway, Iceland. Some countries of Anglophone Africa are an exception regarding the latter group of systems (Kenya, Tanzania, Uganda, Nigeria) which expressly adopted the system of protection of rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms (*e.g.* Nigeria in the Constitution of 1960) influenced by the extension clause to the European Convention in terms of Article 63, which Great Britain signed on 23 October 1953, whereby only the Convention itself and Protocol 1 apply in these regions.

questions in specific constitutional and legal provisions: Statutes and other regulations must be in accordance with the generally valid principles of international law and with international contracts to which Slovenia is bound. Ratified and promulgated international contracts must be applied directly (Article 8 of the Constitution). The Constitutional Court decides on the accordance of statutes and other regulations with the ratified international contracts and general principles of international law (subsection 2 of Paragraph 1 of Article 160 of the Constitution; subsection 2 of Paragraph 1 of Article 21 of the Constitutional Court Act.

The institution of constitutional complaint and European complaint and the function of European bodies (above all the European Court of Human Rights) raises the question of national and supra-national (final) instance. The national (final) instance: the Constitutional Court as the highest body of judicial authority in a particular state for the protection of constitutionality and legality and human rights and fundamental freedoms (the status of the Constitutional Court is thus defined in *e.g.* Paragraph 1 of Article 1 of the *Constitutional Court Act* of 1994) would be limited to investigation of constitutional-legal questions only. Review of the correct finding of the actual circumstances and the use of simple rules of evidence is a matter for the regular Courts. The subsidiary nature of a constitutional complaint also lies in the division of responsibility between the Constitutional and the regular Courts. The gradation of instance could be established as ascending from the national Supreme Court through the national Constitutional Court to the European Commission or European Court. In fact, instance is not the essence of this gradation although it is essential in the role of supplementing, which means that the national constitutional complaint supplements national judicial protection while supra-national European complaint supplements national constitutional complaint.

IV. SLOVENIA

1. History

With the introduction of the Constitutional Court by the Constitution of 1963 the then Slovenian Constitutional Court also acquired jurisdiction over the protection of the fundamental rights and freedoms. It could also decide on the protection of self-government rights and other fundamental freedoms and rights determined by the then Federal and federal state Constitutions in case these were violated by an individual act or deed by a federal state or communal body, or company in case such protection was not guaranteed by some other form of judicial protection or by statute (Paragraph 3 of Article 228 of the Constitution of the SRS of 1963 and the *Constitutional Court Act*, Official Gazette of the SRS, No. 39/63 and 1/64). The decision of the Constitutional Court in such proceedings had a cassatory effect in the case of an established violation (annulment or invalidation or amendment of an individual act and the removal of possible consequences; prohibition on the continued performance of an activity). The jurisdiction of the Constitutional Court was, therefore, subsidiary. It was possible to initiate proceedings only if, in a specific case, there was no judicial protection envisaged, or if all other legal remedies were exhausted.

However, in practice, the then Constitutional Court rejected such individual suits on the basis of absence of power and directed the plaintiff to proceedings before the regular Courts. Such a practice also created a certain negative attitude of the Constitutional Court itself, since it knew in advance that it would reject such suits and thus carry out a never-ending task. The then

Constitutional Court itself warned that in relation to individual acts, the most sensible solution would be for decisions to be transferred, as a whole, to the regular Courts. The negatively arranged jurisdiction of the Constitutional Court (whenever other legal protection was not provided) resulted in the fact that its activities in this field showed no results, although this activity was initiated precisely because of a complaint for the protection of rights. However, the then system of the constitutional review guaranteed through the individual the right of *actio popularis* without the appellant having to demonstrate his/her own standing.

From then on, the constitutional complaint no longer found any place in the system, until it was again introduced by the Constitution of 1991. This specific legal remedy thus remained combined with the previous system, *i.e.*, with the possibility of lodging a *actio popularis* (Paragraph 2 of Article 162 of the Constitution of 1991; Article 24 of the *Constitutional Court Act* of 1994) with the Constitutional Court - despite the individual as petitioner having to demonstrate his/her standing - which in effect limits the procedural presumption). Accordingly, an individual may impugn all categories of (general) act by lodging a constitutional or *actio popularis* if he/she is directly aggrieved.

2. The Constitutional Complaint System in Slovenia

The provisions of the Slovenian Constitution of 1991 that regulate constitutional complaint in detail are relatively modest (Articles 160 and 161 of the Constitution). However, the Constitution itself (Paragraph 3 of Article 160 of the Constitution) envisages special statutorial regulating (provisions of Articles 50 to 60 of the *Constitutional Court Act*, Official Gazette of the RS, No. 15/94).

The Constitutional Court decides cases of constitutional complaints alleging violations of human rights and fundamental freedoms (subsection 6 of Paragraph 1 of Article 160 of the Constitution). The protection thus embraces all constitutionally guaranteed fundamental human rights and freedoms [15] including those adopted through international agreements which have become part of the national law through ratification.

Any legal entity or natural person may file a constitutional complaint (Paragraph 1 of Article 50 of the *Constitutional Court Act*), as may the Guardian of Human Rights (Ombudsman) if directly connected with individual matters with which he deals (Paragraph 2 of Article 50 of the *Constitutional Court Act*), although subject to the agreement of those whose human rights and fundamental freedoms he is protecting in an individual case (Paragraph 2 of Article 52 of the *Constitutional Court Act*). The subject-matter of constitutional complaint is an individual act of a government body, a body of local self-government, or public authority allegedly violating human rights or fundamental freedoms (Paragraph 1 of Article of the *Constitutional Court Act*).

The precondition for lodging a constitutional complaint is the prior exhaustion of legal remedies (Paragraph 3 of Article 160 of the Constitution; Paragraph 1 of Article 51 of the *Constitutional Court Act*). As an exception (only the German and Swiss systems recognise such

[15] such a formulation in the Slovenian, as well as in the Croatian and Montenegrin, arrangements and the arrangement of FRY, is rare, since other arrangements as a rule explicitly define the circle of rights protected by the constitutional complaint

an exception) to this condition the Constitutional Court may hear a constitutional complaint even before all legal remedies have been exhausted in cases of *prima sacre* violations and if the carrying out of the individual act would have irreparable consequences for the complainant (Paragraph 2 of Article 51 of the *Constitutional Court Act*).

A constitutional complaint may be lodged within sixty days of the adoption of the individual act (Paragraph 1 of Article 52 of the *Constitutional Court Act*), though in individual cases with good grounds, the Constitutional Court may decide on a constitutional complaint after the expiry of this time limit (Paragraph 3 of Article 52 of the *Constitutional Court Act*). The complaint must cite the disputed individual act, the facts on which the complaint is based, and the suspected violation of human rights and fundamental freedoms (Paragraph 1 of Article 53 of the *Constitutional Court Act*). It shall be made in writing and a copy of the respective act and appropriate documentation shall be attached to the complaint (Paragraph 2 and 3 of Article 53 of the *Constitutional Court Act*).

In a senate of three judges (Paragraph 3 of Article 162 of the Constitution; Paragraph 1 of Article 54 of the *Constitutional Court Act*) the Constitutional Court decides whether it will accept or reject the constitutional complaint for hearing (or its allowability) at a non-public session. The Constitutional Court may establish a number of senates depending on the need. The ruling of the Constitutional Court on the allowability of a constitutional complaint (Paragraph 3 of Article 55 of the *Constitutional Court Act*) is final. The constitutional complaint may be communicated to the opposing party for response, either prior to or after acceptance (Article 56 of the *Constitutional Court Act*). The Constitutional Court normally deals with a constitutional complaint in a closed session but it may also call a public hearing (Article 57 of the *Constitutional Court Act*). The Constitutional Court may issue a temporary restraining in the proceedings, either against an individual act or statute, or against some other regulation or general act on the grounds of which the disputed individual act was adopted (Article 58 of the *Constitutional Court Act*).

The decision *in merito* of the Constitutional Court may lead to:

- The complaint being denied as being unfounded (Paragraph 1 of Article 59 of the *Constitutional Court Act*);

- partially or in entirety annul or invalidate the disputed (individual) act or return the case to the body having jurisdiction for a new decision (Paragraph 1 of Article 59 of the *Constitutional Court Act*);

- annul or invalidate (*ex officio*) unconstitutional regulations or general acts issued for the exercise of public authority if the Constitutional Court finds that the annulled individual act is based on such a regulation or general act (Paragraph 2 of Article 161 of the Constitution; Paragraph 2 of Article 59 of the *Constitutional Court Act*);

- in case it annuls or invalidates an disputed individual act the Constitutional Court may also decide on the disputed rights or freedoms if this is necessary to remove the consequences that have already been caused by the annulled or invalidated individual act, or if so required by the nature of the constitutional right or freedom, and if it is possible to so decide on the basis of data in the documentation (Paragraph 1 of Article 60 of the *Constitutional Court Act*); such an order

is executed by the body having jurisdiction for implementation of the respective act which was retroactively abrogated by the Constitutional Court and replaced by the Court's decision on the same; if there is no such body having jurisdiction according to currently valid regulations the Constitutional Court shall appoint one (Paragraph 2 of Article 60 of the *Constitutional Court Act*).

Accordingly, the particularities of the Slovenian regulation are as follows:

- Exceptions from the precondition of legal remedies having previously been exhausted, for filing a constitutional complaint (Article 51 of the *Constitutional Court Act*);

- Wide definition of constitutional rights as the subject of protection by constitutional complaint in comparison with other systems which specifically define the circle of the rights so protected;

- Judgment (of the regular Courts) as the potential subject of impugnment by constitutional complaint, which is relatively rare [16];

- *Ex officio* proceedings inasmuch as Constitutional Court is not bound to the complaint in the event of finding that an individual act annulled is based on an unconstitutional regulation or general act - in such a case, the regulation or general act may be annulled or invalidated (Paragraph 2 of Article 59 of the *Constitutional Court Act*);

- Coexistence of constitutional and *actio popularis*, the latter restricted only by the standing requirements for the appellant;

- No particular court fee in the proceedings: each party pays its own costs in the proceedings before the Constitutional Court unless otherwise determined by the Constitutional Court (Paragraph 1 of Article 34 of the *Constitutional Court Act*);

- Possibility of ultimate decision on constitutional rights (Paragraph 1 of Article 60 of the *Constitutional Court Act*).

The core of judicial protection of human rights lies in the constitutional complaint, since:

- Human rights are attributes of any democratic legal system;

- Constitutional complaint is (only) one of the legal remedies for protecting constitutional rights;

- Constitutional complaint is an important remedy for the protection of human rights connected with the human rights themselves[17]; the Constitution guarantees the constitutional complaint, in the same way as the rights it protects; at the same time, the constitutional complaint is limited by statute to the benefit of the operational capacity of the Constitutional Court;

[16] since only Croatia, Macedonia, Portugal, Spain, FRY and Montenegro expressly envisage it

[17] Ruling taken by the Slovenian Constitutional Court No. U-I-71/94 of 6 October 1994

- Its effectiveness is disputed, since successful constitutional complaints are in a clear minority, although that should be no reason for their restriction or abolition. The latter is also very often the result of the great burden of this kind of case on Constitutional Courts;

However, despite the internal contradictory properties of this institution, the possibility shall remain open of access by the individual to justice or to judicial protection of his/her constitutional rights. The very existence of the constitutional complaint ensures more effective review of violations of constitutional rights on the part of government bodies.

3. The Human Rights' Protection Viewed Through the Slovenian Constitutional Case-Law

The Constitution of 1963 explicitly authorized the Constitutional Court for the decision-making on protection of the self-government right as well as of other fundamental rights and freedoms specified by the Federal as well as by the federal state Constitution, if these rights were violated through an individual act of government, communal body or by a work or other organisation and no other judicial protection was provided for by the statute (Paragraph 3 of Article 228 of the Constitution of the SRS). Further details were derived from the *Constitutional Court Act* (Official Gazette of the SRS, No. 39/63 and 1/64). Examples of constitutional case-law from that period reveal that Constitutional Courts mostly used to reject such individuals' complaints due to the lack of power of the Courts and they used to refer such complainants to the regular Courts. The activity of the Constitutional Court in the field of fundamental constitutional rights and freedoms was predominantly based on the petitions lodged by the citizens. In the initial period of activity of the Constitutional Court, since the Constitution of 1963, the protection of human rights and freedoms by the Constitutional Court made no intensive progress. Maybe this was due to an insufficiently specific constitutional and legal basis, such that it would provide the Constitutional Court with enough practical standards for its decision-making. The reason perhaps lied in the whole system which was not in favour of Constitutional Court protection of basic rights.

The Constitution of 1974, however, removed the jurisdiction of the Constitutional Court over individual constitutional rights and freedoms and attributed the protection of these rights to the regular Courts. Nevertheless, in the second period of the Constitutional Court's activity, from the Constitution of 1974 till the Constitution of 1991, the number of decisions explicitly relating to the constitutionally protected human rights and freedoms, scored a slight increase. In this respect the examples of concretisation of the Principle of Equality before the Law, the freedom of work, the right to social security and the right to legal remedies are of special significance. Unfortunately, most of these decisions taken by the Constitutional Court included few reasons. The reader may seems be prevented from comprehending of all the background reasons for the decision-making.

It was also characteristic of Slovenian Constitutional Case-Law prior to 1991 that, in comparison with Europe, it avoided the use of legal principles a great deal more, even those explicitly included in the text of the Constitution itself. In common with foreign practice, however, the principle of equality greatly predominated among otherwise rarely used principles. Decisions consistently remained within the framework of legalistic (formalistic) argument and no other values references were ever allowed: the Constitutional Court respected the principle of self-restraint and stuck to the presumption of the constitutionality of the statute.

The new Constitution of the Republic of Slovenia of 1991 along with the catalogue of classical fundamental rights in combination with the newly defined powers of the Constitutional Court set the ground for the intensification of its role in this domain. It is considered that the Constitutional Court now has sufficient space for such activity. The Slovenian Constitution contains adequate definitions of rights which allow for professionally correct understanding and reasoning. Almost all fundamental rights have the nature of legal principles and are thus open to such an extent that they require significant further concretisation and implementation [18].

The question as to whether Slovenian Constitutional case-law from the period after the introduction of the 1991 Constitution, in its relations to the fundamental rights and freedoms, has adapted to or is more comparable with foreign constitutional case-law, can be answered in the sense that the Slovenian Constitutional Case-Law comes close to the foreign case-law in its approach to fundamental rights. The number of examples from this field has increased. At this it is necessary to bear in mind that the "frequency" of individual rights claims before Constitutional Courts mainly depends on what kind of problem appellants place before Constitutional Court. The Constitutional Court now appears as the guardian of constitutionality in such a way that it decides not only on the conformity of general legal acts with the constitutional provisions on fundamental constitutional rights (in the sense of abstract and specific review of general legal acts) but also on constitutional complaints against the violation of human rights and fundamental freedoms by individual acts (Paragraph 1 of Article 160 and Article 162 of the Constitution). Here it is, however, necessary to add that in principle the new Constitution slightly limited the still broad possibilities for individuals' impugnment of general acts. In accordance to this principle any individual can still lodge the petition for the beginning of the proceedings, but on condition of being able to prove his/her standing. The implementation of this newly prescribed condition is one of the issues which the Constitutional Court is consistently concerned with in its actual practice.

[18] citation from Pav_nik Marijan, Verfassungsauslegung am Beispiel der Grundrechte in der neuen slowenischen Verfassung, WGO Monatshefte fuer Osteuropaeisches Recht, 35th yearbook 1993, Heft 6, p.345-356.