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REPORT

"DIFFERENCES BETWEEN CONSTITUTIONAL COMPLAINTS THAT CHALLENGE COURT RULINGS AND THOSE THAT CHALLENGE STATUTES"

by

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Dear President Kiliç,
dear Secretary Buquicchio,
dear Colleagues,

First of all, I would like to thank President Kiliç and Secretary Buquicchio, but also Ms Martin and all the other members of staff of the Constitutional Court of Turkey and of the Venice Commission for organising this 4th Conference of Secretaries General. You provide us, the Secretaries General, with the opportunity of engaging in an interchange of ideas and experiences, and I am convinced that the presentations and discussions in our sessions will have a fruitful effect on the daily work at our constitutional courts. I warmly thank you for your efforts and your hospitality, which are the foundations of this meeting.

Allow me to express my very personal thanks for giving me the opportunity of talking to you about the differences between constitutional complaints that challenge court rulings and those that challenge statutes. This subject is close to my heart, so to speak; it is a concern of mine which has developed in many talks with presidents and judges as well as with colleagues from other constitutional courts which took place when they visited Karlsruhe or during visits of the Federal Constitutional Court to other constitutional courts.

It is a well-known fact that in some countries, it is not possible for citizens to directly invoke their constitutional courts' jurisdiction. The focus of these constitutional courts' work is that of a court for state matters, and thus they focus on the task of settling disputes between constitutional bodies, or parts of such bodies, or other state institutions. Apart from this, other constitutional courts also deal with the concrete review of statutes, which means that they deal with proceedings which involve judicial referrals to the constitutional court. For these courts, my comparison between constitutional complaints that challenge court rulings and those that challenge statutes is possibly not relevant to their daily work. However, due to the fact that in recent years, more and more countries have incorporated the possibility of lodging a constitutional complaint into their constitutions and into the rules of procedure of their constitutional courts, this subject might possibly be of interest to these constitutional courts as well.

With regard to the constitutional courts which do have constitutional complaint proceedings, one can see – at least this is how it seems to me – that especially many Eastern European states only provide constitutional complaints that directly challenge statutes. This is the case for instance in Poland, Russia and Hungary, as well as in Armenia and Georgia. In contrast, for example Spain, the Czech Republic, Slovakia, Slovenia and Azerbaijan have systems which are similar to the German one. In these countries, it is possible to challenge a court ruling by a constitutional complaint, in other words, it is possible to lodge a constitutional complaint against a court ruling. Some countries have both types of proceedings, that is, constitutional complaints that challenge court rulings and constitutional complaints that challenge statutes. The latter may often only be lodged in an admissible manner if it is not possible to exhaust all other legal remedies, for instance in the case of secret measures of police surveillance of which the person affected is not informed and therefore cannot lodge an appeal against it, and in cases in which it is unreasonable to expect the complainant to exhaust all other legal remedies. The latter combination of circumstances exists especially where the unconstitutionality of a provision under criminal law is at issue and the requirement of exhausting all other legal remedies would result in the risk for the complainant to be exposed to criminal proceedings. Furthermore it must be emphasised that in some states, for instance in Germany, the complainant can, in constitutional complaint proceedings that challenge court rulings, also assert the unconstitutionality of the statute on which the ruling is based. In these cases, the constitutional court can set aside the last-mentioned ruling of a non-constitutional court, that is, of a court below the level of the constitutional court, and repeal the law or the individual provisions on which the ruling is based.

Precisely because the very same result can be achieved by means of constitutional complaints that challenge court rulings and constitutional complaints that challenge statutes, the question arises what the differences are between them.

1. Time restrictions for constitutional complaints that challenge statutes

Rules of procedure normally provide a time limit for lodging a constitutional complaint that challenges a statute after the statute comes into force and a time limit for lodging a constitutional complaint that challenges a court ruling after the pronouncement of the last-instance ruling. If however, the statute is indirectly challenged in the context of a constitutional complaint that challenges a court ruling, the time limit for challenging statutes does not apply. This makes it possible to review statutes against the standard of the constitution even after they have been in force for many years and to thus react to changes in society or in constitutional law. For instance, in its decision of 19 January 1999 regarding the testamentary capacity of persons who are unable to write and to speak, the Federal Constitutional Court declared provisions of the Civil Code unconstitutional which had been valid for almost 100 years[1].

2. Lack of individual effect of the constitutional complaint that challenges a statute

The constitutional complaint against a court ruling provides the individual citizen with the possibility of challenging the decision of a court for the following two reasons:

The first reason is because the ruling itself or the law on which it is based is unconstitutional. Where the latter combination of circumstances exists, it is basically solved in the same manner in those countries in which the possibility of lodging a constitutional complaint against a statute after all other remedies have been exhausted exists. Also here, the citizen can challenge the law and if necessary achieve by means of the constitutional complaint that the law is declared unconstitutional and is possibly declared void. What the citizen cannot achieve, however, is the setting aside, and thus the reversal, of the judgment or last-instance decision which violates this citizen's individual rights and which is based precisely on the unconstitutional law. Only where the codes of procedure provide a new trial in such cases can the elimination of the judicial decision which is based on the unconstitutional law be achieved. This is done in of another set of proceedings, but not directly by means of the constitutional complaint. In these cases, it appears to be in the interest of procedural economy if also the constitutional court can set aside court rulings which are based on the unconstitutional statute. It is true that without proceedings for a new trial, the objective effect of the constitutional complaint, namely to be able to challenge an unconstitutional law, is realised; what is lacking, however, is the individual effect in the shape of the elimination of the individual unconstitutional situation because the unconstitutional court ruling continues to exist. To express it in a pointed manner: What use is it to a prisoner if the law on which his conviction is based is declared unconstitutional but the court ruling which imposes the prison sentence on him is not set aside?

3. Limited effect of the constitutional complaint that challenges a statute

The constitutional complaint that challenges a statute does not help in those cases in which human rights are violated or disregarded exclusively by an unconstitutional application of statutes by courts. In these cases, the constitutional court will establish in constitutional

[1] Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 99, pp. 1 et seq.

complaint proceedings which challenge a statute that the statute is constitutional. Only an *obiter dictum* could mention the unconstitutionality of the court ruling. Only where the further rules of procedure provide for proceedings for a new trial also in these cases can the constitutional complaint against a statute remedy the individual fundamental rights violation. If this is not the case, the constitutional complaint against a statute cannot help the complainant under these circumstances in such a way that the complainant's human rights are safeguarded or a human-rights violation is remedied. Apart from this, there is, in my opinion, no possibility of safeguarding procedural fundamental rights by means of a constitutional complaint that challenges a statute. Where procedural fundamental rights are violated, that is, for instance the right to a hearing in court or the right to one's lawful judge, it is precisely not the constitutionality or the unconstitutionality of the underlying statute which is decisive. Consequently, these fundamental rights are normally not subject to review by the constitutional court in those countries which exclusively have constitutional complaints that challenge statutes. In these cases, a category of fundamental rights which is very important in a state under the rule of law is not subject to review by a constitutional court.

4. General preventive effect of the constitutional complaint against a court ruling

A setting aside, but also a confirmation of a decision of a national court by a constitutional court makes the standard of human rights binding and above all discernible for all courts. Other citizens can invoke the constitutional court's decisions before other, non-constitutional, courts provided that the constitutional court's decisions are binding on the country's constitutional bodies as well as on its courts and authorities. Court rulings which are contrary to the constitution are often not individual fundamental-rights violations which relate to an individual case, as is the case for instance with the violation of the right to a hearing in court, but in a great number of cases for example the Federal Constitutional Court, by setting aside a court ruling, sets standards for the interpretation and application of fundamental rights and/or for the interpretation and application of non-constitutional law in the light of human rights. It is in this manner that constitutional complaints which successfully challenge court rulings, but also constitutional complaints against court rulings which are rejected as unfounded have, as a general rule, quite considerable effects beyond the individual case; this guarantees the uniform application and in particular the observance of the fundamental rights in all branches of non-constitutional jurisdiction.

Furthermore, the existence of a constitutional complaint that challenges court rulings, and the possibility of a court ruling being set aside by a constitutional court that goes with it, has a preventive effect in such a way that the non-constitutional courts take the fundamental rights into account in their interpretation of the non-constitutional law and in their decisions. What prevails in Germany in this context is the positive effect of the uniformity of application of the fundamental rights. What has not become reality in almost 60 years of practice with the constitutional complaint that challenges court rulings are the objections that were raised when the constitutional complaint was codified, namely that the non-constitutional court's authority, especially the authority of the supreme courts, would be undermined if the non-appealability of their judgments could be reversed by decisions of the Federal Constitutional Court. What argues against this is already the mere fact that the existence of stages of appeal, something that you will know in all your countries, has the consequence that the next court up can set aside the ruling of the initial court or lower court.

4. Dangers of the constitutional complaint that challenges a court ruling

The acceptance which I have just described of decisions on constitutional complaints that challenge court rulings, an acceptance which is shown especially by the non-constitutional courts, will only realise if the constitutional court uses restraint when reviewing court rulings. It is obvious that there may be no clear-cut dividing line between the review of a ruling against the

standard of the constitution and its review against the sole standard of the non-constitutional law applied. This is a tightrope walk, and in Germany sometimes judges, professors and the press reproach the Federal Constitutional Court of not having applied a standard of constitutional law but merely having had a "better interpretation" of non-constitutional law in mind. In principle, however, the Federal Constitutional Court's established case-law says that the interpretation and application of non-constitutional law is for the non-constitutional courts. According to the Federal Constitutional Court's Lüth decision, the courts have to take the fundamental rights into account when interpreting and applying non-constitutional law[2]. Apart from this, the Federal Constitutional Court has repeatedly held that different decisions or a different interpretation of non-constitutional law by the non-constitutional courts do not as such lead to the unconstitutionality of a decision[3]. In this regard the Federal Constitutional Court has emphasised time and again that the normal subsumption processes within non-constitutional law are removed from the Federal Constitutional Court's review as long as no errors of interpretation become apparent which result from a fundamentally erroneous view of the meaning of a fundamental right or, in particular, an erroneous view of the scope of its protection, and which carry some weight for the actual case also as regards their substantive importance[4]. The courts violate the constitution, and in particular the fundamental rights, only if they disregard the fundamental rights when interpreting and applying non-constitutional law, if they decide arbitrarily[5] or if they misjudge the content of fundamental rights. Especially in cases of conflicts of fundamental rights which occur virtually every day, the Federal Constitutional Court normally exercises restraint. Typical example of such conflicts of fundamental rights are cases in which a conflict arises between the right of personality, for instance of public figures whose images are shown by the press in publications, and the freedom of the press, which exercises in contrast, as a conflicting fundamental right, the right to publish aspects which are important to the general public. Precisely in such cases of fundamental-rights conflicts between the general right of personality and the freedom of the press, the Federal Constitutional Court as a general rule exercises great restraint. Here the latest decision in the matter of Caroline von Hannover should be mentioned[6]. Also this decision, in accordance with the established case-law, grants the non-constitutional courts a margin of discretion within which they have to weigh the conflicting fundamental rights[7].

5. Safeguarding the national autonomy

As the European Court of Human Rights is competent to review every state measure, and thus not only statutes but also rulings, against the standard of the European Convention on Human Rights, it is obvious that an independent national review of rulings for their conformity with the European Convention on Human Rights is more than worthwhile. By providing for a constitutional complaint that challenges court rulings, the state has the possibility of autonomously remedying violations of the European Convention on Human Rights. This safeguards the national autonomy while at the same time easing the caseload of the European Court of Human Rights. What is more, the national constitutional courts can set standards also for the European Court of Human Rights through their case-law. In this way an indirect communication can take place between the national constitutional court and the European Court of Human Rights. It goes without saying that this can also lead to conflicts, especially if the European Court of Human rights has a different legal viewpoint. In Germany, we have experienced this with the "Caroline von Hannover" decision. However, the Federal Constitutional Court has meanwhile passed new decisions in cases with comparable

2 BVerfGE 7, 198 (206); in the same line of argument 12, 113 (124); 13, 318 (325); 18, 88 (92).
3 BVerfGE 87, 283 (284) with further references
4 BVerfGE 18, 85 (93).
5 BVerfGE 3, 359 (364).
6 Order of the First Panel of 26 February 2008, 1 BvR 1602/07, 1 BvR 1606/07, 1 BvR 1626/07, published on the website www.bundesverfassungsgericht.de.
7 See previous footnote, marginal no. 71 on the website.

combinations of circumstances and in doing so, has profoundly dealt with the case-law of the European Court of Human Rights. Whether a new consensual way has been found here is still open. The corresponding proceedings are pending in Strasbourg at the moment, and it remains to be seen whether a new cooperation will arise here.

6. Consequences of the constitutional complaint that challenges court rulings for the workload of the courts

In almost all countries which have provided for a constitutional complaint that challenges court rulings in their constitutions or in their rules of procedure it can be seen that the constitutional complaint that challenges court rulings results in a considerable increase of the caseload at the constitutional courts. This is undoubtedly a considerable problem, and it can be stated that this is a heavy load for the constitutional courts which deal with this type of constitutional complaint. What is surprising and extremely interesting for me are the experiments, so to speak, which these constitutional courts perform when it comes to dealing with this workload. An instrument which is frequently used is that it is not always the entire Panel which rules on such constitutional complaints but that these constitutional complaints are decided by smaller bodies, which are composed for example of three or five judges, in Germany, for instance, this is done by means of the acceptance procedure. We see something similar at the European Court of Human Rights, which even provides the possibility of a decision to be passed by a single judge in case of manifestly inadmissible constitutional complaints. The Protocol which provides this possibility has however not been ratified so far by all signatory States. To my recollection, the Constitutional Court of the Czech Republic also for some time provided the possibility of a decision to be passed by a single judge, but has meanwhile – and I hope I remember this correctly; please correct me if I am mistaken – abolished this possibility.

Ladies and Gentlemen,

In my comparison between the constitutional complaint that challenges court rulings and the constitutional complaint that challenges statutes, I have tried my best to show their advantages, their disadvantages and also their dangers. Nevertheless, for the reasons that I have stated, providing for the possibility of a constitutional complaint that challenges court rulings seems to me a very good idea. I very much hope that my contribution has aroused your interest, and I thank you for your attention.