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CAN THERE BE A FINAL TIME LIMIT FOR THE CONSTITUTIONAL COURT TO REACH A DECISION?

REPORT

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Abstract

The overburdening of constitutional courts which have responsibility to decide upon constitutional complaints and/or other forms of individual appeals is growing and causing serious considerations to be given to question of guaranteeing that the decision is reached not only in reasonable time form the position of the parties to the dispute, but also in time to give a response to wider legal and social issues that are being considered in important cases pending before the constitutional court. It is therefore that the question arises, whether it would be possible to introduce a final time – limit for the constitutional court to reach a decision. Even this seems to be contrary to traditional principles and practices of judicial decision making, there are valid arguments that support this principle: the declared right to appeal to the constitutional court is quite often void and leads to disappointment, which diminishes the court's respect and authority, if the decision can't be reached in reasonable time or is limited to a short decision stating only that the case will not be accepted for further consideration – and even that after a number of years. So it would probably lead to an improved transparency and predictability – if not honesty - of judicial process of the constitutional court, if the procedure would openly declare that it will not examine all appeals, but only the most important ones and that all the other cases would be subjected to a final time-limit, after expiry of which the case would ipso lege *be deemed to be dismissed.*

1. Introduction

The role and importance of constitutional courts is growing all across the wider European area, with many new courts being established in the last twenty years and others gaining new powers and responsibilities. One of the major reforms both on national and supranational levels has been to grant citizens the right of individual appeal to the constitutional courts, enabling them to demand judicial protection of their constitutional rights by the highest judicial authority. The principle is in theory sound: that there is always a (final) remedy, which enables the protection of citizens against violations of human rights and fundamental freedoms from the state authorities, if everything else has failed. But the introduction of individual access to the constitutional court or other highest judicial authority has on the other hand in practice lead to a serious consequence: the overburdening of supreme judicial bodies. The constitutional courts are not – and can not – be organized to handle a vast number of cases, reaching in thousands of individual appeals, both for systemic and procedural reasons, as will be examined further. So the question remains: how to guarantee the time for decision-making to remain reasonable, without causing the justice to the citizens to be delayed and therefore to be denied?

There are a number of responses to this challenge, which can be seen both in laws and regulations being amended, as well as in changes in every-day functioning of constitutional courts. This paper, however, deals with only one of them, maybe the most formal of them all: can there be a final time-limit for the constitutional court to reach a decision – and if so, what are the consequences? Even if on the first glance this question may seem to be either trivial or impossible to reach, there have been recent discussions about this even regarding the possibilities to reform the European Court of Human Rights, not supported by the majority, but the question remains valid. Let us examine this further.

2. The problem

There is one observation that should be stressed again at the very beginning: the caseload of the constitutional courts and other highest courts with competence to judge upon individual appeals[1] is growing and they are faced with challenges to find new alternative solutions to handling appeals, with minimal (or at least reasonable) lowering of the standards of legal protection of the citizens, including the crucial aspect of delivering a judgement within reasonable time[2]. Several possible solutions were discussed, prepared and presented on many occasions, from minor changes to radical reshaping of the whole systems.

The question of (more) effective decision-making by the constitutional courts in this context is therefore an open challenge[3], but one has to keep in mind that legal remedies have their specific characteristics and consequences that influence the functioning of the national legal, judicial and administrative system as a whole. The goal to be achieved is of course related to the need for constitutional court decisions to be delivered timely, giving the answer to both legal and wider social questions that have to be resolved in the course of its proceedings. The logic remains constant: the more effective the remedies themselves, the shorter the time needed for the decision to be taken. But let us examine some of the facts and developments regarding the efforts to raise the efficiency of constitutional courts decision-making.

To present the specific challenge in how to enable the constitutional courts to reach a decision in reasonable time let us first examine the general characteristics of constitutional complaints and other forms of individual appeals. Experience shows that if there is a legal remedy available to the individuals, which enables them to access these courts directly, such a remedy will lead to a very high (if not extreme) caseload of the court.

This is supported by the logic of the protection of human rights: if they are applicable in practically all legal cases and procedures, it is possible that in all such cases there occurs a violation of these rights, so that an appeal on these grounds is always possible; it suffices for the applicant to **claim** that his human rights have been violated for the procedure before the court of higher instance to be introduced and since it is possible that the case is not resolved in the interests of the appellant in the lower levels of the judicial system, it is quite logical for him to use also the appeal to the highest courts, including the constitutional complaint[4]. Opinions about the correct interpretation and implementation of the Constitution (and/or the ECHR) may differ between the parties to the dispute and consequently between the different levels of the judicial system in the proceedings based on appeals and other legal remedies. It is not unusual even for every level of the judiciary to have a different opinion, even if the same legal texts are used in the decision-making. And one has to keep in mind that the appellant seeks the outcome that satisfies his interests, not abstract justice. If remedies are available against a court's decision, the party which is unsatisfied with the result will use them to get the judgement changed in its favour.

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[1] An individual appeal/constitutional complaint procedure can vary among States, but in its core principle it is a remedy that may be lodged due to a violation of human rights or fundamental freedoms against iconstitutional courtndividual acts by which state authorities, local community authorities, or bearers of public authority decided on the rights, obligations, or legal entitlements of individuals or legal entities. Generally it may be lodged only after all legal remedies have been exhausted.

[2] The overburdening with cases faced by the ECtHR is therefore a situation that reflects similar developments in many national legal systems.

[3] More on the topic with many of presented ideas developed in Kersevan: Constitutional Complaint as a General Domestic Remedy and the Shared Responsibility to Implement the European Convention of Human Rights (2010).

[4] Cases have been known in Slovenia where an applicant has lodged a constitutional complaint against the judgement of the Supreme Court and has in his appeal already "warned" the constitutional court that in the case his case was not resolved in his favour, he would appeal to the ECtHR. It is quite probable that these cases are not country-specific and that they have occurred in other States Parties as well.

In relation to this there is another factual observation that has been made on analysing the use of legal remedies: the successful use of legal remedies motivates other persons to use them against unfavourable decisions or actions, administrative or judicial. These considerations are valid for all legal remedies, ordinary and extraordinary, and in all types of legal proceedings, including the constitutional complaints and other forms of individual appeal to constitutional courts. And tied to it, there is one fact that will remain unchanged: that (with possible exception of Solomon's judgments) in every dispute between two opposing parties with contrary interests there will always be at least one of them, who will be unsatisfied with the result because of losing the trial[5]. This gives an approximation of 50% of parties to a judicial proceeding unsatisfied with its outcome and at least potentially interested or willing to challenge such a judgement and claim that their rights have been violated, especially if they know that such challenges have often been successful in other cases and therefore have reason to believe they are likely to succeed. And the answer to the question, whether the court or (another State authority) has indeed violated rights of an individual or not can and will finally be given only in the judgement of the superior level. But for starting the proceedings with legal remedies the appellant has only to **claim** that he has been violated in his rights and freedoms, meaning that the pure possibility and assertion of such illegality causes in-depth examination and trial to be conducted by the constitutional court.

If we take all these facts into consideration there is a general result, supported by both logic and statistics: more legal remedies cause more litigation, not less. And the creation of an even higher level of judicial control, i.e. the constitutional court, with new remedies against final judgements, only broadens the possibilities of potential litigation and therefore causes more and more judicial decision-making. New, extraordinary legal measures to access constitutional courts (or other similar highest national courts) are justified only by the specialization and quality of judicial protection, the highest degree of professionalism, independence and impartiality. The balance between the need for *res iudicata* and the achieved legal certainty and the multi-tier and multi-level protection of individual's constitutional rights and freedoms is therefore important both in the scope of individual's legal security and in the functioning of a legal order as a whole[6].

There follows another quite obvious truth: if all cases were brought by unsatisfied parties to the constitutional courts as the highest levels of national jurisdiction, the courts would be unable to rule on the merits of them all. Judicial systems cannot but keep the classic pyramid structure, keeping higher levels in the system less numerous than the lower ones and with the presupposition that the level of judicial quality is raised higher up in the system one goes. And higher in the hierarchy of courts there are also more and more organizational and procedural limitations to counter the "flood" of cases with raising of capacities to handle them: it is contrary to both the role of constitutional courts as well as their position in judicial system to raise the efficiency in raising e.g. the number of judges (which in European countries varies in principle between 5 and 16) and similar measures[7].

With more legal remedies and more litigation numerous constitutional courts that are faced with the problem of overburdening and with the need to solve cases without undue delay, within a reasonable time-frame have tried to find new solutions. The answer to this has been in most cases to limit the access to the constitutional courts themselves, however without abandoning the system of constitutional complaints or other forms of individual appeals to these highest courts. So the prevention of overburdening is achieved firstly by raising procedural

[5] In criminal and administrative cases the "opposing party" is the State, which is specific in its legal position, but other participants (victims of crimes, persons affected by administrative decisions) will have the same considerations in the case that an appeal against the State is successful.

[6] In regard to overlapping competences in protection of Human rights in Europe, see Kirchhof: Grundrechtschutz durch europäische und nationale Gerichte (2011).

[7] It is also dubious, whether it is really the role of the Constitutional courts to make thousands of decisions, see Bobek: Quantity or Quality? Reassessing the Role of Supreme Jurisdictions in Central Europe (2009).

requirements: strict deadlines to use a constitutional complaint, preclusions in using certain arguments that have not been already presented in earlier stages of the proceedings, exclusion of cases of minor importance and limitation of grounds to appeal a decision (e.g. questions of law, but not fact), a need to exhaust lower level legal remedies, etc. It is difficult always to claim there is an inherent 'natural' logic in these limitations, other than the simple fact that there is no need and/or capacity to rule on each fact and legal question a repeated (or exaggerated) number of times. The judgement on fulfilment of these conditions is often combined with the ruling on the importance of the case, which grants access to the court in question. Consequently it is quite clear that a considerable number (if not a large majority) of applicants to the constitutional courts will not be given decision on the grounds of the case, but will be faced only with a procedural decision that the leave to appeal was not granted, that the case was dismissed as inadmissible, manifestly unfounded, unsubstantiated, not of sufficient importance (*de minimis*), etc[8]. This is the practice of many superior jurisdictions within the State Parties of the European Convention on Human rights, but the imposed limitations have also been shown to be to predominantly ineffective in lowering the number of constitutional complaints – even the most traditional and respected constitutional courts that have responsibilities to handle individual appeal are overwhelmed with them and the numbers are not getting any better[9].

There is also one other important aspect of the protection of human rights within the national legal system, which can be relevant for the further discussion. The constitutional courts have several times expressly confirmed and enforced the position that all national authorities are directly bound by their national Constitutions and that they have to respect the relevant requirements in their decision-making. On the other hand, the fact that the constitutional complaint is established in a State as an individual's right to access the constitutional court if he claims that his human rights have been violated, gives an implicit confirmation that there is a serious mistrust within the system that these obligations would be successfully met by the courts, administrative bodies and other relevant State authorities, so that a system-wide control of the constitutional court and its prerogative to decide in all the relevant individual cases is necessary if not essential to give an adequate redress of the violations of human rights. And the more the constitutional court has used its powers to change or annul the challenged judgements or administrative acts, the more this assumption has been seen to be confirmed – both in the eyes of the general and professional public, politicians included[10]. It is also important to observe that in the majority of cases – and recently practically in all of them – the question was not the ignorance of the existence of human rights and their protection but the correct interpretation and implementation of the relevant constitutional provisions.

Finally, one has to bear in mind that these problems are not just abstract and theoretical, on the contrary: an inefficient constitutional court which can't respond to demands of both law and society in time, when these questions are relevant, is not fulfilling its main function of protecting and upholding the Constitution and law. From the perspective of an individual this is not much better, since the justice delayed can in fact be justice denied – if it takes another number of years for the constitutional court to reach its decision **after** all other judicial and/or administrative procedures have already claimed their share of time, the effect can be

[8] The general declaration that "anyone" has the right to get the protection of his rights and freedoms by the constitutional courts if the need arises is therefore in practice often more an insincere promise than an actual legal right of an affected individual.

[9] BVerfG of Germany annual report shows that third consecutive year there has been an overburdening with more than thousand cases. ECtHR report shows the numbers of new cases is rising, so is the case in Slovenia, etc.

[10] This has led - paradoxically - in some cases to the position of the lower courts that the parties should reserve their claims of violations of human rights for the complaint to the constitutional court and that they are not obliged to deal with them in e.g. the appeal procedure.

devastating, and even more, it can be contrary to legal demands of the right to fair trial, enshrined in constitutional orders and ECHR[11].
So in respect of the developments of the abovementioned trends to do nothing is not a solution. Can we try to solve these issues by imposing a formal time limit for the decision of constitutional court to be taken? Even though it may seem to be a provocative thesis, let us examine the potential consequences.

3. The possibility of a solution

In procedural legal theory there is a distinction between two types of time limits for the judicial and administrative decision making: instructive and preclusive procedural time limits (deadlines). The instructive time limit is in principle without legal consequences for the proceedings themselves; it is determined by law, but the failure to meet the time limit does not cause the procedure to be altered, stopped or otherwise directly influenced by this occurrence. The instructive time limit therefore only gives an instruction to the decision-making body and/or parties to the dispute a reference regarding their expected action. The violation of such time limits can in principle only indirectly affect the procedure itself, e.g. lead to possibilities to use remedies for speeding up the proceedings, such as an appeal to the president of the Court or a subordinated administrative authority, etc. These time limits can be imposed also on constitutional courts, but their influence on the efficiency of the proceedings is minimal: if there is a problem of overburdening and the decision can not be reached within the prescribed time, there is nothing that the imposition of such a time limit can contribute. On the contrary, it combines the fact of overburdening and inability to timely resolve pending cases with the form of illegality – the violation of instructive legal deadline is still unlawful, even without other formal consequences.
So to make a new and potentially effective approach, we should examine the imposition of formal and preclusive time limits for the constitutional court decision making, meaning that after the deadline has expired there is a formal consequence – and which should the consequence be?
To give an answer we should first look at the basic principles in judicial decision-making and legal remedies. The first to observe is a combination of both the stressed need to trust in the judicial decisions (*res iudicata pro veritate habetur*) and a need to have every act of authority subjected to a supervisory legal examination, even the judicial ones (*qui custodiet ipso custodes?*)[12] It is therefore a principle of legal order that a first level judgement can become final without further examination or approval of higher authorities and can therefore represent a successful end to a dispute, respected as a part of the legal order. This finality is a value in itself, since it provides legal certainty for all parties to the dispute as well as for other persons, directly or indirectly affected by its verdict. But since the finality of judgements (and other legal decisions of authority, such as e.g. administrative acts) is a very important element of the rule of law, it is common - or even constitutionally required - for the parties to have the right to appeal against the judgement and have it re-examined by a higher court before it becomes final. There are some results derived from that right of appeal: the authority of the first instance court is diminished, since a higher court can overrule its judgement and the time till a judgement becomes final and unchangeable (*res iudicata*) is prolonged.
After the finality of the judgement its legal consequences come into force and the rules set by it have to be observed and can be enforced on the party not complying with them. Only in limited cases expressly specified by law can a final judgement be challenged using extraordinary legal remedies. The possibility to use legal remedies that can change or affect a final judgement

[11] There are several judgemets of ECtHR in this respect, e.g. Judgement in Klein v Germany of 20 July 2000.

[12] It is important to point out that the Convention does not demand a legal remedy against judicial decisions (judicial control of judges is not necessary), but e.g. the Constitution of Slovenia does (Art. 25).

weakens the legal certainty and can cause serious difficulties when the consequences of already implemented judgements should be reversed and *restitutio in integrum* should be achieved if the final judgement is changed by the responsible court or other empowered authority. It is therefore that extraordinary legal remedies against final judgements should be limited and should have a high degree of legitimacy in their goals that go beyond the resolution of a particular dispute (e.g. the protection of constitutional order, setting an important precedent for future judicial practice, the resolution of an important legal question, etc.). Finality of judgements as an important element of the rule of law and courts' authority means that legal remedies which could affect them should be introduced in a legal order "avec la main tremblante"; there is a good reason why they are called *extraordinary* legal remedies. These facts are quite obvious, but it is good to have them clearly presented before this discussion is brought further into more complex issues.
Second important observation is that to ensure the effective protection of human rights the best method is to ensure that they are observed in the first level decision-making process and/or the appeal procedures before the decision becomes final. In this way both the principles of the effective legal remedies as well as the protection of the principle of finality (*res iudicata*) are observed and respected. But, as the question of *qui custodiet* is logically continued, what if the lower courts in the regular proceedings fail to do so? Should another legal remedy be created? And then another? How many? And this is where the answers offered often take a completely wrong direction. It may be possible that the lower level courts fail to observe the human rights guaranteed by the Constitution (or the ECHR), but the solution that it should be the highest court to do that **instead** of them is wrong. The creation of new legal remedies, especially extraordinary ones, that would grant access to the highest courts to everyone who claims that the violation has not been adequately redressed by the lower courts causes overburdening of the highest courts, since the pyramid structure of judicial system never enables enough capacity to be concentrated at the top of the hierarchy to substitute decision-making of the lower tiers of the system. Experience has proven that in practically all legal systems, including the ECtHR.

There is another argument to the issue mentioned above. The violations of human rights are – just as in any other case of legal litigation – established in a legal decision, mostly a judgement by a court. But the question whether a right or obligation has been violated is not a question of fact, it's a question of law, expressed in the judgement itself. It is therefore a product of legal reasoning, not of factual discovery, to decide whether a right has to be observed in a given case and if there was a violation of such a right. The court therefore **determines**[13] that a right has been violated, it does **not discover** that a right has been violated. And it is at this point where the element of subjectivity comes into focus. In the cases of remedies against the decisions of lower courts it is for the superior courts to decide, to judge, whether the lower level court has failed to determine, not to discover, that a violation of a (human) right has occurred. And based on the argument of higher professional competence the higher court has the power and legitimacy to do so. And this is valid *mutatis mutandis* even for the highest courts in a certain State. And it is of this fact that applicants are intensely aware: if there is a higher level in the judiciary that **can** have a different opinion on the matter, it is rational to try to access it and to achieve that such a different legal reasoning **will** be expressed in a binding judgement. The statistics support – or at least do not oppose – this consideration. After a new supreme level of a court is established and develops its authority, the caseload will grow exponentially, as is the case at many constitutional courts.
Based on these conclusions, there is a need to understand the position of a constitutional court, which is concerned with the protection of human rights and fundamental freedoms on the

[13] In this relation it is important to observe the principle of Federal constitutional court of Germany, which sits in a panel of 8 judges and in the case there is no majority for the decision to be taken, there is a decision in which the Court declares that due to lack of necessary majority “the violation of the Constitution can not be established” – also Bundesverfassungsgerichtsgesetz Art. 15, more in Umbach, Clemes, Dollinger: Bundesverfassungsgerichtsgesetz, Mitarbeiterkommentar und Handbuch, (2005).

national level[14]. It is safe to claim that this highest court has the role of unifying or at least harmonizing the national jurisprudence and of an establishment of *de iure* or *de facto* binding legal precedents, since in principle there should be one highest national court which can give a final judgement on the issues of protection of human rights and therefore prevent inequality and legal uncertainty that could result from the differences of opinions of different national courts. But in relation to protecting the individuals lodging constitutional complaints to the constitutional court it can be observed that in the efforts to achieve the most effective protection of human rights by the constitutional courts itself the first response, which comes almost as a reflex, is that the best way is to handle **all** cases where there is a possibility of violations of human rights and to redress these violations with an appropriate judgement, issued in every single case. But is this really the correct way? One has to keep in mind that
1. The constitutional court in question is the highest court for the protection of human rights in the State, and
2. That this court can in principle be accessed only through the extraordinary legal remedies, which are possible only after a judgement has become final.

The first fact means that the constitutional court (or another court with similar responsibilities) is necessarily on the pinnacle of the judicial system hierarchy and that it is therefore limited in its capacity to handle a large amount of cases, but certainly precluded to effectively examine all cases processed in the lower tiers of the judicial system[15]. The second fact means that the final judgements have been relied upon by the parties to the dispute and all the other persons affected by them, so that to preserve the legal certainty and the rule of law within the State, a subsequent change or annulment of such a judgement has to be an exception, not a principle. This can be stressed even more if we bear in mind the fact that quite often there are other extraordinary legal remedies that have already been exhausted before the constitutional complaint to the constitutional court has been lodged.

Together with these facts it has to be stressed that the legal system has to ensure that the burden of the constitutional court is not too excessive, so that the cases are tried by the Court **in due and reasonable time[16]**. This is of utmost significance since the examination of individual cases regarding the important issues of protection of human rights and fundamental freedoms in the legal and social system as a whole have to give an appropriate and timely response both to the applicant as well as to the legal and general public.

To continue this discussion it is therefore important to present the possible solution, which lies in a different understanding of effectiveness of the protection of human rights and fundamental freedoms by the constitutional court. If we want to get closer to a solution of the problem it has to be accepted that the constitutional court **can not** examine all the cases, where an individual claims there has been a violation of the Convention and that it also should not examine all such cases. The examination of individual lawsuits, appeals and complaints and providing

[14] It is quite clear that practically all legal systems have established a supreme court, which has the responsibility to judge on the claims of violations of human rights and fundamental freedoms, committed by the bodies exercising the power of the State. Often there is a special constitutional court, which is empowered to rule on such cases, but of course there are many variations to its position and procedure, which cannot be represented in this discussion.

[15] This also means that it would be quite impossible to form ordinary legal remedies to lodge before this Court, which would precede the finality of judgement, since such a finality would be postponed in every case of appeal to this court for an exceedingly - if not impossibly - long time and the legal certainty would become practically non-existent.

[16] The constitutional courts' procedures are included in this obligation under the ECHR, e.g. Judgement in Klein v Germany of 20 July 2000.

appropriate legal decisions in the disputes, being civil, criminal or administrative in nature, is the task of the lower tiers of the judicial systems and it cannot and should not be duplicated at the very peak of the judicial system. The contribution to the effectiveness of protection of human rights and fundamental freedoms by the constitutional court lies in its system-wide influence it (can) have through its judgements and decisions. If one ruling of the constitutional court is observed and respected in the subsequent thousand cases tried by the national courts that represents a success in the true sense of the word. To achieve this efficiency it is important to limit the jurisprudence to a reasonable and transparent number of cases, where the important legal questions are adequately examined and presented in a relatively short period of time.

The possible solution lies therefore in establishing the difference between the number of complaints addressed to the constitutional court and the number of cases that have to be tried by the Court, (i.e. examined on the merits of the case). The number of complaints that the constitutional court receives depends on the decision of the individuals that seek legal protection of their human rights, which they claim have been violated. The number of complaints that have to be tried by the constitutional court depends on the rules governing the Court's procedure and can go to two opposing positions: either all the complaints that are received by the constitutional court have to be tried by it or none of the complaints received has to be examined, so that it is in the discretion of the constitutional court to decide, which complaints will be examined and which not.

If the rules regulate that all complaints have to be examined on the merits by the constitutional court, the prevention of an excessive burden is difficult, since it is dependent on the motivation of the (potential) applicants and/or purely formal limitations to accessing the Court. Measures can be therefore be adopted only to either impose new formal legal barriers to use the legal remedy (e.g. new legal remedies to be exhausted before addressing the constitutional court, necessary formal legal representation, etc.) or to influence these applicants not to lodge a constitutional complaint with the constitutional court. The latter measures can be various and can range from high costs of proceedings to convincing the party that the favourable outcome is uncertain or improbable (because of existing case-law and precedents...). But in every case it remains a question of legal culture and individual decision to appeal or not to appeal to the constitutional court, so that this approach has in practice proven to be highly inefficient in limiting the burden. It is demonstrated to be quite improbable that the dissatisfied individual will refrain from using a remedy which was formally and declaratory given to him to use in case he feels his human rights have been violated, if there is a chance of success, however slim that may be. Even new formal requirements, as has been made quite clear in the national experiences for accessing the highest courts, can lead either to the situations where the constitutional court cannot address a legal issue it considers important based on the fact that the formal requirements have not been met or, worse, the access is just delayed or postponed if there is a new formal hurdle a complainant has to overcome, before access is formally possible (e.g. new legal remedy that has to be exhausted). And the citizens will take the possibility of the constitutional complaint to the constitutional court very seriously, even - or especially – if there is a legal counsellor, who represents them and knows how to overcome all the formal obstacles, so that the desire or expectation that there will be fewer applications that have to be (at least) formally examined is unfortunately unfounded – based on the statistical and other experiences.

Based on these presumptions the necessary step to effective and timely decision-making is that the constitutional court has the power to effectively limit its own caseload. This can be done in different ways, but the core principle is that the court has to have the power to decide which complaints to examine and which not. This can be done for example by using certiorari system, meaning the power of selection of important cases (as the e.g. Supreme Court of the United States) or other selection mechanisms, such as the possibility of prioritizing the cases[17] to be handled before all other cases, thus departing from the basic principle of resolving the cases in

[17] In regard to the use of ECtHR of priority principle, see Preliminary opinion of the Court in preparation for the Brighton Conference, adopted by the Plenary Court on 20 February 2012.

the order they were received by the constitutional court. It is even possible to claim that all constitutional courts which face high or even extreme number of cases of constitutional complaints or other forms of individual appeals have *de facto* if not *de iure* reversed to some form of selection mechanism (e.g. the combination of introduction and interpretation of undefined legal terms establishing formal procedural requirements to access the court: "manifestly unfounded appeal", "causing negligible consequences to the applicant", "of no importance that exceeds the present case", etc.)
With these mechanisms in place, there is an important step towards solving important cases in due time, which is a *sine qua non* of efficient performance of constitutional court responsibilities. But this is only one part of the answer, since the question, which influences the effective and efficient functioning of the court remains: how to handle all the other cases that are **not** selected as important but still have to be resolved and an answer has to be given to the complainant[18]? Can this be done through imposing a final time limit for the constitutional court to decide, after expiry of which the individual case is deemed to be closed?

4. The consequences of a final time limit

The general principle of judicial proceedings is that if a legal remedy is used, the party is entitled to a court's decision and until then the case is pending with all the consequences this has for the enforcement and/or validity of the disputed judicial (or administrative) decision. But this also means that even manifestly or otherwise unfounded cases, cases of minor importance and of negligible consequences to the complainant lead to a judicial decision, burdening the court, its judges, professional staff and other capacities. This requirement of available resources can often be so high that it also influences the decision-making capacities in important cases, threatening thereby the timely performance of core, essential function of the court itself. So what can be done?
The fundamental rule is and has to remain that every single constitutional complaint has to be read and evaluated by an officer of the constitutional court. This does of course mean that the professional staff capacities have to be (and contrary to number of judges can be) expanded to guarantee this minimum of procedural consideration. Whether this obligation goes further, is where the debate can start. The proceedings could of course always end with a reasoned decision, but - as mentioned above – that is beyond the capacity of many (if not all) constitutional courts, dealing with constitutional complaints and other forms of individual appeal. Next the possibility is for the party to get an unreasoned decision, stating only that her case will not be examined further. And after that it is also possible to take this decision away from the judges and empower a member of the professional staff (e.g. the secretary general of the constitutional court) to issue such a decision or notification to the party. And then it is only one further step that leads in the same direction – imposition of a legal presumption that the case will not be examined further by the constitutional court after a set final time limit is reached.
Contrary to the introduction of a final time limit is the abovementioned traditional principle of European legal orders that every remedy is to be finished with a judicial decision. The solution, whereby the unresolved case deems to be finished just by passing of the time (*tractu temporis)* is something that seems alien to this supposition. The other argument against this solution is that the possibility of a constitutional complaint or other form of individual appeal to the constitutional court can be considered to be a guarantee to the individual that he will get protection of his human rights by the said Court if there has been a violation committed by the State authorities. In the case that a final time limit for the constitutional court to reach a decision is to be introduced this promise is made very relative, since the protection will be given only if

[18] The prioritizing of important cases – even though presented as a solution to the problem of many courts, including ECtHR – leaves exactly this question open: what happens with non-priority cases, since they could remain at the court theoretically forever, waiting that the prioritzed cases are resolved. The only other solution is to prioritize »old« cases after a certain period of time – but this means that the principle of prioritizing important cases is practically annuled.

the case will be accepted for consideration and resolved within that time – frame. And last but not least, the differentiation between those appellants that will be given a judicial decision regarding their constitutional complaint and those, who will because of the expired time limit get their case rejected or dismissed *ex lege* can lead to a doubt about the arbitrariness of the constitutional courts in their deciding about which cases can be accepted for consideration and which not.

On the other hand there are numerous reasons that support the solution of imposing the final time limit to the constitutional court's decision-making. First, it is consistent with the role of the constitutional court in as far it is regarded to be in deciding the most important cases, setting the precedents for protection of human rights in further judicial practice, as well as developing basic principles of the constitutional order. This means that it is not the task of the constitutional court to give a reasoned decision on all individual appeals – which is in practice predominantly quite impossible because of limited capacities – but to solve those cases of constitutional complaints which have wider implications than just being limited to a grievance of a particular party. The cause of the expiry of the final time limit should therefore result in the *ex lege* presumption that the constitutional complaint has been dismissed and no judicial decision has to be made in this regard, but e.g. a letter of the Secretariat informing the appellant that this has occurred[19]. This could release a tremendous amount of resources of the constitutional court which could consequently be used in dealing with decision making in those cases, which have to be resolved because of their general importance to the constitutional order and protection of human rights. It would not mean that the constitutional court would have less work, but that it would be burdened with important cases.The introduction of the final time limit for deciding upon constitutional complaints can also be consistent with presumption of conformity of national legal acts with the Constitution: if no violation has been determined, the challenged decision remains final (or legal act remains in force) and is deemed to be in accordance with the protection of human rights, guaranteed by the Constitution. The final time limit could also clarify the expectations of parties regarding the proceedings, since they would in advance be aware of both the fact that not all constitutional complaints can be examined and that the case will be no longer pending after a certain number of time, so that the validity of the challenged judgement (or other legal act) will no longer be subjected to the conditionality of successful constitutional complaint. And lastly, the protection of the obligation to resolve a pending case within a reasonable time would be firmly protected on the level of the constitutional court itself.

Conclusion

The intention of the present discussion is not to give final answers as much as declare possible alternatives. With overburdening of constitutional courts which have responsibility to decide upon constitutional complaints and/or other forms of individual appeals, the consequence can be that the declared "right" to appeal to the constitutional court is quite often void and leads to disappointment, which diminishes the court's respect and authority, since the decision can't be reached in reasonable time or is limited to a short decision stating only that the case will not be accepted for further consideration – and even that after a number of years. So it would probably lead to an improved transparency and predictability – if not honesty - of judicial process of the constitutional court, if the procedure would openly declare that it will not examine all appeals, but only the most important ones and that all the other cases would be subjected to a final time-limit, after expiry of which the case would ipso lege be deemed to be dismissed.

[19] This is of course based on the abovementioned basic rule that all appeals have been evaluated, so that the time limit should not be such as to prevent the constitutional court officials to get acquainted with the lodged constitutional complaints.

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