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(VENICE COMMISSION)

The protection of fundamental rights by the Constitutional Court

Brioni, Croatia, 23-25 September 1995

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Introductory statement - by Jadranko CRNIĆ

President of the Constitutional Court of Croatia

I have a special pleasure to welcome Mr Nikica Valentić, Prime Minister of the Republic of Croatia as the special representative of the President of the Republic of Croatia, Dr Franjo Tudjman. Expressing our thanks for this representation

and attendance, please allow me to point out that Mr Valentić himself is a distinguished lawyer, an attorney for many years, and consequently our colleague. I hereby thank the Prime Minister for his presentation which has a special significance in the land in which the rule of law is one of the highest constitutional values, the land in which the Constitutional Court occupies the position of an inter-branch of government, on which I will elaborate in my report. Yesterday, I already had the honour to welcome Prof. Antonio La Pergola, President of the European Commission for Democracy through Law, and now I wish to welcome him again, as well as all his collaborators.

If I assert that today the Brioni isles are the capital of the European constitutions, then it is a matter of fact and honour, because we have in our midst many Presidents or Vice-Presidents of numerous constitutional courts, as well as Prof. Dr. Laszlo Solyom, President of the Constitutional Court of Hungary and Chairman of the 10th Conference of the Constitutional Courts of Europe, the highest authority, the roof association of the constitutional courts. I would like to express special thanks to Prof. Dr. Solyom for preferring our meeting to another important meeting on a similar topic taking place in Budapest at the same time. Please allow me also to welcome Mr Miroslav Šeparović, Minister of Justice of the Republic of Croatia; Mr Luciano Delbianco, Prefect of the County of Istria; and the Mayor of the town of Novi Vinodolski, Mr Zlatko Pavelić, with his associates, to whom we extend our thanks for presenting all participants with a copy of the "Vinodolski zakonik"/the "Vinodol Act" book, an act which belongs to the oldest documents of the Croatian legal history, written in the Croatian language and script in 1288. On this occasion, I would like to explain to you what the sign on all our invitations, letters and pads means : it is the initial letter of the Act meaning "In the name of God".

Yesterday, awaiting your arrival with anticipation, I and all my collaborators tried to show you how much the arrival of each and every one of you means to us, how pleased I am that you have come in spite of your numerous, difficult and responsible commitments in converting the noble idea of democracy into reality through law, doing your utmost - in the words of the Bible - that from the beginning at which there was the Constitution, the Constitution should become a living fact. I hope that our efforts in showing what your arrival meant to us can excuse me for not mentioning each of you individually, and that you could all feel our joy. We are proud of the fact that in this long search for democracy through law, which as you know best is not strewn with roses but rather with thorns - therefore : per aspera ad astra - the science and practice walk the same road hand in hand. This guarantees that on these isles in our country, the Republic of Croatia, in which we never subscribed to the ancient Roman dictum according to which "inter arma silent musae", the profuse combination of science and practice will advance one step further in the judgment of the marvellous remedy called the

constitutional complaint, with a long tradition in some countries and still unknown in others, always praised and always criticised.

We shall probably give rise to new doubts, new disputes, but shall muster new support and contents as well.

On behalf of all judges of the Constitutional Court of the Republic of Croatia and all our associates, I once again thank each and every one of you and wish you fruitful proceeding with your work, a pleasant stay and, in short, continuing of the UniDem seminar tradition.

Introductory statement - by Antonio LA PERGOLA

President of the European Commission for Democracy through Law

It is a priviledge and a heartfelt pleasure to address you here on this beautiful island, for a UniDem Seminar on the protection of human rights by constitutional courts. Let me extend the Commission's warm welcome to our distinguished guests from nearly all courts in Central and Eastern Europe and from some Western European courts, as well as scholars and practioners of law. Let me say how grateful all of us are to our hosts. Every seminar on which we engage is an excercise in a most advanced form of cultural solidarity. It is a meeting of like minded people who share the urge to discover and appreciate the values we have in common. And the place where our Croatian friends have staged this seminar has all the bewitching appeal of a corner of paradise on earth. Our sincere appreciation goes to you, Mr President of the Constitutional Court, to all your colleagues and the members of the court Secretariat, to our old, dear friend Mr Nick, and to all the other persons who have contributed to organise this seminar here and offer us such overwhelming hospitality.

We are lawyers, and each of us feels she or he belongs in the community of the thought ways that are reflected in our Commission across national borders. Democracy through law is a world view on which those who make the law, or apply and explain it, know they can rely. A world view that works both inside and above the nation state. That is why our UniDem seminars address issues that seem to be raised in unison by the hand of the common destiny of all peoples living in the same conditions of legality and freedom.

A little more than a year ago, in Bucharest, at the invitation of the Constitutional Court of Romania, we already had an opportunity for an in depth discussion, in a similar circle, of the role of constitutional judges. We have succeeded in bringing together again distinguished exponents from many courts, and this clearly shows

that there is a real need for an exchange of views between constitutional judges of the various courts in Europe and beyond. The Venice Commission is, because of its experience and composition, highly qualified, I trust, to pursue this line of endeavours. Our aim is to institutionalise a continuous dialogue between constitutional courts.

In Bucharest we saw in general how the constitutional courts contribute to the development of the rule of law. We will now look in more detail at the function these judicial bodies may and do exercise to protect fundamental rights. Our Commission is part of the Council of Europe and the defence of human rights has always been a particular concern of this Organisation. Thanks to the European Convention on Human Rights the Council of Europe provides for effective protection of these rights at a European level. However, protection has to begin at a national level, and there the role of the constitutional courts in the countries where they have been established, and I note with pleasure that nearly all new democracies in Central and Eastern Europe have established constitutional courts, is paramount.

Several courts in Western Europe have already developed an extensive case-law concerning the protection of fundamental rights, foremost among them Germany, Spain, Italy and Austria. Therefore it is no coincidence that you will hear during these two days reports from representatives of these countries as well as a report by the distinguished American scholar, Professor Kommers.

While the courts in these countries can rely on a wealth of precedents, the newly established courts have the difficult but rewarding task of developing a case-law of their own. They have to protect the interests of individuals against the excesses of State power in States where previously there was an unquestioned tradition that the State could do no wrong, and that it had all the rights and the individual none. But it is by no means a new situation. Save a few remarkable exceptions, democracy and the rule of law had to be restored from scratch after the tragedies suffered by our countries, brutal dictatorship, racial hatred, the scourge of war, even the implacable terminal conflicts which may result from opposed ideologies or any other kind of violent clash inside nations, once the light of reason is lost.

Let us remember, however, that when a new order arises from the ashes of what has been destroyed - that, at least, is our experience - the time comes when the rule of law is finally established, and, if fairly administered, as it must be, ushers in reason and peace and thus allows democracy to develop where it can strike root.

The point I wish to make with reference to the topic of our present seminar is that the rebuilding of demoracy, again in the light of experience, is inseparable from

some form of integration, one which brings the nation states within an overarching system of shared values. I do not mean here integration as political union on a transnational scale. This is a far-reaching goal, the achievement of which, even if it is largely regarded as desirable, will meet with obstacles that are not easily removed, as is all too clearly shown by the case of the European Community. The integration I have in mind fully attains its possible scope when it is fashioned as a greening hot-house of individual rights. The nation state, to be sure, is called upon to secure these rights in the first place, through its constitution. But the protection of human rights has been internationalised, and the nation state open to the needs and views of our time can hardly afford opting out of the treaties which pursue these objectives. The freedom from isolation, which is the first blessing of peace, offers its dividends to each and all states grouped under treaties that create and protect individual rights. These international bills of rights are not needless duplicates of those which a democratic constitution is likely to enshrine in its provisions. It may even be that a national basic charter of a mature democracy goes further than any international convention in protecting such rights. The fact of the matter, however, is that in the context which I am describing domestic law, resourceful as it may be, is no longer held to be self-sufficient. An international court is created to adjudicate alleged violations of basic rights after the remedies offered by internal law have been exhausted by the aggrieved individual. There is another judge, then, who, in addition to the constitutional court, will protect individual rights. But the international and the constitutional sources of protection dovetail, and complement each other. There is a double jurisdictional guarantee, each of which will operate within its own remit and by its own resources. The international judge protects treaty based rights, and a state whose behaviour is found to be in breach of the treaty will be responsible as a wrong doer, the sanctions being those provided by the international instrument itself. The constitutional courts, for their part, protect constitutionally guaranteed rights by declaring null and void such acts of state power as may, under domestic law, be challenged for having offended these rights. Thus, there are two different sources of guarantees and, accordingly, two different sets of remedies available to the individual concerned. The court maintains what may be called a domestic monopoly of the ultimate protection of the individual, though the extent of its jurisdiction depends on how the whole system of constitutional justice is structured in each state. In certain systems the courts protect rights only through the judicial review of legislation, while in others they have been given the added power to adjudicate direct claims lodged by the individual, normally after having exhausted all the other internal ways of redress. This is one way our constitutional brand of justice has come nearer to the spirit, if not the technicalities, of the judicial review of the American type. Another is the concrete norm control which can be initiated by some or all the other national judges to obtain from the court a preliminary ruling on a question of constitutionality

arising from the actual case or controversy with which the referring judge is concerned. Our constitutional courts, though originally conceived as the depositaries of objective jurisdiction and abstract control as the organs that kill legislation from above with the thunder and lightening of their pronouncement, will here don the robes of the judges of direct individual claims and subjective rights.

So the fact that basic rights are surrounded by appropriate guarantees does not detract from the courts' responsibility as their natural custodian. This is indeed the philosophy of the European Convention on Human Rights and similar arrangements elsewhere.

Yet there are other forms of integration in which there is a delicate question of adjusting the protection of fundamental human rights to the respective functions of constitutional courts and the judicial body of the supranational system of which the nation state is a member. I am thinking, as you will have understood, of the European Community. The founding treaty of the Community may be viewed as a charter of the great freedoms of circulation needed for the single market that has been put in place. These are rights that do not originate in the nation state, but arise exclusively in the sphere covered by the treaty which members have concluded in conformity with their constitutions in order to vest the necessary powers in the community. Now the rights deriving from the common market imply other root rights, so to speak, which are presupposed but not expressly listed in the treaty. That international instrument has not been drawn up after the constitutional fashion of a fully articulated bill of basic human rights. But our common bill of rights is there, hidden, as it were, in the background of our common constitutional traditions. No individual can accede to the single market nor share in its fruition without being recognised as the legitimate bearer of those other broader basic rights we call human rights. The thorny knot to untie is whether the protection of these underlying rights of the individual, each time they surface in the legal universe of the common market, and they often do, is taken to have been trasferred to the community court or retained by the constitutional or other national courts as the hard-core of sovereignty which member states have not intended to forfeit. Here any conflicting claims over power transferred or power retained hinge in ultimate analyse around the extent to which the rights and freedoms of man must be protected; and we are confronted with rights and freedom which deserve the same protection in the context of integration as they require under the national constitution that has authorised that state to become a member of the community.
It is note-worthy that the location of sovereignty should have been debated by courts, the community court as interpreter of the treaty and the national courts as interpreters of the basic charters of their countries, rather than by political organs. The reason for this striking feature of our Europe in the making is not far

to seek. Integration has thus far mattered much more as a normative than as an institutional phenomenon. It is meant to create rights albeit, in good substance, by the methods of multilateral diplomacy, not by those of representative democracy. Integration such as we know and practice it is the crucible where rights are created which will be enforced even in the presence of incompatible national legislation. The direct effect and the supremacy of community law are judge made principles, laid down by the community court and agreed to by the national courts. And the creation of the individual rights of which these principles guarantee the recognition generates the need for the organ that must enforce them, the judge, sooner than the need for any other institution. Thus the judges have become major protagonists of integration. The views of the community court and of the national courts have often crisscrossed, but never doublecrossed each other, at the expense of the defence of the individual. Their different notions concerning the transfer of sovereignty do not stem from any assertion of power over man. On the contrary, they are dictated by the preoccupation to locate the level of jurisdiction, be it national or supranational, which can offer the best possible guarantee against the infringement of individual rights by the unlawful exercise of power and authority. If the community court secures the observance of these rights not at the lowest, but at the highest level of protection afforded by member states, it will eventually succeed in spreading the wings of its protective function as far as individuals may be affected by the integration process, regardless of whether by action or inaction of the community itself or of any member that is called upon to fulfil its duties in a community context. Member states will be persuaded to withdraw their reservation as to the jurisdiction of the community court and let it perform its role. It is important they do so, in the interest and for the sake of their nationals. The community court cannot directly annul state laws or other state measures, for it is not a federal court but it can declare them illegal, in which case the remedies its case law has worked out to redress wrongs suffered by the individuals can bite with the sharp teeth of efficient justice. On the other hand, the national courts may not have an unqualified monopoly on the protection of human rights. But the scope and weight of their jurisdiction in this vital area of the rule of law must, in any event, be taken into account as a necessary point of reference to determine whether and how far other courts, inside the state or under a treaty based system, should allow to administer alternative or additional guarantees, other than those of constitutional justice in the strict and proper sense. What conclusion can be drawn when we see the role of courts against the backdrop of integration? Reason tested by experience tells us that the bill of rights is the heart of a written constitution, and the judge who enforces it is in fact, if not in name, a constitutional judge.

In our present time bills of rights have come to light even outside their original cradle, which is the nation state. They are laid down in treaties under which states agree on novel systems of creating and protecting individual rights. Such

systems call for the establishment of courts which embody the idea of constitutional justice: courts from which we can expect the judge-made federalism now emerging in Europe. A modern kind of federalism: one that does not aim to reshape existing states or rearrange the seats of power but to situate their citizens in wider and fuller circles of citizenship, designed for the co-fruition of their rights and thus linked to the transnational value of individual freedoms.

Mr President and distinguished members of the Constitutional Court of Croatia

Your country has joined the family of democratic nations and your function is vital for the stability and development of its institutions. It is, no doubt, a difficult role to play, it has always been in all our countries. But in the end it has always succeeded. All of us know that it will in your country too. The Europe of which this beautiful land is an integral part is the home of the rule of law and reason. The darkest hour of Europe between the world wars began when the first constitutional courts to be established found themselves impotent to perform their work of guardians of the constitution. But times change. And the highest hope today, now that what was Yugoslavia is the scene of a tragic conflict that has moved your sister nations of Europe and whole world, is that your young court, which has already acquired dignity, wisdom and prestige, to be an honoured and trusted defender of individual rights and of democracy. The service you can render to your country and to its involvement in Europe is an invaluable one.

Thank you very much for your attention.

FIRST WORKING SESSION

Rights suitable for protection by constitutional complaint procedures

Chaired by Mr Antonio LA PERGOLA

a. Rights suitable for protection by constitutional appeal procedures
Report by Professor J.L. CASCAJO CASTRO, University of Salamanca, Spain

b. What rights can be duly protected by a constitutional complaint
Report by Mr Jadranko CRNIĆ, President of the Constitutional Court of Croatia

c. Contesting the arbitration decision in the proceedings before the Constitutional Court according to the Croatian law
Report by Mr Hrvoje MOMČINOVIĆ, Vice-President of the Constitutional Court of Croatia

Rights suitable for protection by constitutional appeal procedures - Report by Professor J.L. CASCAJO CASTRO

Spain

I. INTRODUCTION

*Scientific analysis of constitutional jurisdiction and judicial experience of appeals lodged directly by individuals alleging violations of their fundamental rights have together given rise to a series of principles that already belong to our common legal heritage. Furthermore, they serve as a starting point for reflection on the problems that arise when an attempt is made to circumscribe the area protected by "constitutional appeal" (*recurso de amparo *in Spanish).*

Amongst these prinicples, the following are worth remembering:

"The growing appeal of constitutional justice lies in the moral force it has acquired in the eyes of citizens who trust in the Court to secure the enjoyment of freedoms and rights through the observance of the Constitution"[1].

"Vesting a special constitutional court with the power to deal with constitutional complaints relating to violations of individual constitutional rights might intensify the protection of these rights and emphasise their constitutional rank."[2]*. Needless to say, the Constitutional Court is not intended to replace the ordinary courts in protecting these rights, which is why it is so difficult and complex a problem to draw the dividing line between ordinary jurisdiction and constitutional jurisdiction. In legal systems where provision is made for constitutional appeal, the scope of the matter protected (pleadable rights or types of act that can be the object of a constitutional appeal) does not always coincide from one country to another.*

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[1] *See statement by A. LA PERGOLA, in "The role of the constitutional court in the consolidation of the rule of law", European Commission for Democracy through Law, Proceedings of the seminar held in Bucharest, 8-10 June 1994, pp 7-14.*

[2] *See H. STEINBERGER, "Models of constitutional jurisdiction", European Commission for Democracy through Law, Council of Europe, 1993.*

"While the primary function of the constitutional complaint certainly is the protection of individual subjective rights guaranteed by constitutional law, it operates at the same time to safeguard the Constitution as part of the objective legal order"[3].

In this sense constitutional jurisdiction in the realm of freedoms draws on a series of principles and criteria that extend beyond the individual interests of those who lodge complaints, fulfilling a wider function of integration and application of fundamental rights. "By means of the individual's constitutional complaint, the Court may guide the action of the judicial, executive and legislative powers in all matters concerning fundamental rights"[4].

The protection of human rights is unanimously considered as essential to the very existence and survival of a democratic State. Constitutional jurisdiction has played a highly significant role in this field, contributing to the concrete definition of fundamental rights and weighing them, when necessary, in terms of compatibility. The experience of the Recurso de Amparo *in Spain, now in operation for 15 years, provides the basis for this report and paints a picture worth noting: of the 29,814 cases brought between 15 July 1980 and 31 December 1994, classified by type of appeal, 28,106 were filed as* Recursos de Amparo[5].

II. SOME QUESTIONS CONCERNING THE SUBJECT MATTER PROTECTED BY CONSTITUTIONAL APPEAL

1. In principle, a correct normative approach requires the essential aspects of constitutional appeal to be delimited as accurately as possible in the Constitution. One such aspect is, naturally, the definition of the subject matter protected.

In the experience of Spain, however, this would appear to be a moot point. Leaving questions of convenience and opportunity aside, there is some discussion as to how much leeway the legislator has with regard to the final configuration of constitutional appeal, and more precisely to what extent he can influence the catalogue of fundamental rights protected by constitutional appeal.

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[3] *See H. STEINBERGER, "Decisions of the constitutional court and their effects", in "The role of the constitutional court...", op.cit. pp 72 et seq.*

[4] *L. LOPEZ GUERRA, "The role and competences of the constitutional court", in "The role of the constitutional court...", op. cit. pp 20 et seq.*

[5] *Statistical appendix on the work of the Constitutional Court from 15 June 1980 to 31 December 1994, in the collective work "La Jurisdicción Constitutional en España: La Ley Orgánica del Tribunal Constitucional: 1979-1997, Madrid 1995.*

For some authors "not only does the Constitution negatively delimit the scope of constitutional appeal, but it also determines that the fundamental rights listed in it (but no others) shall be protected in the last instance by the Constitutional Court through the Recurso de Amparo. *It would therefore be quite unthinkable for a legislative reform to attempt to restrict the fundamental rights which are protected, in accordance with the Constitution, by the Constitutional Court"*[6]*. So there is a kind of "constitutional reserve", of a limitative nature insofar as it establishes a biunivocal relationship between the power of the constituent legislator and the subject matter protected by constitutional appeal. As a result, this central element of constitutional appeal becomes inaccessible to the ordinary legislator, thereby neutralising any risk of deconstitutionalisation. According to this hypothesis, any reform "in peius", which detracted from the subject matter protected, would be anti-constitutional. The fact of determining a catalogue of fundamental rights, however, in the "numerus clausus" sense, fails to solve the question of the possibility of increasing the range of subject matter protected by constitutional appeal to include "new" fundamental rights considered worthy of protection by this specific form of guarantee. Practice has shown, through various interpretative devices, the expansive character of the subject matter covered by constitutional appeal.*

From a diametrically opposite viewpoint, "one can by no means draw arguments from the Constitution to support the idea that the legislator is unable to delimit the set of rights protected by constitutional appeal (...) much less invoke voluntas legislatoris (rectius constituentis) *to argue that the legislator cannot select from the catalogue of "protectable" rights those which are to be effectively protected by constitutional appeal"*[7]*. Following the logic of this reasoning it would be possible for the legislator to exclude fundamental rights of a procedural nature from the subject matter protected by constitutional appeal. And conversely, there is nothing to prevent the extension of the catalogue of protected fundamental rights, within the limits of what is constitutionally possible.*

At the margins of the legal system on which they are based, these two interpretations show two possible means of construing the legal ground covered by constitutional appeal, the choice of which depends largely on whether constitutional appeal is considered as a "subsidiary" or an "alternative" remedy to ordinary judicial proceedings.

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6 *G.F. FARRERES, "El Recurso de Amparo según la Jurisprudencia Constitucional", Madrid, 1994, p. 14.*

7 *F.RUBIO, "El Recurso de Amparo Constitucional", in the collective work "La Jurisdicción Constitucional en España...", op. cit. p. 132.*

2. When the subject matter protected is reduced to a set of fundamental rights, enshrined in a series of constitutional precepts, it evidently excludes legal concepts other than rights, such as institutional guarantees, that might also be considered worthy of inclusion in the series of constitutional provisions protected by constitutional appeal.

The question becomes more complex when one considers the reason or cause behind the invocation and protection of a right in relation to its fundamental nature or character, insofar as we are called upon to consider what it is that makes a right fundamental.

Examination of constitutional texts sometimes reveals so-called fundamental rights to be a heterogeneous category with different distinctive criteria. These criteria include their degree of direct or indirect applicability in legal relations between private individuals, the type of infra-constitutional norms that can regulate them (according to the Constitution), the complexity of the procedure required to reform them, and the different systems of judicial protection applicable.

The heterogeneous character of the category, however, does not prevent the identification of certain essential characteristics of fundamental rights that are generally easy to pinpoint:

- *From the substantive point of view, fundamental rights are considered to derive from the legal conscience and culture of the constituent authority[8]. They take precedence because they are the very essence of the constitutional system. In the case law of superior courts, they occasionally function as a sort of modern-day substitute for natural law.*

- *From a procedural point of view their most specific characteristic, that which best defines them, is their constraining effect on the legislator. Fundamental rights are set forth and acknowledged by the Constitution, not by law, which must respect their essential content at all times. Since the days of the Weimar Constitution, the guarantee of supremacy of the Constitution over the legislature has always been stressed in the field of fundamental rights. An essential role is played in this respect by the techniques for verifying constitutionality, which have over the years been developed and perfected. The instruments of such judicial supervision, including constitutional appeal, are a generic whole extending to both*

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[8] *P. CRUZ, "Formación y evolución de los derechos fundamentales", in Revista Española de Derecho Constitucional, n °25, 1989, and "El legislador de los derechos fundamentales" in A. Lopez Pina (ed) "La garantia constitucional de los Derechos Fundamentales", Madrid 1991.*

fundamental and non-fundamental rights. In this sense constitutional appeal should not be considered as a criterion for identifying and characterising those rights which are fundamental. For that purpose, the nature of objects and interests constitutionally protected is more relevant than the different forms of guarantee.

3. According to commonly accepted theory, the rights which can be invoked and protected by constitutional appeal include the effective enjoyment of such rights within their legal framework. So the fundamental right protected is characterised not only by its essential content, but also by its rights and procedures associated with it, and as recognised by the legislator. Distinguishing between the constitutional plane and the ordinary legal plane thus becomes a complex, never-ending aspect of constitutional law. As the Spanish Constitutional Court ruled (STC 50/84) "the unity of the law and the supremacy of the Constitution do not permit us to consider the two planes as if they were different worlds with no communication between them. When interpreting and applying the law the ordinary courts cannot ignore the existence of the Constitution, just as the Constitutional Court cannot ignore the way in which the ordinary courts apply the law when this analysis is necessary to determine whether or not any of the fundamental laws or public freedoms it is responsible for protecting have been violated".

There is no room here for abstract solutions disconnected from actual concrete realities and practice. It should always be borne in mind that the constitutional judge, who by his very function is a "judge of judges", cannot sever his ties with his original task as a "judge of the law".

The constitutional appeal procedure is the best test bench for demonstrating how difficult it is to work on two planes at once. It clearly shows, at least in Spain's experience, that "the battle for the supremacy of the Constitution is fought on a regulatory and judicial level too, not only on a legal level"[9].

Fundamental rights requiring legislative elaboration, the concrete content of which cannot be properly determined without reference to the relevant legislation, inevitably extend the range of the subject matter covered by constitutional appeal.

How constitutionality and legality interrelate is not the only problem to be solved in the proper determination of constitutional and ordinary jurisdiction. It is also possible to distinguish between recognised constitutional rights which may or may not be invoked in appeals to the Constitutional Court. In certain concrete legal

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[9] *L.M. DIEZ-PICAZO, "Dificultades prácticas y significado constitucional del Recurso de Amparo", in Revista Española de Derecho Constitucional, n º40, Madrid 1994.*

systems it is even possible to define the subject matter covered by constitutional appeal in negative terms. But even the fundamental rights specifically excluded from such protection may qualify for protection as a result of a disputed act being declared void, or where the rights concerned are inextricably bound up with another protected fundamental right or rights. Here too, the field protected by constitutional appeal extends to embrace these fundamental rights per relationem. *Some authors see in this a constitutional jurisdiction that is neither "organic" nor functional but* ratione materiae - *fundamental rights, whether invocable or not before the Constitutional Court, are thus understood as the field of action most propitious for co-operative constitutionalism.*

4. In this order of ideas, special mention should be made of the possible inclusion of procedural rights guaranteed by the Constitution (droits procéduraux garantis par la constitution) *in the field protected by constitutional appeal. The Spanish experience in the matter, which will be considered below, is most apposite in this correction.*

If one includes rights of this type, it has been argued quite forcefully, there is a risk of converting the Constitutional Court into a general supervisor of the ordinary justice system as far as fundamental rights are concerned. Other factors therefore need to be taken into account, such as a reform of the procedural laws concerning constitutional rights linked to judicial procedure, making it possible at the same time to correct possible disorders in procedendo *without resorting to constitutional appeal. Note in this respect that "all courts of appeal should be empowered to hear cases of violation by the lower courts of procedural rights guaranteed by the Constitution (such as the right to a fair trial and other rights connected with judicial procedure)"*[10].

The protection of this category of fundamental rights of a procedural nature gives rise to a further permanent source of questions of constitutionality, linked to considerations of straightforward legality.

In any event there is no room here for an abstract posture that fails to take into account the peculiarities of the legal system itself, the constitutional jurisdiction model adopted and the ordinary measures for protecting rights and interests under the legal system concerned.

III. THE SPANISH EXPERIENCE OF "RECURSO DE AMPARO"*: THE SUBJECT MATTER PROTECTED*

[10] *H. STEINBERGER, "Models...", op.cit.*

1. The "numerus clausus" character of the rights protected by Recurso de Amparo *or constitutional appeal*

Article 41.1 of the Act regulating constitutional jurisdiction stipulates that the rights and freedoms listed in articles 14 to 29 of the Constitution shall enjoy the protection of the constitutional appeal procedure. The same applies to the right to conscientious objection, enshrined in article 30 of the Constitution.

The list of rights thus protected includes subjective legal rights based on the principle of equality; the right to life and to physical and moral safety; the right to ideological and religious freedom, and to freedom of worship; the right to liberty and security; the right to one's honour, to privacy for oneself and one's family, and to one's own image; freedom to reside and to go where one will; rights connected with freedom of expression and information; the right to assemble, to form associations and to participate in public affairs; procedural rights and other rights connected with the principle of lawful treatment; the right to education; the right to form trade unions; the right to strike; the individual and collective right to petition; and the right to conscientious objection.

This list of rights coincides with that set forth in article 53.2 of the Constitution. This delimitation of the scope of the Recurso de Amparo *also tells us which rights are not protected in this way. The experience of the Constitutional Court itself has made a decisive contribution to the definition of the subject matter covered, which has grown considerably with the inclusion of procedural rights and the right to equality (articles 24 and 14 respectively).*

In principle the Constitutional Court rejects those appeals which under the pretext of claiming a violation of a constitutionally protected right, actually bear no relation to the constitutional precept concerned but involve the violation of principles or rights outside the sphere protected by constitutional appeal.

Other precepts that are not protected, even though they fall within the constitutional measures objectively covered by the constitutional appeal procedure, are the kind which instead of generating fundamental rights exercisable by the beneficiaries establish, for example, a duty of the State to co-operate with the different religious faiths, or a mandate for the legislator without granting private teaching establishments a subjective right to public funding.

Recurso de Amparo *comes into play in the event of concrete violations of specific rights and freedoms, and not when there is allged to have been a violation of some vague principle derived from the Constitution. It has been repeatedly stressed that the right to personal security under article 17.1 of the Constitution is not the same thing as the principle of legal security in article 9.3, which roughly means*

knowing what laws are in force and what interests are covered. Constitutional appeal is not the proper channel for protecting principles or seeking and obtaining abstract, generic judgments about the constitutionality of this or that criterion of interpretation of the law. Nor is it a solution when a judge refuses to consider a plea of unconstitutionality when the plea is not based on the violation of one of the specific rights and liberties protected by Recurso de Amparo.

Regarding the distinction between higher values and fundamental rights, the Constitutional Court considers that the right to personal freedom protected by article 17.1 of the Constitution means "physical freedom", freedom from arbitrary detention, conviction or internment, but does not include a general freedom to act as one pleases, or the right to personal self-determination, since this type of freedom, being a "superior interest" of the legal system - article 1.1 of the Constitution - is protected by the Recurso de Amparo *only in those cases affecting the concrete fundamental rights and freedoms listed in Chapter II of Part I of the Constitution. The Constitutional Court (decision STC 89/1987) distinguishes between manifestations "of the multitude of activities and vital relations freedom renders possible" (or manifestations of "freedom as such") and the "fundamental rights that guarantee freedom" but "the concrete content of which is not and cannot be each and every one of these practical manifestations, however important they may be in the life of the person concerned" (decision STC 120/1990).*

Note also that the rights protected by constitutional appeal must be interpreted in accordance with the relevant international covenants and treaties to which Spain is party (article 10.1 of the Constitution). However, no precept of an international treaty entered into by Spain may give rise alone to a constitutional appeal, since outside our Constitution no fundamental rights are considered to exist (STC 84/1989). In the words of one judgment, "the only canon admissible in resolving constitutional appeals is that of the constitutional precept that proclaims the right or freedom that is claimed to have been violated" (STC 64/1991). The Constitutional Court therefore has no part in guaranteeing the proper application of European Community Law by the public authorities, since this is considered as an infra-constitutional matter, or more precisely as a <u>non-constitutional</u> matter, and therefore outside the ambit of constitutional appeal and of any other constitutional process.

This position has met with sharp criticism amongst those who maintain that Spain's membership of the European Communities has brought new and increased fundamental rights and freedoms in our favour and in favour of the citizens of the other member States, and that these are covered by article 93 of the Constitution. This article states that "a constitutional law may authorise the conclusion of treaties attributing powers derived from the Constitution to an international

organisation or institution. It is for the Parliament or the Government, as appropriate, to guarantee the execution of these treaties and of resolutions emanating from the international or supranational organisations to which these powers are transferred"[11]*. According to the above opinion, article 93 authorises the transfer of the exercise of powers of sovereignty, and more than that, it constantly governs our relations with the European Communities - the fact that the Constitutional Court refuses to ensure that the Spanish authorities respect their international/Community commitments gives rise to criticism on this ground.*

2. The expansive power of certain fundamental rights

In spite of the literal tenor of the texts that define the scope of constitutional appeal, it has tended to grow in practice because of what one might call the expansive power of certain fundamental rights covered by constitutional appeal. Under the protective wing of these fundamental rights, other inextricably related rights, although theoretically outside the ambit of the Recurso de Amparo*, have been brought within its scope: the right, for example, to create political parties, which is linked to freedom to form associations; or the right to collective bargaining, as an extension of the fundamental right of trade unions to exist. At times this inextricable connection between two rights is given legislative expression, as in the case of popular referendums, for example, which are evidently connected with the fundamental right to participate in public affairs.*

In other respects, the trend towards growth is the result of the extension of entitlement to and of the active enjoyment of certain rights or freedoms to new communities or legal entities. This has been the case, for example, of freedom of worship, a fundamental right guaranteed by the Constitution and protected by the constitutional appeal procedure.

In other cases, recognition of an institutional guarantee is added to the scope of a fundamental right, and although this has no repercussions for the objective delimitation of constitutional appeal, it may be important when it comes to solving the frequent clashes between fundamental rights. Case law has repeatedly established that freedom of expression and the right to information in our legal system are rights enjoyed equally by all citizens, and this means recognising and safeguarding public opinion as a fundamental political institution, linked to political pluralism, an essential aspect of a democratic State.

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[11] *A. MANGAS, "La perspectiva constitucional española", paper submitted at the Symposium on international public law, Community law, national constitutional law, Brussels, 21-22 June 1995, unpublished, kindly supplied by the author.*

3. Fundamental rights requiring legislative elaboration

Concerning the fundamental right to accede to public office, enshrined in the law, "the Constitutional Court shall verify, in the event of an appeal, whether the law in which the fundamental right is enshrined has been interpreted "secundum Constitutionem"*, and in particular whether or not, given the facts brought before the Court, the way in which the law was applied may have affected full enjoyment of the fundamental right concerned" (STC 24/1990). Were this not the case, fundamental rights of a legislative nature would remain the province of the ordinary courts and be excluded from constitutional appeal, which is an ideal instrument for reviewing possible violations of the rights set forth in article 23.2 of the Constitution.*

Rights of this type are exercised not directly on the basis of the Constitution but through the channels established by the legislator. This does not mean, however, that they do not have a minimum essential content before the legislation is enacted, or that the legislator can raise obstacles that go against the essential content of the fundamental rights concerned. Furthermore, nobody other than the legislator may create obstacles or limitations to these rights, the exercise of which is regulated "by the law alone" (STC 99/1985).

Fundamental rights of a legislative nature seem bound to cause tension between ordinary and constitutional law, making it harder to demarcate the two.

4. The right to equality

This is a derived right which, as the theorists have pointed out, is devoid of any substantive content of its own, and is always projected onto an existing legal relationship or position.

The Constitutional Court has also highlighted the relational and heteronomous nature of the right to equality by maintaining that it is not an autonomous subjective right existing indepently, since its content is always defined by reference to concrete legal relationships.

This is one of the rights that has been invoked most frequently before the Constitutional Court in cases of Recurso de Amparo *(23% of the appeals brought before the First Chamber and 21% of those lodged with the Second Chamber).*

It has also given rise to a varied jurisprudence in which, needless to say, claimants cannot plead legitimate aspiration to material or practical equality in the face of inequalities that are not the result of discriminatory legal criteria.

The right to equality is not merely the right of citizens to equal treatment by the law but also to equality before the legislator (or the maker of rules), whose decisions can therefore be quashed if they establish distinctions based on specifically prohibited criteria or criteria not reasonably relevant to the aim of the regulation or law (STC 68/1991).

In the case of what one might call "discrimination by non-differentiation", there is no fundamental right to special treatment under the law (STC 68/1985).

The Constitutional Court has also ruled that the principle of equality before the law does not imply any right to equality in the face of illegality, which it considers impossible (STC 21/1992).

The general guarantee of equality of all Spanish citizens before the law does not, in the eyes of the Supreme Court, call for a rigid list of possible cases of discrimination. It does, on the other hand, represent an explicit ban on certain specific forms of discrimination on grounds of sex, opinion or any other personal factor, such as race, etc.

As regards those fundamental rights formed around the principle of equality, learned sources consider that one cannot speak of an "extension in absolute terms, for although the protectable content of the principle of equality before the law has increased more than is reasonable, so that the right to equality in the application of the law by the courts now includes a (limited) right to expect judges to adhere to the same interpretative criteria that they used in the past, the Court has limited itself, perhaps excessively thus far, in its supervision of the principle of equality in the law, almost automatically accepting differences established by the legislator as legal as long as they are not based on any of the criteria expressly prohibited under article 14 (race, sex, etc.)."[12].

5. Procedural rights under Article 24 of the Spanish Constitution

It is significant that among all the appeals lodged with the Constitutional Court between 15 July 1980 and 31 December 1994, 66% in the First Chamber and 69% in the Second Chamber were concerned with article 24 of the Constitution. Fully 86.5% of the appeals lodged in 1992 and 86.4% of those lodged in 1993 were based on the procedural rights guaranteed by article 24. This clearly shows the significance of these rights, which the theorists are currently debating. It is also clear, above and beyond the different assessments that may be made, that the case law of the Constitutional Court has extended the sphere protected by these rights of a procedural nature to limits which are difficult to measure, thereby

[12] *F. RUBIO, op.cit.*

contributing to the perception of Recurso de Amparo *as a common and general instrument of last resort in the event of any real or presumed procedural violations in ordinary proceedings affecting the fundamental right to due legal process. Many aspects of procedural guarantees have thus undergone substantial revision in the light of the constitutional principles established, allowing the effects of the varied constitutional case law to permeate the daily routine of the courtrooms. At the same time, the case law itself has become an excessive benchmark for supervising the constitutionality of judicial decisions. This explains the plaintive cry of author P. CRUZ, who called for "less protection from the judge, more protection from the legislator", and the call by F. RUBIO for "an effort to establish a constant connection between the implicit censorship of the judge that goes with any concession of constitutional protection, and the explicit censorship of the legislator, although in many cases this can go no further than a simple call for him to remedy the imperfection or lacuna in the law".*

The expansion of the sphere covered by constitutional appeal has attained its utmost expression via the rights enshrined in article 24 of the Spanish Constitution. In other legal systems, for example in Austria, on the other hand, court decisions may not be appealed to the Constitutional Court. Clearly, any proper configuration of the subject matter protected by constitutional appeal requires the accurate difinition both of the rights protected and of the decisions that can be challenged or appealed. Good legal texts are not enough, however, for the Constitutional Court to fulfil its duty and protect our fundamental rights. There are other factors in the versatile reality with which it is our lot to live, marking developments unsuspected by any Constitutional Court in action. Only through in-depth common reflection can new courses be mapped out to help us along the path of democracy through law.

What rights can be duly protected by a constitutional complaint - Report by Mr Jadranko CRNIĆ

Croatia

In the present trouble-ridden, insecure and cruel world there is little comfort in the realization that there is no group, no association, no political party, no church or state which does not take pride in its efforts to proclaim, protect and exercise human rights.

This imperative, previously voiced within the confines of national policies, has soon asserted itself at international level. Shortly after World War II a number of important texts began to mushroom, originating from historic declarations which had come into being as a result of collective enthusiasm and lyrical illusions characteristic of the turn of the century.

True, one may have wondered why, all of a sudden, it became so urgent to legally formulate the rights of individuals at an international level.

The reasons became obvious quite soon. It was necessary to define a joint fund of principles which were sufficiently flexible to be acceptable to the entire international community, one which would precise enough to ensure real protection and on the basis of which it would be possible to create a system of real protection for proclaimed rights reinforcing the efficiency of national mechanisms through international documents as an important plus[13].

One of the highest values of the constitutional order of the Republic of Croatia, defined in the basic provisions of the Constitution of the Republic of Croatia[14] *(hereinafter: Constitution) is the rule of law (Article 3 of the Constitution).*

Such commitment to law and the rule of law is one of the basic historic features of the Croatian people, as witnessed in many legal documents both old and recent. These documents show that the Croatian people has always belonged to the European culture and civilization, that the moral, intellectual and political forces underlying and prompting such orientation have always been kept alive, as exemplified by Croatian legal documents and many statutes: the 1288 Code of Vinodol[15]*, the 1312 Statute of the City of Split*[16]*, the 1214 Statute of Korčula*[17]*, the 1333 Poljice Almanac*[18]*, the 1388 Statute of Senj*[19]*, etc.*

Let me elaborate a little on the essence of the Croatian Constitution.

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13 *Jacques Robert: Rapport général: Protection constitutionnelle et protection internationale des droits de l'homme; Concurrence ou complémentarité?, issued by Conseil constitutionnel, Paris, volume II, p. 751.*

14 *"Narodne novine" (Official Gazette) No. 56/90.*

15 *See Lujo Margeti_: "The Code of Vinodol", Novi Vinodolski, 1987. This code, the name of which at the time of its passage meant "legal customs" (Margeti_, op. cit., pp. 7) attached a great value to the protection of human rights even at that early stage, as exemplified by the provision of its Article 27 which says: "Should a man maliciously throw a woman's headdress and should this be possible to prove by three good men or women, he shall be liable to a fine of 50 librae ..." No doubt, even at that time the woman's dignity was protected.*

16 *See Statute of the City of Split, Medieval Law of Split, 2nd (revised) edition, published by Knji_evni krug, Split, 1987.*

17 *See "The Statute of Kor_ula", published by Knji_evni krug, Split, 1995.*

18 *See "The Poljice Almanac", Volume I, Zagreb, 1968.*

19 *See "The Statute of Senj", Year 12, Senj City Museum, Senj Museum Society, Senj.*

When reading through it we shall find that out of 142 Articles nearly 70 of them directly or indirectly contain provisions on human rights and freedoms.

If trying to trace the roots of these provisions, it seems to me that we should return to the 1776 Declaration of Independence of the United States of America which says that "all men are created equal, they are endowed by their Creator with certain unalienable rights, among these are life, liberty and the pursuit of happiness".

The same universalist will was at work when on 26 August 1789 the French Constituent Assembly declared that people are born and die with equal rights and specified these "natural and imprescriptible rights".

150 years later the same ideals inspired those who wrote the Universal Declaration of Human Rights, of 10 December 1948, which says, inter alia, that the recognition of indivisible dignity in all members of the human family and their equal and inalienable rights constitute the foundations of freedom, justice and peace in the world[20].

The constitutional provisions on fundamental human and civil rights feed on the deeply rooted and continuous aspirations of western civilization inspired by Greek and Roman humanism, fostered by the Judaic-Christian message and invigorated by the right philosophy of Enlightenment which teaches that the fundamental human rights and freedoms are not derived from the political and legal order, but are rather antecedent to it.

These fundamental rights and freedoms are not only listed in Part III of the Constitution entitled "Fundamental freedoms and rights of man and the citizen". They are also contained in a series of other provisions, especially those on the collective rights of ethnic and national communities in the Republic of Croatia. These collective rights are also a prerequisite for individual rights of the members of such communities or minorities.

All these rights and freedoms are referred to in the provisions of Article 3 of the Constitution which describe freedom, equal rights, national equality, love of peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the human environment, the rule of law and a democratic multiparty system as the highest values of the constitutional order of the Republic of Croatia[21].

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[20] *Cf. Jacques Robert: op. cit., pp. 758.*

[21] *It is interesting to note that the term "fundamental freedoms and rights" was not introduced in France until the Constitutional Council made a decision to this effect.*

The Croatian Constitution makes explicit use of the term "fundamental freedoms and rights of man and the citizen", which is of crucial importance, because it is not just a declaration. It is a fundamental concept being used by the courts, especially the Constitutional Court of the Republic of Croatia, in their judgments as to whether certain fundamental constitutional rights and freedoms of man and the citizen have been violated, and whether the protection thereof is also required by the Constitutional Court.

Whatever the case of the countries which became major centres of creative civilization by following the policy of individual freedoms - as for myself, I know no example in history which shows that a country has achieved the same by following a path other than that of the rule of law - I believe that the way towards such intellectual and real greatness of a country, to the achievement or near-achievement of the fundamental human and civil rights and freedoms is as arduous today, and probably even more arduous and more cruel, than it was in the distant past when some nations succeeded in achieving it[22]*. The same applies to Croatia.*

So much greater is the responsibility of all parties to achieve this ideal, especially those who are there to give the final verdict about what is constitutional, what is lawful, and what is not. This role in the Republic of Croatia is almost entirely entrusted to the Constitutional Court of the Republic of Croatia (hereinafter: Constitutional Court). Prominent in this is the (new) competence of the Constitutional Court as defined in Article 125, para. 3, of the Constitution, which says that it "... shall protect the constitutional freedoms and rights of man and the citizen".

Constitutional Court of the Republic of Croatia

By defining the system of government - Article 4 - the Constitution limits it through the tripartite division of power. This is based on the perennial experience,

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See on the same subject: Olivier Duhamel - Yves Mény: Dictionnaire constitutionnel, Presses universitaires de France, Paris, 1992, pp. 337, and Dominique Rousseau: Droit du contentieux constitutionnel, 3rd edition, Montchrestien, 1993, pp. 327, etc.

[22] *This, in fact, is the introductory proposition of F. von Hayek in his "The Rule of Law", published by Školska knjiga, Zagreb, 1994, translated by Prof. Dr. Arsen Ba_i_.*

already stressed by Montesquieu in his work "On the Spirit of the Laws"[23] which argues that any man in possession of power tends to abuse it[24].

The government in the Republic of Croatia shall be organized on the principle of the separation of powers into:

- *legislative,*
- *executive,*
- *judicial.*

In this tripartite division of power a special role is given by the Constitution to the Constitutional Court of the Republic of Croatia in that it is not classified under any of the three spheres of government. Since the Constitutional Court is envisaged directly by the Constitution itself, it constitutes a constitutional exception, a special constitutional category which cannot be dealt with by the laws. For the laws are dealt with by this category, that is the Constitutional Court as a separate body endowed with a high degree of legal competence and authority, detached from the system of tripartite division of power. The chief responsibility of the Constitutional Court is constitutionality and legality.

Thus, in a way, one may describe the system as one of quadripartite division of power or rather (as I prefer to see it) as an inter-authority supervising all the three (legislative, executive and judicial) authorities within responsibilities as defined in the Constitution itself. It is not superordinate to them in terms of hierarchy nor is it part of them in terms of the structure of the government or indeed in any other sense[25]. Constitutional questions are legal questions, just like any other, but with far stronger political implications, and this is characteristic of the position of the Constitutional Court and constitutional court practice.

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[23] *De l'Esprit des Lois, Book IX, Section 6.*

[24] *On the principles of the division of power see also the following works:*

Dr. Smiljko Sokol - Dr. Branko Smerdel: "The Constitutional Law", Školska knjiga, Zagreb, 1995, pp. 204;

F. von Hayek: "The Political Ideal and the Rule of Law", Školska knjiga, Zagreb, 1994, pp. 51;

Dr. Branko Smerdel: "The U.S.A. Constitution", Pan Liber, Osijek, 1994, pp. 6;

Vjekoslav Mili_i_: "A General Theory of Law and State", Volume I, pp. 134.

[25] *See on the subject: Dr. Mihajlo Dika: "Notes on the Institute of Constitutional Complaint", Almanac of the Ljubljana-Zagreb Colloquium, Ljubljana, 1993, pp. 41.*

In terms of the decision-making process, and the method of work, the Constitutional Court is related to a court authority, because it is uses the laws and other regulations in its rulings. It also, however, acts through individual rulings, through the institute of constitutional complaint.

In the architecture of the Constitution, but also in terms of the theory of constitution, the specificity of the Constitutional Court in the Croatian Constitution is reflected in the basic feature of the constitutional body[26].

The quality of the constitutional body primarily depends on the position that this body occupies within the constitution as a whole and secondarily on the type and manner of its functioning.

To quote from Santi Romano, the constitutional bodies "si distinguono dagli altri non tanto per una differenza di funzioni, quanto di posizione, nel senso che essi, ed essi soli, individualizzano lo Stato in un dato momento storico e lo rendono capace di continuare ad organizzarsi pel raggiungimento dei suoi fini"[27].

Nothing may be as important for the survival of a democratic society as are a truly independent judiciary and constitutional courts. For there is no rule of law unless it is practised by the constitutional courts and the judiciary, without any influence, exercised whether from within or without the other sections of government.

"The Constitutional Court of the Republic of Croatia shall be independent of any government authority. The Constitutional Court shall guarantee the rule of the Constitution of the Republic of Croatia. In its activity the Constitutional Court shall be guided by the provisions of the Constitution and the Constitutional Act on the Constitutional Court of the Republic of Croatia."[28]

Such functioning of the Constitutional Court is guaranteed by the very standards of the Constitution itself as well as by the Constitutional Act on the Constitutional Court of the Republic of Croatia[29]*. These are the only regulations passed outside the Constitutional Court (which passes its own Rules of Procedure) defining the organization and competence of the Constitutional Court.*

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[26] *The concept of the constitutional body is also known in the Italian theory of state law. E.g., see Santi Romano: Nozione e natura degli organi costituzionali dello Stato, in: Scritti minori, 1950, pp. 6.*

[27] *Santi Romano, op. cit.*

[28] *Article 7, paragraph 1, of the Rules of Procedure of the Constitutional Court of the Republic of Croatia (hereinafter: Rules of Procedure, Official Gazette No. 29/94).*

[29] *Official Gazette No. 13/91.*

Other laws, which do not have the importance of the Constitutional Act, cannot affect either the organization or the competence of the Constitutional Court. In should be noted in this connection that a constitutional act shall be passed or amended under the procedure envisaged for amending the Constitution (Article 127, paragraph 2, of the Constitution), which eliminates the possibility of revoking the constitutional competence of the Constitutional Court.

The Constitutional Court has its own constitutional act status, the importance of which is not inferior to other constitutional bodies, such as the Parliament, President of the Republic or the Government.

In terms of organization and hierarchy the Constitutional Court is neither dependent on another constitutional body, nor can it be subservient to it.

The extent of new responsibilities of the Constitutional Court and its powers stemming directly from the Constitution makes the Constitutional Court a guarantor and guardian of the Constitution, a supreme body of constitutional safeguards, vested with the highest authority.

The constitutional status of the Constitutional Court cannot be equated with that of regular courts, whether in terms of procedure or constitutional complaint. There is no doubt that the decisions of the Constitutional Court under a constitutional complaint directly "affect" the court rulings. Such an "overruling" of regular court proceedings and the judiciary system is based on the Constitution. This has resulted, I would say, from a competition between two constitutional principles, that of the independent judiciary and court ruling in compliance with the Constitution and the law, on the one hand, and that of the unconditional protection of constitutional human and civil freedoms and rights on the other. As the Constitutional Court is not a court of full jurisdiction, it should be granted respect for those decisions for which it is defined as the only interpreter of the Constitution, a body which beyond any hierarchy is entrusted with the unconditional protection of constitutional human and civil freedoms and rights, a body whose legal opinion on the violation of the constitutionally defined freedoms and rights of a plaintiff is subject to no one else's subsequent control of any kind. No discussion on them should therefore be permitted, not even before courts to which the Constitutional Court, having quashed their ruling, returns a case for renewed proceedings.

Such a view is also corroborated by Article 25 of the Constitutional Law on the Constitutional Court, according to which the Constitutional Court's decisions and rulings are binding and enforceable.

This provision is further elaborated in Article 62 of the Rules of Procedure whereby the Constitutional Court in explaining its annulment should state which constitutional right or freedom has been violated and what is the nature of such a violation. The body whose decision has been quashed is to pass another decision by making allowances for the Constitutional Court's legal opinion on the respective violation of the constitutionally defined freedoms and rights of the Plaintiff. What is, therefore, inherent in a decision by the Constitutional Court is the power of precedent.

These provisions and such practice of the Constitutional Court mean that the views expressed in its decisions are also binding upon the Constitutional Court itself, not only if the same case reappears before the Constitutional Court with identical facts, but also in cases of other constitutional complaints involving essentially the same facts. Of course, this notion should not petrify the constitutional court practice and it does not exclude the possibility for constitutional law positions to change over time through the process of law-making (for the decisions of the Constitutional Court imply both the implementation of the law and the creation of law). In that sense one can refer to "more flexible" precedents which can be changed, as exemplified by the practice of other constitutional courts, even as a result of some prominent opinions, especially those which are well elaborated and published, something which also occurs, not so rarely, in the practice of the Constitutional Court of the Republic of Croatia.

Which rights can be properly protected in Croatia through constitutional complaint

The Croatian Constitution departed from the idea, shared by all sovereign democratic countries, that the constitutions or special documents of a constitutional legal nature should promulgate and safeguard many human and civil freedoms and rights and that these should be continuously renewed and extended. Namely, there is a tendency in democratic societies to give guaranteed rights and freedoms (individual freedom, equality before the law and the court, freedom of movement and residence, religious freedom, inviolability of one's home, access of all to public services, right of private property, election right etc.) a real, and not merely a declarative value, and to establish a legal system, which can provide quick and efficient protection of all constitutional freedoms and rights from any violation or threat[30].

[30] *See on the subject:*

The powers of a constitutional court to protect the constitutional rights and freedoms of private persons, their associations and private entities imply that the constitution guarantees individual rights and freedoms. The individual constitutional rights, to be effective, require some means of coercion, which can be achieved if the protection of these rights is entrusted to civil, criminal and administrative courts; in some countries, e.g. France, the Conseil d'Etat and administrative courts have a long and laudable history of the protection of libertés publiques. The protection of these rights can be strengthened and their

constitutional level upgraded by authorising special constitutional courts to deal with constitutional complaints against the violation of specific individual constitutional rights. The responsibility of such constitutional courts for cases involving individual rights, if efficient enough, will enhance the respect for the fundamental rights and freedoms of individuals as persons, their dignity and independence[31].

The basics of the protection of constitutional human and civil freedoms and rights through a constitutional complaint in Croatia are defined in Article 125, paragraph 3, of the Constitution, which says that the constitutional human and civil freedoms and rights shall be protected by the Constitutional Court.

According to Article 127, paragraph 1, of the Constitution, the protection of the constitutional human and civil freedoms and rights shall be regulated by the constitutional act, i.e. the Constitutional Act on the Constitutional Court of the Republic of Croatia (hereinafter: Constitutional Act). This Constitutional Act has defined the constitutional complaint[32] [33]

Blanka Tuden-Mazuth: A commentary on Article 28 of the Constitutional Law in the textbook "Constitutional Act on the Constitutional Court of the Republic of Croatia", Zagreb, published by Informator, 1991, pp. 24;

Dr. Arne Mav_i_: "Constitutional Complaint", Podjetje in delo, 5-7/1993/XIX;

My book "The Rule of the Constitution", Informator, Zagreb, 1994, pp. 78.

[31] *Helmut Steinberger: "Models of Constitutional Jurisdiction", European Commission for Democracy through Law, Council of Europe Press, 1993, pp. 25.*

[32] *On the constitutional complaint see Zdravko Bartov_ak: "Protection of Constitutional Rights through A Constitutional Complaint", Odvjetnik No. 9-12/92, pp. 3; Hrvoje Mom_inovi_: "Constitutional Complaint", Privreda i pravo No. 1-2/94, pp. 12; Hrvoje Mom_inovi_: "The Arbitration Decision and the Constitutional Complaint", Zakonitost No. 8-12/1993, pp. 612; Jadranko Crni_; "Constitutional Complaint", Zakonitost No. 9-10/1991, pp. 959; Jadranko Crni_: "Preconditions for the Protection of Constitutional Human and Civil Freedoms and Rights through a Constitutional Complaint", Informator No. 4188; Jadranko Crni_: "Constitutional Complaint in the Constitutional System of the Republic of Croatia", Legal Mission, Bulgarian Academy of Science, Institute for Legal Sciences, Sofia, 1994, No. 4/1994, pp. 71.*

as a means of safeguarding the constitutional human and civil freedoms and rights.

The subject of protection and the preconditions for a constitutional complaint are defined in Article 28 of the Constitutional Law, which reads:

(1) Any person can submit a constitutional complaint to the Constitutional Court if he feels that the decision of a court, an authority or other body vested with public powers has violated one of the constitutionally defined human and civil freedoms and rights (hereinafter: constitutional right).

(2) If alternative remedies are available, a constitutional complaint can be filed only after such alternative remedies have been exhausted.

(3) In cases where a civil lawsuit or a revision through civil procedure or an extrajudicial procedure is possible, the legal remedies are considered exhausted once a decision has been passed on the legal remedies.

These provisions are further elaborated in the Rules of Procedure of the Constitutional Court of the Republic of Croatia.

It may be interesting to note that back in 1960, Dr. Ivo Krbek in his book "The Constitutional Court Action", published by JAZU, Zagreb, 1960, pp. 68, pointed to the need for a direct constitutional court action in matters concerning fundamental human and civil rights as well as other constitutionally guaranteed rights.

[33] *In the present text I shall not elaborate on the term "constitutional complaint". It is defined in the Constitutional Act, although it may be argued as to whether or not the best choice of the term has been made. For the term "constitutional complaint" suggests a lawsuit, which may have given rise to some misunderstandings. The term "constitutional appeal" or "legal recourse" or some other may be more apposite, but this matter should be discussed de lege ferenda. On this subject see Zdravko Bartov_ak: op. cit., pp. 4.*

The constitutions or constitutional acts in other countries, such as Austria or Germany, prefer the term "Verfassungsbeschwerde" or, in Spain, "recurso de amparo" or "recurso" in Portugal, etc.

An attempt at summarizing the concepts of the protection of constitutional rights through a constitutional complaint or appeal or recourse through a universal definition would probably fail to be quite successful. The definition given by Rüdiger Zuck in "Das Recht der Verfassungsbeschwerde", 2nd edition, Verlag C.H. Beck, Munich 1988, pp. 4, may be the nearest to the point, based as it is on the constitutional court practice of the Constitutional Court of Germany: "A constitutional complaint is a special legal remedy against the state, available to any individual whose constitutionally guaranteed rights have been violated by any state authority; consequently, a constitutional complaint may be used not only for the protection of fundamental rights, but also to ensure the political rights of an active status, above all the election right".

Based on such constitutional principles, in its practice so far the Constitutional Court has been advocating the idea that all fundamental human and civil freedoms as specified in Part III of the Constitution "The Fundamental Freedoms and Rights of Man and the Citizen", Articles 14 through 69 of the Constitution are subject to protection.

However, protection has been extended to some other provisions, including a direct resort to Article 3 (Part II, Basic Provisions) in specific cases involving a challenge to the highest values of the Constitution - the rule of law, and also, to some extent, to Article 115 of the Constitution. I shall return to it in some more detail in discussing Article 3 of the Constitution.

Some doubts about such an approach have been expressed recently as to whether this whole catalogue of rights can be considered as fundamental rights or rights which can be protected through a constitutional complaint[34].

Catalogue of Rights

I shall refer to those constitutional provisions which are related to fundamental rights. Due to lack of space only some of them will be touched upon, but this does not mean that others are not deserving of certain consideration.

The fundamental human and civil freedoms and rights are classified in the Constitution into three main groups:

1. *General provisions;*

2. *Individual and political freedoms and rights;*

3. *Economic, social and cultural rights.*

The provisions on some further important rights and freedoms have not followed the logic of broad generalizations designed to merely instruct the law-makers how to define them in more detail. On the contrary, the Constitution contains a series of detailed legal safeguards, which are of special importance to the Constitutional Court entrusted by the Constitution with the task of protecting these rights.

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[34] *This issue has been tackled by Judge Velimir Belajec of the Constitutional Court in his paper of 4 July 1995 "Supplement to the paper of 18 May 1995, on the relevance of Article 19, paragraph 1 (Article 115, paragraph 3) of the Constitution to the constitutional complaint" in connection with File No. U-III-321/1995. The matter is discussed below.*

Article 3

Freedom, equal rights, national equality, love of peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the human environment, the rule of law and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia.

In constitutional court practice there has been a dilemma as to whether or not the provision of Article 3 of the Constitution can be directly applied as a basis on which the Constitutional Court shall decide on the violation of a constitutional right. This dilemma was particularly expressed when it came to the question of whether the rule of law as one of the highest values of the Croatian constitutional order can serve as such a basis without reference to a provision from Chapter III of the Constitution, "Fundamental freedoms and rights of man and the citizen". The opinions varied, including this one:

"The rule of law, referred to in Article 3 of the Constitution, one of the basic constitutional provisions, cannot alone help establish the existence of the violation of a constitutional right, liable to filing a constitutional complaint. The constitutional complaint is a legal remedy for the protection of constitutional rights specified in Chapter III of the Constitution and in the provisions of Articles 14-69, so that the rule of law can be said to have been violated only if one of these constitutional provisions has been found to be violated. The same applies to the principle from Article 115, paragraph 3, of the Constitution according to which courts shall administer justice on the basis of the Constitution and the law".

This opinion has remained questionable in Constitutional Court practice and a different opinion was given in the decisions U-III-267/93 and U-III-126/1993. Thus the Constitutional Court stated, inter alia:

"The Constitutional Court does not believe that a constitutional complaint for trespassing would involve the violation of any of the highest constitutional values from Article 3 of the Constitution".

Decision No. U-III-186/1995 of 5 July 1995[35] *advocates the same view: "Hence the disputed decision .... does not violate any of the highest constitutional values from Article 3".*

In a way, this confirms the view about the provision of Article 3 as an independent constitutional right and a basis for constitutional complaint[36].

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[35] *Official Gazette No. 47/1995.*

This opinion does not appear acceptable to me. Although Article 3 of the Constitution has the characteristic of a fundamental right, I feel that, rather than being a provision on a fundamental freedom or right, it is a constitutional principle both in terms of the architecture of the Constitution (placed as it is in Part II "Basic Provisions") and its substance. Consequently, the function of Article 3 of the Constitution is accessory and hence cannot constitute an independent constitutional right complaint.

III. FUNDAMENTAL HUMAN AND CIVIL FREEDOMS AND RIGHTS

1. General Provisions

Article 14

Citizens of the Republic of Croatia shall enjoy all rights and freedoms, regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, education, social status or other properties.

All shall be equal before the law.[37]

Article 15

Members of all nations and minorities shall have equal rights in the Republic of Croatia.

Members of all nations and minorities shall be guaranteed freedom to express their nationality, freedom to use their language and script, and cultural autonomy.

The highest values of the constitutional order include national equality (Article 3), which is also a point of departure for both constitutional and legislative elaboration.

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[36] *See Siniša Rodin: "The Constitutional Court of the Republic of Croatia and the International Law", Zakonitost, No. 8-12, Zagreb, 1993, pp. 578.*

[37] *From the Constitutional Court's practice see, for example, Decision No. U-III-312/1992 published in Official Gazette No. 38/93, Decisions No. U-III-457/1994, U-III-267/1993, U-III-87/1994, U-III-279/1994.*

The Constitutional Court's practice related to Articles 14 through 69 of the Constitution is described in my book "The Rule of the Constitution", 1994, Informator pp. 105.

The regulation of rights and freedoms as prerequisites for the exercise of national equality, as defined in Article 15 of the Constitution, is also elaborated in the Constitutional Law on Human Rights and the Freedoms and Rights of Ethnic and National Communities or Minorities in the Republic of Croatia (revised text published in the Official Gazette No. 34/92); also see Articles 3 and 4 of the said Constitutional Law.

Cultural autonomy and other rights of ethnic and national communities or minorities are dealt with in Part III "Cultural autonomy and other rights of ethnic or national communities or minorities" of the same Constitutional Law. Minorities are not groups with reduced rights. For preservation of their ethnicity and tradition they are recognized as having some additional rights to the effect that their members are in some way privileged in relation to other citizens. There is no question of discrimination, rather a question of positive discrimination. More details on the constitutional complaint based on the said Constitutional Law can be found in the Report by Judge Vojislav Kučeković of the Constitutional Court presented for this UniDem Seminar, entitled "Protection of national minority rights before the Constitutional Court of the Republic of Croatia", so there is no need to elaborate here on the rights that can be protected through a constitutional complaint pursuant to the said Constitutional Law.

Article 16

Freedoms and rights may only be restricted by law to protect the freedoms and rights of other people and the public order, morality and health.

It is hard to tell whether this provision can be used for filing a constitutional complaint. What this provision actually describes are the limits to using freedoms and rights. It also relies on Article 29 of the Universal Declaration of Human Rights, of 10 December 1948[38].

Article 17

During a state of war or an immediate danger to the independence and unity of the Republic, or in the event of some natural disaster, individual freedoms and rights guaranteed by the Constitution may be restricted. This shall be decided by the Croatian Sabor by a two-thirds majority of all representatives or, if the Croatian Sabor is unable to meet, by the President of the Republic.

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[38] *Also see Smiljko Sokol - Branko Smerdel: "Constitutional Law", Zagreb, 1995, Informator, pp. 72.*

The extent of such restrictions shall be adequate to the nature of the danger and may not result in the inequality of citizens in respect of race, colour, sex, language, religion, national or social origin.

Not even in the case of immediate danger to the existence of the state may restrictions be imposed on the application of the provisions of this Constitution concerning the right to life, prohibition of torture, cruel or degrading treatment or punishment, and on the legal definitions of penal offences and punishments, and on freedom of thought, conscience and religion.

Modern constitutions tend to anticipate special circumstances, including war, but they also want to ensure that the system is restored to normal operation once the risks no longer exist. It is along these lines that Article 17 of the Constitution is conceived, which makes the respective part of the Constitution a kind of "crisis constitution"[39] and which, in addition to the limits in paragraph 1, contains limits on the limits in paragraphs 2 and 3.

Article 18

The right to appeal against individual legal acts made in first-instance proceedings before courts and other authorized bodies shall be guaranteed.

The right to appeal may be exceptionally denied in cases specified by law if other legal protection is ensured.[40]

See Article 26 of the Constitution.

Article 19

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[39] *See Sokol - Smerdel, op. cit., pp. 74, and Branko Smerdel: "Constitution, International Law and Political Crisis", Zakonitost No. 8-12/1993, pp. 501.*

[40] *As a practical example of this point see the Constitutional Court's Decision U-III-336/1993 (Official Gazette No. 50/94).*

In application of Articles 18, 19 and 26 of the Constitution also see the Constitutional Court's constitutional complaint rulings Nos. U-III-339/93 of 21 June 1994, U-III-393/93 of 5 July 1994, U-II-416/93 of 5 July 1994, U-III-26/94 of 5 July 1994, U-III-74/94 of 5 July 1994, U-III-91/94 of 5 July 1994, U-III-168/94 of 5 July 1994, U-III-262/94 of 5 July 1994, U-III-271/94 of 5 July 1994, U-III-477/94 of 5 July 1994, U-III-510/94 of 13 July 1994, U-III-511/94 of 5 July 1994, U-III-513/94 of 5 July 1994, U-III-519/94 of 13 July 1994, U-III-520/94 of 5 July 1994, U-III-565/94 of 5 July 1994, U-III-604/94 of 13 July 1994.

Individual acts of state administration and bodies vested with public powers shall be based on law.

Judicial review of the legality of individual acts of administrative authorities and bodies vested with public powers shall be guaranteed.

In his already mentioned paper (see footnote 22) Dr. V. Belajec holds the view that Article 19, paragraph 1, of the Constitution does not define a constitutional right and he says, inter alia:

"The constitutional rights, as a rule, are accompanied by the words 'it shall be guaranteed...', "all shall enjoy the right...", "all shall be equal...", "all shall enjoy equal rights...', etc. There are no such qualifications in the quoted provision. Instead, what it amounts to is that individual acts of governmental authorities and bodies with public powers must be founded in law. But paragraph 2 of the same Article explicitly provides for the court control of the legality of individual acts, so this provision is to be considered one of the fundamental constitutional rights".

To quote further:

"It is obvious why the provision of Article 19, paragraph 1, is placed in the part of the Constitution dealing with constitutional rights. These provisions should have been joined by the one from Article 19, paragraph 2 (providing for the control of the legality of individual acts of governmental authorities and bodies with public powers), because this provision truly describes a fundamental constitutional right of any person. But to make this a standard, it was necessary to previously stipulate that the individual acts of governmental authorities and bodies with public powers must be founded in law (Article 19, paragraph 1), for this provision is a logical and legal prerequisite for any control of legality. As Article 19, paragraph 2, refers to the control of the legality of administrative acts (not those of the courts), it was necessary to define in the preceding paragraph the principle of legality, only in the area of administration. That is why the general rule has been split into two parts (one relating to administration, the other to the judiciary), and that is why this principle is dealt with in two separate articles of the Constitution.

It is obvious that any violation of a fundamental constitutional right comes from the illegality of an individual act deciding on the rights and interests of a citizen. It is hard to imagine a constitutional violation without an illegal act against which a constitutional complaint has been filed.

However, not every unlawful decision necessarily involves the violation of a constitutional right. Arguing that any illegal decision, administrative or judicial,

constitutes the violation of a constitutional right under Article 19, paragraph 1, would lead to unforeseeable consequences and would imply the following equation:

unlawful = nonconstitutional = violation of a constitutional right.

Furthermore, it would mean that any illegal act under Article 19, paragraph 1, and Article 115, paragraph 3, of the Constitution would immediately be a violation of a constitutional right, and that the Constitutional Court would be entitled to rule in all cases involving an illegal administrative or court decision passed in a previous proceeding or, more precisely, in all cases where a person argues that an administrative or court decision in his legal matter is unlawful.

In practice this would turn the Constitutional Court into a kind of fourth-degree super court controlling legality (and thereby violations of constitutional rights) in all legal matters under the jurisdiction of administrative bodies, bodies vested with public powers or courts.

To give the Constitutional Court such a role would be at variance with the role assigned to it under the Constitution. Besides, it would be unable to cope with all the files coming in for its ruling.

Hence the view that the provision of Article 19, paragraph 1 does define a constitutional right (and the one from Article 115, paragraph 3), the one which regulates the constitutional law, is unacceptable and unfeasible".

Article 20

Anyone violating the provisions of this Constitution concerning the basic human and civil freedoms and rights shall be held personally responsible and may not exculpate himself by invoking a higher order.

It is, no doubt, an exceptionally important provision, rooted in natural law. It was on these grounds that war criminals were convicted in the Nuremberg trial. The same principle was applied in 1993 when the International Tribunal for war crimes committed in the area of former Yugoslavia was set up in The Hague. However, it seems to me that Dr. Belajec in his above mentioned paper (see footnote 22) rightly considers this provision - which for reasons of systematic presentation is placed in Part III of the Constitution - as a provision which does not regulate the constitutional rights and which cannot provide protection through a constitutional complaint.

2. Personal and political freedoms and rights

Article 21

Every human being shall have the right to life.

In the Republic of Croatia there shall be no capital punishment.

Article 22

Man's freedom and personality shall be inviolable.

No one shall be deprived of liberty nor may his liberty be restricted, except when so specified by law, which shall be decided by a court.[41]

Compare the discussion on a constitutional complaint against a custody ruling with reference to Article 29 of the Constitution.

Article 23

No one shall be subjected to any form of maltreatment or, without his consent, to medical or scientific experiments.

Forced and obligatory labour shall be forbidden.

Article 24

No one shall be arrested or detained without a written court order based on law. Such an order shall be read to and served on the arrested person at the moment of arrest.

The police may without a court order arrest a person reasonably suspected of having committed a serious criminal offence defined by law, and shall immediately hand him over to the court. The arrested person shall be immediately

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[41] *See Dr. Ivo Josipovi_: "International law on the right to freedom, constitutional provisions on the right to freedom and their implications to criminal proceedings", Zakonitost No. 8-12/1993, Zagreb, 1993, pp. 515.*

informed in a way understandable to him of the reasons for arrest and of his rights determined by law.

Any person arrested or detained shall have the right to appeal to the court, which shall without delay decide on the legality of the arrest.

A question arises here relevant to criminal procedure. Freedom is doubtlessly one of the fundamental human and civil rights, it is inviolable and should not be taken from or restricted to anybody, except as prescribed by the law, which is the responsibility of a court[42].

Regarding this fundamental personal freedom and right, as defined in the Constitution, one may raise the question if some actions, even stages in a criminal procedure should be viewed in their entirety. Thus the duration of custody in a criminal procedure may depend not only on the reasons for it, but also the duration of the procedure.

One of the preconditions for filing a constitutional complaint is that legal (subsidiary) remedies have been exhausted.

If we accept the notion that legal remedies relating to custody have only been exhausted once the guilt and punishment have been established, then a detained person may stay in custody for a long time only to be declared not guilty in the end, which means that he was innocent in spite of custody ruled as legal. In that case one could not exclude the possibility that the decision on custody had violated a constitutional right. The question arising in this connection is whether a constitutional complaint would have already been permissible at the moment when custody was ruled or perhaps again at the moment when the charge has taken effect.

Although the exhausted legal remedies are a procedural assumption, they still figure prominently even in terms of what are basically the aspects of material law. The problem can be presented by the following questions: Are there different

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[42] *Within its responsibility under Article 125, paragraph 1, of the Constitution, the Constitutional Court initiated a procedure questioning the legality of the provisions of Article 57, paragraph 1, and Article 154 of the Law on Offences which allowed the prosecution authorities (not having the status of a court) to mete out prison sentences or commute a fine into a prison sentence as well as to detain a citizen up to 48 hours and to search his flat. As the Constitution explicitly stipulates that restrictions to freedom and inviolability of one's home can be ruled only by a court within limits of legislation (Articles 22, 24 and 34 of the Constitution), the Constitutional Court expressed its doubts about the constitutionality of these regulations and instituted a procedure for the evaluation of their constitutionality. (Decision No. U-I-335/93 of 16 February 1994 - Official Gazette No. 15/54). After that the law-maker, having accepted the reasons put forward by the Constitutional Court, amended the regulation by handing over all the mentioned restrictions to the responsibility of courts. Then the Constitutional Court suspended the procedure with its decision No. U-I-335/1993 of 7 June 1995 (Official Gazette No. 42/95).*

freedoms and which freedoms are protected or are they protected at all times or only at times? What about the violation of constitutional rights up to that moment, do they exist and can their occasional non-protection be defended - in the interests of the legal order? Where is this written in the Constitution?

So far the Constitutional Court has expressed the following view on the matter:

"M.M. submitted a constitutional complaint to the Constitutional Court, pursuant to Article 28 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (Official Gazette No. 13/91), convinced that the decision of the Supreme Court of the Republic of Croatia No. Kz-13/1992-3 of 9 February 1992 rejecting his complaint against the decision of the District Court of Zagreb on prolonged custody had violated his constitutional rights.

The Constitutional Court rejected this constitutional complaint as unfounded on the following grounds:

Pursuant to Article 28 of the Constitutional Act on the Constitutional Court of the Republic of Croatia, any person can file a constitutional complaint with the Constitutional Court, if he believes that one of the constitutionally defined human and civil freedoms and rights has been violated by a court decision or a decision passed by an administrative or other body vested with public powers. If other remedies are available against such violations of constitutional rights, a constitutional complaint can be filed only after such remedies have been exhausted.

In the opinion of the Constitutional Court, a decision on custody or prolonged custody can be disputed through a constitutional complaint only after criminal proceedings have been completed, and therefore, once the legal remedies against a criminal verdict have been exhausted.

Since alternative remedies have not been used in the specific case of the said constitutional complainant, pursuant to Article 28, paragraph 2, of the Constitutional Act on the Constitutional Court of the Republic of Croatia, the procedural requirements have not been met. Therefore, the Constitutional Court, pursuant to Article 26 of the Constitutional Act on the Constitutional Court of the Republic of Croatia, has decided as stated in the dispositif".

(Decision by the Constitutional Court No. U-III-32/1992 of 27 May 1992).

It should be noted that a constitutional complaint in some western countries can be filed even before all legal remedies have been exhausted, provided there is a

threat of a violation of constitutional rights which could not subsequently be easily remedied.

Thus in Germany the Federal Court can decide on a constitutional complaint immediately, even before all legal remedies have been exhausted, but only in cases in which such a constitutional complaint is of general importance or if the complainant may suffer heavy and irremediable damage if first subjected to a regular procedure (Article 90, paragraph 2, of the Constitutional Court Act)[43].

"Custody can be ruled in various stages of criminal procedure: in the course of investigation, after the charges have been raised, under certain conditions and after passing the sentence, even before instituting criminal procedure. However, at each stage of the criminal procedure custody is ruled or prolonged by a separate decision disputable by a separate appeal, subject to the decision of an extra-trial council or a second-degree court. At certain intervals the court is officially obligated to review the reasons for detention. Even the public prosecutor can apply for the protection of legality against a decision on custody or prolonged custody.

Throughout the criminal procedure the conditions and reasons for custody or prolonged custody are therefore examined, but without examining the facts and circumstances on the basis of which a meritorious decision will be made. Thus in the first-degree criminal procedure and later in the appeal stage the legality of custody or the facts and circumstances which led to the decision on custody during the hearing stage cannot be examined or reassessed, because such custody no longer exists now or at that time. The decision on custody during the investigation has been consumed and has ceased to apply. Abolishing such a decision at a later stage would be legal nonsense: under such an abolished decision no one would be able to act in any way whatsoever.

The above leads us to the conclusion that a violation of constitutional rights through detention can be and must be properly dealt with or an efficient protection of the constitutional right to freedom considered (Article 22 of the Constitution) when this right has been violated. If the protection of this right were prolonged, if one were to wait for the end of a criminal procedure, such protection

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[43] *See Rüdiger Zuck: Das Recht der Verfassungsbeschwerde, 2nd edition, Verlag C.H. Beck, Munich, 1988, pp. 278.*

Also see the Report by Judge Zdravko Bartov_ak for this UniDem Seminar: "The efficiency of the protection of constitutionally defined human rights by means of a constitutional complaint in the Republic of Croatia", infra, p. 191.

would not have any effect, because the consequence of (nonconstitutional) detention can be prevented only if a person is still detained on the basis of a concrete decision. Legal remedies against a custody ruling are therefore exhausted once the court has made its decision on the complaint lodged against this ruling, so that a constitutional lawsuit can be filed against this ruling pursuant to the provisions of Article 28 of the Constitutional Act on the Constitutional Court of the Republic of Croatia"[44].

More reserved in this respect is Judge Nikola Filipović in his paper of 31 March 1992, where he proposes the following conclusions:

"All this points to the fact that the investigation stage - for specific legal, technical, personnel and other reasons, including above all the poorer degree of access of the public to this stage of criminal procedure as well as many prejudices which still prevail - is potentially the principal source of threat to human and civil freedoms, to human dignity and security. That is why the utmost attention should be paid to this stage of criminal proceedings by providing it with highly efficient sanctions and mechanisms of legal protection...

The constitutional complaint in the area of criminal law can be approached in two ways. First, no standards in this connection should be prescribed in the Constitutional Act on the Constitutional Court and, second, due to its complexity the constitutional complaint institute should be gradually developed in the Constitutional Court's practice. This approach is closer to our view that the Constitutional Court should not be harnessed by unnecessary norms which would limit its creativity and freedom in its efforts to help build a democratic legal system. This view, however, is disputed by many opinions opposed to such Constitutional Court practice. We, too, believe that the Constitutional Court should intervene in criminal procedure only in very exceptional cases involving only the rights explicitly defined in the Constitution, and we would therefore suggest that consideration be given to the following amendment to the Constitutional Law:

"If in considering a constitutional complaint the Constitutional Court finds that the rights of an arrested person or suspect have been violated excluding detention or rights which in some other way endanger his constitutional rights, the Constitutional Court can rule his release or other measures intended to protect his rights"[45].

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[44] *Paper by Vojislav Ku_ekovi_: "On the constitutional complaint - de lege lata and de lege ferenda", attached to the Constitutional Court's file No. U-III-556/94.*

[45] *Study by Nikola Filipovi_ of 31 March 1992 "Constitutional complaint in criminal procedures", attached to file No. U-III-556/94.*

This view is partly disputed by Dr. Berislav Pavišić in his notes for discussion at the Constitutional Court on the constitutional complaint. "... is the extension of Constitutional Court's protection", to quote from his notes, "into a current criminal procedure not supposed to make up for the inadequate efficiency of protective mechanisms in a regular court procedure? In practice Constitutional Court protection is subsidiary. Such protection can be but a strict exception, acceptable only in cases where primary means in themselves fail to provide firm safeguards. If the task of seeking such space for legal safety is left to the Constitutional Court, a parallel-running system of judicial authority may be brought into being at the risk of prejudicing the outcome of criminal procedures and undermining the system of regular and extraordinary legal remedies".

In theory some authors are inclined "to assign to the Constitutional Court the discretionary power to decide on a constitutional complaint prior to the use of alternative legal remedies, if the complaint is of general importance or if the complainant may suffer heavy and irremediable damage as a result of applying to other courts"[46].

In spite of all the reservations expressed by Professor Pavišić and the risks involved in the new piles of constitutional complaints - the practice shows that this constitutional remedy is being partly abused, with a marked tendency to resort to it even in matters where obviously no constitutional right is at stake[47] - I am still

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[46] *See Steinberger, op. cit., pp. 28.*

[47] *This can be corroborated by the following facts. The number of constitutional complaints received in the period from 1991 to 30 June 1995: 25 received in 1991, 126 in 1992, 252 in 1993, 825 in 1994. Out of a total of 1228 constitutional complaints 573 or 46.6% have been solved, but at a relatively low rate of acceptance. Besides, the number of 59 accepted complaints includes a relatively high percentage of identical cases, based on the violation of the constitutional rights under Articles 18, 19 and 26 of the Constitution - a special right to a productive complaint (see the succeeding notes on Article 26 of the Constitution). What can already be traced here, however, is the anticipated educative effect of the constitutional complaint in the sense that the guidelines for the subsequent procedure following an accepted constitutional complaint are derived from the critical notes contained in the explanation of the accepted constitutional complaint. As a result, the number of files based on such violations of constitutional rights has been reduced.*

The percentage of accepted constitutional complaints (59 out of 573, a little more than 2.5%) is comparable to the European average.

However, such "backlog" of files is not confined to our country. The same tendency, following the introduction of constitutional complaints and for quite a long time afterwards, was experienced by Austria and Germany. To quote from Ivan Kristan's "Constitutional Complaint", Ljubljana, Pravnik No. 6-9/92, pp 211:

inclined to agree with the constitutional notion that a procedure initiated against a custody decision should be considered exhausted if a complaint to this effect is impermissible or rejected. Of course, it would be useful not to leave this matter to the Constitutional Court only, and matters are increasingly heading in this direction. The matter should be dealt with instead in the Constitutional Act on the Constitutional Court[48].

Article 25

Any arrested and condemned persons shall be treated humanely and their dignity shall be respected.

Anyone who is detained and accused of a penal offence shall have the right within the shortest term specified by law to be brought before a court, and within the statutory term to be acquitted or condemned.

A detainee may be released on legal bail to defend himself.

Any person who has been illegally deprived of liberty or condemned shall, in conformity with law, be entitled to damages and a public apology.

Article 26

All citizens and aliens shall be equal before courts, government bodies and other bodies vested with public powers.

"The provisions of Article 18 of the Constitution guarantee the right to a complaint or an alternative legal remedy against first-instance decisions passed

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"The fact that the Constitutional Court of Germany was overworked was one reason why since 1951 onwards the provisions on the constitutional complaints have been changed on six occasions. The landmark was the very practice of the Constitutional Court. The Constitutional Court was simply unable to cope with the overload imposed on it. The sheer number of constitutional complaints coming in has presented them with a problem defying solution: with its maximum capacity to attend to 70 cases, in 1995 the number soared to about 500 and the situation was described as hopeless: 'Die gegenwärtige Situation des Bundesverfassungsgerichtes is trostlos; die Bundesverfassungsgerichtsbarkeit kann im Augenblick: ihre Funktion nicht mehr erfüllen'. W. Geiger, Zur Reform des Bundesverfassungsgerichts, Festschrift für Nawiasky, 1956.

This problem is also tackled in the Report by Dr. Velimir Belajec for this UniDem Seminar: "The permissibility of constitutional complaints and how to prevent an excessive number of files".

[48] *On the deprivation of freedom and detention see Boštjan M. Zupan_i_: "Constitutional Criminal Procedural Law", Open Society Fund - Slovenia, Ljubljana, 1995, pp. 229, 251.*

by a court or another authorized body, whereas the provision of Article 19, paragraph 2, of the Constitution guarantees judicial review of the legality of individual decisions by administrative authorities and bodies vested with public powers. These constitutional rights cannot be efficiently exercised unless the reasons, being disputed in an appellate procedure, in a procedure involving a different type of legal protection or in a procedure involving judicial review of the legality of individual decisions, are known.

Besides, withholding the reasons for rejection of a request also violates the constitutional right of citizens and aliens to equality before courts and other authorities vested with public powers, as stipulated in Article 26 of the Constitution. The persons who do not know the reasons behind their request's rejection are certainly at a disadvantage in relation to those who are acquainted with such reasons.

It was on these grounds that the Constitutional Court in its decision (No. U-I-206/1992, U-I-207/1992, U-I-209/1992, U-I-222/1992 of 8 December 1993), published in the Official Gazette No. 113/1993, abolished the provision of Article 26, paragraph 3, of the Croatian Citizenship Act according to which no reasons had to be given for rejecting an application for Croatian citizenship.

In conformity with the above, the respective constitutional complaint was accepted due to the violation of the constitutional rights guaranteed under Articles 18, 19 and 26 of the Constitution"[49], [50].

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[49] *Decision of the Constitutional Court No. U-III-434/1993 of 20 April 1994. Also see the decision of the Constitutional Court No. U-I-272/1992.*

[50] *Also see Mladen Ivanovi_: "Free assessment of and the duty to explain decisions passed in an administrative procedure", Informator No. 4186 of 20 April 1994, pp. 8. It may be interesting to quote the author's concluding remarks:*

> *"What the decision of the Constitutional Court abrogating a provision of the Croatian Citizenship Act amounts to is not only the abolishment of a legal provision like any other, but also the elimination of a nomothetical phrase which is incompatible with the Croatian Constitution and which, was inherited from the previous legal system, with us for decades. For a free assessment based on an undefined legal standard, together with the right of an authority not to explain its decision, equally contravenes the principles of the Constitution, and is thus subject to the same objections as the abrogated provision of the Croatian Citizenship Act.*
>
> *Nevertheless, the Constitutional Court believes that it is legally permissible to free an authority from the need to explain its negative decisions, provided however that a free assessment is not based on an undefined standard, but that the law should specify the preconditions under which the reasons for rejecting an application are deemed to exist. It is in the light of such an interpretation that the provision of Article 209, para. 3 of the Administrative Procedure Act should be applied, whereas a legal opinion of the Constitutional Court should be considered a nomothetical guideline for the future".*

Article 27

The Bar as an autonomous and independent service shall provide citizens with legal aid, in conformity with law.

This provision, too, has been described by the Constitutional Court as a fundamental constitutional right to a lawyer (U-I-272/1992). In my opinion Belajec rightly questions this provision (see footnote 22) as one constituting a constitutional right. It may rather be accessory to Article 29 of the Constitution, for example.

Article 28

Everyone shall be presumed innocent and may not be considered guilty of a penal offence until his guilt has been proved by a final court judgement.

Article 29

Anyone suspected or accused of a penal offence shall have the right:

- to a fair trial before a competent court specified by law;
- within the shortest possible term to be informed of the reasons for the charges preferred against him and of the evidence incriminating him;
- to a defence counsel and free communication with him, and to be informed of his right;

to be tried in his presence if he is accessible to the court, and to defend himself by himself or with the assistance of the defence counsel chosen by him.

A charged and accused person shall not be forced to testify against himself or to admit his guilt

Evidence illegally obtained shall not be admitted in court proceedings.

Compare Article 27 of the Constitution.

This article obviously finds the assessment of the violation of constitutional rights justified, but, at the same time, warns of the anticipatory effect of a constitutional complaint.

Article 30

A penal judgment for a serious and exceptionally dishonourable penal offence may, in conformity with law, have as a consequence loss of acquired rights or a ban on acquiring, for a specific time, certain rights to the conduct of specific affairs, if this is required for the protection of the legal order.

Article 31

No-one shall be punished for an act which before its commission was not defined by law or international law as a punishable offence, nor may he be sentenced to a punishment which was not defined by law. If after the commission of an act a less severe punishment is determined by law, such punishment shall be imposed.

No-one may again be tried for an act for which he was already sentenced or for which a final court judgment was passed.

No criminal proceedings shall be repeated against a person acquitted by a final court judgment.

Concerning the "ne bis in idem" see the decision of the Constitutional Court No. U-I-370/1994[51].

On the impermissibility of renewing a criminal procedure against a person acquitted of criminal charges by a final court decision see the Decision of the Constitutional Court No. U-I-197/1992[52].

Article 32

Anyone who legally finds himself on the territory of the Republic shall have the right freely to move and choose a residence.

Every citizen of the Republic shall have the right at any time to leave the state territory and permanently or temporarily to settle abroad, and at any time to return home.

The right of movement within the Republic and the right to enter or leave it may exceptionally be restricted by law, if this is necessary to protect the legal order, or the health, rights and freedom of others.

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[51] *Official Gazette No. 56/1994.*

[52] *Official Gazette No. 25/1994.*

Article 33

Foreign citizens and stateless persons may obtain asylum in Croatia, unless they are persecuted for non-political crimes and activities contrary to the basic principles of international law.

No alien who legally finds himself on the territory of the Republic shall be banished or extradited to another state, unless a decision made in accordance with a treaty or law is to be enforced.

Article 34

Homes shall be inviolable.

Only a court may by a warrant based on law and a statement of reasons order the search of a home or other premises.

The tenant concerned shall have the right, personally or through his representatives and two obligatory witnesses, to be present at the search of his home or other premises.

Subject to conditions spelled out by law, police authorities may even without a court warrant or consent from the tenant enter his home or premises and carry out a search in the absence of witnesses, if this is indispensable to enforce an arrest warrant or to apprehend the offender, or to prevent serious danger to life or major property.

A search aimed at finding or securing evidence, which there is a reasonable probability to believe is to be found in the home of the perpetrator of a penal offence, may only be carried out in the presence of witnesses.

Article 35

All citizens shall be guaranteed respect for and legal protection of personal and family life, dignity, reputation and honour.

Article 36

Freedom and secrecy of correspondence and all other forms of communication shall be guaranteed and inviolable.

Restrictions necessary for the protection of the Republic's security and the conduct of criminal proceedings may only be prescribed by law.

Article 37

Everyone shall be guaranteed the safety and secrecy of personal data. Without consent from the person concerned, personal data may be collected, processed and used only under conditions specified by law.

The use of personal data contrary to the purpose of their collection shall be prohibited.

Article 38

Freedom of thought and expression of thought shall be guaranteed.

Freedom of expression shall specifically include freedom of the press and other media of communication, freedom of speech and public expression, and free establishment of all institutions of public communication.

Censorship shall be forbidden. Journalists shall have the right to freedom of reporting and access to information.

The right to correction shall be guaranteed to anyone whose constitutionally determined rights have been violated by public communication.

Article 39

Any call for or incitement to war, or resort to violence, national, racial or religious hatred, or any form of intolerance shall be prohibited and punishable.

Article 40

Freedom of conscience and religion and free public profession of religion and other convictions shall be guaranteed.

Article 41

All religious communities shall be equal before the law and shall be separate from the state.

Religious communities shall be free, in conformity with law, publicly to perform religious services, open schools, teaching establishments and other institutions, social and charitable institutions and to manage them, and shall in their activity enjoy the protection and assistance of the state.

Article 42

All citizens shall be guaranteed the right to peaceful assembly and public protest.

Article 43

Citizens shall be guaranteed the right to free association for the purposes of protection of their interests or promotion of social, economic, political, national, cultural and other convictions and objectives. For this purpose, citizens may freely form political parties, trade unions and other associations, join them or leave them

The right to free association shall be restricted by the prohibition of any violent threat to the democratic constitutional order and the independence, unity and territorial integrity of the Republic.

Article 44

Every citizen of the Republic shall have the right, under equal conditions, to take part in the conduct of public affairs, and have access to public service.

Article 45

All citizens of the Republic who have reached the age of eighteen years shall have universal and equal suffrage. This right shall be exercised at direct elections by secret ballot.

In elections for the Croatian Sabor and the President for the Republic, the Republic shall ensure suffrage to all citizens who at the time of the elections find themselves outside its borders, so that they may vote in the states in which they find themselves or in any other way specified by law.

Article 46

All citizens shall have the right to submit petitions and complaints, to make proposals to government and other public bodies and to receive answers thereto.

Article 47

Military service and the defence of the Republic shall be the duty of all citizens able to perform it.

Conscientious objection shall be allowed to all those who for religious or moral beliefs are not willing to participate in the performance of military duties in the armed forces. Such persons shall be obliged to perform other duties specified by law.

3. Economic, social and cultural rights.[53]

Article 48

The right of ownership shall be guaranteed.

Ownership implies obligations. Holders of the right of ownership and its users shall contribute to the general good.

A foreign person may acquire the right of ownership under conditions spelled out by law.

The right of inheritance shall be guaranteed.

The scope of constitutional guarantees of ownership is much wider, it goes beyond the guarantee of the ownership itself and comprises the whole range of private (civil) rights. Protection is provided not only to the individual legal power vested in the owners in relation to their possession, but also to the ownership in general as an institution within a legal system[54].

Gavella elaborates along these lines (op. cit. , footnote 42):

"It should be noted that the scope of constitutional guarantees of ownership is very broad, that it goes beyond the guarantee of the ownership itself and extends to the whole range of private (civil) rights. The use of the term "ownership" to stand for the concept of ownership rights and other private (civil) rights is quite typical in constitutional law practice. Both the Croatian Constitution and the constitutions of other European countries, when guaranteeing the constitutional

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[53] *Along with the provisions of this and next Articles also see the Report for this UniDem Seminar by Hrvoje Mom_inovi_: "Disputing an arbitration decision before the Constitutional Court under Croatian law".*

[54] *See Gavella: "The substance and limits of ownership" in "Selected material law topics", Zagreb, 1992, pp. 47 and onwards; Ante _uveli_: "Ownership restrictions only in compliance with the Constitution", Informator No. 4228, pp. 13; Mladen _uvela: "Real estate in the period of transition", Zagreb, 1994, pp. 1.*

right of ownership, provide the same to all other private (civil) rights. Thus when Article 22 of the Swiss Bundesverfassung guarantees the ownership, what it means in terms of both the doctrine and practice is the protection of not only the ownership of movables and immovables, but also of all ownership rights (limited material rights, obligational rights, intellectual property rights, including copyright and what is called industrial property rights - patent rights, the right to use a seal, etc., even some private personal rights of public law origin (the duly acquired right to use public property, concessionary rights, employees's claims which may include the rights under the social insurance scheme) -see Müller, G.: "Privateigentum heute", Zeitschrift für Schweizerisches Recht, 1981, Vol. 100, II. Halbband, Heft 1, pp. 50; Meier-Hayoz, A. u. Berner Kommentar, Vol. IV, Das Sachenrecht, I/i, Bern, 1959, pp. 101[55].

Article 49

Entrepreneurial and market freedom shall be the basis of the economic system of the Republic.

The state shall ensure all entrepreneurs an equal legal status on the market. Monopolies shall be forbidden.

The Republic shall stimulate economic progress and social welfare and shall care for the economic development of all regions.

The rights acquired through the investment of capital shall not belessened by law, nor by any other legal act.

Foreign investors shall be guaranteed free transfer and repatriation of profit and the capital invested.

"It is indisputable that in bankruptcy proceedings the debtor as a legal person was subjected to an auction held on 7 September 1992, and that the BS Company as the highest bidder qualified as a purchaser with whom a purchase contract was duly signed. Pursuant to Article 148, paragraph 1, of the Bankruptcy and Receivership Act (Official Gazette Nos. 53/91 and 9/94) a portion of the achieved price went to the Croatian Development Fund.

The contract between the Croatian Development Fund and the purchaser on the instalment repayment of the said portion of the price, i.e. the repayment of the Fund's claims, actually changed the bidding conditions at the cost of other auctioneers. Although this legal transaction came after the completion of the

[55] *See Gavella op. cit.*

auction and the signing of the purchase contract, it was bound to the published conditions of auction sale.

Since other potential purchasers were not aware of the possibility of repaying a part of the purchase price in instalments, the bidder who was not committed to the auction conditions was placed in a privileged position.

For these reasons the Constitutional Court decided that in this case the constitutional right to equality of all before the law, pursuant to Article 14, paragraph 2, and the constitutional right of equal legal status of all entrepreneurs on the market, pursuant to Article 49, paragraph 2, of the Constitution, were violated.

Consequently, pursuant to the provisions of Article 30 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (Official Gazette No. 13/91), the Constitutional Court accepted the complaint, declared the disputed court decisions null and void and returned the file to the responsible Commercial Court in Split for a renewed procedure (points 1 and two of the dispositif). In the continued procedure the said Court shall renew the sale of the debtor's estate in conformity with the provisions of Articles 129-130 of the Bankruptcy and Receivership Act"[56].

Article 50

Ownership may in the interests of the Republic be restricted by law, or property taken over against indemnity equal to its market value.

Entrepreneurial freedom and property rights may exceptionally be restricted by law for the purposes of protecting the interests and security of the Republic, nature, the human environment and human health.

The provision of Article 50 is also considered by the Constitutional Court as a constitutional law provision. This is exemplified by its decision No. U-III-350/1993 which says, inter alia: "The said decision of the Supreme Court of the Republic of Croatia does not contravene the J.M's constitutional right under Article 50 of the Constitution, because interests are not considered to be a market value compensation guaranteed by the Constitution".

Yet this point may be a point of issue, because the claimant will seek protection primarily by referring to the constitutional right of ownership under Article 48 of

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[56] *Decision of the Constitutional Court No. U-III-361/1992 of 1 June 1994 published in the Official Gazette Nos. 45/1994 and 51/1994.*

the Constitution and, only secondarily, by referring to Article 50, paragraph 1, of the Constitution. Paragraph 2 is a provision similar to the provision of Article 16 of the Constitution concerning the restrictions on freedoms and rights"[57], [58].

Article 51

Everyone shall participate in the defrayment of public expenses, in accordance with their economic possibilities.

The tax system shall be based on the principles of equality and equity.

Article 52

The sea, seashore and islands, waters, air space, mineral wealth and other natural resources, as well as land, forest, fauna and flora other parts of nature, real estate and items of special cultural, historic, economic and ecological significance which are specified by law to be of interest to the Republic, shall enjoy its special protection.

The way in which goods of interest to the Republic may be used and exploited by holders of rights to them and by owners, and compensation for the restrictions imposed on them, shall be regulated by law.

Article 53

The National Bank of Croatia shall be the central bank of the Republic of Croatia.

The National Bank of Croatia shall, within the framework of its rights and duties, be responsible for the stability of the currency and for general payment liquidity at home and abroad.

The National Bank of Croatia shall be independent in its work and shall be responsible to the Croatian Sabor. Profits made through the operation of the National bank of Croatia shall accrue to the state budget.

The status of the National Bank of Croatia shall be regulated by law.

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[57] *See Jadranko Crni_: "Comments on the Expropriation Act", Informator, 1994, pp. 22 and Jadranko Crni_: "Expropriation of real estate - conditions and obstacles", Organizator, Zagreb, 1994, pp. 29.*

[58] *Also see Sokol-Smerdel: op. cit., pp. 72.*

Article 54

Everyone shall have the right to work and to freedom of work.

Everyone shall be free to choose his vocation and occupation, and all work places and duties shall be accessible to everyone under the same conditions.

Article 55

Every employed person shall have the right to remuneration, ensuring for himself and his family a free and decent life.

Maximum working hours shall be regulated by law.

Every employed person shall have the right to a weekly rest and annual holidays with pay, and may not renounce these rights.

Employed persons may, in conformity with law, participate in decision-making in firms in which they work.

Article 56

The right of those employed and of members of their families to social security and social insurance shall be regulated by law and collective agreements.

Rights in connection with childbirth, maternity and child shall be regulated by law.

Article 57

The Republic shall ensure to weak, helpless and other unprovided-for citizens, due to unemployment or incapacity to work, the right to assistance to meet their basic needs.

The Republic shall ensure special care for the protection of disabled persons and their inclusion in social life.

Receiving humanitarian help from abroad may not be forbidden.

Article 58

Every citizen shall be guaranteed the right to health care.

Article 59

In order to protect their economic and social interests, all employees and employers shall have the right to form trade unions and freely to join them und leave them.

Trade unions may form their federations and associations in international trade union organizations.

Formation of trade unions in the armed forces and the police may be restricted by law.

Article 60

The right to strike shall be guaranteed.

The right to strike may be restricted in the armed forces, the police, government administration and the public services specified by law.[59]

Article 61

The family shall enjoy special protection of the Republic.

Marriage and legal relations in marriage, common-law marriage and families shall be regulated by law.

Article 62

The Republic shall protect maternity, children and young people, and shall create social, cultural, educational, material and other conditions conducive to the realization of the right to decent life.

Article 63

Parents shall have the duty to bring up, support and school their children, and shall have the right and freedom independently to decide on the upbringing of their children.

Parents shall be responsible for ensuring the right of their children to the full and and harmonious development of their personalities.

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[59] *See Dr. _eljko Poto_njak: "The Right to Strike", Zagreb, 1992.*

Physically and mentally handicapped and socially neglected children shall have the right to special care, education and welfare.

Children shall be bound to take care of old and helpless parents.

The Republic shall take special care of parentless minors and of parentally neglected children.

Article 64

Everyone shall have the duty to protect children and helpless persons.

Children may not be employed before reaching the legally determined age, nor may they be forced or allowed to do work which is harmful to their health or morality.

Young people, mothers and disabled persons shall be entitled to special protection at work.

Article 65

Primary schooling shall be compulsory and free.

Everyone shall have access, under the same conditions, to secondary and higher education in accordance with his abilities.

Article 66

Under conditions specified by law, citizens may open private schools and teaching establishments.

Article 67

The autonomy of universities shall be guaranteed.

Universities shall independently decide on their organization and work in conformity with law.

Article 68

Freedom of scientific, cultural and artistic creativity shall be guaranteed.

The Republic shall stimulate and assist the development of science, culture and arts. [60].

The Republic shall protect scientific, cultural and artistic goods as spiritual national values.

Protection of moral and material rights deriving from scientific, cultural, artistic, intellectual and other creative endeavour shall be guaranteed.

The Republic shall promote physical culture and sport.

Regulations incorporated from international law

The list of constitutional human and civil rights and guarantees contained in the Croatian Constitution is not conceived as final or closed. This list is and will be replenished by the provisions of international agreements acceded to by the Republic of Croatia[61].

To quote from Article 134 of the Constitution: "International agreements concluded and ratified in accordance with the Constitution and made public shall be part of the Republic's internal legal order and shall in terms of legal effect be above law".

Therefore, by acceding to an international convention regulating human rights and freedoms, the Republic of Croatia will enforce the provisions of such a convention, even if its legislation in the respective area is at variance with the provisions thereof.

In this way the Republic of Croatia as a sovereign state is committed to respect human rights, including national and minority rights, not as an internal matter but as a common cause of the international community. This does not diminish its sovereignty. What it does mean is that Croatia accepts the rules prevailing in the democratic world today of which it is an equal member.

This, however, poses certain dilemmas:

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[60] *Judge Belajec in his study (see footnote 22), for example, advocates the view that Articles 20, 21, para. 2, Articles 27, 39, 47, para. 1, Article 51, para. 1, Articles 52, 53, 61, 62, 63 and others have been incorporated in Part III "Fundamental human and civil rights and freedoms" for reasons of systematic presentation, not in order to define the constitutional rights of citizens.*

[61] *See Siniša Rodin: "The Constitutional Court of the Republic of Croatia and International Law", Zakonitost No. 8-12/93, pp. 578.*

a) The Constitutional Court must make allowance also for international documents in its work. On the other hand, the provision of Article 134 of the Constitution concedes the prevalence of international conventions concluded, ratified and published in accordance with the Constitution, which, at the same time, means that in the national legal system they occupy a position lower than that pertaining to the Constitution.

b) What is also questionable is the immediate applicability of international conventions in national legal practice, including the applicability in the Constitutional Court's practice of legal supervision; such applicability seems to be sustainable only if a national law or a regulation finds itself in collision with these international instruments, but not in the immediate application as an independent basis for a constitutional complaint.

The above suggests that international conventions cannot be given a constitutional status within national law, not even when it comes to Article 1 of the Constitutional Law on Human Rights and Freedoms and the Rights of National and Ethnic Communities or Minorities in the Republic of Croatia[62]*, which reads:*

"The Republic of Croatia in accordance with:

- the Constitution of the Republic of Croatia,

- the principles of the United Nations Charter,

- the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights,

- the Final Act of the Conference on Security and Cooperation in Europe (CSCE Helsinki), the Paris Charter on New Europe and other CSCE documents referring to human rights, especially the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE and the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE,

- the Council of Europe Convention on Protection of Human Rights and Fundamental Freedoms, and its protocols,

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[62] *Revised text in the Official Gazette No. 34/92.*

- the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Prevention and Punishment of the Crime of Genocide, and the Convention on The Rights of the Child,

- pledges to respect and protect national and other fundamental human rights and freedoms, the rule of law, and other supreme values of its constitutional and international legal system for all its citizens."

As for human rights and freedoms, here is a quotation from Article 2 of the said Constitutional Law:

"The Republic of Croatia shall recognize and protect human rights and freedoms, notably:

m) all other rights provided by the international instruments from Article 1 of this Law, subject only to the exceptions and restrictions enumerated in those instruments, without any discrimination based on sex, race, colour, language, religion, political and other beliefs, national and social background, cultivating links with a national minority, property, status, achieved by birth or otherwise (Articles 14 and 17, Paragraph 3 of the Constitution)."

Thus the Republic of Croatia unilaterally adopts some international instruments as part of its efforts to be integrated into the European public order. However, although its Constitution and the said Constitutional Law make Croatia a part of the European constitutional tradition, the argument that these international provisions are at par with or even above the Constitution lacks credibility, the more so as the Republic of Croatia is still not a member state of the European Union.

"As shown by Andrew Z. Drzemczewski[63], the impact and status of the Convention widely varies from state to state within the Council of Europe. In most cases the Convention's impact on and the status in domestic law depend on general national standards relative to international law. It is only in Austria that the European Human Rights Convention has a constitutional status. In Switzerland its status is close to a constitutional status. In other states the Convention is recognized a status between the law and the constitution or the legal power of a law. The other states do not even consider the Convention a part of their domestic law, so that individuals cannot make a direct reference to it in their lawsuits"[64].

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[63] *See Andrew Z. Drzemczewski: European Human Rights Convention in Domestic Law, A Comparative Study, 1983.*

[64] *See Albert Bleckmann: Verfassungsrang der Europäischen Menschenrechtskonvention, Europäische Grundrechte, zeitschrift, Heft 7-8, 1994, pp. 149.*

In his cited article Bleckmann gives an account of these differences (pp. 150) in an attempt to prove that the European Human Rights Convention should be assigned at least a constitutional status within national legislations.

This brings us to Article 134 of the Constitution and Article 1 of the said Constitutional Law, which, irrespective of its name, does not have the force of the Constitution[65].

Hence no constitutional complaint for violation of rights can be founded on these international instruments, not even on the Constitutional Law on Human Rights and Freedoms and the Rights of National and Ethnic Communities or Minorities as regulations of domestic law. For it is only the Constitution that defines the fundamental constitutional freedoms and rights. This dilemma, however, has no bearing on the Republic of Croatia (at least not at present in relation to the experience of the Constitutional Court), because, as illustrated by the above presented catalogue of fundamental constitutional human and civil freedoms and rights, the Constitution has adopted all essential human rights provisions from the international instruments. That is why these fundamental (constitutional) human and civil freedoms and rights can be successfully defended in Croatia through a constitutional complaint, but with reference to the provisions of the Croatian Constitution. The current practice of referring to the provisions of the mentioned international instruments in constitutional complaints or in the explanations to the decisions by the Constitutional Court should be, for the time being, attributed to the openness of the Croatian legal system to international law, its readiness to interpret all fundamental human and civil freedoms and rights in conformity with the substance and purpose of these international instruments. I believe that they cannot be an independent or sole foundation for a constitutional complaint, because this would contradict the explicit provisions of Article 125, paragraph 3, of the Constitution concerning the fundamental constitutional human and civil freedoms and rights, those defined in the Constitution, not some other rights based on the laws only (although, of course, these are supposed to be in accordance with the Constitution), not even those regulations which, pursuant to Article 134 of the Constitution, prevail over domestic law, but are inferior to the Constitution in terms of legal power. Therefore, their importance can only be "supportive", accessory.

Protection of local self-government

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[65] *It was passed on the basis of Article 83, paragraph 1, of the Constitution as a law regulating national rights - by a two-third vote of all MPs. It is not a constitution-making procedure: The Constitutional Act on the Constitutional Court, on the other hand, was passed in compliance with the procedure envisaged for amending the Constitution (Article 127, paragraph 2, of the Constitution).*

The Constitution guarantees the right to local self-government (Article 128 of the Constitution). The self-government units can be, in accordance with the law, a municipality, a district or a town (Article 129, paragraph 1, of the Constitution). The counties are both local administration and local self-government units (Article 131, paragraph 1 of the Constitution).

As for the protection of local self-government, the Law on Local Self-Government and Administration[66] prescribes in its Article 81 that in case of the dissolution of a representative body of a local self-government unit by the Croatian Government, the president of the dissolved representative body can submit a constitutional complaint to the Constitutional Court within 48 hours.

The Constitutional Court shall decide on such a constitutional complaint within seven days.

So far the Constitutional Court has not received any such constitutional complaints.

Contesting the arbitration decision in the proceedings before the Constitutional Court according to the Croatian law - Report by Mr Hrvoje MOMČINOVIĆ

Croatia

I. INTRODUCTORY NOTES

A constitutional complaint is the legal remedy in the constitutional court protection of the constitutionally guaranteed rights and freedoms of natural and legal persons in the Republic of Croatia. Constitutional court protection may even be obtained in cases when an arbitration decision has violated some of the constitutional rights of the Plaintiff.

In the text below, the constitutional complaint is presented with special regard to the person of the Plaintiff and the rights and freedoms protected by the Constitutional Court of the Republic of Croatia. The requirements and terms for lodging the complaint are elaborated, as well as the content of the complaint and the decisions to be made by the Constitutional Court with regard to this remedy.

Particular attention is paid to the question of contesting the arbitration decision by means of the constitutional complaint, the proceedings before the Constitutional Court in such legal situations, and the legal status after the repeal of the arbitration decision.

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[66] *Official Gazette Nos. 90/1992, 94/1993 and 117/1993.*

II. THE CONSTITUTIONAL COMPLAINT AS THE REMEDY IN THE PROTECTION OF THE CONSTITUTIONAL FREEDOMS AND RIGHTS

1. Legal sources for the constitutional court protection of constitutionally guaranteed freedoms and rights

In the Republic of Croatia, the protection of the rights and freedoms of citizens and others who have rights is exercised by the judiciary and administrative authorities, as well as by other bodies vested with public powers. The Constitution of the Republic of Croatia ("Narodne novine" /the Official Gazette/ No. 56/90, hereinafter: the Constitution) and the Constitutional Act on the Constitutional Court of the Republic of Croatia (Official Gazette No. 13/91, hereinafter: the Constitutional Act) guarantee all those who hold rights an additional, direct constitutional court protection in cases where their freedoms and rights provided by the Constitution are violated. This protection may be obtained by means of constitutional complaint which is decided on by the Constitutional Court of the Republic of Croatia (hereinafter: the Constitutional Court).

One of the competences of the Constitutional Court is to protect the constitutional rights and freedoms of man and citizen (Art. 125, line 3, of the Constitution). Under the provision of Art. 127, Para 1, of the Constitution, the protection of the constitutional rights and freedoms of man and citizen is regulated by the Constitutional Act. The Constitutional Act on the Constitutional Court of the Republic of Croatia - passed on the basis of the abovementioned constitutional provision - in Part IV ("Protection of the constitutional rights and freedoms of man and citizen") prescribes in Articles 28-30 some substantial legal and procedural provisions on the protection of the constitutional rights and freedoms, as well as on the remedy on the basis of which the protection is to be achieved. These provisions are, to some extent, elaborated in the Rules of Procedure of the Constitutional Court of the Republic of Croatia (Official Gazette No. 29/94, hereinafter: the Rules of Procedure).

Only three Articles of the Constitutional Act regulate the issue of the protection of the constitutional rights and freedoms. Due to such a lack of regulation, the practice of the Constitutional Court of the Republic of Croatia is also a significant legal source in this field.

2. Rights and freedoms protected by the Constitutional Court

From the provisions of Art. 28, Para 1, of the Constitutional Act it follows that constitutional court protection is rendered with regard to the violation of all

constitutional rights and freedoms of man and citizen.[67] *Thus, the Constitution (Art. 127, Para 1) and the Constitutional Act (Art 28, Para 1) have not adopted a system of (positive or negative) enumeration of the constitutional rights and freedoms to be additionally protected by the Constitutional Court of the Republic of Croatia, but have joined these to constitutional systems which provide such protection for all constitutional freedoms and rights.*[68]

Predominant in the practice of the Constitutional Court so far have been requests for the protection of the following constitutional rights and freedoms: the right to equality before the law (Art. 12, Para 2, of the Constitution), the right to complaint (Art. 18 of the Constitution), the right to the inviolability of human freedom and personality, the right to a fair trial (Art. 29, Para 1, line 1, of the Constitution), the right to access to public service (Art. 44 of the Constitution), the right to ownership and inheritance (Art. 48 of the Constitution), entrepreneurship and market freedoms i.e. the rights acquired by capital investment (Art. 49 of the Constitution), the right to work (Art. 54 of the Constitution), the right to remuneration (Art. 55 of the Constitution) and the right to health care (Art. 58 of the Constitution).

Thus, the Constitutional Court shall not protect the rights which do not fall within the scope of the constitutional rights, such as for instance the right to allowance for somebody else's assistance and care (Ruling of the Constitutional Court No. U-III-166/91), the right to a disability pension (Ruling of the Constitutional Court No. U-III-142/91 of 30.10.1991), the right of tenure (Ruling of the Constitutional Court No. U-III-159/92 of 08.07.1992), the primary right to use building land (Ruling of the Constitutional Court No. U-III-304/92 of 18.05.1993).

We hereby emphasize that the Constitutional Court does not review whether the regulations are being correctly applied by courts, except when an incorrect application of the regulations has led to the violation of constitutionally guaranteed freedoms and rights of man and citizen. This view has been expressed in a number of the Constitutional Court decisions, e.g. U-III-1/92 of 20.05.1992, U-III-9/92 of 25.03.1992, I-III-116/91 of 30.10.1991, U-III-105/91 of 04.03.1992, U-III-312/1992 of 31.03.1993.

3. <u>Plaintiff</u>

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[67] *The provision reads: "(1) Anyone may lodge a constitutional complaint with the Constitutional Court, if they believe that by a decision of the judicial or administrative authorities or other bodies vested with public powers one of their constitutionally guaranteed rights and freedoms of man and citizen (hereinafter: constitutional right) has been violated."*

[68] *Crni_, J.: Ustavna tu_ba - zaštita ustavnih sloboda i prava _ovjeka i gradjanina, Prilog br. 2, Ustav Republike Hrvatske - Komentari, objašnjenja i ustavnosudska praksa - "Narodne novine", Zagreb, 1993, page 105.*

Without any doubt, the constitutional complaint may be lodged by any citizen who believes that by a decision of judicial or administrative authorities or other bodies vested with public powers his or her constitutional rights have been violated.

It is debatable whether a legal person may be the Plaintiff.[69]

Some exclude the possibility for a legal person to be the Plaintiff, because under the provisions of Art. 28, Para 1, of the Constitutional Act[70] *the constitutional complaint shall render the constitutional court protection for the constitutional rights of man and citizen which undoubtedly are personal rights.*[71]

We believe that this view, based on a grammatical interpretation of the Constitution (Art. 125) and the Constitutional Act (Art. 28, Para 1), is not in conformity with the spirit of the Constitution. Equality and the rule of law, among other things, are the highest values of the constitutional order of the Republic of Croatia (Art. 3 of the Constitution). Moreover, the Constitution guarantees the right to ownership (Art. 48, Para 1), and the entrepreneurship, and market freedom, which are the basis of the economic system of the Republic of Croatia (Art. 49, Para 1). The Government shall provide equal legal status in the market for all entrepreneurs (Art. 49, Para 2, of the Constitution). Finally, under the Constitution the rights acquired by capital investment cannot be reduced by law or any other legal act (Art. 49, Para 4). The holders of the abovementioned constitutional rights (the right to ownership, the right to market equality, the rights acquired by capital investment) and freedoms (entrepreneurship and market freedoms) may be not only natural but legal persons as well, e.g. companies. Is then equality of all holders of constitutional rights and freedoms, and consistently the rule of law, provided, if the constitutional court protection is rendered only with regard to the violation of the constitutional rights and freedoms of citizens, and not of the legal persons as well? We believe that such conduct would be contrary to the fundamental values of the constitutional order of the Republic of Croatia (equality and the rule of law), so we hold that not only a citizen (natural person) but also any legal person ("anyone", see Art. 28, Para 1, of the Constitutional Act) believing their constitutional rights have been violated by a decision of judicial or administrative authorities or other bodies may lodge a constitutional complaint.

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[69] *Sale_i_, M.: Zaštita ustavnih prava putem ustavne tu_be, "Informator", No. 4024, of 30.09.1992.*

[70] *See note No.1.*

[71] *Tudjen-Mazuth, B.: Ustavni zakon o Ustavnom sudu Republike Hrvatske s komentarom, "Informator", Zagreb, 1991, page 26.*

The view that the constitutional complaint may also be lodged by a legal person has been adopted in the practice of the Constitutional Court (Ruling No. U-III-1/92 of 20.05.1992, U-III-51/92 of 08.04.1992, U-III-361/92 of 01.06.1994).

A constitutional complaint cannot be lodged on behalf of another person. Only the person whose constitutional right has been violated may act as Plaintiff (Ruling of the Constitutional Court U-III-51/92 of 08.04.1992, U-III-358/93 of 19.01.1994, U-III-217/92 of 07.07.1993).

A constitutional complaint is lodged personally or via an attorney. The authorization of an attorney must be based on a special power-of-attorney (Art. 30, Para 2, of the Rules of Procedure), as confirmed by the practice of the Constitutional Court (e.g. Ruling U-III-246/93 of 08.12.1993, U-III-48/92 of 08.07.1992, U-III-264/94 of 01.06.1994).

4. <u>Requirements for lodging a constitutional complaint</u>

To lodge a constitutional complaint, both of the following two requirements must be fulfilled:

1. there must be a decision of the judicial or administrative authorities or other bodies vested with public powers (Art. 28, Para 1, of the Constitutional Act).[72] A constitutional complaint may be lodged only with regard to the decisions of the government authorities, i.e. other bodies vested with public powers (Ruling of the Constitutional Court No. U-III-182/93 of 07.07.1993, U-III-236/93 of 05.01.1994).

2. the regular legal course must be exhausted (Art. 28, Paras 2 and 3, of the Constitutional Act).[73] This means:

a) If in extrajudiciary or court proceedings no review is allowed (judged either by the value or type of dispute), the prerequisite for lodging a constitutional complaint is that the regular legal course be exhausted - decision on the

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[72] *See note No. 1.*

[73] *The provisions read: "(2) If another legal course is provided with regard to the violation of the constitutional rights, the constitutional complaint may be lodged only after such legal course has been exhausted.*

(3) In matters where an administrative lawsuit is provided, i.e. a review in the court proceedings or in extrajudiciary proceedings, the legal course is exhausted after these remedies have also been decided on."

complaint in extrajudiciary or court proceedings. The same is corroborated by the practice of the Constitutional Court, e.g. the Ruling No. U-III.120/92 of 28.09.1993.

If in specific case the review is allowed, the regular legal course is exhausted with the decision on the review declared. (Rulings of the Constitutional Court Nos. U-III-357/92 of 09.06.1993, U-III-120/92 of 28.09,1993).

In all cases in which the complaint or review in the court or the extrajudiciary proceedings is allowed but not lodged or requested, the regular legal course shall not be deemed exhausted, notwithstanding the fact that the court decision has become effective. This position was stated in many Constitutional Court decisions, e.g. U-III-78/92 of 08.07.1992, U-III-79/92 of 27.05.1992, U-III-241/92 of 31.03.1993, U-III-176/92 of 10-03.1993, U-III-170/93 of 09-02.1994.

b) In cases in which only an administrative lawsuit is provided, i.e. a quasi-administrative lawsuit, the regular legal course is exhausted after a decision is given on the charges in the administrative lawsuit i.e. on the request in the quasi-administrative lawsuit. This is also the position of the Constitutional Court - Ruling No. U-III-244/92 of 02.06.1993.

We hereby point out that other prior extraordinary remedies like renewed proceedings or a request for the protection of legality in court proceedings are no prerequisite requirement for a constitutional complaint. This is also corroborated by the practice of the Constitutional Court (e.g. Ruling No. U-III-236/93 of 06.01.1994). If such remedies are made use of, they do not postpone the proceedings initiated by the constitutional complaint before the Constitutional Court. These proceedings run in parallel, unless the Constitutional Court decides to discontinue the proceedings until the decision of the other court on the extraordinary remedy is reached.

5. <u>Term for lodging constitutional complaint</u>

Under Art. 29 of the Constitutional Act, the constitutional complaint may be lodged within one month of the date when a decision to be contested is received.

The one month term starts running from the receipt of the decision by which the regular legal course is exhausted: in cases in which no review is allowed it is the decision of the Supreme Court of the Republic of Croatia, and in cases in which an administrative lawsuit is allowed, it is the decision of the Administrative Court of the Republic of Croatia (Ruling of the Constitutional Court No. U-III-294/92 of 20.01.1993, U-III-398/93 of 05.01.1994).

A constitutional complaint is lodged with the Constitutional Court directly or by mail. The date of the registered letter's postal stamp is considered as the date of lodging the complaint with the Constitutional Court (Art. 22, Para 3, of the Rules of Procedure). This is also corroborated by the practice of the Constitutional Court (Ruling No. U-III-300/92 of 02.12.1992).

A constitutional complaint which is not lodged in due time shall be rejected by the Constitutional Court (Article 58 of the Rules of Procedure).

6. <u>Restitution</u>

The loss of the right to lodge a constitutional complaint due to the expiry of the one month term may be unjust in the case of a subject who was not able to duly lodge the constitutional complaint. The need to rectify such injustice is covered by the classic institute of the procedural law - the restitution (restitutio in integrum), by which the proceedings are restored to the state of affairs prior to the expiration of the due term.

Under the provisions of Art. 52 of the Rules of Procedure, a person who for justified reasons misses the term for lodging the constitutional complaint shall be accorded the restitution by the Constitutional Court, if such a person applies for restitution within 15 days after the disappearance of the reason for missing the due term and simultaneously lodges the constitutional complaint. No restitution may be applied for once three months have passed since the date of the expiry of the due term for the lodging of the constitutional complaint. No restitution shall be accorded, if the term for the application for the restitution has expired (restitutio restitutionis non datur).

7. <u>Content of constitutional complaint</u>

Under the provisions of Art. 51 of the Rules of Procedure, a constitutional complaint must contain the following:

1. name and surname, residence or place of abode, or the company and position of the Plaintiff;

2. name and surname of the Plaintiff's attorney;

3. reference No. of the decision by which the Plaintiff's constitutional right or freedom has been violated. This is corroborated by the Constitutional Court, e.g. Ruling No. U-III-147/93 of 20.10.1993;

4. reference to the constitutional right or freedom which has been violated (see also the Rulings of the Constitutional Court Nos. U-III-91/91 of 04.07.1991, U-III-175/91 of 04.03.1991, U-III-314/1993 of 19.01.1994, U-III-32/94 of 20.02.1994, U-III-89/94 of 27.04.1994).

5. reasons for the complaint - e.g. whether the Plaintiff's constitutional right has been violated by an incorrect application of the substantive law or by the violation of the procedural provisions.

6. evidence that the regular legal course has been exhausted (Ruling of the Constitutional Court No. U-III-147/93 of 20.10.1993).

7. evidence that the complaint has been duly lodged (see also the Ruling of the Constitutional Court No. U-III-32/94 of 20.04.1994).

8. Plaintiff's signature, i.e. the signature of his attorney, if there is one.

The disputed document (original or copy) must be enclosed to the constitutional complaint, as well as the special power-of-attorney, if the plaintiff lodges the constitutional complaint through an attorney (see also the Ruling of the Constitutional Court U-III-264/94 of 01.06.1994).

8. <u>Rejecting the constitutional complaint and dismissing the case</u>

The Constitutional Court issues a ruling in cases where the constitutional complaint is rejected, i.e. the case is dismissed.

Under the provisions of Art. 58 of the Rules of Procedure, the Constitutional Court shall reject the constitutional complaint if it is not within its jurisdiction, if the complaint has not been duly lodged, if it is incomprehensible or impermissible. The constitutional complaint is unduly lodged if it has been lodged after the expiry of the one month term, counting from the date of receipt of the disputed decision (Art. 29 of the Constitutional Act). An incomplete constitutional complaint is one which does not have the content prescribed under the provisions of Art. 51 of the Rules of Procedure.[74] The constitutional complaint is impermissible: if the regular legal course has not been exhausted, if the Plaintiff has not made use of the available remedies in the prior proceedings (e.g. complaint in court proceedings in which he was partly unsuccessful, and the complaint was lodged or the review was requested by the opponent only), or if the constitutional complaint was lodged by a person who was not authorized to do so.

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[74] *For details see II/7 above.*

The proceedings initiated by the constitutional complaint are dismissed: 1) if the plaintiff dies, 2) if the plaintiff who is a legal person ceases to exist - and in both cases the proceedings relate to the Plaintiff's personal, untransferable rights, 3) in case the constitutional complaint is withdrawn (Art. 64 of the Rules of Procedure).

9. Court decision

By its decision the Court shall decide on the merit of the case. The complaint may thereby either be accepted or rejected as unfounded (Art. 59 of the Rules of Procedure).

As a rule, the Constitutional Court judges the possible violation of a constitutional right on the basis of facts which have been established in the proceedings prior to the lodging of the constitutional complaint, and on the basis of the substantive law applied in the proceedings. Exceptionally, in cases where there is a reasonable doubt that the Plaintiff's constitutional right has been violated due to incorrectly or incompletely established facts and the incorrect application of the substantive law, the Constitutional Court will be authorized and obliged to establish the facts and, by applying appropriate regulations, to establish whether the substantive law has been violated (decision of the Constitutional Court Nos. U-III-217/92 of 07.07.1993, U-III-134/93 of 20.10.1993).

The constitutional complaint is rejected as unfounded by the decision of the Constitutional Court when the Court establishes that the reasons for which the act has been disputed do not exist (Art. 61 of the Rules of Procedure).

By the decision to accept the constitutional complaint, the disputed act which violated the constitutional right is repealed and the case is returned to the competent authority for renewed procedure (Art. 30 of the Constitutional Act). The Constitutional Court is not a full jurisdiction court, and therefore cannot alter the disputed act. If it finds that the Plaintiff's constitutional right or freedom has been violated not only by the disputed act (e.g. the decision of a court of appeal) but also by some other acts relating to the case (e.g. decisions of the court of the first instance or the appellate court), the Constitutional Court shall also repeal that Act either completely or in part (Art. 60 of the Rules of Procedure). In repealing the disputed act, the Constitutional Court is to state in the opinion to its decision which constitutional right or freedom was violated and in what way (Art. 62, Para 2, of the Rules of Procedure).

The court or the body whose act has been repealed by the decision of the Constitutional Court, shall conduct proceedings by the rules regulating the procedure in the specific case (court proceedings, extrajudiciary proceedings etc.).

It is important to note that the ruling of the Constitutional Court is fully binding on the court (body). Under Art. 62, Para 3, of the Rules of Procedure the body whose act has been repealed is obliged to enact another one in lieu of the one which has been repealed, whereby it is bound by the legal opinion of the Constitutional Court on the violation of the constitutionally guaranteed freedoms and rights of the Plaintiff.

III. CONTESTING THE ARBITRATION DECISION BY MEANS OF CONSTITUTIONAL COMPLAINT

1. General remarks on the arbitration decision as a prerequisite for lodging the constitutional complaint

The Constitutional Act does not say anything about the arbitration decision as an act which may be disputed by the constitutional complaint. The question is: Is there, in principle, a possibility of constitutional court protection against the violation of the constitutional freedoms and rights by an arbitration decision (ruling)?

In answering this question one should start with the fact that arbitration tribunals (as appointed) are legal media which derive their authority, in almost all kinds of property lawsuits in which the parties may freely dispose of their rights, from the consensual will of the parties to the dispute.[75] Thus, the authority of the appointed arbitrators to judge and make decisions on the matter in dispute depends on the will of the parties. However, our legal order delegates to the appointed tribunal, respecting the agreement of the parties, the basic prerogatives of the state judiciary. Arbitration is a judiciary authority: it judges and makes a decision which is effective and enforceable in relation to the parties (Art. 481 and 483 of the Civil Procedure Act, "Narodne novine" Nos. 53/91 and 91/92, hereinafter: CPA). The party which succeeds in the arbitration proceedings may thus immediately demand that the competent state court enforce the arbitration decision (except in the case when the agreement of the parties allows for the possibility of contesting the decision before a higher level appointed tribunal - Art. 483, Para 1, of CPA).

The judgement of the appointed tribunal is an act of delegated jurisdiction with the force of an effective regular court judgement.[76] Accordingly, we believe that

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[75] *Triva, S.: Arbitra_no rješavanje medjunarodnih trgova_kih sporova, in Zbornik Radova "Medjunarodna trgova_ka arbitra_a u Hrvatskoj i Sloveniji", Hrvatska gospodarska komora, Zagreb, 1993, p. 2.*

[76] *Triva, S.-Belajec, V.-Dika, M.: Gradjansko parni_no procesno pravo, VI ed., "Narodne novine", Zagreb, 1986, p. 706.*

the arbitration decision (judgement, ruling) should, in principle, be placed within the category of "judiciary decision" in the sense of the provisions of Art. 28, Para 1, of the Constitutional Act. Therefrom follows the conclusion: the constitutional complaint may be lodged in the case of the violation of the constitutional rights and freedoms by an arbitration decision (as well).

This, of course, applies only to decisions of "genuine" arbitration, i.e. arbitration which has all the characteristics of this procedural legal institute. It does not apply to decisions of "non-genuine" arbitration, because they do not have the significance of a court judgement, but only represent a basis for seeking legal protection before the court.[77]

2. Which arbitration decisions may be contested by the constitutional complaint

a) "Domestic" arbitration decision - the Constitutional Court is competent to decide on matters only if the Plaintiff's constitutional right or freedom is violated by a "domestic" arbitration decision.

Qualifying an arbitration decision as "domestic" or "foreign" is disputable. In modern internal legal and international legal regulations two criteria prevail for establishing to which category a decision belongs, and whether it should be rated as "domestic" or "foreign": the criterion of the place where the decision was made, and the criterion of the autonomy of the will of the parties.[78]

So much for Croatian internal law.[79] *In theory, the relation of these criteria is disputable. According to one opinion, the provisions of Art. 97 of LRC is to be*

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[77] *For details about the difference between the "genuine" and "non-genuine" arbitration see Triva-Belajec-Dika, op.cit., pp. 688-689, 691.*

[78] *Ude, L. Pobijanje arbitra_ne odluke, in Zbornik radova "Medjunarodna trgova_ka arbitra_a u Hrvatskoj i Sloveniji", Hrvatska gospodarska komora, Zagreb, 1993, p. 103; Dika, M. Priznanje i izvršenje stranih arbitra_nih odluka po hrvatskom i slovenskom pravu, in the abovementioned Zbornik, pp. 118-119.*

[79] *See the provisions of Art. 97 of the Law on Resolving Conflicts between Law and the Regulations of Foreign Countries in Certain relations ("Narodne novine No. 53/91, hereinafter: LRC), which read:*

"The decision which was not made in the Republic of Croatia is to be understood as the foreign arbitration decision.

The foreign arbitration decision belongs to the state in which it was made.

literally applied: decisions made abroad and decisions made in the Republic of Croatia under foreign procedural law are foreign decision, unless they contravene the compulsory regulations of the Republic of Croatia. Decisions made abroad under Croatian procedural law are not considered as domestic.[80] *Another opinion holds that under the provisions of Art. 97 of LRC the primary criterion for establishing the type of arbitration decision, irrespective of the place where it was made, should be the autonomy of will, while the criterion of place would be subsidiary. A decision made abroad may thus be qualified as domestic, if subject to the Croatian procedural law.*[81]

LRC does not contain provisions on which arbitration decision is to be considered domestic. The conclusion on this matter should be made argumento a contrario from the provisions of Art. 97 of LRC: it is the arbitration decision made in the Republic of Croatia; such decision belongs to the Croatian state. In favour of this conclusion one may quote the provision (Para 3 of the abovementioned Article) under which even the arbitration decision made in Croatia is considered foreign, if the prescribed requirements are met; if not, the arbitration decision is domestic.[82]

It is worthwhile noticing and further examining the position under which even the arbitration decision made by an arbitration tribunal with the seat abroad should be considered domestic, if the procedural law of the Republic of Croatia was essentially applied.[83]

The arbitration decision which was made in the Republic of Croatia is to be considered also as a foreign arbitration decision, if in passing it the procedural law of a foreign state was applied, and if it is not in contravention with compulsory regulations of the Republic of Croatia.

The foreign arbitration decision under Paragraph 3 of this Article belongs to the state whose procedural law was applied.

[80] *Dika, M.: Pojam priznanja strane arbitra_ne odluke under LRC 82, "Privreda i pravo" 3-4/86;*

Dika, M.: Priznanje i izvršenje stranih arbitra_nih odluka, in the manual"Arbitra_no rješavanje medjunarodnih trgova_kih sporova", Ljubljana 1989, pp. 64-65; Wedarn-Luki_, D. in Medjunarodno zasebno pravo, Komentar zakona, Ljubljana, 1992, pp. 144-146.

[81] *Triva-Belajec-Dika, op.cit. p. 698; Goldštajn,A._Triva, D.: Medjunarodna trgova_ka arbitra_a, "Informator", Zagreb, 1987, pp.211-214.*

[82] *Goldštajn-Triva, above, p. 211.*

[83] *For details see: Ude, op.cit. p.104.*

We should briefly add that the concept of a domestic arbitration decision is regulated by some international conventions. Thus, for example, the 1961 European (Geneva) Convention on International Trade Arbitration is applied to arbitration decisions made under agreements for settling international trade disputes between natural and legal persons with the usual residence or seat in different contracting states at the time of the conclusion of the agreement (Art. I/1). The 1958 New York Convention on the Recognition and Execution of Foreign Arbitration Decisions does not require that the decision be made on the territory of another contracting state. It allows for the decision to be made in some state other than the state which recognizes it; and if it is made in the state which recognizes it, it is not considered domestic in such a state (Art. I/1). From this provision follows the conclusion that the territorial criterion is the basic criterion to tell domestic from foreign arbitration decisions. However, other provisions of the Convention lead to the conclusion that the accepted principle of the autonomy of the parties' will be regarded as the primary criterion, while the territorial principle is only of subsidiary importance.

Bilateral agreements concluded between the Republic of Croatia and other states relating to the recognition and execution of foreign decisions define the concept of domestic i.e. foreign arbitration decision.

b) An arbitration decision which violates constitutional freedoms and rights - a constitutional complaint may be lodged only if the Plaintiff believes that the domestic arbitration decision violates some of his or her constitutionally guaranteed freedoms and rights (see Art. 28, Para 1, of the Constitutional Act).[84] *Rights other than the constitutional rights cannot be the subject of constitutional legal protection.*[85]

c) A Permanent (institutional) or periodic (ad hoc) arbitration decision - a constitutional complaint may contest not only permanent arbitration decisions but also periodic (ad hoc) arbitration decision as well. The organization of the arbitration is not decisive.

3. An Exhausted legal course as a prerequisite for lodging the constitutional complaint

a) Complaint against the arbitration decision - Under the provision of Art 28, Para 2, of the Constitutional Act, if another legal course is provided for addressing the violation of constitutional rights, the constitutional complaint may

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[84] *The text of Art. 28, Para 1, of the Constitutional Act see in note 1.*

[85] *On freedoms and rights protected by the Constitutional Court see II/2 above.*

be lodged only after this legal course has been exhausted. Consistently, if the parties in their arbitration agreement have provided for the possibility of contesting the arbitration decision before a higher level appointed tribunal (Art 483, Para 1, CPA), the complaint has the nature of a regular legal remedy and postpones the entry into force and enforceability of the arbitration decision (suspension effect). The regular legal course in such case is exhausted with the decision of the appointed higher level tribunal (rejection of the complaint or the alteration of the arbitration decision). If the time for lodging the complaint expires and the party (that was entitled to the complaint) does not lodge the complaint within this period, i.e. if the parties renounce their right to complaint or quit a complaint which has already been lodged, the legal course shall not be considered exhausted, notwithstanding the fact that the arbitration decision has become effective.[86]

b) Complaint for the repealing of the arbitration decision - A repeal complaint is allowed against arbitration decisions (Art. 484-486 of CPA). Under the provisions of Art. 485 of CPA, the repeal of a decision of an appointed tribunal may not be requested for the following reasons: 1) if no agreement whatever was concluded on the appointed tribunal or if the agreement was not valid; 2) if with regard to the composition of the appointed tribunal or to the decision-making any of the provisions of this law or the law on the appointed tribunal was violated; 3) if the decision was not explained in the sense of law, or if the original and copies of the decision were not signed as regulated by law; 4) if the appointed tribunal overstepped the limits of its task; 5) if the wording of the decision is incomprehensible or contradictory in itself; 6) if the decision of the appointed tribunal is in contravention with the basis of the system as established by the Constitution of the Republic of Croatia; 7) if any of the reasons for renewed procedure under Art. 421 CPA are in existence.

Contesting is limited to the reasons which relate to the validity of the arbitration agreement, its content, the setting up of the arbitration tribunal, some of the gravest violations of the procedure (Point 1-5), the violation of cogent regulations which can be included in the concept of public order (Point 6), and the reasons relating to incorrectly and incompletely established facts and incorrect application of the substantive law. According to these features, the control by a state court is of a limited nature: it does not venture to question the decision on the merit of the dispute. The judgement by which the complaint is accepted repeals the judgement of the appointed tribunal, with consequences ex tunc.[87]

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[86] *For details see II/4-a above and the described practice of the Constitutional Court.*

[87] *Triva-Belajec-Dika, op.cit. p. 708; Goldštajn-Triva, op.cit. p. 186; Dika, M.: Pobijanje arbitra`nih odluka in the manual "Arbitra`no rješavanje trgova_kih sporova", Ljubljana 1989, pp. 48-53; Ude, op.cit. p. 107.*

We believe that judging by its features the complaint for the repeal of the arbitration decision is somewhat close to the renewed procedure request, and is essentially different from the review (which may be conducted, among other reasons, on account of the incorrect application of substantive law).

Under Art. 28, Para 3, of the Constitutional Act, in cases in which an extrajudiciary or court review is allowed, the legal course is exhausted after this remedy has been decided upon. Other extraordinary remedies, e.g. renewed procedure are not prerequisite to the lodging of a constitutional complaint (Ruling of the Constitutional Court No. U-III-236/93 of 05.01.1994). By analogy, and especially bearing in mind the tendency of constitutional court practice not to extend the concept of the exhausted legal course to other extraordinary remedies (except review), we may conclude as follows: the lodging of the complaint to repeal the arbitration decision is not prerequisite to a constitutional complaint about the same decision.

To sum up the above (a and b):

1) a constitutional complaint may be lodged in connection with the arbitration decision which the Plaintiff believes has violated some of his or her constitutional rights;

2) the complaint for the repeal of the arbitration decision is not prerequisite to the lodging of a constitutional complaint;

3) if the arbitration agreement provides for the possibility of contesting the arbitration decision by means of complaint, the constitutional complaint may be lodged only after the decision of the appointed higher level tribunal (on rejecting the complaint or altering the arbitration decision) has been reached.

4. <u>Term for lodging a constitutional complaint</u>

A constitutional complaint may be lodged within one month, of the date of the receipt of the decision (Art. 29 of the Constitutional Act).

The one month period begins to run with the receipt of the decision with which the regular legal course was exhausted: in cases where a complaint against the arbitration decision is allowed (Art. 483, Para 1, CPA) it is the decision on the complaint lodged with the appointed higher level tribunal.[88] In other cases (as a

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[88] *For details see III/3 above.*

rule, because the parties rarely provide for the possibility of complaint)[89] *it is the decision of the (institutional or ad hoc) arbitration which the parties have entrusted to decide on this dispute by means of their arbitration agreement.*

We hereby note that the permanent appointed tribunals deliver their decisions themselves, while the ad hoc arbitration decisions are delivered through the court that would be competent if there were no arbitration agreement (Art. 481, Para 3, of CPA).[90]

The person who for justified reasons misses the time for lodging the constitutional complaint may be accorded restitution by the Constitutional Court.[91]

5. Proceedings before the Constitutional Court

a) Plaintiff - the Plaintiff is the defeated party from the arbitration dispute who believes that some of his or her constitutionally guaranteed freedoms and rights have been violated.[92] *The Plaintiff (natural or legal person) shall lodge the complaint personally or via an attorney.*[93]

b) The content of the constitutional complaint and enclosures - the content of the constitutional complaint, as well as the enclosures, are regulated by the provisions of Art. 51 in connection with Art. 30 of the Rules of Procedure.[94] *The reporting judge shall urge the Plaintiff to supplement or correct the complaint if it is incomprehensible i.e. if on the basis of its information and enclosures it cannot be established which Act is thereby contested, or if the complaint is unsigned (incomplete complaint - Art. 55, Point 1 of the Rules of Procedure).*

c) Delivery of the complaint to interested persons - Under Art. 55, Point 2, of the Rules of Procedure, the reporting judge forwards, when needed, a copy of the complaint to the interested persons and urges them to make a statement on it. The "Interested person" is undoubtedly the winning party to the arbitration dispute which in our opinion should always (therefore: in any case) be forwarded the constitutional complaint and urged to make a statement. This is necessary

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89 *Triva-Belajec-Dika, op.cit. p. 707; Goldštajn-Triva, op.cit. p. 183; Ude, op.cit. p. 105.*

90 *On the time for lodging the complaint see also II/5 above.*

91 *On restitution see II/6 above.*

92 *For details on rights and freedoms guaranteed by the Constitutional Court see II/2 above.*

93 *On plaintiffs see II/3 above.*

94 *See II/7 above.*

because the rights of the mentioned person were decided on in the proceedings in which the arbitration decision was made that is contested by the constitutional complaint, so this party should be enabled to participate in the proceedings before the Constitutional Court.[95]

We hereby note, however, that the literature records a different position as well, under which there are no parties (Plaintiff and Defendant) in the constitutional court proceedings for the protection of the constitutionally guaranteed freedoms and rights, since the Constitutional Court only establishes whether the constitutional freedoms and rights have been violated as described in the constitutional complaint.[96] *Consistently, the conclusion would (probably) be: delivery of the constitutional complaint to the interested party should be an exception and not a rule in the proceedings before the Constitutional Court.*

d) Acquisition of the arbitration file - The reporting judge, when needed, requires the delivery of the file relating to the case i.e. of the report on the violation of the constitutional rights and freedoms by the disputed act (Art. 55, Point 3, of the Rules of Procedure). The delivery is to be requested from the state court which would be competent if the ad hoc arbitration were not agreed upon (this court is to keep the file of the ad hoc arbitration - Art. of CPA), i.e. from the permanent appointed tribunal, if its decision is contested by the constitutional complaint (institutional arbitration shall keep its files - Art. 482 of CPA).

Within the scheduled time, the state court i.e. the institutional arbitration is obliged to deliver to the Constitutional Court the deposited files relating to the matter of the constitutional complaint. (Art. 56 of the Rules of Procedure).

e) Procedural decisions of the Constitutional Court - the Constitutional Court shall issue a ruling in cases where the constitutional complaint is rejected i.e. dismissal of the case.[97]

f) Deciding on the merits of the case - the Constitutional Court restricts itself to reviewing only those violations of constitutional rights and freedoms which are contained in the complaint (Art. 57 of the Rules of Procedure). It decides on the

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[95] *Also Dika, M.: Marginalije uz institut ustavne tu`be, in Zbornik Ljubljansko-zagrebškega kolokvija, Ljubljana, 1993, pp. 38-39.*

[96] *Bartov_ak, Z.: O zaštiti ustavnih prava i sloboda putem ustavne tu`be, "Odvjetnik" No. pp.4-5.*

[97] *See II/8 above.*

merits of the case by a decision,[98] *by which the constitutional complaint is either accepted or rejected as unfounded (Art. 59 of the Rules of Procedure).*

The Constitutional Court shall reject the complaint as unfounded if it establishes that the reasons for which the arbitration decision is contested do not exist (Art. 61 of the Rules of Procedure).

Under Art. 30 of the Constitutional Act, the decision by which the complaint is accepted repeals the disputed act by which the constitutional right was violated and returns it to the competent authority for renewed procedure. When the constitutional complaint is accepted and the disputed act repealed, the Constitutional Court should in its opinion to the decision state which constitutional right i.e. freedom was violated and in what way (Art. 62, Para 2, of the Rules of Procedure).[99]

6. <u>Legal status after the repeal of the arbitration decision</u>

Neither the Constitutional Act nor the Rules of Procedure contain provisions on what a "competent authority" is and how it is to proceed in the dispute once the Constitutional Court has repealed the arbitration decision. The question is: shall the renewed proceedings in the dispute be conducted before the arbitration tribunal or before a regular court competent under the law?

The answer to this question depends on the legal fate of the arbitration agreement after the arbitration decision has been repealed. With regard to the legal issue of whether (or not) by the arbitration decision the arbitration agreement has been consumed, (at least) three positions may be presented.

First, in reaching its decision the arbitration tribunal has exhausted its mandate. The reaching of the arbitration decision - irrespective of its content and further legal fate - has consumed the arbitration agreement, so that there is no legal foundation any longer according to which the arbitration could judge the dispute again once the arbitration decision is repealed. Accordingly, the renewed proceedings in the dispute must be entrusted to a state court.

Second, the decision of the Constitutional Court by which the arbitration decision is repealed does not affect the arbitration agreement on the basis of which the arbitration was constituted. Making the arbitration decision which is repealed by

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[98] *The term "decision" may rightfully be objected to - see note No. 1 in connection with the text of Triva: Arbitra`no rješdjavanje me|unarodnih trgova_kih sporova, published in Zbornik radova "Medjunarodna trgova_ka arbitra`a u Hrvatskoj i Sloveniji", Zagreb, 1993, p. 4.*

[99] *For the Constitutional Court's deciding on the merit of the case see also II/9 above.*

the decision of the Constitutional Court does not end the agreed arbitration in accordance with the intentions of the contracting parties. Thus, the arbitration agreement is not consumed by reaching the arbitration decision, so that the renewed proceedings must be conducted before the arbitration tribunal competent under the agreement which is still in force.

Third, the fate of the arbitration agreement after the repeal of the arbitration decision may be related to the reasons for which (although indirectly, prejudiciously) the arbitration decision was repealed, and to the content of the arbitration agreement itself. The Constitutional Court will repeal the arbitration decision if it violates any of the constitutionally guaranteed rights or freedoms of the Plaintiff. It is possible that the violation of constitutional rights i.e. freedoms are perpetrated by the arbitration tribunal conducting the proceedings and passing judgement in spite of the non-existence or non-effectiveness of the arbitration agreement, or by passing judgement in a dispute which does not fall within the scope of the arbitration agreement. In such cases there is no legal ground for constituting a new arbitration tribunal for conducting the proceedings in the same dispute - a state court is competent for renewed proceedings in such a dispute. If, however, the arbitration tribunal has decided on the basis of a valid arbitration agreement which applied to all disputes arising from a certain legal relation, this agreement would remain in force - if the arbitration decision had been repealed for reasons which (indirectly, prejudiciously) do not relate to the existence or the validity of the arbitration agreement. In such a case, the arbitration agreement would be a valid legal ground for constituting a new arbitration tribunal for the same dispute.[100]

We hereby adhere to the third position, for the time being (until convinced by arguments of the correctness of some other position). Thus, we believe that the Constitutional Court by its decision, as a rule, repeals only the arbitration decision, without affecting the arbitration agreement on the basis of which the arbitration tribunal was constituted. Exceptionally, if the arbitration decision has been repealed because of the violation of the plaintiff's constitutional right arising from the non-existence or non-effectiveness of the arbitration agreement, i.e. because of overstepping the competence of the arbitration tribunal, the legal ground for constituting a new arbitration tribunal in the same dispute is no longer provided, with the consequence that a state court is competent for renewed proceedings.[101]

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[100] *We hereby point to the literature on the issue of legal consequences of the repeal of an arbitration decision, like Triva, S.: Arbitra`ni ugovor nakon poništenja arbitra`ne klauzule, Rad JAZU, Book XX/1991; Goldštajn-Triva, op.cit., pp.188-189; Ude, op.cit., p. 114; Dika, M.: Pobijanje arbitra`nih odluka, in the manual "Arbitra`no rješavanje medjunarodnih sporova", Ljubljana 1989, pp. 60-61.*

[101] *On the conduct of the "competent authority" after the decision contested by the constitutional complaint has been repealed see also II/9 above.*

7. Conclusion

In conclusion we may sum up the above legal issues:

1. Anybody (natural or legal person) may lodge a constitutional complaint with the Constitutional Court if he or she believes that some of his or her constitutionally guaranteed rights and freedoms have been violated by a decision of domestic (institutional or ad hoc) arbitration.

2. If in relation to the violation of the constitutional rights another legal course (complaint against an arbitration decision) is permitted, the constitutional complaint may be lodged only after such legal course has been exhausted, i.e. after the decision of an appointed higher level tribunal on the rejection of the complaint or the alteration of the arbitration decision. The lodging of the complaint for repeal of the arbitration decision (Art. 484-486 of CPA) is not prerequisite to the constitutional complaint.

3. The constitutional complaint may be lodged within one month of the date of receipt of the arbitration decision.

4. The Constitutional Court decides on the merits of the case by its decision by which it either accepts the constitutional complaint or rejects it as unfounded.

5. The decision on accepting the constitutional complaint repeals the arbitration decision, and renewed proceedings are, as a rule, conducted before an arbitration tribunal.

6. Exceptionally, if the arbitration decision has been repealed because of the violation of the plaintiff's constitutional right arising from the non-existence or non-effectiveness of the arbitration agreement, i.e. because of the overstepping of the competence of the arbitration tribunal - a state court shall be competent for renewed proceedings.

S U M M A R Y

Any natural and legal person may lodge a constitutional complaint with the Constitutional Court of the Republic of Croatia, if he or she believes that some of his or her constitutionally guaranteed freedoms and rights has been violated by a

decision of domestic arbitration. The constitutional complaint may be lodged within one month of the date of the receipt of the arbitration decision.

The decision of the Constitutional Court on the acceptance of the constitutional complaint repeals the arbitration decision. Renewed proceedings are conducted, as a rule, before the arbitration tribunal, and only exceptionally before a state court.

SECOND WORKING SESSION

Procedures other than constitutional complaints for protecting human rights

Chaired by Mr Peter JAMBREK, Member of the European Commission for Democracy through Law in respect of Slovenia

a. Procedures for the protection of human rights in diffuse systems of judicial review
Report by Professor Donald P. KOMMERS, Notre Dame Law School, USA

b. Interlocutory Review - Abstract Review
Report by Professor Lorenza CARLASSARE, University of Ferrara, Italy

Procedures for the protection of human rights in diffuse systems of judicial review[*] - Report by Professor Donald P. KOMMERS

U.S.A.

Common-law systems throughout the world, as they have evolved, use a variety of practices in order to protect fundamental human rights. Among those practices are systems of diffuse judicial review, which is characterized by the power of courts at various levels of a judicial hierarchy to review cases that raise issues involving fundamental rights. The legal system of the United States is typical of diffuse systems of judicial review in the common law world.[102] In the interest of economy, this paper is limited to the United States, although some attention is also given to Canada. It describes those procedures which either advance or implicate the protection of fundamental rights.

Other common law systems, such as those of Australia, New Zealand, and Ireland also have systems of diffuse judicial review. But this paper avoids comparisons with those countries because their systems also incorporate significant differences, and to deal thoroughly with these differences is beyond our scope

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[*] *I wish to thank Jeff Gimpel, Bradley Lewis and Melissa Brown for their assistance in the preparation of this report.*

[102] *For an excellent structural analysis of constitutional review in the contemporary world, see Mauro Cappelletti and William Cohen, Comparative Constitutional Law (Indianapolis: The Bobbs-Merrill Company, Inc., 1979), 73-112. For a comparison of diffuse and concentrated systems of judicial review, see Allan R. Brewer-Carías, Judicial Review in Comparative Law (Cambridge: Cambridge Univ. Press, 1989), 125-262.*

today. Australia, for instance, lacks an entrenched bill of rights in its constitution; New Zealand, like England, lacks a written constitution; and Ireland lacks a pure system of diffuse judicial review. The United States and Canada are much more comparable in their systems of judicial review.

For present purposes, unless otherwise noted, "fundamental rights" shall be understood to mean constitutionally guaranteed rights. The effective guarantee of such rights, however, depends on the existence of adequate procedures by which individuals can claim and enforce their rights, usually against the government. The American constitutional system spreads the power to interpret and enforce constitutional rights throughout the federal and state judiciaries, and assigns important roles to other governmental bodies as well. This paper will describe some of the more important procedures by which an aggrieved citizen can claim a fundamental right and seek redress for its violation.

I. THE CONSTITUTIONAL FRAMEWORK

Fundamental rights in the United States, as in Canada, are protected and enforced within a framework of separated and divided powers overlaid by a complicated system of checks and balances. These separated structures, like the division of authority between levels of government, were designed to protect liberty in their own right, apart from the specified guarantees contained in bills of rights. Constitutionalism means that branches and units of government will remain within their defined spheres of power, as defined by a written constitution. Judicial review, of course, plays a critical role within this structure, for all courts are empowered to declare laws and official actions unconstitutional.

While diffuse judicial review is usually thought of as a feature of common law systems, it is really a requirement of constitutional supremacy.[103] *As Chief Justice John Marshall wrote in Marbury v. Madison (1803):*

> *Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and permanent law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.*[104]

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[103] *Brewer-Carías, supra note 1 at 128f. A number of civil law systems have adopted diffuse judicial review, e.g., Japan, Mexico, Argentina, Brazil, Finland, Iceland, Sweden, Norway, Denmark, and Greece.*

[104] *5 U.S. (1 Cranch) 137 at 177.*

The peculiar character of diffuse judicial review, as just noted, is that the authority to enforce the constitution as supreme law (all the more important where fundamental rights are at stake) rests with all courts and judges as a matter of practice. Indeed Marshall went on to write that this function was "the essence of the judicial duty."[105]

The extent to which a diffuse system of judicial review protects fundamental rights may depend on the structure of the judiciary as well as the government generally. For example, in the United States, as noted below, the "abstention" doctrine substantially affects both the efficacy and immediacy with which rights are protected. In its adherence to the "political question" doctrine, on the other hand -- also mentioned below -- the federal courts have refused to adjudicate certain questions arising under the constitution even though jurisdiction is present and fundamental rights implicated. In such instances, it may be said that the supremacy of the constitution has been compromised, the result being that the implicated rights remain unprotected.

As regards Canada, we may note that the Charter of Rights and Freedoms likewise proclaims the supremacy of the Canadian constitution.[106] *But in an effort to balance the principles of democracy and basic rights, the Charter includes the so-called "notwithstanding clause."*[107] *This clause allows the national parliament or a provincial legislature to pass a law incompatible with a guaranteed right provided such legislation specifies that the law "shall operate notwithstanding a provision included in [the basic rights section] of the Charter." Such declarations cease to have effect after five years, though they can be reenacted.*[108] *To this extent, Canadian parliaments are empowered potentially to nullify the force and effectiveness of judicial review in protecting rights although in practice this has not happened very often and § 33 is now frequently said to be a dead letter. Indeed, the Charter has inaugurated a tradition of rights-oriented judicial review similar to that which exists in the United States.*[109]

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105 *Id., at 178.*

106 *Constitution Act, 1982, § 52 (1)(2). The Constitution of Canada is said to include the Constitution Act, 1982 and the Constitution Act 1867 (formerly the British North American Act, 1867).*

107 *Canadian Charter of Rights and Freedoms, § 33 (1). See also § 1 which specifies that Charter rights are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."*

108 *Id. at § 33 (3) (4).*

109 *See Frank Iacobucci, "Judicial Review by the Supreme Court of Canada Under the Canadian Charter of Rights and Freedoms: The First Ten Years" in David M. Beatty (ed.), Human Rights and Judicial Review (Dordrecht and Boston: Martinus Nijhoff Publisher, 1994), 57-92.*

Fundamental rights in the United States are protected at two levels: under the federal Constitution and under state constitutions. The rights designated as fundamental are mainly protections against invasion of rights by government. These constitutions, far more than some of their European counterparts, give significant attention to procedure as an essential method of protecting fundamental rights, particularly with regard to criminal defendants. In addition, to the extent that their respective constitutions allow, national and state legislatures are empowered to pass laws designed to protect certain rights against invasion by private parties.[110] *By the same token, within the framework of their constitutional powers, executive officials may issue orders designed to protect fundamental rights.*

While each branch of the government has a role in the protection of fundamental rights, the judiciary has come to be considered the primary guardian. This is due to its assumed role as the authoritative interpretor of the constitution, its power of judicial review over legislative and executive actions, and its relative freedom from political pressures. This high degree of power and freedom does not exist without controversy; many people feel that the American federal judiciary itself has assumed too much power and, in the exercise of its power, has gone beyond its proper role in government.[111] *However, courts have often seen themselves as the last bulwark of constitutional protection against an overzealous legislature or executive.*

II. THRESHOLD PROCEDURES AND DOCTRINES

While the U.S. Constitution guarantees a number of substantive rights explicitly and others by implication, it does not provide many specific procedures for enforcing such rights.[112] *Procedures for protecting rights have been developed mainly by congressional legislation and judicial doctrines, many of which, such as the writ of habeas corpus, are rooted in the common law tradition.*

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110 *For example, Congress has passed many civil rights acts to ensure fair treatment of minorities in securing access to public facilities and accommodations, employment, education, housing, and the right to vote. Some of these acts are based, not on constitutional protections of fundamental liberties, but on the power of Congress to regulate interstate commerce. The Civil Rights Act of 1866, 42 U.S.C. §§ 1981-1982 (1988), which guarantees equal legal rights and property rights to all citizens, is grounded in the enforcement clause of the Fourteenth Amendment, and the Voting Rights Act of 1965, 42 U.S.C. §§ 1971 et. seq. (1988 & Supp. 1993), guaranteeing equal access to polls, is grounded in the enforcement clause of the Fifteenth Amendment. However, many other acts, including the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 et seq. (1988 & Supp. 1993), and the Fair Housing Act of 1988, 42 U.S.C. §§ 3601-3619 (1988 & Supp. 1993), are grounded in the commerce power of Congress.*

111 *WILLIAM EATON, WHO KILLED THE CONSTITUTION? THE JUDGES V. THE LAW 229-230 (1988).*

112 *The Constitution explicitly preserves the writ of habeas corpus from suspension by Congress. U.S. CONST. art. I, § 9, cl. 2. It also prohibits Congress from passing any ex post facto law or bill of attainder, Id., cl. 3., and likewise prohibits the states from passing such laws, Id., § 10, cl. 1. The Canadian Charter also explicitly guarantees the right to habeas corpus (§ 10[c]).*

With minor exceptions -- again the point requires emphasis -- the Constitution limits government and not individuals.[113] *Thus, a claim that a constitutional right has been violated must usually be based on some action by a government entity.*

The Constitution is most frequently invoked directly in one of three general circumstances, corresponding to the three ways in which it protects fundamental rights. First, the complainant may claim a violation of some basic right protected by the Bill of Rights or other explicit constitutional provision. Second, the complainant may claim that the government exceeded its limited grant of authority under the Constitution.[114] *Third, the complainant may claim that some structural violation of the Constitution has deprived him of a right.*[115] *The most common method of vindicating a constitutional right is to seek redress in a court <u>after</u> a right has been violated. In the diffuse system of American judicial review, any court may accept a case involving a claim to a constitutional right. In addition, any court of general or limited jurisdiction hearing such a case must apply the constitution when an issue of constitutionality is involved.*

Similar rules apply in Canada. The Charter declares that "[a]nyone whose rights or freedoms, as guaranteed by this charter, have been infringed or denied may appeal to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."[116] *This section is the constitutional basis of Canada's system of diffuse judicial review.*[117] *An alleged violation of rights guaranteed by the Charter can be raised in the course of any*

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[113] *An exception is the Thirteenth Amendment, making slavery illegal in the United States whether by private or government action. U.S. CONST. amend. XIII, § 1. The Supreme Court has also held that courts may not enforce certain types of private agreements which deny equal rights. See Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that courts may not enforce private covenants which restrict on racial grounds the sale of real estate).*

[114] *See, e.g., United States v. Lopez, 155 S. Ct. 1624 (1995) (holding that Congress exceeded its authority under the constitutional grant of commerce power in enacting the Gun-Free School Zones Act, 18 U.S.C.A. § 922(q) (1988 and Supp. 1993)). The complainant in this situation can be a state or political subdivision as well as a natural or legal person.*

[115] *See, e.g., Bowsher v. Synar, 478 U.S. 714 (1986) (concerning separation of powers); Powell v. McCormack, 395 U.S. 486 (1969) (concerning qualifications of Representatives).*

[116] *Charter of Rights, § 24 (1). The phrase "court of competent jurisdiction" has been interpreted to mean one operating within its own statutory jurisdiction. R. v. Mills (1986), 29 D.L.R. 161.*

[117] *Strictly speaking, the provisions of § 24 (1) only apply to Charter rights. Other constitutional issues must be raised through § 52, the Canadian "supremacy clause."*

judicial proceeding. Typically, although not always, constitutional questions are raised in the court of first instance. A number of the procedures used to protect constitutional rights against federal bodies, however, must originate in the Federal Court.[118]

A. Justiciability

In the American system, before a complainant can bring suit against a defendant who has violated his constitutional rights, he must satisfy the requirements of justiciability, a term that implicates the principle of separation of powers just as it underscores the essential importance of the adversary process. Among these requirements are the rules of standing, ripeness, mootness, and the political question doctrine. Each of these requirements can be considered as an aspect of the fundamental constitutional requirement that a court can adjudicate only actual cases or controversies. The common law tradition is crucial here, for judges are deemed incapable of deciding cases without a detailed knowledge of all relevant facts and values pertaining to a case. Accordingly, each case coming before the judiciary must involve the right party (standing), embrace hard facts (ripeness), present a live dispute (mootness), and avoid any encroachment upon the powers of another branch of government (political question doctrine).

To have standing for an action in federal court to challenge the constitutionality of a government act, the complainant must be able at a minimum to show three facts: that an injury in fact is threatened or has occurred, that the injury is traceable to the governmental defendant, and that the injury is susceptible to redress by the court.[119] *Ordinarily the complainant can only assert his own rights, and has no standing to assert the constitutional rights of an injured third party.*[120] *Ripeness, on the other hand, requires that the cause of the complainant must have resulted in a present injury or real threat. This means that all the conditions or events which must occur in order to cause an injury have already come into existence.*[121] *A court may not provide relief for a speculative claim of*

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[118] *Federal Court Act, R.S.C. 1985, c. F-7, §§ 17, 18.*

[119] *Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982).*

[120] *Courts will make an exception, however, when the complainant has a sufficiently close relationship to the injured party so that the assertion of the third party's interest necessarily serves the interest of the complainant, and the injured party faces an obstruction to asserting the interest of her own. Singleton v. Wolff, 428 U.S. 106, 114-116 (1976).*

[121] *The Declaratory Judgment Act, 28 U.S.C. § 2201 (1988 & Supp. 1993), provides an exception which allows a party to challenge the constitutionality of an act without having to violate it and face possible prosecution. This eliminates the basic unfairness of a requirement that a party must risk prosecution to assert a constitutional right. Erwin Chemerinsky, Federal Jurisdiction, 2nd ed. (Boston: Little Brown and Co., 1984), 115.*

future injury.[122] *Mootness, finally, may be a bar to raising a constitutional claim if the complainant's status has changed so that relief is no longer needed. If the rights of the complainant can no longer be affected by the outcome of the case, then the court must dismiss the complaint as moot. An exception exists, however, if the claim is capable of repetition with respect to the complainant, and would escape review if the claim were dismissed.*[123]

The political question doctrine, finally, differs from other questions of justiciability because it concerns the subject matter of the claim rather than the timing or standing of the person bringing the claim. An issue is a political question when the constitution commits its resolution to another branch of government; or when the court lacks "judicially determinable and manageable standards"[124] *in resolving it; or when a judicial decision would embarrass a co-equal branch of government or show lack of respect for its authority. The courts have held that they lack power to resolve political questions in this technical sense, and in order to preserve the important constitutional protection of separation of powers, must allow such issues to be resolved through the political process.*[125]

Canadian practices with respect to case or controversy requirements are considerably more liberal than those in the United States. For one thing, Canadian courts do not recognize the "political question" doctrine[126]*. For another, the Canadian Supreme Court has granted discretionary standing to parties not directly affected by a statute under its "public interest" doctrine.*[127] *This relaxed view of standing is required, said the Court, to protect "the right of the citizenry to constitutional behavior where the issue in such behavior is justiciable as a legal question."*[128] *In Minister of Justice of Canada v.*

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122 *North Carolina v. Rice, 404 U.S. 244, 246 (1971).*

123 *Roe v. Wade, 410 U.S. 113, 125 (1973).*

124 *Baker v. Carr, 369 U.S. 186, 217 (1962).*

125 *See CHEMERINSKY, supra note 21, at 142.*

126 *In one of the most important cases yet heard under the Charter, Operation Dismantle v. the Queen (1985), 18 D.L.R. (4th) 481, the Supreme Court of Canada agreed to hear an application for a declaratory judgment that Canada's plan to allow the United States to test cruise missiles in Canada violated § 7 of the Charter. The plaintiffs, a Canadian peace grope, argued that the testing would make a nuclear attack against Canada (an obvious threat to "life, liberty, and security of the person") more likely. While the court denied the application on grounds that the plaintiffs' arguments were overly speculative, it did assert for itself a right to judicial review of government policy on the basis of § 32 (1)(a) of the Charter which specifies the application of its guarantees to the parliament and government of Canada "in respect of all matters within the authority of Parliament."*

127 *See Thorson v. Attorney General of Canada (No. 2) (1974), 43 D.L.R. (3d) 1.*

128 *Id., at 19.*

Borowski,[129] *discretionary standing was extended to require only "genuine interest as a citizen in the validity of the legislation and . . . [when] there is no other reasonable and effective manner in which the issue may be brought before the court."*[130] *The Canadian rules of ripeness and mootness are also more liberal than in the United States. Canadian courts have recognized claims which anticipate harms that have not yet occurred.*[131] *In addition, the Supreme Court has occasionally settled cases which are technically moot if the case (1) retains a genuinely adversarial context and (2) retains some practical effects on the rights of the parties apart from the specific controversy that gave rise to the case or if the case refers to recurring problems of brief duration (e.g., labor disputes), or (3) does not require the court to encroach on the prerogative of the legislative branch in the absence of reference to a specific piece of legislation.*[132]

B. Trial Procedures

Once a complainant has gained access to the court, her primary means for bringing her claim to the attention of the defendant is through the pleadings. Federal courts in the U.S. employ the "notice" method of pleading, so called because it is designed primarily to give the opposing party adequate notice of the nature of the claim. Under notice pleading, the plaintiff must provide a short statement giving the grounds for jurisdiction in the court, a short statement of the claim which shows that the plaintiff is entitled to relief, and a demand for a judgment which provides the relief.[133] *In pleading a violation of constitutional or civil rights, the normal rules of pleading apply. However, the plaintiff must specify how she has been injured, and may not request an abstract ruling on a constitutional question.*[134] *In pleading a violation under civil rights statutes, the*

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129 *(1981), 130 D.L.R. (3d) 588.*

130 *Id., at 606 See also Canadian Council of Churches v. Canada (1992), 88 D.L.R. (4th) 193.*

131 *Operation Dismantle v. the Queen (1985), 18 D.L.R. (4th) 481. This case, as noted above, dealt with the claim of a Canadian peace group about the likelihood of nuclear war given certain of the government's policies as against the Charter's guarantee of the rights to "life, liberty, and security of the person" in § 7. The court granted standing even though no damage to those rights, i.e., no actual nuclear war, had occured.*

132 *See Borowski v. the Attorney General of Canada (1989), 57 D.L.R. (4th) 231, 243-47.*

133 *FED. R. CIV. P. 8(a). If the complainant brings a case in federal court under federal question jurisdiction, the Well-Pleaded Complaint Rule requires the pleading to show that the issue arises under the federal constitution or laws. See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 20 (1993). The complaint need not state a specific cause of action or detailed statement of facts supporting the claim. In contrast, some state courts still adhere to "fact" pleading. Under this method, to be sufficient, the pleading must state facts sufficient to support each element of a claim. Id., at 247-248. The whole purpose of pleading is to give notice to the defendant of the nature of the plaintiff's claim and the specific events giving rise to it.*

plaintiff must allege a deprivation of rights under the Constitution or laws of the United States, and state a claim for relief.[135]

Once a claim is filed, many of the procedures in the judicial proceeding are designed to protect constitutional rights and ensure the fairness of the trial. For instance, a defendant may file a motion challenging the jurisdiction of the court in which the suit was brought,[136] *and either party may file a motion* in limine *(a pretrial motion on an evidentiary issue) to exclude irrelevant or prejudicial evidence.*[137]

In criminal cases and in many civil cases, the right to trial by jury receives Constitutional protection. To protect fairness in the jury selection process, the parties have the right to examine jurors and exclude those from the panel who cannot render an impartial judgment.[138] *Each party may also exclude a certain number by peremptory challenge.*[139]

Rules governing the introduction of evidence during trial are designed to ensure a fair trial as well as a speedy one.[140] *Finally, at the conclusion of evidence, the judge must properly instruct the jury*[141] *to ensure that it returns a fair verdict based on the facts presented at trial.*

In criminal prosecutions, courts have fashioned many additional procedures to protect the constitutional rights of defendants. These procedures apply from the moment the accused is taken into custody,[142] *to ensure that the accused is*

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134 *CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, Civil 2d § 1234 (1990).*

135 *Id. § 1230.*

136 *FED. R. CIV. P. 12(b)(1); 12(b)(2).*

137 *MCCORMICK ON EVIDENCE § 52 (John W. Strong ed., 1992).*

138 *FED. R. CIV. P. 47(a); 28 U.S.C. § 1866 (1988).*

139 *FED. R. CIV. P. 47(b); 28 U.S.C. § 1870 (1988). However, a peremptory challenge may not discriminate against a prospective juror based on race, Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991), or gender, J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419, 1427 (1994).*

140 *FED. R. EVID. 102.*

141 *The right to a jury trial in criminal prosecutions, enumerated in the Sixth Amendment, is a fundamental constitutional right, and has been extended to state prosecutions through the Fourteenth Amendment Due Process clause. Duncan v. Louisiana, 391 U.S. 145, 156 (1968). However, the right to a jury trial in civil cases applies at the federal level only to common law issues, U.S. CONST. amend. VII, and has not been extended to the states in any case.*

142 *Miranda v. Arizona, 384 U.S. 436, 477 (1966).*

informed of his rights and is allowed to assert them, and they continue throughout the judicial process. During trial, the defendant may make a motion to exclude any confessions or evidence which the government obtained in violation of these rights, or obtained by an illegal search or seizure.[143] *And the court must implement procedures which allow the defendant to fairly cross-examine witnesses.*[144] *The Canadian Charter includes an explicit provision for the exclusion of evidence obtained in violation of rights guaranteed by the Charter.*[145]

After a trial is completed and the judgment is final, individuals who have been charged in criminal cases enjoy the U.S. Constitution's protection against "double jeopardy." This means that a defendant who has been acquitted cannot be tried for the same offense; or, if he has been convicted, he cannot be subjected to a second prosecution or multiple punishments for the same offense. Civil litigants receive protection from the doctrines of res judicata, which precludes relitigation of the same cause of action between parties, and collateral estoppel, which prevents relitigation of an issue that was litigated and determined in a previous lawsuit.

C. Appellate Procedures

The complainant or defendant has a right of appeal from an unfavorable final judgment.[146] *In ordinary cases, appellate courts will only review a case on appeal for errors in the application of law; usually, they will not re-examine any factual issues which were determined by the trial court unless the factual determination was clearly erroneous*[147]*. If the asserted error concerns an issue within the*

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143 *The power to exclude evidence obtained by an illegal search or seizure is not a constitutional right, but is a judicially formed remedy intended to discourage illegal searches by the police. For this reason, a convicted defendant may not collaterally attack a state court conviction by a habeas corpus suit based upon admission of evidence obtained in violation of the Fourth Amendment, so long as the legality of the search received a full and fair hearing in the trial. Stone v. Powell, 428 U.S. 465, 494 (1976). In contrast to the privacy rights protected under the Fourth Amendment, the rights protected under Miranda are rights which ensure a fair trial and thus guarantee the constitutionally protected due process of law. Therefore the admission of evidence obtained in violation of Miranda rights may be a basis for habeas review. Withrow v. Williams, 113 S. Ct. 1745, 1753 (1993).*

144 *See Maryland v. Craig, 497 U.S. 836, 847 (1990).*

145 *Charter § 24(2). See also Kent Roach, Constitutional Remedies in Canada, ch. 10 (1994).*

146 *A party may not ordinarily appeal a favorable judgment in order to challenge the determination of a non-essential issue which was decided against him. See Electrical Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241, 242 (1939).*

147 *This principle was stated with respect to federal courts in United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948), and is codified in Federal Rule of Civil Procedure 52(a). A jury verdict returned in federal court receives a particular immunity from appellate review under the Seventh Amendment to the Constitution.*

discretion of the trial judge, such as admissibility of evidence, the appellate court will overturn the judgment only if the discretion was abused.

In the federal system, a circuit court of appeal has jurisdiction to hear appeals from federal district courts within its circuit.[148] *With respect to most issues, a party may appeal only final judgments. However, a party is entitled to interlocutory review of certain district court orders, particularly injunctions.*[149] *This exception to the final judgment rule is provided to prevent the irreparable deprivation of rights which the improper granting or denying of an injunction may cause. A court of appeal also has discretionary power to accept an appeal of other interlocutory orders if so doing will speed up the litigation.*[150]

The United States Supreme Court is the court of highest review for constitutional issues. It has power to review decisions of the courts of appeal upon petition by a party for a writ of certiorari, whether or not the court of appeal has entered a judgment.[151] *The Court will grant certiorari only to determine important questions, or to resolve conflicting decisions in the lower courts. The Supreme Court also has power to review a final judgment from the highest court in a state if the judgment involves the deprivation of a constitutional right or the constitutionality of a state statute.*[152]

In determining the constitutionality of government actions, the Supreme Court will usually adhere to certain prominent principles. In deference to the legislative and executive branches, the Court will attempt to construe a statute or the manner of its application as constitutional if at all possible, even if this requires narrowing the scope of the statute.[153]

The Court also considers the imporant principle of stare decisis, (the doctrine of precedent, or abiding by former judicial decisions), although this principle is applied less strictly in constitutional than in ordinary cases. Finally, the Court will take care to limit its ruling to the precise issue it is considering, and avoid

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However, if the issue involves a First Amendment right, the court has a duty to make an independent review of the entire case. Bose Corp. v. Consumer Union, 466 U.S. 485, 499 (1984).

148 *28 U.S.C. § 1291 (1988).*

149 *28 U.S.C. § 1292 (a) (1988).*

150 *28 U.S.C. § 1292(b) (1988).*

151 *28 U.S.C. § 1254 (1988).*

152 *28 U.S.C. § 1257(a) (1988).*

153 *Screws v. United States, 325 U.S. 91, 98 (1945).*

extending its ruling to additional issues or hypothetical situations. Lower courts will follow the interpretations of appellate courts which encompass their jurisdictions, and all courts are ultimately bound by the interpretations of the Supreme Court on constitutional matters.

In Canada, the appellate process is similar to that in the United States. One major difference between the two systems, however, is that, where the United States has essentially two complete systems of courts, the state and federal court systems (unified by the Supreme Court's authority as court of last resort), to match two complete sets of law, Canada has a unified court system which operates in the unique context of Canadian federalism. Under that regime, legislative power is divided between the federal parliament and the provincial legislatures. The criminal law is the exclusive province of the federal parliament.[154] *Courts of criminal jurisdictions, however, are created by provincial legislatures.*[155] *Typically, the court of first instance in a criminal matter is a provincial superior court which, in each province, has both a trial and an appellate division. The trial division has jurisdiction to try indictable offenses under the criminal code.*[156]

Persons convicted in trial courts can appeal to the court of appeals against their conviction on questions of law alone[157] *(such an appeal is virtually of right) or, with leave of the appeals court, on questions of fact or mixed questions of law and fact*[158]*, on certificate of the trial judge that the case is fit for appeal, or on any other ground which appears sufficient to the court of appeal.*[159] *An appeal can also be made against the sentence by leave of the appeals court unless the sentence be fixed by law.*[160]

Under §101 of the Constitution Act, 1867, the federal parliament has the power to establish a general court of appeal for Canada or other courts "for the better administration of the laws of Canada." Pursuant to this power, parliament established the Federal Court of Canada with both trial and appellate divisions. The Trial Division has excusive jurisdiction in all cases, where relief is claimed

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154 *Constitution Act, 1867, § 91 (27).*

155 *Constitution Act, 1867, § 92 (14). See also § 91 (27).*

156 *Criminal Code, R.S.C. 1985, c. C-46, §§ 468, 469.*

157 *Criminal Code, R.S.C. 1985, c. C-46, § 675 (1)(a)(i).*

158 *Criminal Code, R.S.C. 1985, c. C-46, § 675 (1)(a)(ii).*

159 *Criminal Code, R.S.C. 1985, c. C-46, § 675 (1)(a)(iii).*

160 *Criminal Code, R.S.C. 1985, c. C-46, § 675 (1)(b).*

against the Crown,[161] *to hear applications for extraordinary writs in relation to anyone serving in the Canadian armed forces outside Canada,*[162] *to grant extraordinary writs against any federal board, commission or other tribunal (including the Attorney General),*[163] *and shares concurrent jurisdiction with other courts over (among other things) actions against an officer or servant of the Crown for anything done or omitted in the performance of his duties.*[164] *The Appellate Division hears appeals against the Trial Division from any final judgment, judgment as to question of law determined before trial, or interlocutory judgment.*[165] *The Appellate Division can also review decisions of federal boards, commissions or other tribunals.*[166]

The Supreme Court of Canada, also created pursuent to § 101 of the Constitution Act, 1867, is the highest court in Canada and its judgments carry weight equivalent there to decisions of the U.S. Supreme Court.[167] *Persons whose criminal convictions are sustained by an appellate court can appeal to the Supreme Court on any question of law on which a judge of the court of appeal dissents,*[168] *or on any question of law if leave is granted by the Supreme Court.*[169] *The highest court of final resort in a province can refer cases to the Supreme Court if, in the opinion of that court, the question involved in the appeal "is one that ought to be submitted to the Supreme Court for Decision."*[170] *Appeal can also be made from lower courts directly to the Supreme Court in questions of law alone by leave of the Supreme Court.*[171] *The Supreme Court also has the power (not unlike certiorari in the United States) to call up cases from lower courts if it feels that a question of sufficient importance is implicated.*[172]

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161 *Federal Court Act, R.S.C. 1985, c. F-7, § 17 (1).*

162 *Federal Court Act, R.S.C. 1985, c. F-7, § 17(6).*

163 *Federal Court Act, R.S.C. 1985, c. F-7, § 18(a)(b).*

164 *Federal Court Act, R.S.C. 1985, c. F-7, § 17 (5)(b).*

165 *Federal Court Act, R.S.C. 1985, c. F-7, § 27 (1).*

166 *Federal Court Act, R.S.C. 1985, c. F-7, § 28 (1).*

167 *Supreme Court Act, R.S.C. 1985, c. S-26, § 52.*

168 *Criminal Code, R.S.C. 1985, c. C-46, § 691 (1) (a).*

169 *Criminal Code, R.S.C. 1985, c. C-46, § 691 (1) (b).*

170 *Supreme Court Act, R.S.C. 1985, c. S-26, § 37.*

171 *Supreme Court Act, R.S.C. 1985, c. S-26, § 38.*

172 *Supreme Court Act, R.S.C. 1985, c. S-26, § 40 (1).*

D. Other Procedures

The American system has developed some special procedures which are important in protecting constitutional and civil rights. One is the class action suit. It allows a party to sue or be sued for vindication of a right as a member of a class of people that have common interests at stake. The procedure requires that the class be so large that joinder of all interested parties in the suit would be impractical; that common questions of law or fact will apply to the class; that the claims or defenses of the representative party are typical of the claims or defenses of the class; and that the representative party can adequately represent the interests of the class.[173] *The class action suit can be employed if there is a risk that individual suits by members of the class would lead to inconsistent judgments, or would impair the interests of other members of the class who are not parties.*[174] *A member of the class who has notice of the suit may opt out of the class action and thus preserve her rights to sue on her own behalf.*[175] *Class action allows an exception to the mootness doctrine, since the case may not become moot for the class even if the original party bringing the suit is removed from the proceeding.*[176]

Another important provision is the petition to proceed in forma pauperis. A court may grant permission to an indigent complainant to file suit without payment of usual costs.[177] *The complainant must make a showing that he is unable to pay,*[178] *but he need not be totally indigent to qualify.*[179] *This is a vital procedure for preserving the constitutional rights of poor citizens. However, courts may refuse to entertain such suits if they are frivolous.*[180] *Courts have also limited the benefit of this provision by narrowly defining the "costs" which the complainant is*

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[173] *FED. R. CIV. P. 23(a).*

[174] *FED. R. CIV. P. 23(b).*

[175] *FED. R. CIV. P. 23 (c) (2).*

[176] *Sosna v. Iowa, 419 U.S. 393, 399 (1975).*

[177] *28 U.S.C. § 1915 (1988).*

[178] *Pothier v. Rodman, 261 U.S. 307, 309 (1923).*

[179] *Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 339-340 (1948).*

[180] *Whittaker v. Superior Ct., 115 S. Ct. 1446, 1447 (1995).*

excused from paying.[181] *The Supreme Court of Canada also allows for appeals* *in forma pauperis*.[182]

One feature which distinguishes the Canadian Supreme Court from its U.S. counterpart is the former's issuance of advisory opinions under its "reference jurisdiction."[183] *The Canadian court's reference jurisdiction is mandated by statute and has mainly been used for constitutional questions.*[184] *According to law, the Governor General in Council (meaning the federal cabinet) "may refer to the court for hearing and consideration important questions of law or fact." Such questions may concern constitutional interpretation, the constitutionality of federal legislation, or the powers of the federal or provincial legislatures. The Senate and House of Commons can also refer private member bills to the court for an opinion.*[185] *While, according to the statute, only the federal government or parliament can refer questions to the court, provincial governments have also been able to do this by referring questions to their own provincial courts of appeal (by statutory authority in all provinces) which, in turn, enjoy an appeal of right to the Supreme Court.*[186] *While the court has frequently treated references as precedents and the government has usually accepted them, they formally have only advisory weight.*[187] *The court has also occasionally declined to give opinions on the basis of its discretionary authority.*

According to one recent study, the Canadian Supreme Court has answered approximately 115 references since 1874.[188] *Most references have dealt with*

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181 *CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE* *Civil 2d* *§ 2673 (1983 & Supp. 1992).*

182 *Supreme Court Act, R.S.C. 1985, c. S-25, § 97 (1) (b). The specific requirements are laid out in Supreme Court Rule 47.*

183 *While there are American state courts which issue advisory opinions, the U.S. Supreme Court does not. See Hayburn's Case, 2 U.S. (2 Dallas) 409, 409-410 (1792) and Muskrat v. United States, 219 U.S. 346, 362 (1911). For the long history of advisory opinions in Canada see Barry L. Strayer, The Canadian Constitution and the Courts 311-318 (3d ed. 1988).*

184 *Supreme Court Act, R.S.C. 1985, c. S-26, § 53.*

185 *Supreme Court Act, R.S.C. 1985, c. S-26, § 54.*

186 *Supreme Court Act, R.S.C. 1985, c. S-26, § 36.*

187 *See Peter Hogg, Constitutional Law of Canada 216-219 (3d ed. 1992) and James L. Huffman and Mardilyn Saathoff, Advisory Opinions and Canadian Constitutional Development: The Supreme Court's Reference Jurisdiction, 74 Minn. L. Rev. 1281-85 (1990). In the case, Reference re Fisheries (1896), 26 S.C.R. 444, 539, Justice Taschereau wrote, "[W]e are mere advisors, and the answers we give bind no one, not even ourselves." See also Reference re References (1910), 43 S.C.R. 536, 538 and Reference re Water and Water-Powers (1958), 1929 S.C.R. 200, 200.*

188 *Huffman and Saathoff,* *supra* *note 84 at 1287. A list of these cases is appended to the article at 1323-1336.*

issues of federalism; however, since the adoption of the Charter, this procedure has been used in cases involving fundamental rights. A classic example is Reference re an Act to Amend the Education Act (Ontario), decided by the Supreme Court on appeal from the Ontario Court of Appeal.[189] *The government of Ontario sought an opinion from the court of appeal on the question whether an act of the provincial legislature amending the Education Act there by providing for full funding of Roman Catholic schools violated Charter rights to equality (§ 15) and freedom of religion and conscience (§ 2[a]). The provincial court answered that the law was not unconstitutional and the decision was appealed to the Supreme Court of Canada which sustained the lower court opinion.*

III. FEDERAL JURISDICTION

A. Special Powers of the Federal Courts

If the process of trial and appeal fails to protect the rights of a citizen, U.S. federal courts have additional power to protect these rights by the issuance of certain writs. The most important is the writ of habeas corpus, expressly provided for in the Constitution, which empowers a judge to inquire into the legality of any form of loss of personal liberty. Federal courts may issue a habeas writ only to a prisoner who is held in custody in violation of federal laws or the Constitution.[190] *The doctrine of res judicata, incidentally, does not apply to habeas corpus, since habeas corpus is considered to be a challenge to the legality of the defendant's imprisonment rather re-litigation of the original criminal charge; one may petition for the writ at any time.*

If a prisoner is in the custody of a state, a federal court can accept a petition for habeas corpus only if the prisoner alleges a violation of federal law of the Constitution by the state,[191] *and has exhausted state remedies to obtain her freedom, or shown them to be ineffective.*[192] *If the prisoner is in federal custody, she can use habeas petition to collaterally attack a sentence which was wrongly imposed or excessive, but she must first have made a motion in the court which sentenced her to vacate or reduce the sentence.*[193] *If the prisoner is proceeding in*

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189 *(1988), 40 D.L.R. (4th) 18.*

190 *28 U.S.C. § 2241 (1988 & Supp. 1993).*

191 *28 U.S.C. § 2254(a) (1988).*

192 *28 U.S.C. § 2254(b) (1988).*

193 *28 U.S.C. § 2255 (1988).*

forma pauperis in a habeas corpus suit, a federal court will provide her with court documents without costs.[194]

The All-Writs Act[195] *provides federal courts with power to issue any other writs which are "necessary or appropriate" to carry out their functions within their jurisdictions. The Act is a residual source of authority to issue "extraordinary" writs which have no independent statutory basis.*[196] *Such extraordinary writs include mandamus,*[197] *prohibition,*[198] *and quo warranto.*

Mandamus is one of those prerogative writs which traces its origin to English common law. By the use of this writ, an appellate court can order a lower court to exercise its authority when it has a duty to do so.[199] *A court can also force a federal officer to perform his duty, enjoin the enforcement of a statute that is unconstitutional, or prohibit a violation of constitutional rights of a litigant or a third party in a lower court.*[200]

CBS, Inc. v. Davis is a recent example of the use of the mandamus power. A state trial court issued a temporary injunction to prevent CBS from broadcasting a videotape of unsanitary practices in a meat packing operation on grounds that it would irreparably harm the company. The South Dakota Supreme Court refused to stay the injunction. The U.S. Supreme Court issued a mandamus writ to stay the injunction on grounds that it was an impermissible prior restraint of freedom of the press under the First Amendment.[201]

In any event, a mandamus writ is a drastic penalty, and will be issued only if no other adequate remedy is available.[202] *The reverse side of mandamus is the writ*

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194 *28 U.S.C. § 2250 (1988).*

195 *28 U.S.C. § 1651(a) (1988).*

196 *Pa. Bureau of Correction v. U.S. Marshals Service, 474 U.S. 34, 43 (1985).*

197 *While mandamus has been technically abolished in federal courts, FED. R. CIV. P. 81(b), a court may issue a writ of the same effect. Haggard v. State of Tennessee, 421 F.2d 1384, 1385 (6th Cir. 1970).*

198 *Little distinction is made in practice between mandamus and prohibition. CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE Jurisdiction 2d § 3932 (1977 & Supp. 1992).*

199 *See Banker's Life & Casualty Co. v. Holland, 346 U.S. 379, 382 (1953).*

200 *See CBS Inc. V. Davis, 114 S. Ct. 912, 915 (1994) (issuing writ to overturn gag order of lower court which was a First Amendment violation).*

201 *114 S.Ct. 912 (1994).*

202 *In re Glass Workers, Local No. 173, 983 F.2d 725, 727 (6th Cir. 1993).*

of prohibition; it is used by a superior court to confine a lower court to its lawful jurisdiction.[203]

Quo warranto, on the other hand, an extraordinary writ of medieval origin, is a challenge to the exercise of governmental or judicial authority by a person who is not legally entitled to do so. It prohibits only the continued exercise of power beyond authorized limits, and does not provide a vindication of rights or a remedy for past deprivations.[204] *A counterbalance to the quo warranto writ is the de facto officer doctrine, which holds that the acts of a person done within the authority of her office are valid even if her election or appointment to the office is later found to be illegal.*[205] *This doctrine prevents the disruption in government which would result if every act by an officer whose appointment is in question were allowed to be challenged.*

The issuance of prerogative writs in Canada is mostly done in the context of administrative law. Writs of quo warranto, prohibition, and mandamus are usually remedies against administrative decisions and as such come directly from the common law.[206] *The Trial Division of the Federal Court of Canada has exclusive original jurisdiction to issue such writs on application of Canadian military personell serving outside of Canada and against all federal boards, commissions, and tribunals.*[207]

B. Limits on the Power of Federal Courts

In addition to limits on federal court jurisdiction, Congress has limited the power of federal courts to interfere in state court proceedings. The Anti-Injunction Act[208] *is a counterbalance to the All-Writs Act, and the two provisions are construed together. The Anti-Injunction Act prevents a federal court from issuing an injunction to stay a proceeding in state court, unless such an injunction is*

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[203] *See In re Pearson, 990 F.2d 653, 656 (1st Cir. 1993).*

[204] *Johnson v. Manhattan Ry. Co., 289 U.S. 479, 502 (1933).*

[205] *Ryder v. United States, 63 U.S.L.W. 4516, 4517 (U.S. June 12, 1995).*

[206] *See S.A. De Smith, Judicial Review of Administrative Action (3d ed. 1973).*

[207] *Federal Court Act, R.S.C. 1985, c. F-7, § 18.*

[208] *28 U.S.C. § 2283 (1988).*

authorized by an act of Congress,[209] or is necessary to protect a judgment of the federal court.[210]

Federal court power of review over state courts is also limited by several judicial doctrines. The Younger rule, formulated in Younger v. Harris,[211] prevents federal courts from intervening in state court proceedings, even in the face of constitutional violations, unless there will be immediate, irreparable injury. Another limit is the abstention rule, formulated in Railroad Commission of Texas v. Pullman.[212] This doctrine is applied when an issue in the case involves a matter of state law which is being litigated in the state court. If resolution of the issue by the state would make it unnecessary to decide the federal constitutional question, the federal court must suspend its proceeding until the state court resolves the issue. A stronger abstention doctrine applies under the conditions of Burford v. Sun Oil Co..[213] It applies to cases which clearly concern state policies, for which the state has provided a unified scheme of regulation, and in which intervention of the federal court would be disruptive. Since the state court is better equipped to interpret a complex state scheme of regulation, in such a case the proceeding in federal court must be dismissed rather than stayed.

Both the Anti-Injunction Act and the Younger rule give deference to the concept of federalism by showing respect for the judicial proceedings of the states. The abstention doctrines of Pullman and Burford give deference to the superior ability of the states to interpret their own laws. Federal courts must also give full faith and credit to the judicial proceedings and records of each state.[214] Together these doctrines help to maintain the proper balance between state and federal power which is vital to the protection of rights in the federalist plan.

C. Other Criminal and Civil Procedures

In civil rights legislation, Congress has enacted criminal penalties for state officials who abrogate civil rights under certain circumstances. The Civil Rights

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[209] *Specific provisions of civil rights acts, including 42 U.S.C. § 1983 (1988), have been held to be acts of Congress which authorize an injunction. See Mitchum v. Foster, 407 U.S. 225, 242-243 (1972).*

[210] *An exception is recognized if the state court proceeding may result in "irreparable injury." Wulff v. Corcoran, 454 F.2d 826, 831 & n.5 (1st Cir. 1972).*

[211] *401 U.S. 37 (1971).*

[212] *312 U.S. 496 (1941).*

[213] *319 U.S. 315 (1943).*

[214] *28 U.S.C. § 1738 (1988).*

Act of 1866[215] provides criminal penalties for state officials who deprive citizens of rights under color of law on account of race or alienage. The Voting Rights Act of 1965[216] similarly provides criminal penalties for an official who interferes with the right to vote on account of race.[217] It also provides penalties for interfering with the right to vote because of illiteracy, residency (in the election of President and Vice-President only), or language.[218]

In addition to criminal penalties, many civil rights acts enable a person deprived of a right to seek redress by a civil action against a governmental or private party. The Civil Rights Act of 1871[219] allows an aggrieved person to sue a state official who deprives him of constitutional rights under color of law. The Civil Rights Act of 1964[220] entitles a person who is deprived of economic rights to file a civil action for injunctive relief. This provides only preventive relief and does not allow recovery of damages.[221] The Fair Housing Act of 1988[222] allows a person to file a civil action for discrimination in housing, and claim compensatory and punitive damages as well as preventive relief.[223]

As economic regulation and social programs have expanded, the size and power of regulatory agencies in American government have greatly increased. This has brought the need for procedures by which citizens can protect their rights from encroachment by these agencies. The Administrative Procedures Act,[224] which governs the actions of regulatory agencies within the federal government, guarantees the right of judicial review of an administrative decision to any person who suffers a legal wrong as a result of action or refusal to act by an agency. An agency action can be made reviewable by a court one of two ways: if it is made reviewable by statute, or if it is a final agency action for which the complainant

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215 *18 U.S.C. § 242 (1988).*

216 *42 U.S.C. §§ 1971 et seq. (1988 & Supp. 1993).*

217 *42 U.S.C. § 1973j(a) (1988).*

218 *42 U.S.C. § 1973aa-3 (1988).*

219 *42 U.S.C. § 1983 (1988).*

220 *42 U.S.C. § 2000a-3(a) (1988).*

221 *The party may, however, be able to collect counsel fees. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).*

222 *42 U.S.C. § 3613(a)(1)(A) (1988).*

223 *42 U.S.C. § 3613(c) (1988).*

224 *5 U.S.C. § 702 (1988).*

has no other adequate judicial remedy available.[225] *To have standing, the complainant must be among those actually injured by the action.*[226] *The standard of review depends upon whether the issue is legal, factual, or procedural, and the procedures for review depend upon whether the decision is adjudicative, rulemaking, or ancillary.*

In the Canadian courts since adoption of the Charter, declaratory judgments have become an increasingly common means of claiming vindication of constitutional rights. Since such judgments simply state the rights of the party making application, but compel no action, they are usually used when no other remedy is available. Though a declaratory judgment compels no action, it frequently carries implications which do suggest remedies. The success of these judgments in protecting constitutional rights rests largely on the willingness of government officials and agencies to accede to them as a means of implementing the Charter. Such judgments could be said to carry more moral than simply legal weight.

IV. NON-JUDICIAL PROCEDURES FOR ENFORCING RIGHTS

A. Role of Executive in Protecting Rights

Several federal civil rights statutes allow the Attorney General of the United States to intervene in a civil suit filed by an aggrieved party if the issue has general public importance.[227] *This allows the Attorney General to represent and protect the public interest in the determination of the issue.*

In addition, under many of the statutes, the federal government may initiate a suit to protect the rights of individuals when they may be unable to assert their own rights. The Civil Rights Act of 1964[228] *allows the Attorney General to initiate a civil action in the name of the United States if she finds that a person has been deprived of equal access to a public facility and is unable to initiate legal proceedings. The Fair Housing Act of 1988*[229] *authorizes the Attorney General to enforce the Act by civil action if there is a pattern of deprivation of rights in housing. The Act also allows an aggrieved person to file a complaint with the*

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225 *5 U.S.C. § 704 (1988).*

226 *Sierra Club v. Morton, 405 U.S. 727, 735 (1972).*

227 *42 U.S.C. § 2000a-3(a) (1988) (Civil Rights Act of 1964); 42 U.S.C. § 3613(d) (1988) (Fair Housing Act of 1988).*

228 *42 U.S.C. § 2000b (1988).*

229 *42 U.S.C. § 3614(a) (1988).*

Secretary of Housing and Urban Development,[230] who may then authorize the Attorney General to file a civil action for temporary relief.[231]

Both the Attorney General and federal courts have important roles in enforcement of the Voting Rights Act of 1965. Several provisions give the Attorney General the power to institute civil action to prevent voter discrimination based on race,[232] qualifications,[233] poll taxes,[234] residency,[235] or age.[236] The Attorney General or a federal court can appoint voting examiners,[237] and must approve any changes in voting rules,[238] in an electoral subdivision covered by the Act. If a court finds a pattern of discrimination in voter qualifications, it may order a person to be qualified to vote, and hold a refusal to be contempt of court.[239]

In discussing these non-judicial procedures, one should not overlook the powers of the President in protecting fundamental rights. The president has ultimate power over the executive departments through the appointment and removal of chief federal officers. He may thus control the overall policy direction of many federal programs such as social services. This implicates rights to the extent that presidential power may be used to protect or deny rights. An example would be an order prohibiting doctors working under federal programs from advising women to have abortions.

As commander-in-chief of the armed services, the President has control over fundamental rights in the military. An example is President Truman's executive order to desegregate the armed services.[240] The Emancipation Proclamation, which freed the slaves, is another example. A less dramatic example is President Clinton's order revising military policy dealing with the rights of homosexuals.

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230 *42 U.S.C. § 3610(a)(1)(A)(i) (1988).*

231 *42 U.S.C. § 3610(e) (1988).*

232 *42 U.S.C. § 1971(c) (1988).*

233 *42 U.S.C. § 1973j(e) (1988).*

234 *42 U.S.C. § 1973h(b) (1988).*

235 *42 U.S.C. § 1973aa-2 (1988).*

236 *42 U.S.C. § 1973bb (1988).*

237 *42 U.S.C. § 1973d; § 1973a(a) (1988 & Supp. 1993).*

238 *42 U.S.C. § 1973c (1988).*

239 *42 U.S.C. § 1971(e) (1988).*

240 *Executive Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).*

The President may also nationalize the state militias when necessary to protect human rights. The war power can be used to deny fundamental rights as well, the best example being the internment of Japanese-Americans during the Second World War.

B. Informal Roles in the Protection of Fundamental Rights

The Attorney General also has less formal roles in constitutional decision making. She is authorized to give advice and opinions of law to the President and other executive branches,[241] and will often advise government agencies so that they can implement a statute in a constitutional manner.[242] The Office of Legal Counsel prepares formal opinions of the Attorney General,[243] and reviews pending Congressional legislation for constitutional questions.[244]

The Solicitor General of the United States, an officer in the Department of Justice under the Attorney General, has the duty of representing the United States government in court. In this position, he has much influence over the development of constitutional issues. The Solicitor General conducts or supervises cases before the Supreme Court in which the government is a party, and authorizes or declines to authorize appeals on behalf of the government.[245] He can authorize intervention by the government in all cases involving the constitutionality of acts of Congress.[246] Courts often seek amicus curiae briefs from the Solicitor General when constitutional issues are involved, and he is exempt from the usual requirement that all parties in a suit must consent to the filing of an amicus brief.[247]

Courts will often allow amicus briefs from other interested persons as well when constitutional issues are involved.[248] State attorneys general often seek to

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241 *28 U.S.C. § 511 (1988).*

242 *Douglas W. Kmiec, OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive, 15 CARDOZO L. REV. 337, 347 (1993).*

243 *28 C.F.R. § 0.25 (1994).*

244 *Kmiec, supra note 127, at 338.*

245 *28 C.F.R. § 0.20 (1994).*

246 *28 C.F.R. § 0.21 (1994).*

247 *Karen O'Connor, The Amicus Curiae Role of the Solicitor General in Supreme Court Litigation, 66 JUDICATURE 257, 260 (1983).*

248 *In Canada, such parties are referred to as "interveners" and can file briefs with leave of the courts. The Supreme Court Rules specify how this is done in that court.*

participate in cases involving federalism issues, though they participate less often in cases involving civil rights.[249] *Many private organizations are deeply interested in constitutional issues, and seek to participate by amicus briefs in cases in which they have no standing to be litigants. The courts have relied on these participants to overcome some of the shortcomings of the adversary process and represent the interests of third parties.*[250] *By submitting amicus briefs, these participants can introduce non-legal materials, of which the judges would not otherwise be aware, into the deliberations,*[251] *and can supplement or replace expert testimony.*[252]

Some legal scholars see the expanding use of amicus briefs as a form of judicial lobbying, since they often take positions of advocacy rather than neutrality.[253] *Some find this to be similar to a legislative fact-finding exercise which is inappropriate for a judicial body.*[254] *Some scholars fear that the courts lack the tools to adequately analyze the non-legal materials which these briefs may introduce,*[255] *or that their admission will undermine the constitutional requirements of standing.*[256] *However, since the determination of individual rights is inescapably part of the political process,*[257] *the participation of these interest groups in attempts to influence court decisions may not be out of place.*

V. SUMMARY

Within the cultural and legal traditions of both the U.S. and Canada, notions of individual liberty and protection of the rights of the individual from government intrusion have great power. The fundamental rights protected by the U.S. Constitution have their origins in natural law and common-law traditions that

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249 *Thomas R. Morris, States Before the U.S. Supreme Court: State Attorneys General as Amicus Curiae, 70 JUDICATURE 298, 303 (1987).*

250 *Michael K. Lowman, The Litigating Amicus Curiae: When Does the Party Begin after the Friends Leave?, 41 AM. U. L. REV. 1243, 1244 (1992).*

251 *Michael Rustad & Thomas Koenig, The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs, 72 N.C. L. REV. 91, 99 (1993).*

252 *Ronald Roesch et al., Social Science and the Courts: The Role of Amicus Curiae Briefs, 15 LAW & HUM. BEHAV. 1, 4 (1991).*

253 *LOUIS FISHER, CONSTITUTIONAL DIALOGUES 21 (1988).*

254 *Philip B. Kurland, Toward a Political Supreme Court, 37 U. CHI. L. REV. 19, 34-36 (1969).*

255 *Rustad, supra note 135.*

256 *Lowman, supra note 134, at 1280-1281.*

257 *FISHER, supra note 137, at 23-24.*

evolved over centuries and are deeply embedded in law and in national consciousness.

The U.S. Constitution protects not only the rights enumerated in it, but many other rights as well, by separating and limiting the power of government. The Constitution itself does not provide specific procedures for enforcing these rights. Delineation of procedure was left to the judiciary and the legislature; the framers of the Constitution were more concerned with carefully defining the nature of the protected rights themselves, understanding that procedures would necessarily evolve over time and change with circumstances.

In the U.S. system of diffuse judicial review, all branches of government have a role in protecting the fundamental rights of citizens. But the primary way a citizen may invoke that protection is through a judicial proceeding. All courts have the duty to interpret and apply the Constitution to the cases they are trying. Generally, U.S. courts can adjudicate only actual cases or controversies, and cannot decide abstract constitutional questions. A person who claims a violation of her constitutional rights must show an actual injury, and meet the other requirements of justiciability, before she can bring a suit.

Judicial procedures such as rules of evidence, procedures for selecting a jury acceptable to both sides in a controversy, and the like, are designed to protect the rights of litigants and ensure a fair trial in both civil cases and criminal prosecutions. When the trial process falters, and fails to adequately protect a person's rights, the courts can employ extraordinary writs to vindicate them.

Most constitutional issues are settled in the appellate courts, and the Supreme Court makes the ultimate determination of the meaning of the Constitution. To provide certainty and uniformity in constitutional interpretation, the Supreme Court develops analytical frameworks with which to judge the issues. But, as the framers of the Constitution foresaw, evolving social values, political climates, historic circumstances, and even changing technologies require adaptable systems of interpretation and procedures for protecting human rights. This is the essential strength of a constitutional system depending on diffuse judicial review: the Constitution provides, not procedure, but definition of the nature of the rights considered fundamental. It then gives to the judiciary the responsibility for continuous review of law, legal processes, and their application to the unique situation of each litigant, to assure that in attempting to apply the law, the State never violates rights that our Constitution holds fundamental.

Interlocutory review - Abstract review - Report by Professor Lorenza CARLASSARE

Italy

1. Constitutional Courts and democracy

The last part of this century has been marked by the proliferation of constitutional courts. This is a sign of the spread of democracy for, in theory, at least, the establishment of a constitutional court marks the end of an authoritarian regime and the birth of a new democracy. In the wake of World War II, it was the constitutions of two countries overcoming fascism, Italy and Germany, which first established constitutional courts; at the same time, in Austria, the constitutional court, abolished when the country was occupied, was re-established on 12 October 1945.

In Portugal, judicial review of the constitutionality of laws, introduced for the first time by the Republican Constitution of 1911 and retained by the subsequent Constitution of 1933, was a fully decentralised system of review which, in practice, did not function. It was only after the Revolution of April 1974, with the Constitution of 1976, that an effective system was established combining decentralised review by the ordinary courts with centralised *or, as it is described in some quarters, "concentrated" review by a political body (the Revolutionary Council) and a judicial body (the Constitutional Commission, replaced by a Constitutional Court under the Constitutional Act of 30 September 1982).*

In Spain, the experience of constitutional justice witnessed during the Second Republic (1931 - 1936) and destroyed by the Franco Regime was likewise reintroduced when democracy was restored. The Constitution of December 1978 set up a Constitutional Court, which started functioning on 15 July 1980.

The trend starting in 1920 with the establishment of the Czechoslovakian Constitutional Court and the Supreme Constitutional Court of Austria has recently spread widely among the new democracies of central and eastern Europe. Some of them have introduced a constitutional court for the first time, while others have redefined the scope of the constitution and the jurisdiction of their courts with a view to ensuring effective protection of human rights and fundamental freedoms.

The establishment of the French Constitutional Council under the Constitution of 1958 is to be seen in a different perspective. Although the Council did not initially appear to have the same objectives as those of the other courts, it later fulfilled a task more and more comparable to that of constitutional court judges, notably in relation to fundamental rights (see below, § 6.1).

2. The constitutional guarantee of fundamental rights

The safeguarding of individual rights and freedoms, according to the solemn proclamation of the Declaration of the Rights of Man of 1789, represents the very essence of the rule of law, the fundamental purpose for what it was introduced. All the principles included in it (separation of powers, lawfulness, etc.) serve to ensure the realisation of these rights and freedoms. Nevertheless, in the legal systems of the 19th century, because of the flexibility of the Constitution, the rights were not binding on the legislature. In Italy, for example, although the monarchic Constitution of 1848 recognised numerous personal freedoms in proclaiming the equality of citizens, with the arrival of fascism freedom and democracy disappeared, as did equality of citizens when racial and political discrimination were established by force of law. The constitutional provisions could be waived by ordinary legislation introduced by the regime, which, having won the majority of parliamentary seats, had legislative power at its disposal.

The majority may thus become a threat to freedom; the numerous violations of the constitutional order by parliaments made it necessary to supervise the legislature. The adoption of a rigid constitutional charter which was beyond the control of the governing majority was the premise for this. To this end, the monitoring of compliance with constitutional principles and rights could be entrusted to a court especially established to settle constitutional disputes, or it could remain the responsibility of each judge, in accordance with the American model. If the Constitution is the supreme *law to which all ordinary laws must conform, in the event of conflict the judge, in choosing the law to apply in a specific case, cannot but give precedence to that arising from the superior source (the Constitution).*

3. The European Model of Constitutional Justice: features common to the various systems and differences between them

In the European model of constitutional justice, responsibility for reviewing the constitutionality of laws is concentrated in the hands of a single institution, which has a monopoly in this respect. The classic example of this is the Austrian (Kelsenian) model: Austria was the first to endow itself with a Supreme Constitutional Court (under the Constitution of 1920), under the influence of HANS KELSEN. Its example was followed after the Second World War by Italy (1948), Germany (1949) and the other countries mentioned above.

In fact, the European model of constitutional justice varies considerably *from one country to another. The common characteristic, a constitutional court (which may also be called Constitutional Council or Constitutional Tribunal), is not sufficient to hide the differences between the systems. The rules relating to the* composition *of the constitutional court and the* means of access *to it are not the same; moreover, the review may be* abstract or concrete, *and preventative (*a priori*) or subsequent (*a posteriori*), depending on whether the law is one which has not yet*

entered into effect or one which is already in effect. Finally, there are differences relating to the binding effect *of the decisions delivered by the courts, and their effectiveness* over time.

The differences between the systems do not relate only to marginal questions, but also to the relationship between the constitutional court and the other courts. This relationship is a key aspect of the system whereby review is the prerogative of a central body. This system contrasts with one of decentralised review in which any judge can review the constitutionality of the laws - a system of review which has its roots in a decision taken by the Supreme Court of the United States in 1803. The review is concrete*, that is, carried out by the court only in the light of the decision which it must deliver on a dispute between the parties to the litigation.*

However, the distinction between the two systems is not always as clear-cut as it is sometimes said; here, too, it is appropriate to remain cautious. Indeed, the system whereby review is the prerogative of a central body is not uniform. The relationship between the Constitutional Court and the other courts, which are not always deprived of all power and which at times also have the option of not applying *a rule considered to be unconstitutional, also varies from one country to another. The direct review provided for under the Portuguese Constitution, in particular, represents a noteworthy example of an exception to the monopoly of the Constitutional Court, that is, to the very essence of the system of centralised review.*

This type of review, moreover, is not necessarily abstract*, but may be concrete just like that of the North American courts. Thus,* ex post facto *interlocutory review of constitutionality in cases referred to the Constitutional Court by the ordinary courts is often defined as* concrete*. However, here too it is necessary to distinguish one system from another: whilst in some countries the effect of the decision delivered by the court is limited to the parties to the litigation, elsewhere it produces an "erga omnes" effect. In this case the term "concrete" does not seem to define this type of review correctly: this is why in Italy one speaks rather of a "mixed" system, corresponding to a mix of the Austrian abstract review and the American concrete review.*

4.1. Interlocutory review in Italy

It must be acknowledged that in Italy, in particular, review of the constitutionality of laws is of a hybrid *nature which goes back to the very origins of the system. During the course of the debates in the Constituent Assembly, various solutions were envisaged, in accordance with the different approaches to the essential role of the Constitutional Court, which could be seen as the protection of* citizens'rights *violated by an unconstitutional law or the pursuit of the* general

interest, *which lay in the repeal of unconstitutional laws. Once* actio popularis *and direct petition ("constitutional complaint") had been discarded, an intermediate solution prevailed, i.e. interlocutory review, carried out as a defence in a particular case.*

This kind of review, which has been introduced in several systems which also allow petitions by individuals, *is very important for the protection of fundamental rights, as it is the* only avenue *in Italy whereby individuals can refer a matter to the Constitutional Court. It is an indirect avenue, for it is up to the* judge *to decide to refer a matter to the Constitutional Court, either* ex officio *or at the request of one of the parties to the litigation. Everyone*[258] *has the opportunity of "raising a question of constitutional legitimacy" (Section 23, 1. No. 87/1953) "in the course of proceedings before a judicial authority" (*see below, *§ 5.1), but it is only the latter that may refer a matter to the Constitutional Court, once it has established the fulfilment of the* prerequisites *for doing so. Judges must first of all consider whether the constitutional question is "decisive" ("*rilevante*") for the case they are to judge, i.e. it must relate to a law which they must actually apply. Judges are not obliged to proceed as long as it is not absolutely certain that the law will be applied (see below, § 4.2), but it is sufficient that they consider it to be* probable, *in view of the particulars at their disposal, when deciding to refer the matter to the Court.*

The second prerequisite is that the defence of unconstitutionality is not "manifestly unfounded". Consequently, the judge, in the event of doubt *about the constitutionality of the disputed statutory provision, is required to stay the application and refer the matter to the Constitutional Court.*

4.1.2. The autonomy of the proceedings before the Constitutional Court

*The fundamental question, at this point, pertains to the relationship between the two sets of proceedings: is the outcome of the one tied to that of the other? The answer accounts for the half-concrete and half-abstract nature of interlocutory review. Initially, the latter is indeed linked to the concrete interests of the parties to the original proceedings (*a quo *proceedings), but once under way it proceeds* independently. *From then on, the* general interest in the elimination of the unconstitutional law or provision *takes precedence over the concrete interests of the individuals. Indeed, the judgment declaring the unconstitutionality of a provision has an* erga omnes *effect: the provision may no longer be applied in any*

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[258] *The provisions of Law No. 87/1953 have been somewhat liberally interpreted: not only the plaintiff, the defendant, the accused, the appellant and the respondent, but also the intervening parties have the opportunity to raise the issue of constitutional legitimacy. (On the subject of procedure, see A. PIZZORUSSO, Art. 137, in Commentario della Costituzione a cura di G. Branca, Bologna (Zanichelli), 1981, p. 212).*

circumstances, even with respect to legal relationships existing prior to the declaration of unconstitutionality (see below, § 5.4).

Several judgments (No. 89/1982; No. 137/1983; No. 300/1984; No. 288/1985; No. 52/1986) have specified that constitutional proceedings are independent from the original proceedings, so that the former, once legitimately initiated, must continue *without any consideration of facts subsequently arising in relation to the original proceedings. Even the interruption of the latter, for example of criminal proceedings because of the death of the accused, does not prevent the Constitutional Court from pursuing its review of the challenged statutory provision*[259]*. Under Rule 22 of the 1956 Rules of procedure, the general provisions relating to the staying of, interruption of, or termination of proceedings do not apply to the judgment delivered by the Court, even in the event that, for whatever reason, the proceedings which have resulted in the reference to the Court are brought to an end.*

As a result, a remarkable contradiction exists between this autonomy and the current Constitutional Court practice of determining, itself, whether the prerequisites *have in fact been met, or at the very least,* whether the judge in the main proceedings has given appropriate reasons. *The most disputed question concerns "rilevanza", the determination of which, - because it relates ultimately to the* applicability of the provision in question *to the case at issue - does not seem to fall within the jurisdiction of the Constitutional Court, but rather within that of the judge dealing with the original proceedings*[260]*.*

4.2. A comparative approach

*In Spain, too, the Constitutional Court has often stated that it does not have to decide on a particular matter because the question of the constitutionality of the law is not crucial to the decision the referring judge is required to deliver ("*falta de relevancia*"). The Austrian Court considers that it has jurisdiction to ascertain* only *if the first instance judge has been unreasonable or manifestly mistaken in assessing the "prejudicial nature" of the law in question. The attitude of the*

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[259] *These specifications are contained in Judgment No. 52/1986: "il processo incidentale di costituzionalità non è influenzato da circostanze di fatto sopravvenute nel procedimento principale, e ciò in quanto, svolgendosi esso nell'interesse generale, una volta che sia validamente instaurato, a norma dell'art. 23 1. n. 87/1953, acquisisce autonomia che lo pone al riparo dall'ulteriore atteggiarsi della fattispecie, financo nel caso in cui, per qualsiasi causa, il giudizio rimasto sospeso cessi".*

[260] *I have criticised the Italian Court's tendency to make its review more and more concrete, and to adapt it to the case at issue, and I do not understand writers who approve of this: (L. CARLASSARE, Le questioni inammissibili e la loro riproposizione, in Scritti in onore di Vedzio Crisafulli, Padova, 1985, Vol. I, 159 pp.; ID., "Le decisioni di inammissibilità e di manifesta infondatezza della Corte costituzionale", in Foro italiano, 1986, V, 293 pp.)*

Belgian (Administrative) Jurisdiction and Procedure Court is completely different. With the objective of protecting the reciprocal autonomy of the courts of the two branches of law (constitutional and ordinary), it takes the view that it is up to the judges referring the case to decide on the relevance of the preliminary point of law facing them[261].

As to the merits, in Italy and Austria the question of constitutionality is referred to the Constitutional Court as soon as a reasonable doubt *exists as to the constitutionality of the law; in Germany, by contrast, the question is only referred when the judge* a quo *comes to the actual conclusion of unconstitutionality. This is a decisive hurdle. Mere doubt is not sufficient: judges must refer the question to the Court if they are* convinced *that the legislation is not in keeping with the Constitution. It must be added that they must be equally convinced that the issue is of* decisive influence *for the outcome of the judgment: if the decision in the case would be the same whether the law was valid or invalid, they must refrain from referring the matter to the Court. The reference may thus only be made if the decision on the case depends entirely upon the law which the judge finds to be contrary to the Constitution*[262]*. However, it should be noted that in Germany individuals also have a right to* petition *the Constitutional Court directly; consequently, this hurdle does not have such serious consequences as in Italy, where interlocutory review is the only way for individuals to protect their rights.*

By contrast, in other systems (notably in Romania), the courts are required to refer such questions to the Constitutional Court without being able to refuse *such a referral on the grounds that the objection of unconstitutionality is unfounded (see below § 4.3).*

4.3. The parties to the original proceedings and the constitutional proceedings

What is the influence exercised by the parties to the original proceedings on the constitutional judgment? The answer is not the same for all systems.

Individuals prejudiced in a fundamental right by legislation have, above all, the possibility of requesting the trial judge to refer the question to the Constitutional

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261 *"Even if the Court finds that the judge did not correctly assess the legislation applicable to the facts of the case, it cannot correct the matter in this respect" (Judgment No. 3/1989). See also Judgment No. 64/1993 and the other examples mentioned by M. MELCHIOR, De quelques aspects des questions préjudicielles à la Cour d'Arbitrage, in Revue belge de Droit constitutionnel, 1995, I, p. 61-63.)*

262 *The Federal Constitutional Court has allowed reference in advance when "the question referred is of general and fundamental importance for the public interest and this is the reason why a decision must not be delayed" (see K. SCHLAICH, Procédure et technique de protection des droits fondamentaux in Cours constitutionnelles européennes et droits fondamentaux, (under the direction of L. FAVOREU, Economica, 1982, 130).*

Court. But it is the judge who decides whether to do so, and at times (above, § 4.2) does so only if he or she is convinced *of the unconstitutionality. This is a first barrier, which does not exist in all systems and is a more serious obstacle in some than in others. This is not without consequences for the scope of the right to be protected: initially it was rather unusual for matters to be referred to the Italian Court, especially by the higher courts, which almost never doubted the constitutionality of the laws in force.*

The Constitutional Court itself may be said to be a barrier when it reviews the referring judge's assessment of whether the prerequisites have been met (see above, § 4.2), or when it directly carries out this assessment, as occurs, for example, in Romania, where the ordinary courts are obliged *to refer the matter to the Constitutional Court, whatever their opinion might be on the objections raised by the parties to the proceedings. Screening out manifestly unfounded objections is the responsibility of the Court, but entails a two-tier procedure*[263]*. By contrast, in Italy the parties have no remedy against the refusal of a trial court judge to refer the matter to the Court. It should be pointed out that they have the possibility of raising the same objection again before the higher court. But in any event, the objections transmitted to the Court are not necessarily those raised by the* parties *(as is the case, for example, in Romania); only the* judge *may formulate the objections in his or her reference, which is* binding *on the Court. That means that the issue to be decided ("*thema decidendum*"), once fixed by the reference, cannot be extended (or changed) even by the parties to the original proceedings, and even though they are entitled to participate in the proceedings before the Constitutional Court*[264]*. Consequently, when the Court does not find any conflict between the challenged provision and the constitutional provision indicated, it is obliged to* dismiss *the objection, even if it believes that the challenged provision is flawed because of a violation of a different constitutional provision not mentioned by the referring judge*[265]*. The situation is quite different where (as in Germany) the Court has the possibility of reviewing the challenged rule in all respects*[266]*, or*

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263 *The parties may appeal against the decision of inadmissibility delivered by a bench of three judges (within a period of ten days) to a bench made up of five judges, which - if they allow the appeal - will also decide on the merits.*

264 *It must be emphasised that, in Italy, the parties are defined as "possible" parties because even if they do not participate, the constitutional proceedings will still take place. This relates to private parties as well as to the government (whose intervention, in practice, takes place when it defends the challenged law).*

265 *In Belgium, on the one hand the (Administrative) Jurisdiction and Procedure Court does not hesitate to redraft an interlocutory question; on the other hand, it has not granted the parties to the main proceedings permission to change the content of the questions formulated (F. DELPEREE and A. ROSSON-ROLAND, in Annuaire International de Justice Constitutionnelle, 1985, 318).*

266 *See A. WEBER, Le contrôle juridictionnel de la constitutionnalité des lois dans les pays de l'Europe occidentale, in Annuaire International, op. cit., 1985, 58, who points out that, on the contrary, the Austrian Court may not go beyond the points raised by the referring judge.*

when the parties to the original proceedings can exercise their influence on the judgment delivered by the Constitutional Court by putting forward new arguments for the Court to consider without being bound by the request of the referring judge. It is obvious that rights are better protected in these cases.

5.1. The effectiveness of the protection of rights in the different systems of interlocutory review: the court empowered to refer the matter to the Constitutional Court

Despite the similarities (even in practice) between the various systems, there are thus differences which determine the effectiveness of the protection of fundamental rights; this is particularly true for the differences concerning the courts empowered to refer an issue to the Constitutional Court. The larger the number of such courts, the wider the access to review proceedings and, consequently, the more chance there is of having the provision affecting these rights respected.

Whereas in Germany, Italy and Spain, the possibility of referring matters to the Constitutional Court is available to any judge*, in other systems (in Austria, for example) it is open only to the Supreme Courts and to the courts of second instance. In Italy, the Constitutional Court has ensured wide access for interlocutory questions, which may be raised as soon as either of two alternative conditions is fulfilled: a* subjective *condition, relating to the notion of "judicial authority", or an* objective *condition, relating to the notion of "proceedings". Consequently, an interlocutory question may be raised: a) when the proceedings (*whatever their nature and the procedural forms they take*) "are completed in the presence and under the direction of a* person appointed to judicial office*; b) when the institutions in question, even if they are "outside the organisation of the judiciary", are, exceptionally, empowered to adjudicate "for the purpose of the objective application of the law" and, to this end, occupy "*a super partes *position" (Judgment No. 83/1966). In any event, the Court also requires that the referring authority have effective* decision-making *powers in the proceedings taking place before it (see, for example, Judgment No. 17/1980). It must be added that the case-law on this subject is not unambiguous, but at the same time, the extensive approach followed by the Court, which has led it to increase the number of avenues of access to the Court, has also induced it to state that it may itself raise questions of constitutional legitimacy (Judgment No. 2/1960) once it has, of course, ascertained that the prerequisites have been fulfilled and notably that the law in question has to be applied in the main proceedings.*

5.2. The scope and purpose of review

The protection of constitutionally guaranteed individual interests that is assured by interlocutory review may, consequently, vary in effectiveness from one system

to another, in several respects. This applies to the scope *and the* subject *of the review carried out by a central body. This review may relate to* all rules and provisions*, whatever the nature of the instrument in which they are laid down (Poland, Slovenia, Germany as far as abstract review is concerned), or only to some of them. Thus, in Italy and Spain, it is the* laws and provisions having force of law *that are subject to review, whereas in Austria, Croatia, Poland, Romania and Slovakia the review extends to regulations issued by the executive. As to the* Rules of Procedure of Parliamentary Assemblies*, though they are subject to review in several systems (Spain, France, Hungary, Romania, Turkey), they remain excluded in Italy (as in Poland, where the Rules of Procedure of the Parliament are excluded). The Constitutional Court, contrary to the prevailing opinion in the literature, has declared itself incompetent to review them, considering them to be the expression of parliamentary sovereignty. It is desirable that this case-law change; the importance of constitutional review of these Rules of Procedure is evident, in particular, as far as the protection of the rights of* minorities *is concerned*[267].

As fundamental rights are directly safeguarded by the Constitution, their very existence, as well as their essential content, is at risk in the event of a revision which is not subject to review. The extent to which the Constitutional Courts monitor laws providing for a revision of the constitution *is therefore a question of the highest importance.*

Although, for several reasons (not least of an international nature), the current trend favours an inviolability of fundamental rights that transcends the prohibitions expressly laid down, the attitude is not the same everywhere. Sometimes the Court scrutinises only the conduct *of the procedure (in Austria for example); in other cases it also reviews the* merits*. This is true of the Italian Court, which has affirmed (and several times confirmed) its jurisdiction to review constitutional laws when these violate "supreme principles" - individual rights and freedoms*[268]*. Some Constitutions expressly lay down rights and freedoms as one of the* substantive limits *to revision, as in the case of the German Constitution (Art. 79, para. 3) and the Portuguese Constitution (Art. 228, paras. d and e). In this case, there is no doubt that review by the Court extends to constitutional laws. In other instances, it is equally obvious that they are excluded from review (for example, in Poland: see below § 5.3).*

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[267] *As for the regulations issued by the executive (governmental or ministerial regulations), the fact that they are excluded from centralised review does not mean that they are excluded from any kind of review. In Italy, notably (just as in Spain), any judge may refuse to apply a secondary rule which is contrary to the law: judicial review of secondary rules is allowed. It must also be remembered that regulations (like other secondary rules and administrative decisions) may be the subject of an application to the administrative courts to have them set aside.*

[268] *Judgment No. 183/1973; No. 170/1984; No. 1146/1988.*

5.2.1. Unconstitutionality by omission: the "amplifying" judgment

*What can be done when individuals do not have the benefit of their rights because of the legislator's negligence? Few are the constitutions which provide remedies for unconstitutionality by omission. Normally, it is the Constitutional Courts which fulfil this task, in the absence of any express provision, as a result of the techniques developed almost everywhere in order to avoid being restricted to the alternatives of eliminating an unconstitutional provision and dismissing the question of the constitutionality of the law. However, the procedural mechanisms are always subject to limitations which are not easily overcome. The "*complementary*" judgment, in particular, does not serve to fill a legal vacuum, of whatever nature. As a rule (see below, § 5.2.2.), the legislator's omissions, in themselves, may not be the subject of a constitutional decision. The reason is that the review may take place only if the omission renders another provision (that is being reviewed) contrary to the Constitution. However, when a legal loophole violates the* principle of equality*, the result of eliminating the provision concerned may undermine the rights of individuals. Given that an advantage may not be maintained for the benefit of one category of persons, the Constitutional Court would have to set aside not only the law which arbitrarily penalises one or more persons, but also the favourable provisions.*

It is for this reason that, contrary to the Austrian Court[269]*, other Courts (with the help of a rather subtle technique) have drafted their judgments in such a way as to remedy the omission. In Italy, for instance, the Court has in this way invalidated rules which were not textually explicit, but could be deduced from the challenged provisions. These decisions are described as "amplifying" judgments, in that they add the required provision to the law in order to make it conform to the Constitution. The operative part of this kind of judgment declares the statutory provision unconstitutional "in that it excludes..." or "in that it does not provide for ..." something. However, although these judgments, like other judgments "which manipulate the law", may be delivered when a statutory provision is defective because of a lack of discipline, they may not be delivered when the legislator has not included a provision at all.*

The problem is therefore sometimes impossible to solve, even in cases in which such an omission is liable to distort democracy. It is social rights *in particular (see below, § 7) which risk being unprotected, that is, a category of fundamental rights on which the enjoyment of constitutional freedoms and political rights depends and which, as a consequence, are* prerequisites *for democracy. The absence of the requisite minimum in terms of education and health becomes an*

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[269] *Annuaire International de Justice Constitutionnelle, 1987, 65.*

insurmountable obstacle to participation in democracy. This is why Constitutions making express provision for review in cases of unconstitutionality by omission are especially advantageous.

5.2.2. Provision for review in cases of unconstitutionality by omission

Express provision for review in cases of legislative omission is quite rare[270]*. It is found, in particular, in the Portuguese Constitution, which provides for a remedy for unconstitutionality by omission by empowering the Constitutional Court to check for such unconstitutionality when provisions requiring the intervention of the legislature are not observed by the latter, which has failed to enact the laws needed to make them applicable. The initiative for the review procedure rests with the President of the Republic and the "Provedor de Justiça" (*Ombudsman*), that is, the person who is* specifically *entrusted with the protection of individual rights (see below, § 6.2).*

A decision on unconstitutionality by omission is simply declaratory, because the Court cannot introduce the provisions which the legislator has failed to enact. Under the Basic Law, the Constitutional Court "considers and checks only whether the Constitution has been infringed by the failure to introduce the legislation required to make the constitutional provisions operative". Once the unconstitutionality is confirmed, the Court must "inform the competent legislative bodies", which are obliged *to legislate. The Court may not substitute itself for the legislative body, nor oblige it* in practice *to enact the omitted law; instead "the legal conscience of the community (or public opinion) is relied on to prompt Parliament to do what it has to do"*[271]*.*

5.3. Nature and effects of judgments

The degree of protection of constitutional rights also depends on the effects over time *(in addition to the* erga omnes *or* inter partes *effects) of the decisions delivered by the Court. Judgments delivered in the context of* ex post facto *review must be distinguished primarily according to their content. Although a decision admitting a complaint and declaring the provision in question to be*

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[270] *In Poland, for example, under Section 6 of the Law of 29 April 1985, the Constitutional Court submits to the Parliament of the Republic of Poland and other bodies with rule-making powers "its observations on legal defects and loopholes whose elimination is necessary to ensure the coherence of the legal system of the Republic of Poland."*

[271] *J. MIRANDA, Annuaire International, op. cit., 1989, 627: the first decision concerns Art. 35 of the Constitution, which guarantees citizens the right to inspect the contents of computerised personal data relating to them, the right to demand their rectification and the right to certain guarantees against possible abuse: the case conscerns a constitutional provision which, without the interpositio legislatoris, remains ineffective.*

unconstitutional normally leads to its removal from the legal system, the effect of the decision is not always the same. At times one speaks of repeal *(Austria), at other times of* nullity *(Germany, Spain) or of* setting aside *the provision (Italy). The Italian Court has more than once stated that the effect of its decisions is to set aside the provision in question (Judgment No. 127/1966 and, in particular, Judgment No. 139/1984). This means that the unconstitutional provision becomes inapplicable from the outset (*ex tunc*). It follows that, as from the publication of the judgment, it is prohibited to apply the provision,* even to situations that existed prior *to the declaration of unconstitutionality.*

*In Austria, by contrast, the judgment has a retroactive effect only in the case at issue in the proceedings leading to the interlocutory reference, where it is the complainant who benefits. The provision set aside must normally be applied, not least to past situations, by the courts as well as the administrative authorities (*ex nunc *effect). This implies that the provision has* become unchallengeable as far as the past is concerned[272]*. Under no circumstances can it be challenged again. It must however be recalled that the Austrian Court may decide otherwise, because of the possibility it was given in 1976 of setting aside a law or regulation either retroactively or with effect "*pro futuro*". In other countries, too (in particular, in Germany), the Courts have acquired - through various techniques - the possibility of fine-tuning the effects of judgments over time, sometimes reducing the scope of protected rights[273]. In the past few years in Italy, the Court has tried, albeit rarely, to prevent decisions invalidating legislation from being retroactive when these decisions entail public expenditure[274]. It should be pointed out that legal writers were not, as a rule, in favour of this.*

In Turkey the decision to invalidate a provision likewise has an erga omnes *effect and is not retroactive. But a fundamental difference must be emphasised: the Court makes its judgment public at the latest* five months *after the matter has been referred to it. If the deadline passes without the Court taking a decision, the referring court concludes the proceedings, applying the statutory provision which formed the subject of the reference. Consequently, the rights affected by the law in question remain unprotected. Lastly, in Poland, legislation remains in force*

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272 *Annuaire International de Justice Constitutionnelle, 1987, p. 77*

273 *See W. ZEIDLER Cour constitutionnelle fédérale allemande, in Annuaire International de Justice Constitutionnelle, 1987, pp. 40; K. SCHLAICH, Procédures et techniques de protection des droits fondamentaux, in Cours constitutionnelles européennes et droits fondamentaux, under the direction of L. FAVOREU, Economica, 1982, pp. 140; H. STEINBERGER, Decisions of the Constitutional Court and their effects, The role of the Constitutional Court in the consolidation of the Rule of Law, Proceedings of the Unidem Seminar (Bucharest, June 1994), pp. 78 ff.*

274 *Whether it be by limiting the retroactive effect of decisions (Judgments Nos. 501/1988, 1/1991, 124/1991), or by decisions to set aside the rule in question pro futuro (Judgments Nos. 266/1988, 50/1989, 398/1989).*

despite a judgment of the Constitutional Court declaring it unconstitutional if Parliament, *by a resolution passed with a majority of two-thirds of the votes cast (as in the case of the* revision *of the Constitution), considers that the legislation conforms to the Constitution.*

The effects of a decision ***dismissing the application*** *differ from one system to another. Whilst in Italy such a judgment binds only the referring judge, so that the same question may be raised again without risk of estoppel, even at the request of the parties to the original proceedings if they are at a higher instance, the situation is completely different in Turkey. When the Court dismisses the application, the same objection of unconstitutionality may not be raised again before ten years have elapsed*[275]*. These two situations, so different from each other, are enough to make it clear that the degree to which rights are protected may vary considerably from one system to another.*

6.1. Abstract review. Preventive review in France

At first glance, it might be thought that a system of purely abstract review of the constitutionality of laws, in which the right to initiate proceedings rests exclusively with the political authorities and never with individuals, cannot have any role in the protection of fundamental rights.

In effect, the establishment of the Constitutional Council reflected to the wish of the members of the Constituent Assembly to introduce a system ensuring respect for the new division of powers between Parliament and the Government established by the Constitution of the Fifth Republic, in order to avoid a return to a system whereby Parliament was supreme. Thus the Council was originally seen "as a body favourable to the Government and systematically hostile to Parliament"[276]*.*

However, it must be recognised that the role of the Constitutional Council as protector of fundamental freedoms has developed quickly, especially since 1974, when the right to initiate proceedings was granted to a Parliamentary minority (60 Senators or 60 Deputies)[277]*. Decisions which spring to mind are these establishing the right to life and the freedom to control one's body (15 January 1975), personal freedom and the protection of private life (as of the Judgment of*

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[275] *See D. TURPIN and A. MENEUSE, Annuaire International de Justice Constitutionnelle, 1992, p. 735-736.*

[276] *L. FAVOREU et L. PHILIP, Le Conseil Constitutionnel, Paris, 1991, 3.*

[277] *But even before that, when matters were referred to it by the President of the Senate, the Council affirmed that freedom of association ruled out all prior intervention by an administrative authority or even the courts (16 July 1971), and it also established the principle of equality (27 December 1973).*

12 January 1977), freedom of conscience (23 November 1977), the right to bring legal proceedings (2 December 1980), the right to health (15 January 1975, 18 January 1978, 22 July 1980), the right to a fair hearing (2 December 1976, 19 January 1981), the principle of non-retroactive effect (9 January 1980 and other decisions), the right of ownership (16 January and 30 December 1982), freedom to engage in business (16 January 1982, 27 July 1982), the principle of the presumption of innocence (19-20 January 1981), freedom of expression (30 October 1981), freedom of communication (27 July 1982), the principle of the non-retroactive effect of laws involving penalties, even those of a non-criminal nature (30 December 1982), freedom of association (25 July 1984 and 2 August 1991) and the principle of equality, *which has given rise to several decisions setting aside legislative provisions*[278].

*It is true that the Constitutional Council does not participate, in individual cases, in the protection of fundamental rights against violations by a governmental authority. Such protection continues to be assured by the Supreme Administrative Court (*Conseil d'Etat*) and by the ordinary courts under the supervision of the Court of Cassation. However, it must not be forgotten that the administrative and ordinary judges will increasingly have to take into account the freedoms and fundamental rights in the list (which is very far from being closed) drawn up by the Constitutional Council, and the interpretation given to them by the Council*[279].

Henceforth, Parliament is also required to respect the list of rights and freedoms drawn up by the Constitutional Council on the basis of the 1789 Declaration of the Rights of Man (which are considered as constitutional principles); and Parliament will "increasingly take into account in the drafting of laws the case-law of the Council as it follows from the reasons *for its decisions"*[280].

6.2. Abstract review: reference by Parliament, reference by the Ombudsman, actio popularis, *the initiative of the Court*

I have primarily mentioned France as an example of a country where preventative abstract review is the only means of having laws affecting fundamental rights repealed. Even though it is a form of review which is entirely out of the hands of individuals, it has a remarkable impact on the status of these rights. Moreover, in

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[278] *L. FAVOREU, Les grandes décisions du Conseil constitutionnel, Paris, 1993.*

[279] *L. FAVOREU, Les grandes décisions, op. cit., 367. On this point, in particular, D. ROUSSEAU, Une résurrection: la notion de Constitution, in Revue de droit public, 1990, 15 ff.*

[280] *F. GOGUEL who, in Cours constitutionnelles européennes, op. cit., p. 239, notes that it is not only the operative words of the judgment which bind the public authority and all administrative and judicial authorities (under Article 62 of the Constitution).*

so far as it is preventative*, this form of review is the most effective: it prevents the law from entering into effect.*

*In other systems, abstract review (*subsequent *and, rarely (Romania)* preventative*, review) is combined with other procedures.* Reference by parliament *is of predominant interest and is found in most of the systems, except for Italy, where, now that an electoral law introducing majority voting has been passed, its introduction appears indispensable for the protection of minorities.*

Reference by the Ombudsman *must also be mentioned: in Portugal, the Constitutional Court may review the constitutionality of a law at the request of the* Provedor de Justiça*, who is also empowered to refer an omission on the part of the legislator to the Court (above, § 5.2.2). Even in Spain, the* Defensor del Pueblo *may submit an application on grounds of unconstitutionality (*recurso de incostitucionalidad*) besides the* recurso de amparo*, when the fundamental rights of Part I of the Constitution are violated (see below, § 7)*[281] *because of procedural or substantive flaws.*

Finally, the Constitutional Court *itself may, upon its own initiative, institute review proceedings, which may also be prompted by an application from any individual at all, independently of whether or not he or she has any particular interest in the matter (*actio popularis*). It is the constitutions of the new democracies (Croatia, for example, and Hungary) which, as a rule, provide for this open access. Perhaps it has serious drawbacks in that it overburdens the court, but it does uphold the idea of the Constitution as* belonging to all.

7. Fundamental rights and interpretation of the Constitution

Several authors[282] *have pointed out that giving effect to a declaration of law increases the scope of judicial law-making, i.e. the participation of judges, and above all of the Constitutional Courts, in the very creation of the law itself. On the one hand, given its vague and summary nature, constitutional drafting does necessitate interpretation*[283]*; on the other hand, fundamental rights are not listed*

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[281] *Cf. J. VARELA SUANZES-CARPEGNA, Naturaleza juridica del Defensor del Pueblo, in Revista Espagnola de Derecho Constitucional, 1983, 78. Contra: E. A. CONDE, Curso de Derecho Constitucional, 1992, p. 430, which holds that the responsabilities of the Ombudsman are not limited to the safeguarding of individual rights.*

[282] *Cf. M. CAPPELLETTI; Nécessité et légitimité de la Justice constitutionnelle, in Cours constitutionnelles européennes, op. cit., 473 pp.*

[283] *Constitutions often expressly mention the interpretation role of Constitutional Courts: cf. L. LOPEZ GUERRA, The role and competences of the Constitutional Court, in: The role of the Constitutional Court ..., op. cit. 22.*

in all Constitutions. In all cases, the extent to which rights are protected necessarily depends on the rules of interpretation and construction which the Court uses when carrying out its review. For example, to avoid as much as possible the influence of political and subjective values, the Austrian Constitutional Court has given preference to a method of literal interpretation of the Constitution, though it has become more and more attentive to the content *of the guarantees, and consequently to the limits of the legislature, under the influence of the European Convention on Human Rights,*[284] *which has been invested with constitutional rank*[285] *in Austria. It must be recalled that Austrian constitutional law "does not recognise the notion of fundamental rights as a technical term"*[286]*, whereas in Germany constitutionally guaranteed fundamental rights are included in the Basic Law,*[287] *as in Spain.*[288] *Even in France, there is no definition of fundamental rights arising from the Constitution. This "has however not prevented the Constitutional Council from gradually producing case-law protecting fundamental rights"*[289]*, including rights of a social nature whose guarantee is more uncertain in the traditional democracies*[290]*. The Italian Constitution speaks more of inviolable rights*[291]*, characterising as* fundamental *only the right to health (Art. 32). However, the Constitutional Court has not considered there to be any difference whatsoever of status between different constitutional rights,* including social rights[292].

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284 *Austrian Constitutional Court, Annuaire International de Justice Constitutionnelle, 1987, 68-69.*

285 *As opposed to the European Social Charter and the International Covenant on Economic, Social and Cultural Rights, see S. MORSHER, in Annuaire International, op. cit., 1990, 28, 58.*

286 *T. ÖHLINGER, Objet et portée de la protection des droits fondamentaux, Cours constitutionnelles européennes, op. cit., 335.*

287 *In Articles 1 to 19, 20 para. 4, 33, 38, 101, 103 and 104 concerning above all the protection of human dignity and liberty (but not rights of a social nature).*

288 *See M. RODRIGUEZ-PINERO y BRAVO FERRER and Y. LEGUINA VILLA, Annuaire International, op. cit., 1990, 122-123.*

289 *R. BADINTER, in Annuaire International, op. cit., 1990, 133.*

290 *As opposed to Poland, for example, (cfr. Annuaire International de Justice Constitutionnelle, 1993), where the case-law of the Constitutional Court "is traditionally centered on the problems of socio-economic rights while the "classic" rights and freedoms still remain in the second rank".*

291 *In the general provision of Article 2 "The Republic recognises and guarantees the inviolable rights of the person whether as an individual, or in social groups in which his or her personality develops..." and in Articles 13,14, 15 and 24, which deal with freedom of the person, freedom in the home, freedom of correspondence and the right of defence. See G. ZAGREBELSKY, Objet et portée de la protection des droits fondamentaux, in Cours Constitutionnelles, cit. 303 pp.*

292 *See especially P. BARILLE, Diritti dell'uomo e libertà fondamentali, Bologna 1984. Recently, L. CARLASSARE, Forma di Stato e diritti fondamentali, in Quaderni costituzionali, 1995, 33 pp.*

The risk of arbitrariness stemming from interpretation prompts serious reflection on the impartiality and independence of judges. In particular, the choice of the members of the Constitutional Courts becomes a key problem, given that the Courts do not merely interpret the Constitution, but also interpret the laws under review. In Italy, the Court passes judgment on the "rule" rather than on the legislative text (the "provision"), i. e. on the meaning *the text acquires once it has been interpreted (this results in the well-known practice of interpretive judgments). This meaning may vary according to the person interpreting it. Can the Court freely substitute its interpretation (and consequently the "rule" which is the subject of the review) for the interpretation of the referring judge? In order to limit the extent of its power, the notion of the "living law" has been introduced, i.e., the interpretation given to the provision by the* majority of the judges, *by which the Court should be bound.*[293]

Regardless of any differences between the systems (which may alter their effectiveness), interlocutory review is a rather useful means of protecting rights, mainly because Constitutional Courts are unable to deal with individual petitions, which may be excessively numerous.

In Italy, in particular, where this form of review is the sole means of access for individuals, it is necessary to make the procedure more flexible and also to introduce the possibility of reference by Parliament. In any event, it is very important to note that, even where individuals whose rights have been infringed do not have direct access to constitutional justice (as in France), the Court performs a remarkable role by means of abstract review in safeguarding fundamental rights and ensuring that they are considered as constitutional principles.

THIRD WORKING SESSION

Admissibility requirements for constitutional complaints and mechanisms for avoiding an excessive case load

Chaired by Mr Hrvoje MOMČINOVIĆ, Vice President, Constitutional Court of Croatia

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[293] *On this question, see recently, A. PUGIOTTO, Sindacato di costituzionalità e "diritto vivente", Milano (Giuffré), 1994.*

a. *Admissibility requirements for constitutional complaints and mechanisms for avoiding an excessive case load*
Report by Ms Helga SEIBERT, Judge at the Constitutional Court of Germany

b. *Admissibility requirements for constitutional complaints and mechanisms for avoiding an excessive case load*
Report by Mr Velimir BELAJEC Judge at the Constitutional Court of Croatia

Admissibility requirements for constitutional complaints and mechanisms for avoiding an excessive case load[294] - Report by Ms Helga SEIBERT

Germany

The constitutional complaint is an important remedy for the protection of individual rights and gives constitutional courts a valuable insight into the whole range of problems connected with the enforcement of basic rights. On the other hand, dealing with constitutional complaints may require so much time and "manpower" that important cases are delayed or cannot receive the attention they deserve. In order to maintain and strengthen the role of the constitutional courts as guardians of the constitution it is therefore necessary to design admissibility requirements which do not unduly hamper the lodging of constitutional complaints in serious cases, but reduce the number of frivolous complaints and prevent the constitutional courts from becoming an additional court of appeals. Such requirements have to be supplemented with appropriate mechanisms to deal with inadmissible or frivolous complaints if the functioning of the constitutional courts is to be secured.

1. Many of the admissibility requirements *can be derived from the very nature of the constitutional complaint as an extraordinary remedy which is granted in addition to other remedies for the sole purpose of ensuring the respect for the basic rights proclaimed in the constitution.*

a) Unless the constitution or the law setting up the constitutional court provide for an actio popularis, a constitutional complaint should be admissible only where

[294] *In the following footnotes I will cite some decisions of the Federal Constitutional Court by way of example.*

the complainant claims that his or her basic rights have been violated by a public authority.

Let me deal with these requirements one by one.

The rights proclaimed in the constitution are typically rights of the individual or of private enterprises or associations against the state. That does not necessarily mean that they have no bearing on the relationships between private persons, but they do not normally create rights or duties of private persons in their relationships with each other. Therefore they cannot be directly violated by a private person. As a result only acts of a public authority *can be the object of a constitutional complaint. It depends on the relevant domestic law whether all acts of public authorities shall be subject to the constitutional complaint or only certain categories of such acts, such as administrative acts or court decisions. In addition, a constitutional complaint may also be lodged against an* omission *by a public authority. However, a failure to act can constitute a violation of a basic right only if the constitution imposes a duty to act, e.g. the duty to grant legal protection through the courts. If legislative acts, especially statutes and ordinances, can be challenged by way of constitutional complaints it will be useful to submit such complaints to specific requirements. A constitutional complaint against a failure of the legislature to act should only be admissible if a clearly defined obligation to legislate can be shown to exist*[295].

A constitutional complaint can be lodged by any person or entity who or which has been or claims to have been granted a basic right or a procedural right in the constitution. If the constitution reserves certain basic rights to the citizens of the country concerned, only they will be able to claim that these rights have been violated. A more difficult question arises where the constitution grants certain rights to public corporations or other public entities. Should state universities have the right to claim that they have been victims of a violation of freedom of science[296]*, and should public broadcasting corporations be able to lodge a constitutional complaint against state action interfering with their freedom of speech*[297]*? Of course, this depends on national legislation, but if there is room for interpretation, the constitutional complaint should be regarded as admissible because the constitutional court would otherwise be prevented from interpreting the constitutional provisions on important freedoms which are really fundamental for our societies.*

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[295] *See. BVerfGE 56, 54 <70 f.>.*

[296] *See BVerfGE 15, 256 <262>.*

[297] *See BVerfGE 31, 314 <322>.*

Unless an actio popularis is specifically provided for, a constitutional complaint requires a showing that the complainant himself *has been a* victim *of a violation of one of his basic rights. This requirement is not always easy to establish. Can a lawyer claim a violation of his own rights if a petition of his client has been rejected because of an alleged behaviour of the lawyer? Can a person whose papers have been seized during a search of a friend's house claim that the search was incompatible with the constitutional provision on the inviolability of one's private home? I think these questions should be answered by keeping in mind the purpose of providing an effective protection of basic rights*[298]*. Admissibility requirements should therefore not be interpreted in such a way that the person whose rights are directly affected is denied access to the constitutional court.*

For the same reason minors should be allowed to lodge constitutional complaints themselves wherever they have been granted specific rights by the constitution or by legislation enacted in order to implement constitutional provisions. Thus a minor who is drafted into the military should be able to claim himself that his right to conscientious objection has been violated[299]*. Similarly, legally incapacitated persons should be able to claim that the decision pronouncing their legal disqualification violates their constitutional rights*[300]*.*

In principle, a constitutional complaint should only be admissible if the complainant is directly and presently affected *by the act complained of. If an administrative act or a court decision is addressed to the complainant he will usually be* directly *affected, but he is no longer* presently *affected if the act has been reversed or is no longer relevant so that the case has become moot. In the latter category of cases a complaint should nonetheless be admissible if the complainant has a legitimate interest in obtaining a decision on the unconstitutionality of the act. There may be several reasons for acknowledging such an interest*[301]*. The complainant may want to sue for damages*[302] *or he may be afraid that the violation might be repeated in similar situations. The rejection of the complaint* a limine *might also be inconsistent with the main purpose of the*

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298 *The Federal Constitutional Court has allowed an employer who had been fined for employing women workers at night to challenge the constitutionality of the law prohibiting night work of women in view of the equal rights provision of the constitution (BVerfGE 85, 191 <205 f.>). On the other hand, it has not allowed the father of a child born out of wedlock to claim that a court decision violated the right of the child to be granted the same conditions for his development as legitimate children (BVerfGE 79, 203 <209>).*

299 *See BVerfGE 28, 243 <254 f.>.*

300 *See BVerfGE 10, 302 <306>; 65, 317 <321>.*

301 *See BVerfGE 33, 247 <257 f.>; 81, 138 <140>.*

302 *BVerfGE 88, 366 <374>.*

constitutional complaint where the encroachment complained of is of considerable weight and the rejection of the complaint would prevent the constitutional court from settling important questions of constitutional law[303]*. As some infringements, e.g. preventive detention, searches which do not result in a seizure, are by their very nature of limited duration it will often be impossible to obtain a decision of the court while the measure lasts.*

Problems of a different nature arise when the act complained of does not directly and presently encroach upon the rights of the complainant but creates a risk for the future, e.g. the granting of a licence for building a nuclear power plant or for dumping hazardous waste. In such cases it might be unreasonable to require that the risk must have materialised or developed into a "clear and present danger".

The requirement that the complainant be directly *and* presently affected *is of great importance where a constitutional complaint is lodged against a* legislative act. *Such acts usually affect a great number of people, and the constitutional complaint might well develop into an actio popularis if this admissibility requirement is not strictly enforced. Usually an individual is not* directly *affected if the legislative act has to be implemented by the state administration. He is not* presently *affected if the law will enter into effect or affect him at a later time unless important and irreversible decisions have to be made immediately in view of the legal consequences provided for in the new law*[304]*. The mere possibility that the complainant might be affected by the law at some later time should not be a sufficient basis for a constitutional complaint against a legislative act, but there will have to be some exceptions to this rule. If a legislative act prohibits a certain behaviour and qualifies it as a punishable act, it may very well have an immediate effect on most people by influencing their behaviour. If such a law infringes a freedom guaranteed in the constitution it should be possible to challenge its constitutionality without having to run the risk of being punished*[305]*. Where a legislative act enables a public authority to encroach upon a basic right without the knowledge of the person concerned, e.g. by wiretapping under certain conditions, the mere possibility that the complainant might be affected should be sufficient for the admissibility of the complaint*[306]*.*

b) The constitutional complaint should be an extraordinary remedy. The constitution is the supreme law of the land and has to be respected and applied by

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[303] *See BVerfGE 76, 1 <38>; 76, 83 <88 f.>; 76, 363 <381>; 83, 341, <352>.*

[304] *See BVerfGE 75, 246 <263>; 77, 84 <100>.*

[305] *See BVerfGE 20, 283 <290>; 77, 84 <100>.*

[306] *See BVerfGE 30, 1 <16>; 67, 157 <169>.*

all courts. Therefore, the constitutional court should only be the last resort if all other efforts to prevent a violation of a basic right or to obtain relief have failed. The exhaustion of remedies *is therefore one of the most important requirements with a view to reducing the work load of the constitutional courts. It not only reduces the number of cases reaching them but also ensures that the facts of the case and the law applicable to it have already been examined by at least one other court.*

The exhaustion of remedies means more than just formally moving the case up through the court system. The party which thinks that his or her basic rights have been violated must have drawn the attention of the courts to the alleged violation and attempted to obtain relief from them[307]*. That does not mean, however, that the party must have explicitly referred to his or her basic rights or even to a particular provision of the constitution. It should be sufficient that the substantive issue has been raised in the courts below. Here too, we should never forget that the constitutional complaint should remain an effective remedy against violations of basic rights. Admissibility requirements should therefore be designed and interpreted in such a way that people who cannot afford a good lawyer can comply with them.*

If the case is still pending below and the complainant has only obtained a decision denying him preliminary relief (e.g. an interim order), the constitutional complaint should be admissible if the complainant claims that the denial of interim relief by itself violates his basic rights, if it seems unreasonable to require the full exhaustion of existing remedies because the complainant might suffer a serious and irreversible detriment, or if the subject matter is of general importance[308]*. On the other hand, the exhaustion of remedies should be required if the facts or the points of law have not yet been sufficiently clarified in the courts below.*

In most jurisdictions there is no ordinary judicial remedy against legislative acts. If such acts directly and presently affect an individual, they can therefore be the subject of a constitutional complaint without the prior exhaustion of other remedies. The constitutional court may thus have to decide on the constitutionality of a law which has not yet been interpreted by the courts which are competent to deal with the subject matter. In order to avoid this as far as possible, the Federal Constitutional Court of Germany has required complainants to make use of any existing judicial remedies including the possibility of asking for a declaratory

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[307] *See e.g. BVerfGE 74, 102 <113 f.>; 84, 203 <208>.*

[308] *See BVerfGE 77, 381 <401>; 86, 15 <22 f.>.*

judgement before lodging a constitutional complaint against a legislative act[309]*. These decisions are based on a general principle of "subsidiarity" of the constitutional complaint which the Court has deduced from the provision on the exhaustion of remedies and from the arguments underlying this requirement: an appropriate division of functions between the various courts, the nature of the constitutional complaint as an extraordinary remedy, and the motive to limit the case load of the constitutional court*[310]*. I should point out, however, that the principle of subsidiarity and its application to constitutional complaints against legislative acts is controversial in Germany. The principle should certainly be applied with sufficient flexibility, but it has the merit of respecting the different competencies of different courts and of relieving the constitutional court of tasks for which it is not well prepared.*

c) Time-limits *for judicial remedies are common in most judicial systems. They ensure that a case is settled within a reasonable time and protect the confidence of the other party that the conflict will not be reopened at a later time. Therefore, there should also be a strict time-limit for constitutional complaints. As the constitutional complaint is an extraordinary remedy against final decisions it is even more imperative to protect the confidence of the other party to the initial conflict. For this reason, the time-limit should not be too long, but, of course, it must be sufficiently long to enable a private person to find a lawyer who will represent him or to write the complaint himself. A period of one or two months is probably adequate. For constitutional complaints against legislative acts the time-limit should be extended to six months or a year. For one thing, it is usually more difficult to learn of the existence of a new law and its exact content and to realise what the consequences will be for oneself. On the other hand, there is less need of protection, as no one can be certain that a legislative act will not be challenged in the future and eventually held to be unconstitutional.*

Within the time-limit the constitutional complaint should not only be lodged but also substantiated. *The minimum requirements are a statement of the relevant facts, the precise data of the act of a public authority which is the object of the complaint, an explicit or implicit reference to the basic rights which are alleged to have been violated and the statement of the main reasons why the infringement of the right is regarded as unconstitutional.*

Although the time-limit is important there should be a possibility of reinstatement *if a complainant was unable to comply with it through no fault of his own or of his*

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[309] *See BVerfGE 74, 69 <74 f.>; 79, 1 <20>.*

[310] *See BVerfGE 9, 3 <7f.>; 78, 155 <159 f.>.*

lawyer. In Germany, this possibility was introduced only recently[311]*. In fact, the constitutional court itself had refused to apply the provisions contained in the codes of procedure of the other courts by way of analogy and had for a long time opposed the insertion of a similar provision into its own code of procedure. In the long run, however, it seemed unsatisfactory that a constitutional complaint might fail for the simple reason that at the relevant time the postmen were on strike or that the letter containing it was mixed up with other mail and arrived late for this reason. Fortunately, we did not have any serious case in which this question became an issue. The new provision enables us to grant a reinstatement. It has caused us much less work than we had expected and proved to be quite satisfactory.*

d) Should complainants be required to be represented by lawyers*? The answer to this question will very much depend on the legal system of the country concerned and on the organisation of the legal profession. It is my personal experience that laymen often write very clear and well-reasoned complaints while some lawyers do a very poor job. What is more important, however, the requirement to be represented by a lawyer would probably deter many people from lodging constitutional complaints. While reducing the work load of the constitutional courts, it would make it harder for many people to lodge complaints with good prospects of success. Besides, indigent complainants would have to be granted legal aid, and the constitutional courts would be burdened with the task of examining their petitions for legal aid. So I am not sure whether the benefits of such a requirement would outweigh its disadvantages.*

Obviously, if you don't require representation by lawyer you cannot expect legal reasoning in the constitutional complaint. It should therefore be sufficient for the substantiation of a complaint that the basic rights which have been encroached upon are described and that the reasons why this is regarded as a violation are explained with a layman's words.

e) In today's world costs are quite often the most effective way of influencing the behaviour of people, and a fee *might also be regarded as an effective means of reducing the work load of constitutional courts. Again, the answer to the question as to whether the proceedings on a constitutional complaint should be free of charge or whether the admissibility of the complaint should depend on the payment of a fee will have to take into account the domestic law on court fees and on legal aid. I can only recount the German experience. The proceedings of the Federal Constitutional Court are free of charge, but in proceedings on constitutional complaints the Court may charge the complainant a fee if the*

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311 *Fünftes Gesetz zur Änderung des Gesetzes über das Bundesverfassungsgericht, 2 August 1993, BGBl. I p. 1442, amending section 93 of the statute.*

lodging of the complaint constituted an abuse. In 1985, the law was amended in order to enable the Court to charge the complainant a fee whenever his complaint had not been accepted unless this seemed inequitable[312]*. The decision on the fee was to take into account all the circumstances of the case, in particular the weight of the reasons stated, the significance of the proceedings for the complainant and his economic situation (as far as it was known). This provision may well have deterred a number of persons from lodging a complaint, but the number of cases did not decrease, in fact it continued to rise after a short period of time. In particular, querulous persons lodged as many complaints as before. It also proved difficult to establish clear standards for the amount of the fee. As a result, the Court itself regarded the provision as unsatisfactory and suggested its abrogation. So we are back to the possibility of charging a fee if the lodging of the complaint constitutes an abuse.*

2. The mechanisms for reducing the work load *of the constitutional courts must be adapted to the constitutional provisions of each country and to the definition of the jurisdiction of the court concerned.*

a) If the court has mandatory jurisdiction on constitutional complaints which fulfil the conditions of admissibility, there is no room for a special acceptance procedure, but the case load of the court can be reduced by designing mechanisms for dealing with inadmissible complaints.

Depending on the number and qualification of the staff, the secretariat of the court may perform a first preliminary examination in order to weed out manifestly inadmissible complaints as far as possible. However, as the judicial power cannot be delegated to the secretariat, its opinion can only be advisory. Thus the secretariat may point out the deficiencies of the complaint to the complainant and ask him whether he upholds it or it may submit a recommendation to the judges to reject the complaint a limine.

Apart from this preparatory work the preliminary examination should be entrusted to panels *or* committees *of a few judges who may either report to the full court with suggestions as to which complaints should be rejected a limine and which complaints deserve a more thorough examination or have the power to reject inadmissible complaints by a unanimous vote. Where possible, this mechanism should also be used to reject a limine complaints which are manifestly illfounded or constitute an abuse of the right to lodge a constitutional complaint*[313]*.*

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[312] *Gesetz zur Änderung des Gesetzes über das Bundesverfassungsgericht und zur Änderung des Deutschen Richtergesetzes, 12 December 1985, BGBl. I p. 2226, amending section 34 of the statute.*

[313] *These criteria are listed in art. 27 paragraph 3 of the European Convention on Human Rights.*

In a system where you have a "reporting judge", i.e. the designation of a judge who will be responsible for preparing the decision on the case, this judge would have to prepare the decision of the panel or committee by submitting a brief memorandum to his colleagues dealing with the admissibility requirements and with the question as to whether the complaint is manifestly illfounded. Such a procedure would make it possible to reject a great deal of constitutional complaints without further scrutiny. If the full court has to take the decision, it should do so on the basis of memoranda which should be discussed only if a judge disagrees with the recommendation to reject a case a limine.

This preliminary examination may be greatly facilitated if there is no need to give reasons for the rejection. It is much easier to agree on the reasons set out in an internal memorandum than to a text which is sent to the complainant or even published, and a lot of time may be spent on the wording of the decision and thus lost for more important cases. On the other hand, the acceptance of and the respect for a constitutional court might be impaired if a great number of constitutional complaints were rejected out of hand without any stated reasons. Therefore, it will always be a difficult decision whether it is more important to explain the reasons for the rejection of constitutional complaints or more urgent to preserve the working capacity of the court and its ability to devote enough time to its important cases.

b) The case load of the constitutional court can be even further reduced if the Constitution and the law setting up the court provide for or permit a special acceptance procedure *in the sense that constitutional complaints require acceptance before further examination and a decision on the merits.*

Of course, it depends on the criteria for acceptance and on the mechanism chosen for reaching a decision whether this procedure can effectively reduce the case load. The criteria may be similar to those for a rejection, e.g. the determination that the complaint is inadmissible or does not offer a sufficient prospect of success, or they may be designed to restrict the work of the court to cases which are of general importance or of particular importance for the complainant.

Obviously, the case load can be more effectively reduced or limited if the court is given a certain degree of discretion in accepting or rejecting cases. I doubt whether in Europe we will get to the point where the constitutional courts will have full discretion in the selection of the constitutional complaints which they accept, as the Supreme Court of the United States when granting or denying the writ of certiorari, but I am also convinced that it will be difficult to keep the case load within reasonable limits if the courts do not have any discretion as to which constitutional complaints to accept and which to reject.

The criteria for such decisions have to be deduced from the purpose of the constitutional complaint on the one hand and from the function of the constitutional court in the judicial system on the other hand. As we have seen before, all courts have the task to uphold the constitution and to apply it to the cases before them if questions of constitutional law are relevant. The constitutional courts should therefore be allowed to concentrate on the more important cases. Above all, it is their specific task to clarify controversial questions of constitutional law so that their decisions can serve as guidelines for the other courts and for all public authorities. In addition, the constitutional court should have to intervene in cases in which there has been a serious violation of a basic right and the complainant has not been able to obtain redress elsewhere, and allowed to intervene wherever other courts disregard its jurisprudence or tend "to forget" the constitutional requirements.[314]

Allowing the constitutional courts to select the cases they accept according to these criteria would not seriously impair the function of the constitutional complaint as a means for private persons and associations to enforce their basic rights. On the contrary, it would enable constitutional courts to concentrate on those cases in which their intervention is necessary for the enforcement of these rights and to reach a decision on the merits within a reasonable time.

If the courts are given a certain degree of discretion, it is even more important that the decision on the acceptance or rejection of a case be taken by the judges. Of course, their decision can be prepared by law clerks or other staff with a legal education, but the judges will have to decide whether the case raises a fundamental question of constitutional law or is of sufficient importance to merit or even require a decision of the court. Ideally, I suppose, the decision should be made by the whole court, and a minority of votes in favour of acceptance should suffice. In order to reduce the case load of the judges, however, it might be advisable to entrust the decisions to smaller panels of judges *which can reject constitutional complaints with a unanimous vote.*

The main task of such panels or committees would be the rejection of cases which do not fulfil the conditions for acceptance. It is consistent with the idea of requiring an acceptance that no reasons need be given for the denial of acceptance, although there may be cases in which it is desirable to point out the reasons very briefly.

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[314] *Under art. 93 a of the law on the Federal Constitutional Court as amended by the law of 2 August 1993 the court has to accept cases in so far as they raise essential questions of constitutional law or as their acceptance is necessary in order to enforce basic rights. These criteria have been clarified by the court in BVerfGE 90, 22 <24 ff.>.*

Before leaving this issue I would like to mention a problem which is not the subject of my report, but one of the main reasons why it is so difficult to limit or even reduce the case load of those constitutional courts which have to decide on constitutional complaints. These complaints are usually directed against court decisions. Nonetheless, the constitutional court should not perform the function of an additional court of appeal. It should limit its scrutiny to the question whether a basic right guaranteed in the constitution has been violated. But where do we draw the line between conformity with constitutional law and conformity with the law in general? Does a court decision which is clearly wrong violate the constitution because it is arbitrary? Is the right to own property violated if a court decides that a person is not the owner because it gets the facts wrong or misreads the law? What does the right to a fair procedure or to a fair hearing require? Are these rights violated whenever a court disregards a provision of the code of procedure designed to ensure their observance? These are only a few examples which show that it is not always easy to determine whether a case raises questions of constitutional law or not. The Federal Constitutional Court uses a formula which can serve as a guideline, but does not offer an easy answer in the more difficult cases in which questions of (as we call it) "simple" law and aspects of constitutional law are closely connected. According to this formula, decisions on the procedure, the ascertainment and evaluation of the facts, the interpretation and application of the provisions of "simple law" are entrusted to the other courts and not subject to the control of the constitutional court. This court can only intervene if the deficiencies of the decision result from a fundamental error of the court below concerning the significance and the reach of a basic right[315]*. As I said, this is only a guideline. There are cases where the Federal Constitutional Court has applied stricter standards of scrutiny*[316]*.*

The difficulty to draw a clear line between questions of constitutional law and "simple law" is one of the reasons why the preliminary examination of constitutional complaints often takes so much time. The acceptance procedure described above can facilitate the task considerably, if acceptance depends on the importance of the case.

c) The case load of the whole court can also be reduced by giving a smaller group of judges, a chamber or a panel*, the* competence to decide *on constitutional complaints which do not raise new questions of constitutional law and which are* clearly justified *in view of existing case law. Such a mechanism enables the court to enforce basic rights in individual cases without unduly burdening all the*

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[315] *BVerfGE 18, 85 <92f.>.*

[316] *E.g. BVerfGE 43, 130, <135 f.> with regard to freedom of speech; 60, 79 <90 f.> with regard to the separation of children from their family in case of neglect.*

judges. The vote in the panel or chamber should be unanimous to make sure that this procedure is only used in truly clear cases. Otherwise there would be a risk that the panels or chambers develop a jurisprudence of their own and decide on questions which have not yet been settled by the court as a whole.

3. Most of my suggestions have been based on the German experience. Unfortunately, it is not a success story. The Federal Constitutional Court has tried various mechanisms and procedures to limit or even reduce its case load, but I have to admit that we have not yet found a satisfactory solution. The number of constitutional complaints has increased steadily and even dramatically after unification. In the next years we will have to try to use our new acceptance procedure more effectively. But even the limited possibility of the Court to select the cases it accepts according to their importance has been severely criticised. I can only hope we will be able to convince our citizens and the legal community that the new procedure does not impair the protection of the basic rights of the individual, but is designed to render it more effective by giving the court more time for the important, and eventually successful cases. The main criterion for accepting or rejecting a case will be the goal to enhance the respect for basic rights.

Admissibility requirements for constitutional complaints and mechanisms for avoiding an excessive case load – Report by Mr Velimir BELAJEC

Croatia

I. INTRODUCTORY NOTES

1. The requirements for the permissibility of a certain legal remedy (so-called procedural requirements), as usually understood and defined by the theory of the procedural law, are circumstances the existence of which decides the permissibility of a certain legal procedure, court proceedings or meritorious decisions. The purpose of procedural requirements is twofold: primarily, they provide for the existence of certain circumstances the absence of which could jeopardise just and lawful solutions in court proceedings and they therefore represent the lower (minimum) limit of procedural rules that must be realized for proceedings to be uniformly initiated and meritoriously brought to a close. Secondly, the procedural requirements (that is, some of them) define the limits to which the body conducting the proceedings is authorised to go by defining something which in its broadest sense is called competence (jurisdiction), as well as other features on which the authorization of such a body and its obligation to initiate or decline to initiate proceedings in certain cases depends.

2. In the latter (limiting) sense, procedural requirements for constitutional complaint are a means by which to alleviate the Constitutional Courts' burden of

cases which do not fall within their jurisdiction or which for other reasons do not fall within their authorization. This part of this paper's topic ("Requirements for constitutional complaint permissibility...") merges to such an extent with the other ("...the way to prevent excessive influx of cases") in a coherent whole, so that further discussion will follow the above direction.

3.1. From the provisions of the Constitution of the Republic of Croatia ("Narodne novine"/Official Gazette/ No. 56/59 and the Constitutional Act on the Constitutional Court of the Republic of Croatia ("Narodne novine" No. 13/91) it follows that constitutional legal protection is provided for all constitutional freedoms and the rights of man and citizen as defined in Articles 14-69 of the Constitution (Section III of the Constitution - Fundamental freedoms and rights of man and citizen; hereinafter constitutional rights)[317]. There is no division between the so-called fundamental constitutional rights and those not judged as fundamental (i.e. all rights listed in the Constitution are "fundamental"), nor is there a system of (positive or negative) enumeration of constitutional rights limiting constitutional legal protection to only certain constitutional rights - all constitutional rights may be referred to in a constitutional complaint and may be subject to a claim for protection before the Constitutional Court. In addition, the Constitutional Court of the Republic of Croatia extended constitutional legal protection in some cases even to include certain provisions of the Constitution which did not fall within the above-mentioned Articles 14-69, i.e. to certain basic provisions of the Constitution[318]. Moreover, if one considers that the so-called procedural qualification for the lodging of a constitutional complaint is very broadly defined - it may be lodged by anyone (natural persons, and in the opinion of the Constitutional Court legal persons as well) who believes that one of his or her constitutionally guaranteed rights has been violated by a decision of the judicial or administrative authorities or of other bodies vested with public powers[319] - this will give some notion of the comprehensive nature of constitutional legal protection in the Republic of Croatia.

3.2. The fact that the Constitutional Court has such a comprehensive jurisdiction means that a comprehensive protection of the citizens' constitutional

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317 *Art. 125 of the Constitution defines the jurisdiction of the Constitutional Court, which among other things shall "... protect the constitutional freedoms and rights of man and citizen..." (it. 3). The provision of Art. 28, Para 1, of the Constitutional Act reads: "Anyone may lodge complaint with the Constitutional Court if they believe that by a decision of judicial or administrative authorities or other bodies vested with public powers one of their constitutionally guaranteed freedoms and rights of man and citizen (hereinafter constitutional right) has been violated".*

318 *For details see the paper of J. Crni_: Which rights may adequately be protected by constitutional complaint, supra p. 29 et seq.*

319 *For reference see the paper of H. Mom_inovi_, p. 77, and the provision of Art. 28, Para 1, of the Constitutional Act on the Constitutional Court, quoted in note No. 1.*

rights is possible and that the principles of constitutionality and legality can be realised. It does however have disadvantages since it threatens to push the jurisdiction over the limits which normally correspond to the function of the Constitutional Court and to increase the number of cases far beyond the Court's actual capacity. Extensive interpretation of provisions for individual constitutional rights - defined in the Constitution using general and insufficiently accurate phrases which may be subject to a variety of interpretations - could turn the Constitutional Court into a sort of mega-court which, in proceedings resembling ordinary court practice, would decide on all (or nearly all) cases previously tried by courts, administrative authorities or bodies vested with public powers.

3.3. Therefore, the primary task of the Constitutional Court of the Republic of Croatia in the near future, in our opinion, will be to specify the occasions for constitutional legal protection and to judiciously and effectively limit its own jurisdiction. The emphasis is not on when (i.e. in which cases) the Court is competent, but rather when it is not or should not be competent (as though both of these aspects present two angles on one and the same question). It will be necessary to check whether all the provisions of Articles 14-69 regulate constitutional rights or whether some of them are of a different nature, and to set the criteria for deciding when certain constitutional rights have been violated and when there is unlawfulness which does not assume the proportions of a constitutional right violation.[320] In the very near future, the excessive influx of cases before the Constitutional Court will be more efficiently prevented through the elaboration of substantive legal criteria to determine whether a complaint is or is not well-founded) than by the application of rules to determine whether or not the complaint is permissible (procedural criteria) and other procedural rules to simplify the proceedings.

3.4. A more accurate definition of substantive legal criteria as mentioned above will not in itself reduce the excessive influx of cases before the Constitutional Court, because a constitutional complaint may be lodged not only by the persons whose constitutional right has actually been violated, but also by anyone who (even mistakenly) believes that one of his or her constitutional rights has been violated. The existence of regular, reasonable and published court practice with regard to certain legal issues has always been the best form of protection against an excessive influx of cases, since it enables each prospective plaintiff to realistically assess his or her chances in the proceedings and discourages efforts which are certain to fail.

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[320] *For details see the paper referred to in note No. 2, pp. 36 et seq.*

4. The topicality of this paper's subject can be seen even in the basic statistical data on the operation of the Constitutional Court of the Republic of Croatia. The inclusion of the topic in the seminar's agenda indicates that constitutional courts of certain other countries probably face the same problem. By 30 June 1995, the Constitutional Court had received a total of 1,613 constitutional complaints, of which 25 were received in 1991, 126 in 1992, 252 in 1993, and 825 in 1994; in 1995, 586 complaints have been received by 30 June alone, confirming the rising trend (although perhaps the trend has slowed somewhat when compared to previous years). At the same time, the number of unsolved cases is also increasing - not only as regards the total number but also in relation to the number of the complaints received - a trend which shows that if no efficient measures are taken the Constitutional Court would eventually approach a critical point when it would be totally inundated by the excessive number of cases.

5. The Constitutional Court of the Republic of Croatia has, in its short history, not had the time to take a firm stance on many of the issues discussed in this paper. The above-mentioned opinions should therefore be assigned to the author himself, except in cases when the formal position of the Constitutional Court is explicitly invoked.

II. PROCEDURAL REQUIREMENTS FOR THE PERMISSIBILITY OF TRIAL

6.1. Criteria for the permissibility of constitutional complaints are defined by the above-mentioned Constitutional Act on the Constitutional Court and by the Rules of Procedure of the Constitutional Court of the Republic of Croatia ("Narodne novine" No. 29/94), and basically concern the question of which decisions may be contested by means of constitutional complaint; the time-limits within which a constitutional complaint may be lodged; the formal requirements which the constitutional complaint must meet; and when certain legal subjects are authorized to lodge a constitutional complaint (procedural qualification).

6.2. In addition to these criteria, which are regulated separately for and apply only to constitutional complaints (special procedural criteria), there are other criteria which, in different forms, apply to all legally regulated procedures (general procedural criteria), such as for instance the litigation capacity of the parties, legal interest in the complaint (including the so-called procedural impediments like res judicata, double litispendentia and others). They are not specifically regulated for the proceedings following a constitutional complaint, so that their provision (the extent to which they may be applied in the proceedings) should as a rule be judged by an analogous application of the rules of the procedure in which the contested decision was reached. Such procedural criteria

are however of no special interest in this paper. Their complexity and variety would require a separate paper and they will not be specifically dealt with here.

7.1. A constitutional complaint may be lodged if the plaintiff believes that one of his or her constitutional rights has been violated (Art. 28, Para 1, of the Constitutional Act) by a decision by the judiciary or administrative authorities (in a broad sense, including decisions by non-governmental bodies vested with public powers). The prerequisite for constitutional legal protection is a decision which in differently regulated proceedings comes as judgement, ruling, decision and other, but the Constitutional Court has repeatedly expressed its position that in fact it is not the name of the decision which matters but its essence, i.e. the fact that the rights and duties of an individual are decided by the authority and power of government.

7.2. The main issue in the proceedings following the constitutional complaint is the question of whether some of the plaintiff's constitutional rights have been violated; the indirect issue is the question of the legality and constitutionality of the decision by which the constitutional right has been violated, or allegedly violated. Such decision must therefore be indicated in the complaint and enclosed as the original or a copy (Art. 51 of the Rules of Procedure). The decision by which the complaint is adopted repeals the disputed decision which violated the constitutional right, and the case is returned to the competent authority for renewed procedure (Art. 30 of the Constitutional Act). Although the Constitutional Court is bound by the complaint, it may, however, also repeal acts other than the disputed decision, if it finds that they, too, violate the plaintiff's constitutional rights (Art. 57 and 60 of the Rules of Procedure).

7.3. A constitutional complaint may not be lodged directly in a case where the competent government authority has failed to reach a decision in specific proceedings (although it was obliged to do so), or when the constitutional rights of an individual have been violated in some other way (and not by unlawful and unconstitutional decision). The legal system of the Republic of Croatia however contains efficient legal remedies which enable a citizen to effect a decision by the judiciary or administrative authorities in such cases, giving access to constitutional legal protection if the decision violates a constitutional right. If in an administrative procedure the competent authority does not reach a first instance decision within the time-limit stipulated by law (two months, as a rule), the party is entitled to complain to the court of appeal as if its application had been turned down (the so-called "administrative silence"[321], Art. 218 of the General Administrative Procedure Act, "Narodne novine" No. 53/91); when the

[321] *In the legal system of the Republic of Croatia there is no legal remedy for the case of "judicial silence", i.e. when a court reaches no decision and no time limit for doing so is stipulated.*

competent authority has not under the conditions stipulated by law reached a decision on the application i.e. the complaint of the party, the latter may initiate an administrative lawsuit before the Administrative Court (Art. 8 of the Administrative Lawsuit Act - "Narodne novine" No. 53/91, 9/92, and 77/92). When a constitutional right has been violated by the final individual act, and no other court protection is provided, the Administrative Court is to decide on the protection of such right by an appropriate application of the provisions of the Administrative Lawsuit Act (the so-called quasi administrative court proceedings, Art 66 of the Act). When a constitutional right has been violated by the unlawful action of a government official or an authorized person in a company or other legal persons, and no other court protection is provided, the proceedings for the protection of the constitutional right is to be initiated before a County Court; the party may then lodge a complaint against the ruling of such court. Such a complaint should be lodged with the Supreme Court of the Republic of Croatia (Art. 67-76 of the above-mentioned Act).

8.1. If the violation of constitutional rights allows for another legal course of action, the constitutional complaint may be lodged only after this course has been exhausted (Art. 28, Para 2, of the Constitutional Act). In matters where an administrative lawsuit (i.e. a complaint to the Administrative Court after the final administrative act has been reached) is allowed, or there is a review in court or extrajudiciary proceedings (i.e. an extraordinary legal remedy to be lodged with the Supreme Court after the decision of the court of appeal becomes effective), the legal course is also exhausted after decisions are given on these legal remedies (Art. 28, Para 2). When these legal remedies are not allowed, the legal course is exhausted after the administrative act has become final, i.e. after the second instance (effective) court decision has been reached. If, on the contrary, any of the legal remedies within this legal course have been omitted (a complaint against the first instance decision in administrative proceedings or charges pressed in administrative lawsuit; a complaint against the first instance court decision or review of the second instance decision in court or extrajudiciary proceedings), the legal course has not been exhausted, and a constitutional complaint is not permissible.[322]

8.2. The "other legal course" as defined above contains regular legal remedies (i.e. such as those used against non-effective decisions - complaint against first instance decision) and some extraordinary legal remedies against effective decisions (charges pressed in an administrative lawsuit, or court review or

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[322] *It is not allowed to circumvent the mentioned legal remedies, i.e. the party may make use of a higher level legal remedy only if the preceding legal remedy has already been made use of. This rule consistently applies all the way up to the constitutional complaint. For more details on the criterion of exhausted legal course, with examples from the Constitutional Court practice, see Mom_inovi_, supra pp. 77/78.*

extrajudiciary proceedings). Making use of other extraordinary legal remedies and deciding which to use (e.g. renewed court proceedings or renewed administrative proceedings; application for the protection of legality submitted by public prosecutor) is not a prerequisite for the lodging of a constitutional complaint, with the result that constitutional legal proceedings and the proceedings relating to these legal remedies may run in parallel.

8.3. This system of extraordinary legal remedies is a result of a combination of compromise and pragmatic attitude about the role and legal status of the constitutional complaint. Review is an extraordinary legal remedy, but by being relatively widely accessible to parties and therefore frequent in court practice, it approximates to some general features of regular legal remedies. It is therefore reasonable to stipulate that, for the purpose of enhanced legal security and firmness of the constitutional legal protection, a constitutional complaint may be lodged only after the procedure following the application for review has been exhausted. Similar arguments could be presented for charges pressed in an administrative lawsuit. The same argument cannot however be used for the rest of the extraordinary legal remedies, since - due to the length of the scheduled periods (for repeating or renewing the procedure) i.e. since they are not accessible to the parties but to government bodies (public prosecutor in the case of the application for the protection of legality) - constitutional legal protection would be significantly prolonged, i.e. it would depend on the action of the government body and not the party itself, if those legal remedies had to be exhausted prior to the lodging of a constitutional complaint.

9.1. A constitutional complaint may be lodged within a month of the day when the decision was received (Art. 29 of the Constitutional Act). According to usual Constitutional Court practice, this time period begins to run from the day that the decision, by which the previous legal course was exhausted, was received. If the complaint was sent by registered mail, it is assumed that it was lodged with the Court on the day it was submitted at the post office (Art. 22, Para 3, of the Rules of Procedure).

9.2. Anyone who for justified reasons lodges a constitutional complaint outside the given time period will be accorded restitution by the Constitutional Court, if he or she applies for the same within 15 days of the termination of the reasons which caused him or her to miss the stipulated time period, provided that such a person simultaneously lodges a constitutional complaint. No restitution may be applied for more than three months from the day the regular time period expired.

10.1. In order for a constitutional complaint to proceed and be meritoriously decided upon, it should contain specific information (formal correctness, appropriateness of the complaint), including: first and last name, residence or

place of abode i.e. the company and position of the plaintiff, first and last name of his or her attorney, reference number of the decision by which a constitutional right was violated, reference to the constitutional right violated, purpose of the complaint, evidence to prove that the legal course has been exhausted and that the complaint is lodged in time, as well as the plaintiff's signature. Along with the complaint, an original or a copy of the disputed decision must be enclosed (Art. 51 of the Rules of Procedure).

10.2. If the complaint is incomprehensible or does not contain all the required information, the Constitutional Court will return it to the plaintiff for amendment it, and set a time-limit within which it may be lodged again. If the complaint is amended within this period, it will be considered as having been lodged on the day it was lodged for the first time. The complaint will be considered as dropped if it is not re-lodged in time; if it is re-lodged without being amended, it will be rejected.

10.3. The aforementioned provisions are a consequence of the general position expressed in many procedural laws of the Republic of Croatia (e.g. in the Civil Procedure Act, General Administrative Procedure Act and Administrative Lawsuit Act, as well as in many others) that the party may turn to government bodies itself directly in all proceedings and on all deciding levels. They hardly contain any provisions on the so-called statutory incapacitation of parties i.e. on their obligatory representation by professional attorneys (e.g. lawyers - Advokatenzwang). The same applies to proceedings before the Constitutional Court. This is why the manner of dealing with (not so rare) cases of incomprehensible or incomplete complaints had to be defined. All the more so since given the few years that the Constitutional Court has existed the public at large still does not sufficiently understand its real role, and it is sometimes understood as a universal court which exists to resolve all legal grievances of citizens, or otherwise.

10.4. These provisions (more accurately: the non-existence of provisions on obligatory representation) have been inherited from socialist times when this position was considered to be extremely progressive and to contribute to the opening of government bodies to the people and the democratization of government.[323] Although some of these arguments have political and social significance, it should be noted that such procedural legal practice makes it possible for a large number of complaints to appear before government bodies,

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[323] *All procedural laws in force in the Republic of Croatia were enacted during the existence of the former Yugoslavia, and have been accepted for Croatia by special acts and with certain amendments. When enacting new, Croatian laws, consideration should among other things be given to whether obligatory representation could be introduced before some (higher) courts or in some more complex proceedings.*

which must be amended before action can be taken on them, something which does nothing to improve the expedience, efficiency and rationality of legal protection. It should be noted that the provisions of such laws are not consistent with their own basic concepts; they do not differentiate between cases when a party turns directly to a government body, and when a professional attorney acts on behalf of the party, so that the provisions on the amendment of the complaint protect not only an ignorant party (who is not acquainted with procedural regulations) but also his or her attorney (who should be).

10.5. The Civil Procedure Act goes beyond the provisions of the Rules of Procedure by stipulating that a court must "...instruct the plaintiff and assist him or her in amending the complaint, and to this purpose may summon the plaintiff before the court..." (Art. 109, Para 1). Provisions which indicate certain degree of assistance to the party are also contained in Art. 68, Para 1, of the General Administrative Procedure Act as well, which stipulates that the complaint cannot be rejected solely on the grounds that it is not neatly presented, and the administrative authority shall "...do what it takes to eliminate the shortcomings...". Provision 25 of the Rules of Procedure does not provide an obligation to instruct and assist the party in constitutional court proceedings, but the return of the complaint for amendment is hard to imagine without basic instructions, which at least point out the shortcomings of the complaint and state the regulation which stipulates the obligatory contents of the complaint. In this sense, the Constitutional Court is also frequently in a position to give such instructions to parties (sometimes even to their lawyers as well).

10.6. In keeping with such efforts to facilitate the lodging of constitutional complaints by parties (and attorneys), it is also the practice of the Constitutional Court to indicate the constitutional right which, in the opinion of the plaintiff, has been violated. Although the Constitutional Court is limited to checking only the rights indicated in the complaint (Art. 57 of the Rules of Procedure), and the plaintiff is obliged to indicate his violated constitutional right (Art. 51), in practice it is considered that the complaint is valid and can be acted upon (i.e. should not be returned for amendment) if from the application it can be determined which constitutional rights have been violated and in which respect, even if the plaintiff has not directly indicated this.

11.1. Under Art. 28 of the Constitutional Act, anyone may lodge constitutional complaint with the Constitutional Court, if they believe that their constitutional rights have been violated by a decision of a certain authority. This rule gives rise to two questions; firstly, who is this "anyone" that may be the plaintiff (party) in the proceedings following a constitutional complaint (irrespective of his or her relation to the violated constitutional right - the question of who may qualify as a party); and secondly, when may "anyone" qualified as a party lodge a

constitutional complaint - only when he or she alleges that his or her personal (and not somebody else's) constitutional right has been violated (the question of the party's relation to the matter in dispute, i.e. the question of procedural qualification for lodging the constitutional complaint).

11.2. The question of procedural qualification is relatively simple to resolve, since it clearly follows from the aforementioned regulations that the constitutional complaint may be lodged only by the person whose constitutional right has been violated - it cannot be lodged on behalf of another person.[324]

11.3. Natural persons qualify as a party (capability of being a plaintiff) to the proceedings following the constitutional complaint. Although the wording of Art. 28, Para 1, of the Constitutional Act indicates primarily natural persons by invoking the violation of the constitutional rights and freedoms of man and citizen, the Constitutional Court nevertheless takes the view that legal persons also qualify as parties, since they, too, may be entitled to exercise certain constitutional rights.

11.4. Following this logic we believe that a further step should be taken to accord the qualification as a party to some subjects (social associations) which do not have legal personality but are exceptionally - by special regulations or a court decision - allowed to participate as parties in certain proceedings in which their rights or duties are being decided. These subjects may obviously be holding certain substantive legal authority and thus also be entitled to certain constitutional rights. The question of (limited) qualification as a party may also raise subjects which in specific proceedings as parties protect public or other people's interests (e.g. public prosecutor, guardianship authority). These subjects do not and cannot have their own substantive legal authorization from the disputed relation that is on trial, but they have procedural authorization and thus also some procedural related constitutional rights (e.g. equality before the courts and government and other bodies vested with public powers - Art. 26 of the Constitution). This leads to the final conclusion that qualification as a party should as a rule be accorded to all subjects who may be entitled to constitutional rights (which in turn may be violated), and that these are mostly the same who in the capacity of parties participated in the proceedings preceding the lodging of the constitutional complaint, in which the decision was reached by which their constitutional right was violated.

12.1. Procedural consequences of the non-existence of procedural criteria are defined in Art. 58 of the Constitutional Court Rules of Procedure. The Court shall

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[324] *To this effect see the Constitutional Court rulings Nos. U-III-51/92 of 8.4.1992, U-III-217/92 of 7.7.1993, and U-III-358/93 of 19.1.1994.*

rule to reject a constitutional complaint if it is not competent to try the matter; if the complaint is untimely, incomplete, incomprehensible or impermissible. The complaint is impermissible if the provided legal course was not exhausted prior to it, i.e. if the plaintiff did not make use of an available legal remedy, and if the complaint was lodged by a person who was not authorized to lodge it.

12.2. The Constitutional Court should be considered non-competent if required to render legal protection which it is not authorized to render under the Constitution and Constitutional Act.[325] *This should also apply to cases where the plaintiff requests protection for some of his or her constitutional rights but in the complaint demands that a decision be reached which the Constitutional Court is not competent to make - e.g. demands that some person be ordered to do or not do something, whereas the Court may only decide on the repeal of the disputed government body act (Art. 30 of the Constitutional Act).*

12.3. One may ask how to deal with the plaintiff's request for the protection of some right which the complaint itself makes obvious and clear is not constitutionally guaranteed (constitutional right). From one point of view, this is the matter of the basic question of whether a constitutional right has been violated (and it obviously has not been), and so a decision should be made to turn down the complaint. From another point of view, the Constitutional Court is not competent to decide on the protection of non-constitutional rights, so the constitutional complaint should be rejected. This is the issue that comes up every now and then both in theory and practice, with regard to which certain substantive legal criteria may be understood and qualified as procedural legal criteria and vice versa. It should be noted that procedural legislation contains provisions under which some remedies should be rejected if they have been used for purposes for which they cannot be used (e.g. repeated proceedings - Art. 421 and 425 of the Civil Procedure Act).

12.4. Undoubtedly, a meritorious decision should be made on the constitutional complaint (i.e. it should either be adopted or turned down by a decision) when the plaintiff invokes violation of a right whose constitutional guarantee is ambiguous, so that an interpretation of the constitutional legal provisions or some other method is needed, to establish whether it is a constitutional right. The difference

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[325] *Under Art. 125 of the Constitution of the Republic of Croatia, the Constitutional Court shall: decide on the conformity of laws with the Constitution; decide on the conformity of other regulations with the Constitution and law; protect the constitutional freedoms and rights or man and citizen; decide jurisdictional disputes among legislative,executive and judicial branches; decide, in conformity with the Constitution, on the impeachability of the President of the Republic; supervise the constitutionality of the programmes and activities of political parties and may, in conformity with the Constitution, ban their work; supervise the constitutionality and legality of elections and republican referenda, and decide electoral disputes which do not fall within the jurisdiction of courts; conducts other affairs specified by the Constitution.*

between the cases in which it is "obvious" that some right is not constitutional, and the cases in which it is only "ambiguous", is too subtle to form a basis for far-reaching procedural legal consequences. We, therefore, believe that in both of the above-mentioned cases a meritorious decision should be given on the constitutional complaint, and that it should not just be dealt with at the level of procedural legal criteria.

13. The Constitutional complaint is untimely if lodged after the expiry of one month from the day the decision was reached by which the preceding legal course was exhausted (see Point 9.1-2). In this case the complaint should be rejected (Art. 58 of the Rules of Procedure).

14. For incomprehensible or incomplete constitutional complaints see Point 10.1-6. It is possible to reject the complaint for this reason alone if the Constitutional Court returns it to the plaintiff for amendment, and it is lodged again without amendment (Art. 25, Para 4, of the Rules of Procedure).

15. The constitutional complaint should be rejected if the plaintiff has not yet exhausted the available legal course, i.e. if he or she in the preceding proceedings has not made use of a provided legal remedy (Art. 58 of the Rules of Procedure; see Point 8.1-3). The second part of this provision ("...if he or she /the plaintiff/ in the preceding proceedings had not made use of a provided legal remedy...") is not only redundant but also incorrect. It is irrelevant who made use of legal remedies in the preceding proceedings (the plaintiff or the defendant in the preceding proceedings); what is relevant, is that the preceding proceedings concluded with a decision by which the plaintiff's constitutional right was violated, even if this decision was reached on the basis of the legal remedy of the defendant (arg. in Art. 28 of the Constitutional Act).

16. A constitutional complaint shall be rejected if lodged by a person who was not authorized to do so (Art. 58 of the Rules of Procedure). This provision contains procedural criteria for qualification as a party and procedural qualification (see Point 11.1-4).

17. We believe that the list of reasons given in Art. 58 of the Rules of Procedure, for which a constitutional complaint is to be rejected, is not definitive but exemplary, because the Constitutional Court Act and the Rules of Procedure do not list and regulate all procedural criteria for the lodging of constitutional complaint (see Point 6.2), and therefore the complaint could perhaps be rejected also for other reasons as well.

18.1. When deciding on whether a constitutional complaint is wellfounded or not (the major issue, merit of the case), the Constitutional Court reaches decision by

which the complaint is either adopted or turned down (Art. 30 of the Constitutional Act; Art 59-61 of the Rules of Procedure). When deciding on the criteria of permissibility of a constitutional complaint, and having established that such criteria are not met, the Constitutional Court reaches a decision by which the complaint is rejected.

18.2. These rules adopt the separation of adjudication for the proceedings following the constitutional complaint by differentiating between the names (and not only names) of those deciding on the merits of the dispute and those relating to the procedural matters (in this case, procedural criteria). This separation has a long tradition in almost all procedural legislation in the Republic of Croatia, thus also in the civil procedure (judgement and ruling), executive court procedure (ruling and conclusion), administrative proceedings (ruling and conclusion), administrative lawsuit (judgement and ruling) etc.

18.3. The basic idea of the separation is to judge and to decide in a somewhat simplified manner on less important matters in the proceedings, the procedural matters being undoubtedly less important than the main issue (merits of the case). Thus, for instance, under the Civil Procedure Act, even the president of the tribunal may at a certain stage rule on the rejection of complaint, even though the trial may be within the competence of the tribunal (Art. 281); rules for communication between the court and the parties are simplified, especially as regards the publication of rulings some of which need not even be delivered to the parties (Art. 343, 344); the court is not bound by some of the rulings it previously made (Art. 343, Para 3); the formal content of the ruling is narrowed, so that some of the rulings (especially those rejecting the application) do not need to contain the opinion (Art. 345); no complaint is permitted against some rulings made in the first stage of the proceedings (arg. in Art. 378), and the review of appellate rulings is significantly limited (Art. 400).

18.4. In the proceedings following a constitutional complaint there is no difference between a decision and a ruling: there is no difference in the composition of the tribunal when deciding on the merits of the case or on the procedural criteria, and no difference in the manner of publishing and delivering adjudication. Since no regular or extraordinary legal remedies are provided against the decisions of the Constitutional Court, the issue of possible differences in different instance proceedings is non-existent.[326]

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[326] *Some other above-mentioned simplifications in a civil procedure also cannot be applied to the Constitutional Court proceedings, especially in relation to a ruling rejecting a complaint. Some of these rules do not apply to the ruling on the rejection of the complaint in a civil procedure either.*

18.5. Under Art. 62, Para 1, of the Rules of Procedure, in its opinion to a decision or ruling the Constitutional Court is to assess the allegations in the complaint which are of decisive importance; this, too, makes the decision and ruling equal with regard to their content. When adopting a constitutional complaint and repealing the disputed act, the Constitutional Court should in its opinion state which constitutional right or freedom has been violated and in what way. Arg. a contrario, this component of the opinion is not required for other adjudications, that is for the decision by which the complaint is turned down and for the ruling by which the complaint is rejected.[327] *Even here, the difference in the opinion is not that between the decision and the ruling, but between the decision by which the complaint is adopted and all other decisions of the Constitutional Court.*

18.6. The separation of adjudications in the proceedings following the constitutional complaint into decisions and rulings is probably a consequence of the traditional views on Croatian use of adjectives; however, it still lacks its real content. What remains is the essential and practical difference in the proceedings which precede the reaching of these adjudications: deciding on the procedural criteria is, as a rule, simpler than a trial on the merits of the case. For this reason, the opinion on the ruling is in most cases easier and shorter than the opinion on the decision (even when the complaint is rejected).

SOME WAYS TO PREVENT THE INFLUX OF CASES

19.1. An excessive influx of cases and the serious threat of the Constitutional Court being inundated by sheer volume of work which it is not able to deal with, call for consideration on how to prevent this, i.e. how at least in certain cases to simplify the Court's proceedings. The influx of cases cannot, of course, be reduced by directly urging citizens not to lodge complaints and other applications with the Constitutional Court (i.e. to do this to a lesser extent), and nor should it be. However, perhaps in certain cases - primarily with regard to the complaints and applications which are obviously quite inappropriate for any court action - things could be settled directly between the parties, avoiding the engagement of the plenum or individual tribunals of the Constitutional Court.

19.2. At the Constitutional Court of the Republic of Croatia, ever since 1991 (i.e. since the Court began to function as a body of an independent state), such cases

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[327] *It should be noted that the term "decision" for adjudication by which the adoption or turning down of a constitutional complaint is decided on, is not the best one. In procedural theory and practice the "decision" is used as a collective phrase for all kinds of adjudication (judgement, ruling, conclusion et al.); in regulations relating to the constitutional complaint, this term is reserved only for one kind of adjudication. This in turn causes interference in the regular procedural terminology and makes accurate expression difficult. For this reason, we use the term "adjudication" as a collective phrase in this paper.*

have been separately filed (marked "R") and statistically monitored. The simplification of procedure consists in the Court secretariat determining which cases belong to this group; the applicant is informed in a special letter that his or her case legal action cannot be initiated, with a brief account of the reason for this; finally, no decision is made in relation to such application unless explicitly demanded by the party. The letter is signed by the Constitutional Court secretary and co-signed by the judge to whom the case was assigned. A Constitutional Court judge may change the marking of the case and place it among other cases; and conversely, the judge may have some other case assigned to him put in the simplified procedure.

19.3. According to the current practice, applications so incomprehensible and incoherent that the wish of the party could not be discerned were placed among "R" cases; applications with general complaints and without any concrete requests; and applications with concrete requests, but relating to political or welfare and not legal points. There is a tendency to extend the simplified procedure beyond these limits. It could hardly be said that the Constitutional Court practice has so far been uniform and steady, and therefore these issues will still have to be much discussed.

19.4. As of 30.06.1995, the Constitutional Court received a total of 602 "R" cases, of which 100 were received in 1991, 132 in 1992, 125 in 1993, 155 in 1994, and 90 until 30.06.1995. The statistics show a significant number of solved cases (533 out of 602), which indicates the efficiency of the simplified procedure. Apparently, the number of "R" cases tends to increase at a slower rate than the number of constitutional complaints (see Point 4). If one may presume to draw far-reaching conclusions from this scanty information, this could mean that the public at large has come to better understand the role of the Constitutional Court over the years, so there are less inappropriate applications; or that the selection criteria at the Constitutional Court have become more strict, so that smaller percentage of cases are marked "R" as compared to being marked as constitutional complaints (and other forms of legal protection provided by the Constitutional Court).

20.1. The basic problem of the "simplified procedure" lies in the difficulties of accurately establishing to which cases it should be applied. In almost all cases where the simplified procedure is applied (or where there is a doubt as to whether it should be applied), there is the option of twofold qualification and twofold legal course: the case may be decided on in simplified procedure or in a regular procedure by applying the rules of the procedural criteria (i.e. deciding how to deal with a case if such criteria are not met). Thus, for instance, in the case of an application with general complaints and no specific request, or with a request of a non-legal nature, the simplified procedure could be applied, but the case could

also be solved by applying the rule of the Constitutional Court's non-competence (Art. 58 of the Rules of Procedure; see Point 12.2-4) or the rules on dealing with an irregular constitutional complaint (see Point 10.1-6). In the case of an incoherent and incomprehensible constitutional complaint there are again the competing options of simplified procedure and regular procedure set down for irregular complaints.

20.2. The difficulty of finding accurate distinguishing criteria is especially apparent in the latter case. It is not difficult to distinguish a "regular" from "irregular" complaint, because the criteria are defined by the regulation which stipulates the obligatory content of constitutional complaint (Art. 51 of the Rules of Procedure; see Point 10.1). It is, however, much more difficult (if at all possible) to set up the criteria for distinguishing an "irregular" complaint from a "non-complaint", i.e. from an application which cannot be qualified as constitutional complaint at all (nor as an initial act for obtaining other kinds of constitutional legal protection that lie within the competence of the Constitutional Court). We should wait to see whether Constitutional Court practice will manage to establish some guidelines and typical cases for the simplified procedure. Even now it can be noted that the criterion of distinction does not relate to the essence of the matter, but measures the shortcomings (quantity and quality) of a constitutional complaint. As a rule, each application with shortcomings can be amended to the level of regular constitutional complaint. The rules of the simplified procedure should be followed when the complaint has so many shortcomings that its amendment could not reasonably be expected. However, whether or not a valid amendment is possible, cannot be established in advance with any certainty. The same conclusion - that the heart of the problem is quantity and not quality - could probably also be reached for other cases to which the simplified procedure is applied (and not only in the case of irregular complaint).

20.3. Therefore, a significant degree of restraint should be shown in setting up the criteria for the application of the simplified procedure, especially in refraining from extending them unduly. The advantages of the simplified procedure beyond any doubt relate to the rational and expedient procedure, especially in reducing the work of the Constitutional Court judges, since the procedure is completed without any court decision. However, it would not be good for efficiency to affect the legality of the procedure; specifically, the simplified procedure should not unreasonably make the existing rules on handling matters where procedural criteria are not met redundant. At least the presumptive rule on the preference for the regular legal course should be respected: where there is serious doubt the regular and not simplified procedure should be applied.

20.4. The difficulties in finding the criteria of distinction call for this problem to be dealt with by an expert officer (or department) of the Constitutional Court,

since it is only by doing this that a uniform and steady practice will be established.

21.1. One of the problems relating to the simplified procedure lies in that its application lacks any legal ground, either in the Constitutional Act on the Constitutional Court or in the Rules of Procedure of the Constitutional Court (not to mention the Constitution of the Republic of Croatia itself). Nevertheless however paradoxical this may appear, the non-provision of a legal ground may itself be a legal ground for certain practices. The above-mentioned legal sources provide procedural rules for the proceedings following the constitutional complaint and other Constitutional Court proceedings. However, if a party's act is not a constitutional complaint (and not an initial act for obtaining other constitutional legal protection), then it remains outside of any procedural legal regulations, and the Constitutional Court is authorized and indeed forced to create adequate procedural rules in practice.

21.2. Positive regulations (with the exception of the Rules of Procedure) contain a very small number of procedural regulations - only the Constitutional Act on the Constitutional Court contains scanty regulations relating to the determination of an attorney for the lodging of a constitutional complaint (Art. 28, Para 1); the necessity for the available legal course to be exhausted prior to lodging the constitutional complaint (Art. 28, Paras 2 and 3); the time in which the complaint is to be lodged (Art. 29) and the authorization of the Constitutional Court to repeal the disputed decision of the competent government body and return the case for a renewed procedure (Art. 30). On the basis of such scanty procedural legal regulations no proceedings can be conducted, including the proceedings following the constitutional complaint. For this reason, the Constitutional Court, from its very beginning, has itself had to create in its practice procedural rules for its own use. As a rule, the Constitutional Court adjusted the fundamental institutes and rules of other procedural legislation to the needs of the constitutional legal proceedings following the constitutional complaint. The procedural rules in the Rules of Procedure are mostly the result of such creativity of the Constitutional Court. The Court assessed that is better for it to codify such procedural rules and make them available to everybody by publishing them in the official gazette of the Republic of Croatia, than to leave them at the level of procedural legal usages that may be known only to a narrow circle of experts. As can be seen from the above presentation, the creation of procedural rules is continuing.[328]

22.1. According to certain general procedural principles, which are mostly not explicitly stipulated by the procedural legislation but do follow from them, a party

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[328] *See the Constitutional Court Ruling No. U-I-252/95 of 16.05.1995.*

is entitled to obtain an appropriate decision with regard to his or her application (whatever this may be), even if the result for the party is negative.[329] *Instructions should, therefore, be given in the letter delivered to the party in the simplified procedure, indicating that a decision with regard to the party's application will be reached if the party insists on it, and that it would benefit the party to amend his or her application in the way that it can be properly discussed and decided on. Such instruction raises the question of how long a party's possible answer should be awaited and also the consequences for replying outside this special time-limit. All this brings the simplified procedure even closer to the regular procedure in the case of an irregular constitutional complaint (see Point 10.1-5).*

22.2. Essentially, the simplified procedure entails directly or indirectly suggesting that the party drop his or her inappropriate complaint (application). Notwithstanding the moral dilemmas - because such a suggestion represents a sort of pressure, even if it be in the party's own interest - it should be noted that it creates situations similar to the regular procedure relating to an irregular constitutional complaint. In both cases the party is faced with an alternative either to drop the complaint or to amend it; in both cases the proceedings are suspended, without a court decision, if the complaint is not amended. For this reason, in certain cases the question of the necessity and purpose of the simplified procedure may be raised.

23. From this presentation it should be concluded that the simplified procedure is probably necessary for constitutional courts burdened with a large number of constitutional complaints and unable to solve this problem in any other way. However, such a procedure is not to be recommended where it is not necessary.

FOURTH WORKING SESSION

Remedies and effects of decisions inconstitutional complaint procedures

Chaired by Mr Jadranko CRNIĆ, President, Constitutional Court of Croatia

a. Remedies and effects of decisions in constitutional complaint procedures

[329] *This is not to plead for the so-called abstract right to complaint in its extreme version, i.e. that the party is entitled to request the reaching of the negative decision. It is merely so that the party is entitled to believe to be right; and if he or she is not, his or her application shall be turned down or rejected.*

Report by Ms Britta WAGNER, Secetary General, Austrian Constitutional Court

b. *The efficiency of the protection of constitutional human rights by means of constitutional complaint in the Republic of Croatia*
Report by Mr Zdravko BARTOVČAK, Judge at the Constitutional Court of Croatia

Remedies and effects of decisions in constitutional complaint procedures - Report by Ms Britta WAGNER

Austria

1. *The Austrian Constitutional Court*

1.1. Competences of the Austrian Constitutional Court and the Respective Decisions

1.1.1. Art. 137 B-VG (Financial Claims under Public Law)

1.1.2. Art. 138, Art. 126a and Art. 148f B-VG (Conflicts of Competence, Declaration of Competence)

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1.1.7. Art. 141 B-VG (Examination of Elections, Removal of Persons from Certain Offices, Examination of People's Initiatives and Referenda)

1.1.8. Art. 142 and Art. 143 B-VG (Impeachment)

1.1.9. Art. 144 B-VG (Petitions for the Protection of Fundamental Rights)

1. The Austrian Constitutional Court

The Austrian Constitutional Court was established in 1920 and is the oldest Constitutional Court in Europe. It is located in Vienna and consists of a president, a vice president, 12 members and 6 substitute members. The substitute members replace regular members in their absence.

The president, the vice president, six regular members and three substitute members are appointed by the Federal President on the recommendation of the federal government. The other six regular members and three substitute members are appointed by the Federal President on the basis of recommendations of the two chambers of parliament. The members and substitute members are judges under the Constitution. They are independent and can be removed from office only in case of a decision by the Constitutional Court itself for special reasons (loss of nationality, incapacity, etc.). The members are appointed for lifetime, but their office ceases with the end of the year in which they reach 70 years of age. Members of the federal government or the state government (Landesregierung), members of the National Council, the Federal Council or any other popular representative body or persons who are employed by a political party cannot become members of the Constitutional Court. If they take over any such office after their appointment, they have to resign from the Constitutional Court.

The Austrian Constitutional Court is not divided into a number of panels. Decisions are reached in meetings of all of the 14 justices. In order to prevent the court from becoming inactive, the court may award a valid judgment in the

absence of one or more of its members, if at least the president or the vice president and 8 of its members are present.

In exceptional cases, the presence of the president or the vice president and four members is sufficient (for instance, in the event of the rejection of a petition on formal grounds, etc.). In practice, however, the majority of cases is deliberated upon and decided in the above composition.

The Austrian Constitutional Court does not sit permanently, but gathers four times a year to so called Court sessions which last about three weeks each. The sessions take place in March, in June, in September and in December of each year. The time during the Court sessions is exclusively reserved for hearings and deliberations of pending cases. The time between the Court sessions is dedicated to the preparation of draft decisions and to the finalisation of decisions taken by the Court, as well as to the preparation of their delivery. In 1994 the Constitutional Court decided about 3100 cases, with each of the reporting judges having prepared an average of close to 400 cases.

The rules governing the competences, the organisation and the procedure of the Constitutional Court are partly laid down in the Constitution itself, partly in the Law on the Procedure before the Constitutional Court (Verfassungsgerichtshofgesetz).

Before dedicating myself to questions of Constitutional Court procedure, permit me to remark on two peculiarities of the Austrian constitutional jurisdiction system, which seem important to me:

Firstly, contrary to, for instance, the Federal Constitutional Court in the Federal Republic of Germany, the Austrian Constitutional Court has no competence to review acts of the ordinary courts.

Secondly, the review of the Austrian Constitutional Court is - apart from one exception that can, however, be neglected in this context - always an ex post review, because the examined act has to belong to the legal order. In contrast, the French Conseil Constitutionnel, for instance, exercises its review power exclusively ex ante.

1.1. Competences of the Austrian Constitutional Court and the Respective Decisions

1.1.1. Art. 137 B-VG (Financial Claims under Public Law)

Under this article, the Constitutional Court is competent to decide pecuniary claims under public law against the federation, the federated states and the communities if such claims are not subject to proceedings before a court of ordinary jurisdiction or to proceedings before an administrative authority.

Whereas claims against the federation, the federated states or the communities under private law are subject to an ordinary legal process, pecuniary claims based on public law are settled in most cases by a decree of an administrative authority. Thus, the Constitutional Court has in these cases residual jurisdiction only. Consequently, only a small variety of such cases can be brought before the constitutional court (e.g. claims involving the federation, the federated states and the communities, in which the plaintiff claims that the distribution of tax revenues among them is not in accordance with the applicable laws; claims for the actual payment of pecuniary claims founded on public law, when the claim itself was found to be justified and was therefore awarded by a decree of an administrative authority, but not paid; employment matters of civil servants).

In its decision the Constitutional Court may either hold that the claim was founded or may dismiss it.

The judgment is enforceable before the ordinary courts (see below).

1.1.2. Art. 138, Art. 126a and Art. 148f B-VG (Conflicts of Competence, Declaration of Competence)

The Constitutional Court decides upon conflicts of competence between courts and administrative authorities, between the Administrative Court and all other courts, particularly between the Administrative Court and itself, between ordinary courts and other courts, between the federation and a federated state and between two or more federated states.

In its decision, the Constitutional Court has to resolve the conflict of competences and has to determine the competent authority.

According to Art. 138 (2) B-VG the Constitutional Court decides, upon application of the federal government or of a state government, whether legislative, administrative or jurisdictional matter falls into the competence of the federation or of the states.

The decision of the Constitutional Court determines the competence, but the declaration of competence is then set out in a "legal rule" ("Rechtssatz") which has to be promulgated promptly by the Federal Chancellor in the Law Gazette.

The Constitutional Court furthermore decides upon differences of opinion between the Audit Office (Art. 126a B-VG), or the Ombudsman Institution (Art. 148f B-VG), on the one hand, and the federal government or a federal minister (also a state government in the case of the Audit Office), on the other hand, on the interpretation of legal provisions which regulate their competences.

The decision of the Constitutional Court constitutes an authentic interpretation of the rules on legal competances. The decision is declaratory. (For further details see also 3.1. below.)

1.1.3. Art. 138a B-VG (Treaties between the Federation and the Federated States)

According to Art. 15a B-VG, the federation and the federated states can enter into treaties on matters of common interest (e.g. environmental pollution laws, etc.). Art. 138a B-VG states that in the case of a treaty between the federation and one or more federated states, the Constitutional Court can issue a declaratory decision, upon application of the federal government or of a state government, on whether a valid treaty exists and whether the federation or the respective federated state has performed its obligations under the treaty.

The same goes for treaties among federated states if those treaties provide for the exercise of jurisdiction by the Constitutional Court.

1.1.4. Art. 139 B-VG (Examination of Regulations)

Administrative authorities are entitled to issue regulations (general abstract acts) based upon federal laws or state laws. The Constitutional Court decides whether a specific regulation of an administrative authority is legal, upon application of institutions and - in a very restricted way - of individuals.

In the event of a finding of illegality, the Constitutional Court will simply overrule the regulation. In such a case the regulation becomes invalid on the day of the promulgation of the judgment in the relevant gazette. The competent highest administrative authority of the federation or a federated state is obliged by the Constitution itself to promulgate the decision at its earliest convenience. The Constitutional Court may, however, stipulate a certain period not exceeding one year before the regulation becomes null and void, or it may overrule a regulation retroactively.

All courts and administrative authorities are bound by a decision overruling a regulation. For further details see 1.1.5. below.

1.1.5. Art. 140 B-VG (Examination of Statutes)

Federal and state statutes can be subject to examination by the Constitutional Court to determine whether they are in accordance with the Constitution. The Constitution regulates cases of abstract and incidental review of norms. Proceedings can be initiated by institutions and - in a very limited sense - by individuals.

The proceedings dealing with the question of the constitutionality or unconstitutionality of statutes can only have two types of results. Either the Constitutional Court decides that the statute should not be declared null and void for unconstitutionality, or it concludes that the statute is in violation of the Constitution, in which case it must overrule the statute.

If the Constitutional Court overrules a particular federal or state statute, it becomes invalid with the promulgation of the decision in the relevant Law Gazette. The Federal Chancellor or the Governor in question are obliged by the Constitution to promulgate the decision at their earliest convenience. The Court has the possibility to decide that the statute becomes invalid after a certain period of time not exceeding 18 months, or it may decide that a particular statute is overruled retroactively (see below).

Generally, the statute becomes ineffective (invalid) on the day of the promulgation of the anullment of the statute in the Law Gazette, with the effect that it no longer forms part of the legal order.

The Constitutional Court, however, also has the possiblity to decide itself that a statute shall only become ineffective after a certain period of time which must not exceed eighteen months. This has the consequence that a statute that has been found unconstitutional by the Constitutional Court continues to remain in force for a certain period of time, and has to continue to be applied until the date the Court has determined for its abolition. An exception to this is always the case which has led to the particular proceedings before the Constitutional Court ("Anlaßfall"), to which the overruled statute can no longer be applied.

The Constitutional Court usually makes use of this possibility when it is evident that the legislator will need sufficient time to produce a new regulation that is in conformity with the Constitution, or when the sudden lack of a legal provision would cause problems (e.g. the abolition of tax laws durng the year).

All courts and administrative authorities are bound by the decision of the Constitutional Court. An overruled statute is, however, still applicable to those cases which have materialised before the statute has been overruled (except for the case that has caused the norm control proceedings, the "Anlaßfall"), for

instance cases pending before administrative authorities or the Administrative Court. It is then up to the administrative authorities to decide whether to suspend their decision until the statute is no longer in force, or to decide the pending cases based on the statute that has been found unconstitutional but which will remain in force for a certain period of time.

However, the Constitution also gives the Constitutional Court the possibility to state in its decision that the statute that has been found unconstitutional shall not be applied to pending cases either. This possibility can be considered as a retroactive abolition of the statute.

An example will make clear when the Constitutional Court makes use of this possibility. A few years ago the Court was examining the constitutionality of a tax law. In the oral hearing, the representative of the Ministry of Finance said that many cases in which this tax law had to be applied were pending before the second instance administrative authorities. Upon an instruction of the Minister of Finance these cases were, however, not allowed to be decided as long as the relevant proceedings before the Constitutional Court were pending. This was in order to prevent the persons concerned from attaining a decree which they could then challenge before the Constitutional Court, arguing that the tax law applied was unconstitutional, and, thus, become cases which could (also) result in the non-application of the tax law in question to their cases. After these "revelations", the Constitutional Court of course stated in its decision that the overruled tax law was not to be applied to the cases pending before the second instance administrative authorities.

1.1.6. Art. 140a B-VG (Examination of State Treaties)

The Constitutional Court can examine whether state treaties are legal. In certain cases, the Constitution requires the approval of state treaties by the National Council and here the Constitutional Court follows the rules for the examination of statutes (Art. 140 B-VG). Otherwise the examination is made in accordance with the provision of Art. 139 B-VG.

In its decision the Constitutional Court has to declare the legality or illegality of a state treaty. The consequence of a declaration of illegality is that such state treaties become ineffective in domestic law upon the promulgation of the decision.

1.1.7. Art. 141 B-VG (Examination of Elections, Removal of Persons from Certain Offices, Examination of People's Initiatives and Referenda)

The Constitutional Court reviews the legality of the electoral procedure for the most important elections (e.g. National Council, state councils, town councils,

European Parliament, Federal President, state governments). The Court has to grant the application when the alleged illegality of the electoral procedure is considered proved and when it was sufficient to influence the election result. If, for instance, the casting of some votes in a particular district was illegal, but the number of illegal votes was so small that it could not have influenced the outcome of the election, the Court would dismiss the application.

In line with the above mentioned principles, the Constitutional Court decides upon the legality of people's initiatives or referenda.

Federal law and state law stipulate the reasons for the loss of a political position. Among others, loss of membership in the National Council, of the Federal Council, of a state or a town council or of the European Parliament are subject to examination by the Constitutional Court. In these cases proceedings are initiated by the respective council.

When the Constitutional Court grants the application because an ineligible person had been declared eligible, it has to declare the election null and void.

In case of the granting of an application because an eligible person had unlawfully been deprived of his eligibility, the Constitutional Court has to decide whether, through this fact, the election of other persons has become void, and whether to anul the election of these persons in consequence.

In cases of any other illegality in the course of an electoral procedure, it is - as mentioned - decisive that this illegality has had an influence on the result of the election. If such an influence is probable, the decision has to state either that the whole electoral procedure or a precisely determined part thereof are anulled. The election authorities, which have to act in accordance with the decision, are bound by the finding of facts and by the legal opinion of the Constitutional Court.

1.1.8. Art. 142 and Art. 143 B-VG (Impeachment)

The Federal President, the members of the federal government, the members of the state governments, as well as the president of the Audit Office and the presidents of the state school councils, are subject to impeachment before the Constitutional Court.

The Constitutional Court decides upon indictments alleging constitutional responsibility of the highest Federal or state organs for their culpable violation of the legal order in exercising their official duty.

The proceedings before the Court are initiated by an indictment. The Court applies the Code of Penal Procedure. The Court decides whether the respective office holder has - at least negligently - violated the legal order.

Under this competence, the Constitutional Court can even act as a criminal court.

The decision of the Constitutional Court consists either of an acquittal or a conviction. In case of a conviction, the Constitutional Court has to declare the loss of office and - under aggravating circumstances - the temporary loss of political rights. Only in case of a minor violation of the legal order can the Court restrict itself to the declaration that such a violation has been committed. In this case the accused will remain in office.

1.1.9. Art. 144 B-VG (Petitions for the Protection of Fundamental Rights)

Most of the cases brought before the Austrian Constitutional Court are petitions against decrees of the respective highest administrative authorities for violation of "constitutionally guaranteed rights" in the course of the proceedings before the administrative authorities. Such a petition may also be based on the allegation that there are doubts whether a regulation is legal or a statute is consistent with the Constitution.

Since such a petition can only oppose acts of administrative authorities, it cannot be compared with the so-called "Verfassungsbeschwerde" in the Federal Republic of Germany, although the problems arising in this exercise of that jurisdiction are quite similar.

From 1975 onwards, in particular at the beginning of the eighties, the number of this type of cases brought before the Constitutional Court increased dramatically. According to the procedural law then applicable, the Court had two options if a petition was unfounded: it could either reject it on procedural grounds, or dismiss it on substantive grounds. A rejection was only possible if certain formal requirements for the filing of a petition were not met, for instance that the six-week period for the filing of a petition was exhausted. When a petition did meet the formal requirements, the Constitutional Court had to consider the case in detail. Until 1981, the Constitutional Court was obliged to decide each case with a reasoned opinion. The Court did not have the power to refuse an unfounded petition without giving the reasoning for its decision.

Consequently, the Constitutional Court submitted an initiative to Parliament for the introduction of a system that would allow the Court to refuse certain cases without giving a reasoned decision. In 1981 an amendment to the Constitution and to the Law of the Procedure before the Constitutional Court was enacted,

authorising the Court to refuse a petition if there is no reasonable chance of success. In 1984, amendments were enacted authorising the Court to refuse a petition also when a decision on the petition could not be expected to clarify an issue of constitutional law.

These two amendments have allowed the Constitutional Court to be once again in a position to cope with its ever increasing workload and to keep the length of the proceedings within tolerable limits.

These developments are worth mentioning in detail in order to show that the Austrian Constitutional Court - although it has never had to deal with the "Verfassungsbeschwerde" in the classic sense - has been in severe trouble in connection with the work load problem and the problem of access to the Court.

The decision of the Constitutional Court has to state whether a violation of the constitutionally guaranteed rights of the petitioner has taken place, or whether such rights have been violated because of the application of an unconstitutional statute or an illegal regulation. When such a violation has taken place, the Court has to anul the decree of the administrative authority.

Consequently, the administrative authorities are obliged to promptly act upon the legal opinion of the Constitutional Court, and to provide restitution in respect of the petitioner, as demanded by the legal situation.

The decision of the Constitutional Court has no effect erga omnes. It concerns only the parties involved.

2. Effect of Decisions of the Austrian Constitutional Court

The effect of decisions of the Constitutinal Court depends, of course, on the type of competence exercised by the Court.

2.1. Binding Force of Constitutional Court Decisions

2.1.1. Res iudicata Effect

In principle, a decision taken by the Constitutional Court is final. If an applicant or a petitioner whose case has been decided by the Constitutional Court brings the same case before the Court again, his application or petition will be rejected on the grounds of res iudicata.

It is, however, important to remark that the res iudicata effect has certain limits in the case of proceedings for the review of norms. Alleged doubts about the constitutionality or legality of a general abstract norm determine to some extent

the subject matter of the Constitutional Court proceedings. Consequently, as regards explicitly described doubts as to the constitutionality/legality of a legal norm, the Court can decide the issue only once. Such a decision creates res iudicata effects vis à vis the same doubts about the same norm in all possible directions. A negative decision, however, does not impede the examination of the same legal norm in the light of other doubts.

2.1.2. Precedents

An important question in this context is whether at all, and if so to what extent, a Constitutional Court is bound by its own decisions. In other words, how extensive is the Court's freedom to develop its own jurisdiction.

The Austrian Constitutional Court is not divided into panels, so that the frequently occuring question of diverging jurisdiction in two different panels cannot arise. This question is usually resolved by the institution of an enlarged panel or a plenary session of a court which has to decide which way to go.

Precedents play an important role in the jurisdiction of the Austrian Constitutional Court, and are often quoted in the reasonings in much detail. In some types of decisions the reasoning consists of the mere quotation of precedents. This is, for instance, the case in the case of the refusal of a petition because it has no reasonable chance for success, the chance for success thus being evaluated on the base of existing precedents.

The Constitutional Court can, however, change its legal opinion. When the Court decides to depart from established case law, it will describe the reasons for its now different view in much detail in the reasoning.

Such a change in case law is not subject to qualified preconditions like, for instance, unanimity of votes.

3. Enforcement/Execution of the Decisions of the Austrian Constitutional Court

3.1. Legal Situation (Art. 146, Art. 126a B-VG)

The question of the enforcement of the Constitutional Court's decisions appears to be enormously important at first glance. In most cases it is, however, of theoretical importance only and has little practical significance.

Art. 146 of the Constitution deals primarily with this question. According to Art. 146 (1) B-VG the execution of judgements of the Constitutional Court regarding claims under Art. 137 B-VG is carried out by the ordinary courts.

The execution of all other decisions of the Constitutional Court falls within the competence of the Federal President (Art. 146 (2) B-VG): "It has to be carried out in line with his directives by the Federal or state organs appointed by him, including the federal army. The Constitutional Court has to file the application for the execution of such decisons with the Federal President."

An important amendment to Art. 126a of the Constitution became necessary in 1993 following a decision of the Constitutional Court (KR 1/92) in proceedings regarding a difference of opinion between the Audit Office, on the one hand, and the federal government as well as the Vienna state government, on the other hand, as to the interpretation of legal provisions governing the ability of the Audit Office to examine the orderly conduct of affairs of a major Austrian bank. In its decision, the Constitutional Court stated that the Audit Office was competent to carry out the examination. When the Audit Court officers wanted to commence their examination, they were denied admittance to the premises of the bank.

On the basis of the legal situation in force at that time, no legal instrument existed to enforce the decision of the Constitutional Court, a situation that entailed an amendment of Art. 126a of the Constitution (BGBl. 508/1993). The revised version now obliges all legal entities to make an examination by the Audit Office possible, in accordance with the legal opinion of the Constitutional Court. The execution of this obligation will be carried out by the ordinary courts.

3.2. Which Decisions are Accessible to Enforcement?

The question of which decisions - apart from the aforementioned case - can be at all subject to execution in a wider sense is, however, not settled.

- *In cases of the resolution of conflicts of competence (Art. 138 B-VG), execution of the decision is no longer possible because the decision itself has resolved the competence question (declaratory decision).*

- *In the case of differences of opinion between the Ombudsman and the federal government or a federal minister on the interpretation of provisions governing competence (Art. 148f B-VG), the decision of the Constitutional Court provides an authentic interpretation of the legal provisions in question in a declaratory decision which is not accesible to execution.*

- *The declaration that a statute, a regulation or a state treaty is null and void is not enforceable as such because the anulment occurs eo ipso together with the promulgation of the decision of the Constitutional Court.*

Since - as mentioned above - the competent federal or state organs are obliged by the Constitution to promulgate the Constitutional Court decision, the question arises whether the decision is enforceable as far as this particular obligation is concerned. Most authors answer this question affirmatively. On the other hand, it can be argued that the obligation to carry out the promulgation is not part of the content of the decision, but one of its consequences. Since, however, only the content of a decision can be subject to execution, the promulgation cannot be enforced. Only when the Constitutional Court states the obligation in its decision - which it usually does in practice - is execution possible.

- *As regards the review of elections (Art. 141 B-VG), execution of the Constitutional Court's decision cannot be considered, since all acts that have to be taken have a constitutive legal effect.*

- *In as much as a conviction under Art. 142 B-VG leads to removal from office, execution is impossible. Only when the Constitutional Court imposes a penalty, is execution possible.*

- *Regarding the competence of the Constitutional Court under Art. 144 B-VG ("special administrative jurisdiction"), the decision removes the contested administrative act, and execution is accordingly not possible. The obligation of the administrative authorities to act according to the Constitutional Court's decision is only a consequence of this decision and not part of its content. It cannot therefore be subject to execution.*

3.3. Costs of Proceedings

A claim of a party in Constitutional Court proceedings to payment of costs only exists in those cases where such a claim is explicitly stated in the Law of the Procedure before the Constitutional Court (27 VfGG1953). Accordingly, in some proceedings the unsuccessful party can be subject to an order for costs. This happens especially in proceedings concerning financial claims under public law (Art. 137 B-VG), in proceedings for the review of norms initiated by an individual (Art. 139, Art. 140 B-VG), and in the case of petitions for the protection of fundamental rights (Art. 144 B-VG). In these cases costs of the proceedings are awarded to the winning party either by reference to the provisions on lawyer's fees connected to the sum in dispute (Art. 137 B-VG) or by reference to a regulation issued by the Constitutional Court itself which fixes lump sums for

various stages in the course of the proceedings (e.g. application, oral hearing, etc.).

Decisions of the Constitutional Court on costs are subject to execution upon application by the winning party. In such cases, the Constitutional Court forwards an application to the Federal President, who then issues a decree in which he entrusts the execution of the judgment to the ordinary courts.

The efficiency of the protection of constitutional human rights by means of constitutional complaint in the republic of Croatia - *Report by Mr Zdravko BARTOVČA*

Croatia

1. Which constitutional-civil rights are protected in the Republic of Croatia ?

Under Article 28, Para 1, of the Constitutional Act on the Constitutional Court of the Republic of Croatia (hereinafter the Constitutional Act), in the Republic of Croatia any natural or legal person may lodge a constitutional complaint with the Constitutional Court, if they believe that one of their constitutional freedoms or constitutional rights of man and citizen has been violated by a decision of a judicial or administrative authority, or of another body vested with public powers.

These constitutional rights are specified in Chapter III of the Constitution of the Republic of Croatia under the title of "Fundamental Freedoms and Rights of Man and Citizen". This Chapter contains 56 Articles subdivided into: "Common Provisions", "Personal and Political Freedoms and Rights, and "Economic, Social and Cultural Rights". Since the Constitution of the Republic of Croatia contains 142 Articles in total, the importance given to the constitutional rights of citizens is obvious.

To mention but a few, the Constitution of the Republic of Croatia, like that of other Western-European states, protects all civil and human rights which are derived from the Human Rights Charter, all conventions and agreements adopted so far, like for instance: "the right to life, the right to inviolability of freedom, the right to the freedom of thought and expression, freedom of conscience and religion, the right to the protection of property, the right to freedom of entrepreneurship and to market freedom, the right to work, health care and the right to a healthy life and environment".

Special protection is provided for the constitutional rights of ethnic and national communities or minorities under the Constitutional Law on Human Rights and Freedoms and the Rights of Ethnic and National Communities or Minorities in the Republic of Croatia (hereinafter the Constitutional Law).

2. When can protection of constitutional rights be requested, by what legal remedy and from which authority ?

Under Article 28, Para 2, of the Constitutional Act, the protection of constitutional rights, if no other legal course is permitted, may only be requested after the regular legal course has been exhausted. This means that a constitutional complaint for the protection of constitutional rights may be lodged after the court or administrative proceedings, or the proceedings of any other authority vested with public powers, have been completed. In administrative proceedings this occurs after the administrative dispute has ended, and in court proceedings after a decision has been reached by the court of appeal or the court of revision in a civil lawsuit, if review is permitted.

As for the protection of rights under Article 58 of the Constitutional Law, any citizen may also request the protection of such rights after all available legal remedies have been exhausted in the field of human rights and freedoms and the rights and status of ethnic and national communities or minorities guaranteed by the Constitution of the Republic of Croatia, international agreements binding on the Republic of Croatia, the abovesaid Law or any other laws in force in the Republic of Croatia.

Under Article 59 of the Constitutional Law, a district with a special statute may lodge a constitutional complaint with the Constitutional Court of the Republic of Croatia, if it believes that a document or ACTION of the central authorities of the Republic of Croatia violates personal freedoms and human rights and ethnic and national communities or minorities guaranteed under the Law.[330]

3. Is the protection of constitutional rights efficient and timely ?

Initially, I should point out that in this report I shall not deal with the issue of efficiency of human rights protection in the countries torn by war or Serbian aggression, such as the Republic of Bosnia-Herzegovina or the temporarily occupied territories of the Republic of Croatia, where there are extreme objective difficulties interfering with or preventing such protection altogether, despite the fact that violations of constitutional rights are most frequent and grave there.

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[330] *For details on the requirements for lodging constitutional complaint with the Constitutional Court of the Republic of Croatia, see the book by Jadranko Crni_, President of the Constitutional Court of the Republic of Croatia, Vladavina ustava, Informator 1994.*

How are we to urgently and efficiently protect the human rights of the innocent civilian population and resist aggression, terrorism and genocide, which are the gravest assaults on human rights?

I will not discuss this issue here, because it is so large as to require an entire conference like this for itself.

During several years working as a judge at the Constitutional Court, I have been faced with the question of whether the protection of the constitutional rights of citizens is efficient and timely, or whether it is provided too late and does not have the effects it should. The answer to this question is, unfortunately, negative. The protection provided, almost as a rule, is neither timely nor efficient. I categorically maintain that the reason for this is not the inefficient operation of the Constitutional Court.

All regular administrative proceedings, and even court proceedings, as well as the proceedings of other bodies vested with public powers, take a notoriously long time, sometimes even taking years. In such cases, if during these proceedings there is a violation of a citizen's constitutional right (in first or second instance proceedings), a citizen will be able to request the protection of his or her constitutional rights only after the regular proceedings have been completed notwithstanding the gravity of the violation of his or her constitutional rights, and the fact that the procedure may take several years. If the duration of the Constitutional Court proceedings is added on top of that of the proceedings for the protection against the violation of the constitutional rights, it is clear that such protection is inefficient and that a citizen has recourse to it as a kind of post factum satisfaction.

Surely such methods cannot be used to attain the goal intended by providing the possibility of the protection of the constitutional rights through constitutional complaint.

4. Examples that prove it

How can any citizen whose constitutional right to freedom has been violated in criminal proceedings (for instance, by unlawful deprivation of liberty) be satisfied, if he or she can request or receive the protection of this constitutional right only after the criminal proceedings which may last for years have been completed, whereas the constitutional right was violated at the very beginning of the proceedings or even prior to the proceedings. The citizen, of course, will not see such protection of his or her constitutional rights as real, but rather as a declarative rather than as actual right.

In all this I believe there is no doubt that the right to freedom is one of the most important constitutional rights next to the right to life.

We know that in some countries (Austria, Germany, U.S.A.) the protection of this constitutional right is possible even before the completion of the criminal proceedings if the right was violated during police custody, that is prior to court proceedings or, as in Germany, if the case is of general significance, or if further delay would cause severe and irreparable harm.

In some respects this issue also remains open at the Constitutional Court of Croatia and there are judges who believe that it should be possible to request that a constitutional right be protected even before criminal proceedings are completed. Our Court was already on the verge of introducing such a practice, but in this specific case the Court could not establish beyond doubt that a constitutional right had in fact been violated, and so it made no such decision.

There are other examples too from which it can be seen that the protection of the constitutional rights occurs too late and is inefficient. A citizen, under our Constitution has the constitutional right to a fair trial. However, in the course of the proceedings the issue of the exemption of judges may arise in the case of judges (professional and lay-assessors) whose impartiality is in doubt. A Court decision stating that a request for the exemption of such judges may be challenged by the interested party only by a complaint after the completion of the proceedings means that a citizen's constitutional right may be violated, and he or she cannot immediately request protection, with the result that a biased judge could pass judgment upon the citizen. The protection of the constitutional right may be requested by the citizen only after regular legal proceedings have been exhausted. It is doubtful whether the violation of this constitutional right can be rectified at all after the completion of the proceedings.

The same situation arises with the issue of delegation by another court, because such a decision can also be disputed in a complaint against the final decision on the case, id est *after the completion of the proceedings. Undoubtedly, grave violations of the constitutional right to fair trial may also occur here, and just as in the previous example the protection may be requested only after it is in practice no longer possible to rectify the violation.*

The question of efficient protection of constitutional rights is raised, for example, in the protection of the constitutional right to strike, of unauthorized entry on to other people's premises, of restricting freedom of movement, and in almost all cases of the violation of constitutional rights. I have mentioned only a few examples to illustrate the existing problem.

Besides what has already been said, we also have to mention the fact that where a longer period has elapsed since the violation of the constitutional right, the interest for requesting the protection of the right dwindles and may even disappear altogether.

5. Exceptions concerning the provision of the protection of constitutional rights before the regular legal procedure has been exhausted

In its operation so far, the Constitutional Court of the Republic of Croatia, has adopted only one positive decision on a constitutional complaint adopted before regular legal procedure was exhausted under Article 28, Para 2, of the Constitutional Act. This decision was reached by the Constitutional Court after it concluded that the regular legal procedure was not at all possible, and that this constituted grounds for immediate protection of violated constitutional rights. The case in question concerned constitutional complaints by candidates for the position of judges of the Supreme Court of the Republic of Croatia, who were not appointed and thought that in the proceedings at the High Judiciary Council responsible for the appointments their constitutional right to equal access to public service under Article 44 of the Constitution, had been violated. The Constitutional Court established in its proceedings that their statements were correct, and that their constitutional right under Article 44 of the Constitution had been violated, and therefore it adopted the directly lodged constitutional complaints, repealing the decisions of the High Judiciary Council on the appointment of the judges of the Supreme Court of the Republic of Croatia and returning the case to the High Judiciary Council for renewed proceedings. It should be mentioned that there are legal theoreticians here who believe that such direct protection of the constitutional rights was not possible under the provisions of our Constitution and the Constitutional Act, and that prior to the request for protection at least a quasi-administrative lawsuit should have been conducted.

If by any chance the Constitutional Court of the Republic of Croatia had taken the theoretic position that in this case of the violation of constitutional rights in the appointment of judges of the Supreme Court regular legal procedures were possible, the protection of the plaintiffs' constitutional rights would certainly have come too late, at a time when the consequences of the violation of these constitutional rights would have been immeasurable. The unlawfully appointed judges would in the meantime have passed so many individual decisions that restitution in such cases would have been almost impossible.

The practice of our Constitutional Court concerning decisions on temporary measures is indicative of providing direct protection of constitutional rights. In the field of the protection of a citizen's constitutional rights, the Constitutional Court has adopted the practice of temporary measures in proceedings for the

eviction of citizens from apartments, not only in connection with reviewing the constitutionality of Article 94 of the Housing Act - under which a decision on eviction is made by administrative authorities and not by a court - but also in proceedings in which, along with lodging a constitutional complaint there is a temporary measure for suspending the execution of the eviction until the constitutional complaint has been decided upon, i.e. until it has been decided whether or not a constitutional right has been violated.

This, of course, is no direct provision of constitutional protection against the violation of constitutional rights, but this temporary measure is an act which promptly halts the process in which there has already been or which could produce violations of constitutional rights, and this for the citizen is the same as if his or her constitutional complaint has been accepted, since the violation of his or her constitutional rights has been prevented, even if only temporarily.

As a very important possibility for requesting the protection of human rights even before regular legal procedure has been exhausted, or any available domestic remedies for that matter, I point out the possibility for districts with special statutes under abovementioned Article 59 of the Constitutional Law to lodge a constitutional complaint with the Constitutional Court, if they believe that by a document or ACTION of the central authorities of the Republic of Croatia the freedom and rights of ethnic and national communities or minorities have been violated. This also applies to violations of constitutional rights merely by an action, id est *before any regular legal course has been exhausted. It should be noted here that due to the unresolved issue of sovereignty of the Republic of Croatia, on the occupied territory this Constitutional Law has still not been put into practice.*

6. Problems of legal theory

It is clear that a situation where the Constitution, law or court practice makes it possible to request that the constitutional courts protect constitutional rights even before regular court or administrative proceedings are completed, would raise the question of whether the Constitutional Court thereby encroaches upon the autonomy and independence of these authorities, with the exception of those cases where regular proceedings have not even been initiated.

This, of course, is the major theoretical and practical problem in connection with this issue.

Notwithstanding the above, I believe that because of the importance of protecting constitutional rights a theoretical and practical solution to this problem must be found.

I, personally, advocate the protection of constitutional rights by the constitutional courts even before the regular legal course has been exhausted. I favour a solution, which would guarantee a citizen's rights at all stages of court, administrative or any other proceedings, even when constitutional rights are being encroached upon by the actions or failure of the authorities to act. I therefore stand for a situation broader even than that which already exists in some European countries where in some cases protection of constitutional rights can be requested even before the regular legal procedure has been exhausted.

How could this be implemented without encroaching upon the competence of the regular courts, administrative and other authorities?

I believe that if the Constitutional Court received a constitutional complaint about the violation of a constitutional right, and this complaint is received before the regular legal procedure has been exhausted, if it is found that the constitutional right really has been violated, the Constitutional court should decide that regular proceedings be discontinued pending the Constitutional Court's decision on whether or not the constitutional right has been violated. I advocate such an approach for all proceedings, including criminal proceedings (and one that is not restricted only to cases of deprivation of liberty - custody, as already introduced in some countries).

I do not maintain that this is the only possible way to achieve a more efficient protection of human rights, but if the proposed direction is taken, the protection of the constitutional rights will remain too slow and inefficient. I am certain that this problem is not only present in the operation of the Constitutional Court of the Republic of Croatia, but must certainly occur in the operation of other constitutional courts in the protection of a citizen's constitutional rights. I, therefore, believe that something has to be done to achieve as efficient and quick a protection of constitutional rights as possible. There is an old proverb which says: "He who gives quickly, gives twice." This proverb certainly may serve as the starting point in considering the solutions to the abovementioned problem.

After the completion of Constitutional Court proceedings, the regular proceedings would be resumed at the stage at which they had been discontinued. The opinion of the Constitutional Court would, of course, be binding on the regular court. This manner of protecting constitutional rights by the constitutional courts would not represent an excessive burden for constitutional court operations provided they did not allow the concept of constitutional legal protection to be too broadly interpreted.

7. The European and our trends in the development of constitutional rights protection

As far as I know, neither in Croatia nor in other European countries are there any constitutional or legal initiatives for achieving greater efficiency and speeding up proceedings for the protection of a citizen's constitutional rights. On the contrary, the trend seems to be quite the opposite, especially as far as international institutions for the protection of a citizen's constitutional rights are concerned. There are rising trends towards proposing and establishing new tribunals or other national or international bodies for protecting constitutional rights. Such trends are also present in the Republic of Croatia, where - in addition to the Constitutional Court of the Republic of Croatia which is authorised to protect the constitutional rights of citizens - a Provisional Human Rights Court has been set up (at the explicit request of certain international factions).

It would seem that in Europe new tribunals, bodies and committees are being established to protect a citizen's constitutional rights.

I believe that establishing further different tribunals, bodies or institutions to protect constitutional rights will not go very far towards achieving a quicker and more efficient protection of these constitutional rights. On the contrary, the system of protection simply becomes more complicated, significantly more expensive, and competences often overlap.

8. Way out of the existing situation

I believe that a citizen's constitutional rights could be sufficiently protected by the national constitutional or similar high courts, with the sole addition of the European Court of Human Rights which is already operative and for which a new splendid building was opened at the end of June 1995.

If one starts from the assumption that all regular courts and authorities are obliged to proceed in compliance with the Constitution and law, then it is only normal to assume that besides them a single court specialized in the protection of the constitutional rights should exist. The European Court would aim to correct decisions by the national constitutional courts, if in proceedings for the protection of constitutional rights they have acted with bias or contrary to the relevant national constitutional order or adopted international agreements and conventions. Citizens can already turn to the European Court, once the domestic legal procedure for the protection of their constitutional rights has been exhausted[331].

[331] *The citizens of the Council of Europe member states are meant here.*

Beside this European Court there is, in my opinion, justification only for the existence of the International War Crimes Tribunal, established in 1993, as the court to which specific violations of human rights should be addressed.

I am not convinced that there should be a special court for the protection of the constitutional rights of national minorities, national or European, since if we all agree that national minorities should have the same rights as other citizens then in fact it may amount to discrimination against these national minorities if some court other than that competent for the majority of the nation is to address the violation of their constitutional rights.

I especially believe that there is no need for such special national courts, since we have the European court for the protection of the constitutional rights to which any citizen, including the members of national minorities, may turn if dissatisfied with the decision of a national court.

I have first presented such proposal at the International Conference of the Constitutional Courts in Warsaw 1994. However, I believe that this proposal should be discussed, being aware of the fact that it could be extensively criticised and that there are also other ways of enhancing the efficiency of the protection of constitutional rights.

9. What else, besides the existing constitution and laws, could be done to enhance the efficiency of the protection of constitutional rights ?

In most countries, including Croatia, constitutional and legal amendments intending to change the protection of constitutional rights are rarely undertaken. The solution is therefore to be sought within the framework of existing legislation.

I believe that even using the existing constitutional provisions it is possible to protect constitutional rights with utmost efficiency. Under Article 125 of the Constitution of the Republic of Croatia, the Constitutional Court shall protect the constitutional freedoms and rights of man and citizen. This is the whole provision. The Constitutional Act, however, elaborating on this constitutional standard, provides that the protection of the constitutional rights may only be requested after the regular legal procedure has been exhausted. The primary issue here is whether in protecting constitutional rights the Constitutional Act has actually reduced the right and responsibility of the Constitutional Court since no such or similar restriction follows from the constitutional provision. Besides, Article 59 of the Constitutional Act envisages that a district with a special statute may lodge a constitutional complaint with the Constitutional Court even when the constitutional rights of members of a national minority are violated by an ACTION and not a formal document. With regard to the constitutional provision

of Article 125 and the abovementioned provision of the Constitutional Law (on minorities), it is certain that the Constitutional Court is authorized to compensate for the insufficiencies of the constitutional provision by its practice, and to do what is necessary in practice to protect a citizen's constitutional rights in case of any doubt, because this is the basic purpose and task of the Constitutional Court in the field of the protection of constitutional rights. The interpretation of the constitutional and legal provisions regulating constitutional rights must exclusively follow the postulate that the Constitutional Court is obliged to give efficient and maximum protection to constitutional rights, last but not least for the reason that all international documents dealing with human rights stem from the rights of man and citizen, having been enacted to protect these rights.

The practice of the Constitutional Court of the Republic of Croatia has already attacked the problem, and I am positive that our practice will continue to develop in this direction, because the human being and the protection of his or her rights is of the highest value.

I am convinced that the practice of the European courts in the protection of constitutional rights will also continue to develop in this direction. All the more so for the fact that such practice already exists, and the human being and his or her rights are an imperative urging us to take every measure to offer protection as quickly and efficiently as possible to a person whose constitutional-human rights have been violated.

Papers submitted to the seminar

a. *The protection of fundamental rights by the Constitutional Court and the practice of the Constitutional Court of the Republic of Slovenia*
Paper by Mr Arne MAVČIČ, Constitutional Court of Slovenia

b. *The Supreme Court of Canada and the Protection of Rights and Freedoms*
Paper by Mr Gérald BEAUDOIN, Senator, Ottawa, Canada

c. *The Constitutional Court of the Russian Federation and the protection of the*

(constitutional) fundamental rights and freedoms of citizens
Paper by Mr Nikolai V. VITRUK, Judge at the Constitutional Court of Russia

d. *Protection of fundamental freedoms and rights before the Constitutional Court during time of war*
Paper by Mr Nedjo MILIĆEVIĆ, Judge at the Constitutional Court of Bosnia-Herzegovina

The protection of fundamental rights by the Constitutional Court and the practice of the Constitutional Court of the Republic of Slovenia - Paper by Mr Arne MAVČIČ

Slovenia

I. FORMS OF PROTECTION OF FUNDAMENTAL RIGHTS

An affected individual whose constitutional rights are claimed to have been violated generally has to initiate appropriate proceedings for their protection. Protection of rights by the constitutional court is only one of a number of means of such protection, and the alternatives will vary depending on the concrete system.

1. Rights may be protected in ordinary court proceedings.

a) Some legal systems provide protection of rights predominantly by way of proceedings before courts of general competence. For the most part these are countries which have also adopted the so-called diffuse or American model of judicial review[332].

The following are examples of specific forms of rights protection by courts of general competence:

b) Habeas corpus procedure, which means protection from unjustified deprivation of liberty.

An appropriate application is lodged with the competent body of a regular court. Such proceedings are characterised by speed, simplicity and openness[333].

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

d) Public law remedies recognised mainly by States which have adopted the American model of judicial review[334] *:*

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

[333] *Habeas corpus is mainly used in USA, Canada, Mexico, Cuba, Costa Rica, Salvador, Guatamala and Honduras, Columbia, Argentina, Brazil, Ecuador, Peru, Bolivia and Chile; 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.*

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

- *prohibition, which means preventing a higher court from usurping the jurisdiction of a lower court;*

- *certiorari, as the right of a higher court to resolve a dispute concerning the jurisdiction of a lower court;*

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

e) Respondeat superior is a compensation claim by an individual against the State[335].

2. A specific form of protection of rights which is reminiscent of a constitutional complaint or appeal is the so-called amparo. This is a universal and traditional form of protection of rights in the Hispanophone legal system: the protection of an individual from violations of constitutional rights by State acts of all categories. In the main, the supreme courts of the States in question are responsible for this form of protection. The aim of such a proceeding is to restore the person whose rights have been violated right to his or her position prior to the violation. It is also a characteristically fast procedure. Mexico is the classic amparo State[336].

3. Subsidiary amparo is even more similar to a constitutional appeal. This is a particular "sub-species" of amparo, in that the procedure takes place before the constitutional court[337]*. This form of protection is also called accion de tutela. In Columbia, the accion de tutela is directly comparable to a constitutional appeal. It was introduced by the Columbian Constitution of 1991. It is characterised by the explicit definition of the circle of rights protected, and makes possible the annulment of legal or administrative acts (in the case of Colombia, as an addition to popular appeals and habeas corpus proceedings).*

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[334] *The following States recognise this procedure: 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.*

[335] *For example, in the USA, and on the American model, also Taiwan.*

[336] *It is followed in Guatamala, Salvador, Nicaragua, Costa Rica, Honduras, Panama, Columbia, Cuba, Haiti, Dominican Republic, Ecuador, Peru, Bolivia, Paraguay, Argentina, Uruguay and Seychelles.*

[337] *Spain, Columbia.*

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

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

- *mandado de injuncao, which is a special individual complaint directed against cases of negligence by the legislature.*

5. A popular appeal may equally be lodged by an individual, generally without restrictions[338]. This is a special, individual legal procedure for the judicial protection of rights, although intended for the protection of fundamental rights in the public interest (while a constitutional appeal is lodged in the interest of the individual). A popular appeal is normally directed against a general act (usually a law) which is considered to have violated a constitutional right.

The constitutional court is generally the competent body to reach a decision, based upon an abstract review of the applicable law. Although not common in Europe,[339] popular appeal is an extensive feature of Central and South American jurisdictions[340]. It is relatively rare in Africa,[341] whereas in Asia, popular appeal is only recognised in Japan, and only in electoral matters[342].

6. A specific group of constitutional law systems guarantees the individual only indirect protection, such that the individual does not have direct access to the constitutional court or other court of equivalent jurisdiction. These are systems that consider that the protection of individual rights is ensured through:

- *abstract review of standards[343] or*

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338 The exceptions are Slovenia and Hungary, where it is restricted by the demonstration of a legal interest by the appellant.

339 Since only the following States recognise it: Bavaria (although in other German provinces and on a federal level there is no popular appeal), Hungary, Slovenia, Croatia, Macedonia, Malta and FRY.

340 Where Salvador, Panama, Columbia, Venezuela, Brazil, Peru, Paraguay and Argentina recognise it. Argentina is an interesting example, where there is no popular appeal on a state level, but individual provinces have introduced it (Buenos Aires, La Rioja, Entre Rios, Rio Negro, Chaco, Neuquen and Santiago del Estero).

341 Since only the following states recognise it: Benin, Congo, Gabon, Burkino Faso, Ghana, Niger and Sierra Leone (according to the 1991 Constitution).

342 As a people's action or objective action.

343 Poland, Bulgaria, Italy, Belgium.

- *concrete review of standards*[344] *or*
- *preventive abstract review of standards*[345]

II. CONSTITUTIONAL APPEAL AND ITS EXTENT IN THE WORLD

A constitutional appeal (appeal) is a specific subsidiary legal proceeding against an alleged violation of constitutional rights, primarily by individual acts of State bodies, that enables a subject who believes his rights to have been affected to have his case heard and a decision made by a court having competence to judicially review disputed acts. In contrast to popular appeal, generally the subjects impugned are administrative and judicial acts, although it may also be a law, either indirectly[346] *or directly*[347].

Is there a right to a constitutional appeal? The Slovene Constitutional Court has taken the view that it is a part of judicial proceedings, or a special legal procedure[348].

Constitutional appeal is not an entirely new institution, since its forerunner may be found in the law of Aragon in the 13th to 16th centuries,[349] *in Germany from the 15th century onwards,*[350] *while Switzerland introduced a "state-judicial appeal" in its 1874 Constitution and in laws adopted in 1874 and 1893.*

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344 *Bulgaria, Italy.*

345 *France*

346 *Slovenia, Spain*

347 *Germany*

348 *This question was raised before the Constitutional Court of Slovenia in a case in which an individual impugned the transitional provisions of the Slovene law on the Constitutional Court (article 82 of the law, Official gazette RS, no. 15/94), according to which a constitutional appeal filed prior to the validation of this law shall count as timely and shall be allowed against individual acts issued after the entry into force of the Constitution. The person affected believed the constitutional provision in question to be anti-constitutional in that it gave the right to a constitutional appeal to some citizens, but denied it to others in such a way that those mainly affected would be those whose human rights had been violated in the earlier period, which was known for its failure to recognise these rights. The Constitutional Court rejected the case on the grounds that the impugned legal provision was an autonomous procedural standard of general application in constitutional law. In its article 160, the Constitution introduced constitutional appeal as a new constitutional court procedure, and envisaged for it specific, legally defined measures and procedures, which the law on the Constitutional Court also defined. On the basis of the constitutional premise of more detailed implementation, the legislator had to determine suitable conditions and time limits for their validation. In this, the legislator treated all potential appellants the same, and accordingly did not violate the constitutional principle of equal protection of rights.*

349 *In the form of recurso de agravios, firme de derecho, manifestacion de personas*

350 *Incorporated in the "Reichskammergericht" from 1495, envisaged in the "Paulskirchenverfassung" of 1849, and in Bavaria it was envisaged in the Constitutions of 1808, 1818, 1919 and 1946.*

The constitutional appeal is very common in systems providing for judicial review as to constitutionality. It is widespread in Europe,[351] less so elsewhere[352].

The particularity of some systems is that they recognise both forms of appeal, popular and constitutional[353]. The two forms may compete in their functions. The aim of both is the protection of rights, but with popular in the public, and with constitutional appeals in the private interest. While the plaintiff in both cases is an individual, the subject impugned is as a rule different, popular appeals being directed against general acts, and constitutional appeals against individual acts[354].

Standing is a particular requirement of constitutional appeals. Although it should be possible to overlook the legal interest of the appellant in a popular appeal, many systems apply this condition to popular appeals such that here too the legal interest or personal effect on an individual works as a corrective with the aim of preventing abuse and avoiding an overburdening of the constitutional court or

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[351] *Where it is recognised in the constitutional systems of the following states: Russia, Cyprus, Malta, Czech Republic, Slovakia, Hungary, Albania, Macedonia, Croatia, Slovenia, Austria, Switzerland (supreme court), Germany, Spain, Portugal and FRY (on a federal level and in Montenegro).*

In Germany, constitutional appeal exists at both federal and provincial levels:

- *federal constitutional appeal is the responsibility of the federal constitutional court, and*
- *provincial constitutional appeal is the responsibility of certain provincial constitutional courts: Bavaria, Berlin and Hessen.*

[352] *Outside Europe, the following systems recognise constitutional appeal: Kirgistan (constitutional court), Mongolia (constitutional court since 1992), South Korea (constitutional court since 1987), Taiwan (supreme court), Papua (supreme court), Syria (constitutional court). It should be additionally noted that other Arab countries, insofar as they recognise judicial review at all, have in the main adopted the French system of preventive control of standards on the model of the French constitutional council of 1958, which does not recognise the right of individual, direct access to concrete bodies of judicial review. In Africa, only the following States recognise systems of judicial review : Sudan (supreme court), Mauritius (supreme court), Senegal (supreme court) and Benin (constitutional court). The only example of constitutional appeal in South America is the Brazilian mandado de injuncao, i.e. individual appeal in the case of negligence of the legislator (supreme court). The Columbian accion de tutela (constitutional court) is usually considered to be a form of subsidiary amparo.*

[353] *Slovenia, Croatia, Macedonia, Bavaria, Hungary, Malta, FRY and Montenegro, Columbia and Brazil.*

[354] *Exceptions allow for the possibility of indirectly impugning the law in Slovenia, Spain, FRY and Montenegro, and for directly impugning the law in Germany.*

court of equivalent jurisdiction[355]. The same purpose is served by the payment of a tax on submissions.

It is notable that the number of constitutional appeals is in practice increasing everywhere. Many constitutional courts have adapted the organisation of their work accordingly, by introducing either specialised individual chambers or narrower units of the constitutional court (sub-chambers) for deciding on constitutional appeals[356].

The following are characteristic elements of the constitutional appeal:

- *a system of prior selection designed to sift out potentially unsuccessful appeals through a procedure which gives the constitutional court an extensive competence to reject appeals unargued. This is most highly developed in the German system.*

- *the subjects of protection are generally constitutional rights and freedoms, whether or not the circle of such rights is left open[357] or is specifically defined. Special forms of constitutional appeal may also protect special categories of rights[358].*

- *acts impugned as the suspected source of violations of constitutional rights and freedoms are, as a rule, individual acts[359];*

- *those entitled to lodge a constitutional appeal are generally individuals[360] ;*

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[355] *Slovenia, Macedonia.*

[356] *For example, the German federal and Spanish Constitutional Courts.*

[357] *For example, Slovenia, Croatia, FRY and Montenegro, where "all" constitutionally guaranteed fundamental rights are protected.*

[358] *In Germany, municipalities are the subject of protection of rights of self-government, such that the appellant in the latter, so-called "communal" constitutional appeal is the municipality (FRG recognises "communal" constitutional appeal on a federal level and on a provincial level in the provinces of Baden-Wuerttemberg and North-Rhine-Westphalia). The German system also recognises a special constitutional appeal 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 appeal exists in Spain, connected to the institution of citizens' legislative initiative.*

[359] *In Switzerland and Austria, a constitutional appeal can impugn only an administrative act, while in Germany all acts (including laws) can be challenged. In Spain, Slovenia, FRY and Montenegro a law may also be the indirect subject of a constitutional appeal. Legislative negligence may be directly impugned by constitutional appeal in Brazil, and also according to the practice of the German federal Constitutional Court and the practice of the Bavarian Constitutional Court.*

[360] *Austria, Germany, Spain, Switzerland, FRY and Montenegro also expressly include legal persons while in the Croatian system a legal person is expressly excluded as a potential appellant; in some systems, an*

- *a personal effect on the individual or his legal interest is a mandatory standing requirement, although the concept of legal interest is fairly loosely defined in the majority of systems;*

- *the exhaustion of legal remedies is an essential condition, subject to certain exceptions which allow the constitutional court to deal with a case irrespective of this condition*[361] *;*

- *a time limit for the lodging of an application ranges from 20 days to three months, on average one month, calculated from the day of receipt or delivery of a final, legally binding decision;*

- *the content of an application is prescribed and defined in detail in the majority of systems: for example, the application must be in written form, and must describe the factual position, the disputed act, the alleged violation of rights, etc;*

- *the majority of systems provide for the possibility of temporary orders or resolutions of the constitutional court to restrain implementation of the impugned act until the final decision in the case;*

- *orders for costs in the case of abuse are explicitly envisaged in some systems*[362] *;*

- *as regards the effects of a decision, judgments of constitutional courts are restricted to a decision on constitutional-legal matters, and on the violation of constitutional rights. However, in the case of a finding of a violation, a decision may have cassatory effect, as a rule inter partes (and erga omnes in a case in which the subject of the decision is a legislative act). In these respects, the constitutional court has the position of the highest judicial authority.*

Although the constitutional court is not a court of full jurisdiction, in concrete cases it is the only competent court to judge whether an ordinary court has violated the constitutional rights of the plaintiff. Although, in any particular case, the constitutional court is restricted in its treatment and decisions strictly to

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appeal may be filed by the Ombudsman (Spain, Slovenia, FRY) or by the public prosecutor (Spain, Portugal).

361 *FRG, Slovenia, Switzerland.*

362 *Germany, Austria, Portugal, Spain, Switzerland.*

questions of constitutional law, constitutional appeals raise sensitive questions concerning constitutional limits. The Slovene arrangement is specific in that the constitutional court may, under defined conditions, make a final decision on the existence of constitutional rights or fundamental freedoms themselves[363].

III. EXTRA-NATIONAL FORMS OF INDIVIDUAL APPEAL

1. The concept "constitutional appeal" is normally associated with the protection of fundamental rights at the national level. However, certain international documents also envisage specific forms of appeal for the protection of fundamental rights and freedoms[364].

2. The European Convention on Human Rights of 4.11.1950 establishes a procedure of individual petition[365] *whereby an individual may lodge an appeal with the European Commission of Human Rights in respect of an alleged violation of his or her rights guaranteed by the Convention. It is an explicit international legal procedure that can be compared from some points of view with domestic constitutional appeals. It serves to complement and complete domestic guarantees, and is a subsidiary procedure preconditioned on the exhaustion of national legal channels. It is not a popular appeal, and it does not have retroactive and cassatory effect. It differs from constitutional appeal in that, in contrast to the latter, it leads only to a finding.*

The position of the European Convention in domestic law governs whether an individual may plead the Convention in domestic courts, or even base a national constitutional appeal on it. This question also determines the manouvering space of the constitutional court itself in the interpretation of the provisions of the Convention. In any case, the constitutional court will usually be the final instance at national level prior to an individual appeal to the European forum.

The European Convention:

- *has constitutional status in Austria;*

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[363] *Paragraph 1 of article 60 of the Slovene law on the constitutional court (Official Gazette RS, no. 15/94).*

[364] *For example, Article 2 of the Optional Protocol to the 1966 International Covenant on Civil and Political Rights; Article 23 of the Declaration on Fundamental Rights and Freedoms of the European Parliament of 12.4.1989; point 18(2) of the document of the Moscow meeting of CSCE of 3.10.1991; Article 25 of the American Convention on Human Rights of 22.11.1969; Article 28 of the Treaty on European Union of 1.2.1992.*

[365] *Article 25 of the Convention.*

- *is the basis for a State constitutional appeal in Switzerland, where it has a status comparable to the Constitution;*

In both cases it is possible to base a national constitutional appeal on the Convention.

In other States,

- *it has a rank higher than ordinary law*[366] *; or*

- *it is ranked on the same level as common law*[367]*; or*

- *it does not form part of domestic law*[368]*.*

- *Slovenia signed the European Convention on 14 May 1993 and ratified it on 8 June 1994*[369]*. The above questions are regulated by provisions of the 1991 Constitution and by certain legal provisions*[370]*.*

The constitutional court as the highest organ of judicial authority in a particular State for the protection of constitutionality, legality and human rights and fundamental freedoms[371] *is usually restricted to investigating constitutional and legal questions. Review of the correct finding of the factual circumstances and the application of rules of evidence is a matter for the regular courts. The subsidiary nature of a constitutional appeal, and the division of responsibility between the constitutional and regular courts, is also evident here.*

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366 *Belgium, France, Luxembourg, Malta, The Netherlands, Portugal, Spain, Cyprus.*

367 *FRG, Denmark (which introduced the national use of the Convention by special law on 1.7.1992), Finland, Italy, Liechtenstein, San Marino, Turkey.*

368 *Great Britain, Ireland, Sweden, Norway, Iceland. Certain English-speaking countries in Africa (Kenya, Tanzania, Uganda, Nigeria) are an exception in that they have expressly adopted the European system of protection (for example in Nigeria by the Constitution of 1960), drawing upon the territorial clause in article 63 ECHR, invoked by the United Kingdom in respect of the Convention and Protocol I on 23 October 1953.*

369 *Official Gazette RS, International Contract, no. 33/94.*

370 *Laws and other regulations must be in accordance with generally accepted principles of international law and with international agreements to which Slovenia is party. Ratified and promulgated international treaties shall be directly applicable (article 8 of the Constitution). The Constitutional Court decides on the accordance of laws and other regulations with ratified international agreements and general principles of international law (line 2 of paragraph 1 of article 160 of the Constitution; line 2 of paragraph 1 of article 21 of the Law on the Constitutional Court).*

371 *The status of the Constitutional Court is thus defined in e.g., paragraph 1 of article 1 of the Law on the Constitutional Court of the RS, Official Gazette RS, no. 15/94.*

A similar gradation of jurisdiction, and division of competence, may be seen at the supra-national level. In the same way as the constitutional appeal supplements ordinary judicial remedies, the jurisdiction of the European Commission and Court of Human Rights supplements the domestic constitutional appeal.

IV. SLOVENIA

1. System of Constitutional Appeal in Slovenia

With the introduction of the Constitutional Court by the Constitution of 1963, the then Slovene constitutional court became responsible for the protection of fundamental
rights and freedoms. It could also decide on the protection of the rights of self-management and other fundamental freedoms and rights of a State or municipal body or of a company, as determined by the then federal and republican Constitutions if these were allegedly violated by an individual act or decision, provided no other judicial remedy existed[372]*. A decision of the Constitutional Court in such a proceeding had cassatory effect in the case of an established violation (resulting in the annulment, invalidation or amendment of an individual act and the removal of possible consequences; and/or in prohibition on the continued performance of an activity). The responsibility of the Constitutional Court was subsidiary. It was thus possible to initiate a proceeding only if, in the concrete case, no other judicial protection was envisaged, or if all other legal means were exhausted.*

However, the then Constitutional Court in practice rejected such suits by individuals on the grounds that it lacked competence. Instead, it directed the plaintiff to proceed before the ordinary courts. This itself created a certain negative attitude on the part of the Constitutional Court, which operated together with its negatively arranged competence (intervening only when other legal protection was not provided) to deny the procedure any positive results in practice. Although this jurisdiction was created precisely for the purpose of protecting rights, the Court itself warned that in relation to individual acts, the most sensible solution would be for decisions on them to be transferred as a whole to the ordinary courts. However, the system then in place allowed individuals access to the Constitutional Court through the possibility of a popular appeal, with the individual as initiator having to demonstrate only such a legal interest as to overcome a limited procedural burden.

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[372] *Paragraph 3 of article 228 of the Constitution of the SRS of 1963, and the Law on the Constitutional Court of the SRS (Official Gazette SRS, no. 39/63 and 1/64).*

From then on, the constitutional appeal no longer found any place in the system, until it was again introduced by the Constitution of 1991. This specific legal procedure now remains open alongside the previous arrangement, i.e., the possibility of filing a popular appeal before the Constitutional Court[373]*. An individual may thus impugn all categories of (general) act by filing a constitutional or popular appeal.*

The provisions of the Slovene Constitution of 1991 that regulate constitutional appeals in detail are relatively modest,[374] *but the Constitution itself*[375] *envisages a special legislative arrangement*[376]*.*

The constitutional court decides on constitutional appeals against the violation of human rights and fundamental freedoms[377]*. The protection thus embraces all constitutionally guaranteed fundamental human rights and freedoms,*[378] *including those adopted through international agreements, which become part of national law upon ratification.*

Any legal or physical person may file a constitutional appeal,[379] *as may the Guardian of Human Rights (Ombudsman) in connection with individual matters with which he deals,*[380] *although only with the agreement of those whose rights he is protecting in an individual matter*[381]*. The subject of a constitutional appeal is an individual act of a State organ, an organ of local self-government or of a bearer of public authority, which is believed to violate human rights or fundamental freedoms*[382]*.*

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373 *Paragraph 2 of article 162 of the Constitution of 1991; article 24 of the 1994 Law on the Constitutional Court.*

374 *Articles 160 and 161 of the Constitution.*

375 *Paragraph 3 of article 160 of the Constitution.*

376 *Provisions of articles 50 to 60 of the Law on the Constitutional Court, Official Gazette RS, no. 15/94.*

377 *Line 6 of paragraph 1 of article 160 of the Constitution.*

378 *Such a formulation in the Slovene, as well as in the Croatian, Montenegro and FRY arrangements, is rare, since other arrangements as a rule explicitly define the circle of rights protected by constitutional appeal.*

379 *Paragraph 1 of article 50 of the law.*

380 *Paragraph 2 of article 50 of the law.*

381 *Paragraph 2 of article 52 of the law.*

382 *Paragraph 1 of article 50 of the law.*

The condition for filing a constitutional appeal is the prior exhaustion of legal remedies[383]. Exceptionally,[384] the Constitutional Court may hear a constitutional appeal before such exhaustion if the claimed violation is obvious and if the carrying out of the individual act will have irreparable consequences for the appellant[385].

A constitutional appeal may be lodged within 60 days of the adoption of the individual act,[386] though in individual cases and with good grounds, the Constitutional Court may decide on a constitutional appeal after the expiry of this time limit[387]. It is necessary to cite in an appeal the impugned individual act, the facts on which the appeal is based, and the suspected violation of human rights and fundamental freedoms[388].

The form is written, and a copy of the individual act and appropriate documentation must be attached to the suit[389].

The Constitutional Court decides whether or not to accept a constitutional appeal for hearing (or its admissibility) at a non-public session in a chamber of three judges[390]. For this purpose, the Court may establish a number of chambers depending on need. There is no appeal against a resolution of the Court on the admissibility of a constitutional appeal[391].

A constitutional appeal may be communicated to the opposing party for response, either prior to or after acceptance[392]. The Court normally deals with a constitutional appeal in closed session, but it may also call a public hearing[393]. It

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383 *Paragraph 3 of article 160 of the Constitution; paragraph 1 of article 51 of the law.*

384 *Only the German and Swiss systems recognise such an exception.*

385 *Paragraph 2 of article 51 of the law.*

386 *Paragraph 1 of article 52 of the law.*

387 *Paragraph 3 of article 52 of the law.*

388 *Paragraph 1 of article 53 of the law.*

389 *Paragraphs 2 and 3 of article 53 of the law.*

390 *Paragraph 3 of article 162 of the Constitution; paragraph 1 of article 54 of the law.*

391 *Paragraph 3 of article 55 of the law.*

392 *Article 56 of the law.*

393 *Article 57 of the law.*

may issue a temporary order in a proceeding, either against an individual act, or against a law, regulation or other general act forming the basis of the impugned individual act[394].

A substantive decision of the Constitutional Court may:

- *reject an appeal as being unfounded;*

- *annul or invalidate an impugned act in whole or in part, or return the case to the competent body for a fresh decision ;*[395]

- *annul or invalidate anti-constitutional regulations or general acts issued for the exercise of public authority if the Court finds that the annulled individual act is based on such a regulation or general act ;*[396]

- *in a case in which it annuls or invalidates an impugned individual act, the Court may also decide on disputed rights or freedoms if this is necessary to remove the consequences that have already resulted from the annulled or invalidated individual act, or if the nature of the constitutional right or freedom so requires, and if it is possible to so decide on the basis of the information contained in the file*[397]*. Such an order is executed by the body which is responsible for carrying out the individual act which the constitutional court has annulled. If there is no competent body according to valid laws and regulations, the Constitutional Court shall determine one*[398].

The particularities of the Slovene arrangement are thus the following:

- *exceptions to the requirement of exhaustion of legal remedies prior to filing a constitutional appeal ;*[399]

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394 *Article 58 of the law.*

395 *Paragraph 1 of article 59 of the law.*

396 *Paragraph 2 of article 161 of the Constitution; paragraph 2 of article 59 of the law.*

397 *Paragraph 1 of article 60 of the law.*

398 *Paragraph 2 of article 60 of the law.*

399 *Article 51 of the law.*

- *a wide definition of constitutional rights as the subject of protection by constitutional appeal, when compared to systems which specifically define the circle of rights protected;*

- *a court order as the potential subject of impugnment by constitutional appeal, which is relatively rare ;*[400]

- *ex offo proceeding, whereby the Court is not bound to the petition in the event of finding that an annulled individual act is based on an anti-constitutional regulation or general act - in such a case, the regulation or general act may be annulled or invalidated ;*[401]

- *coexistence of constitutional and popular appeal, restricted to the legal interest of the appellant;*

- *no charge made on the proceedings, since each party pays its own costs in proceedings before the Constitutional Court unless the Court determines otherwise ;*[402]

- *the possibility of a final decision on constitutional rights*[403].

2. Comparative aspects of Slovene constitutional practice (popular and constitutional appeals) since 1991.

a) <u>Individual, political and citizens rights</u>

The protection of individual, political and citizens rights is a central function of all modern constitutional courts. Initially, their main task was to protect political rights, but in recent decades, the protection of individual rights has become increasingly important. In the latter categories, the judiciary can only partially rely on traditional interpretation in the field of political rights, and it has thus developed completely new standards for the protection of individual rights.[404]

i) The principle of equality before the law

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[400] *Since only Croatia, Macedonia, Portugal, Spain, FRY and Montenegro expressly envisage this.*

[401] *Paragraph 2 of article 59 of the law.*

[402] *Paragraph 1 of article 34 of the law.*

[403] *Paragraph 1 of article 60 of the law.*

[404] *Bruenneck, p. 89.*

The principle of equality before the law is at the very heart of modern European judicial opinion. The courts have essentially extended the scope of their decision-making capacity by the use of this principle: with the aid of legal theory, they have gradually established that the principle of equality is violated when distinctions made by the legislature can be characterised as arbitrary[405]*. In essence, it is a judgment on whether the legislature's differentiation is objectively founded and coherently incorporated into the legal system, since equality before the law does not itself mean absolute, but only relative equality*[406]*. Constitutional courts are aware of this, of course, and of the danger that they could overstep the limits of their competence and unnecessarily politicise their function. This confirms, on the one hand, the need constantly to stress the importance of self-restraint and respect for the freedom of regulation of the legislature, and, on the other hand, the ongoing need to produce a careful methodology for judicial assessment and decision-making*[407]*.*

In practice, too, the Slovene Constitutional Court has often cited this principle (contained in Article 14 of the Constitution) as an important constitutional foundation in cases before it. The Court has already laid down specific standards for such sensitive decision-making, proceeding from the following basic definition: by equality before the law is understood the non-arbitrary use of law in relation to those subject to the law[408]*. At the same time, the Court has taken the view that the Article 14 is not explicitly intended only for physical persons but reasonably extends also to legal persons*[409]*.*

The legislator must respect differences in factual circumstances in its standards of regulation. The Court must judge, in deciding on possible violations of the principle, whether the legislator's distinction is objectively founded, that is to say whether there are really factual differences which may fairly be treated differently. Different factual circumstances may be treated differently, but the principle of equality does not allow the legislator to treat identical situations differently[410]*.*

ii) freedom of opinion and freedom of the press (communication)

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[405] *Pereni_ - How..., p. 80.*

[406] *Pereni_ - Legal..., p. 684.*

[407] *Pereni_ - Legal..., p. 681.*

[408] *See also Šinkovec, p.1.*

[409] *Šinkovec, p. 1.*

[410] *Report 93, p. 18.*

With rare exceptions, there is a tendency in constitutional practice constantly to extend both of these freedoms[411].

In one Slovenian case, the judiciary nonetheless accepted that economic interests, and structural pressure from the economic system, could give rise to restrictions on these freedoms, and succeeded only in limiting the extent of a regular increase in RTV subscriptions[412]. *At the same time, the Slovene Constitutional Court annulled the provisions of the "Law on RTV Slovenia"*[413] *which contained an unspecific and legally undefined concept of confirmation of appointment of the director of RTV, because it found that the arrangement in question was in conflict with the principle of a legal State (under Article 2 of the Constitution) and that it also failed to provide the General Director of RTV with the necessary independence in relation to public power structures and the political powers of the moment, in the interest of protecting the constitutional right to a free press (article 39 of the Constitution).*

iii) right of assembly and association

Constitutional practice in general gives a wide interpretation to these rights, and allows limitations only within narrow limits[414].

In its practice, the Slovene Constitutional Court has addressed the question of when mandatory membership of a specific association gives rise to an encroachment on the constitutional right to freedom of assembly and association (under Article 42 of the Constitution). In the case of the chamber of medicine, it found that this was an institution charged with the public supervision of medical practice by law, and in consequence that mandatory membership in the chamber under the law on health activities[415] *was not an unlawful restriction of the constitutional right to assembly and association*[416]. *This is also one of the rare decisions of the Constitutional Court which has relied on the practice of the European Court of Human Rights*[417].

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411 *Bruenneck, p. 72.*

412 *Bruenneck, p. 77.*

413 *Article 31 of the law, resolution no. U-I-172/93 of 9/11/1994, prom. Official Gazette RS, no. 73/94.*

414 *Bruenneck, p. 78.*

415 *Official Gazette RS, no. 2/92.*

416 *Resolution no. U-I-48/92 of 11/2-1993, prom. Official Gazette RS, no. 12/93; Zbirka (Collection) 93/no. 15.*

417 *European Convention on Human Rights, article 11; decision in the case of Le Compte of 23/6-1981, comp. Reports, p. 17.*

In the case of compulsory membership in the social chamber, the Constitutional Court found that such an encroachment on the generally free treatment of people, despite the existence of a public interest in the provision of social security and in the maintenance of social security services, was not strictly necessary because the chamber can carry out its tasks, including those which are defined as tasks of public authorities, irrespective of compulsory membership[418].

iv) voting rights

The Constitutional Court has never decided on basic questions concerning the electoral system, although the law allows for such adjudication. However, constitutional practice pays strict attention to whether decisions of principle concerning the legislature are introduced and implemented in practice in such a way that individual voting groups are not placed in an inferior position or that specific candidates do not obtain precedence[419].

In judging the constitutionality of the electoral system, the Slovene Constitutional Court must restrict itself to a judgment of its compliance with the express constitutional principles of generality and equality of voting rights (under Article 43 of the Constitution), secrecy of voting, etc, and it must leave it to Parliament to judge the broad political fairness or suitability of one voting system or another. This again is a reflection of the principle of judicial self-restraint exercised in all countries in which the principle of the division of powers is recognised[420].

v) procedural rights before the courts

Constitutional courts have developed this right especially from the principle of fair trial,[421] *devoting particular attention to conditions of imprisonment and to the pronouncement and execution of penal sanctions. In relation to the legal justification for imprisonment and punishment, the general standpoint is that these must match the severity of the criminal act performed. It is a form of review for proportionality, resulting from the constitutionalisation of penal law and the prohibition of cruel and unnecessary punishment.*

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418 *Decree no. U-I-137/93 of 2/6-1994, prom. Official Gazette RS, no. 42/94.*

419 *Bruenneck, p. 84.*

420 *From the reasoning of resolution no. U-I-128/92 of 27/10-1992, prom. Official Gazette RS, no. 53/92, Zbirka 92/no. 75.*

421 *Bruenneck, p. 94.*

It is clear that, when in doubt in this field, constitutional courts tend to defend the freedom of the individual rather than extending the rights of State bodies[422]*. The Slovene Constitutional Court must react in the interests of affected individuals when confronted by an arrangement which works to the detriment of their rights (under Articles 22, 23, 25, 28 and 31 of the Constitution). This can arise, for example, from evidential limits on means of proof, from the absence of effective remedies, or because, due to their unspecific nature, procedural provisions can allow for arbitrariness in criminal proceedings, or fail to strike a proper balance between the defence and the prosecution.*

vi) protection of private life and personal data

The Slovene Constitutional Court has also addressed this right, which international theory and jurisprudence is increasingly called upon to interpret[423]*.*

vii) freedom of movement

In the interpretation of this right, constitutional courts have relied on the general principle that possible limitations of these rights, introduced in order to protect public safety and order, may not overstep the limits of what is crucial for the protection of a "specific democratic society"[424]*.*

In interpreting Article 34 of the Constitution, the Slovene Constitutional Court has decided that the application of provisions of the law on foreigners,[425] *whereby a decision to refuse the issue of a visa and the ban or refusal of entry to the State was stamped in a foreigner's passport, did not encroach on their individual rights and thus was not in conflict with the Constitution*[426]*.*

In another decision, a decree of the Executive Council of the Assembly of the Republic of Slovenia on the payment of an advance on military pensions[427] *was found to be in conflict with the constitutional guarantee of freedom of movement in that it unduly restricted the citizen's constitutional right to a pension irrespective of his or her place of residence*[428]*.*

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[422] *Bruenneck, p. 97.*

[423] *Comp. also Report 93, p. 18.*

[424] *Rengeling, p. 75-76.*

[425] *Official Gazette RS, no. 1/91-I.*

[426] *Resolution no. U-I-90/91 of 7/5-1992, prom. Zbirka 92/no. 30.*

[427] *Official Gazette RS, no. 4/92.*

[428] *Decree no. U-I-70/92 of 5/11-1992, prom. Official Gazette RS, no. 55/92; Zbirka 92/no. 77.*

b) Economic, social and cultural rights

Modern constitutional legal practice recognises that the legislator may encroach to a wide extent on economic rights (for example, ownership, free performance of a profession or trade activities) on the basis of social considerations. The constitutionality of such encroachments is only considered to a limited extent[429]*. Most constitutional courts thus have a tendency to allow limits to be placed on ownership by the legislator. The only exception is Italian constitutional judicial practice, which has often struck down legal arrangements for the reduction or even exclusion of compensation in nationalisation of building land on public interest grounds*[430]*.*

The constitutional court protects only the minimum standard of economic rights, or their core, and allows the legislator a great deal of discretion for judgment and almost always follows its opinion. Constitutions do not for the most part have concrete measures for resolving economic questions, and this also requires a certain degree of self-restraint on the part of constitutional courts.

In the field of social rights, however, constitutional courts ensure that freedom of association and the freedom to strike are adequately protected against excessive State intervention. Otherwise, constitutional courts provide the social rights of individuals with less protection than economic rights, and for the most part will aim to interpret legislative solutions in this field in a manner consistent with the Constitution[431]*.*

In cases in this field, the Slovene Constitutional Court has adopted an approach of judicial restraint in relation to the legislator. Only exceptionally have its decisions

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[429] *Bruenneck, p. 63.*

[430] *Bruenneck, p. 66.*

[431] *Bruenneck, p. 71; for the practice of the European court (Luxembourg) it has been argued (Rengeling, p. 233) that this court has difficulty in recognising that social rights affect the foundations of the Community. To date, the European Court in Luxembourg has only rarely been prepared to find a violation of such fundamental rights, the only exceptions being established violations of the principles of equality and the right to property. Even in the European Convention on Human Rights, social rights are at first sight only protected to a limited extent (Frowein, p. 263). However, the European Court of Human Rights in Strasbourg defined the approach of the Convention to economic and social rights in a decision of 9/10-1979: it is necessary to bear in mind, in interpreting the Convention, the social component of human rights, especially in connection with the UN Covenant on Economic and Social Rights, with the European Social Charter and with the constitutional principle of a social State, which the court has understood in its practice to date primarily as the social responsibility of a State to provide protection for employees, protection from encroachments of the legislator into private property, protection in the social field, protection of persons without the means for their own support, and education.*

affected legislation, respecting the reality of a transitional situation in which the political and social system is being transformed[432].

CONCLUSION

1. The following may be said, in summary, about the judicial protection of fundamental rights through constitutional appeal:

- *Constitutional rights are attributes of any democratic legal system;*

- *Constitutional appeal is (only) one of the possible means of protecting constitutional rights;*

- *Constitutional appeal is not a constitutional right*[433]*, although it is an important mechanism for the protection of rights connected with the rights themselves: the Constitution guarantees a right of constitutional appeal in the same way as the rights it protects; at the same time, constitutional appeal is limited by law to the benefit of the operational capacity of the constitutional court;*

- *Its effectiveness is disputed, since successful constitutional appeals are relatively infrequent, 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. The practice of the Slovene Constitutional Court also confirms the relative ineffectiveness of constitutional appeals*[434]*.*

However, despite the internal contradictory characteristics of this procedure, the possibility must remain open of access by the individual to justice or to judicial protection of his constitutional rights. The very existence of constitutional appeal ensures more effective control of violations of constitutional rights attributable to State organs.

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[432] *Report, p. 14-15.*

[433] *Cf. note 17 for the standpoint of the Slovene Constitutional Court.*

[434] *Between 1 January 1992 and 20 November 1994, the Slovene Constitutional Court received 180 constitutional appeals. Of a total of 31 cases resolved, 30 were rejected for formal reasons, while the decision was favourable to the appellant in only one case - decree no. Up-16/92 of 25/11-1992, Official Gazette RS, no. 57/92 of 30/11-1992, and collected decrees of the Constitutional Court Od/US 95/I. By this decree, the Constitutional Court annulled an individual decision of the electoral commission and a judgment of the Supreme Court because it found that the rejection of the candidate list of a party in an individual electoral unit, with the simultaneous acceptance of the candidate list of the same party in other electoral units, was a violation of equality before the law, and at the same time a violation of the active voting rights of potential voters for these lists and the passive voting rights of candidates on these lists.*

2. Protection of fundamental rights and freedoms is an important task for the majority of constitutional courts, irrespective of whether they perform their function of constitutional judgment in the negative or positive sense. Whenever a constitutional court has the function of "negative legislator", constitutional control is strongest precisely in the field of fundamental rights. Even in other fields in which the legislator has the primary role even in principle (concretisation of State organisation and economic constitutional principles), constitutional courts are bound to take care that fundamental rights are protected.

Peculiarly in the field of the protection of rights, the constitutional court also has the function of a substitute "constitution-maker" ("positive function"), which means that constitutional courts in specific cases even supplement constitutional provisions[435].

It was characteristic of Slovene constitutional practice prior to 1991 that, in comparison with other European countries, it tended to avoid general appeals to legal principle, even those which were explicitly included in the text of the Constitution[436]*. In common with foreign practice, however, the principle of equality greatly predominated among otherwise rarely used principles. Otherwise, decisions consistently remained within a framework of legalistic argument and no other values were permitted to enter on the deliberations. Officially sanctioned research for the most part also respected the principle of self-restraint, and proceeded from a presumption that laws were constitutional.*

To the question as to whether Slovene constitutional practice from the period after the introduction of the 1991 Constitution, in its relations to fundamental rights and freedoms, has adapted to or is more comparable with foreign constitutional judicial practice, it is possible to answer, broadly, that Slovene practice now comes close to other jurisdictions in its approach to fundamental rights. This has been made possible by contextually similar starting points, because in many cases Slovene constitutional provisions have been modelled by comparison with and use of foreign solutions.

The number of examples from this field has increased. It is necessary to bear in mind in this that the "frequency" of individual rights before constitutional courts depends mainly on what sort of problems individual appellants place before them. But the last three year period, since the adoption of the 1991 Constitution, has

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[435] *Bruenneck, p. 171, 179.*

[436] *Pereni_ - Legal..., p. 686.*

witnessed a particular growth in the legal protection of fundamental rights because such protection is also a legal safeguard of democratic legitimacy.

The Constitutional Court now appears as the guardian of the Constitution in such a way that it decides not only on the conformity of general legal acts with constitutional provisions on fundamental rights (both by way of abstract and concrete review of such acts) but also on constitutional appeals against the violation of human rights and fundamental freedoms by individual acts[437]*. The Constitutional Court now has a sufficient capacity for such activity, and operates in a professional environment in which fundamental rights are understood as the embodiment of legal principles which are open to and often require extensive interpretation in order to be implemented effectively*[438]*.*

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[437] *Paragraph 1 of article 160 of the Constitution; comp. Pav_nik, p. 348.*

[438] *Comp. Pav_nik, p. 355.*

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The Supreme Court of Canada and the Protection of Rights and Freedoms - Paper by Senator Gérald BEAUDOIN

Canada

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INTRODUCTION

A- The Supreme Court

Canada is a federation since 1867. Its parliamentary system has been inspired by that of the United Kingdom. Its judiciary is powerful and independent.

Established in 1875, our Court of last instance became truly supreme only in 1949. Appeals to the Judicial Committee of the Privy Council in London were abolished in 1933 for criminal cases, and in 1949 for civil cases.

In its centennial year, the Court was granted the power to hear, in principle, appeals on leave. But a certain number of appeals as a matter of right are still possible.

The Supreme Court delivers approximately 120 judgments per year. It chooses cases of national importance.

The composition of the Court varied from 1875 to 1949. Originally, it had six judges. In 1927, the number was increased to seven. In 1949, this number was increased again to nine. At least three judges must be chosen from the judges of the Quebec Court of Appeal or Superior Court or from the lawyers of Quebec. The Constitution Act 1982 provides that in order to change the composition of the Supreme Court the federal consent as well as that of ten provinces is required. Since the beginning, it has delivered judgments on public and private law in the areas of both federal and provincial law. It works increasingly in the area of public law. It delivers far-reaching judgments and opinions. Its decisions on the distribution of powers and on the Charter of Rights are a focus of attention. It has become the guardian of the Constitution.

The entry into force of the constitutional Charter of Rights in April 1982 considerably changed the role of the Court.

It should also be mentioned that in Canada, a law can be declared inconsistent with the fundamental law (Constitution), even many years after its adoption. The Forest[439] *judgment, the Reference on the Manitoba Language Rights*[440]*, the*

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[439] *A. G. Manitoba v. Forest [1979] 2 S. C. R. 1032.*

[440] *Re Manitoba Language Rights, [1985] 1 S. C. R. 721.*

Mercure[441] *decision may be cited in support. In these three judgments, the Supreme Court, in order to avoid legal chaos, broke new ground on the basis of the principle of the rule of law and of the de facto theory, and showed foremost judicial leadership.*

Section 52 of the Constitution Act, 1982 ensures review of constitutionality on a solid and unequivocal basis by stating that "the Constitution of Canada is the supreme law of Canada". In Canada, the review of the constitutionality of the laws falls under the jurisdiction of the ordinary courts and not of a specialised Court as in some European countries.

The Supreme Court of Canada and the Supreme Court of the United States have some striking resemblances. They are both courts of last instance; they both have nine judges; and both ensure a rigorous review of the constitutionality of laws. They are both powerful and independent. The right to dissent exists in both courts. The stare decisis rule does not bind the Court.

They differ, in contrast, in some very important points. By contrast to the Supreme Court of the United States, our highest Court is bilingual and bi-jurisdictional: its jurisdiction is national and not exclusively federal. It delivers decisions pertaining to two different systems of private law. It is probably unique in the world. The Supreme Court of Canada gives opinions of an advisory nature. This is not so in the United States. The President's choice of judges in the United States is ratified by the Senate. This is not the case in Canada. Our judges must go into compulsory retirement at the age of 75, which is not the case in the United States where the judges are appointed for life.

B- The context of 1867

In 1864-1867, the Founding Fathers of Canadian Confederation considered the question of the protection of rights and freedoms. They were obviously not from the Jefferson school of thought. They did not find it necessary to enshrine a Canadian counterpart to the U.S. Bill of Rights, which was known to them, in the fundamental law of the country. In their eyes, it was better to follow the British example. They had moreover provided in the preamble to the Constitution that Canada had a Constitution "similar in Principle to that of the United Kingdom". We have consequently inherited the principles of the Magna Carta of 1215, of the Bill of Rights of 1689, of the Act of Settlement of 1701, of numerous Habeas corpus and of all those great British documents protecting rights as well as the principle of the rule of law (the supremacy of the rule of law). The Founding Fathers added the following sections to this: Section 133 (use of English and

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[441] *A. G. Saskatchewan v. Mercure, [1988] 1 S. C. R. 234.*

French languages), Section 93 (religious rights (denominational schools)), Section 20 (yearly session), Section 50 (duration of the House of Commons), Section 99 (independence of the judges), and finally, the great principle of representation according to population (Section 51). For them, these were essential points. As for the rest, Parliament and the Courts, acting in their own domains, would protect the rights and freedoms, as they did in the United Kingdom.

The international charters and instruments on rights and freedoms do not come into effect in Canada with the federal government's accession to them alone. Under Canadian constitutional law, it is also necessary that the competent legislative bodies translate them, through legislation, into internal law, federal or provincial. In order to implement a treaty, legislation must be passed in conformity with the division of powers under the Constitution.

After the Second World War, the fashion of Charters of Rights spread in different places of the world.

In 1947, Saskatchewan adopted a Bill of Rights[442]. Some provincial and federal laws assured equality in employment matters, checked discrimination and fought against hate literature. It was only from 1960 onwards that the federal authority and the provincial legislatures determinedly acted in this field[443]. It should be noted in passing that, at the international level, Canada assented to the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948. Quebec adopted a Charter of Rights and Freedoms[444], and the other provinces legislated bills of rights. The legislation is at the same time profuse and very much to the point.

Our study will consist of two main parts:

I - the protection of rights and freedoms from 1875 to 1982;
II - the constitutional protection of rights and freedoms since the Canadian Charter of Rights and Freedoms of 1982.

I- THE PROTECTION OF RIGHTS AND FREEDOMS FROM 1875 TO 1982

A. The period from 1875 to 1950

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442 *The Saskatchewan Bill of Rights Act, of 1947, R. S. S. 1965, c. 378.*

443 *P. E. TRUDEAU, A Canadian Charter of Human Rights, 1968, Queen's Printer, p. 179 - 183. In this publication, there is a list of legislation in this field.*

444 *Charter of Rights and Freedoms, R. S. Q. ch. C-12.*

In the Bryden[445] case, the Judicial Committee of the Privy Council struck down a provision of provincial law restricting the employment of Chinese workers in coal mines on the grounds that this delegated legislation concerning only alien and naturalised Chinese did not relate to "property and civil rights" but rather to "naturalisation and aliens" which is a federal responsibility.

In the Homma[446] decision, the Judicial Committee of the Privy Council found a British Columbia statute taking the right to vote away from Chinese, Japanese and Indians to be intra vires; the Court recognised that it was the valid exercise of a power of constitutional amendment held by the provinces under Section 92 (1) of the British North America Act 1867 (Constitution of 1867).

In these two cases, fundamental rights were at times limited, at times affirmed by the play of distribution of the power to legislate.

In the Lapointe[447] case, the Judicial Committee of the Privy Council overturned the decision of a committee of the Police Welfare and Pension Association refusing a resigning police officer a retirement pension. According to the Privy Council, this committee did not conform to the rule of audi alteram partem.

In the Quong-Wing[448] case, the Supreme Court confirmed the validity of a Saskatchewan statute preventing white women from working for employers of Chinese descent.

In the Reference on Military Service[449], the Court declared that the rule of law applies in Canada and that military personnel do not escape the jurisdiction of the ordinary courts.

In the Christie[450] case, our Supreme Court gave precedence to the principle of contractual freedom over that of non-discrimination. In this case, a restaurant owner refused to serve a black person who came into his establishment.

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445 *Union Colliery Company of B.C. Ltd. v. Bryden, [1899] A.C. 580.*

446 *Cunningham and Att.- Gen. B. C. v. Homma and Att.- Gen. Canada, (1903] A. C. 151.*

447 *Lapointe v. L'Association de bienfaisance et de retraite de la Police de Montréal, [1906] A. C. 535.*

448 *Quong-Wing v. R. [1914] 49 S. C. R. 440.*

449 *Reference as to Whether Members of the Military of Naval Forces of the United States of America are Exempt from Criminal Proceedings in Canadian Criminal Courts, [1943] S. C. R. 483.*

450 *Christie v. The York Corporation, [1949] S. C. R. 139.*

In the Wolf[451] decision, the Supreme Court struck down a clause in a contract of sale providing that the property sold could not be transferred to persons belonging to the Jewish or Hebraic race, or to Blacks.

In the Edwards[452] decision, the Judicial Committee of the Privy Council interpreting the word "persons" in Section 24 of the British North America Act of 1867 decreed that women could have access to the Senate.

In 1947, in the decision on the deportation of Japanese Canadians[453], the Judicial Committee of the Privy Council recognised the validity of orders-in-council passed by the federal executive under the War Measures Act and of a temporary emergency law extending their duration. These orders provided for the deportation of Japanese-Canadians after the war. As the Federal legislation was clear, no restrictive interpretation could protect the rights of these persons. These emergency measures were recognised as being intra vires of the powers of Parliament during times of war. The Supreme Court had previously recognised the validity of these orders-in-council[454].

With the exception of these judgments, which are, after all, not very numerous, the first seventy-five years of the Supreme Court have not left a strong impression on the subject of fundamental rights. The Court most often protected fundamental rights in an indirect manner by delivering a decision on the division of the power to legislate.

One decision of the 1875 - 1950 era, however, is more significant: this is the reference on the Alberta Press Law[455]. On the basis of the preamble to the Constitution, an implicit protection of the freedom of opinion, press and expression was recognised. In this case, three Supreme Court judges concluded that as our system of government rests on the principle of parliamentary democracy, it is essential to ensure the freedom of discussion; as a result, a provincial legislature could not undermine this freedom by means of statute. Several judges refer to the preamble of our Constitution which affirms that our Constitution is, in principle, similiar to that of the United Kingdom.

B. The period from 1950 to 1960

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451 *Noble and Wolf v. Alley, [1951] S. C. R. 64.*

452 *[1930] A. C. 124.*

453 *Co-operative Committee on Japanese Canadians v. A.G. of Canada, [1947] A. C. 47.*

454 *[1946] S. C. R. 248.*

455 *In re Alberta Bills, [1938] S. C. R. 100.*

During this period, the Supreme Court of Canada, in a series of well-drafted judgments, made an important contribution to the protection of freedoms, even creating, as was said, an unwritten Bill of Rights. The Supreme Court protected the fundamental freedoms using as a starting point, above all, the division of legislative powers in criminal law (federal) and private law (provincial). This concerns the cases of Boucher[456] and Switzman[457] on freedom of expression, Chaput[458] and Saumur[459] on freedom of religion, and Roncarelli[460] on equality before the law. In a judgment delivered after the Canadian Charter of Rights of 1982, in the Dolphin Delivery[461] case, Mr Justice McIntyre of the Supreme Court would later declare that the Supreme Court had constitutionalised the freedom of expression before the entry into force of the Canadian Charter of Rights.

In the Boucher[462] decision, the Court, in a majority judgment, found Aimé Boucher not guilty of seditious libel for distributing in Beauceville a virulent pamphlet entitled La haine ardente du Québec ("The burning hatred of Quebec"). Mr Justice Rand stated that freedom of thought and expression on all subjects is the very essence of our life in a democratic society.

Applying the rule of audi alteram partem, the Supreme Court, in the Alliance des professeurs catholiques de Montréal[463] case, invalidated a decertification of the Alliance done by the Labour Relations Board of Quebec without hearing the parties concerned. The Alliance had unlawfully ordered its members to go on strike.

In the Saumur[464] case relating to the freedom of religion, our highest court found a regulation of the City of Quebec prohibiting the distribution of religious pamphlets in the street to be unenforceable, mainly on the basis of the United

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456 *Boucher v. R. [1951] S. C. R. 265.*

457 *Switzman v. Elbling, (Padlock Act), [1957] S. C. R. 285.*

458 *Chaput v. Romain, [1955] S. C. R. 834.*

459 *Saumur v. Quebec and A.G. Que., [1953] 2 S. C. R. 299.*

460 *Roncarelli v. Duplessis, [1959] S. C. R. 121.*

461 *S.D.G.M.R. v. Dolphin Delivery, [1986] S. C. R. 573.*

462 *Boucher v R [1951] S.C.R. 265, decision of 5 to 4.*

463 *L'Alliance des professeurs catholiques de Montréal v. The Labour Relations Board of Québec, [1953] 2 S. C. R. 140, no dissenting opinions.*

464 *Saumur v. City of Quebec, see above, footnote 21, majority decision of 5 to 4.*

Canada Freedom of Religion Act of 1852. Mr Justice Rand noted that freedom of religion has been recognised as a fundamental principle of law since 1760.

In the Chaput[465] case, the Court, on the basis of Article 1053 of the Civil Code of Lower Canada[466], found three police officers civilly liable who, under orders of a superior, broke up a Jehovah's Witness religious service being celebrated in a private home, seized religious documents and forced the minister to leave the premises. Mr Justice Robert Taschereau noted that in our country there is no state religion, that all religions are on equal footing, and that a person's religion is a personal matter and no one else's concern.

In the well-known case of Roncarelli[467], the Supreme Court, in a majority decision, awarded damages against the Premier of Quebec who, acting without legal authority, ordered the chairman of a Board to cancel a restaurant owner's liquor licence because he acted as a bondsman for Jehovah's Witnesses accused of distributing their literature in breach of municipal by-laws. It was also found that the order of a superior does not permit a person subjected to the authority of the superior to commit a reprehensible act. This judgment finally reaffirms the principle that all are equal before the law and all are subjected to the rule of law.

Once again basing their decision on Article 1053 of the Civil Code[468], the Supreme Court, in the Lamb[469] case, awarded damages to Louise Lamb, Jehovah's Witness, arbitrarily arrested by the police and held over a weekend without being able to speak with legal counsel and without having charges brought against her.

In the Switzman[470] decision, the Court declared ultra vires the Quebec statute known under the name of the Padlock Act which prevented the propagation of bolshevism or communism on grounds that such a prohibition is prohibition of a criminal law nature and falls exclusively within the jurisdiction of the Federal Parliament because such a prohibition shares the nature of a criminal law defence.

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[465] *Chaput v. Romain, [1955] S. C. R. 834.*

[466] *Now Article 1462 of the Civil Code of Quebec.*

[467] *Roncarelli v. Duplessis, [1959] S. C. R. 121.*

[468] *See above, footnote 28.*

[469] *Lamb v. Benoît, [1959] S. C. R. 321.*

[470] *Switzman v. Elbling, [1957] S. C. R. 285.*

One may conclude that from 1875 to 1960, the Supreme Court has had, inter alia, the opportunity to express itself on the freedom of religion, the observation of Sunday, the principle of equality before the law, arbitrary arrest, the principle of audi alteram partem, contractual freedom, the rule of law, freedoms in times of war, and discriminatory measures.

C- THE CANADIAN BILL OF RIGHTS OF 1960: A QUASI-CONSTITUTIONAL PROTECTION

The year 1960 marks another chapter in the area of the protection of fundamental rights. The Federal Parliament gave its unanimous approval to the Canadian Bill of Rights. The Bill of Rights was given royal assent on 10 August 1960 and entered into force on the same day.

The Bill of Rights is applicable to only federal laws. In its preamble, it refers to "the dignity and worth of the human person and the position of the family in a society of free men and free institutions".

The Bill of Rights protects the right to life, liberty, security of the person, the right to equality before the law and the protection of the law, freedom of religion, freedom of speech, freedom of assembly and association, and freedom of the press. Moreover, no federal law must be interpreted as authorising the arbitrary detention, imprisonment or exile of any person; as imposing cruel and unusual treatment; as depriving a person who has been arrested or detained of the right to be informed of the reason thereof, of the right to retain and instruct counsel, of the remedy by way of habeas corpus; as depriving a person of the right to a fair hearing; as depriving the accused of the right to the presumption of innocence; as depriving him of the right to the assistance of an interpreter in any proceedings in which he is involved, etc.

This Bill of Rights is a statute which can be repealed at the discretion of Parliament. It still exists. It is not enshrined in the Constitution. However, given its wording, it is more than a statute of interpretation. It is true that Parliament may state in a statute that this statute shall apply notwithstanding the Bill of Rights, but if it does not do so, it opens the way for the courts to declare a law which does not conform with Bill of Rights as invalid.

The Canadian Bill of Rights at the time raised great hopes. But for all pratical purposes, for ten years, the courts saw in the Bill of Rights only a simple code of interpretation.

In the Rosetanni[471] judgment, the Supreme Court concluded that section 4 of the Lord's Day Act does not violate the principle of the "freedom of religion" as set out in the Canadian Bill of Rights. In this case, the accused were charged with operating a business on Sunday, contrary to section 4 of the Lord's Day Act.

In the Brodie[472] case, the famous novel Lady Chatterley's Lover was found not to be an obscene publication within the meaning of section 150 (8) of the Criminal Code.

In the Lieberman[473] case, the Court concluded that a municipal by-law relating to the closing hours of business was not aimed at Sunday observance but rather at the regulation of business hours. They upheld the validity of the by-law.

In the R. v. Radio-Canada[474] judgment, the Court held that the Lord's Day Act did not bind this state-owned corporation which is an extension of the Crown.

In the Oil, Chemical and Atomic Workers International Union v. Imperial Oil Ltd.[475] case, the Supreme Court of Canada confirmed the validity of a British Columbia statute prohibiting trade union donations to the election funds of political parties of funds obtained by compulsory deductions from employees' pay. This did not amount to an unjustifiable encroachment onto the freedom of expression.

In the McKay[476] case, the Supreme Court reached the conclusion that a municipal by-law prohibiting the display of announcements and signs on private property did not prohibit the display of federal election signs as it was not the intended effect of the aforementioned by-law.

In Guay v. Lafleur[477], the Supreme Court, reversing a decision of the Quebec Court of Appeal, concluded that the investigator Guay, acting under the Tax Act, did not make decisions or judgments, and the rule of audi alteram partem did not apply because it was not a hearing of a judicial or quasi-judicial nature.

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[471] *Robertson and Rosetanni v. R., [1962] S. C. R. 651.*

[472] *Brodie v. R., [1962] S. C. R. 643.*

[473] *Lieberman v. R. [1963] S. C. R. 643.*

[474] *(1957) 118 C. C. C. 200.*

[475] *(1964) 41 D. L. R. (2d) 1.*

[476] *McKay and McKay v. R. [1965] S. C. R. 798.*

[477] *[1965] S. C. R. 798.*

Reviewing the case-law of the 1960s, the Honourable P. E. Trudeau wrote in 1968: "It would have perhaps been possible to give this Bill an interpretation which would have allowed modification of these earlier statutes but the Courts have never done this."[478]

Then came the Drybones judgment of 1970[479]*, a breath of fresh air, certainly, but greeted too soon as the judgment of the century. The century lasted only three years. Then the Lavell*[480] *decision came, in which, despite a noteworthy dissenting opinion by Mr Justice Laskin, the principles established by the Drybones decision were shelved. In the Curr*[481] *judgment, the Chief Justice assessed the limits of the Canadian Bill of Rights within the Canadian constitutional system.*

Let us first examine the Drybones[482] *judgment. Drybones, an Indian, was found drunk outside an Indian reserve in the Northwest Territories, in violation of section 94 (b) of the Indian Act. Section 19 (1) of the Ordinance on Alcoholic Beverages provides that only persons found intoxicated in a public place are guilty of an offence; Drybones was not intoxicated in a public place but he was at the relevant time outside an Indian reserve.*

The Supreme Court, in a majority judgment of six to three, concluded that section 94 (b) of the Indian Act was invalid by virtue of section 2 of the Canadian Bill of Rights because it was inconsistent with the principle of "equality before the law" laid down in section 1 (b) of the Canadian Bill of Rights.

Mr Justice Ritchie, whom the majority of the Court followed, held that a person is deprived of "equality before the law" if, because of his race, he is punished for having committed an act that for any other Canadian would not constitute an offence[483]*. He added that section 2 of the Bill of Rights signified that if a federal law cannot be reasonably interpreted and applied without abolishing, limiting or infringing a right or freedom recognised and proclaimed in the Bill of Rights, then this law is invalid unless a law of the Parliament of Canada expressly states that it applies notwithstanding the Canadian Bill of Rights.*

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478 *P. E. TRUDEAU, The Canadian Charter of Human Rights, Queen's Printer, Ottawa, 1968 p. 13.*

479 *R. v. Drybones, [1970] S. C. R. 282.*

480 *A. G. Canada v. Lavell, [1974] S. C. R. 1349.*

481 *Curr v. R., [1972] S. C. R. 889.*

482 *R. v. Drybones, see above, Footnote 41.*

483 *Ibid., p. 297.*

In his dissenting opinion, Mr Justice Louis-Philippe Pigeon recalled that the very purpose of section 91 (24) of the Constitution is to enable the Federal Parliament to enact legislation which applies only to Indians[484]*. The Bill of Rights was not of a constitutional nature. It constituted only a rule of interpretation.*

In our system of parliamentary sovereignty, he wrote, it is up to Parliament and not to the courts to establish human rights. If the federal Parliament had wanted fundamental freedoms to be henceforth the work of the courts, it would have made its intention known in much clearer and more explicit terms than it did in the Bill of Rights.

Between the Drybones judgment of 1970 and the Lavell judgment of 1973, the Supreme Court delivered judgments in other cases, which whilst having attracted less attention, still have a certain importance. These are the judgments in Brownridge (right to consult legal counsel)[485]*, Smythe equality before the law)*[486]*, Curr (breathalyzer)*[487]*, Duke (fair hearing)*[488]*, and Appleby (presumption of innocence)*[489]*. In these cases, no provision of federal law was declared invalid by the Court.*

In August 1973, the Supreme Court delivered the Lavell judgment, which caused quite a stir[490]*. In this case, the issue was whether section 12 (1) (b) of the Indian Act, providing that an Indian woman who marries a non-Indian loses her Indian rights and cannot continue to live on the reserve, was contrary to the principle of "equality before the law" in the Canadian Bill of Rights. Under the Indian Act, an Indian man who marries a non-Indian woman does not lose his rights and he and his spouse may live on the reserve. Was there this time discrimination on the basis of sex as there was discrimination on the basis of race in the Drybones case?*

The Supreme Court was divided. Five judges found the law valid, and four judges dissented.

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484 *Ibid., p. 303.*

485 *Brownridge v. R., [1972] S. C. R. 926, three dissents.*

486 *Smythe v. R., [1971] S. C. R. 680.*

487 *Curr v. R., [1972] S. C. R. 889.*

488 *Duke v. R., [1972] S. C. R. 917.*

489 *R. v. Appleby, [1972] S. C. R. 303.*

490 *A.G. Canada v. Lavell; Issac v. Bédard, [1974] S. C. R. 1349.*

As in the Drybones case, Mr Justice Ritchie drafted an opinion which once again attracted the majority. He concluded that section 12 (1) (b) of the Indian Act could be interpreted and applied in a "reasonable way" without infringing Mrs Lavell's and Mrs Bédard's rights of "equality before the law".

Mr Justice Pigeon maintained the same opinion that he adopted in the Drybones judgment. Obviously concerned about the stare decisis, he referred to the dissenting opinion of Mr Justice Laskin. This dissent is in keeping with the logic of the Drybones judgment. Dissenting in the Drybones case, and once again in the Lavell judgment, Mr Justice Abbott affirmed that the Canadian Bill of Rights had substantially affected the doctrine of the supremacy of Parliament. Mr Justice Laskin, who did not sit in the Drybones case, marked a strong dissent in the Lavell judgment. He pointed out, -- rightly, in our opinion -- that unless the Court chose to depart from what it had stated and affirmed in the Drybones decision, it had to continue on the same road. For his part, he was not inclined to repudiate the Drybones judgment. Mr Justice Laskin recalled that the Drybones judgment clearly established that the Canadian Bill of Rights is more than an interpretative law, that it prevails when federal legislation conflicts with its terms and that the incompatible provision must yield to the Bill of Rights.

Other judgments followed Drybones and Lavell.

In the Canard[491] *case, Mr Justice Beetz concluded that the issue was whether the fact of investing the Minister with some administrative powers created an irregular situation which was inconsistent with the Bill of Rights and whether the Indian Act was applied in accordance with the principles of the Bill of Rights. In his opinion, if Mrs Canard was a victim of racial discrimination, this discrimination was of an administrative and not of a legislative nature. The Canard case, in his opinion, differs from the Drybones and Lavell judgments.*

Dissenting, Chief Justice Laskin maintained the opinion he adopted in the Lavell case. Section 91 (24) of the Constitution does not in se authorise Parliament to infringe the freedoms laid down in the Bill of Rights. If Parliament thought it necessary, basing itself on section 91 (24), to enact provisions inconsistent with the Bill of Rights, it is free to do so using the notwithstanding clause, but section 91 (24) is not an invitation for the courts to do what Parliament has not chosen to do.

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[491] *[1976] 1 S. C. R. 170.*

The Cosimo Reale[492] case relates to the right to the assistance of an interpreter. The Court held that the accused should have benefitted from this right.

The Prata[493] judgment relates to deportation and the Hogan[494] judgment to the breathalyzer test.

In April 1974, in the Jones[495] judgment, Chief Justice Laskin, on behalf of all nine judges of the Court, affirmed that section 133 of the Constitution grants a "constitutional right" to use French or English in the Parliamentary Debates in Quebec City and in Ottawa and in proceedings before Quebec and federal courts.

In the Morgentaler[496] case, the Supreme Court found that section 251 of the Criminal Code on therapeutic abortion was not inconsistent with the Canadian Bill of Rights, under the headings of the right to privacy, to a fair trial, to security of the person, to natural justice, to protection of the law, to equality before the law. Later it will be shown that the same Court, basing its judgment on the Charter of Rights of 1982 reached the opposite conclusion.

In the Burnshine[497] judgment, the issue was whether this section ran counter to the principle of "equality before the law".

In the Lowry and Lepper[498] judgment, the Supreme Court held that a right to "a fair trial" in the criminal context includes sentencing, and as a result, the power to sentence a convicted defendant can only be exercised after a fair hearing.

In the Saulnier[499] judgment, the nine Supreme Court judges allowed the appeal on the ground that the audi alteram partem rule applied to the Quebec Police Commission under Article 24 of the Police Act (provincial statute), which consequently differs radically from the Income Tax Act, under review in the Guay v. Lafleur[500] case.

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492 *[1975] 2 S. C. R. 624 (7 to 2)*

493 *Prata v. The Minister of Manpower and Immigration, (1975) 52 D. L. R. (3d) 383, unanimous decision.*

494 *[1975] S. C. R. 575.*

495 *(1974) 16 C. C. C. (2d) 297.*

496 *Morgentaler v. R., (1975) 20 C. C. C. (2d) 449.*

497 *R. v. Burnshine, (1974) 4 W. W. R. 49, majority judgment of 6 to 3.*

498 *Lowry and Lepper v. R., [1974] S. C. R. 195.*

499 *Saulnier v. Quebec Police Commission, [1976] 1 S. C. R. 572.*

500 *See above, foonote 40.*

In the Howarth[501] case, the issue was whether the Parole Board exercised a quasi-judicial function when it revoked conditional parole. The majority of the Supreme Court answered in the negative. The audi alteram partem rule does not apply.

In the Murdoch[502] case, the Supreme Court, in a majority judgment (Mr Justice Laskin dissenting), held that Mrs Murdoch, separated from her husband, was not entitled to a share of some property registered only in the name of her husband. The wife claimed a right "in equity" for having contributed to the acquisition of the said property with her work.

In the Dupond[503] case, the Supreme Court upheld the validity of a City of Montreal by-law prohibiting demonstrations in the streets on grounds that it was a matter of local public order. The dissenting judges were of the opinion that it was an encroachment on the federal competence in the matters of criminal law. In the McNeil[504] judgment, the Supreme Court upheld the validity of a Nova Scotia statute on the regulation of films, on the basis of sections 92 (13) (local commerce) and 92 (16) (local public order). The dissenting judges saw in the legislation at issue an encroachment onto section 91 (27).

The discussion in these two cases was essentially on the division of powers.

The Supreme Court, from 1960 to 1982, had the opportunity to deliver decisions on, inter alia, the freedom of religion, equality before the law, the audi alteram partem rule, the right to retain and instruct counsel, to a fair hearing, the presumption of innocence, a fair trial, the proper application of the law, the right to the assistance of an interpreter, freedom of the press, the freedom of expression and language rights.

In the Canard[505] judgment, Mr Justice Beetz spoke of the Bill of Rights as being of a quasi-constitutional nature. Mr Justice Laskin, in the Hogan[506] judgment affirmed that the Bill of Rights lies half-way between a common law and a constitutional law regime, and that it is a quasi-constitutional law.

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501 *Howarth v. The Parole Board, [1976] 1 S. C. R. 453, decision of 5 to 3.*

502 *Murdoch v. Murdoch, [1975] 1 S. C. R. 423.*

503 *[1978] 2 S. C. R. 770.*

504 *[1978] 2 S. C. R. 662.*

505 *See above, footnote 53.*

506 *See above, footnote 56.*

II- THE CONSTIUTIONAL PROTECTION OF RIGHTS AND FREEDOMS SINCE THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS OF 1982

A- The constitutional context of 1982

In the judicial field, this is the greatest event since the adoption of federalism in 1867. In 1867, the sacrosanct principle of parliamentary supremacy which we have inherited from Great Britain was limited in Canada by the division of powers; in 1982, the said parliamentary supremacy was once again limited by a Charter of Rights and Freedoms. Our laws must consequently be consistent with both the division of powers and with the constitutional Charter.

The "constitutionalism" already present in 1867 was thus considerably widened in 1982. Canada became, with the United States, one of the countries where the constitutional review of laws is the most pronounced. If one considers that in the United States, the U.S. Bill of Rights has, at the level of the Supreme Court, overshadowed the division of powers, whereas this is not manifestly the case in Canada, Canada has perhaps become the country where constitutional review of laws is the most rigorous. It should also be said that in Canada, it is relatively easy for a simple taxpayer to put the mechanism for the constitutional review of laws into motion, as evidenced by the Thorson[507] and Borowski[508] judgments.

To a certain extent, the judges are the architects of the Constitution. The constitutional legislator cannot provide for every situation, it sometimes has to use vague terms, often even intentionally. It is up to the courts to interpret the words used. A constitution must last. It must be given life.

The entry into force of the Constitutional Charter of Rights in April 1982 considerably changed the role of the Court of last instance. The judgments are coming thick and fast; the legal literature is also flourishing.

In a colloquy on the Supreme Court of Canada, held in October 1985 in Ottawa[509], Chief Justice Brian Dickson stated that the introduction of a constitutional charter of rights in Canada constituted the greatest challenge to the

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[507] *Thornson v. A. G. Canada, [1975] 1 S. C. R. 138.*

[508] *Borowski v. Minister of Justice et al., [1981] 2 S. C. R. 575.*

[509] *B. DICKSON, "Address of the Chief Justice of Canada/Discours du Juge en chef du Canada", in G.-A. BEAUDOIN, (ed.), La Cour suprême du Canada - The Supreme Court of Canada, Cowansville, Ed. Yvon Blais, 1986, p. 382.*

Supreme Court since its creation in 1875. In its first judgment, the Skapinker[510] case, the Supreme Court announced the beginning of a new era in the protection of rights and freedoms in Canada. This Charter is rooted in the Constitution and belongs to the very substance of Canadian law. Chief Justice Dickson also spoke of the construction of a cathedral of case-law[511].

Section 52 of the Constitution Act of 1982 lays down the principle that the Constitution of Canada is the supreme law of the land and that any provisions of law which are inconsistent with the Constitution are invalid, as we have seen. The Canadian Charter of Rights and Freedoms is an integral part of this Constitution and by virtue of this, it is the supreme law of Canada, on par with the division of powers and Canadian parliamentarism.

In the Skapinker[512] judgment, the Supreme Court illustrated the difference between a constitutional law such as the Charter of 1982 and a quasi-constitutional law such as the Bill of Rights of 1960.

In 1982, the Canadian Charter of Rights and Freedoms constitutionalised rights which, up until then, were only statutory, or even rights which did not exist, or finally rights which were protected only indirectly by the Constitution: the right to vote, the right to qualify for membership of a legislative assembly, mobility rights, certain language rights and some others.

This Charter, in sections 25 and 29, leaves intact the the religious rights provided for under section 93 of the Constitution of 1867, as well as the rights of the aboriginal peoples of Canada.

Section 52 of the Constitution Act, 1982 affirms that in order to amend the Charter, a constitutional amendment is necessary. The Supreme Court, in turn, made this statement in 1984, in the case of Law 101[513].

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510 *Law Society of Upper Canada v. Skapinker, [1984] 1 S. C. R. 357.*

511 *See G.-A. BEAUDOIN, "Introduction", in G.- A. BEAUDOIN, see above, footnote 71, p. 11.*

512 *In the Skapinker judgment, see above, footnote 72, Mr. Justice Estey affirmed that the Charter of 1982 is not an ordinary law, it is also not an exceptional law such as the Canadian Bill of Rights. It belongs to the very substance of Canadian law. It is the supreme law of the land. In the Hogan case (see above, footnote 56), Chief Justice Laskin treated the Canadian Bill of Rights as a quasi-constitutional law. In the Skapinker case, Mr. Justice Estey placed the Canadian Bill of Rights somewhere between an ordinary law and a constitutional law. In the Action Travail des Femmes case, ([1987] 1 S. C. R. 1114) the Supreme Court treated the federal laws on human rights as laws of a special nature. In the Singh case, ([1985] 1 S. C. R. 177), Mr. Justice Beetz treated the Bill of Rights as a quasi-constitutional law.*

513 *A. G. Quebec v. Quebec Association of Protestant School Boards, [1984] 2 S. C. R. 66.*

This Charter borrows from the U.S. Bill of Rights of 1789, from the Declaration of the Rights of Men and Citizens of 1789, from the Universal Declaration of Human Rights of 1948 and from the International Covenant on Civil and Political Rights of 1976. But it also contains, some very Canadian clauses, such as those relating to language rights, the continuation of the rights of aboriginal persons and religious rights.

B- Entry into force and scope of the Charter

The Canadian Charter of Rights and Freedoms came into force on 17 April 1982. It covers the "classic" universal rights: fundamental freedoms, democratic rights, mobility rights, legal rights, equality rights, equality between men and women. It also protects the official languages at the federal level and in New Brunswick, and the right of education in the minority language. The rights relating to denominational schools, as well as those of aboriginal peoples are maintained. The Charter also applies to the territories.

C- Scope of Section 1 of the Charter

The rights and freedoms guaranteed by the Canadian Charter of Rights and Freedoms are not absolute. The Charter has two particular clauses relating to this: a limitation clause (section 1) and an override clause (section 33).

Section 1 provides that the rights and freedoms guaranteed by the Charter are subject to the reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The Supreme Court of Canada put the question in context and gave it its full meaning in the Oakes[514] decision, where it developed the test of proportionality. When the complainant shows that a right or freedom has been limited, the legislator must be able to establish that the restriction conforms to the "test in the Oakes judgment" viz.: (1) that there is a sufficiently important purpose to justify the infringement of a right or freedom; (2) that the legislator's concerns are urgent and real; (3) that the means used to reach these purposes are reasonable (the means are neither arbitrary, nor inequitable, nor irrational); (4) that the means used infringe on the rights and freedoms in the least possible way; (5) finally, that the effects of the means used are proportional to the purpose recognised as being sufficiently important.

This test, even though demanding, is not rigid. Section 1 confers upon the judges a power of discretion and authorises them to make value judgments[515].

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[514] *R. v. Oakes, [1986] 1 S. C. R. 103.*

[515] *See the R. v. Keegstra judgment, [1990] 3 S. C. R. 697, p. 735 - 736 (Chief Justice Dickson) and p. 845 (Mr. Justice McLachlin, dissenting on another point).*

The limitation clause in Section 1 of the Charter is justified. Rights and freedoms cannot be absolute. If this clause did not exist, it is to be assumed that the Supreme Court would have invented it. It is moreover what the Court did on the subject of the Canadian Bill of Rights. Given the silence of the law, it created the reasonableness test in the Drybones case[516].

The Supreme Court first mentioned the test of reasonableness in Big M Drug Mart[517]. *In the Oakes*[518] *judgment, it clearly affirmed the existence of this test and described the criteria of application. The test is demanding, as it is based on proportionality. It is not a bad starting point. However, as is subsequently seen in the Edwards Books*[519] *case, the test can be applied in a more relative manner.*

In this case, the Chief Justice wrote:

> *"Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights".*[520]

In the Chaussure Brown's (Ford)[521] *case, the Court held that the exclusion of every other language except French on business signs, as provided in Law 101, cannot be justified under Section 1, taking into account the criteria established in Oakes*[522] *However, section 1 permits, in order to ensure Quebec's "linguistic character", to give French clear predominance.*

Contrary to European instruments, the test under section 1 is intentionally vague and general. It does not expressly provide for the case of emergency; it will be up

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516 *R. v. Drybones, above, footnote 41.*

517 *R. v. Big M Drug Mart, [1985] 1 S. C. R. 295.*

518 *See above, footnote 76.*

519 *R. v. Edwards Books, [1986] 2 S. C. R. 713.*

520 *Ibid., p. 768.*

521 *Ford v. (A.G.) Quebec, [1988] 2 S. C. R. 712.*

522 *See above, footnote 76.*

to the courts to decide on the restrictions on freedoms in the event of emergency in times of war and in times of peace.

Does section 1 apply equally to all sections of the Charter? In the Law 101[523] *case, the Court indicated that it could be applied differently. The wording might be important, such as that of the strongly worded section 23.*

In the Cotroni case[524]*, the Court made it known that the criteria in the Oakes*[525] *decision must not be applied too rigidly or mechanically. There must be some flexibility.*

Could the limitation authorised by section 1 also cover denials? In an obiter dictum, the Court seems to have given a positive answer in the case of Law 101[526]*.*

As far as evidence is concerned, several judgments deal with extrinsic evidence[527]*.*

In the case of Metropolitan Stores[528]*, the Court declared that because of the innovative nature of the Charter, there is no presumption that the law under examination is consistent with the Charter.*

D- The exception clause of section 33

The application of section 33 of the Charter, also known as the "notwithstanding clause" is different. Its application is more mechanical and leaves very little to discretion or evaluation. The Ford[529] *and Devine*[530] *judgments state that a legislative provision which intends to depart from the Charter must contain a declaration specifying the section or subsection of the Charter concerned. It is mostly a condition of form and, once it is observed, the suspension of rights and freedoms is valid for a period of five years, a period which can be renewed*[531]*.*

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523 *Quebec Association of Protestant School Boards v. Quebec, above, footnote 75.*

524 *United States of America v. Cotroni, [1989] 1 S. C. R. 1469.*

525 *See above, footnote 76.*

526 *See above, footnote 75, p. 84 and following.*

527 *Extrinsic evidence, See Skapinker case, footnote 72, and Re Section 94 (2) of the B. C. Motor Vehicle Act, [1985] 2 S. C. R. 486.*

528 *Metropolitan Stores Ltd. v. Manitoba (A.G.), [1987] 1 S. C. R. 110, p. 122.*

529 *See above, footnote 83.*

530 *Devine v. Quebec (A.G.), [1988] 2 S. C. R. 792.*

531 *Consistent with sections 33 (3) and 33 (4) of the Charter.*

Such a suspension of rights and freedoms can be directed only (but this is already a lot) at fundamental freedoms (section 2), the legal rights (sections 7 to 14) and equality rights (article 15). The other rights and freedoms listed are not subject to the possible use of the exception clause.

E- The application of the Charter (section 32)

The Charter applies to common law[532]. It applies when there is a conflict between the State and an individual, or when an element of governmental action is at issue. Consequently, relations between individuals or the private relationships, which do not have an element of governmental action are not covered by the Canadian Charter of Rights and Freedoms[533]. The idea of "act of government" is not clear. But we know as a matter of certainty that the Charter applies to governments, legislatures, to decisions of cabinet[534], to the courts[535], and to education colleges[536]. The Charter does not apply to private disputes[537], nor to foreign governments[538], to universities[539] or to hospitals[540].

The outcome of the Dolphin[541] judgment is that the legislative and executive powers are bound by the Charter. What is the situation of the courts? Mr Justice McIntyre pointed out that even if in political science, one speaks of the three great powers:

> *"...I cannot equate for the purposes of Charter application the order of a court with an element of governmental action."[542]*

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532 *See the S.D.G.M.R. v. Dolphin Delivery Ltd., [1986] 2 S. C. R. 573.*

533 *Ibid.*

534 *See the Operation Dismantle Inc. v. R. judgment, [1985] 1 S. C. R. 441.*

535 *S.D.G.M.R. v. Dolphin Delivery, see above, footnote 94.*

536 *See the Douglas/Kwantlen Faculty Association v. Douglas College, [1990] 3 S. C. R. 570. The colleges exercise a government function.*

537 *S.D.G.M.R. v. Dolphin Delivery, see above, footnote 94.*

538 *See the United States of America v. Allard and Charette judgment, [1987] 1 S. C. R. 564.*

539 *See the McKinney v. University of Guelph judgment, [1990] 3 S. C. R. 229. Dissenting opinion of Madam Justice Wilson.*

540 *See the Stoffman v. Vancouver General Hospital, [1990] 3 S. C. R. 483 judgment.*

541 *S.D.G.M.R. v. Dolphin Delivery Ltd., see above, footnote 94.*

542 *Ibid., p. 600.*

But he added:

> *"This is not to say that the courts are not bound by the Charter. The courts are, of course, bound by the Charter as they are bound by all law."*[543]

Some sections cannot not bind the courts, such as, for example, sections 11 and 12. Several authors have emphasised this.

F- Principles of interpretation of the Charter

It is the courts which have breathed life into the Charter and in the first place the Supreme Court of Canada which has already delivered more than two hundred and fifty judgments on the various sections of the Charter. It has developed numerous principles of interpretation. Accordingly, the Charter must receive wide, liberal and generous interpretation[544]*. The rubrics in the Charter may help in its interpretation*[545]*. The absence of a factual basis of an application founded on the Charter is fatal*[546]*. The Charter does not have retroactive effect, but it can be applied for the future to previous legislation; it may be applied in a prospective manner*[547]*. One can also, in interpreting the Charter use cross-wise interpretation*[548]*, the versions in the two official languages being equally authoritative. But the rule of statutory interpretation of expressio unius est exclusio alterius is not consistent with the requirements of interpretation of the Charter*[549]*. The rights and freedoms guaranteed by the Charter are not frozen forever, they evolve*[550]*. This means that flexibility is essential in the interpretation of the Charter*[551]*. A right or freedom granted by the Charter can only be waived*

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543 *Ibid.*

544 *See in the Law Society of Upper Canada v. Skapinker, above, footnote 72, and the Hunter v. Southam Inc., [1984] 2 S. C. R. 145.*

545 *Ibid.*

546 *See the judgments in MacKay v. Manitoba (A.G.), [1989] 2 S.C.R. 357 and Danson v. Manitoba (A.G.), [1990] 2 S. C. R. 1086.*

547 *R. v. Gamble, [1988] 2 S.C.R. 595.*

548 *R. v. Turpin, [1989] 1 S.C.R. 1296.*

549 *Thomson Newspapers Ltd. v. Director of Investigation and Research, Restrictive Trade Practices Commission, [1990] 1 S. C. R. 425, p. 470.*

550 *R. v. Hébert, [1990] 2 S.C.R. 151, p. 163.*

551 *R. v. McKinlay Transport Ltd., [1990] 1 S. C. R. 627, p. 641.*

expressly and clearly in full knowledge of the situation[552]*. The interpretation given must be a function of the purpose of the right or freedom in question*[553]*. It must also be observed that American case-law, with over two hundred years of history, plays a certain role in the interpretation of the Charter*[554]*, in the same way as, more and more, various international documents, such as the International Covenant on Civil and Political Rights*[555]*. The Supreme Court has also formulated the theory of imprecision which rests on the principle of the rule of law. The requirements of reasonable notice to the citizens, as well as the limitation of discretionary power in the application of the law constitute the foundations of this theory.*

Imprecision, which is part of the fundamental principles of justice, applies in all areas of law: civil, administrative, criminal, constitutional, etc. The factors to be considered in the determination of whether a provision is imprecise are the following: "a) the need for flexibility and the interpretive role of the courts; b) the impossibility of achieving absolute certainty, a standard of an intelligibility being more apropriate; c) the possibility that many varying judicial intepretations of a given disposition may exist and perhaps co-exist."[556] *An imprecise provision will be judged as being unconstitutional.*

G- The Supreme Court, Guardian of the Constitution

In Reference re Manitoba Language Rights[557]*, the Supreme Court declared: "The judiciary is the institution charged with the duty of ensuring that the government complies with the Constitution"... "They duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails"*[558]*. In the Société des Acadiens case, the Supreme Court affirmed its role as "the guardian of the constitution"*[559]*.*

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552 *R. v. Clarkson, [1986] 1 S. C. R. 383.*

553 *R. v. Big M Drug Mart Ltd., see above, footnote 79.*

554 *See, notably, the judgments in Hunter v. Southam Inc., above, footnote 106, and Re: B. C. Motor Vehicle Act, [1985] 2 S.C.R. 486.*

555 *See, in particular, the judgments in Re: B. C. Motor Vehicle Act, ibid.; R. v. Oakes, above, footnote 76; Jones v. R., [1986] 2 S. C. R. 284; Mills v. R., [1986] 1 S.C.R. 863; and R. v. Keegstra, [1990] 3 S.C.R. 697.*

556 *R. v. Nova Scotia Pharmaceutial Society, [1992] 2 S. C. R. 606, p. 627 (reaons of Mr. Justice Gonthier).*

557 *Reference re Manitoba Language Rights, [1985] 1 S. C. R. 721.*

558 *Ibid., p. 745.*

559 *Société des Acadiens du Nouveau-Brunswick v. Association of Parents, [1986] 1 S. C. R. 549.*

H- Concrete rights, abstract rights, classic rights

The Supreme Court in the Reference re Law 101 of 1984[560] distinguished between the rights guaranteed by the Charter. Some are laid down in a concrete manner; others in an abstract manner. In the Société des Acadiens case[561], Mr Justice Jean Beetz also distinguishes between the classic fundamental rights and language rights. The latter result from political compromises.

I- Evidence

The standard of proof to be reached is that of the preponderance of evidence, as affirmed by Chief Justice Dickson in the Edwards Books[562] case.

J- Study of the case-law, section by section

(1) Section 2: the fundamental freedoms

(a) Freedom of conscience and religion (s. 2 (a))

In the Big M Drug Mart[563] case relating to federal Sunday closing legislation, the Court has distanced itself from the American solution. The genesis of the test of Section 1 can be traced back to this case. The Court affirmed that the federal legislation on Sunday closing, even though consistent with the division of powers under section 91(27) of the Constitution Act, 1867, nevertheless violated the principle of the freedom of religion laid down in section 2 of the Charter, and could not be justified under section 1 of the Charter. The Court also found support in section 27 of the Charter.

The Supreme Court, in the Edward Books[564] case, expressed its opinion on the subject of Sunday closing. It recognised the validity of an Ontario statute entitled the Retail Business Holidays Act, whose purpose was to grant one uniform day of weekly rest. This Act falls within the legislative powers of Ontario under section 92 of the Constitution Act 1867. The Court added that section 2 of the Ontario

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560 *A. G. Quebec v. Quebec Association of Protestant School Boards, above, footnote 75.*

561 *See above, footnote 121.*

562 *R. v. Edwards Books, see above, footnote 81.*

563 *R. v. Big M Drug Mart, see above, footnote 79.*

564 *See above, footnote 81.*

statute infringed on the freedom of religion of retailers observing Saturday as a day of rest; but this infringement was justifiable under section 1 of the Charter.

In the Morgentaler[565] case, Madam Justice Wilson dealt with the freedom of conscience with respect to abortions.

In the Young[566] case, the Supreme Court declared that parents do not have the right to indoctrinate their children. The interests of the child take precedence over the parents' freedom of religion. In the case at issue, they were Jehovah's Witnesses.

b) freedom of expression (s. 2 (b))

In the Dolphin Delivery Ltd.[567] case, the Court noted that picketing is a form of freedom of expression. This freedom does not cover incidents of violence and illegal acts.

The B.C. Government Employees Union[568] case dealt with picketing before the Court of Justice. Discussed were also the issues of access to justice and the rule of law.

In the Chaussure Brown's (Ford)[569] case, the Supreme Court of Canada declared that freedom of expression also includes commercial speech and the right to choose the language in which one wishes to express oneself. The Court concluded that sections 58 and 69 of the Charter of the French Language, in so far as they exclusively impose the French language for business signs and company names, are inconsistent with section 2 (b) of the Canadian Charter of Rights and Freedoms and section 3 of the Quebec Charter of Human Rights and Freedoms. It was not shown that the exclusive use of French was necessary for the preservation of the French language character of Quebec. But to make French clearly preponderant would be consistent.

In the Irwin Toy Ltd.[570] case, the Supreme Court concluded that sections 248 and 249 of the Consumer Protection Act prohibiting commercial advertising aimed at

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565 *R. v. Morgentaler, [1988] 1 S. C. R. 30.*

566 *Young v. Young, [1993] 4 S. C. R. 3.*

567 *See above, footnote 94.*

568 *British Columbia Government Employees Union v. British Columbia (A.G.), [1988] 2 S. C. R. 214.*

569 *See above, footnote 83.*

570 *Irwin Toy Ltd. v. Quebec (A.G.), [1989] 1 S.C.R. 927.*

children under 13 years of age are valid. It is true that the said sections violated the freedom of expression, but they they can be justified under section 1 of the Canadian Charter of Rights and Freedoms and section 9.1 of the Quebec Charter of Human Rights. The Court was divided. The Court added that the freedom of expression includes commercial speech. The prohibition, said the majority, is not absolute, as non-commercial educational advertising being permitted.

The Keegstra[571] *case concerns the freedom of expression. The Supreme Court decided that hate propaganda is covered by freedom of expression and that section 319(2) of the Criminal Code prohibiting hate propaganda constitutes an infringement on the freedom of expression. The judges were divided (4 to 3) on the question of justification. The majority formed by Chief Justice Dickson, and Judges Wilson, L'Heureux-Dubé and Gonthier concluded that the prohibition of hate propaganda is an urgent, real and very important purpose, as evidenced by international documents (International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights) and by sections 15 and 27 of the Charter. There is a clear rational link between the prohibition of hate propaganda and the suppression of its prejudicial effects: prohibition of racist propaganda. Finally, it is a minimal infringement, as the prohibition does not apply to private conversations, and there are three defences: good faith, sincere belief and defence of truth; the prohibition is thus neither excessive nor vague.*

The minority formed by judges McLachlin, La Forest and Sopinka concluded that there is neither a rational link nor minimal prejudice: the scope of the provision is too wide; the section is subjective and vague; and there are no imperative State interests.

The Keegstra[572] *judgment also deals with the presumption of innocence. The Supreme Court declared that section 319(2) of the Criminal Code constitutes a reversal of the burden of proof as the accused, to prove his innocence, must show that his declarations are true. The majority formed by judges Wilson, L'Heureux-Dubé and Gonthier concluded that the reversal of the burden of proof is justified: it would otherwise be too simple to circumvent the section; it only comes into play when the prosecution proves beyond reasonable doubt the intention to create prejudicial hate.*

By contrast, a minority made up by judges McLachlin, La Forest, and Sopinka concluded that there was no rational link between the prohibition on hate

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571 *R. v. Keegstra, [1990] 3 S.C.R. 697.*

572 *Ibid.*

propaganda and the requirement to prove the truth of the declarations in question; the reverse was not justified by an imperative State interest.

The Zundel[573] judgment relates to freedom of expression. The case was related to the constitutionality of section 181 of the Criminal Code prohibiting the intentional publication of false news.

In the case at instance, Zundel published a brochure entitled Did Six Million Really Die? characterised as part of the "revisionist history" literature. He claimed, inter alia, that the Holocaust was a myth resulting from a world-wide Jewish plot.

Madam Justice McLachlin, on behalf of the Court on this point, is of the opinion that Zundel's brochure comes within the protection of section 2 (b) of the Charter, as, consistent with the criteria laid down in the Irwin Toy Ltd.[574] judgment, Zundel indeed attempts to impart a message. The Court recalls that in order to decide whether the message is protected by section 2 (b) of the Charter, it is not necessary to know its contents. All communications are protected except those which are tainted with violence. This is the reason Madam Justice McLachlin affirms:

> *"Before we put a person beyond the pale of the Constitution, before we deny a person the protection which the most fundamental law of this land on its face accords to the person, we should, in my belief, be entirely certain that there can be no justification for offering protection. The criterion of falsity falls short of this certainty, given that false statements can sometimes have value and given the difficulty of conclusively determining total falsity."[575]*

The Court was however divided (4-3) on the justification of section 181 of the Criminal Code under section 1 of the Charter.

Madam Justice McLachlin, on behalf of the majority[576], held that section 181 of the Criminal Code is not justified in a free and democratic society. She put forward the following arguments.

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573 *R. v. Zundel, [1992] 2 S. C. R. 731.*

574 *See above, footnote 132.*

575 *See above, footnote 135, p. 758.*

576 *The majority was made up of Judges La Forest, L'Heureux-Dubé, Sopinka and McLachlin.*

According to Madam Justice McLachlin, section 181 of the Criminal Code does not reflect the formulation of an important legislative purpose; it does not constiute an urgent and real concern. Its wording, general and imprecise, is not based on any documentation. The legislator did not give any justification for keeping it in force. The Canadian Law Reform Commission has even recommended its repeal, characterising it as "anachronistic"[577]. Madam Justice McLachlin takes care to specify that section 181 is not necessary for Canada to respect its international obligations.

c) freedom of the press (section 2 b))

In the Moysa[578] judgment, the Court held that a journalist cannot refuse to testify and cannot refuse to reveal his sources.

According to the New Brunswick Broadcasting Corp.[579] judgment, freedom of the press does not include the freedom to broadcast all the parliamentary debates on television.

In the case of Canadian Newspapers[580], it was held that the court order banning the publication of the identity of the complainant upon the complainant's application in a case of a sexual nature infringes on the freedom of the press, but is justified under section 1.

In the Lessard[581] decision, the Supreme Court upheld the validity of a search warrant authorising police officers to seize video tapes in a news agency. The majority of the Court held that the search was not excessive and it did not prevent Canadian Broadcasting Corporation from functioning normally.

d) freedom of association (section 2 (d))

In the case of Public Service Employee Relations Act[582], the Supreme Court, (Dickson and Wilson dissenting) declared that the right to strike and to negotiate

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577 *See above, footnote 135, p. 764.*

578 *Moysa v. Alberta Labour Relations Board, [1989] 1 S. C. R. 1572.*

579 *New Brunswick Broadcasting Corp. v. Nova Scotia (President of the Legislative Assembly), [1993] 1 S. C. R. 319.*

580 *Canadian Newspapers Co. v. Canada (A.G.), [1988] 2 S.C.R. 122.*

581 *Canadian Broadcasting Corporation v. Lessard, [1991] 3 S.C.R. 421.*

582 *Re Public Service Employee Relations Act, [1987] 1 S. C. R. 421.*

collectively are not included in the freedom of association laid down in section 2 of the Charter.

The judgments in Civil Servants Alliance of Canada[583] *and S.D.G.M.R. v. Saskatchewan (A.G.)*[584] *are to the same effect.*

The constitutional legislator of 1981 did not expressly constitutionalise the right to strike and the right to negotiate collectively and the Supreme Court held that it is also not implicitly required. It is not fundamental to this point.

(2) Section 3: the democratic rights

The Gould[585] *judgment concerns prisoners and the right to vote. An injunction is not the appropriate means two days before an election to allow a prisoner to vote in a federal election.*

In the Sauvé[586] *case, the Supreme Court affirmed that section 51 (e) of the Canadian Elections Act depriving prisoners of the exercise of their right to vote, infringes section 3 of the Charter and is not justified under section 1 because its scope is too wide. The criterion of minimal prejudice has not be met.*

Some weeks after the publication of this judgment, the Parliament of Canada adopted Bill C-114, Act amending the Canada Elections Act with a view of granting the right to vote to prisoners serving a prison sentence of less than two years[587]*.*

In the Reference re the Saskatchewan Electoral Constituencies[588]*, judges McLachlin and Cory of the Supreme Court both gave their opinion of the scope of the right to vote. The opinion by Madam Justice McLachlin had the support of the majority of her colleagues:*

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583 *Civil Servants Alliance of Canada v. Canada (A.G.), [1987] 1 S.C.R. 424.*

584 *S.D.G.M.R. v. Saskatchewan (A.G.), [1987] 1 S.C.R. 460.*

585 *Gould v. Canada (A.G.), [1984] 2 S.C.R. 124.*

586 *Sauvé v. Canada (A.G.), [1993] 2 S.C.R. 438.*

587 *Section 51 (e) amended by the Act amending the Canadian Elections Act, S. C. 1993, ch. 19, s. 23.*

588 *Reference re the Electoral Constituencies (Saskatchewan) [1991] 2 S.C.R. 158.*

> *"(...) the history of our right to vote and the context in which it existed at the time the Charter was adoptedsupport the conclusion that the purpose of the guarantee of the right to vote is not to effect perfect voter equality, in so far as that can be done, but the broader goal of guaranteeing effective representation."*[589]

Mr Justice Cory expressed the following opinion:

> *"The right to vote is synonymous with democracy. It is the most basic prerequisite of our form of government. (...) [E]ach vote must be relatively equal to every other vote. (...) [F]ree people have always striven for relative equality of voting power."*[590]

In this reference, the majority of the Supreme Court held that section 3 of the Charter does not lay down the principle of "one person, one vote". Section 3 rather guarantees the right to "effective representation", a broader concept than that of the equality of votes, according to Madam Justice McLachlin.

According to the Court of Appeal, the constituency map resulting from the Report of the Commission which, in certain cases, authorises deviations from (proportional) representation between 15% and 25%, infringes section 3 of the Charter because it deviates too far from the principle of "one person, one vote" and is not justified under section 1.

It is precisely on the "process" that the minority of the Court dissents.

Mr Justice Cory writes:

> *"The right to vote is so fundamental that this interference is sufficient to constitute a breach of section 3 of the Charter. To diminish the voting rights of individuals is to violate the democratic system."*[591]

In the Haig[592] *case, the Supreme Court decided that the right to vote in a referendum is not protected by the Charter.*

(3) Section 6: mobility rights.

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589 *Ibid., p. 186.*

590 *Ibid., p. 165.*

591 *Ibid., p. 172.*

592 *Haig v. Canada (Chief Electoral Officer), [1993] 2 S.C.R. 995.*

In the Skapinker[593] case, the first judgment delivered on the Charter, the Supreme Court decided that the freedom dealt with in section 6 is the freedom of inter-provincial mobility. The rights laid down relate to the move into another province, be it to take up residence there or to work there without taking up residence there. On behalf of the Supreme Court, Mr Justice Estey wrote:

> *"... para. (b) of subs. (2) of s. 6 does not establish a separate and distinct right to work divorced from the mobility provisions in which it is found. The two rights (in para. (a) and in para. (b) both relate to movement into another province, either for the taking up of residence, or to work without establishing residence. Paragraph (b), therefore, does not avail... an independent constitutional right to work as a lawyer in the province of residence so as to override the provincial legislation, the Law Society Act, s. 28(c), through s. 52 of the Constitution Act, 1982"[594].*

In the Black[595] case, the right to gain a livelihood in any province was recognised. A law firm may set itself up in more than one province. The absolute prohibition of association between resident and non-resident lawyers infringes on the rights of the latter to gain a livelihood in Alberta. A person may gain a livelihood in one province without being present there.

In the Cotroni[596] case, the Court declared that extradition is inconsistent with section 6 but justified under section 1.

(4) Section 7: the principles of fundamental justice.

Section 7 of the Charter, the Court states in the B.C. Motor Vehicle Act, is not limited to only the procedure but it covers the very substance of the laws[597]. This is a fundamental decision.

In the Stevens[598] judgment, the Court declared that there is no retroactive effect.

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593 *See above, footnote 72.*

594 *Ibid., p. 382-383.*

595 *Black v. Law Society of Alberta, [1989] 1 S.C.R. 591.*

596 *United States of America v. Cotroni, [1989] 1 S.C.R. 1469.*

597 *Re: Section 94(2) of the B.C. Motor Vehicle Act, see above, footnote 116. An absolute liability offence matched with mandatory imprisonment violates section 7 and is not justified section 1.*

598 *R. v. Stevens, [1988] 1 S.C.R. 1153.*

In the Irwin Toy[599] case, the Court affirmed that section 7 does not apply to corporations. The Charter does not protect social and economic rights.

a) abortion

The Morgentaler[600] case, drew as one expected, a lot of attention. The mechanism under section 251 of the Criminal Code (therapeutic abortions) violates section 7 of the Charter and cannot be justified under section 1. Two judges dissented. This judgment, based on the Charter, differs from that delivered in 1976, under the Bill of Rights, which we have already discussed.

b) Aiding suicide

The Supreme Court delivered a judgment on aiding suicide in the Sue Rodriguez[601] case. In a split decision of 5 to 4, it upheld section 241 (b) of the Criminal Code prohibiting assistance in suicide. This section does not violate, in its opinion, the Canadian Charter of Rights and Freedoms. Even if this section limits the right of Sue Rodriguez to liberty and the security of the person, guaranteed by section 7 of the Charter, it does not do so in a manner which is contrary to the principles of fundamental justice. Mr Justice Sopinka, on behalf of the majority, held that even if there were a violation of the right to equality guaranteed by the Charter, it could be shown that this limitation is justified in a free and democratic society under section 1 of the Charter.

Four judges dissented; Chief Justice Lamer relied on section 15, two others, Judges McLachlin and L'Heureux-Dubé on section 7, and a fourth, Mr Justice Cory on both of these sections[602].

c) scope of section 7

The Singh[603] ruling holds that persons claiming the status of refugee are entitled to the protection of section 7. "Everyone" includes all persons present in Canada.

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599 *See above, footnote 132.*

600 *R. v. Morgentaler, [1988] 1 S.C.R. 30. There was a third Morgentaler judgment in 1993 (R. v. Morgentaler, [1993] 3 S. C. R.463) in which the Supreme Court found a Nova Scotia statute prohibiting abortions in private clinics to be unconstitutional. The prohibition of abortions falls under the exclusive powers of the (Federal) Parliament over the criminal law under section 91 (27) of the Constitution Act, 1867.*

601 *Rodiriguez v. British Columbia (A.G.), [1993] 3 S.C.R. 519.*

602 *Special senate committee on euthanasia and suicide assistance, of life and death, Ottawa, 1995, p. 93.*

The procedure provided for is not consistent with fundamental justice as it does not give the refugee the opportunity to be heard.

In the Operation Dismantle[604] judgment, the Supreme Court ruled that section 7 does not apply to American cruise missile tests. In Canada, there is no causal link between the decision to authorise these tests and an increase in the threat of nuclear conflicts: the danger is not based on real facts.

In the Hebert[605] case, the Court recognises the right to remain silent as a principle of fundamental justice so that every person who is arrested or detained has the right to remain silent.
The Daviault[606] case relates to dangerous intoxication. According to the Supreme Court, the prohibition of raising a defence based on voluntary intoxication infringes section 7 and is not justified under section 1. Parliament remedied the situation by enacting Bill C-72[607].

The Vaillancourt[608] case holds that constructive murder is inconsistent with section 7. It is not justified under section 1.

In the Edwards Books[609] judgment, the Supreme Court decided that the Retail Business Holidays Act does not violate section 7. The term "freedom" does not amount to an unlimited right to transact business whenever one wants.

(5) Section 8: unreasonable search or seizure

The landmark decision is the Hunter ruling[610]. The Court declared that the person authorising the search must act judiciously (neutral and impartial), have reasonable and probable grounds to believe that an offence has been committed, and that elements of proof can be found at the place to be searched (minimum criteria).

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603 *See above, footnote 74.*

604 *See above, note 96.*

605 *R. v. Hebert, [1990] 2 S.C.R. 151.*

606 *R. v. Deviault, [1994] 3 S.C.R. 151.*

607 *Bill C-72, became S.C. 1985, ch. 32.*

608 *R. v. Vaillancourt, [1987] 2 S.C.R. 636.*

609 *See above, footnote 81.*

610 *See above, footnote 106.*

Sections 10 (1) and 10(3) of the Combines Investigation Act are inconsistent with section 8.

The Pohoretsky[611] judgment establishes that the taking of a blood sample by a doctor authorised under the Blood Analysis Act of Manitoba but not under the Criminal Code and without the consent of the accused is an unreasonable search.

(6) Section 9: arbitrary detention and imprisonment

The Supreme Court held in the Lyons[612] case that the sentencing of a dangerous offender to an indefinite period of imprisonment does not constitute arbitrary detention. In the Hufsky[613] judgment, the highest Court declared that the stopping at random of a motor vehicle, to verify the driver's licence, the driver's insurance certificate, the vehicle's mechanical state and the driver's sobriety constitutes an arbitrary detention because there are no criteria of selection; the police officer has full discretion. This restriction is justified under section 1.

(7) Section 10: the right to retain and instruct counsel

The Therens[614] judgment deals with physical and psychological detention and also the right to retain and instruct counsel. The refusal to authorise the accused to consult a lawyer before a breathalyzer test is inconsistent with section 10 (b).

The Clarkson[615] judgment deals with the waiver of the right to consult a lawyer. Mrs Clarkson, who was in an advanced state of intoxication, could not appreciate the consequences of her waiver of the right to consult a lawyer. Her waiver is invalid and her incriminating declaration is invalidated.

The Bartle[616] decision relates to legal aid and night duty, 24 hours per day. As soon as an individual is arrested or detained, the police officers must give him this information.

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611 *R. v. Pohertsky, [1987] 1 S. C. R. 945.*

612 *R. v. Lyons, [1987] 2 S. C. R. 309.*

613 *R. v. Hufsky, [1988] 1 S.C.R. 621.*

614 *R. v. Therens, [1985] 1 S.C.R. 613.*

615 *Clarkson v. R., [1986] 1 S. C. R. 383.*

616 *R. v. Bartle, [1994] 3 S. C. R. 173.*

(8) Section 11

a) Reasonable time (s. 11 (b))

The Askov[617] judgment relates to the notion of reasonable time. The Supreme Court held that a lapse of two years between the bringing of charges and the beginning of the trial is obviously unreasonable and excessive. The lapse of time cannot be attributed to the accused but rather to the shortage of institutional resources: this cannot justify the delay. The Court lists the following as factors to be considered in determining whether the delay is unreasonable: the length of the delay; the explanation for this; the waiver of the accused of his rights, the prejudice suffered by the accused. These factors were somewhat refined in Morin[618].

In the Finta[619] decision, the Court declared that a time lapse of 45 years before the charges were laid is not unacceptable.

b) independent and impartial tribunal (section 11 (d))

(i) the military courts

In the MacKay[620] decision, prior to the Charter, it was held that a permanent military court presided over by an officer of the armed forces may try a member of the armed forces for an offence under the Criminal Code. This Court is an independent court within the meaning of section 2 (f) of the Canadian Bill of Rights. The Federal Parliament here was dealing with a valid federal objective.

In the Généreux[621] decision, the Supreme Court declared that Parliament could create military courts and a parallel system of law. The Court relied on section 11 (f) of the Charter. Nevertheless, the majority of the Court held that the organisation of the Court was inconsistent with section 11 (d) of the Charter and set aside the McKay decision on this point. This military court is not an independent and impartial court within the meaning given to this constitutional

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617 *R. v. Askov, [1990] 2 S. C. R. 1199.*

618 *R. v. Morin, [1992] 1 S. C. R. 771.*

619 *R. v. Finta, [1994] 1 S. C. R. 701.*

620 *MacKay v. R., [1980] 2 S.C.R. 370.*

621 *R. v. Généreux, [1992] 1 S.C.R. 259.*

guarantee by the Supreme Court since the Valente[622] judgment for the following reasons:

(1) the military judge does not enjoy the requisite security of office: he fulfils an ad hoc duty which depends on the discretion of the executive;

(2) he does not have financial security;

(3) he does not enjoy institutional independence.

Following this decision, Parliament corrected the situation.

(ii) independence of the courts

In the Valente[623] case, the issue of the independence of the courts was raised. In order for judicial independence to exist within the meaning of section 11 (d) of the Charter, the Court held that three essential conditions must exist: 1) security of office for the judges; 2) financial security of the judges; 3) the institutional independence of judges on matters directly relating to the judical functions.

The Beauregard[624] judgment dealt with the different kinds of judges' pensions. The Court held that there was no infringement of the principle of independence of the judges and that there was no inequality. This judgment was not based on the Charter but on the Bill of Rights, 1960.

c) the lesser punishment (section 11 (i))

The Court, in the Milne[625] case, held that a reduction of the punishment can only take place between the time of commission of the offence and the time of sentencing. Nevertheless the Supreme Court has recently decided in the Dunn[626] judgment that the accused has the right to benefit from the lesser punishment even if the sentence has only been reduced after the time of sentencing but during the appeal proceedings. The majority based their opinion on section 44 (e) of the

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622 *Valente v. R., [1985] 2 S. C. R. 673.*

623 *Ibid.*

624 *R. v. Beauregard, [1986] 2 S. C. R. 56.*

625 *R. v. Milne, [1987] 2 S. C. R. 512.*

626 *R. v. Dunn, [1995] 1 S. C. R. 226.*

Interpretation Act. Mr Justice L'Heureux-Dubé dissented and based his reasons on section 11 (i) of the Charter.

(9) Section 12: Protection against cruel and unusual punishment

The Supreme Court, in the Smith[627] judgment, declared that the imposition of a minimum punishment of 7 years imprisonment for the importation of narcotics, independently of the seriousness of the offence infringes section 12 of the Charter and is not justified under section 1. The protection afforded by section 12 "... governs the quality of the punishment and is concerned with the effect that punishment may have on the person on whom it is imposed."[628] The Court laid down the criterion of "grossly disproportionate".

In the Lyons[629] case, the majority of the Supreme Court held that Part XXI of the Criminal Code providing for the discretionary imposition of imprisonment for an indeterminate length of time when a person has been declared "a dangerous criminal", is not inconsistent with section 12 of the Charter.

In the Kindler[630] judgment, the Supreme Court declared that returning a fugitive to a foreign State does not constitute cruel and unusual punishment, even if it could result in the death penalty being inflicted on the fugitive. Mr Justice Cory dissented. The majority based its reasoning on the fact that the Charter does not have extra-territorial effect.

(10) Section 13: protection against self-incrimination

The Dubois[631] judgment lays down the principle that incriminating evidence voluntarily given by the accused cannot be admitted as evidence of the prosecution in other proceedings. The Supreme Court added that the date of the previous evidence does not matter. The protection against self-incrimination consequently applies whenever it is intended to use the previous statement as a witness in order to incriminate the accused.

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627 *R. v. Smith, [1987] 1 S. C. R. 1045.*

628 *Ibid., p. 1072.*

629 *R. v. Lyons, [1987] 2 S. C. R. 309.*

630 *R. v. Kindler, [1991] 2 S. C. R. 779.*

631 *Dubois v. R., [1985] 2 S. C. R. 350.*

In the Kuldip[632] judgment, Chief Justice Lamer, concluded on behalf of the majority[633] that a cross-examination in another trial relating to previous evidence does not violate section 13 of the Charter in so far as the purpose of this cross-examination is to attack the credibility of the accused and not to incriminate him. Because section 13 is aimed at self-incrimination.

(11) Section 14: the right to the assistance of an interpreter

The Tran[634] case relates to the right to the assistance of an interpreter. The basic criterion which is at the heart of this constitutional guarantee is linguistic comprehension. According to the Supreme Court, the courts have a positive role to play in determining whether a person needs an interpreter, and omission to do so may constitute a mistake of law entailing on its own a new trial. In the absence of convincing evidence to the contrary, the right to an interpreter should be recognised by the court.

(12) Section 15: equality rights

In the Eve[635] case, the Supreme Court concluded that the principle of equality of section 15 had not been violated. The refusal of the Court to exercise a parens patriae competence for the purpose of authorising the non-therapeutic sterilisation of a mentally handicapped person does not constitute discrimination based on mental deficiency.

Section 15 must be read in conjunction with section 28 which provides that independently of the other provisions of the present Charter, the rights and freedoms mentioned here are guaranteed equally to persons of both sexes. Consequently, the notwithstanding clause does not apply to equality between men and women.

In the Andrews[636] case, the first case on equality rights considered by the Supreme Court, the Court had to answer the two following questions: (1) Does the requirement of Canadian citizenship for the admission to the British Columbia

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632 *R. v. Kuldip, [1990] 3 S. C. R. 618.*

633 *The majority was made up of Chief Justice Lamer (Chief Justice on the date of the judgment), Chief Justice Dickson (Chief Justice at the time of the hearing of the appeal), and Judges Gonthier and McLachlin. Judges Wilson, La Forest and L'Heureux-Dubé dissented.*

634 *R. v. Tran, [1994] 2 S. C. R. 951.*

635 *Re Eve, [1986] 2 S. C. R. 388.*

636 *Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.*

Bar infringe equality rights guaranteed under section 15 of the Charter, and (2) if so, can this infringement be justified under section 1 of the Charter?

Five judges decided that the Charter requires that an examination under section 15 (1) be done in two steps: the first aims at establishing whether there has been an infringement of the right guaranteed; the second consists in determining, as the case may be, if this infringement can be justified under section 1.

The grounds for discrimination listed in section 15 (1) of the Charter are not exhaustive. Grounds similar to those listed can also be taken into consideration.

The Court answered that a rule which excludes a category of persons from certain types of employment on the sole ground that they are not Canadian citizens, without regard to their diplomas, professional abilities and without regard to other qualities or merits of the individuals belonging to this group, infringes the equality rights under section 15. Section 42 of the Barristers and Solicitors Act is a rule of this kind.

Three judges found that the purpose of the British Columbia statute did not relate to sufficiently urgent and real considerations to justify the infringement of the rights protected under section 15. Moreover, the criterion of proportionality was not respected.

For Judges McIntyre and Lamer, who dissented, the requirement of Canadian citizenship is reasonable and defendable under section 1 given the importance of the legal profession in the government of the country. This dissent is impressive.

The Supreme Court affirmed in the Andrews[637] *decison that section 15 (1) of the Charter has the purpose of protecting the following four fundamental rights: (1) the right of equality before the law; (2) the right that the law applies equally to everyone; (3) the right to equal protection of the law; and (4) the right to equal benefit from the law. According to the Court, these rights mean more than the elimination of discrimination, but they do not constitute a general guarantee of equality.*

The Supreme Court, in its interpretation of section 15, rejected the theory according to which persons in identical situations must be treated equally.

a) mandatory retirement

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[637] *Ibid.*

The McKinney[638] judgment relates to mandatory retirement.

In the case at instance, eight professors and a librarian sought a declaratory judgment holding that the University of Guelph's policy of mandatory retirement at 65 years of age infringes section 15 (1) of the Charter and is not justified under section 1.

The majority of the Court, concurring with the opinion of Mr Justice La Forest, held that the Canadian Charter of Rights and Freedoms is not applicable to universities because they are not part of the government apparatus. However, if the Charter were to apply to universities, Mr Justice La Forest believes that mandatory retirement would infringe section 15 (1) of the Charter because it constitutes a form of discrimination, namely discrimination based on age, which is a ground listed in section 15 (1) of the Charter. Mr Justice La Forest believes that the policy of mandatory retirement is justified under section 1 of the Charter.

Madam Justice Wilson dissented. She believes that the Charter is applicable to universities.

The policy of mandatory retirement is discriminatory, according to Madam Justice Wilson. She declares: "Indeed, one would be hard pressed to construe any rule prohibiting employment past a certain age as anything other than a clear example of direct discrimination".[639]

Such discrimination is not justified under section 1 of the Charter.

Judges Wilson and L'Heureux-Dubé dissented. Mr Judge L'Heureux-Dubé is of the opinion that there is no reasonable justification for the establishment of a policy of mandatory retirement at the age of 65. It constitutes absolute and generalised discrimination.

(13) Sections 16 to 22: language rights

In the MacDonald[640] and Société des Acadiens[641] cases, a distinction was made between classic rights and language rights, and the Court did not miss the opportunity to emphasise the role of the legislator in the political arena.

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638 *McKinney v. University of Guelph, [1990] 3 S. C. R. 229.*

639 *Ibid., p. 389.*

640 *MacDonald v. City of Montreal, [1986] 1 S. C. R. 460.*

641 *See above, footnote 121.*

Undoubtedly, as provided for in section 16 (3) of the Charter, bilingualism can be established in stages. Some lawyers have remained unsatisfied here, in anticipation that the language rights would escape the override clause of section 33 because of their great importance in the Canadian context, even though fundamental rights are subject to this clause.

(14) Section 23: minority language education rights

In the case of Quebec Association of Protestant School Boards[642]*, the Supreme Court concluded that section 73 of Law 101 redefining the circle of persons having the right to be taught in the minority language is inconsistent with section 23.*

In the Mahé[643] *decision, the Supreme Court affirmed its judgment on Law 101*[644]*. It reiterated that section 23 of the Charter is of a remedial nature and that in this spirit that it must be interpreted in a broad and liberal way.*

The major guiding principle derived from the Mahé[645] *judgment is that the Supreme Court recognises the right of the group using one of the official languages as a minority to manage and control the teaching language, the contents of the educational programmes and the facilities of the minority. The degree of management and control may vary as a function of the number of students actually registered. Management and control powers will be absolute when "the numbers warrant"; they will be relative, i.e. there would not necessarily be a homogeneous school board or facility if the number of students registered is too small.*

Chief Justice Dickson, on behalf of the Court, defined the minimum threshold of section 23 of the Charter as follows:

> *"Section 23 requires at a minimum, that "instruction" take place in the minority language: if there are too few students to justify a programme which qualifies as "minority language instruction", then section 23 will not require any programmes to be put in place."*[646]

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642 *See above, footnote 75.*

643 *Mahé v. Alberta, [1990] 1 S. C. R. 342.*

644 *See above, footnote 75.*

645 *See above, footnote 205.*

646 *Ibid., p. 367.*

The higher level is the following:

> *" ... the entire term "minority language educational facilities as setting out an upper level of management and control."*[647]

Each case must be assessed individually as the Supreme Court does not identify a fixed number or a magic figure to meet the criterion "where numbers warrant".

Section 23 of the Charter consequently constitutes a general right to instruction in the language of the minority, the purpose of which, as affirmed by the Supreme Court : "... is to preserve and promote minority language and culture throughout Canada."[648]

The Reference re the Manitoba Public Schools Act[649] *fits into the logic of the Mahé*[650] *judgment. Chief Justice Lamer, on behalf of the Court, reiterates the great principles laid down by former Chief Justice Dickson.*

In the case at instance, the Court affirmed that the number of students in Manitoba is high enough to warrant the creation of an autonomous school board managed and controlled by the French-speaking linguistic minority. And the Court affirmed that Manitoba must establish without delay an efficient system to enable French-speakers to fully exercise their rights.

But the Supreme Court refrained from describing the contents of the law which must be adopted by Manitoba with a view to fulfilling its constitutional obligations because of the discretionary power of the governments in the choice of the institutional means aimed at the implementation of the said obligations.

(15) Section 24: Enforcement

a) section 24 (1)

In the Cuddy Chicks Ltd.[651] *case, the Supreme Court found that administrative tribunals have the competence to declare a law unconstitutional. They are competent tribunals.*

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647 *Ibid., p. 370.*

648 *Ibid., p. 371.*

649 *Reference re the (Manitoba) Public Schools Act, [1993] 1 S. C. R. 839.*

650 *See above, footnote 205.*

In the Schachter[652] judgment, the Supreme Court formulated the theory of broad interpretation ("reading in"). This theory allows courts to broaden the scope of statutes by way of interpretation. Broad interpretation is useful in ensuring respect for the purposes of the Charter. It serves to reduce judicial interference in those parts of a statute which are not incompatible with the Charter.

Some factors must be taken into consideration in order to determine whether broad interpretation is appropriate in a given case. These factors are the following: the corrective measure; the interference with the legislative purpose; the change of the meaning of the remainder of the text; the meaning of the remaining part.

b) Section 24 (2)

Section 24 (2) of the Charter empowers a court to exclude evidence in so far as its admission in the proceedings would bring the administration of justice into disrepute. The Collins[653] judgment is the benchmark decision on the scope of section 24 (2) of the Charter. The Supreme Court lists the criteria to be applied which are still valid today.

The bringing of the administration of justice into disrepute is, according to the Court, made up of three groups of factors. These are: (1) fairness of the hearing (comparison between the nature of the evidence obtained and the nature of the right violated); (2) the seriousness of the violation of the Charter (was the violation committed in good faith? ; was it a simple procedural defect or a flagrant and intentional violation?; was the violation motivated by a situation of emergency or by fear that the evidence would be destroyed?; would it have been possible to obtain the evidence by other means?; in a way consistent with the Charter?); (3) Does the possibility of excluding the evidence obtained in a manner inconsistent with the Charter bring the administration of justice into disrepute (is the interest in discovering the truth greater than the integrity of the judicial system?).

(16) the interpretative provisions

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651 *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board), [1991] 2 S. C. R. 5.*

652 *Schachter v. Canada, [1992] 2 S. C. R. 679.*

653 *R. v. Collins, [1987] 1 S. C. R. 265.*

a) Section 25

The aboriginal peoples took care, at the time of repatriation, to have expressly written in the Charter, that the Charter would not prejudice their rights and freedoms. This section relates to collective rights.

b) Section 26

The Canadian Charter of Rights and Freedoms does not invalidate quasi-constitutional charters in so far as they are not inconsistent with it: this is the purpose of section 26.

In the Singh[654] judgment, Mr Justice Beetz writes on the subject of section 26 of the Charter:

> *"Thus, the Canadian Bill of Rights retains all its force and effect, together with the various provincial charters of rights. Because these constitutional or quasi-constitutional instruments are drafted differently, they are susceptible of producing cumulative effects for the better protection of rights and freedoms. But this beneficial result will be lost if these instruments fall into neglect. It is particularly so where they contain provisions not be found in the Canadian Charter of Rights and Freedoms and almost tailor-made for certain factual situations such as those in the cases at bar."[655]*

c) Section 27

The purpose of section 27 is obviously to illustrate that if Canada is a bilingual country at the federal level and at the level of some provinces, it has nevertheless inherited a multicultural heritage. In this way, in the Big M Drug Mart Ltd.[656] judgment, the Supreme Court declared that the Lord's Day Act violates freedom of religion and is not consistent with the preservation and enhancement of the multicultural heritage of Canadians under section 27.

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654 *See above, footnote 74.*

655 *Ibid., p. 224*

656 *See above, Footnote 79.*

d) Section 28

This section lays down the equality of men and women. The notwithstanding clause in section 33, which applies to section 15, cannot, in our opinion, apply to the equality of the two sexes: no legislator may enact a measure violating the equality of the sexes. In our opinion, even section 1 of the Charter is excluded by the unequivocal wording of section 28 which begins with the following words: "Notwithstanding anything in this Charter ...".

e) Section 29

In the reference on Bill 30 of Ontario[657]*, the Court affirmed that the constitutional guarantees enshrined in section 93 of the Constitution Act, 1867 constitute a "small bill of rights" and that they escape the application of the Canadian Charter of Rights and Freedoms. Section 93 is a part of the compromise of 1867. This is also in the case of religious rights which were subsequently granted by the provinces under section 93.*

Section 29 of the Charter provides that nothing in this Charter abrogates or derogates from any rights and privileges guaranteed under section 93 to separate or other denominational schools.

f) Section 30

The interpretation of section 30 of the Charter does not raise serious problems. This is at least the opinion of authors Swinton[658] *and Tassé*[659]*. Mr Tassé stipulates that:*

> *"[This section] ... is positioned outside the main body of the Charter in that it stipulates that the rights and freedoms guaranteed by the sections which precede it apply to the Canadian state in its entirety at both federal and provincial levels."*[660]

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[657] *Reference: An Act to Amend the Education Act, [1987] 1 S. C. R. 1148.*

[658] *K. E. SWINTON, "Application de la Charte canadienne des droits et libertés" in G.-A. BEAUDOIN and W.S. TARNOPOLSKY (ed.), Charte canadienne des droits et libertés, Montreal, Wilson-Lafleur, 1982, p. 51 and following.*

[659] *R. TASSÉ; "Application of the Canadian Charter of Rights and Freedoms" in G.-A. BEAUDOIN and E. RATUSHNY (ed.), Canadian Charter of Rights and Freedoms, 2nd ed., Montreal , Wilson-Lafleur, 1989, p. 65.*

[660] *Ibid., p. 67.*

g) Section 31

It is interesting to observe that, contrary to the United States, where the constitutional amendments occasionally empower Congress to legislate in order to implement them, this is not the case in Canada, under the Charter. This is why Mr Roger Tassé writes:

> *"The Canadian Parliament, on the other hand could not rely on the Charter to claim that it possessed legislative authority outside its normal jurisdiction in order to ensure that provincial obligations are fulfilled."*[661]

CONCLUSION

Canada has gone through several phases. At the beginning of Confederation, in 1867, it chose not to include a Charter of Rights in the Constitution; but the rights and freedoms were not however less protected. In 1960, it adopted quasi-constitutional protection. In 1982, a Charter of Rights and Freedoms was enshrined in the Constitution of Canada. This Charter plays an exceptional role. I think that we are on the right path.

Finally, let us say that the Supreme Court is correct in emphasising that -- even though it is the guardian of the Constitution -- it is not exclusively its role to develop rights and freedoms. The legislator must also do his share.

APPENDIX

ARTICLES AND PUBLICATIONS BY GÉRALD-A. BEAUDOIN ON THE PROTECTION OF FUNDAMENTAL RIGHTS

1) La Cour suprême et la protection des droits fondamentaux, Canadian Bar Review, 1975, pp. 675-714.
Reprinted in Essai sur la Constitution, by G.-A. BEAUDOIN, University of Ottawa Press, 1979, pp. 279-316.

2) La protection de l'enfant en droit constitutionnel au Canada et au Québec: une vue générale, Revue de Droit de Sherbrooke, 1978.

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[661] *Ibid., p. 80.*

Reprinted in Essai sur la Constitution, by G.-A. BEAUDOIN, 1979, pp. 317-330.

3) *La Cour suprême du Canada, The Supreme Court of Canada, Introduction, Collective writings under the direction of G.-A. BEAUDOIN, Publ. Yvon Blais, 1986, pp. 9 - 15.*

4) *Vues canadiennes et européennes des droits et libertés, Collective writings, under the direction of G.-A. BEAUDOIN. Chapter 2: De la suprématie de la Charte canadienne des droits et libertés et des autres chartes sur le droit canadien, fédéral ou provincial, Journées strasbourgeoises, Publ. Yvon Blais Inc., 1989, pp. 23 to 41.*

5) *G.-A. BEAUDOIN, La Constitution du Canada, Wilson & Lafleur, 1990, pp. 671 to 809. (Chapter XXIII).*

6) *La Charte dix ans après, The Charter: Ten Years Later. Collective writings under the direction of G.-A. BEAUDOIN, Publ. Yvon Blais, 1992, pp. 203 - 213.*

7) *Introduction, 1992 Ottawa Law Review - Revue de droit d'Ottawa, p. 1 and following.*

8) *La protection constitutionnelle des minorités au Canada: un apercu, Mélanges Germain Brière, Collective writings, under the direction of Ernest Caparros, Collection bleue, Wilson & Lafleur, 1993, pp. 779-805*

The constitutional court of the Russian Federation and the protection of the (constitutional) fundamental rights and freedoms of citizens - Paper by Mr Nikolai V. VITRUK

Russia

The fact that the rights of man and the citizen are respected and protected is an important sign of the rule of constitutional law, and of law and order in general, in society and in the state.

It is no secret that totalitarianism denied political and ideological pluralism, limiting and mutilating the rights of citizens by subordinating them to the interests of the state, society, the community. The destruction of the totalitarian system in the post-socialist states is therefore a matter, first and foremost, of firmly establishing the principle in constitutional law of the priority of human rights and freedoms over other universal values, of radically reforming the legal machinery of the state to guarantee and protect these rights and freedoms, and of creating new institutions to monitor and protect human rights (an ombudsman on human

rights, for example). Constitutional courts have a special role to play in protecting the fundamental rights and freedoms of man and of the citizen in post-totalitarian states.

In Russia the Constitutional Court was founded in 1991, on the basis of Article 119 of the 15 December 1990[662] and 24 May 1991[663] versions of the Constitution of the RSFSR.

It was regulated until 7 October 1993[664] by the RSFSR law "on the Constitutional Court of the RSFSR".[665]

The new Constitution of the Russian Federation, adopted in the referendum of 12 December 1993, defined the membership and powers of the Constitutional Court of the Russian Federation, which is now regulated by the Federal Constitutional law "on the Constitutional Court of the Russian Federation", which came into force on 23 August 1994.[666]

The purpose of the Court is to ensure the protection of the constitutional rights and freedoms of the citizens of Russia, and other natural persons, at their petition. But the grounds and procedure for examining such cases under the provisions of the Constitution of the RSFSR and the Constitution of the Russian Federation of 1993, and of the corresponding laws of the Constitutional Court of the Russian Federation, differ.

Under the previous law the Constitutional Court had the right to deal with cases concerning the constitutionality of the way in which the law was applied, at the request of the citizens and legal entities concerned, when the decision against which they appealed had acquired a customary or recurrent nature in legal practice. At the same time, the Constitutional Court had the right to lump together identical cases in a single procedure and extend its corresponding decisions to subsequent identical cases, thereby to all intents and purposes blocking the

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662 *Official report of the Congress of the Peoples' Deputies and the Supreme Soviet of the RSFSR.1990. No. 29, Art. 395; No. 22, Art. 776.*

663 *Offical report of the Congress of the Peoples' Deputies and the Supreme Soviet of the RSFSR.1991. No. 44, Art. 1450.*

664 *See Decree No. 1612 of the President of the Russian Federation, dated 7 October 1993 "on the Constitutional Court of the Russian Federation" (compendium of acts of law of the President and the Government of the Russian Federation.1993. No. 41, Art. 3921).*

665 *Official report of the Congress of the Peoples' Deputies and the Supreme Soviet of the RSFSR.1991. No. 19, Art. 621; No. 22, Art. 776.*

666 *Compendium of the laws of the Russian Federation.1994. No. 13, Art. 1147.*

unconstitutional practice concerned, even when it had its roots in law (pending the repeal of the offending law).

The advantage of this procedure for examining the appeals of individual citizens lay in the possibility of lodging an appeal against legal practices of the Court and State organs based not only on the legislation in force but also on the absence of any law governing this or that aspect of the Constitutional Rights of the citizen.

The Constitutional Court examined 8 appeals lodged by individual citizens in 1992-1993 and declared the following practices in the Russian Federation unconstitutional[667]: dismissing workers when they reach retirement age, which it qualifies as discrimination (decision of 4 February 1992)[668]; laying down restrictions on appeals against unlawful dismissal; the application of disciplinary sanctions to law officers; the expulsion of squatters with the authorisation of the public prosecutor, with no right of appeal practices, it considers to restrict the right of citizens to legal protection (judgments of 23 June 1992, 5 February and 16 February 1993)[669]; limiting the compensation for damages to which people are entitled when reinstated following unlawful dismissal (judgment of 27 January 1993.[670]

The Constitutional Court has confirmed the principle of equality between the state and the citizen in contractual relationships, acknowledging the constitutionality of citizens' demands that the state fulfil its commitments in respect of special cheques for the purchase of motor cars and also regarding the indexation of citizens' incomes and savings in cash (judgments of 9 June 1992 and 31 May 1993).[671]

These decisions of the Constitutional Court have the value of principles. They testify to the unconstitutionality of late payment of salaries, pensions and other monies due, and of failure by the state to honour its commitments to citizens concerning special cheques, bonds and other values, the indexation of cash savings and amounts insured, and compensation for material damages.

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667 *See summaries of Constitutional Court decisions in the Bulletin of Constitutional Law. Council of Europe. Stasbourg.1994. No.1, p.54-57.*

668 *Official report of the Congress of the Peoples' Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation. 1992. No.13, Art. 669.*

669 *Ibidem. 1992. No. 30, Art. 1809; 1993. No. 12, Art. 445.*

670 *Ibidem. 1993. No. 14, Art. 508.*

671 *Ibidem. 1992. No. 28, Art. 1634; 1993. No. 29, Art. 1142.*

Fully in keeping with the provisions of the International Covenant on Political and Civil Rights and of the Russian Constitution, the Constitutional Court has actively defended the political rights and freedoms of Russian citizens with regard to the formation of political parties and movements, freedom of speech and of the press and the right to referendum (judgments of 30 November 1992, 12 February 1993, 20 and 21 April 1993 and 9 and 27 May 1993.[672]

Amongst the shortcomings of the former procedure for examining individual appeals it should be noted that while acknowledging the unconstitutional nature of the strict application of certain laws (which is tantamount to acknowledging the unconstitutionality of the laws themselves), the Constitutional Court is powerless to repeal the laws concerned or any other legislation, this being the prerogative of the legislative bodies that enacted them in the first place.

The effect has been to delay the repeal of unconstitutional provisions of the legislation in force (the legislative bodies concerned may also ignore the decision of the Constitutional Court, thus placing themselves in conflict with the judiciary).

This has also made it difficult to interpret the notion of the "habitual nature" of the way in which the law is applied, leading to conflicts and legal uncertainty: while Constitutional Court decisions declared the practice of applying the law unconstitutional, the ordinary courts were obliged to continue to apply the law until it was repealed, in spite of the fact that the provisions of the Constitution take precedence over those of the law.

The new Constitution of the Russian Federation and the Federal Constitutional Law "on the Constitutional Court of the Russian Federation" have made changes regarding the theory and procedure for protecting the fundamental rights and freedoms of citizens.

By virtue of para. 4 of Art.125 of the Constitution of the Russian Federation, on receiving complaints about violations of the constitutional rights and freedoms of citizens the Constitutional Court checks the constitutionality of the law applied or to be applied in a particular case, in accordance with the procedure established by Federal law. The Federal Constitutional Law "on the Constitutional Court of the Russian Federation" (Chapter XII, Articles 96-100) states that complaints of violation of constitutional rights and freedoms by the law may be "individual or collective"; the complaint may be lodged by the citizens whose rights and freedoms have been violated by a law, but also by their associations and by other persons or organs mentioned in the Federal Law.

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[672] *Ibidem. 1993. No. 11, Art. 400; 1993. No. 9, Art. 344; 1993. No. 18, Art. 653; 1993. No. 30, Art. 1182.*

In the event that a case of violation of citizens' constitutional rights and freedoms by a law is referred to the Constitutional Court, the court or other body examining the particular case in which the offending law has been applied or is to be applied, may suspend the proceedings until the Constitutional Court of the Russian Federation reaches its decision (para.2 of Article 98 of the Federal Constitutional Law "on the Constitutional Court of the Russian Federation").

Should the Constitutional Court find a law or certain of its provisions incompatible with the Constitution of the Russian Federation, they lose force immediately after the Constitutional Court passes judgment, and the particular case in connection with which the constitutionality of the law was examined is subject to revision by the judge or another competent body, according to the general provisions of the law (para. 6 of Article 125 of the Constitution of the Russian Federation, para.3 of Article 79, para. 2 of Article 100 of the Federal Constitutional Law "on the Constitutional Court of the Russian Federation").

The ordinary courts may also detect instances of violations by the law of constitutional rights and freedoms of citizens in the course of their proceedings. Should this occur, the court concerned invites the Constitutional Court of the Russian Federation to check the constitutionality of the law in question (para. 4 of Article 125 of the Constitution of the Russian Federation, Article 101 of the Federal Constitutional Law "on the Constitutional Court of the Russian Federation"). When a court decides to refer a matter to the Constitutional Court of the Russian Federation in this way, proceedings in the case, or the execution of the decision returned by the court, are suspended pending the decision of the Constitutional Court (Article 103 of the Federal Constitutional Law "on the Constitutional Court of the Russian Federation"). The legal consequences of the decision reached by the Constitutional Court are the same as in the case of complaints lodged by citizens against violations by the law of their constitutional rights and freedoms.

On the basis of the Federal Constitutional Law "on the Constitutional Court of the Russian Federation" the Constitutional Court examined 7 cases in 1995 of alleged violation by the law of the constitutional rights and freedoms of citizens, five of the complaints being lodged by individuals, one by a trade union and another by a municipal court. Decisions of the Constitutional Court in these matters have been designed to eliminate discrimination in civil rights, tenants' rights and the labour and procedural rights of citizens, and to guarantee legal protection of citizens' rights and freedoms in accordance with Article 46 of the Constitution of the Russian Federation.

A number of problems arise with regard to the protection of citizens' fundamental rights and freedoms by the Constitutional Court.

1. The constitutional rights and freedoms of citizens are guaranteed not only by the Constitutional Court but also by all the other courts - ordinary courts, arbitration courts, etc - which, like the Constitutional Court, are independent and subordinate only to the Constitution and to Federal law (first paragraph of Article 120 of the Constitution of the Russian Federation). Since the Constitution of the Russian Federation has supreme legal force and direct effect and is applicable on the entire territory of the Russian Federation (paragraph 1 of Article 15 of the Constitution), the problem of competition between the Constitutional Court and the other courts requires serious examination based on the legislation in force, to develop machinery for eliminating possible contradictions in the ways in which constitutional standards are applied. An atmosphere of mutual understanding and co-operation must be created within the system in the name of the protection of human rights.

The Constitutional Court is not an appeal court or a hight court supervising the other courts. The Constitutional Court of the Russian Federation considers only matters of law. In the administration of constitutional justice it refrains from establishing and examining the actual circumstances of the case when this falls within the competence of other courts and bodies (paragraphs 2 and 3 of Article 4 of the Federal Constitutional Law "on the Constitutional Court of the Russian Federation"). The Constitutional Court has exclusive power to verify the constitutionality of laws. All other instruments (Presidential decrees, government decisions, etc) may be checked quite independently by any court for conformity with the provisions of the Constitution concerning the rights and freedoms of citizens, just as the question of the direct application of the provisions of the Constitution and of Federal law is resolved in a perfectly independent manner.

2. The protection of fundamental rights and freedoms by the Constitutional Court of the Russian Federation comprises certain characteristic features because of the federal nature of the Russian state. Under Article 71, paragraph (c) of the Constitution of the Russian Federation, "the Russian Federation has jurisdiction over the regulation and protection of human and civil rights and freedoms; citizenship in the Russian Federation; and the regulation and protection of the rights of national minorities". And under paragraph 1 (b) of Article 72 of the Constitution, "the protection of human and civil rights and freedoms, the protection of the rights of national minorities and maintaining law and order and public security" fall within the joint jurisdiction of the Russian Federation and the subjects of the Federation. The similarity between these texts points to a need for clearer definition of the powers and jurisdiction of the state itself and of the subjects of the Federation in respect of the regulation and protection of the rights and freedoms of the citizen in Russia. A clear definition of ordinary court and

constitutional court jurisdictions at the level of the Federation and its constituent parts.

The case examined by the Constitutional Court of the Russian Federation concerning the constitutionality of Article 42, paragraph 2 of the law of the Chuvash Republic (version of 26 August 1994) governing the election of the members of the Council of State (Parliament) of the Chuvash Republic, at the request of the President of the Chuvash Republic, is of particular interest in this respect. One provision of the law was declared in contradiction with the Constitution of the Russian Federation and amended while the elections were already in progress, leading to a violation of the principle of equal electoral rights.[673] *Since the adoption of this law falls exclusively within the sphere of competence of the Chuvash Republic as a subject of the Russian Federation, verification of its compatibility with the Constitution of the Chuvash Republic is a matter, in our opinion, for the Supreme Court of the Chuvash Republic (until the Republic acquires a Constitutional Court). And only after every possible channel within the Republic has been exhausted is the President of the Chuvash Republic entitled to refer the matter to the Constitutional Court of the Russian Federation to examine the substance. This is what one might call a case of "jumping the gun".*[674]

3. Re-establishing the violated rights and freedoms of citizens poses a serious problem, partly because the state lacks the necessary material and financial resources and partly because of the slow pace at which parliament makes the necessary amendments and additions to the legislation. The decision of the Constitutional Court of the Russian Federation of 15 June 1995 in the case brought by citizens G I Chouljenko and S A Mazanov is characteristic in this respect:[675] *it confirmed its own judgment of 27 January 1993 declaring unconstitutional the legal practice of limiting the period of compensation for forced absence from work in the event of unlawful dismissal, based on the provisions of Article 213 paragraph 2 of the Labour Code of the Russian Federation. The Constitutional Court of the Russian Federation found that its judgment of 27 January 1993 had not been put into practice. The courts continued as in the past to collect compensation for a period of one year, in keeping with the provisions of Article 213 paragraph 2 of the Labour Code of the Russian Federation, even though the duration of citizen Chouljenko's forced absence from work was almost 4 years and citizen Mazanov's 12 years. The Parliament of the Russian Federation has not made the necessary amendment to the Labour Code.*

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673 *Rossiyskaïa gazetta (Russian gazette). 13 July 1995.*

674 *See our personal opinion on this matter (Rossiyskaïa gazetta, 14 July 1995).*

675 *Vestnik (Messenger) of the Constitutional Court of the Russian Federation of 1995. No. 2-3, pp 66-70.*

Point 3 of the judgment of the Constitutional Court of the Russian Federation states: "the Federal Assembly of the Russian Federation, on the basis of Articles 46 and 53 of the Constitution of the Russian Federation, shall define the conditions of the effective reinstatement of the rights of, and compensation for the damages sustained by, persons dismissed unlawfully, eliminating the lacunae in the existing legislation, which the Constitutional Court of the Russian Federation is not empowered to amend". There is no guarantee, however, that this question will be examined in the near future. It would evidently be wise, in the Federal Constitutional Law on the Constitutional Court of the Russian Federation or in another Federal law, to provided additional guarantees that the decisions of the Constitutional Court of the Russian Federation will actually be implemented by the legislator.

The protection of constitutional rights and freedoms by the Constitutional Court of the Russian Federation may be achieved indirectly (with a different degree of effectiveness) when it examines other types of cases, for example when it checks the constitutionality of the instruments and the treaties mentioned in Article 125, paragraph 2, sub-paragraphs (a),(b),(c),(d),(e) of the Constitution of the Russian Federation; when resolving disputes on authority between the state government bodies mentioned in Article 125, paragraph 3, sub-paragraphs (a),(b),(c) of the Constitution; or when interpreting the Constitution (Article 125, paragraph 5 of the Constitution of the Russian Federation).

Almost all the cases heard by the Constitutional Court of the Russian Federation concern the protection of citizens' constitutional rights and freedoms in one way or the other. In examining all sorts of cases the Constitutional Court bases its action on the provisions of international legal texts on human rights, so it is able, when judging cases on the basis of the Constitution, to respect the democratic norms and standards recognised by the world community.

The judgment of the Constitutional Court of the Russian Federation of 31 July 1995 in the so-called "Chechnya Affair", concerning the constitutionality of 3 decrees of the President of the Russian Federation and the decision of the Government of the Russian Federation, determined that in 1991-94, on the territory of the Republic of Chechnya, a subject of the Russian Federation, there was a mass violation of human rights; the measures taken by the President and the Government of the Russian Federation, including the use of armed forces, were designed to preserve the integrity of the Russian state and to guarantee the rights and freedoms of citizens; the implementation of these measures led to cases of violation of the protocol to the Geneva Conventions of 12 August 1949 relating to the protection of victims of non-international conflicts (Protocol II).

The ruling of the Constitutional Court acknowledged that the government order violated a series of constitutional rights and freedoms, and stressed in particular that "in accordance with Articles 52 and 53 of the Constitution of the Russian Federation and with the International Covenant on Civil and Political Rights (Article 2, paragraph 3) effective means must be provided for the legal protection of citizens against all violations, crimes, and abuses of power, and for the compensation of victims for any damage sustained".[676]

The events concerned and the action taken by the President and the Government of the Russian Federation in using the armed forces to settle an internal problem of the Republic of Chechnya (leading to substantial human rights violations) were interpreted in a much harsher light in the personal opinions of several judges of the Constitutional Court (including the author of this report).[677]

There is one more aspect of the work of the Constitutional Court, or rather its secretariat, which should not be neglected.

There is no clear understanding as yet in Russian society of what the Constitutional Court is, what place it occupies in the judicial system, what its powers are and what it can and cannot do. A lack of familiarity with the legal system amongst civil servants and the general population was part of the heavy legacy of the totalitarian regime. Citizens often consider the Constitutional Court as a supreme court of supervision, appeal or control (resulting in a large number of appeals which tend to distract the court from its principal task). In appealing court rulings before the Constitutional Court people ask it to re-examine the facts of the case, which the Constitutional Court is forbidden to do.

Tens of thousands of appeals of this type to the Constitutional Court of the Russian Federation are examined by specialists on the machinery of the Court and give rise to detailed reports; in many cases the appeals are then referred to the competent bodies for re-examination of the merits.

All this points to another problem: the serious need to educate civil servants and the population at large on the role of the Constitutional Court in protecting fundamental rights and freedoms.

More than ever Russia is in need of an independent and efficient constitutional justice system. Strict compliance with the Constitution of the Russian Federation and the Federal Constitutional Law "on the Constitutional Court of the Russian

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676 *See: Rossiyskaïa gazeta, 11 August 1995.*

677 *Ibidem.*

Federation", is a guarantee that the Constitutional Court of the Russian Federation will continue to protect the principles of respect for human rights and freedoms, the rule of law and constitutional law recognised by the international community.

Protection of fundamental freedoms and rights before the constitutional court during time of war - Paper by Mr Nedjo Milićević

Bosnia-Herzegovina

I

Besides providing for political, economic and social measures, law represents one of the most important means for accomplishing equality and for protecting the rights of the individual. The existence of law does not necessarily guarantee democracy, because it can itself be undemocratic, but it is at the same time beyond any doubt that there is no democracy without law nor without the rule of law.

Being aware of such a significance of law, and starting from the conviction that fundamental human rights and freedoms are universal values, the international community has been committed to the more all-inclusive standardising of social relations by international law instruments as obligatory rules of behaviour for all the members, aiming at harmonising relations among people, collectivities and states.

The increasing significance and social function of law has been expressed by the international community, first of all through the two fundamental principles in the preamble of the "Universal declaration of human rights", one of the most significant international documents. These principles are: firstly, that it is essential that human rights should be protected by the rule of law and the secondly, that it is essential that people should not be forced to seek to rebellion against tyranny and oppression as a last resort. These principles are, in fact, also an explanation for the fact that in the overall scheme of international law, human rights and fundamental freedoms are separate and emphasised as pronounced priorities of the first order.

In history, and in the contemporary world, there are no examples of a democratic political system which has not adopted, respected and implemented the principles of constitutionality and legality as the form of rule of law. These principles represent the historic result of transforming power into law and submissiveness into duty. It is not possible without them to set, and even less to accomplish, the traditional demand of democracy to transform a political conflict into a legal dispute nor to establish that a way of resolving that dispute should not be sought in the ratio of forces but in application of previously established rules of behaviour.

Human beings are born free and equal in dignity and in rights. The following are the fundamental principles on which are based all requests for respecting human rights and fundamental freedoms in international law instruments: human dignity, equality, the enjoyment of the same rights and the same possibilities by all people, and the prevention and elimination of all aspects of discrimination. All individuals and all collectivities have the right to consider themselves different and to demand that others recognise such differences, but at the same time they have an obligation to ensure that this quality of being different in the way they live and the right to be different from others should in no case serve as an excuse for a legally determined or real discriminatory practice.

There is no legitimate power of law if a society is indifferent towards justice and human freedoms and rights. Constitutionality and legality are, first of all, institutions for the protection of human rights and freedoms established by a constitution and, consequently, it could be then affirmed with reason that their protection is the main justification for the existence of a constitutional judiciary. Regarded in principle, all aspects of constitutional court competences are connected to the function of protecting fundamental human rights and freedoms, particularly where, as in many countries, citizens have access to direct constitutional judicial protection. In this way the number and variety of legal institutions and instruments will offer greater guarantees against violations of the law and the constitution as these are eliminated efficiently over time. Inclusion of a constitutional court in that system, due to its being competent and authoritative, expresses both the legal and the political attitude of the constitution-framer that the protection of fundamental freedoms and rights established in a constitution is of primary social significance.

II

While democratic and developed States in Europe and the world persistently make efforts to versatilely promote and protect achievements of civilisation and high standards of contemporary international law in the domain of the protection of fundamental human rights and freedoms, Bosnia and Herzegovina has been confronted as a young State with the cruel reality that both the gaining of independence and its international legal recognition almost coincided in time with the breakout of war on its territory. This brutal war has been raging for almost four years and is expressed in all manner of terrible destruction, including mass genocide and ethnic cleansing.

The State legal structure of Bosnia and Herzegovina obtained at the moment of independence was inappropriate for the qualitatively changed State situation, and the war made it impossible either to define a new adequate State structure for

these new conditions and for these new characteristics, or to determine these at constitutional level. That is why the situation in Bosnia and Herzegovina is such as it is, even now, so that the larger part of the territory of the Republic of Bosnia and Herzegovina is not under the power of the legal State authorities. In the areas where that power exists, there are still valid not only the constitutional regulations enacted after the gain of independence, but also many constitutional solutions from the previous period. Furthermore, in the area of the Croatian Republic "Herzeg-Bosnia", there remain the so-called "existing administrative arrangements" that were in force at the moment of promulgation of the Constitution of the Federation of Bosnia and Herzegovina.

Our present reality is such that there exists both the Constitution of the Republic of Bosnia and Herzegovina and the Constitution of the Federation of Bosnia and Herzegovina (which has been established by the Constitution as a "transformed internal structure of the territories with a majority of Bosniac and Croat population in the Republic of Bosnia and Herzegovina"). In conditions of war and the objectively drastically torn and blocked legal system, it is difficult to meet high international standards on democracy, human rights and fundamental freedoms. However, the strongest engagement in that direction is not only the unavoidable obligation but also the condition for preserving the statehood of Bosnia and Herzegovina. The legal and legitimate actions of the State authorities in Bosnia and Herzegovina, and the related conviction of both our citizens and the international community, that constitutionality and legality are protected here, represent some of the most effective means in a struggle for preserving its independence and integrity. In our circumstances, constitutional and legal actions primarily, and even first of all, should mean that all those who have committed crimes in this brutal war must assume responsibility for their actions. To accept otherwise would mean that both crime and the worst discrimination might be committed without punishment. Besides, we must keep on telling the truth to everyone that without adequate punishment of the criminals in these areas, peace and any prospect of prosperous conditions for living can hardly be expected.

Care about respecting principles of legality and legitimacy has been first of all addressed to the State authorities, that is in the sense both that rights should be protected and ensured and especially that they should not be misused. This is because the most dangerous are those violations of law committed by those who are anyway, and above all, in charge of implementing and protecting these rights, these being the State authorities. The higher the level at which these violations of law are committed (in respect of the hierarchy of legal instruments) and the more important the State body which commits them (in respect of the hierarchy of State authorities), the more proportionally damaging are the consequences for constitutionality and legality, because then it does not only generate an illegal situation, but also encourages all others to behave in that way. The conclusion

follows from this that the more dangerous are those violations of law when they are committed by a legislative body of the State authorities by enacting unconstitutional laws, because this gives rise to a situation in which the actions contrary to the Constitution and to the international law instruments have the appearance of legality.

III

Under the Constitution of the Republic of Bosnia and Herzegovina, there exists the Constitutional Court of Bosnia and Herzegovina, whereas under the Constitution of the Federation of Bosnia and Herzegovina, there exists the Constitutional Court of the Federation. Within the framework of their competences, these Courts are not empowered to protect fundamental freedoms and rights on the basis of a constitutional complaint. However, obviously as a consequence of the fact that the war and the sufferings of war have drastically disordered and endangered fundamental freedoms and rights, the Constitution of the Federation of Bosnia and Herzegovina provides for a special judicial body to protect these rights and freedoms – the Human Rights Court.

The competence of the Human Rights Court relates to any question concerning constitutional or other legal provisions relating to human rights or fundamental freedoms or to any of the instruments listed in the Annex to the Constitution of the Federation (instruments for the protection of human rights having the legal power of constitutional provisions). Such a competence raises some questions which have to be answered, particularly, by analogy, when having in mind the Constitutional Courts' competence in connection with constitutional complaints. In any event, the Court has not yet started to work, and pursuant to the Constitution it is responsible for regulating its own proceedings and organisation.

Besides protection of freedoms and rights before ordinary and administrative courts, many countries also provide for their direct protection before the constitutional court, although they may do so in a number of different ways. In some of them, constitutional judicial protection extends to all freedoms and rights guaranteed by the Constitution, while in others it is limited only to certain fundamental rights and freedoms enumerated in the Constitution or in a separate law. When one considers the Human Rights Court of the Federation of Bosnia and Herzegovina, this competence extends to "any question" concerning respect of human rights or fundamental freedoms, as well as to "any question" relating to "any of the instruments for protection of human rights referred to in the Annex to the Constitution", which enumerates 21 declarations, conventions, recommendations and other instruments of the United Nations and other international organisations.

One more competence of the Human Rights Court of the Federation of the Republic of Bosnia and Herzegovina deserves attention. Namely, according to the Constitution of the Federation, the Constitutional Court, the Supreme Court or a Cantonal Court may, at the request of any party to an appeal pending before it, or at its own initiative in relation to such an appeal, address to the Human Rights Court a question arising out of the appeal if the question relates to any matter deriving from that Court's competence. The reply of the Human Rights Court is binding on the requesting Court.

As far as the authorisation for starting proceedings is concerned, the Constitution provides that each party to an appeal in which another court of the Federation or a Canton has pronounced a judgment that is not subject to any other appeal, may appeal such judgment to the Human Rights Court on the basis of any question within the frame of its competence for a reason other than the lapse of a time limit for which the party bringing the appeal is responsible. The right or possibility of taking an appeal to the Human Rights Court has been provided also for cases when proceedings in the other Court of the Federation or a Canton have been pending for an unduly long period, subject to the Court's consideration of whether the delay in the other court has been unjustified and whether the subject of the appeal is within its competence.

IV

Since the effectiveness of a legal system, especially in the domain of human rights protection, primarily depends on the overall stability of social relations, the possibility of protecting these rights effectively in circumstances of war has been very limited. A special problem is also presented by those territories which are outside jurisdiction of the State authority. Rights have been most drastically violated in just such situations – murders, acts of torture, brutal and humiliating treatment or punishment. The legal institutions and instruments for the protection of human rights and freedoms available to the State authority bodies are in such cases mainly under complete blockade and, objectively, they are not able to act efficiently to protect these rights and freedoms.

These cases present a violation not only of the legal regulations of the State, but also very often constitute a violation of the most elevated international legal principles. How should international associations of legal institutions treat these cases? Actually, there would be many reasons for the Conference of Constitutional Courts of Europe to consider possibilities for condemning and preventing such actions.

As, in principle, the range of constitutional and legal questions can ultimately be reduced to the protection of fundamental freedoms and rights because it includes

in itself the accomplishment of one of the essential aims of society – the emancipation of the person in all manifestations of life and social organisation, it is hard to accept that the international forum of bodies whose basic function is the protection of individual rights should remain aside in relation to the most brutal violations of these rights and freedoms, especially when they have obtained legal institutionalisation in international law instruments.

There is no State in the world today that has not entered into and confirmed many international agreements relating to human rights and freedoms, which have thus become part of their internal legal system, often with a legal force even greater than ordinary laws. By this the list of human rights and freedoms is not only completed, but also given international legal guarantees. This is the fundamental legal basis for today's attempts to establish international responsibility before the International War Crimes Court. Consequently, there could be a legal basis even for the actions of the international association of constitutional courts in the mentioned context. It means that a certain and appropriate institutionalisation of the actions of the international association of constitutional courts might be supported by international law instruments in cases when in a certain country the most brutal violations of human rights and fundamental freedoms are committed, and the effects of such actions could be beyond any doubt extremely great. There are many forms of instrument by which it might be expressed, and its content would have great significance with the power of its arguments and as well as the qualifications and authoritativeness of its maker.

V

For constitutional rights and fundamental freedoms the following are also questions of importance for carrying out the functions of a constitutional judiciary in that domain during a state of war or an immediate threat of war:

1. Changes to the Constitution during time of war

Constitutional systems of certain countries have different solutions to this issue. While some of them do not expressly address the question, which means that a change to their Constitution is possible even during time of war, some other countries have an explicit constitutional provision to the effect that such changes cannot be made during these periods. Moreover, some constitutions provide for a rule whereby not only revision of the constitution but even the initiative itself in this sense is forbidden during such periods (the Constitutions of France, Spain, Belgium, Portugal). There are a lot of reasons which justify such a point of view. The most important is probably that which considers that even a mere initiative may weaken the front of patriotically committed forces for a country's defence and that defence is something which stands higher and above the political concepts of

individual political parties and their mutual struggle for power, which is unavoidably present in every change to the Constitution.

2. Suspension of certain provisions of the Constitution

In times of war or in cases of an immediate threat of war, reliance on the principle "Salus rei publicae suprema lex esto" – let the highest law be salvation of a homeland – may sometimes result in the suspension of certain provisions of the Constitution. It is important in this connection to bear in mind the fact that these suspensions most often and primarily relate to particular constitutionally established freedoms, rights and duties.

No matter how much this need is imposed and justified by circumstances of war, having regard to the primary social and civilisational importance of exactly these constitutional provisions, the law should be very clear and impose very strict limitations. This is why many limitations for introducing suspensions of certain constitutional provisions are established in the Constitution, although there may be quite large differences from country to country.

While in some Constitutions not a single constitutional provision on freedoms and rights has been exempted from the possibility of such suspension (Amendment LI to the Constitution of the Republic of Bosnia and Herzegovina), other Constitutions impose limitations. So, in addition to providing that restrictions have to be appropriate to the nature of the danger and that they cannot have as a consequence the inequality of citizens on the grounds of race, colour, sex, language, religion, or national or social origin, the Constitution of the Republic of Croatia establishes specifically that "there cannot be limitations in applying the Constitutional provisions on the right to life, the prohibition against torture, cruel or humiliating treatment or punishment, the requirement that offences and punishments be clearly defined, nor on freedom of thought, conscience and belief, even in the case of an immediate threat of war endangering the survival of the State" (Article 17).

If suspension of certain constitutional provisions occurs, the most important question is how long they will last. Constitutions usually relate this to the duration of the circumstances which give rise to the reason for the introduction of the suspension ("while that situation lasts"). But such a state of war can last for a long time without this necessarily meaning at the same time that the reasons and circumstances for which the suspension of constitutional rights and freedoms was introduced will remain unchanged. Therefore, it is a sensible safeguard for a constitution-framer, in providing for the possibility of such suspensions, to provide at the same time for an obligation on the part of a legislative body to

consider at regular intervals (at least once a year) whether there are continuing reasons for their existence.

3. Enacting provisions with force of law

The position of democratic constitutional systems is that whereas fundamental freedoms and rights are established and corresponding responsibilities and duties created on the basis of the Constitution, the manner of their exercise may be regulated only by the law. If such regulation were left to instruments having lower legal force than a law, that is to say to the executive and administrative authorities, the degree of legal security for accomplishing and protecting these rights and freedoms would in principle be brought into question. It should also be considered in light of the fact that the enactment of laws is explicitly reserved to the legislative body as a collectivity of representatives of all those to whom the provision will be applied. The number of members of this authority, being responsible before those whose mandate they exercise, and its reliable procedure for enacting laws, gives a high level of guarantee that the solutions chosen will seek to adapt real social and political possibilities and needs to given, concrete social relations and circumstances.

There are constitutional systems in which a legislative body may transfer to executive authorities the power to regulate certain matters within their domain by their own instruments (e.g., in France: ordonnances*). Without considering this issue in more detail, it should be said that there are many reasons favouring such a solution, and that such a system also calls for awareness that it is not without its dangers. That is why certain restrictions are incorporated in constitutions for such cases and possibilities. They primarily relate to limitations on duration, defining the final deadline for the exercise of the delegated power, as well as to providing for certain exemptions in respect of constitutionally regulated issues and relations. Such exceptions relate primarily to constitutionally established freedoms and rights (for instance, in the Constitution of the Republic of Croatia).*

However, in considering the subject under discussion it is necessary to pay attention also to those provisions having force of law which are made during time of war or in the case of an immediate threat of war. Usually, the President of the State is empowered to make such provisions. Many reasons can give rise to such a necessity, when the very independence and integrity of that State is directly jeopardised, or when the State authorities are objectively unable to regularly perform their constitutional responsibilities. In addition, though, it should be borne in mind that such emergency provisions regulate all those issues and relations which are otherwise regulated by the law, including human rights and freedoms, and are effected by an individual (or by a few members of a respective body) mainly without requiring prior procedural safeguards.

Proceeding from the fact that there are real justifications for passing emergency provisions during time of war, the issue that with regard to protecting constitutional rights and freedoms deserves special attention is the question of how long this possibility lasts. Namely, although the war or a direct threat of war may last, the question is whether there is a justification for emergency regulations after the conditions enabling the legislative body to begin to perform its regular work continue or have been restored in fact? In situations such as this, it happens that the legislative body enacts laws within its competence and that this coincides with emergency regulations which continue to have force of law (on certain questions and relations which otherwise come within the domain of the legislature). What is in issue is not only actions which might bring into question the constitutionally defined competence of the legislature, but also whether the State may be said to be stepping outside the framework of constitutional reasons which justify such measures. Therefore, it would be only reasonable that, after the legislative body has started to regularly perform its duties, emergency regulations could no longer be made, at least until circumstances requiring them reappear.

It may also be questioned whether the complete absence of any obligation on a maker of regulations to submit them for confirmation to a legislative body is consistent with the fundamental principle that social relations regulated by the law fall exclusively within the competence of the legislature. In other words, there is a qualitative difference between the normal procedure for enacting laws and the procedure for confirming regulations, which should in any case be respected where possible. It should also be stated, finally, that emergency regulations come about through necessity and that they imply a move away from the fundamental constitutional principle of a clear delimitation and separation of State powers, so that this departure from principle should be strictly limited to the period of time when it remains indispensable.

CLOSING SESSION

Closing speech by :

Mr Jadranko CRNIĆ, President of the Constitutional Court of Croatia

Closing speech

Mr Jadranko CRNIĆ, President of the Constitutional Court of Croatia

Two days have passed now in which we have had, as I hope, the pleasure of sharing our professional and scientific knowledge and experience on the very important matter the purpose of which is to resolutely prevent lawyers to see any group or association of people of whatever kind or number of members as amorphous human mass of whatever identification, but which promotes the view of an individual with all the properties that speak for or against him or her, in whose reality and vision there remain freedom, rights of man and citizen and their possibly complete and effective protection, especially by means of constitutional law.

We have had reports and discussions about magnificent topics, new ideas, criticism and encouragement, affirmation and controversy, in short a spiritual abundance that - to put it somewhat egoistically - can only be shown by lawyers and the people to whom democracy through law is their credo and a dream come true and dreamed over and over again. Only such faith can lead the ship of the rule of law through whatever Scylla and Charybdis may come its way, without swerving to various sirens' calls trying to create alibies for the suspension of law and cause this ship to founder. The helm of the constitutional court captains and helmsmen, as I believe the discussions at our seminar have shown, is in the hands of real constitutional legal sea dogs who are able to recognize any heading deviations and keep the constitutional ship straight on course, lead it through troubled seas, which in the constitutional realm is more likely than not, and to bring it into safe harbour of peace, happiness and well-being in turning the Constitution into reality.

To our regret, the spiritus movens of the Venetian Commission and this UniDem seminar, Prof. Antonio La Pergola had to leave early, so I cannot thank him here now on behalf of all of us gathered here and the Constitutional Court of the Republic of Croatia. However, I would like to ask Mr. Buquicchio and his assistants to convey to Mr. Antonio La Pergola all our gratitude and good wishes.

We have heard formidable reports of Mrs. Lorenza Carlassare, professor of the University in Ferrara; Mrs. Helga Seibert, judge at the German Constitutional Court; Britta Wagner, secretary general of the Constitutional Court of Austria; Mr. Cascajo Castro, professor of the University of Salamanca; Mr. Hrvoje Momčinović, vice-president of the Constitutional Court of the Republic of Croatia; Mr. Donald Kommers, professor at Notre Dame Law School from the United States of America; Dr. Velimir Belajec, judge at the Constitutional Court of the Republic of Croatia; and Mr. Zdravko Bartovčak, judge at the Constitutional Court of the Republic of Croatia. Discussions have proved how interesting and stimulating the reports have been. I hereby thank all reporting participants and all those who took part in the discussion, as well as those who simply did not have time to speak themselves but supported this event.

We in Croatia were very pleased when the Venetian Commission, headed by its President, Prof. Antonio La Pergola, accepted our suggestion to host and co-arrange the UniDem seminar on the subject of the protection of constitutional rights before the constitutional court.

Today, having done our work, we are happy and grateful for your coming in spite of your difficult and responsible commitments and busy schedules. It is a special pleasure for me to state that a large number of European, American and Asian countries took part in the seminar, as well as the representatives of the OSCE Office for Democratic Institutions and Human Rights. Among the participants were 11 constitutional courts' presidents, many vice-presidents, many judges, a large number of scientists from universities and other scientific institutions, people highly competent for discussing this ubiquitous topic dedicated to a human.

I believe that we have made a step further toward considering the necessity and significance of the constitutional complaint or its further development, the content of the fundamental constitutional rights of man and citizen, and that the reports we have heard and discussions we have had be a basis for further consideration and some of them will be recognized in your lectures, articles, books and practice.

When you leave these Brioni Isles in my country, Croatia, please take with you this atmosphere, beauty, serenity and peace, the mildness of these isles, the memory of our meeting, our wishes for your safe return, your further successful work, personal happiness and the happiness of your families. I wish to you as constitutional legal - if not actual - sea dogs smooth sailing of your constitutional ship, with the wish to see you here again soon.

List of participants

CROATIA/CROATIE *:*

SPECIAL GUESTS

Mr Nikica VALENTIĆ, Prime Minister
Mr Miroslav ŠEPAROVIĆ, Minister of Judiciary
Mr Luciano DELBIANCO, the County Prefect
Mr Zlatko PAVELIĆ, Municipal Prefect

PARTICIPANTS

*Mr Jadranko CRNIĆ, President, Constitutional Court (**Rapporteur**)*
*Mr Hrvoje MOMČINOVIĆ, Vice President, Constitutional Court (**Rapporteur**)*
Mr Ivan Marijan SEVERINAC, Vice President, Constitutional Court
*Mr Zdravko BARTOVČAK, Judge, Constitutional Court (**Rapporteur**)*
*Mr Velimir BELAJEC, Judge, Constitutional Court (**Rapporteur**)*
Mr Nikola FILIPOVIĆ, Judge, Constitutional Court
Mr Ante JELAVIĆ, Judge, Constitutional Court
Mr Vojislav KUČEKOVIĆ, Judge, Constitutional Court
Mr Jurica MALČIĆ, Judge, Constitutional Court
Mr Milan VUKOVIĆ, Judge, Constitutional Court
Mr Mladen ŽUVELA, Judge, Constitutional Court
Ms Marija SALEČIĆ, Senior Legal Adviser, Constitutional Court

****

Mr Ivan MRKONJIĆ, President, Administrative Court
Mr Arsen BAČIĆ, Law Faculty, Split
Mr Zvonimir LAUC, Law Faculty, Osijek
Mr Tomislav PENIĆ, Assistant to the Minister of Judiciary
Ms Marina STANCL, Office of the President of the Republic
Ms Vesna ŠKARE-OŽBOLT, Office of the President of the Republic

****

ALBANIA/ALBANIE *:*
Mr Rustem GJATA, President, Constitutional Court
Mr Zija VUCI, Judge, Constitutional Court

ARMENIA/ARMENIE *:*
Supreme Court (Apologised/Excusé)

AZERBAIJAN/AZERBAIDJAN *:*
Mr Khanlar GADJIEV, President, Supreme Court

AUSTRIA/AUTRICHE *:*
*Ms Britta WAGNER, General Secretary, Constitutional Court (**Rapporteur**)*
Mr Meinrad HANDSTANGER, Federal Chancellery
Mr Joseph MARKO, University of Graz

BELARUS *:*
Mr Rygor VASILEVICH, Judge, Constitutional Court

BOSNIA-HERZEGOVINA
Mr Ismet DAUTBAŠIĆ, President, Constitutional Court
Mr Nedjo MILIČEVIĆ, Judge, Constitutional Court
Mr Želimir JUKA, Judge, Constitutional Court
Ms Milica DALAGIJA, Secretary of the Constitutional Court

BULGARIA/BULGARIE *:*
Mr Todor TODOROV, Judge, Constitutional Court
Mr Alexandre DJEROV, Vice President of the Parliamentary Legal Affairs Committee, Professor, Dean of the Law Faculty, New Bulgarian University, Member of the European Commission for Democracy through Law
Mme Anna MILENKOVA, Member of Parliament, Alternate member of the European Commission for Democracy through Law (Apologised/Excusée)

CZECH REPUBLIC/REPUBLIQUE TCHEQUE *:*
Mr Zdenek KESSLER, President, Constitutional Court

ESTONIA/ESTONIE *:*
Mr Rait MARUSTE, President, National Court

FINLAND/FINLANDE *:*
Mr Antti KORKEAKIVI, Lawyers Committee for Human Rights, New York

FRANCE *:*
M. Dominique ROUSSEAU, Professor, Law Faculty, University of Montpellier
Mme Dominique REMY-GRANGER, Chargée de Mission of the President of the Constitutional Council

GEORGIA/GEORGIE *:*
Mr Jimi KIPIANI, Vice President, Supreme Court (Apologised/Excusé)

GERMANY/ALLEMAGNE *:*
*Ms Helga SEIBERT, Judge, Constitutional Court (**Rapporteur**)*

HUNGARY/HONGRIE *:*
Mr Laszlo SOLYOM, President, Constitutional Court

IRELAND/IRLANDE *:*
Mr Matthew RUSSELL, Former Senior Legal Assistant to the Attorney General of Ireland, Member of the European Commission for Democracy through Law

ITALY/ITALIE *:*
Mr Antonio LA PERGOLA, Advocate General, Court of Justice of the European Communities, President of the European Commission for Democracy through Law
*Mme Lorenza CARLASSARE, Professor, University of Ferrara (**Rapporteur**)*
Mr Sergio BARTOLE, Professor, University of Trieste, Alternate member of the European Commission for Democracy through Law

KAZAKHSTAN *:*
Constitutional Court (Apologised/Excusé)

KYRGYZSTAN/KIRGHYSTAN *:*
Constitutional Court (Apologised/Excusé)

LITHUANIA/LITUANIE *:*
Mr Kestutis LAPINSKAS, Judge, Constitutional Court, Member of the European Commission for Democracy through Law

MOLDOVA *:*
Mr Eugeni SOFRONI, Vice President, Constitutional Court

POLAND/POLOGNE *:*
Mr Janusz TRZCINSKI, Vice-President, Constitutional Tribunal

PORTUGAL *:*
Mr Armando MARQUES GUEDES, Former President of the Constitutional Tribunal, Member of the European Commission for Democracy through Law
Mr Luis NUNES de ALMEIDA, Judge, Constitutional Court

ROMANIA/ROUMANIE *:*
Mr Victor Dan ZLATESCU, Judge, Constitutional Court (Apologised/Excusé)

RUSSIA/RUSSIE *:*
Mr Vladimir A. TOUMANOV, President, Constitutional Court
Mr Nicolay VITRUK, Judge, Constitutional Court, Associate Member of the European Commission for Democracy through Law

SLOVAK REPUBLIC/REPUBLIQUE SLOVAQUE *:*
Mr Milan ČIČ, President, Constitutional Court
Mr Stefan OGURČAK, Vice President, Constitutional Court

SLOVENIA/SLOVENIE *:*

Mr Peter JAMBREK, Judge, Constitutional Court, Judge at the European Court of Human Rights, Member of the European Commission for Democracy through Law
Mr Lovro STURM, Judge, Constitutional Court
Mr Bostjan M. ZUPANČIČ, Judge, Constitutional Court
Mr Arne MAVČIČ, Legal Adviser, Constitutional Court (Apologised/Excusé)

SOUTH AFRICA/AFRIQUE DU SUD *:*
Justice DIDCOTT, Constitutional Court (Apologised/Excusé)

SPAIN/ESPAGNE *:*
*Mr José Luis CASCAJO CASTRO, Professor, Law Faculty, University of Salamanca (**Rapporteur**)*

"THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA"/"L'EX-REPUBLIQUE YOUGOSLAVE DE MACEDOINE" *:*
Mr Jovan PROEVSKI, President, Constitutional Court

UNITED STATES OF AMERICA/ETATS UNIS D'AMERIQUE *:*
*Donald P. KOMMERS, Professor, Notre Dame Law School (**Rapporteur**)*

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EUROPEAN COMMISSION/COMMISSION EUROPEENNE *:*
M. Armando TOLEDANO LOREDO, Honorary Director General, Commission of the European Communities

OSCE - OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS/OSCE - BUREAU POUR LES INSTITUTIONS DEMOCRATIQUES ET LES DROITS DE L'HOMME *:*
Mr Anatoly KOBZEV

OSCE - US DELEGATION/OSCE - DELEGATION EU
Mr Casey CHRISTENSEN

CENTRAL AND EAST EUROPEAN LAW INITIATIVE (ABA/CEELI)
Mr Frederick YEAGER

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SECRETARIAT

Mr Gianni BUQUICCHIO, Secretary of the European Commission for Democracy through Law

Mr Thomas MARKERT, Administrator
Mr Pierre GARRONE, Administrator
Ms Helen MONKS, Administrative Assistant
Mr Antoine MEISCH, Administrative Assistant

INTERPRETES
Mr Derrick WORSDALE
Ms Maria FITZGIBBON
Mr Nikita KRIVOCHEINE
Mr Stanislav BELIAEV

Representatives of most European Constitutional Courts participated together with European and North American scholars in the UniDem seminar on "The Protection of fundamental rights by the Constitutional Court", organised on 23-25 September in Brioni (Croatia) by the European Commission for Democracy through Law and the Constitutional Court of Croatia.

Participants examined in particular the substantive and procedural problems of constitutional complaints lodged by individuals with the Constitutional Court. In addition, alternative mechanisms for protecting fundamental rights, in particular incidental norm control and diffuse judicial review, were presented and discussed.

The present volume includes the reports prepared for the seminar as well as several papers submitted there. It contains a wealth of comparative material on constitutional provisions and practice for protecting human rights in Europe and North America as well as an overview of constitutional complaint procedures in the world.

The European Commission for Democracy through Law (the Venice Commission) is an advisory body on constitutional law, set up within the Council of Europe.

It is composed of independent experts from member states of the Council of Europe, as well as from non-member states. At present, some forty-five states participate in the work of the commission.

The commission launched the UniDem (University for Democracy) programme of seminars and conferences, aimed at strengthening democratic awareness in future generations of lawyers and political scientists.