

Contemporary Imperatives in Ensuring the Individual Right to Constitutional Justice

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Distinguished participants of the international conference,

Dear guests.

The discussion of the institute of the individual complaint to the Constitutional Court and the European trends of the development thereof possess exceptional importance for several reasons. Firstly, the existing approaches to this issue in Europe are quite diverse and can be conventionally divided into three groups: a) **full-fledged** systems (Germany, Spain, the Czech Republic, Slovakia, etc.); b) **limited** systems, which focus solely on the constitutionality of laws (Russian Federation, Poland, Armenia, etc.); c) **absence** of individual complaint (Lithuania, Moldova, etc.). Such a situation creates an insistent necessity to reveal and assess the main trends of European developments and systemic solutions compliant with the European legal standards in this area.

Secondly, the main way to further increase the effectiveness of judicial systems in a number of European countries is guaranteeing the rule of law, and the rooting of effective systems to guarantee, ensure, and protect human rights. The **right to constitutional justice** is impossible without the existence of reliable and full-fledged safeguards.

Thirdly, the effectiveness of supranational institutes for the protection of human rights is determined, to a great extent, by the functionality of domestic systems. This, first and foremost, concerns the European Court of Human Rights. The availability of an effective institute of individual constitutional complaint affords an essentially new quality to the domestic system of constitutional justice and greatly contributes to reducing the backlog of the European Court of Human Rights, which nowadays is becoming nearly insurmountable and a thus – a most serious problem.

It is no less important that, while through individual complaint the rights of concrete people enjoy protection, **the person in question also gets involved in the constitutionalization of social relations**, thus undeniably exercising his/her right to direct democracy. Every individual application also acquires significant public significance.

Although the institute of individual constitutional complaint is of exceptional importance for protecting human rights and freedoms, its role may be considered effective, and its operation meaningful, provided it is deployed fully and is backed by the necessary and sufficient functional, structural and procedural mechanisms, which contribute to the effectiveness thereof. In this respect it is appropriate to evoke several assessments of a full-fledged system of constitutional complaint.

According to Rodriguez – Zapata Peres, a judge of the Constitutional Court of Spain, anyone intending to apply to the Court in Strasbourg shall apply to the Constitutional Court of Spain, which shall provide legal remedies that will preclude the likelihood of moving the dispute to Strasbourg. The Constitutional Court, which abides by the Strasbourg case law, dismisses

domestic judicial acts that go against it, thereby preventing the escalation of the dispute to Strasbourg.

During his official visit to Armenia, the former President of the Constitutional Court of the Federal Republic of Germany, Hans-Jürgen Papier evaluated the importance of individual complaint in Germany from the perspective of assisting the mechanism of protection of human rights in the European Court. Following the decision of the constitutional court on the case of Gorgulu, it became possible in Germany to challenge the violation of convention rights through individual complaint... The new practice will result in the Federal Constitutional Court increasingly more frequently considering issues concerning the Convention and the decisions of the European Court. As a result, the influence of the Convention has increased exponentially compared to the former practice.

The approach of a judge of the European Court of Human Rights Zupancic is also noteworthy, he maintains: “Moreover, a State with an independent constitutional court aware of the ECHR's human-rights jurisprudence is much less likely to be condemned for a violation of the Convention, especially if the constitution provides for an individual constitutional complaint. Individual constitutional complaints of this kind authorize the constitutional court of the State in question to examine the human-rights complaint before it ever reaches Strasbourg. Judicial review of individual constitutional complaints, one after another, continues to lead to the growth and further internal differentiation of the State's own constitutional law. In the meantime, this constitutional development is continuously being harmonized - on an analytical case-by-case basis - with the jurisprudence of the European Court of Human Rights.

The big picture is such that a constitutional complaint entails procedures and legal consequences at the national level.”¹

One may, without hesitation, conclude that the states where a full-fledged institute of constitutional complaint is functional enjoy an advantage when it comes to ensuring the rule of law, as the examination of such complaints allows overseeing practically all aspects of the system of defense of human rights. The direct effect of constitutional rights is ensured and guaranteed this way.

What are the contemporary imperatives in the establishment of a full-fledged and comprehensive system of constitutional complaint? In our opinion, they pertain to constitutional as well as legislative solutions and concern the following:

1. Guaranteeing the right of a person to constitutional justice through the institute of individual complaint,
2. Guaranteeing constitutional review of the entire legal system through this institute,
3. Increasing the productivity of constitutional judicial procedures through individual applications,
4. Guaranteeing full and complete implementation of the decisions of constitutional courts on the basis of citizens' applications.

The first premise implies that the absence or incompleteness of the institute of constitutional complaint leads to a contradiction between the constitutional function and the powers of a constitutional court. Constitutional courts are authorized to ensure the rule and direct effect of the constitution. The fundamental human rights and freedoms enshrined in the Constitution are recognized as possessing direct effect. Without safeguards for the direct effect of these rights, the rule of the Constitution would be impossible to guarantee. It is in view of this necessity that

¹ Judge Zupancic/missions/ Relationship between constitutional law and the law of ECHR Bostjan M. Zupancic. Constitutional law and the jurisprudence of the European court of human rights.doc

increasingly more countries are trying to implement the institute of the individual constitutional complaint and the latest such serious step, as it is known, was taken in France.

The experience of our country can offer the best evidence to this. Until 2006, prior to the introduction of the institute of individual constitutional complaint, the Constitutional Court of the Republic of Armenia had examined only eight cases concerning the constitutionality of laws in a decade. During and after 2006, the Court has been hearing such cases every other month. Moreover, since 2008, individual provisions within laws have been recognized as unconstitutional and thus voided in 31 cases. In fact, a completely new situation has emerged. We believe that the establishment of a rule of law state is impossible without fully-fledged guarantees of an individual right to constitutional justice, without actively involving a person and a citizen in the process of constitutionalization of social relations. In this respect, the establishment of a full-fledged institute of individual constitutional complaint has no alternative and, without it, the entire system of judicial constitutional review becomes almost meaningless, as it is not empowered to deliver on its main function of guaranteeing the supremacy of the constitution.

The second imperative requires that a legal act adopted by any constitutional institute, any act or inaction violating human rights shall become the object of constitutional review. This is the main difference between the German and Spanish models, both having been adopted by a number of countries as full-fledged systems.

Firstly, one should agree on a comprehensive approach towards legal acts, the constitutionality of which citizens may question before the Constitutional Court. Constitutional justice cannot be complete if individual complaints are limited only to the four corners of the constitutionality of a provision of law. In particular, the recent decades of European developments and the experience of the Federal Constitutional Court of Germany demonstrate that guaranteeing the direct effect of constitutional rights is impossible unless all legal acts become the object of constitutional scrutiny. The constitutional courts of Germany, Spain and a number of other countries have so far successfully combined, in administering constitutional justice, the American concept of protecting human rights and fundamental freedoms with Kelsen's model of constitutional justice. It is worth mentioning that the Federal Constitutional Court of Germany may admit individual complaints against judicial decisions as well, which is another important safeguard of the effectiveness of the entire system. In this case, if a complaint against the decision is upheld, the Constitutional Court recognizes the respective judicial act invalid and, provided all remedies are exhausted, remands the case to a competent court².

We also believe that one of the guarantees of the effectiveness of the Constitutional Court of the FRG is the regulation envisaged by Article 90(1) of the Law on the Constitutional Court, according to which a constitutional complaint may be submitted by anyone who states that **a public authority has violated any of the fundamental rights and the rights enshrined in Articles 20(4), 33, 38, 101, 103 and 104**. Consequently, if a person maintains that a state authority has violated any of his fundamental rights, he may apply to the constitutional court with respect to **any action** of a state authority. The absence of such a solution can become a

² In this respect, we would like to mention that the court decisions are the object of constitutional review also in a number of countries. Particularly, according to Part 5, Article 130 of the Constitution of the Republic of Azerbaijan "every person ... by the order couched by law, can challenge the normative acts and **judicial acts** of the legislative and executive bodies, which violate his rights and freedoms." According to Part 1, Article 89 of the Constitution of the Republic of Georgia the constitutional court, on the basis of the citizens' applications, solves the issue of the constitutionality of **normative acts** (which can be also as court decisions).

serious obstacle for the implementation of the main provision of Article 1 of the Fundamental Law, pursuant to which the fundamental rights envisaged in that Article are considered as possessing direct effect. The constitutions of a number of countries also envisage this principle, emphasizing that the state is bound by these rights as having direct effect. As already mentioned, the Constitutional Court cannot ensure the supremacy of the Constitution if the direct effect of the rights is not guaranteed. This is impossible to implement only through the assessment of the constitutionality of legal acts. Concurrently with the constitutionalization of social relations, the issue of the constitutionality of the action or inaction of any public institute acquires a further emphasis.

We would like to add, that the institute of constitutional complaint in Germany checks the constitutionality of laws not only when the complaint is submitted against a specific law, but also when it is submitted against **an administrative or judicial act** which, according to the applicant, enforces a law contradicting the Constitution. In this respect, Article 95(3) of the Law on the Constitutional Court of Germany envisages that, if a voided act is based on a law contradicting the Constitution, the law shall be recognized null and void³.

In view of considerations mentioned above, we believe that constitutional justice may function most holistically and provide most effective protection of human rights when its objects also include judicial rulings, as well as the action and/or inaction of constitutional institutes.

The **imperatives of the third group** merit particular attention. Increasing the effectiveness of constitutional litigation in various countries assumes different solutions. It concerns the establishment of an effective system of filters in admitting individual complaints, procedures for the preparation of a hearing, documentary or trial examination of the case, as well as the process of the examination and requirements presented by the law to the act adopted by the constitutional court.

The main issue here is the extent to which the act of the constitutional is relevant for the future (pertinent to objective law) and to which it remedies the violated right in question (addresses issues of subjective law).

The experience of the Constitutional Court of the Republic of Armenia demonstrates that a clear legislative regulation of the deferral of its rulings, as well as of their retroactive effect, is of utmost importance. In this respect the legal regulation in Article 68 of the Law of the Republic of Armenia on «The Constitutional Court» deserves particular attention.

We have come to believe that when the issue of constitutionality of a normative act is examined through concrete review, and the norm is recognized to be non-constitutional, the emergence of new circumstances in itself does not guarantee full protection of the right in question. The Constitutional Court must be empowered to raise the issue of material compensation against the violated right. This issue shall be solved upon the same logic that underlies remedying the violation of convention rights of applicants through the Strasbourg Court.

The decisions of the Constitutional Court must occupy a place in the system of legal acts that allow the latter to effectively assure the protection of the constitutional order and human rights and, moreover, they shall not be endowed with lesser legal power than the laws. For instance, the

³ Besides, we would like to mention a provision of the Law on the Constitutional Court of the FRG, according to which, the final judgment shall result in a new trial (pursuant to the provisions of the Criminal Procedure Code), which is based on the interpretation of law recognized as not corresponding the Main Law or invalid. In other cases the decision which is based on a law recognized as invalid stays unchangeable. Such decisions cannot be implemented.

decisions of the constitutional court of the FRG (on the constitutionality of legal acts, particularly in cases when, following an individual complaint, the law is recognized to be in conformity or non-conformity with the Main Law, or invalid) possess the power of a law⁴. At the same time, pursuant to Article 35, the Federal Constitutional Court can, by its decision, prescribe who in particular should enforce its ruling and, in some cases, also the particular method thereof. With respect to the above we would like to refer to a regulation on the legal effect of the decisions of the Constitutional Court of the Republic of Armenia. Pursuant to Part 2, Article 9 of the Law of the Republic of Armenia on “Legal Acts,” laws shall comply with the Constitution and must not contradict the decisions of the Constitutional Court of the Republic of Armenia. Such provisions are also provided for other legal acts, which mean that, pursuant to the legislation of the Republic of Armenia, the decisions of the Court possess higher legal power than the laws. Nevertheless this does not address the contradiction between the legal consequences of a decision by the constitutional court and the legal consequences of a law on voiding a provision of another law. In the constitutional practice of the Republic of Armenia there exist cases when, while the Constitutional Court voided a norm of a law as unconstitutional, a year later, by an amendment to that very law, the National Assembly invalidated the same norm. An impression was thus promoted that the invalid norm had continued to remain in effect. Such a legislative confusion resulted in convoluted consequences in the practice of enforcing laws, a departure from the fundamental principles of the rule-of-law state.

In certain countries the peculiarities of the implementation of decisions of constitutional courts are regulated by legislation. For instance, Article 80 of the Law of the Russian Federation on “The Constitutional Court” spells out the duties of state bodies and officials for bringing the laws and other normative acts in conformity with the Constitution of the Russian Federation. It also sets specific deadlines for the adoption of appropriate legal acts and bills, and other duties of the bodies responsible for this, providing an overall regulation of the issue. We maintain that, from the perspective of the effectiveness of constitutional justice, it is appropriate to stipulate more detailed legislative regulation of the peculiarities of enforcement of the decisions of the Constitutional Court, and the abovementioned regulation of the Law of the Republic of Armenia on “The Constitutional Court” may serve as such an example.

We think that it, in terms of efficiency of constitutional justice, it would be expedient to provide for most detailed regulation of the specifics of enforcement of the rulings of the Constitutional Court, following the example set by the Law of the Russian Federation on “The Constitutional Court” referred to above.

We believe that it would be appropriate to highlight the situation when, within the frame of a normative constitutional complaint, the Constitutional Court is deprived of the possibility to reflect on the constitutionality of an individual act adopted on the basis of this norm. The problem mentioned becomes even more important when the violation of an applicant’s constitutional right is a consequence of not the disputed normative act, but of an individual act adopted on the basis of the latter.

It is worth mentioning that when the constitutional court recognizes a disputed norm in to be conformity with the constitution through a concrete interpretation, it helps to observe the normative act in question, but this may be ineffective if general jurisdiction and administrative courts fail not follow that interpretation.

⁴ Article 31(2) of the Law on “The Constitutional Court of the FRG”

We think that it would be appropriate to legislatively provide for distinct legal means, which will ensure the effectiveness of implementation of the tactics mentioned. In particular, the legislative prescription of the requirement for general jurisdiction courts to follow the legal position of the Constitutional Court will aid the solution of this problem.

In the case of implementation of the mentioned approach, from the perspective of protection and remedying applicant's rights, the necessity arises to review a judicial act against the applicant on the basis of the decision by the Constitutional Court. As a rule, the Constitutional Court's decision becomes a ground for the review of the judicial act, provided act in question is deemed to contradict the Constitution. Therefore, from the perspective of the effectiveness of protection of applicant's rights, the given approach may be ensured only in the case when the judicial act adopted against the applicant will be reviewed also in the case, when, although the norm has been recognized as corresponding the Constitution, it has not been applied against the Applicant within the interpretation through which the Constitutional Court had recognized the given norm to be in conformity with the Constitution. Nowadays, in a number of countries such as Germany, Latvia, Armenia, etc., a practice has emerged by which the norm of a legal act is recognized as constitutional within the frame of the legal position of the Constitutional Court in the given decision. *That is, if the Constitutional Court recognizes the norm as constitutional in the frame of legal positions expressed in the given decision, then this decision shall become a basis for the acknowledgment of new circumstances, which in turn shall allow for the review of the case in the frame of these positions.*

For increasing the effectiveness of the institute of new circumstances, serious steps shall be undertaken especially in countries of young democracy. The decision of the Constitutional Court acquires importance for the applicant only to the extent to which it gives rise to new circumstance for the review of his case. Some ludicrous cases are registered in practice when, because of this review, the judicial act is restated nearly without changes, omitting a reference to the Article that was recognized as unconstitutional and invalid. Naturally, a number of questions arise in such a situation. In particular, what does the application of the norm of the law by the court mean? How do the courts understand and exercise the basic principles of constitutional rights, according to which the constitutional rights of a person possess direct effect? What does the review of a judicial act mean, and so forth?

The fact that the institute of individual complaint may only be effective in the case when it allows ensuring full protection of human rights can be considered a starting point. Consequently, with respect to the issue mentioned above, the general position shall pursue the stipulation of a system of effective review of judicial acts in accordance with the respective decisions of the Constitutional Court,

Thank you for your attention.