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Can there be a final time limit for the Constitutional Court to reach a decision?

Abstract

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

that it will not examine all appeals, but only the most important ones and that all the other cases would be subjected to a final time-limit, after expiry of which the case would ipso lege be deemed to be dismissed.

1. Introduction

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

There are a number of responses to this challenge, which can be seen both in laws and regulations being amended, as well as in changes in every-day functioning of constitutional courts. This paper, however, deals with only one of them, maybe the

most formal of them all: can there be a final time-limit for the constitutional court to reach a decision – and if so, what are the consequences? Even if on the first glance this question may seem to be either trivial or impossible to reach, there have been recent discussions about this even regarding the possibilities to reform the European Court of Human Rights, not supported by the majority, but the question remains valid. Let us examine this further.

2. The problem

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

The question of (more) effective decision-making by the constitutional courts in this context is therefore an open challenge[3], but one has to keep in mind that legal remedies have their

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

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

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

specific characteristics and consequences that influence the functioning of the national legal, judicial and administrative system as a whole. The goal to be achieved is of course related to the need for constitutional court decisions to be delivered timely, giving the answer to both legal and wider social questions that have to be resolved in the course of its proceedings. The logic remains constant: the more effective the remedies themselves, the shorter the time needed for the decision to be taken. But let us examine some of the facts and developments regarding the efforts to raise the efficiency of constitutional courts decision-making.

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

This is supported by the logic of the protection of human rights: if they are applicable in practically all legal cases and procedures, it is possible that in all such cases there occurs a violation of these rights, so that an appeal on these grounds is always possible; it suffices for the applicant to **claim** that his human rights have been violated for the procedure before the court of higher instance to be introduced and since it is possible that the case is not resolved in the interests of the appellant in the lower levels of the judicial system, it is quite logical for him to use also the appeal to the highest courts, including the constitutional complaint[4]. Opinions about the correct interpretation and implementation of the Constitution (and/or the ECHR) may

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

differ between the parties to the dispute and consequently between the different levels of the judicial system in the proceedings based on appeals and other legal remedies. It is not unusual even for every level of the judiciary to have a different opinion, even if the same legal texts are used in the decision-making. And one has to keep in mind that the appellant seeks the outcome that satisfies his interests, not abstract justice. If remedies are available against a court's decision, the party which is unsatisfied with the result will use them to get the judgement changed in its favour.

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

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

of the superior level. But for starting the proceedings with legal remedies the appellant has only to **claim** that he has been violated in his rights and freedoms, meaning that the pure possibility and assertion of such illegality causes in-depth examination and trial to be conducted by the constitutional court.

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

There follows another quite obvious truth: if all cases were brought by unsatisfied parties to the constitutional courts as the highest levels of national jurisdiction, the courts would be unable to rule on the merits of them all. Judicial systems cannot but keep the classic pyramid structure, keeping higher levels in the system less numerous than the lower ones and with the presupposition that the level of judicial quality is raised higher up in the system one goes. And higher in the hierarchy of courts there are also more and more organizational and procedural limitations to counter the "flood" of cases with raising of capacities to handle them: it is contrary to both the role of constitutional courts as well

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

as their position in judicial system to raise the efficiency in raising e.g. the number of judges (which in European countries varies in principle between 5 and 16) and similar measures[7].

With more legal remedies and more litigation numerous constitutional courts that are faced with the problem of overburdening and with the need to solve cases without undue delay, within a reasonable time-frame have tried to find new solutions. The answer to this has been in most cases to limit the access to the constitutional courts themselves, however without abandoning the system of constitutional complaints or other forms of individual appeals to these highest courts. So the prevention of overburdening is achieved firstly by raising procedural requirements: strict deadlines to use a constitutional complaint, preclusions in using certain arguments that have not been already presented in earlier stages of the proceedings, exclusion of cases of minor importance and limitation of grounds to appeal a decision (e.g. questions of law, but not fact), a need to exhaust lower level legal remedies, etc. It is difficult always to claim there is an inherent 'natural' logic in these limitations, other than the simple fact that there is no need and/or capacity to rule on each fact and legal question a repeated (or exaggerated) number of times. The judgement on fulfilment of these conditions is often combined with the ruling on the importance of the case, which grants access to the court in question. Consequently it is quite clear that a considerable number (if not a large majority) of applicants to the constitutional courts will not be given decision on the grounds of the case, but will be faced only with a procedural decision that the leave to appeal was not granted, that the case was dismissed as inadmissible, manifestly unfounded, unsubstantiated, not of sufficient importance (*de minimis*), etc[8]. This is the practice of many

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

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

superior jurisdictions within the State Parties of the European Convention on Human rights, but the imposed limitations have also been shown to be to predominantly ineffective in lowering the number of constitutional complaints – even the most traditional and respected constitutional courts that have responsibilities to handle individual appeal are overwhelmed with them and the numbers are not getting any better[9].

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

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

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

their protection but the correct interpretation and implementation of the relevant constitutional provisions.

Finally, one has to bear in mind that these problems are not just abstract and theoretical, on the contrary: an inefficient constitutional court which can't respond to demands of both law and society in time, when these questions are relevant, is not fulfilling its main function of protecting and upholding the Constitution and law. From the perspective of an individual this is not much better, since the justice delayed can in fact be justice denied – if it takes another number of years for the constitutional court to reach its decision **after** all other judicial and/or administrative procedures have already claimed their share of time, the effect can be devastating, and even more, it can be contrary to legal demands of the right to fair trial, enshrined in constitutional orders and ECHR[11].

So in respect of the developments of the abovementioned trends to do nothing is not a solution. Can we try to solve these issues by imposing a formal time limit for the decision of constitutional court to be taken? Even though it may seem to be a provocative thesis, let us examine the potential consequences.

3. The possibility of a solution

In procedural legal theory there is a distinction between two types of time limits for the judicial and administrative decision making: instructive and preclusive procedural time limits (deadlines). The instructive time limit is in principle without legal consequences for the proceedings themselves; it is determined by law, but the failure to meet the time limit does not cause the procedure to be altered, stopped or otherwise directly influenced by this occurrence. The instructive time limit therefore only

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

gives an instruction to the decision-making body and/or parties to the dispute a reference regarding their expected action. The violation of such time limits can in principle only indirectly affect the procedure itself, e.g. lead to possibilities to use remedies for speeding up the proceedings, such as an appeal to the president of the Court or a subordinated administrative authority, etc. These time limits can be imposed also on constitutional courts, but their influence on the efficiency of the proceedings is minimal: if there is a problem of overburdening and the decision can not be reached within the prescribed time, there is nothing that the imposition of such a time limit can contribute. On the contrary, it combines the fact of overburdening and inability to timely resolve pending cases with the form of illegality – the violation of instructive legal deadline is still unlawful, even without other formal consequences.

So to make a new and potentially effective approach, we should examine the imposition of formal and preclusive time limits for the constitutional court decision making, meaning that after the deadline has expired there is a formal consequence – and which should the consequence be?

To give an answer we should first look at the basic principles in judicial decision-making and legal remedies. The first to observe is a combination of both the stressed need to trust in the judicial decisions (*res iudicata pro veritate habetur*) and a need to have every act of authority subjected to a supervisory legal examination, even the judicial ones (*qui custodiet ipso custodes?)*[12] It is therefore a principle of legal order that a first level judgement can become final without further examination or approval of higher authorities and can therefore represent a successful end to a dispute, respected as a part of the legal order. This finality is a value in itself, since it provides legal certainty for all parties to the dispute as well as for other persons, directly or indirectly affected by its verdict. But since the finality of judgements (and other legal decisions of authority, such as e.g. administrative acts) is a very important element of the rule of law, it is common - or even constitutionally required - for the parties to have the right to appeal against the judgement and have it re-examined by a higher court before it becomes final. There are some results derived from that right of appeal: the authority of the first instance court is diminished, since a higher court can overrule its judgement and the time till a judgement becomes final and unchangeable (*res iudicata*) is prolonged.

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

After the finality of the judgement its legal consequences come into force and the rules set by it have to be observed and can be enforced on the party not complying with them. Only in limited cases expressly specified by law can a final judgement be challenged using extraordinary legal remedies. The possibility to use legal remedies that can change or affect a final judgement weakens the legal certainty and can cause serious difficulties when the consequences of already implemented judgements should be reversed and *restitutio in integrum* should be achieved if the final judgement is changed by the responsible court or other empowered authority. It is therefore that extraordinary legal remedies against final judgements should be limited and should have a high degree of legitimacy in their goals that go beyond the resolution of a particular dispute (e.g. the protection of constitutional order, setting an important precedent for future judicial practice, the resolution of an important legal question, etc.). Finality of judgements as an important element of the rule of law and courts' authority means that legal remedies which could affect them should be introduced in a legal order "avec la main tremblante"; there is a good reason why they are called *extraordinary* legal remedies. These facts are quite obvious, but it is good to have them clearly presented before this discussion is brought further into more complex issues.

Second important observation is that to ensure the effective

protection of human rights the best method is to ensure that they are observed in the first level decision-making process and/or the appeal procedures before the decision becomes final. In this way both the principles of the effective legal remedies as well as the protection of the principle of finality (*res iudicata*) are observed and respected. But, as the question of *qui custodiet* is logically continued, what if the lower courts in the regular proceedings fail to do so? Should another legal remedy be created? And then another? How many? And this is where the answers offered often take a completely wrong direction. It may be possible that the lower level courts fail to observe the human rights guaranteed by the Constitution (or the ECHR), but the solution that it should be the highest court to do that **instead** of them is wrong. The creation of new legal remedies, especially extraordinary ones, that would grant access to the highest courts to everyone who claims that the violation has not been adequately redressed by the lower courts causes overburdening of the highest courts, since the pyramid structure of judicial system never enables enough capacity to be concentrated at the top of the hierarchy to substitute decision-making of the lower tiers of the system. Experience has proven that in practically all legal systems, including the ECtHR.

There is another argument to the issue mentioned above. The violations of human rights are – just as in any other case of legal litigation – established in a legal decision, mostly a judgement by a court. But the question whether a right or obligation has been violated is not a question of fact; it's a question of law, expressed in the judgement itself. It is therefore a product of legal reasoning, not of factual discovery, to decide whether a right has to be observed in a given case and if there was a violation of such a right. The court therefore **determines**[13] that a right

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

has been violated; it does **not discover** that a right has been violated. And it is at this point where the element of subjectivity comes into focus. In the cases of remedies against the decisions of lower courts it is for the superior courts to decide, to judge, whether the lower level court has failed to determine, not to discover, that a violation of a (human) right has occurred. And based on the argument of higher professional competence the higher court has the power and legitimacy to do so. And this is valid *mutatis mutandis* even for the highest courts in a certain State. And it is of this fact that applicants are intensely aware: if there is a higher level in the judiciary that **can** have a different opinion on the matter, it is rational to try to access it and to achieve that such a different legal reasoning **will** be expressed in a binding judgement. The statistics support – or at least do not oppose – this consideration. After a new supreme level of a court is established and develops its authority, the caseload will grow exponentially, as is the case at many constitutional courts.

Based on these conclusions, there is a need to understand the position of a constitutional court, which is concerned with the protection of human rights and fundamental freedoms on the national level[14]. It is safe to claim that this highest court has the role of unifying or at least harmonizing the national jurisprudence and of an establishment of *de iure* or *de facto* binding legal precedents, since in principle there should be one highest national court which can give a final judgement on the issues of protection of human rights and therefore prevent inequality and legal uncertainty that could result from the differences of opinions of different national courts. But in relation to protecting the individuals lodging constitutional complaints to the constitutional court it can be observed that in the efforts to achieve the most effective protection of human rights by the constitutional courts

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

itself the first response, which comes almost as a reflex, is that the best way is to handle **all** cases where there is a possibility of violations of human rights and to redress these violations with an appropriate judgement, issued in every single case. But is this really the correct way? One has to keep in mind that

1. The constitutional court in question is the highest court for the protection of human rights in the State, and

2. That this court can in principle be accessed only through the extraordinary legal remedies, which are possible only after a judgement, has become final.

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

Together with these facts it has to be stressed that the legal system has to ensure that the burden of the constitutional court is not too excessive, so that the cases are tried by the Court **in due and reasonable time[16].** This is of utmost significance since

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

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

the examination of individual cases regarding the important issues of protection of human rights and fundamental freedoms in the legal and social system as a whole have to give an appropriate and timely response both to the applicant as well as to the legal and general public.

To continue this discussion it is therefore important to present the possible solution, which lies in a different understanding of effectiveness of the protection of human rights and fundamental freedoms by the constitutional court. If we want to get closer to a solution of the problem it has to be accepted that the constitutional court **cannot** examine all the cases, where an individual claims there has been a violation of the Convention and that it also should not examine all such cases. The examination of individual lawsuits, appeals and complaints and providing appropriate legal decisions in the disputes, being civil, criminal or administrative in nature, is the task of the lower tiers of the judicial systems and it cannot and should not be duplicated at the very peak of the judicial system. The contribution to the effectiveness of protection of human rights and fundamental freedoms by the constitutional court lies in its system-wide influence it (can) have through its judgements and decisions. If one ruling of the constitutional court is observed and respected in the subsequent thousand cases tried by the national courts that represents a success in the true sense of the word. To achieve this efficiency it is important to limit the jurisprudence to a reasonable and transparent number of cases, where the important legal questions are adequately examined and presented in a relatively short period of time.

The possible solution lies therefore in establishing the difference between the number of complaints addressed to the constitutional court and the number of cases that have to be tried by the Court, (i.e. examined on the merits of the case). The number of complaints that the constitutional court receives depends on

the decision of the individuals that seek legal protection of their human rights, which they claim have been violated. The number of complaints that have to be tried by the constitutional court depends on the rules governing the Court's procedure and can go to two opposing positions: either all the complaints that are received by the constitutional court have to be tried by it or none of the complaints received has to be examined, so that it is in the discretion of the constitutional court to decide, which complaints will be examined and which not.

If the rules regulate that all complaints have to be examined on the merits by the constitutional court, the prevention of an excessive burden is difficult, since it is dependent on the motivation of the (potential) applicants and/or purely formal limitations to accessing the Court. Measures can be therefore be adopted only to either impose new formal legal barriers to use the legal remedy (e.g. new legal remedies to be exhausted before addressing the constitutional court, necessary formal legal representation, etc.) or to influence these applicants not to lodge a constitutional complaint with the constitutional court. The latter measures can be various and can range from high costs of proceedings to convincing the party that the favourable outcome is uncertain or improbable (because of existing case-law and precedents...). But in every case it remains a question of legal culture and individual decision to appeal or not to appeal to the constitutional court, so that this approach has in practice proven to be highly inefficient in limiting the burden. It is demonstrated to be quite improbable that the dissatisfied individual will refrain from using a remedy which was formally and declaratory given to him to use in case he feels his human rights have been violated, if there is a chance of success, however slim that may be. Even new formal requirements, as has been made quite clear in the national experiences for accessing the highest courts, can lead either to the situations where the constitutional court cannot address a legal

issue it considers important based on the fact that the formal requirements have not been met or, worse, the access is just delayed or postponed if there is a new formal hurdle a complainant has to overcome, before access is formally possible (e.g. new legal remedy that has to be exhausted). And the citizens will take the possibility of the constitutional complaint to the constitutional court very seriously, even - or especially – if there is a legal counsellor, who represents them and knows how to overcome all the formal obstacles, so that the desire or expectation that there will be fewer applications that have to be (at least) formally examined is unfortunately unfounded – based on the statistical and other experiences.

Based on these presumptions the necessary step to effective and timely decision-making is that the constitutional court has the power to effectively limit its own caseload. This can be done in different ways, but the core principle is that the court has to have the power to decide which complaints to examine and which not. This can be done for example by using certiorari system, meaning the power of selection of important cases (as the e.g. Supreme Court of the United States) or other selection mechanisms, such as the possibility of prioritizing the cases[17] to be handled before all other cases, thus departing from the basic principle of resolving the cases in the order they were received by the constitutional court. It is even possible to claim that all constitutional courts which face high or even extreme number of cases of constitutional complaints or other forms of individual appeals have *de facto* if not *de iure* reversed to some form of selection mechanism (e.g. the combination of introduction and interpretation of undefined legal terms establishing formal procedural requirements to access the court: "manifestly unfounded appeal", "causing negligible consequences to the applicant", "of no importance that exceeds the present case", etc.)

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

With these mechanisms in place, there is an important step towards solving important cases in due time, which is a *sine qua non* of efficient performance of constitutional court responsibilities. But this is only one part of the answer, since the question, which influences the effective and efficient functioning of the court remains: how to handle all the other cases that are **not** selected as important but still have to be resolved and an answer has to be given to the complainant[18]? Can this be done through imposing a final time limit for the constitutional court to decide, after expiry of which the individual case is deemed to be closed?

4. The consequences of a final time limit

The general principle of judicial proceedings is that if a legal remedy is used, the party is entitled to a court's decision and until then the case is pending with all the consequences this has for the enforcement and/or validity of the disputed judicial (or administrative) decision. But this also means that even manifestly or otherwise unfounded cases, cases of minor importance and of negligible consequences to the complainant lead to a judicial decision, burdening the court, its judges, professional staff and other capacities. This requirement of available resources can often be so high that it also influences the decision-making capacities in important cases, threatening thereby the timely performance of core, essential function of the court itself. So what can be done?

The fundamental rule is and has to remain that every single constitutional complaint has to be read and evaluated by an officer of the constitutional court. This does of course mean that the professional staff capacities have to be (and contrary to number

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

of judges can be) expanded to guarantee this minimum of procedural consideration. Whether this obligation goes further, is where the debate can start. The proceedings could of course always end with a reasoned decision, but - as mentioned above – that is beyond the capacity of many (if not all) constitutional courts, dealing with constitutional complaints and other forms of individual appeal. Next the possibility is for the party to get an unreasoned decision, stating only that her case will not be examined further. And after that it is also possible to take this decision away from the judges and empower a member of the professional staff (e.g. the secretary general of the constitutional court) to issue such a decision or notification to the party. And then it is only one further step that leads in the same direction – imposition of a legal presumption that the case will not be examined further by the constitutional court after a set final time limit is reached.

Contrary to the introduction of a final time limit is the abovementioned traditional principle of European legal orders that every remedy is to be finished with a judicial decision. The solution, whereby the unresolved case deems to be finished just by passing of the time (*tractu temporis*) is something that seems alien to this supposition. The other argument against this solution is that the possibility of a constitutional complaint or other form of individual appeal to the constitutional court can be considered to be a guarantee to the individual that he will get protection of his human rights by the said Court if there has been a violation committed by the State authorities. In the case that a final time limit for the constitutional court to reach a decision is to be introduced this promise is made very relative, since the protection will be given only if the case will be accepted for consideration and resolved within that time – frame. And last but not least, the differentiation between those appellants that will be given a judicial decision regarding their constitutional complaint and those, who will because of the expired time limit get their case rejected or dismissed *ex lege* can lead to a doubt about the arbitrariness of the

constitutional courts in their deciding about which cases can be accepted for consideration and which not.

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

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

could also clarify the expectations of parties regarding the proceedings, since they would in advance be aware of both the fact that not all constitutional complaints can be examined and that the case will be no longer pending after a certain number of time, so that the validity of the challenged judgement (or other legal act) will no longer be subjected to the conditionality of successful constitutional complaint. And lastly, the protection of the obligation to resolve a pending case within a reasonable time would be firmly protected on the level of the constitutional court itself.

Conclusion

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

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Можно ли установить предельный срок принятия решений Конституционным Судом?

Резюме

Нагрузка конституционных судов, ответственных за принятие решений по конституционным жалобам и/или по другим формам индивидуальных обращений растет и приводит к серьезным обсуждениям вопроса гарантирования того, что решения принимаются не только в разумный срок с точки зрения сторон, но и в разумный срок, который позволит дать ответ на широкие правовые и социальные вопросы, которые рассматриваются в рамках дел, находящихся на рассмотрении Конституционного Суда. Именно поэтому возникает вопрос, будет ли возможным установление предельного срока принятия решений Конституционного Суда? Это, кажется, противоречит традиционным принципам и практике принятия судебных решений. Однако есть веские аргументы в пользу этого принципа: провозглашенное право на обращение в Конституционный Суд часто недействительно и приводит к разочарованию, что снижает уважение к Суду и его авторитет, так как решение не может быть принято в разумный срок или ограничивается лишь коротким решением о том, что дело не будет принято к рассмотрению даже через несколько лет. Если этот механизм будет открыто заявлять, что Суд не будет рассматривать все обращения, а только наиболее важные из них, а во всех остальных случаях по истечении окончательного срока дело будет возвращено, то будет нарушен принцип справедливого судопроизводства.

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Time limits in the Constitutional Court proceedings in the Russian Federation: some questions of legislation and practice

Introduction

If we compare the first Law on the Constitutional Court of the RSFSR of 1991 (which was written from the beginning to the end by the expert in criminal procedure law) with effective Federal Constitutional Law on the Constitutional Court of the Russian Federation (which was prepared by the Court itself), we will notice that the second one is definitely more liberal towards time limits. This liberalism appears primarily in the fact that the Law, in principle, does not attach significance to time limits and almost does not regulate them. The Law on the Constitutional Court of Azerbaijan of 2003, which contains more than 20 organizational and procedural terms, is an example of exactly of the opposite legislative solution. Such specification can not contribute to the effectiveness of constitutional justice: e.g. as stated in the European Commission for Democracy through Law draft Opinion on the Rules of Procedure of the Constitutional Court of Azerbaijan, the provision that the sessions of the Plenum take place between 11 a.m. and 1 p.m. and between 3 p.m. and 5 p.m. seems very precise and the question arises whether it is necessary to lay down the time so precisely in Rules of Procedure[1]. This is undoubtedly the competence of the Court

[1] Draft Opinion on the Rules of Procedure of the Constitutional Court of Azerbaijan. Strasbourg, 14 June 2004. Opinion № 275/2004.

to decide such issues. On the other hand, placing at disposal of the Court (and also of the applicant) practically unlimited discretion is worth of criticism too.

Following more or less formed scientific tradition[2], I shall distinguish the next stages of the constitutional legal proceedings in Russia and here are the ones, which have limited duration:

1. Lodging of a complaint and its preliminary examination in the Secretariat of the Court;
2. Preliminary investigation by a judge single-handedly (*2 months from the moment of registration*);
3. Registration of the complaint for further consideration by the Court (*1 month*);
4. Appointment of the case for hearings (*1 month*);
5. Preparation for hearings;
6. Hearings before the judges;
7. Preparation, adoption and publication of a decision;
8. Execution of a decision[3].

It is remarkable that neither the Law nor the Rules of the Court impose any deadlines, or at least, guiding terms for the first stage, which opens up the process as well as for the last stage which completes the process.

Preliminary examination by the Secretariat

Therefore, the trial begins with the date of registration of appeal in the Department of Letters of the Secretariat. Then, after preliminary examination, a responsible unit of the Secretariat must undertake one of the following decisions:

[2] See, e.g.: *Витрук Н.В.* Конституционное правосудие. Судебное конституционное право и процесс: Учеб. пособие. - М.: Закон и право: ЮНИТИ, 1998; Конституционный судебный процесс: Учебник для вузов / Отв. ред. М.С. Саликов. - М.: НОРМА, 2003; Мазуров А.В. Комментарий к Федеральному Конституционному Закону «О Конституционном Суде Российской Федерации» (Постатейный). - М., Частное Право, 2009.

[3] In contrast to other kinds of judicial proceedings, where courts have a real opportunity to participate in execution of their decisions, in constitutional legal proceedings implementation of judgment cannot be considered as a full-fledged stage, so this topic is beyond the scope of our attention.

1. To notify the applicant about non-compliance of his documents with formal requirements of law.

2. To prepare an opinion (a reference) or a draft decision of the Court and send all materials to the Secretary General for the further distribution among the judges.

According to the Law, the preliminary investigation carried out by a judge, should be completed not later than two months from the date of registration. Consequently, this two-month period must include both time limits for the Secretariat and for the judge. But in the two mentioned situations, steps of the Secretariat are not restricted formally by any time limits, especially if a complaint is evidently inadmissible, and investigation by the judge obviously will not take place. In this case, it is unclear, how long Secretariat can **hold** a complaint. Anyway, in practice, these time limits exist (*30 days*), but it is reflected only in the Court's instruction on case managment[4]. What is the origin of this term? Actually this term is established by the special Law of 2006 on the Order of Consideration of Appeals of Citizens, which determines general rules of consideration of applications, proposals and complaints. However, this act does not cover constitutional litigation (as well as other judicial litigations), so an application of law by analogy or some kind of custom take place. To be honest, I note that at present the Secretariat almost never goes beyond this 30-day deadline. Nevertheless such cases occured recently.

In this regard a question arises: is it possible to appeal against the actions of an official of the Secretariat, which caused unreasonable and essential violation of terms? In my opinion, the answer is - yes, it is possible, both through administrative and judicial procedures. Such a possibility is provided by the Law of the Russian Federation of 1993 on Appeal Against Actions and Decisions, which violates rights and freedoms of

[4] Временная Инструкция по делопроизводству в Конституционном Суде Российской Федерации. Утверждена Председателем Конституционного Суда 9 февраля 2010 года. Архив Конституционного Суда.

the citizens and which is applicable to all actions of the public servants. Such attempts have already been taken, but failed. In contrast to the Supreme Court and the Higher Arbitration Court of the Russian Federation, the Constitutional Court did not even establish rules of handling complaints against officials of the Secretariat. As for judicial appeal, this practice is rather controversial: in some cases the courts have recognized a right of appeal, but it has not led to any positive results[5]. It seems that our district courts, arguing that the ordinary administrative proceeding is not provided for such cases, are not ready yet "to raise their voice" on the major judicial institution in the country...

I suppose that a formalization of this stage of proceedings is possible. Deadline for preliminary examination in the Secretariat can be established. However, given that each year nearly 20,000 appeals and requests are filed in the Constitutional Court and the total number of servants in four main departments is about 50 persons, this time limit should be reasonable. In the Opinion of the Venice Commission on the draft Code of Constitutional Procedure of Bolivia it is stated that a period of time equal to 24 hours can not be estimated as sufficient to determine whether the whole set of documents meet all requirements of the law[6]. Most probably, 5-day period, which is proposed by one of the bills, is not enough as well[7].

Re-submission of a complaint

After receipt of the letter from the Secretariat, the applicant may either correct and complete his complaint and submit it again or require the Court's decision on this matter. Time limits for such actions are not installed too. This means that in practice the applicant's case stays under the control during an indefinite

[5] Определение Судебной коллегии по гражданским делам Самарского областного суда по делу № 2-1725/06

[6] Opinion on the draft Code of constitutional procedure of Bolivia. Strasbourg, 18 October 2011. Opinion № 645/2011 http://www.yabloko.ru/Publ/Docs/KS.rtf

[7] Compilation of Venice Commission opinions and reports on constitutional justice. Strasbourg, 30 May 2011.

period of time (probably about *3 months*), and then removed. In this case, the complaint is considered as not submitted. As a general rule, the deadline for correction of complaints is established precisely. According to the Law on the Constitutional Court of the RSFSR, this period was 1 month. Venice Commission also notes that this term is usually limited[8]. On the other hand, the Commission, stressing that this period should be sufficient, while considering the Law on the establishment and rules of procedure of the Constitutional Court of Turkey has pointed out that the period of 10 days is too short[9]. It seems to me that this preclusive term has a practical value: for example, the Court can join several cases into one case, if the subject of the complaints is identical. This reflects the principle of procedural economy. That is why it is necessary to know precisely what particular cases the Court deals with at this or that moment.

Consideration of the merits

The question of whether the whole trial in constitutional court needs to be restricted by procedural time limits is very debatable. The requirements of the previous Law on the Constitutional Court in this regard were very strict: from receiving an application to issuing the final decision not more than 6 months could pass. An option to extend this period was not provided. The "new" Law does not establish such a requirement, despite proposals of scientists and also judges[10]. Moreover, one of the bills provided for reduction of this period up to 4 months[11].

It seems that if such a provision was included in the Law, it would be permanently infringed. The nature of the constitutional justice is such that a comprehensive investigation may take longer period of time (let me recall the case of KPSS, which took

[8] Opinion on the Law on the establishment and rules of procedure of the Constitutional Court of Turkey. Strasbourg, 12 September 2011. Opinion No. 612/2011

[9] *Лучин В.О., Доронина О.Н.* Жалобы граждан в Конституционный Суд Российской Федерации. - М.: ЮНИТИ, 1998.

[11] http://www.yabloko.ru/Publ/Docs/KS.rtf

more than six months). The recent example is a case of corporation the "Газэнергосеть": its complaint was submitted at the end of July 2007, and the judgment was issued only at the end of June 2009 - hence the total length of the process was almost two years.

In 2010 the continuity principle was excluded from the Law on the Constitutional Court, and the Court obtained the opportunity to consider several cases at the same time, as a conveyor. Moreover so-called written proceedings was legalised by the legislator. At first glance these measures were directed to acceleration and improvement of effectiveness of the Constitutional Court. On the other hand, the legislator (for very arguable reasons) has terminated the chambers so that only one bench remains instead of three. This seriously hampers the work of the Court, and we hope that in the foreseeable future, this amendment will be canceled (probably through the efforts of the most farsighted and principled judges).

In any case the period of time from the adoption of the appeal for consideration to the hearings is determined by the order of bringing the matter before the court and the nature of the case. Consequently, it is unwise to establish any strict limitations. But the given experience of several countries, the deadlines of preparation of final judgments could be determined. On the average, during *1 month* judge-rapporteur prepares 3-5 draft decisions. But sometimes the decision is announced only after 2 - 2.5 months. However, these terms conform to the European practice: according to the German Federal Constitutional Court Act, the decision, as a general rule, shall be issued not later than three months after the end of oral pleadings, and the Court has the right to prolong this period[12].

As for the position of the Venice Commission on the total length of proceedings, at least four statements may be concluded[13]:

[12] See: Law on the Federal Constitutional Court (Gesetz über das Bundesverfassungsgericht)

[13] Compilation of Venice Commission opinions and reports on constitutional justice. Strasbourg, 30 May 2011.

1. National legislator may either provide for a deadline of decision-making, or leave this question open - both variants are allowed;
2. Time limits, if they are established, should not be too short to provide for an opportunity to examine the case fully and should not be too long to provide for an effectiveness of protection of human rights;
3. The constitutional or equivalent court should be able to speed up lengthy procedures;
4. The constitutional or equivalent court should be able to provide compensation in cases where proceedings are of an excessive length.

A complaint to the ECtHR and article 6 of the European Convention

Following the European Court of Human Rights ruling on the case "Burdov v. Russia", the Law on compensation for violation of the right to trial within a reasonable time or the right to judgment enforcement within a reasonable time was adopted. However, as it follows from the text of this Law, it does not apply to constitutional litigation, but only to litigation in the courts of general and arbitration jurisdiction. In this regard, a very interesting question arises: whether it is possible to submit a complaint to the ECtHR on excessive length of proceedings in the Constitutional Court of Russia.

Already in the middle of 1980s, the ECtHR repeatedly recognized that national constitutional legal proceedings can be examined on the subject of compliance with Article 6 of the Convention, including the cases "Deumeland v. Germany" (1986)[14] and "Poiss v. Austria" (1987)[15]. At the moment, the proceedings in the Constitutional Court of Russia have been contested in the ECtHR for several times. As of 2007, in two cases

[14] Judgment on case of Deumeland v. Germany. (Application no. 9384/81) of 29.05.1986.
[15] Judgment on case of Poiss v. Austria. (Application no. 9816/82) of 23.04.1987.

there was an alleged violation of the requirements of a fair trial, in one case - the requirement of publicity, and in 2 cases - the requirement of reasonable time of proceedings[16]. However, it should be noted that in all these cases, it was a violation of a reasonable time not directly by proceedings in constitutional courts, but in the context of the overall length of the proceedings, which included also litigations in other courts.

The conclusions, made by the Court in case "Shneyderman v. Russia" (2007), are especially interesting. The Court found a delay of approximately fifteen months caused by the queuing in the proceedings awaiting the opinion of the Constitutional Court. However, the ECtHR is not called upon to determine the reason for the delay in the preparation of the Constitutional Court's decision - it said because Article 6 § 1 of the Convention imposes on Contracting States the duty to organize their judicial system in such a way that their courts can meet the obligation to decide cases within a reasonable time. The Court observes that the principal responsibility for that delay lies ultimately on the State[17].

Other questions

In addition to these basic problems there are some other minor problems. For example, the law establishes the rules of record-keeping, but does not say a word about the period of time when protocol must be made and the deadline for the remarks of the protocol to be lodged. As a rule, this term is prescribed by law and is ten days (Azerbaijan, Belarus) or five days (Tajikistan, Moldova).

Both the Law and the Rules require the responsible unit of the Secretariat to inform citizens about the upcoming plenary session, but do not indicate that it must be done in due time. As a result, the message may simply become useless.

[17] Judgment on case of Shneyderman v. Russia. (Application no. 36045/02) of 11.01.2007.
[16] См. Российское конституционное судопроизводство как предмет европейской жалобы (2003-2007 годы) / Зарубежная практика конституционного контроля. Выпуск 120, 2007 год. Библиотека Конституционного Суда РФ.

Finally, it is important to note that a constitutional complaint can be filed by a citizen any time regardless of the moment of application of the law, which means that "limitation period" does not exist. This is the fundamental difference between the Law in force and the former Law of the 1991, which established a three-year preclusive term, and also the German Federal Constitutional Court Act (general time limits are 1 month and 1 year). This demonstrates that socially-useful purposes of the constitutional justice must be achieved regardless to time conditions. And if the legislator refused to establish time limits for filing a complaint, it is logical that all the other terms are irrelevant too. This emphasizes that the aim of the constitutional justice differs from protecting a private interest, and an individual complaint can be regarded as a kind of "informational reason" to the proceedings[18]. As a result, constitutional courts should be given a wide discretion. However, this freedom might be restricted by the Court itself in its Rules.

Conclusions

Summarizing all the above, we can draw several conclusions:

1. Key stages of the constitutional legal proceedings in Russia are not legislatively restricted by any time limits;

2. The Constitutional Court also failed to exercise such regulation, leaving a very wide margin of appreciation for itself;

3. However, during the long period of practice the Court has elaborated certain customs in this field;

4. The practice of the Russian Court is broadly consistent with the practice of other European countries and also the standards, cultivated by the Venice Commission;

5. However, to protect the rights of applicants in events of significant and unreasonable delays in proceedings, it is necessary to provide concrete mechanisms of such a protection, including rules about administrative appeals and monetary compensations.

6. It is anticipated that such mechanisms will gradually be created by the national constitutional courts and courts with equivalent jurisdiction in cooperation and with the support of the Venice Commission, which permanently contributes to the development of constitutional justice in the whole world.

[18] However, the author does not fully share this opinion of honored scientists on the purposes of constitutional justice.

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Процессуальные сроки в конституционном судопроизводстве России: некоторые вопросы правового регулирования и практики

Резюме

Ключевые стадии конституционного судопроизводства в России никакими процессуальными сроками законодательно не ограничены. Конституционный Суд в Регламенте не урегулировал этот вопрос, оставив за собой довольно широкую свободу усмотрения.

Тем не менее в результате многолетней практики Суда сложились определенные обычаи продолжительности тех или иных стадий. Эта практика в целом соответствует опыту европейских государств и стандартам Венецианской комиссии Совета Европы. Однако необходима некоторая формализация этой стороны судопроизводства, а также механизма защиты прав заявителя в случае существенного необоснованного затягивания разбирательства, в том числе механиз-

мов административной жалобы на действия сотрудника Секретариата и получения компенсации без обращения в наднациональные инстанции.

Автор надеется, что подобные механизмы постепенно будут вырабатываться совместно национальными судами при поддержке Венецианской комиссии, постоянно вносящей неоценимый вклад в развитие конституционной юстиции во всем мире.

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Procedural time-limits

A. Introduction

The Austrian Constitutional Court is in charge of various completely different powers, each of them being governed by specific procedural conditions. For the purposes of this report, the focus is on the Court's most important powers, which are

– to decide on financial claims based on public law against public bodies, that cannot be settled by the ruling of any other judicial or administrative authority[1];

– to judge whether a Federal or *Land* law is unconstitutional[2] and whether an ordinance issued by an administrative authority is contrary to the law[3], either upon application by another court, or upon application by the Federal Government or a Land Government, or upon application by an individual, or – *ex officio* – upon a constitutional complaint lodged against the ruling of an administrative authority;

– to decide on challenges of the election of the Federal President and of elections to the parliamentary bodies (National Council, Federal Council, regional parliaments [*Landtag*]) as well as to the European Parliament[4];

[1] See Article 137 of the Federal Constitution.
[2] See Article 140 of the Federal Constitution.
[3] See Article 139 of the Federal Constitution.
[4] See Article 141 of the Federal Constitution.

– to rule on constitutional complaints against decisions of administrative authorities[5].

B. Time-Limits for Applicants

As the European Court of Justice held many years ago, the laying down of reasonable time-limits for initiating proceedings is "an application of the fundamental principle of legal certainty", protecting both parties to the proceeding, the applicant as well as the state authority concerned[6]. This finding certainly applies to any kind of judicial proceeding including proceedings before a Constitutional Court.

As regards actions for **financial claims** against public bodies, there is no specific time-limit; i. e., such proceedings can be brought before the Constitutional Court at any time. Even if the claim is already time-barred, this does not affect the admissibility of the action. In this case, however, the action may be dismissed as unfounded if the claim is objected to on grounds of the statute of limitations[7].

Proceedings relating to the **constitutionality of a law** or to the lawfulness of an ordinance are not subject to any statutory time-limits, either; in particular, they may be brought before the Constitutional Court regardless of when the law or ordinance at issue have been enacted.

The time-limit for lodging an **election challenge** in principle is four weeks as of the announcement of the election results[8]. As for the election of the Federal President and the elections to the European Parliament, however, election contestations are subject to a fairly short deadline of one week only[9].

[5] See Article 144 of the Federal Constitution.
[6] *Rewe*, no. 33/76, European Court Reports 1976, p. 1989, 1998.
[7] See, e. g., no. A 3/09, Reports of the Judgments and Decisions of the Constitutional Court (VfSlg.) 2009/18.889.
[8] See section 68 § 1 of the Constitutional Court Act.
[9] See section 21 § 2 of the Federal Act on the Election of the Federal President, and section 80 of the Federal Act on Elections to the European Parliament, respectively.

Time-limits for challenges of elections are in some respects different from other procedural time-limits.

To begin with, in contrast to any other procedural time-limit, the time of postal delivery is included in the count for the deadline[10]. As a consequence, in order to be admissible, such a contestation has not only to be sent off within the time-limit, but it must also be received by the Court on the last day of the term at the latest.

Secondly, if the time-limit for an election challenge ends on a Saturday, on a Sunday or on an official holiday, this does not affect the count for the deadline. Consequently, the Court has to make arrangements in order to ensure that such challenges can, if necessary, be received by the Court on these days too[11].

Finally, once the time-limit has expired, there is no possibility of obtaining *restitutio in integrum*, i. e. requests for reinstatement into the time-limit are not admissible[12].

Another important power of the Constitutional Court, accounting for a major part of its workload, is to rule on constitutional complaints against decisions issued by administrative authorities. Such a complaint may be lodged within a period of six weeks after service of the decision rendered by the last instance of appeal[13].

Contrary to the time-limit for filing an election challenge, this deadline is perfectly in line with the general principles of procedural time-limits:

Firstly, the time of postal delivery is not included in the count for this deadline[14]. Thus, the six-week requirement is satisfied if the complaint is sent off on the last day of the time-limit, regardless of when it is received by the Constitutional Court.

[10] See, e. g., section 123 § 2 of the Federal Act on Elections to the National Council.
[11] See, e. g., section 123 § 1 of the Federal Act on Elections to the National Council.
[12] Cf. section 33 of the Constitutional Court Act. See, e. g., no. W I-4/00, Reports of the Judgments and Decisions of the Constitutional Court (VfSlg.) 2001/16.309.
[13] See section 82 § 1 of the Constitutional Court Act.
[14] See section 35 § 2 of the Constitutional Court Act.

Secondly, if the dies ad quem of this deadline is a Saturday, a Sunday or an official holiday, the six-week time-limit shall eo ipso be extended to include the first working day thereafter[15].

Finally, if the applicant fails to observe the six-week deadline, the Court may, upon request by the applicant and under certain conditions, grant reinstatement into this time-limit[16].

Like most other statutory time-limits, the period of time for lodging such an appeal cannot be extended[17]. However, if the complainant makes a request for legal aid, the six-week time-limit is interrupted. Depending on whether or not the request for legal aid is granted, the time-limit starts to run anew from the day on which the lawyer acting as procedure aid is notified of the decision to be contested, or from the day on which the complainant is notified of the Court's refusal of his request, respectively[18].

C. Time-Limits for the Court

Not only applicants, but also the Court itself has to observe certain time-limits relating to its rulings.

Firstly, rulings on the constitutionality of laws and on the lawfulness of ordinances shall, if possible, be rendered within one month after receipt of the application[19]. As can be seen from the words "if possible", however, this is not a strict deadline, but only a kind of guideline, which has its origin in the very first Constitutional Court Act of 1921. In fact, the average length of proceedings with regard to constitutional appeals against laws and ordinances is about eight months.

A one-month time-limit also applies to proceedings relating

[15] See section 35 § 1 of the Constitutional Court Act in conjunction with Article 126 § 1 of the Code of Civil Procedure; cf. Article 5 of the European Convention on the Calculation of Time-Limits (ECT 76).
[16] See section 33 of the Constitutional Court Act.
[17] See section 35 § 1 of the Constitutional Court Act in conjunction with Article 464 § 1 of the Code of Civil Procedure.
[18] See section 35 § 1 of the Constitutional Court Act in conjunction with Article 464 § 3 of the Code of Civil Procedure.
[19] See section 21 § 2 of the Federal Act on the Election of the Federal President, and section 80 of the Federal Act on Elections to the European Parliament, respectively.19 See section 63 § 3 and section 59 § 1 of the Constitutional Court Act, respectively.

to challenges of the election of the Federal President as well as of elections to the European Parliament[20]. However, in contrast to the time-limit mentioned before, this deadline is mandatory.

With regard to the election of the Federal President, the one-month time-limit is very important since the President elected cannot take up his duties before the Constitutional Court has dismissed any challenge of this election[21]. Therefore, the reason for this time-limit is to ensure that the President elected may take office without any delay at the end of his predecessor's term of office, i. e., to avoid an *interregnum* in this respect.

If the Constitutional Court failed to comply with the one-month requirement, this would not affect the validity of its ruling. In fact, however, election challenges filed with the Court are always given highest priority so as to ensure that this statutory time-limit is observed.

Finally, time-limits for Constitutional Court proceedings may, in some respects, arise from Article 6 § 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Pursuant to Article 6 § 1 of the Convention, in the determination of his civil rights and obligations or of any criminal charge, everyone is entitled to a fair and public hearing within a reasonable time. In so providing, the Convention underlines the importance of rendering justice without delays that might pose a threat to its effectiveness and credibility[22].

According to the well-established case-law of the European Court of Human Rights, Constitutional Court proceedings come within the scope of Article 6 § 1 of the Convention if their outcome is decisive for the determination of civil rights and obligations[23] or of criminal charges[24]. As for the Austrian Constitutional

[20] See section 21 § 2 of the Federal Act on the Election of the Federal President and section 80 of the Federal Act on Elections to the European Parliament, respectively.
[21] Cf. section 22 of the Federal Act on the Election of the Federal President.
[22] See, e. g., *Niederböster v. Germany*, no. 39547/98, Reports 2003-IV, § 44.
[23] See, e. g., *Süßmann v. Germany* (Grand Chamber), no. 20024/92, Reports 1996-IV, § 41; *Pammel v.Germany*, no. 17820/91, Reports 1997-IV, § 53; *Klein v. Germany*, no. 33379/96, § 29; *Tričković v. Slovenia*, no. 39914/98, § 39.
[24] See, e. g., *Gast and Popp v. Germany*, no. 29357/95, Reports 2000-II, §§ 66.

Court, that may be true for actions for financial claims[25] as well as for proceedings for the review of the lawfulness of ordinances[26] and for constitutional appeals against decisions.

In principle, the reasonableness of the length of proceedings is to be assessed in the light of the circumstances of each individual case with particular attention being paid to the complexity of the case, the conduct of the parties and the authorities involved, and the importance of what is at stake for the applicant[27].

With a view to Constitutional Court proceedings, however, the obligation to hear cases within a reasonable time cannot be construed in the same way as for ordinary courts. As the European Court of Human Rights has pointed out, the role as guardian of the Constitution sometimes makes it necessary for a Constitutional Court to take into account other considerations than the mere chronological order in which cases are entered on the list, such as the nature of a case and its importance in political and social terms[28]. Moreover, Article 6 § 1 of the Convention not only requires that judicial proceedings be expeditious, but also lays emphasis on the general principle of the proper administration of justice[29].

In sum, only serious delays in proceedings before the Constitutional Court may lead to a violation of Article 6 § 1 of the Convention[30]. As for the Austrian Constitutional Court, when

[25] See, e. g., no. A 10/08, Reports of the Judgments and Decisions of the Constitutional Court (VfSlg.) 2009/18.824, and no. A 12/09, Reports of the Judgments and Decisions of the Constitutional Court (VfSlg.) 2009/18.911.
[26] See, e. g., no. V 32/09 (2012).
[27] See, e. g., *Süßmann v. Germany* (Grand Chamber), no. 20024/92, Reports 1996-IV, § 48; *Pammel v.Germany*, no. 17820/91, Reports 1997-IV, § 60; *Gast and Popp v. Germany*, no. 29357/95, Reports 2000-II, § 70; *Klein v. Germany*, no. 33379/96, § 36; *Tričković v. Slovenia*, no. 39914/98, § 44; *Niederböster v. Germany*, no. 39547/98, Reports 2003-IV, § 39; *Trippel v. Germany*, no. 68103/01, § 20; *Oršuš et al. v. Croatia* (Grand Chamber), no. 15766/03, Reports 2010, § 108.
[28] See, e. g., *Süßmann v. Germany* (Grand Chamber), no. 20024/92, Reports 1996-IV, § 56; Gast and *Popp v. Germany*, no. 29357/95, Reports 2000-II, § 75; *Tričković v. Slovenia*, no. 39914/98, § 63; *Trippel v. Germany*, no. 68103/01, § 28; *Oršuš et al. v. Croatia* (Grand Chamber), no. 15766/03, Reports 2010, § 109.
[29] See, e. g., *Süßmann v. Germany* (Grand Chamber), no. 20024/92, Reports 1996-IV, § 57; Gast and *Popp v. Germany*, no. 29357/95, Reports 2000-II, § 75; *Tričković v. Slovenia*, no. 39914/98, § 64.
[30] See, e. g., *Trippel v. Germany*, no. 68103/01, § 36.

dealing with an application, it carefully considers whether civil rights and obligations within the meaning of Article 6 § 1 of the Convention are at stake, and, if necessary, sees to it that proceedings are conducted with the requisite promptness.

Ш. Франк

Заместитель Генерального секретаря
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Процессуальные сроки

Резюме

Конституционный Суд Австрии при осуществлении разных полномочий следует определенным процедурным срокам.

При принятии решения относительно финансовых претензий в отношении государственных органов Суд не ограничен сроками. Такие дела могут быть переданы в Конституционный Суд в любое время.

Жалобы об определении конституционности закона или законности постановления могут быть переданы в Конституционный Суд независимо от того, когда они были приняты. Суд, в свою очередь, должен вынести решение, “если это возможно”, в течение одного месяца после получения заявления.

Срок для подачи избирательных жалоб составляет четыре недели с момента оглашения результатов выборов. Что касается выборов федерального президента и выборов в Европейский парламент, то такие жалобы могут быть поданы в течение одной недели. Такие жалобы должны быть получены Судом не позднее последнего дня срока. Праздничные и выходные дни также рассчитываются. Месячный срок вынесения Судом решения в данном случае является императивным.

Еще одно важное полномочие Конституционного Суда – это определение вопроса конституционности решений административных органов. Такая жалоба может быть подана в течение 6 недель после вручения решения, вынесенного последней апелляционной инстанцией.

И, наконец, сроки для конституционного судопроизводства могут исходить из смысла статьи 6 §1 Европейской конвенции. В принципе, разумность длительности судебного разбирательства должна оцениваться в свете обстоятельств в каждом конкретном случае.

D. Mecsi

Head of Cabinet of the
Constitutional Court of Hungary

Procedural time limits in the new Hungarian regulations on the Constitutional Court

"Time is a friend of the Constitutional Court..."
Unknown

It is a pleasure to have the opportunity to talk about the procedural time limits – this exciting topic which involves several other questions and which was in the focus during the drafting of the new Act on the Hungarian Constitutional Court.

In order to understand why exactly the procedural time limits played the central role in the parliamentary debates, we should briefly go back into the history of our twenty-two years old court. According to a saying of uncertain origin[1] *"time is a friend of the Constitutional Court"*[2]. It refers to the general rule of the decision-making process that the Plenum discusses a draft decision until it gets the majority. If it lasts several months, then the public has to wait for all that period. Therefore there is always a strong expectation from the petitioners that legal norms should set time limits not only on lodging petitions but also on the delivery of decisions by the Constitutional Court.

[1] Péter Paczolay, President of the Hungarian Constitutional Court

[2] László Majtényi, former advisor of László Sólyom, and Péter Paczolay, president of the Hungarian Constitutional Court refer to this saying as widely spredspread in the Constitutional Court in 2009 and in 2011, respectively (available at www.ortt.hu/jegyzokonyvek/jegyzokonyv-20090119134344.pdf, http://www.parlament.hu/biz39/bizjkv39/AIB/1107041.pdf).

Recently, Hungary has undergone considerable constitutional changes, and from the 1st of January, 2012 a new Fundamental Law has entered into force, and accordingly a new Act on the Constitutional Court replaced the twenty-two old one.

However, the regulations introduced by the new Fundamental Law are almost the same as the content of the old Constitution in force between 1989 and 2011[3]; the changes affected considerably the competences of the Constitutional Court. As being one of the most important changes, in this presentation we would like to call your attention to the fact that the Hungarian Constitutional Court has joined those constitutional courts that have the right to examine the constitutionality of individual judicial decisions[4]. Having in mind this new competence, it is clear that during the drafting of the new Act the legislator intended to pay special attention to the regulation of time limits that bound the Court itself.

As the Hungarian Constitutional Court gained new competence for German-type constitutional complaints, it became essential to avoid the intolerable prolongation of judicial procedures[5]. We all may know from the case -law of the European Court of Human Rights that *"proceedings in a Constitutional Court are to be taken into account for calculating the relevant period where the result of such proceedings is capable of affecting the outcome of the dispute before the ordinary courts"*[6]. Therefore observing reasonable time limits during the decision-making process of the Constitutional Court is necessary for complying with Article 6 of the Convention on Human Rights, the right to a fair trial.

By the conflict between the Constitutional Court's rather lengthy procedures and the need for immediate remedies, the following questions have to be answered:

- What time limits are considered reasonable? (Taking into account the complexity of different cases and with special regard to the case -law of the European Court of Human Rights?)
- Are there any realistic sanctions for the Constitutional Court if it does not obey regulations on procedural time limits?

Recently in Hungary all of the above-mentioned questions were discussed in details by the members of the Constitutional Court and also by politicians, creating a very exciting debate about the functioning of the Constitutional Court as such[7].

In the Hungarian Parliament, almost all political parties made attempts to determine a more concrete period for the decision-making process of the Constitutional Court a normative deadline for final decisions. They seemed not to be satisified with the reference to a "reasonable" time limit. But by suggesting different periods[8] it became clear for everybody why it is a very delicate question to set deadlines in normative acts. "If the time limits are too short, it will be impossible to observe them, but if they are too long, they become ridiculous"[9].

[3] According to Prof. Dr. László Sólyom, former president of the Constitutional Court: *"The new Constitution is almost the same as the old one,, with the exception of the abovemmentioned serious wounds. Its language is different in 90% - now there is the text of the Charter of Fundamental Rights instead of the International Covenant on Civil and Political Rights for the human rights."* (Oral presentation at the Eötvös Loránd University of Budapest on March 21, 2012 http://majt.elte.hu/Tanszekek/Majt/Aktualis/docs/2012/MAJT_TDK_Solyom_Laszlo_20120321.mp3 at 01:48:12)

[4] Art. 24 para. (2) point d) of the Fundamental Law: *„The Constitutional Court shall (...) review, on the basis of a constitutional complaint, the conformity with the Fundamental Law of a judicial decision"*.

[5] As President Péter Paczolay emphasised in the Parliamentary Committee on Constitutional Affairs in its sitting of September 27, 2011. (Available at http://www.parlament.hu/biz39/bizjkv39/AIB/1109271.pdf)

[6] Ruiz-Mateos v. Spain Judgment (1993), para. 35.

[7] See among others the records from 24 October, 2011 of the Parliamentary Committee on Constitutional Affairs, Justice and Procedure, available at http://www.parlament.hu/biz39/bizjkv39/AIB/1110241.pdf

[8] The periods suggested by certain amendments to the Act on the Constitutional Court ranged from 120 days to one year. See Judit Haraszti: The Constitutional Complaint, manuscript of the paper delivered at the Conference "After the Fundamental Law – before the Cardinal Acts; Changes in the Hungarian Constitutional Law", Corvinus University Budapest, November 18, 2011.

[9] Judit Haraszti, counsel at the Hungarian Constitutional Court refers to Péter Paczolay, available at http://www.parlament.hu/biz39/bizjkv39/AIB/1110241.pdf

Finally a compromise was made that the Constitutional Court itself in its Rules of Proceedings sets forth inner deadlines.

Consequently, we find regulations on time limits in three levels – in the Fundamental Law for the preliminary norm control, in the Act on the Constitutional Court, and in the Rules of Proceedings. (See Figure 1.)

DEADLINES FOR PROCEEDINGS: SUMMARY				
Proceedings	**Decision on admissibility**	**Appointment of rapporteur judje**	**First draft**	**Decision**
Preliminary norm control				30 days
expediter procedure				15 days
Judicial initiative in concrete cases		30 days	180 days	
expediter procedure		15 days	90 days	
Constitutional complaint (all 3 types)	120 days		180 days	
expediter procedure	60 days		90 days	
parliamentary resolution related to referendum		30 days	90 days	
expediter procedure	15 days		45 days	
All other proceedings				

Fig. 1. Summary on the deadlines of different types of proceedings

In the new Fundamental Law, the preliminary norm control is the only competence by which the Fundamental Law itself sets time limits for closing a case. There are thirty days maximum for examining the provisions of adopted but not yet promulgated Acts, and ten days maximum for repeated petitions[10].

Besides the above-mentioned time limit, the Fundamental Law makes a reference to a "reasonable time" regarding the

[10] First sentence of para. (6) Art. 6 of the Basic Law: "The Constitutional Court shall decide on the petitions (…) out of turn, but *within thirty days at the latest*". Second sentence of para. (8) Art. 6: "The Constitutional Court shall decide on the repeated motion out of turn, but *within ten days at the latest*".

adjudication of any charge or litigation[11]. So does the Act on the Constitutional Court, which repeats the same requirement for deciding on constitutional complaints[12].

In the light of the Strasbourg case -law we can assume that the inner time limits of the Rules of Proceeedingsdures may serve as a basis on deciding whether the constitutional Court has delivered its decision within a reasonable time.

Finally, the answers to the above-mentioned two questions can be summarised as follows:

Complying with the European Convention on Human Rights involves the observation of reasonable procedural time limits, which is judged by the Strasbourg Court from case to case. This expectation has special significance in case of constitutional complaints, if they can affect the outcome of the ordinary judicial procedures.

And again, it is the Strasbourg Court that is in the position to impose sanctions for lengthy procedures.

The question, however, remains whether this pressure transforms time into enemy at the Hungarian Constitutional Court…

[11] Para. (1) of Art. XXVIII "Everyone shall be entitled to have any charge against him or her, or his or her rights and obligations in any litigation, *adjudicated within a reasonable time* in a fair and public trial conducted by an independent and impartial court established by an Act".

[12] Para. (5) Section 30 of the Act on the Constitutional Court: "(5) The Constitutional Court shall decide on constitutional complaints within *reasonable* time".

Д. Мечи

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Процедурные сроки в новых венгерских нормах о Конституционном Суде

Резюме

1 января 2012 года вступила в силу новая Конституция Венгрии. Внесены значительные конституционные изменения. Одним из наиболее важных реформ стало присоединение Конституционного Суда Венгрии к тем конституционным судам, которые имеют право рассматривать конституционность отдельных судебных решений.

Соблюдение разумных сроков в процессе принятия решений Конституционным Судом необходимо, исходя из требований статьи 6 Европейской конвенции о защите прав человека и основных свобод. В Парламенте Венгрии делались попытки определения более конкретного срока принятия решений Конститцуионным Судом. Казалось, они не будут удовлетворены ссылкой на “разумный срок”. Компромисс был достигнут и было установлено, что Суд сам в своих правилах судопроизводства устанавливает внутренние сроки.

Е. Кравченко

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Критика решений Конституционного Суда Российской Федерации – меры по учету, анализу и предотвращению (в контексте полномочий Секретариата Конституционного Суда)

Информационная открытость – один из краеугольных камней, лежащих в основе деятельности Конституционного Суда Российской Федерации с первых дней его образования. В июле 2010 года, когда вступил в силу Федеральный закон «Об обеспечении доступа к информации о деятельности судов в Российской Федерации», прозрачность конституционного судопроизводства ещё больше увеличилась. Информационная открытость деятельности судов является средством общественного контроля в сфере осуществления правосудия и выступает в роли одной из гарантий обеспечения независимости и самостоятельности судей, создает условия для повышения их ответственности за результаты своей работы и способствует объективному, беспристрастному и справедливому рассмотрению дел судами.

Одной из причин, по которой Конституционный Суд не может оставаться равнодушным к мнению коллег по юридическому цеху, равно как и к оценкам своих решений, исходящим от самых широких кругов гражданского общества, является уникальность его статуса. В принимаемых им решениях всегда преобладает общественный интерес,

они затрагивают права многих лиц, конкретный круг которых определить невозможно, при этом, в отличие от судебных актов, принятых другими судами, решения Конституционного Суда, являясь окончательными, не подлежат обжалованию и пересмотру. Информационная открытость при таких обстоятельствах становится единственно возможной формой внешнего контроля деятельности КС, решения которого обычно привлекают повышенное внимание средств массовой информации, юридической общественности и широкого круга граждан, которые подвергают их оценке в первую очередь с позиции своих представлений о справедливости.

Суд никогда не позволял себе почивать на лаврах представлений о безошибочности своих решений. Он стремился и стремится к максимальной обоснованности вырабатываемых правовых позиций. Не столько формальные моменты (высшая юридическая сила), сколько их реальные достоинства придают решениям Суда авторитет в глазах профессионального сообщества и всего российского общества.

На реализацию указанных принципиальных подходов нацелена и повседневная работа Секретариата Конституционного Суда по учету и анализу ведущегося в обществе обсуждения принимаемых Судом решений. Обсуждения, которое, разумеется, никогда не может быть и не будет избавлено от критических нот.

Соответствующая критическая информация поступает в Секретариат по нескольким каналам.

Во-первых, это публикации в различных, не специализирующихся на юридической проблематике средствах массовой информации, а также радио и телевизионные репортажи. Как правило, они появляются после принятия и обнародования Конституционным Судом итоговых решений. В обязанности пресс-службы Суда входит проведение ежедневного мониторинга печатных изданий и размещение содержащихся в СМИ публикаций о Конституционном Суде на внутреннем интернет-портале Суда.

Такому текущему мониторингу, постоянно осуществляемому в целях выявления и последующего анализа откликов на решения Конституционного Суда, подвергаются лидеры списка ведущих общероссийских печатных СМИ, располагающих наибольшей читательской аудиторией; общероссийские информационные агентства, а также интернет-сайты, наиболее популярных среди российского юридического сообщества в качестве дискуссионных площадок.

Во-вторых, это содержащие критику решений Суда обращения на имя Председателя Суда, поступающие вне связи с конкретными нарушениями прав и свобод заявителей.

В-третьих, это критика решений Суда со стороны юридического сообщества (академические круги, профессиональные ассоциации и т.д.), осуществляемая как на страницах специализированных научных печатных изданий, так и в рамках научных и экспертных мероприятий, в том числе проходящих с участием судей Конституционного Суда и сотрудников Секретариата. Аналитические подразделения Суда регулярно проводят мониторинг общественно-политических и специальных изданий на предмет выявления и изучения реакции общества и экспертов, а также выработки соответствующих рекомендаций по мерам, которые было бы желательно принять в этой связи.

Кроме того, Секретариат внедрил в практику работы проведение углубленного мониторинга реакции научного юридического сообщества на решения Конституционного Суда. Он охватывает вышедшие в России и за рубежом монографии, диссертационные исследования, сборники научных статей, материалы научных конференций, так или иначе касающиеся деятельности Конституционного Суда. Выступления нескольких десятков крупнейших отечественных правоведов автоматически включаются в подлежащий мониторингу массив, вне зависимости от места публикации.

В ходе текущего и углубленного мониторингов

выявляются типичные критические замечания, высказываемые в связи с принимаемыми Конституционным Судом решениями (согласно разработанной аналитической службой типологии); выявляется аргументация, посредством которой обосновываются эти претензии; выясняется частота критических высказываний применительно к конкретным решениям.

По итогам сбора и обработки полученных данных аналитическая служба Секретариата готовит обзорные записки как общего, так и специального (по отдельным, наиболее дискутируемым решениям) характера. Поступающие материалы руководство Секретариата направляет в секретариаты руководителей Суда, в аппараты судей (прежде всего в аппарат судьи, бывшего докладчиком при рассмотрении соответствующего дела), в отраслевые управления.

В процессе изучения поступающей критической информации усилия Секретариата направляются на определение действительных оснований критики, их анализ и формулирование соответствующих выводов. Чем вызваны негативные оценки решений Конституционного Суда и какие меры следует принять для предотвращения в дальнейшем критических выступлений? В каких случаях Секретариат предпринимает усилия для прекращения распространения необоснованной, неконструктивной, негативной критики решений Суда в тех или иных средствах массовой информации? Попробуем ответить на эти вопросы.

Диапазон оснований критики довольно обширен. Она может быть связана с элементарным непониманием смысла, роли и значения решений Конституционного Суда как таковых или с неправильным пониманием и трактовкой содержания конкретных решений Конституционного Суда. Если первое это все-таки редкие, можно даже сказать - единичные случаи, а источником такой критики являются почти исключительно неспециализированные региональные СМИ, привлекающие к работе со сложным

юридическим материалом непрофессиональных авторов, то ошибки в трактовках решений Конституционного Суда более распространены. Ведь, к сожалению, в печатных изданиях сейчас практически очень редко встречается узкая специализация судебных репортеров, как это было в дореволюционной России. Более того, согласно результатам одного из опросов журналистов, пишущих на правовые темы, только 25% из них читали Конституцию Российской Федерации.

В качестве примера неверной трактовки решения Суда можно привести следующий. В октябре 2009 года внештатный автор одной из санкт-петербургских газет ввел читателей в заблуждение публикацией, в которой по-своему интерпретировал решение КС о возможности распоряжения жильцами многоквартирных домов нежилыми помещениями, имеющими технический характер. Автор сделал неверный вывод о том, что после решения Суда открыта возможность для пересмотра многих решений судов по вопросам использования подвальных и чердачных помещений. В качестве резонанса на этот материал количество обращений в судах с исками о пересмотре права собственности на подвальные помещения жилых домов увеличилось в несколько раз. Поверив автору статьи, граждане напрасно тратили время и деньги. Результатом этого явилась критика решения Конституционного Суда.

Способ прекращения распространения такого рода критики достаточно прост. Обычно пресс-служба Конституционного Суда направляет в редакцию СМИ, опубликовавшего неверную трактовку решения, информацию с разъяснением реальной сути принятого судом решения, просьбой исправить совершенную ошибку и сообщением об ответственности за диффамацию. Как правило, редакция, получившая от нашей пресс-службы описанную информацию, оперативно исправляет свои ошибки. Так, в приведенном примере Секретариат Конституционного Суда подготовил и направил в адрес газеты информацию

о факте искажения сути решения КС. Ознакомившись с информацией, редакция газеты приостановила сотрудничество с исказившим решение автором.

Специфическая разновидность рассматриваемого типа критики – это критика, связанная с определенным недоверием к так называемым «отказным» определениям Суда. Граждане нередко направляют в СМИ полные возмущения сообщения о том, что им отказали в принятии жалобы к рассмотрению. При этом они не замечают, что в «отказных» определениях им зачастую фактически указывается путь к осуществлению надлежащих действий по защите своих прав (в том числе с использованием ранее вынесенных итоговых решений Конституционного Суда по тем или иным делам). В связи с этим Секретариат Конституционного Суда планирует в самое ближайшее время предпринять определенные усилия по повышению уровня присутствия в печатных и электронных СМИ. Целью такого присутствия станет, в том числе, и разъяснение гражданам подлинного смысла, роли и значения тех или иных решений Суда (в частности, принимаемых им «отказных» определений). Это позволит предотвратить многие проявления необоснованной критики в их адрес.

Следующее основание негативной оценки решений Суда, которое можно назвать «критика ради критики», связано исключительно с субъективным отношением некоторых общественных или политических фигур (юристов, политологов или журналистов) к деятельности Конституционного Суда или его руководства, либо со стремлением некоторых журналистов во всем найти хоть какой-то изъян, поскольку писать о хорошем им просто не интересно. Это можно проиллюстрировать примером с решением КС о праве регистрации в дачных домах, расположенных в садово-огородных товариществах. Казалось бы, Судом принято прекрасное решение, тысячи граждан приобрели возможность зарегистрироваться в дачных домах, получать пенсию, лечиться, отдать детей в школу и т.п., их социальные права защищены Судом. Но некоторые ком-

ментаторы нашли «негатив», сообщив об угрозе, которая нависла над беззащитными стариками, которых черные риелторы-грабители свезут в сараи и там пропишут.

Вступление в диалог в случае «критики ради критики» обычно является неконструктивным вариантом реакции. Гораздо более эффективным является отстаивание правоты Суда по тем или иным вопросам в рамках текущего освещения его деятельности, а также подготовки материалов для выступлений и публикаций руководства и судей. Аудитория, как правило, делает правильный выбор между позицией «критиков ради критики» и спокойным, взвешенным, аргументированным обоснованием позиции, закрепленной в решениях Конституционного Суда Российской Федерации.

Часто основанием критики является обычное выражение недовольства решением Суда одним из участников конституционного судопроизводства или заинтересованными лицами, не подкрепленное сколько-нибудь серьезным обоснованием. Так, например, лидеры одного из профсоюзных объединений обвинили Конституционный Суд в том, что он «фактически запретил реальные профсоюзы», т.к. признал противоречащей Конституции норму Трудового кодекса, обеспечивающую защиту профсоюзным активистам. На самом деле Суд в своем решении всего лишь повторил ранее выраженную им правовую позицию, мотивирующую неконституционность норм, не допускающих увольнение руководящих профсоюзных работников без предварительного согласия соответствующих профсоюзных органов в случаях совершения этими работниками дисциплинарных проступков, являющихся основанием для расторжения с ними трудового договора по инициативе работодателя.

К данной группе примыкают неудачные с точки зрения обеспечения гарантий соблюдения прав и свобод граждан меры, принятые законодателем во исполнение того или иного решения Суда.

Распространенная причина критики решений Конституционного Суда - недостаточная осведомленность обо всем спектре выработанных и применяемых Судом правовых позиций. В связи с этим порой возникает нежелательное впечатление «неожиданности» решений, которые, на самом деле, последовательно развивают сформулированные и обнародованные ранее правовые позиции. Поэтому важной задачей, решению которой мы уделяем немало внимания, остается как можно более полное информирование общественности о деятельности Суда.

Не случайно в качестве меры реагирования на критику Секретариат избирает активизацию разъяснительной работы. В настоящее время в Конституционном Суде Российской Федерации создан качественно новый механизм работы со средствами массовой информации применительно к разъяснению их представителям реального содержания наших решений. По заявке руководителя пресс-службы Конституционного Суда отраслевые управления на постоянной регулярной основе готовят для прессы информацию, разъясняющую содержание и правовые последствия принимаемых Судом решений. В таких комментариях дается развернутая характеристика мотивировки принятого решения, а также его существа и последствий, что позволяет снять заведомо некорректные проявления общественной реакции на решения, имеющие особую актуальность в данный момент развития страны. Сотрудники отраслевых аналитических управлений, готовившие то или иное значимое решение, принимают участие в посвященных ему встречах с журналистами, а также осуществляют текущее устное консультирование сотрудников пресс-службы по вопросам, возникающим в ходе их работы с представителями СМИ. Сотрудники пресс-службы активно используют в своей работе такие инструменты, как интервью и Интернет-конференции Председателя Суда, выступления судей-докладчиков по соответствующим делам, составление пресс-релизов и т.п.

Достаточно часто критика решений Суда связана не с самим решением, а с недостатками в сфере его исполнения.

Действующее в Российской Федерации законодательство не предоставляет Конституционному Суду права непосредственно контролировать исполнение своих решений. Подобное положение вытекает из концепции разделения властей и в условиях демократической государственности принципиальных возражений не вызывает.

Между тем, как показывает опыт, адекватное выполнение законодателем и правоприменителем требований, вытекающих из актов конституционного правосудия, имеет место не всегда. Неточное, фрагментарное, несвоевременное исполнение решений Конституционного Суда существенно сокращает позитивное воздействие конституционной юстиции на правовую систему, резко снижая тем самым уровень защиты прав и свобод человека и гражданина.

Такое положение дел не только наносит ущерб авторитету судебной власти и престижу государства в целом, но и, умаляя конституционные гарантии судебной защиты прав граждан, прямо противоречит высокой миссии, возложенной Конституцией на Конституционный Суд.

Многие критические высказывания, адресуемые Конституционному Суду, порождаются длительной пробельностью в правовой регламентации тех или иных отношений. Порой это происходит оттого, что после признания нормативного акта не соответствующим Конституции, законодатель (иногда в течение продолжительного времени) не восполняет лакуну, образовавшуюся в правовом регулировании. Иными словами, недовольство по существу вызывают не столько предполагаемые несовершенства решения Суда, сколько их несвоевременное исполнение. Вытекающие из этого факта выводы и предложения включаются в ежегодно подготавливаемый Секретариатом Информационно-

аналитический отчет об исполнении решений Конституционного Суда и подготавливаемые в порядке текущей работы информационные и аналитические материалы по данной тематике.

В рамках полномочий Секретариата Конституционного Суда сыграть весомую роль в предупреждении такого рода критики могут, в первую очередь, конкретные действия Секретариата по мониторингу исполнения решений, а также консультативному взаимодействию с уполномоченными на это ведомствами и должностными лицами. Процедуры осуществления соответствующих действий можно разделить на две группы.

Процедуры первой группы координируют действия подразделений Секретариата. Так, в течение недели после провозглашения либо опубликования решения Конституционного Суда Отдел анализа и обобщения практика Конституционного Суда Секретариата Конституционного Суда Российской Федерации готовит по согласованию с профильными отраслевыми управлениями заключения о необходимости осуществления дополнительного правового регулирования во исполнение решения Конституционного Суда. Дважды в год Отделом составляется (актуализируется) перечень решений Конституционного Суда, предполагающих изменение федерального (регионального) правового регулирования. Указанный перечень направляется Судом в обе палаты Федерального Собрания, а также в Правительство и в Генеральную прокуратуру. По каждому находящемуся в процессе исполнения решению Конституционного Суда в Отделе анализа и обобщения практики Конституционного Суда ведётся специальное досье, где сосредоточивается вся информация о принятых мерах. Не реже чем раз в год составляется уже упоминавшийся выше сводный отчет об исполнении решений Суда.

Процедуры второй группы опосредуют взаимодействие Секретариата с «внешними» по отношению к Конституционному Суду государственными структурами,

непосредственно вовлеченными в деятельность по исполнению его решений.

Это Совет Федерации и Государственная Дума, (прежде всего, профильные комитеты обеих палат Федерального Собрания). Это Администрация Президента Российской Федерации, это Правительство и его Аппарат (который играет первенствующую роль в сфере подготовки проектов правовых, в том числе законодательных актов, которые должны быть приняты во исполнение решений Конституционного Суда). Это Министерство юстиции (особенно Департамент законопроектной деятельности и мониторинга правоприменения, осуществляющий общероссийский мониторинг исполнения решений Конституционного Суда), это аппараты Верховного и Высшего Арбитражного Суда. Так, в частности, Секретариат наладил тесные рабочие контакты с Отделом специального контроля Аппарата Верховного Суда. На это недавно созданное подразделение возложен контроль исполнения решений Конституционного Суда судами общей юрисдикции и, помимо этого, содействие в изучении практики Конституционного Суда нижестоящими судами.

Наконец, представители Секретариата активно участвуют в тематических научных и научно-практических мероприятиях правовой направленности, доводя до коллег точку зрения Секретариата по поводу оптимальных форм и методов исполнения решений Конституционного Суда.

Итак, непреодолимость и окончательность решений Конституционного Суда не влекут за собой его невосприимчивость к критическим отзывам относительно принимаемых решений. Более того, можно говорить об определенном позитивном значении этих отзывов.

Так, например, часть критических откликов (преимущественно исходящих из академической среды) сосредоточивается не на резолютивной, а на мотивировочной части решений, затрагивая не суть решения, а юридико-

технические аспекты его обоснования. В дальнейшей работе Суд по возможности учитывает высказанные в этой связи справедливые замечания.

Несомненно, информационная открытость, равно как и чуткость Секретариата к внешним оценкам деятельности Суда, имеют свои объективные пределы. Разумеется, мы не можем организовывать голосования и блиц-опросы среди посетителей официального сайта Суда, равно как организовывать публичные дискуссии о его решениях. Вместе с тем безучастность и высокомерие по отношению к общественному мнению, даже если последнее весьма нелицеприятно оценивает решения, принимаемые Судом, не является и, надеюсь, никогда не будет являться нашим выбором.

В той мере, в какой диалог с экспертами и гражданским обществом в целом содействует большей прозрачности конституционного правосудия и, в конечном счете, укрепляет его авторитет, Секретариат готов к всестороннему участию в обсуждении состоявшихся решений со всеми заинтересованными субъектами.

Разумеется, изучение отзывов на решения Конституционного Суда не имеет и не может иметь – в соответствии с установленными нормами конституционного судопроизводства - прямых процессуальных последствий. Однако это работающий механизм взаимодействия. Поддерживая обратную связь Суда с гражданским обществом и профессиональными ассоциациями, он препятствует превращению Суда в подобие «башни из слоновой кости» и тем самым вносит неоспоримый вклад в улучшение качества конституционного правосудия в нашей стране.

Y. Kravchenko

Secretary General of the Constitutional Court of the Russian Federation

Criticism of decisions of the Constitutional Court of the Russian Federation - remedies for the consideration, analysis and prevention (in the context of the powers of the Secretariat of the Constitutional Court)

Summary

Information transparency is one of the cornerstones of the basis for the activity of the Constitutional Court of the Russian Federation since its foundation. It is the only possible form of outside control of the activities of the CC, the decisions of which, as final, are not subject to appeal and revision. The ongoing discussion of decisions of the Court, of course, can never be and shall not be spared also from the critical notes.

Secretariat of the Constitutional Court holds daily work of considering and analyzing critical information, as publications in various, non- specialized in legal matters media, as well as radio and television coverage, appeals to the Chairman of the Court, publications in the specialized scientific printed editions, speeches in the framework of scientific and expert activities, etc.

During the current and in-depth monitoring conducted by the Secretariat, criticism expressed in relation to the decisions adopted by the Constitutional Court, the arguments by means of which these claims are justified and the frequency of critical comments in relation to specific decisions are revealed. On the basis of the collection and processing of findings the analytical service of the Secretariat prepares review notes, both general and special.

Criticism of decisions of the CC might be connected with an elementary misunderstanding of their role and meaning as such or with the misapprehension and wrong interpretation of the content of specific decisions of the Constitutional Court, and particularly its "rejection" definitions. It may be a "criticism for the sake of criticism," drawn entirely by subjective attitude of some public or political figures (lawyers, political scientists or journalists) to the Constitutional Court. Sometimes it is a common expression of discontent with the decision of the Court by one of the participants of constitutional court proceedings or interested persons. Quite often the criticism of the Court's decisions relates not only to the decision itself, but with deficiencies in its execution.

As the main means of reacting to the criticism the Secretariat chooses activating of explanatory work, including during the participation in various scientific discussions. Currently, in Constitutional Court of the Russian Federation a qualitatively new mechanism of collaboration with the mass media is created which explains the actual content of court's decisions to the mass media representatives. Information officers actively use such tools in their work as interviews and Internet Conferences of the Chairman of the Court, speeches of the rapporteurs on relevant matters for prevention of criticism, compliance of press releases etc. The concrete actions of the Secretariat as well as consultancy with the authorized departments and authorities are called to play an important role in prevention of criticism related to the execution of the decisions of the CC.

Thus, invincibility and finality of the decisions of the Constitutional Court do not mean that they are unresponsiveness to criticism. Moreover, certain positive significance of those approaches shall be emphasized. Insofar that the dialogue with experts and civil society generally facilitates to more transparency of constitutional justice and, ultimately, strengthens the authority, the Secretariat is ready for comprehensive participation in the discussions of adopted decisions with all interested parties. Feedback of the Court with civil society and

professional associations prevents the conversion of the Court into "an ivory tower" and thus makes an unquestionable contribution to improvement of constitutional justice in Russian Federation.

Insofar in what merits the dialogue with the experts and civil society aids to more transparency of the constitutional justice and finally strengthens its authority, the Secretariat is ready for comprehensive participation in the discussion of already adopted decisions with all interested parties.

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Criticism of the judiciary *versus* authority and independence of the judiciary

1. A proper reaction to criticism is important to preserve authority of the judiciary and to protect its independence. In order to establish what "proper reaction" is we should balance two constitutional values: freedom of expression on the one hand and authority and independence of the judiciary on the other hand. Both these values play a significant role in a democratic State governed by the rule of law.

The judiciary has always been criticized, as it will always be done. Why is the judiciary criticized? The main reason for such criticism is not always mistakes committed by the court or different opinions in respect to certain legal issues.

1.1 Functioning of the judiciary is a matter of public interest. The court assesses issues that are of great importance to the society, and the society does not always accept and favour even the fair result. Court is often involved in solution of political issues. The society can and it should express its opinion on political issues. Here, it should be noted that those are mainly constitutional courts rather than courts of general jurisdiction that decide political and social issues. Therefore constitutional courts should have a higher threshold for acceptance of criticism.

1.2 Legal experts analyse rulings and case-law of courts. When defending their opinion, they criticise the opposite or different ones.

1.3 before a court, one of the parties involved would always lose, and there are some who find it difficult accept it.

In a constitutional court, this is the legislator that may turn out to be the losing party. The way how politicians justify their mistakes in front of their electorate is not always correct. Moreover, politicians and the court are in rather unequal positions. Possibilities of politicians to express their opinion are almost unlimited, whilst the judiciary is bound to the requirement to express their viewpoint in the form of their decisions by motivating it in such a way that it does not require any supplementary explanations. Before a decision is announced, no opinion on a matter should be disclosed at all. Possibilities of courts to react to criticism are restricted. They are particularly restricted while matters are still pending; and even after pronouncement of a decision courts should restrain from discussions on them.

2. I deliberately broadened the topic. I will not speak only of criticisms of judgments. I will also speak of criticism in respect to the judiciary that includes criticism of judgments, judges, the court and the entire judicial power. Often reaction to an inacceptable decision is manifested through criticism of a particular court or a judge (they are often criticized in relation to issue that are not even related to administration of justice)

It is important to react properly to any kind of criticism because this can have an impact on authority of the judiciary.

"To react properly" means to select the most appropriate way, time, content and person that would respond (react) to criticism; this also includes abstention from any reaction. In fact, the first step, when deciding how to react to criticism, is to assess whether in a particular case the court should or should not react (keeping silent is also reacting).

3. The present topic makes us analysing reaction to "negative criticism". It is important to keep in mind that not every "negative criticism" is ungrounded (undue) criticism. An unfounded and erroneous opinion can be regarded as influence on court; however, a grounded analysis and discussions (even if it is negative) is even necessary.

I have classified "for" and "against" arguments of court criticism.

3.1 Arguments "for" court criticism

1. An open discussion that includes criticism of judges and their work by keeping in mind its possible impact on independence of judges shall be regarded as an acceptable way of discussion that assure accountability of judges.
2. Publicity resulting from criticism of judges and open discussion may facilitate a better understanding of the judiciary. Due to objective reasons, the society cannot control a certain part of work of judges; consequently, the judicial power is the least understood branch of power.
3. An open discussion as a part of the freedom of speech is a fundamental value of a democratic society, and is one of the few possibilities for the society to take part in work of the judiciary and participate in open discussions on court issues (those are matters of public interest).
4. Criticism of committed mistakes pushes judges to correct them.
5. When writing on legal issues, formation of legal policy is facilitated and education of the society on legal issues is assured.
6. Justice should not only be ensured; it is also necessary to create circumstances in which the society would see that justice is indeed ensured.
7. Criticism is a constitutional right of every person.

These arguments are more or less related to grounded and proportional (rational) criticism.

3.2 Arguments "against" court criticism

1. Offensive criticism reduces trust of the society into the judicial system and administration of justice. Trust into the legal system and the judiciary is of great importance to ensure the will of the society to accept decisions and ensure that the society respects judgments (executes judgments).
2. Protection of judges from criticism serves for protection of court independence in the interests of the society. Inviolability of judges is an element of independence. The issue of independence of judges should be regarded in the context of interests of the society, separation of powers and a State governed by the rule of law. It shall be regarded as a prerequisite for judges to fulfil their functions rather than a privilege[1].
3. The society should respect the judicial power and the rule of law. Without questioning this statement, I would like to quote the USA Supreme Court, judgment in the case *Bridges v. California* (1941): "An enforced silence, however limited, solely in the name of preserving the dignity of the bench would probably engender resentment, suspicion, and contempt much more than it would enhance respect".
4. Certain protection facilitates an easier administration of work of the judicial power. However, it would be strange if such simplified administration would be opposed to the freedom of speech.
5. Effective mechanisms for controlling work of the judicial power are sufficient (appeal; dissenting opinion, disciplinary liability) therefore there is no need for criticism;
6. Taking into account specific nature of work of judges, they cannot protect them at a sufficient level because the possibilities of judges to react to criticism are restricted (they cannot "fight against it"). Here, two reasons for this should be mentioned: first, judgments speak for themselves (they should be clear and reasoned)[2]; second, judges should avoid speaking of matters and issues that can be handed in to particular judge for review.

It is not possible to precisely and unambiguously define what judges can and cannot speak openly about when they are administering justice. This serves as the reason for the fact why many judges avoid expressing their opinion openly. Possibilities and right of judges to express their opinion in public are rather related with unawareness of exact limits. Moreover, not all judges are "speakers". The European Court of Human Rights has also drawn attention to limited possibilities of judges to react to criticism[3].

[1] Amihalachioaie v. Moldova, ECHR, 20.07.2004, Application no. 60115/00, dissenting opinion of Mr. S.Pavlovschi

[2] Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies, para 15 "15. Judgments should be reasoned and pronounced publicly. Judges should not otherwise be obliged to justify the reasons for their judgments".

[3] Prager and Oberschlick v. Austria, ECHR, Application no. 15974/90, 26.04.1995, para 34.

4. It can be concluded that: (1) it is necessary to criticize the judiciary and (2) it should be distinguished between "permissible" and "impermissible" criticism (consequently, boundaries should be marked off).

How to distinguish between well-founded (permissible) and unfounded (impermissible) criticism?

The answer is as simple as complex: in each case, particular circumstances should be assessed (who, where, what, why, how criticizes etc.). The ECHR has indicated that, when investigating whether restriction of the freedom of speech is permissible based on execution of requirement of a judicial authority, the restriction should be assessed in the light of the case as a whole, including the tenor (content) of the remarks [criticism] and the context in which they were made[4].

5. Impact of criticism on the court and possibilities and necessity of the court to reply (react) to such criticism depends on the following:

1) time, in which criticism has been expressed (when?);
2) kind of critics, content and place where criticism has been expressed (how, where?);
3) persons who criticize (who?).

6. Impact of criticism depends on the **time**, in which it has been expressed: before or after rendering a decision. This also influences the possibilities to react to criticism.

Authority of the court and trust of the society into the judicial power can be influenced by the following:

1) criticism expressed during legal proceedings (before coming into effect of a judgment) in respect to a particular matter – judge, the court, the procedure of administration of justice, etc.;
2) criticism beyond or after adjudication of a particular case which includes:
   a) criticism in respect to a decision after it is adopted,
   b) criticism in respect to a judge (work or inactivity of a judge, competence of a judge, criticism of individual features of a judge),
   c) criticism in respect to the court,

[4] Amihalachioaie v. Moldova, para 30.

d) criticism of the entire judicial system, etc.

When criticising legal proceedings before a judgment has come into effect (it can be criticism in respect to a judge, the court, adjudication proceedings, etc.), it is rather probable that independence and impartiality of the court would be impacted, if compared to expressing criticism to the court or a judge after adoption of a decision. Criticism before a judgment can influence not only authority of the court, but also its independence and impartiality.

Consequently, the possible threat to the court is greater in case when criticism is expressed before a judgment is delivered; moreover, ability of the court to react to such criticism is more restricted.

7. Opinion (criticism) can be expressed in different **ways**:

1) in public (in press, speeches of politicians, conferences, lections etc.);
2) in private (in letters, direct communication); such criticism would not impact authority of the judiciary;
3) according to procedure established by law (appeal, dissenting opinion).

Dissenting opinion is one of types of criticism. It includes criticism legitimized by law in respect to a court judgment. Dissenting opinion may also influence authority of the court. Attitude of the society would certainly differ (1) to findings established in a unanimous judgment and (2) to the one, in the frameworks of which opinions of judges have split, notably, where a part of judges disagree with argumentation of a particular judgment and, possibly, with the entire ruling. This is why in some countries the law does not provide the opportunity to express a dissenting opinion.

I think that in Latvia the legislation in respect to dissenting opinions of justices of the Constitutional Court can be regarded as progressive. A justice who has voted against the opinion included in a judgment expresses his or her dissenting opinion that is attached to the matter; however, in a court hearing it is not announced (not content, not even the fact how justices voted). Dissenting opinion is published officially two months after the judgment comes into effect. Such regulatory frame-

work is based on two reasons. First, it is related with short and strict terms, in which a judgment should be prepared (30 days). In case if a justice made a decision to disagree with any opinion expressed in a judgment only at the final stage of matter adjudication, then it is impossible to prepare dissenting opinion along with the judgment. Consequently, dissenting opinion is prepared after the judgment is published. Second [reason], dissenting opinion does not influence content and consequences of the judgment. Dissenting opinion plays a major role in assuring individual independence of the justice and in developing the legal doctrine. Therefore, when dissenting opinion is published in two months after coming into effect of the judgment, the purpose of dissenting opinion is reached by also ensuring authority of the court.

8. Opinion (criticism) can be expressed by different **persons:**

1) politicians (problems arise when politicians criticise the judiciary and judges; problems might be caused when judges criticize national policy);
2) State officials.
3) judges (dissenting opinions, criticism of a court of a higher instance in respect to a judgment rendered by a court of a lower instance, public commentaries in the frameworks of scientific activities, private commentaries);
4) participants of litigation;
5) press,
6) lawyers (the ECHR restrict criticism of lawyers at a greater extent because it has an overwhelming impact on the society and it could legalize ungrounded criticism in the eyes of the society. At the same time, lawyers play a particular role in communication between the society and the judiciary, therefore qualification of lawyers that renders criticism expressed by them even more convincing makes it the best and the most appropriate source of a fair (impartial, competent) criticism. Lawyers enjoy better position to inform the society on their problems with the judicial system. They

should also ensure that their comments would not hamper administration of justice (they should be able to assess situation and establish limits of criticism]; etc.

9. Reaction to criticism ("neutralization" of criticism)

In order to neutralize the criticism it is important to know when it is necessary to respond (react) and when it is not.

9.1 It is necessary to react to criticism in the following cases:

1) if criticism is serious and it is likely to have more than a slight (unimportant) impact on the society;
2) if criticism demonstrates lack of understanding of the judicial system or role of a judge, and provided information is at least partially based on lack of such understanding;
3) if criticism (provided information) is mainly incorrect and imprecise; the incorrect information should constitute the major part of criticism for the reply to be adequate.

9.2 It is better to avoid to react to criticism in the following cases:

1) criticism is a fair commentary or opinion;
2) hatred or conflict exists between the person who criticizes and the judge;
3) criticism is uncertain (minor, unclear);
4) criticism deals with issues of ethics of judges and such a case should be transferred to competent authorities;
5) it is necessary to perform a long-term investigation to establish real facts;
6) a reply would prejudice a particular matter.

10. Role of judges in neutralizing criticism

It is difficult to prove causal relation, namely, the fact that it was criticism that influenced trust into the court. But it does not mean that criticism should be ignored.

Those who say that judges and judiciary should not care for criticism are not right. It is also in judges' (court's and judiciary's) interests to establish why an opinion regarding

court rulings expressed in public is incorrect (deliberately or not).

If a judge reacts he/she should do it in a way that his/her action would facilitate trust of the society into judicial impartiality and fairness. A judge should participate in public discussions to obtain practical information that would appear useful when administering justice.

Possibilities of judges to respond (reply) to criticism are restricted[5]. The European Court of Justice has also drawn attention to the duty of judges to "discretion that precludes them from replying"[6].

10.1 A judge may not:

1) [a judge may not] express commentaries in public if this could influence result of a matter to be adjudicated and weakens justice (or at least makes such impression) in respect to it;
2) a judge may not compete with State officials regarding correctness of his or her judgments (judgments speak for themselves);
3) a judge may not act in a way that could cause "reasonable doubt" regarding fairness of a judge, prejudices the office of a judge or hampers fulfilling duties of a judge;
4) a judge should avoid all statements regarding a pending case. Both, abstract public remarks and innocent remarks could be interpreted as such that might cause apparent partiality of the court;

[5] Bangalore Principles of Judicial Conduct
1.6. A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary, which is fundamental to the maintenance of judicial independence.
2.4. A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process, nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.
4.6. A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but, in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

[6] Buscemi v. Italy, ECHR, Application No. 29569/95, 16.09.1999, para 67, Prager and Oberschlick v. Austria, para 34.

5) when expressing one's opinion on legal issues, a judge should not comment pending cases and should be very careful when commenting issues that he or she would probably have to review later.

10.2 A judge may:

1) in a proper place and way, a judge may express its criticism in respect to certain legal provisions in case if it does not apply completely false interpretation of legal norms and if, when doing so, the judge facilitates trust of the society into independence and fairness of a judge;
2) a judge may and should explain legal terms and notions, procedures and issues in a way that would permit press representatives to prepare their releases in the most compatible way possible;
3) a judge may speak to educate the society on legal proceedings or speak of laws, legal system or administration of justice;
4) a judge may speak to rectify misunderstanding of the society of a decision or to respond to criticism that would diminish trust of the society into the judicial system;
5) a judge may express his/her own opinion on a disputable legal issue if he or she would not later undertake its reviewing.

10.3 Judges should express their opinion beyond legal proceedings:

1) if trust of the society into the judiciary diminishes;
2) if it is rather probable that, after adoption of a decision, the legislator would not execute it or would avoid executing it at the necessary extent;
3) if information on particular judgments, judges or legal proceedings is incorrect.

It should be noted that it is necessary to react only in case if the response representing defence of the judiciary would facilitate [opinion on] fairness of the judiciary rather that would undermine it.

11. It is not always the case that a judge or a president of a court (also acting as a judge) is the person who should react to criticism. In situation when a judge cannot react to criticism due to objective circumstances, information and clarifications can be provided by press services of courts. The most preferable way of "neutralizing" criticism is commentaries and explanations provided by lawyers, advocates and law specialists.

Section 9 of the United Nations Basic Principles of the Independence of the judiciary provides that associations of judges represent judges' interests and protect their judicial independence. Section 12 of the Magna Carta of Judges adopted by the Consultative Council of European Judges on November 2012 provides that purpose of (national or international) associations of judges is protection of mission of the judicial power in the society. Section 13 of the same document provides "to ensure independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning […] functioning and the image of judicial institutions". Creation of "image" means active work of the Judicial Council, including reaction to criticism, education and information of the society in issues related with court work.

12. Conclusions:

1. It is permitted and even necessary to criticize court judgments and work.
2. One should distinguish between "permissible" (grounded and constructive) and "impermissible" (unground, false) criticism.
3. It is reasonable to protect the judiciary from ungrounded criticism.
4. The best way of "neutralizing" criticism is involvement of lawyers, advocates, legal experts, as well as judges associations and the Judicial Council into discussions on decisions of courts and work of the judiciary.

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Критика судебной системы в противовес авторитету и независимости судебной власти

Резюме

Надлежащая реакция на критику важна для сохранения авторитета судебной власти и защиты ее независимости. Для того, чтобы установить, что это "адекватная реакция", должны быть сбалансированы две конституционные ценности - свобода выражения мнений и независимость судебной власти.

Важно правильно реагировать на любую критику, поскольку это может повлиять на авторитет судебной власти. Разрешено и даже необходимо критиковать судебные решения и деятельность суда. Однако следует различать "допустимую" и "недопустимую" критику путем оценки особых обстоятельств в каждом конкретном случае (кто, где, как, почему, какая критика и т.д.). Обоснованный анализ и обсуждения необходимы, даже если они являются отрицательными.

Возможная угроза суду больше в случае, когда критика выражается до вынесения судебного решения, кроме того, возможность суда реагировать на такую критику является более ограниченной.

В ситуации, когда судья не может реагировать на критику в связи с объективными обстоятельствами, информация и разъяснения могут быть предоставлены пресс-службой Суда. Наиболее предпочтительный способ «нейтрализации» критики – вовлеченность юристов, адвокатов и экспертов по правовым вопросам, а также Совета судей в обсуждения решений судов и деятельности судебной системы.

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The reaction to negative criticism of court judgments

1. Introduction

The public and public opinion play an important role in social life and development.

The actors of social life, especially in politics, often use public opinion to support their views, serve as a guideline for important decisions, justify why existing conditions must be changed or to explain conduct of a certain kind.

On the other hand, the public often tries to influence and sometimes even to dictate the behaviour of those actors, and to do this it usually makes use of the media to carry its messages. Public opinion always gets media attention and one can often read or hear that the public is against something or supports it, which puts public pressure on decision-makers.

This kind of public pressure influences the behaviour and work, and sometimes even the fate, of the institutions and individuals it targets in varying degrees, regardless of whether it is justified or not or whether the public is right or wrong.

There is no doubt that the public directly influences people's habits and behaviour as well as the creation of a subject's public image. Thus subjects exposed to public opinion must take good care to explain and justify their activities and decisions as soon as public pressure appears in even its mildest forms, so as to acquire or retain their "good image".

At the same time, public opinion has a direct influence on decision-makers. There is no doubt that they want to ensure

public support, which provides their decisions with legitimacy or at least creates an appearance of legitimacy. Even a faulty or wrong decision can seem well-founded and just if it concurs with public opinion. Sometimes the power of public opinion can place the decision-maker before a serious dilemma: whether to make an unpopular decision or to yield to public pressure and secure public support, from which it might later secure some kind of benefit.

Although much has been written about public opinion, there is no uniform definition of the concept. Dewey sees public opinion as a view of public affairs formed and supported by members of the public. Lippmann defines public opinion as pictures in peoples' heads, images about themselves, about others, about their needs, aims and relations[1].

Public opinion is usually seen as the opinion of a relatively large number of persons in a particular society (the "general public") have about a particular issue. It develops when many people think the same about that issue and are aware that their opinions agree.

When public opinion is assessed it is always necessary to remember that "having an opinion about something" does not necessarily mean "knowing anything about it". Public opinion can be formed on the basis of prejudice, disinformation, unconfirmed rumours, lack of information and many other indirect factors.

Furthermore, public opinion is not static and always completely clear; it is connected with particular circumstances, persons, objects and various other factors. Its creation is a complex process that can include interdependent relations, opposed interests, group membership, social position and many other relationships. Some of these factors can be influenced or even controlled. Because of this, Lippmann said that the 20th century brought the technology for *the manufacture of consent*, i.e. it created conditions in which public opinion could be controlled even in world proportions. And controlling public opinion also implies controlling public behaviour in general.

[1] See: Skoko (2006): 98 – 99. John Dewey (1859 – 1952), American philosopher, educator and social reformer (*The Public and its Problems* /1927/); Walter Lippmann (1889 – 1974), American writer and journalist (*Public Opinion* /1922/).

Consequently, the existence of public opinion about a subject or controversial issue does not mean that it is right.

Nevertheless, everybody considers public opinion very important. Public opinion polls strongly influence the creation and implementation of policy and the total behaviour of political leaders. Political bodies begin their working day by meeting with their communication strategy experts in an attempt to discover how the nation is "breathing", to come up with an effective answer to the wishes and needs of the general public and even to create its taste. Thus public opinion is no longer only the subject of events but also their object, confirming Lippmann's theory about "the manufacture of consent".

Although this concept is difficult to define and does not always have only one meaning, from the aspect of its participation in and influence on social events the general public may be broken up into smaller groups.

Thus, for example, there is the division into:

1. nonpublics – who are not concerned with a certain issue or organisation and who therefore do not undertake anything,
2. latent or hidden publics -who observe a common issue as the consequence of an organisation's activities but are not aware of their connections to a situation,
3. aware publics – who observe and understand the issue, but do not act, and
4. active publics – who confront the issue, recognise it and organise themselves so as to discuss it and do something about it[2].

Publics can also be grouped by how they behave toward messages and issues.

- apathetic publics -who are inattentive and inactive on all issues,
- all-issue publics -who are active on all issues,
- single-issue publics -who are (usually fervently) active on a particular issue or a limited number of kindred issues,

[2] Tafra-Vlahović (2007): 37.

- hot-issue publics -who respond and become active only after the media have revealed almost all the actors, and the issue has become one of widespread public discussion[3].

Public relations and public opinion are not important only for political institutions but for judicial ones (in the broader sense) as well. This is especially true when their decisions directly or indirectly affect the rights and/or interests of a large number of people. The situation is especially complex when the decision is unpopular and when the public expresses its negative stand either before or after the decision has been made.

2. Expose of the constitutional courts to public opinion and possible criticism

Under present conditions the countries that accepted the Kelsenian model of constitutional justice gradually also accepted and developed other competences for their constitutional courts, besides the defence and interpretation of the constitution. Many other competences were added to the basic one of controlling the constitutionality of legislation passed by the legislative authorities.

With reference to the above, Lopez Guerra differentiates between four broad groups of competences assumed by contemporary constitutional courts in the countries that started from the original Kelsenian model or consolidated system of constitutional jurisdiction:

1. control of the constitutionality of statutory law,
2. resolution of conflicts between territorial entities within the state,
3. defence of fundamental rights recognized in the constitution,
4. intervention in legal procedures considered particularly important for the political life of the State (control of the constitutionality of political parties, control over electoral procedures and the like)[4].

[3] Cutlip *et al*. (2003): 268 – 269.
[4] Lopez Guerra (1994): 14.

By the nature of things, all these competences of constitutional justice to a greater or lesser extent always include political elements. However, one of the particular aims of constitutional justice is to avoid political undertones. The constitutional court is given the jurisdiction to decide about an issue primarily by legal, not political reasoning.

Nevertheless, in practice it is sometimes difficult to establish what is a political and what is a legal issue, because every legal issue also has political consequences for the addressees of a certain norm. This results from the nature of the constitution as the political and legal document with reference to which decisions are made, and which represents a "link between law and politics" (Luhmann)[5]. It is thus impossible to completely remove all political reasoning from constitutional justice and to reduce it to pure legal reasoning[6]. On the other hand, the portion of political reasoning must be brought within appropriate boundaries that will prevent the constitutional court from becoming a special political authority and misusing its basic judicial function. A special aspect of this problem is very pronounced in transition countries (which include Croatia) and is a result of decreasing confidence in political institutions and the transformative role of the constitutional court.

Constitutional courts guarantee compliance with and the application of the constitution in their countries. They are empowered to control the constitutionality of all the norms passed by governmental bodies and repeal acts of parliament and governmental decisions and regulations. Some constitutional courts may quash the judgments of regular courts, impeach the president, control political elections and execute various other powers.

Because of this, the activities of constitutional courts are potentially, and also in actual fact, very often exposed to pub-

[5] See: Vrban (2011): 419.

[6] Because of this, candidates for the election or appointment of constitutional court judges are always required to have, besides the necessary legal experience, also a high degree of awareness and feeling for the political effects of constitutional court decisions, and are not elected or appointed only from among the judges of regular courts and attorneys, but also from among high government officials, professors and politicians, true, still only those that belong to the legal profession. Harutyunyan/Mavčić (1999): 235.

lic opinion. This can be expressed as pressure before and during constitutional court proceedings and as assessments (positive or negative) made after the court has reached its decision.

This especially refers to the constitutional control of laws and subordinate legislation regulating relations of special public interest, because they affect a wide circle of people and/or strongly impact their rights and interests.

Thus the constitutional court may have to control the constitutionality of a regulation which the public has already "decided" is unconstitutional and a media campaign is already underway clearly telling the court what is expected from it. The constitutional court can easily predict that it will be applauded if it decides in accordance with these expectations, but if it decides otherwise it will be criticised in the range from having made a wrong decision through incompetence and unprofessional conduct to corruption of the judges.

Whatever the reasons for creating public opinion in a particular situation and the measure to which it is based on objective information, knowledge and expertise, such pressure is objectively not easy to withstand. An additional difficulty is if a large number of people share this public opinion and are all sincerely convinced that they are right and are acting justly, and that their will must not be ignored.

How should the constitutional court act in this situation?

To answer this question, I will paraphrase a Hollywood film: *It is not difficult to do what is right; it is difficult to decide what is right. And when you have decided, then there is nothing else you can do!*[7]

It is therefore not difficult to say how the constitutional court should act when its professional finding and conviction differ from public opinion. Considering their scope and time effects, constitutional court decisions are too important for expert opinion to back down before public opinion, however widespread and strong it may be, if these two opinions do not coincide or are even opposed.

[7] *The Confession* (1999), directed by David Hugh Jones.

I consider that this stand needs no further exemplification.

However, this brings us to the next question: how to react when the decision of the constitutional court is subjected to the criticism of opposing public opinion?

3. Reactions of a constitutional court to criticism of its decisions

No decision maker of any kind, including constitutional courts, can avoid occasional criticism. When proceedings before a constitutional court are a continuation of earlier contradictory proceedings, there is sure to be criticism because this is a zero-sum game in which the gain of one side means the loss of the other. But criticism can appear in other kinds of proceedings, as well, especially when the case is one of great public interest, regardless of the reason why and of whether public opinion is united or broken up into opposing camps.

Bearing this in mind, every constitutional court should prepare a strategy for preventing predictable criticism in advance, before the decision has been made, and for reacting to criticism that is expressed after the decision has been made.

Yet techniques for achieving this are very limited because many of the activities that are more or less permitted in other areas (negotiations, lobbying...) can by the nature of things not be used in constitutional court proceedings.

If criticism can be expected, it is best to take appropriate preventive measures to forestall it before the unpopular decision has even been made or to decrease and mitigate it after it has been made.

To do so, the constitutional court must first assess public opinion in a particular case, consider who makes up the active public and whether to address it, and whether to deal with the latent and aware public at the same time before they, too, become active.

After that the constitutional court must decide whether it would be useful to organise a public consultation during the proceedings to secure complete expert arguments about what

is proper and suitable in the particular case. Moreover, depending on the subject of the proceedings and the scope of public interest and engagement, the public consultation could be organised with the public at large, the interested public or only the expert public.

During the proceedings the constitutional court, i.e. its judges, should as a rule not make statements and talk publicly about the case, because this could be seen as prejudging the decision and could later lead to even stronger criticism.

The public's reception of a constitutional court decision that does not meet its expectations greatly depends on how it has been substantiated and how the media reported about it.

The decision's statement of reasons is especially important, because the content and intensity of the criticism hinge on its quality. The statement should be an expert explanation of the decision, not an apology for its substance. A good statement prevents negative criticism by experts or enables preparing a proper answer to it if it is groundless.

In the case of the general public and the media, however, the situation can be different. Sometimes a quality statement with clear reasons and expert arguments does not prevent the public from criticising a decision that is not to its taste. And the media, unlike the constitutional court, need not oppose public opinion even when they know that it is not right. Thus they not infrequently, in their own interests (bigger circulation, better sales, more viewers), support negative public opinion unreservedly even when the constitutional court was obviously not wrong.

Under such circumstances, how to react can become a serious issue.

In the first place, the constitutional court should ensure that the regular activities connected with the public nature of its work, although not directly connected with the specific case, are performed on time: public proclamation of the decision, publication of the decision in the official gazette and on the website, official public statement about making the decision.

Some constitutional judges deem that this is always enough and that the constitutional court, in view of its impor-

tance, standing and professional superiority, should and even may never do more under any circumstances, and should especially not react to criticism of its decisions.

However, other constitutional judges hold more moderate opinions and think that it is wrong to ignore all criticism and absolutely "respond by silence", because this has a contrary effect to the purpose and aim of constitutional justice: it forms a public perception about an elitist group that does not answer to anyone for anything, which generally weakens people's confidence in democratic institutions.

Therefore, if a decision of the constitutional court is criticised, it is first necessary to decide whether to react to the criticism, and this depends on its content and how serious it is.

The constitutional court must certainly react in a fitting way to criticism that is seriously inaccurate and unjustified, taking care not to infringe on the freedom of expression or prevent the expression of criticism as such. This refers to the kind of criticism that attacks the court's decision by using falsehoods and/or deception, which can significantly harm the court or adversely affect the performance of its constitutional tasks.

It is appropriate to respond to criticism:

- if it results from not understanding how the system works, or the role of the constitutional court, or if it is partly based on that kind of misconception, - when the criticism is serious and will probably have a significant negative social influence, - when it contains inaccuracies or is deceptive.
- In making a final decision about whether to react to criticism and how to do so, it is necessary to assess:
- can the answer additionally clarify the procedure or the reasons for making the decision, - will the answer rectify the wrong, inaccurate or deceptive informing of the public, - will the answer have the adequate meaning and serve to inform the public, - could the answer be misunderstood as having been given in the court's own interest (justification, apology...),
- can the answer contribute to the public's better information about an important issue that was the subject of the proceedings or is connected to them in some way.

The practical techniques or manners that are at the disposal of constitutional courts for reacting to criticism of their decisions are well known:

- request to publish a correction,
- public statement,
- press conference,
- interview,
- writing and publishing expert materials.

The decision about which of the above reactions to public criticism to chose in a particular case may depend, among other things, on the relationship between the constitutional court and the media.

If the subjects are of great public interest and the media are campaigning by reporting about them every day, the communications of the constitutional court or statements of its judges could be misquoted, interpreted or the media could denigrate the court in some other way. This kind of treatment could adversely affect understanding, assessing and accepting the court's decisions.

There are three basic explanations for such a negative media presentation:

1. a mistake,
2. they believe that they are writing (telling) the truth (and are ready to defend this),
3. they have bad intentions.

If a medium has made a mistake and the court can show that this is the case, then a correction must certainly be made and the medium requested to publish it in an appropriate manner. Some media do this gladly, making corrections in a text to indirectly show their journalistic care for correct information.

If the media believe that what they have published is the truth, they should be shown in an appropriate and substantiated manner that this is not so.

If, however, there is a bad intention, the court should stay calm, prepare an answer and show that the media presentation is incorrect and unjustified[8].

[8] Essex (2008): 161.

Whatever the case, the following two rules must be borne in mind when dealing with media attacks and assessing how to react to them:

1. if you react too strongly, you risk informing the people (part of the public) who had not even seen it about the attack against you;
2. if you are conducting a war against the media, your reaction cannot give you victory – if it is a good reaction, it may possibly help you lose with a smaller difference.

There are various options as to who should address the public in the name of the constitutional court:

a) always and only the president of the constitutional court; by the virtue of duty the president represents the constitutional court so need not consult the other judges when addressing the public, which may depend on the occasion, subject and specific circumstances;
b) each judge of the constitutional court, on his/her own initiative (which could be a bad variant) or in agreement with the president and/or other judges (which is certainly to be recommended);
c) the judge who was involved in the specific case (the reporting judge; on his/her own initiative or in agreement with the president and/or other judges);
d) a special person authorised for public relations by the constitutional court (spokesperson; this could be one of the judges, the secretary general or a PR official; he/she always addresses the public in agreement with the president and/or other judges)[9];
e) a combination of several or all of the above options.

4. Experiences of the Constitutional Court of the Republic of Croatia

Unlike some other constitutional courts, the Constitutional Court of the Republic of Croatia (further in the text: the

[9] For example, the spokesperson for regular Croatian courts is always one of the judges in that court.

Constitutional Court) does not belong to the judiciary but is a constitutional body independent of all the bodies of state power. Because of this, it is a kind of "fourth" power in addition to the classical separation of powers into legislative, executive and judicial.

The Constitutional Court guarantees compliance with and application of the Constitution of the Republic of Croatia[10] and is empowered to control the constitutionality of the acts of all the three branches of government. It is empowered to repeal laws passed by the Parliament, regulations and other subordinate legislation brought by the Government and its ministers, and quash judicial decisions, including also the decisions of the Supreme Court. Under certain conditions the Constitutional Court may impeach the President of the Republic. Furthermore, it is the supreme controller of the regularity of all electoral proceedings (parliamentary, presidential, local) and of the national referendum[11].

The public nature of the Constitutional Court's activities is realised through:

- the publication of its decisions,
- the printing of collections of decisions,
- the presence of representatives of the press and other media at sessions and public and consultative discussions in the Constitutional Court,
- television and radio broadcasts,
- delivery of official communications to the media,
- holding press conferences,
- publication of the Constitutional Court's case-law and important data on its web page (www.usud.hr).

Furthermore, in this context it is important to emphasise that proceedings to review the constitutionality of a law before the Constitutional Court may be instituted in two ways:

- by a request of the statutory proponents (one fifth of the representatives or a working body of the Parliament, the

[10] *Narodne novine*, no. 85/10 (consolidated wording). Accessible in English at www.sabor.hr/Default.aspx?art=2405.

[11] The jurisdiction of the Constitutional Court is provided for in Article 129 of the Constitution (consolidated text).

President of the Republic, and under certain conditions some other proponents as well - judges, ombudsman etc.)
- by a proposal (in the nature of an initiative) submitted by any natural or legal person, without the obligation to prove any kind of personal interest (*actio popularis*).

On several occasions the Constitutional Court decided in cases that were of great public interest. Sometimes public opinion was strongly expressed even before the proceedings were instituted and during them, and some of the decisions made by the Constitutional Court met with an extremely negative public reaction.

As a rule, however, the Constitutional Court did not officially react to the negative public opinion about its decisions. Instead, the president and the judges of the Constitutional Court made use of particular occasions to additionally clarify the reasons for making the decisions: by giving interviews, delivering papers at professional and scholarly meetings and the like. Exceptionally, in the case of inaccurate quotations and interpretations that had to be corrected, the Constitutional Court sent communications to the media.

I shall continue by showing four characteristic examples of public criticism of decisions from the more recent practice of the Constitutional Court.

4.1 Review of the constitutionality of the Pension Insurance Act[12]

The proceedings were instituted on the initiative of several natural persons who disputed, among other things, the constitutionality of the provisions of the Pension Insurance Act whereby men and women were entitled to a retirement pension at different ages.

In the proceedings the Constitutional Court found that these provisions contravened the Constitution because they departed from the highest values and fundamental guarantees of the constitutional order of the Republic of Croatia *("... equal*

[12] Decision U-I-1152/2000 and others of 18 April 2007, accessible at: www.usud.hr (in English as well).

rights ... gender equality ... are the highest values of the constitutional order of the Republic of Croatia and ground for interpreting the Constitution". /Article 3 of the Constitution/; "All persons in the Republic of Croatia shall enjoy rights and freedoms, regardless of ... gender ... *All persons shall be equal before the law".* /Article 14 of the Constitution/). At the same time, as harmonising these provisions of the Pension Insurance Act with the Constitution required a reform of the immense, extremely complex and very sensitive system of pension insurance, which could not be implemented in a short time, the Constitutional Court laid down that they shall go out of force on 31 December 2018.

In the statement of reasons of the decision the Constitutional Court, among other things, gave a survey of the legal stands and conditions concerning the age for entitlement to a pension in the national legislations of Council of Europe and European Union member states, and compared them with conditions in Croatia. It, furthermore, referred to the case-law of the European Court of Human Rights in Strasbourg and gave a detailed presentation of the facts, circumstances and legal standpoints expressed in the Grand Chamber judgment in the case of *Steck v. the United Kingdom*[13].

Although the decision of the Constitutional Court was well substantiated, detailed and clear, it caused real public upheaval. The reaction of non-governmental women's rights organisations (B.a.b.e., Roda and others) was especially vehement, calling the decision "scandalous", "hypocritical", "socially insensitive", "feministic" and the like.

Moreover, carried forward by the criticism of non-governmental organisations, media comments additionally stoked up public criticism and anger[14]. They misinformed the public by saying that the Constitutional Court had laid down that in future women would be entitled to a pension at the age of 65, which is the age required for men, instead of at the age of 60[15]. In its

[13] Judgment of the Grand Chamber nos. 65731/01 and 65900/01 of 12 April 2006.
[14] For example: "A New Strike at Women's Status" (*Novosti*, 7 May 2007).
[15] For example: "Women, too, to be Pensioned at 65" (*Glas Slavonije*, 19 April 2007), "The Constitutional Court decided that both men and women will be pensioned at 65, finding the present provisions 'sexist" (*Vjesnik*, 20 April 2007).

decision, however, the Constitutional Court did not define the age necessary for entitlement to a pension at all, because this is a matter for the legislator. It only found that setting a different age for entitlement to identical rights, depending on the sex of the addressee, does not comply with the Constitution and that the age must be the same for persons of both sexes, without defining what the age must be.

The Constitutional Court, however, made no direct official reaction to the criticism.

4.2 Review of the constitutionality of the Special Tax on Salaries, Pensions and Other Receipts Act (Special Tax Act)[16]

In July 2009 the Croatian Parliament passed an act introducing a special (additional) tax on salaries, pensions and other receipts as a measure for mitigating the economic and financial crisis, with a time limit for expiry on 31 December 2010.

The President of the Republic submitted a request for the review of the constitutionality of the Special Tax Act. Besides the President's request, in a short time the Constitutional Court received 110,662 proposals (initiatives) to institute proceedings to review the constitutionality of the Special Tax Act. The act caused great public dissatisfaction and some trade unions, citizens' associations and other organisations organised a campaign in which they published a standard form for a proposal to institute proceedings and took charge of collecting and filing the proposals with the Constitutional Court. In addition, the media relentlessly criticised the Special Tax Act, expressed their one-sided and exclusive standpoints and suggested what the finding of the Constitutional Court should be[17].

In this way the Constitutional Court and its judges were under very strong pressure during the very proceedings.

Because of the great public interest and the pressure mentioned above, the president of the Constitutional Court

[16] Decision and Ruling U-IP-3820/2009 and others of 17 November 2009, accessible at: www.usud.hr (in English as well).

[17] For example: "Professional Advice to the Constitutional Court: the encumbrance must fall" (tportal.hr, 16 October 2009).

held a press conference18 during the proceedings at which she pointed out that in its decision-making generally, and in this case as well, the Constitutional Court will not implement the policy of any political party, trade union or non-governmental organisation, but that the only criterion for its work would be the Constitution interpreted in accordance with European legal standards.

With this in mind, the Constitutional Court implemented very exhaustive proceedings in which it:

- acquired the declaration and working materials of the Croatian Parliament (which enacted the Special Tax Act),
- acquired the declaration of the Government of the Republic of Croatia (which proposed the Special Tax Act),
- acquired the written expert opinions of expert advisors of the Constitutional Court,
- held a consultative public session with the participation of representatives of the proponent of the request, invited proponents, representatives of the Croatian Parliament, representatives of the Government of the Republic of Croatia and invited scholars in constitutional law, financial law, social policy and political philosophy,
- convened several consultative working meetings about some specific issues connected with certain aspects of the disputed Special Tax Act with expert advisors of the Constitutional Court from the Labour and Social Law Department and European Public Law Department of the Faculty of Law of Zagreb University,
- through the Venice Forum acquired the declarations of 21 member states of the Council of Europe and three non-member states showing the corresponding measures that they had taken because of the global economic and financial crisis, and which were comparable with the legal measures in the Special Tax Act,
- used the relevant case-law of the European Court of Human Rights in Strasbourg and the case-law of the Federal Constitutional Court of the Federal Republic of Germany, which is of universal importance for clarifying tax-policy issues in a welfare state, i.e., for clarifying the

legislator's obligations in the application of the principles of equality and equity in taxation.

Guided by the reasons that were given for disputing the constitutionality of the Special Tax Act, in the proceedings of review the Constitutional Court applied the proportionality test in which it sought to answer the following questions:

a) What is the legislator's goal in passing the Special Tax Act and is this goal legitimate?
b) Does the Special Tax Act contribute to the realisation of the legitimate goal and is it part of the totality of public polity measures all of which together act towards its realisation?
c) Is the tax in the Special Tax Act proportional to the goal that the legislator wanted to achieve?
d) Is the tax in the Special Tax Act an excessive burden for its taxpayers?
e) After the proceedings the Constitutional Court delivered a decision in which it found that, with reference to the reasons for which it was disputed, the Special Tax Act does not contravene the Constitution. In the reasons for the decision the Constitutional Court explained in detail the reasoning that led to the decision on 45 pages of text. The decision was also explained in short orally at a public session of the Constitutional Court in the presence of many journalists.

However, the decision all the same brought about great dissatisfaction and criticism, in which few people referred to the statement of reasons and to reasons based in constitutional law.

In this case the media gave an especially negative view of the work of the Constitutional Court[19]. Trade unions reacted just as fervently[20].

[18] 19 August 2009.
[19] For example: "A Gift to the Prime Minister from Jasna Omejec and ten Constitutional Judges" (*Jutarnji list*, 18 November 2009), "State Finances outweigh Justice" (*Novi list*, 18 November 2009), "The State is More Important than Justice" (*Glas Slavonije*, 20 November 2009), "A Strictly Controlled Court" (*Novi list*, 21 November 2009).
[20] For example: "The Court Confirms Extortion" (from: Business.hr, 18 November 2009), "Constitutional Judges return the Debt to the HDZ which Appointed Them" (from: *Večernji list*, 19 November 2009).

The Constitutional Court did not directly react to the criticism because it considered that the public had been properly informed about the course of the proceedings and completely and clearly informed about the reasons for making the decision. The president of the Constitutional Court referred to it much later at a press conference called to mark the end of the second year of her term as president[21].

4.3 Finding about the existence of constitutional requirements for calling a national referendum[22]

In May 2010 the Government of the Republic of Croatia submitted a proposal to the Croatian Parliament for amendments to the Labour Act whereby, among other things, a collective agreement remained in force after the expiry of the period for which it had been signed, if the parties did not manage to make a new agreement, but only for the next six months (under the act in force at that time, this time limit did not exist and an existing collective agreement remained in force even after its expiry until a new agreement was made).

The trade unions opposed these changes and started a campaign to collect voter signatures for calling a referendum at which citizens could declare themselves about whether they supported the legal provisions (then) in force. In this campaign 717,149 valid signatures were collected, which was more than the statutory minimum (10% voters), and the Organisation Committee submitted a request to the Croatian Parliament to hold a referendum.

Then the Government of the Republic of Croatia gave up the amendments of the above legal provision and withdrew the bill from parliamentary procedure.

However, the Organisation Committee requested that the Croatian Parliament should nevertheless hold the referendum, despite the Government's withdrawal from amending the law. The public and the media supported that request and created

[21] Press conference of the president of the Constitutional Court of the Republic of Croatia, 7 July 2010.
[22] Decision U-VIIR-4696/2010 of 20 October 2010, accessible at: www.usud.hr (in English as well).

strong political pressure, and the trade unions used rather belligerent slogans[23].

The Croatian Parliament requested a finding from the Constitutional Court about whether the Constitution required holding a national referendum under the given circumstances.

Aware of the great public interest, the Constitutional Court undertook extensive proceedings in which it, among other things, acquired the declarations of the Croatian Government and the Organisation Committee, expert opinions in writing of the Constitutional Court's expert advisors, and the view of the Venice Commission established in the Code of Good Practice on Referendums from 2009.

On the grounds of its proceedings the Constitutional Court found that in this case the preconditions for holding the referendum had ceased to exist after the bill had been withdrawn from legislative procedure.

In the detailed statement of reasons for its decision the Constitutional Court affirmed that by withdrawing the proposal of the act from legislative procedure the Government had in fact complied with the voters' will expressed in the 717,149 valid signatures and that this act of the Croatian Government had accomplished the objective which the voters had wanted to accomplish by singing for a referendum. In this legal situation, in the view of the Constitutional Court, there would be no legal sense or objective and reasonable justification to hold the referendum.

Although members of the legal profession gave a positive assessment of the decision, it nevertheless stirred up the public. Criticism by the trade unions was especially strong, and they publicly threatened petitioning for extraordinary elections, organising a general strike and protests throughout Croatia, even announced a request for abolishing the Constitutional Court. Some of the media commented the decision negatively, too[24].

[23] For example: "If there is no Referendum our Answer will be Deadly", Danas.hr, 20 October 2010.
[24] For example: "Wise Leaders in the Constitutional Court" (*Večernji list*, 22 October 2010), "Trade Unions begin the Defence of Direct Democracy" (*Vjesnik*, 22 October 2010).

However, the Constitutional Court did not react officially to this criticism. Only later did the president of the Constitutional Court refer to the public criticism in connection with this case in one of her interviews[25].

4.4 Review of the constitutionality of the Election of Representatives to the Croatian Parliament Act (Parliamentary Elections Act)[26]

Several proponents submitted proposals to review the constitutionality of amendments to the Parliamentary Elections Act, and they disputed, among other things, the constitutionality of the provisions under which voters – members of national minorities, have dual voting rights (they vote both for the "general list" and the special "minority list"), except for members of the Serb national minority who do not have this right (they may vote either for the "general list" or for their special "minority list"), but have the right to three reserved seats in the Croatian Parliament.

As this belonged to the politically very important and especially sensitive issue of national minority rights, and was at the same time a precedent in electoral systems, the Constitutional Court undertook extremely extensive proceedings in which it, among other things:

- acquired the declaration of the Government of the Republic of Croatia (which proposed the law),
- acquired written expert opinions from the departments of constitutional law of faculties of law,
- held a consultative public discussion with the participation of proponents of the review proceedings, representatives of the Croatian Parliament and Government, the Minister of Public Administration and Minister of Justice, and representatives of the academic community,
- held an expert discussion with members of the Croatian Constitutional Law Association.

On the grounds of its proceedings the Constitutional Court

[25] TV channel Z1, programme "*Look Forward*", interview to Mladenka Šarić, 28 December 2010.
[26] Decision U-I-120/2011 of 19 July 2011, accessible at: www.usud.hr (in English as well).

found that the impugned provisions of the Parliamentary Elections Act were not in conformity with the Constitution because constitutional law does not allow reserved parliamentary seats to be guaranteed in advance by law, in the framework of the general electoral system, to any minority on any grounds (national, ethnic, linguistic ...) as this, by the nature of things, infringes equal suffrage within that system. It also found that under the specific circumstances the impugned provisions of the Parliamentary Elections Act about the supplementary vote of national minorities cannot be acceptably justified because it does not ensure a higher degree of national minority integration in political life than that already achieved, and at the same time it infringes the equality of suffrage to a far greater degree than the statutory measures in force earlier. Thus the Constitutional Court repealed the above provisions of the Parliamentary Elections Act.

The decision met with strong criticism by some national minority representatives who found themselves affected by the loss of status the repealed provisions had provided. Considering the sensitive nature of the material, it was no problem to "incite" some national minority members and the international community and use the media to create a degree of political pressure[27].

However, in this case the Constitutional Court did not officially react either.

5. Instead of a conclusion

The decisions of constitutional courts are of a nature and have effects that can under certain circumstances bring about negative public criticism.

The constitutional court must not neglect public opinion in the implementation of its jurisdiction because the public is the main support and source of constitutional strength through which people hold their rulers under control. However, public opinion cannot be the decisive factor underpinning the decisions of the constitutional court.

[27] For example: "A Step Back to the Ghetto", *Novosti*, 5 August 2011.

When a constitutional court decision is especially strongly criticised, the reasons for this must be discovered. In doing so it is important to perform an objective analysis to answer two inter-connected groups of questions:

1. What is the reason for the negative public criticism: disinformation and manipulation by smaller groups, insufficient knowledge about and acceptance of the legal and constitutional framework, loss of confidence in institutions or something else?
2. Whether and how to react to public criticism: in general and in a specific situation, institutionally and informally, in the short and the long term?

To answer these questions it would be useful to have expert and scholarly research about the number and type of media that deal with the rule of law and the legal framework for the work of the institutions of society, the subjects they deal with, titles and sources, frameworks and approaches (journalistic, critical, informative, provocative, sensationalist, academic) and the like. Unfortunately, there is no such research.

It may also generally be said that media programmes and articles dealing with various subjects concerning the rule of law, principles of constitutionality and legality, human rights and freedoms and constitutional justice, in a manner that would be understandable and acceptable for the layman, are very rare, especially media that specialise in such material.

Under such circumstances there is no universal recipe. Constitutional courts will always face the same doubts and risks, from state to state, from court to court, from case to case.

But from each separate case a lesson and experience should be drawn for use in some future case.

However, there is no recipe to guarantee that no mistakes will be made. It is, therefore, perhaps the simplest to accept the rule:

Try again, make a mistake again, but make a better mistake.

Т. Антич

Генеральный секретарь
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Реакция на негативную критику судебных решений

Резюме

Деятельность конституционных судов очень часто подвергается общественной критике. Это может быть выражено в виде давления до и в ходе конституционного судопроизводства и в виде оценок (положительной или отрицательной), данных после вынесения судом решения. Когда решение конституционного суда критикуется, в первую очередь, необходимо решить, следует ли реагировать на критику, а это зависит от ее содержания и степени серьезности. Конституционный суд, безусловно, должен соответствующим образом реагировать на крайне неточную и необоснованную критику, заботясь о том, чтобы не посягать на свободу слова или препятствовать выражению критики как таковой. Уместно реагировать на критику: а) если она является результатом непонимания того, как работает система, или роли Конституционного суда, либо если она в некоторой степени основана на подобном заблуждении; б) когда критика является серьезной и, вероятно, оказывает значительное негативное социальное воздействие; в) если критика содержит неточности или вводит в заблуждение.

Для принятии окончательного решения о том, следует ли реагировать на критику и как это сделать, необходимо определить: 1) может ли ответ дополнительно уточнить процедуру или причины принятия решения; 2) решит ли ответ проблему неправильного, неточного или

вводящего в заблуждение информирования общественности; 3) будет ли ответ иметь адекватное значение и будет ли служить информированию общественности; 4) может ли ответ быть неправильно понят; 5) может ли ответ способствовать большей информированности общественности о важном вопросе, который был предметом судебного разбирательства или каким-то образом был связан с ним.

Конституционное
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