

Improving Human Rights Protection on the National and the European Levels – Individual Access to Constitutional Courts and the Accession of the European Union to the European Convention on Human Rights

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I. Introduction

Prof. Jean-Claude Colliard was a key member of the Venice Commission from 2006 until his death in 2014, following a long illness. Throughout his membership he was active as a rapporteur and has contributed to shape the doctrine of the Venice Commission, especially in the field of electoral law and political parties. Masterpieces of his work in this field were the Code of Good Practice in the field of Political Parties¹ and his Report on Measures to improve the Democratic Nature of Elections in Council of Europe Member States². Already ill, he still contributed to the

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¹ CDL-EL(2008)020, Draft Code of Good Practice in the field of Political Parties and CDL-AD(2009)021, Code of Good Practice in the field of Political Parties adopted by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008) and Explanatory Report adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009).

² CDL-AD(2012)005, Report on measures to improve the democratic nature of elections in Council of Europe member states adopted by the Council for Democratic Elections at its 40th meeting (Venice, 15 March 2012) and by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012).

Venice Commission in its successful work of assisting in the drafting of a new Constitution for Tunisia³.

The Protection of Human Rights was always close to the heart of Jean-Claude Colliard. This paper in his honour relates to human rights protection on the national level as well as on the European level.

Within this wide field, this paper will deal with two aspects of human rights protection⁴, which currently undergo changes in Europe:

1. On the national level – we will approach the topic of individual access to constitutional justice and notably the question whether a complaint to a Constitutional Court is “effective”. This issue relates to the vertical relationship between national courts and European courts. In Europe we can see a trend to introduce and widen such access, for instance in Turkey, which introduced such an appeal two years ago, or in Macedonia, where a constitutional reform will widen a hitherto narrow constitutional complaint.
2. On the European level – this paper refers to a hot topic, the accession of the European Union to the European Convention of Human Rights. The EU accession to the Human Rights Convention will bring about coherence and clarity in a system where now two European Courts develop human rights in a horizontal, parallel way, which can lead to divergent interpretations of rights.

These two issues exemplify the complexity of multi-level Human Rights protection in Europe. Both questions are pivotal for a coherent functioning of the European human rights system, both on the national and the European levels.

³ CDL-AD(2013)032, Opinion on the Final Draft Constitution of the Republic of Tunisia adopted by the Venice Commission at its 96th Plenary Session (Venice, 11-12 October 2013).

⁴ This paper is based on presentations by the author at the Symposium on “*Institution Design for Conflict Resolution and Negotiation - Theory and Praxis*” (Nagoya, 1-2 February 2014) and Seminar celebrating the 25th anniversary of the Constitutional Chamber of the Supreme Court of Costa Rica (San José, 13-14 November 2014).

II. The national level – individual access to constitutional Courts

Let us first turn to the relationship between national Constitutional Courts and the European Court of Human Rights and in particular the question of national remedies against human rights violations.

Following, the fall of the Berlin wall, the Central and Eastern European countries wanted to join the Council of Europe as quickly as possible in order to become a member of the ‘club’ of democratic countries. Ratification of the European Convention on Human Rights together with the individual application to the European Court of Human Rights was a condition for such membership. Within a relatively short period, the Council of Europe expanded from 23 to 47 member states and the European Court of Human Rights was forced to follow this expansion with dramatic results. Given that the human rights protection in several of the new member states remained problematic in many respects, the number of applications from these countries increased steadily and the European Court of Human Rights accumulated an ever increasing backlog of cases, culminating in some 160.000 cases in 2011⁵.

The member States of the Council of Europe and the Court itself were increasingly worried about this problem, not least because the Court condemned the member states *inter alia* for the excessive length of procedures, while cases before the European Court itself took longer and longer to be settled.

The main remedy to this problem was Protocol No. 14, which brought about several procedural simplifications and notably a reduction of the number of judges for decisions of inadmissibility from three to one judges. Under Protocol no. 14, a single judge can reject manifestly inadmissible applications. However, this protocol was delayed for several years by the refusal of Russia to ratify it. The Russian Federation ratified Protocol 14 only when the other 46 member states agreed to go ahead without Russia and to establish the

⁵ Annual Report of the European Court of Human Rights 2012, p. 6 (http://www.echr.coe.int/Documents/Annual_report_2012_ENG.pdf, accessed 22.1.2014).

new system between them, whereas the old system – with three judges – would continue for Russia only⁶.

Protocol 14 was indeed quite successful. The Court was able to reduce the number of cases from 160.000 to some 90.000 within three years. However, the number of 90.000 pending cases is still impressive and many reckon that easier cases have been settled more quickly and that the remaining number includes a higher percentage of complicated cases.

A further reform was brought about by Protocol 15⁷, which explicitly refers to the principle of subsidiarity but also reduces the deadline to submit a case from 6 months to 4 months after the final national judgment.

In order to overcome the problem of the overburdening of the European Court of Human Rights, the “mother” organisation of the Court, the Council of Europe organised a series of conferences in Rome⁸, in Interlaken⁹, in Izmir¹⁰, and in Brighton in order to further explore ways to safeguard the system of the European Convention on Human Rights. The latest Declaration, adopted in Brighton¹¹, insists on the necessity to improve within the member states the systems of human rights protection in order to settle human rights problems on

⁶ For a prolonged period, the Russian Federation did not ratify Protocol 14 (opened for signature on 15.5.2004), which could enter into force only after ratification by all 47 members states of the Council of Europe, which are also parties to the Convention. All other 46 members had finished the ratification process in 2006 and when it became clear that Russia would not ratify, they elaborated the so called “Protocol 14bis” (opening for signature 27.2.2009, entry into force 1.10.2009), which introduced the simplification of the procedure before the Court only for the member States having ratified it. Probably in view of the impossibility to prevent the reform of the Court, the Russian Federation finally ratified Protocol no. 14 on 18.2.2010. As a consequence, that Protocol entered into force on 1.6.2010 and Protocol 14bis ceased to be in force.

⁷ CETS No. 213, Opened for signature on 24.6.2013, not yet entered into force.

⁸ European Ministerial Conference on Human Rights, Rome, 3-4.11.2000.

⁹ High Level Conference at Interlaken, Declaration of 19 February 2010: <https://wcd.coe.int/ViewDoc.jsp?id=1591969>.

¹⁰ High Level Conference at Interlaken, Declaration of 19 February 2010 ; High Level Conference of Izmir, Declaration of 27 April 2011.

¹¹ High-level Conference on the future of the European Court of Human Rights (Brighton, United Kingdom, 18-20 April 2012), CDDH(2012)007, http://www.coe.int/t/dghl/standardsetting/cddh/cddh-documents/cddh_2012_007_en.pdf (accessed 22.1.2014).

the national level. Paragraph 9.c.iii of the Brighton Declaration calls upon the States Parties to consider the introduction of new domestic legal remedies for alleged violations of the rights and freedoms under the Convention.

Following thorough reforms, the scope of further improvements of the procedures at the European Court of Human Rights seems rather narrow. Therefore, the Council of Europe and its member states turn to the question how human rights violations can be settled at the national level rather than cases being brought to Strasbourg¹².

One vector of this focus on human rights protection on the national level is Protocol no. 16¹³, according to which highest courts of the member States can request advisory opinions from the European Court of Human Rights in the context of a case pending before the national court. The idea is that by following the advisory opinion, the national court would avoid a later appeal to the European Court of Human Rights and a possible condemnation by the European Court. In private discussions, constitutional judges seem rather reluctant towards this mechanism, which has not yet been established.

In this wider context of national remedies, the Venice Commission has prepared a study on individual access to constitutional justice¹⁴, which *inter alia* elaborated on the issue of how such national remedies have to be designed in order to live up to the standards of the European Court of Human Rights, which would require their exhaustion before cases can be brought before the Strasbourg Court.

¹² The Council of Europe mandated two working groups to prepare proposals for a reform of the Court. With participation from the Venice Commission, the working group GT-GDR-F is preparing on the longer-term future of the Convention system (http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/DOCUMENTS-GroupF_en.asp). Another group, GT-GDR-G, prepares proposals for a change of the procedure for the amendment of the Rules of Court, giving the member States more influence over such amendments (http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-G_en.asp).

¹³ CETS No. 214, Opened for signature on 2.10.2013, not yet entered into force.

¹⁴ Study on Individual Access to Constitutional Justice, adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010, CDL-AD(2010)039rev); see also P. Paczolay, Introduction to the Report of the Venice Commission on Individual Access to Constitutional Justice, Conference on Individual Access to Constitutional Justice, Arequipa, Peru, 30-31 May 2013 (CDL-JU(2013)003).

The Study, which is available in Spanish translation thanks to the Constitutional Court of Chile¹⁵, tries to provide answers to the issue of efficient national human rights remedies, as called for in the Brighton Declaration.

The Council of Europe steering committee, which is in charge of the implementation of the Brighton Declaration – CDDH, has indeed invited the Venice Commission to co-operate in the follow-up to the Brighton Declaration.¹⁶

Before entering the the substance of this study, let us present its author, the Venice Commission.

a. Venice Commission

Founded in 1990, the Venice Commission is an advisory body of the Council of Europe. It is composed of independent experts in the field of constitutional law. They are mainly university professors and judges of constitutional or supreme courts.

Being part of the Council of Europe, the Venice Commission is open to the participation of non-European countries and has a total of 60 member states. In the Americas, Brazil, Chile, Mexico, Peru and the United States are full members. Argentina, Canada and Uruguay are observers.

The main activity of the Commission is to provide advice for the preparation of constitutional reforms and para-constitutional legislation (electoral laws, legislation on the structure of the Judiciary etc.).

The Commission only acts upon request, which can come from the State concerned, the organs of the Council of Europe or international organisations that participate in the work of the Venice Commission (European Union, OSCE/ODIHR). In practice, most of the requests for advice come from Governments and Parliaments, but the Commission also provides *amicus curiae* briefs to Constitutional Courts when

¹⁵ Estudio sobre el Acceso individual a la Justicia Constitucional, CDL-AD(2010)039rev ([http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)039rev-spa](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-spa)).

¹⁶ Report of the 79th meeting of the CDDH ([http://www.coe.int/t/dghl/standardsetting/cddh/cddh-documents/cddh\(2013\)r79_en.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/cddh-documents/cddh(2013)r79_en.pdf)).

they ask for them. The Constitutional Court of Peru, for example, has requested an *amicus* brief in a case relating to crimes against humanity¹⁷.

Since its establishment, the Venice Commission supported the idea of an international dialogue of constitutional judges. As a basis for this dialogue, the Venice Commission provides a permanent platform for exchange of information. Tools for this exchange are the CODICES database, which provides information about important cases of more than 80 Constitutional Courts, Constitutional Councils, Constitutional Chambers and Supreme Courts in Europe, Asia, Africa and the Americas, as well as from the European Court of Human Rights, the Court of Justice of the European Union and the Inter-American Court of Human Rights. All contributions are prepared by liaison officers appointed by the Courts themselves.

The liaison officers also have access to the confidential on-line Venice Forum, through which the courts can quickly exchange information and request assistance.

In cooperation with regional groups and linguistic groups uniting Constitutional Courts, Constitutional Councils and Supreme Courts¹⁸, the Commission established the World Conference on Constitutional Justice which has 94 Member Courts¹⁹, and for which the Venice acts as the Secretariat.

So far, the World Conference held Congresses in 2009 in South Africa, in 2011 in Brazil and 2014 in Korea. The goal of the World Conference is to ensure long-term cooperation between constitutional courts, as well as exchanges of human rights case-law in order to strengthen democracy, human rights and the rule of law.

¹⁷ CDL-AD(2011)041, Amicus Curiae Brief on the case Santiago Bryson de la Barra et Al (on crimes against humanity) for the Constitutional Court of Peru adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011)

¹⁸ Conference of European Constitutional Courts, the Association of Constitutional Courts using the French Language, the Southern African Judges Commission, the Conference of Constitutional Control Organs of Countries of New Democracy, the Association of Asian Constitutional Courts and Equivalent Institutions, the Union of Arab Constitutional Courts and Councils, the Ibero-American Conference of Constitutional Justice and the Conference of Constitutional Jurisdictions of Africa, Commonwealth Courts.

¹⁹ www.venice.coe.int/WCCJ.

b. Constitutional control in Europe

Today, there is general agreement that ordinary legislation has to be in conformity with the Constitution²⁰. As a consequence, a large majority of countries have entrusted the control of the conformity of laws with the Constitution to courts, either the ordinary courts or specialised constitutional courts.

The idea of the constitutional review (or control) of ordinary laws originates in the USA where in 1803, the Supreme Court held that a legislative act that conflicts with the Constitution is void and cannot receive judicial application²¹. This idea spread to Europe and already during the 19th century, the Supreme Courts in Monaco, Norway²² and Romania²³ asserted their jurisdiction not to apply unconstitutional laws.

Hans Kelsen, the drafter of the Austrian Constitution of 1920, was in favour of the idea of constitutional review but he also was of the opinion that the annulment of laws adopted by Parliament, elected by the sovereign people, should not be entrusted to the ordinary judiciary, which lacked sufficient democratic legitimacy. His novel idea was to entrust constitutional review to a specialised court – a negative legislator – which would draw its legitimacy from a specific constitutional mandate and from its special composition²⁴. In its Report on the Composition of Constitutional Courts, the Venice Commission examined how specialised constitutional courts are composed. The Venice Commission recommended a composition reflecting various tendencies in society²⁵.

²⁰ H. Steinberger, Models of Constitutional Jurisdiction, CDL-STD(1993)002, p. 3.

²¹ Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803), CODICES [USA-1803-S-001] (the CODICES database of the Venice Commission is available at www.CODICES.CoE.int).

²² K. M. Bruzelius, "Judicial Review within a Unified Country", http://www.venice.coe.int/WCCJ/Papers/NOR_Bruzelius_E.pdf.

²³ G. Conac, *Une antériorité roumaine : le contrôle juridictionnel de la constitutionnalité des lois*, in *Mélanges Slobodan Milacic, Démocratie et liberté : tension, dialogue, confrontation*, Bruylant, Belgique, 2007.

²⁴ Hans Kelsen, General Theory of Law and State, New York (1961), p. 268.

²⁵ Venice Commission, Report on the Composition of Constitutional Court, CDL-STD(1997)020.

Between the two world wars specialised constitutional courts were established in Austria, in Czechoslovakia and in Liechtenstein. Because of Kelsen's origin and because his idea to establish a specialised Constitutional Court was implemented in Austria, this mechanism is often referred to as the 'Austrian model', even though many of these courts differ considerably from the Austrian Constitutional Court. For tragic historic reasons, the original Austrian Court only existed for a short period between 1920 and 1933²⁶.

Since the Second World War, specialised constitutional courts often have been introduced as a remedy against human rights violations after periods of dictatorship. We can discern three waves²⁷ of the establishment of such courts: first in Germany and Italy, as a reaction to Nazism and Fascism, a second wave in Spain and Portugal after end of dictatorships in these countries and finally, after the fall of the Berlin wall in former communist countries of Eastern Europe, but also in other parts of the world²⁸.

The establishment of specialised constitutional courts nearly always results in some form of tension between the established ordinary judiciary and the newly created Constitutional Court²⁹. Nonetheless, many countries have introduced specialised constitutional courts and this trend continues³⁰. There are two main reasons for this trend: hierarchy and human rights protection:

- (a) The constituent power wants to ensure the supremacy of the Constitution over ordinary law and thinks, probably rightly, that a Constitutional Court is more likely to strike down laws because the Court has been set up for this very purpose. The main task for

²⁶ The Liechtenstein Constitutional Court has the longest uninterrupted activity of all constitutional courts. The current law in force of 2003 replaced the Law of 5 November 1925 on the Constitutional Court, Liechtenstein Legal Gazette (Landesgesetzblatt, LGBl.) 1925 No. 8.

²⁷ L. Solyom, *Comment*, in G. Nolte, ed., *European and us Constitutionalism*, Cambridge (2005), p. 210.

²⁸ For example in Asia: South Korea (1988), Mongolia (1992), Indonesia (2003).

²⁹ Sc. Dürr, *Individual Access to Constitutional Courts in European Transitional Countries*, in B. Fort, Bertrand, *Democratising Access to Justice in Transitional Countries* (Singapore 2006), pp 51-74.

³⁰ Jordan, for example introduced a specialised Constitutional Court with a constitutional amendment in 2011 and the Constitutional Court Law no.15 for the year 2012.

ordinary courts is to apply laws and not to annul them. Therefore, it is much more difficult for an ordinary judge to conclude that a provision of a law is constitutional.

- (b) The constituent power wants to provide for efficient human rights protection in a situation of democratic transition after the end of an authoritarian regime. In such a situation, citizens often mistrust the judiciary because it had to accommodate with the previous regime. Many judges will have acquiesced with the undemocratic situation, but reforming or renewing the whole judiciary is often a painfully slow process, even if it has to be addressed on a continuous basis. In such a situation, one specialised Constitutional Court, composed of judges who have an outstanding reputation, can be established relatively quickly.

This second reason calls for the introduction of an individual complaint to the Constitutional Court. By attributing individual access to a specialised Constitutional Court, this Court should be able to correct judgements of the ordinary judiciary. If this idea is to be implemented coherently, a so-called full constitutional complaint is required. A merely normative constitutional complaint, directed against unconstitutional laws only, as it was established in several Eastern European countries, cannot fulfil this purpose. The very establishment of a Constitutional Court raises high expectations in the population, which will be deceived when they find out that very often the Constitutional Court cannot help the victims of human rights violations, because the cause of those violations was not an unconstitutional law, which can be attacked before the Constitutional Court, but 'only' the unconstitutional application of a constitutional law. Such violations, which are much more frequent than violations due to unconstitutional laws, cannot be remedied with the normative constitutional complaint. There is a serious danger - which turned into reality in some countries - that high expectations towards the new Constitutional Court as an efficient human rights protector turn into deception and a negative attitude of at least parts of the population towards that Court.

Following the logic of the above mentioned Brighton Declaration, specialised constitutional courts should however be entrusted with a full constitutional complaint, which would be seen as an effective

remedy by the European Court of Human Rights. In this vein, the Venice Commission positively assessed the project to introduce a full constitutional complaint in Hungary³¹, Turkey³² and in Macedonia³³, and called upon Ukraine to transform its normative constitutional complaint into a full constitutional complaint.³⁴ Recently, the Venice Commission strongly recommended Montenegro not to weaken the existing constitutional complaint by replacing the Court's powers to repeal ordinary court decisions, by a mere declaration of their unconstitutionality³⁵.

c. The Venice Commission's Study on Individual Access to Constitutional Justice

The Commission's Study first distinguishes the various forms of individual access: diffuse vs. concentrated review³⁶, whereby diffuse control mostly exists in Northern European countries and various forms of concentrated review is prevalent in Southern and Eastern Europe. However, it is difficult to make a clear distinction between

³¹ In Hungary the constitutional complaint replaced an *actio popularis*. While criticizing other aspects of constitutional reform in Hungary, the Venice Commission welcomed the introduction of the constitutional complaint: CDL-AD(2012)009, Opinion on Act CLI of 2011 on the Constitutional Court of Hungary adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012); CDL-AD(2011)001, Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary - Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011).

³² Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey adopted by the Venice Commission at its 59th Plenary Session (Venice, 18-19 June 2004, CDL-AD(2004)024), followed by the Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011, CDL-AD(2011)040).

³³ CDL-AD(2014)026, Opinion on the seven amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014).

³⁴ Opinion on Proposals amending the Draft Law on the Amendments to the Constitution to strengthen the Independence of Judges of Ukraine, adopted by the Venice Commission at its 97th Plenary Session, (Venice, 6-7 December 2013), CDL-AD(2013)034, paragraph 11.

³⁵ CDL-AD(2014)033, Opinion on the Draft Law on the Constitutional Court of Montenegro, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October), para. 52.

³⁶ CDL-AD(2010)039rev, paragraph 34.

these systems. Some countries, like Portugal, have mixed systems, combining constitutional review by the ordinary courts with that of a specialised Constitutional Court.

In an opinion on Estonia, the Venice Commission recognised that the establishment of a Constitutional Chamber within a Supreme Court, like in Costa Rica, is a perfectly valid option for establishing a democratic constitutional system³⁷. Nonetheless most of the new democracies in the Central and Eastern Europe have opted for a specialised Constitutional Court. Such a choice necessarily results in questions of distribution of jurisdiction between the ordinary courts and the Constitutional Court, and raises a series of questions, which the Study tries to address. Therefore, the Study points out that a number of issues it deals with relate to countries with a specialised Constitutional Court³⁸.

Another important distinction is *a priori* and *a posteriori* review³⁹. A limitation to abstract *a priori* review, that is before laws are enacted, was a typical feature of the French system. However, since the 2008 constitutional reform, the Priority Question of Constitutionality has provided for individual, albeit indirect access and it introduced an important shift towards the review of laws that are already in force. More and more, the Constitutional Council changes from a political to a judicial institution⁴⁰. In other countries, *a priori* control is known in order to examine the constitutionality of treaties before they are ratified. The reason for such *a priori* control is that once a treaty is ratified, it would be difficult to remedy, *a posteriori*, a finding of unconstitutionality because the State is bound to follow the treaty under international law.

At least in theory, *a priori* examination can avoid the enactment of unconstitutional legislation. However, unconstitutional effects of legislation often are only discovered at the time of its application, in practice. Systems, which only provide for *a priori* review, have to live

³⁷ Opinion on the Reform of Constitutional Justice in Estonia (CDL(1998)059).

³⁸ CDL-AD(2010)029rev, paragraph 26.

³⁹ CDL-AD(2010)039rev, paragraph 44.

⁴⁰ A removal of the former Presidents of the Republic from the membership of the Council would reinforce this process and would strengthen the Council's role as an independent judicial organ.

with the absence of a remedy against unconstitutional laws if either those laws had not been submitted to *a priori* review or when the unconstitutionality only becomes evident during the application of the law.

a. Indirect access

The Venice Commission's Study continues to examine indirect access, foremost preliminary requests to the Constitutional Court⁴¹. When Italy, for instance, established a Constitutional Court, the constituent power chose the preliminary request as a means for individual access. When ordinary judges have to apply a legal provision deemed unconstitutional, they stay the proceedings in the case before them and send a request for constitutional review of that provision to the Constitutional Court⁴². The Constitutional Court either annuls the provision or upholds it as it constitutional⁴³. When the requesting judge (the judge *a quo*) receives the reply from the Constitutional Court (the judge *ad quem*), the ordinary judge resumes the case and decides it on the basis of the decision of the Constitutional Court, (a) either applying the provision found constitutional, (b) applying it with an interpretation given by the Constitutional Court, or (c) by disregarding the provision if it was found to be unconstitutional. Preliminary requests to the Constitutional Court exist in a number of countries, sometimes as the sole type of individual access (e.g. Italy, Lithuania, Romania⁴⁴, France⁴⁵), sometimes together with a direct individual complaint (e.g. Belgium⁴⁶, Germany, Spain⁴⁷).

⁴¹ CDL-AD(2010)039rev, paragraph 56.

⁴² A. Quaranta, *Il giudizio incidentale di legittima costituzionale*, CDL-JU(2012)025.

⁴³ The Constitutional Court of Italy has developed a number of intermediary types of judgement, which provide a specific interpretation of the law, which has to be applied to make the provision constitutional, A. D'Atena, *Interpretazioni adeguate, diritto vivente e sentenze interpretative della corte costituzionale*, http://www.cortecostituzionale.it/documenti/convegni_seminari/06_11_09_DAtena.pdf.

⁴⁴ A. Zegrean, *L'exception d'inconstitutionnalité à la Cour constitutionnelle de la Roumanie*, CDL-JU(2012)023.

⁴⁵ J. de Guillenchmidt, *La question prioritaire de constitutionnalité*, CDL-JU(2012)028.

⁴⁶ P. Nihoul, *Les questions préjudicielles*, CDL-JU(2012)027.

⁴⁷ R. Arribas, «Cuestiones» posées par le juge ordinaire à la Cour constitutionnelle d'Espagne (et autres modes d'accès de l'individu à la Cour constitutionnelle), CDL-JU(2012)024.

In some countries, all levels of the judiciary can make preliminary requests, whereas in France or now also in Jordan, lower instance judges have to send a request first to the supreme court(s) and it is the latter court(s) that finally decide whether or not to make a preliminary request to the Constitutional Court. Such a filter by the ordinary supreme court(s) has the advantage of reducing the case-load of the Constitutional Court. However, there is a serious danger that these courts take their filtering task too seriously so that important cases do not reach the Constitutional Court because the Supreme Court prefers settling the issue within the ordinary judiciary. We have seen this danger in France⁴⁸ and recently also in Jordan.

The Venice Commission recommends giving courts of all levels access to the Constitutional Court⁴⁹. In principle, preliminary requests are less of a danger for creating conflicts between the ordinary and the constitutional judiciary than individual complaints but the (excessive) filtering of preliminary requests can easily become the source of such conflicts.

A key issue is whether the judge *a quo* is obliged to make a preliminary request or whether s/he has discretion. The Study recommends that when there is no direct individual access to constitutional courts, it would be too high a threshold condition to limit preliminary questions to circumstances where an ordinary judge is convinced of the unconstitutionality of a provision; serious doubt should suffice⁵⁰.

The Venice Commission's Study also examines requests to the Constitutional Court by the Ombudsperson and recommends introducing such access in parallel to preliminary requests or direct constitutional complaints. Through his or her work, the ombudsman has an excellent knowledge about the application of the laws and can easily identify unconstitutional laws. As a consequence, the ombudsman should also have the possibility to request the annulment

⁴⁸ Fatin-Rouge Stéfanini, Marthe, *Le filtre exercé par le Conseil d'Etat, La QPC vue du droit comparé - Mars 2013*, http://www.gerjc.univ-cezanne.fr/fileadmin/GERJC/Documents/COMMUNICATIONS/Le_filtre_exerce_par_le_Conseil_d_Etat_1.pdf.

⁴⁹ CDL-AD(2010)039rev, paragraph 62.

⁵⁰ CDL-AD(2010)039rev, paragraph 216.

of such laws by the Constitutional Court, either in abstract form⁵¹ or possibly by referring to a specific case.

b. Direct access

While Kelsen ‘invented’ specialised constitutional courts, he did not favour individual access. According to him, only State bodies should be able to appeal to the Constitutional Court⁵², except for the challenge of administrative acts⁵³.

Various forms of direct access have been developed over time. Like Kelsen, the Venice Commission has a critical attitude towards the *actio popularis*, whereby any citizen can request the annulment of a law, even if the citizen is not affected by that law. Such a wide access can lead to a serious over burdening of the Constitutional Court. In Croatia, where an *actio popularis* exists, a single person, a retired judge, brought some 700 cases to the Constitutional Court, which had to deal with each request⁵⁴. Hungary replaced the *actio popularis* with an individual complaint.

The Commission’s Study focuses on the individual complaint to the Constitutional Court. This term covers quite different procedures. The normative constitutional complaint can be directed only against – allegedly – unconstitutional laws, whereas the full constitutional complaint is directed against unconstitutional individual acts, no matter whether these acts are based on an unconstitutional law or not. The normative constitutional complaint has been introduced mainly in Eastern European countries (e.g. Russia, Ukraine), whereas the full constitutional complaint has been developed first in Germany. The Spanish *amparo* is a full constitutional complaint as well.

⁵¹ CDL-AD(2010)039rev, paragraph 62.

⁵² Kelsen referred to the *actio popularis*: Hans Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit*, in: *VVdStRL* 5 (1929), S. 31-88 (68 f., 70, 74), available at : <http://www.hans-kelsen.de/gericht.pdf> (accessed 23.1.2014); see also V. Neumann, *Hans Kelsen und die deutsche Staatsrechtslehre*, *Humboldt Forum Recht*, 9/2012, p. 1. <http://www.humboldt-forum-recht.de/druckansicht/druckansicht.php?artikelid=269> (accessed 23.1.2014).

⁵³ G. Brunner, *Der Zugang des Einzelnen zur Verfassungsgerichtsbarkeit im Europäischen Raum*, CDL-JU(2001)022, p. 15.

⁵⁴ CDL-AD(2010)039rev, paragraph 74.

In Germany, the horrors of the Nazi regime brought about the need to establish a constitutional court not only as a “State Court”, in charge of disputes between state authorities but also as a protector of human rights. The 1951 Law on the Constitutional Court of Germany introduced an individual complaint to the newly established Constitutional Court, even though the German Constitution, the Basic Law, remained silent on this issue. Only in 1969, the Basic Law was amended to provide for the individual complaint also on the constitutional level.

Most important from the viewpoint of providing an efficient multi-level human system of rights protection, the Venice Commission’s Study examines whether individual complaints can function as a national filter for cases reaching the European Court of Human Rights. Starting from the need to address the heavy case-load of that Court, the Study provides advice on how to design an individual complaint so that it can become an “effective remedy” under Article 13 of the European Convention on Human Rights. The decisive criterion is, according to Article 35 of the Convention, whether the European Court of Human Rights insists on the exhaustion of a remedy or whether it accepts an application directly without insisting that such a remedy be exhausted before making an application to the Strasbourg Court.

The European Court of Human Rights will only recognise a national remedy as “effective” if this remedy can provide relief to the complainant. As a consequence, a constitutional complaint has to result in a binding judgement. For example, a mere recommendation to Parliament to amend an unconstitutional law is obviously not sufficient. The Constitutional Court also must be obliged to hear the case, i.e. there cannot be discretion on whether the Court takes on a case, and there must not be unreasonable demands as to the costs and legal representation by a lawyer for the applicant⁵⁵.

Complaints against excessive length of procedure are a special case. Here, the Constitutional Court has to be able to order the speedy resumption of proceedings. This means that the Court has to provide not only a compensatory but also an acceleratory remedy⁵⁶.

⁵⁵ CDL-AD(2010)039rev, paragraph 93.

⁵⁶ On this point see also the Venice Commission’s Study on the Effectiveness of National Remedies in respect of Excessive Length of Proceedings adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006), CDL-AD(2006)036, para. 173.

The Study continues to give advice on institutional design of individual complaints procedures by examining time-limits, which should be reasonable⁵⁷. As concerns the obligation to be represented by a lawyer, the Commission insists on the availability of free legal aid also for constitutional proceedings⁵⁸. Court fees should remain reasonable and it should be possible to reduce them in justified cases⁵⁹. When there is a complaint against a judgement that was decided in favour of a third party, that party should have the opportunity to make a statement also in the constitutional complaint proceedings⁶⁰.

Complex questions arise in relation to interim measures. According to the Commission's Study, the Constitutional Court should be able to suspend a challenged provision if its implementation would result in further damage that cannot be repaired⁶¹. Such powers are wide, especially given that in such a case Court has not yet decided on the constitutionality of the provision, but already suspends it with *erga omnes* effect pending the final judgement. Only serious irreparable damage can justify the suspension of legislation adopted by Parliament.

c. Standard of review – “Convention friendly” interpretation of constitutional rights

Whatever the type of appeal to the Constitutional Court may be, typically the standard of control of legislative or individual acts will be the fundamental rights of the national Constitution and not the rights provided for in the European Convention on Human Rights. Therefore, numerous questions arise when the scope of constitutional rights and the Convention rights differ. Only few Constitutional Courts use the Convention itself as the relevant standard. The Constitutional Court of Austria does so because the Austrian Constitution does not contain a human rights catalogue. The major political parties could never agree

⁵⁷ CDL-AD(2010)039rev, paragraph 112.

⁵⁸ CDL-AD(2010)039rev, paragraph 113

⁵⁹ CDL-AD(2010)039rev, paragraph 117.

⁶⁰ CDL-AD(2010)039rev, paragraph 132.

⁶¹ CDL-AD(2010)039rev, paragraph 149.

on whether such a catalogue should also contain social rights and therefore they agreed to raise the European Convention on Human Rights to the constitutional level⁶². Also due to the fact that the so-called Dayton Constitution of Bosnia and Herzegovina was part of an internationally brokered agreement to end the civil war in that country, this Constitution provides that the European Convention on Human Rights is part of the Constitution to have some kind of human rights catalogue⁶³. Typically, all other specialised constitutional courts apply the human rights catalogue of their own Constitution as the standard of review. These rights can differ not only in their formulation, but also in the way how limitations are expressed, either in a specific or a general limitation clause⁶⁴. Even if the national rights and the Convention right seem to be close textually, the interpretation which is given to them by the national Constitutional Court and the European Court of Human Rights can differ substantially. Therefore, if the individual complaint is to serve also as an effective national remedy filtering cases before they are brought before the European Court, the national rights need to be interpreted in a “convention friendly”⁶⁵ manner. This does not mean that the interpretation of these rights has to be the same for both courts. Without endangering the assessment as an effective remedy, the national complaint can be wider and can confer more freedom to the individual. However, the national interpretation

⁶² National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council, Austria, A/HRC/WG.6/10/AUT/1, paragraph 9.

⁶³ Although this is unrelated to the issue of individual complaint, it is interesting to note that the supreme courts of the Netherlands (the Supreme Court and the State Council, which is the supreme administrative court) even use the Convention as the only standard of review in human rights matters because Article 120 of the Dutch Constitution explicitly excludes that any judge may disregard laws adopted by Parliament because the law is found to be contrary to the Constitution. Thus explicitly excluding any constitutional review, Article 120 is probably the most radical expression of parliamentary sovereignty, a remnant of the mistrust of the French revolution in the judges. Le juge « *la bouche qui prononce les paroles de la loi ; des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur* », Montesquieu, *De l'esprit des lois* (1748).

⁶⁴ This issue was the subject XIIIth Congress of the Conference of European Constitutional Courts on the “Criteria for the Limitation of Human Rights in the Practice of Constitutional Justice” (Nicosia, 16-17 October 2005), http://www.venice.coe.int/WebForms/pages/?p=02_01_01_Regional_CECC_Cyprus.

⁶⁵ Vallianatos and others v. Greece (applications nos. 29381/09 and 32684/09), partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque.

should not be narrower than the European one. If the scope of the national right were considerably narrower than the Convention right, the European Court of Human Rights would probably find that this remedy is not effective and would accept complaints without insisting in the exhaustion of this remedy.

d. Effective execution / implementation

The term “effective remedy” implies that judgments of constitutional courts have to be implemented to be effective. The Study identifies the interpretation in conformity with the Constitution as an area where implementation can easily be a problem if the ordinary courts do not follow the constitutional interpretation given by the Constitutional Court but continue to apply an interpretation of the law, which was found to be unconstitutional. Therefore, the Venice Commission recommends introducing a provision in the Constitution, which obliges all other state powers to follow a provision’s interpretation given by the Constitutional Court⁶⁶.

Unfortunately, in Europe several constitutional courts are faced with at least occasional non-implementation / execution of their judgements⁶⁷. While the non-respect of judgements is certainly a problem of legal culture – or rather the absence of such a culture, the Courts themselves can contribute to overcome this problem. Several elements can be important: the Court should be coherent with its own case-law. There will always be new issues to be decided but to the extent possible, the case-law of a Constitutional Court should be predictable and the Court should not ‘surprise’ the state powers and the public. The better a judgement follows arguments expressed in earlier case-law, the better it will be accepted and, as a consequence,

⁶⁶ CDL-AD(2010)039rev, paragraph 165.

⁶⁷ P. Paczolay, “Experience of the Execution of Constitutional Court’s decisions declaring legislative omission in Hungary, Conference on “Execution of the decisions of constitutional courts: a cornerstone of the process of implementation of constitutional justice” (Baku, Azerbaijan 14-15 July 2008), CDL-JU(2008)029; Synopsis of the Conference on the “Execution of decisions of Constitutional Courts” (Baku, Azerbaijan, 14-15 July 2008): Synopsis, CDL-JU(2008)051syn.

implemented. Courts can even construct their case-law by referring to important arguments as an *obiter dictum* in judgements where they are not decisive. In a later case, the Court can then already refer to its earlier case-law and the new case will become part of a coherent string of precedents.

e. Constitutional matters

Finally, the Report on Individual Access to Constitutional Justice, examines the relationship between Constitutional Courts and ordinary courts and identifies the danger that the Constitutional Court become a 'super-Supreme Court' or the so-called '4th instance'. Therefore, it is necessary to give a narrow scope of the term 'constitutional matter'. The definition of this concept is crucial for finding a delimitation of competences between supreme courts and the Constitutional Court. The biggest danger stems from a wide interpretation of the right to a fair trial (Article 6 of the European Convention on Human Rights). If widely interpreted, any incorrect interpretation of the law by an ordinary court or a violation of procedural law can result in a violation of the right to a fair trial, and becomes a constitutional matter giving rise to a constitutional complaint. Sometimes, constitutional courts thus 'slide' into the interpretation of ordinary law, and (supreme) ordinary courts are – rightly – upset about such interference. There is no obvious or simple solution. Not each violation of ordinary law can be a constitutional matter but some violations certainly are⁶⁸. Here, the Study cannot provide a simple solution when it recommends: "The constitutional court should only look into 'constitutional matters', leaving the interpretation of ordinary law to the general courts. The identification of constitutional matters can, however, be difficult in relation to the right to fair trial, where any procedural violation by the ordinary courts could be seen as a violation of the right to a fair trial. Some restraint by the constitutional court seems appropriate, not least in order to avoid its own overburdening, but also out of respect of the jurisdiction of ordinary courts'⁶⁹.

⁶⁸ On this issue see Brunner, CDL-JU(2001)022, p. 20 seq.

⁶⁹ CDL-AD(2010)039rev, paragraph 211.

III. Accession of the European Union the European Convention on Human Rights

d. The Problem

Let us turn to Accession of the European Union the European Convention on Human Rights.

In Europe, two international organisations deal – at least partially – with human rights. The older organisation is the Council of Europe with its 47 member states and covers nearly the entire continent⁷⁰. The Council of Europe is the “mother” organisation for the European Court of Human Rights in Strasbourg. While in the framework of the OAS, you have the separate Inter-American Commission and Court of Human Rights, two such bodies have been merged in Europe through Protocol 11 to the European Convention Human Rights⁷¹ into the permanent European Court of Human Rights.

The European Union, which now has 28 member states, established the Court of Justice in Luxembourg. While the latter Court originally dealt mostly with economic issues, it was forced by a national Court, the Constitutional Court of Germany⁷², through the Solange I judgement, to establish its own human rights case-law. Without a specific legal basis for the protection of Human Rights, the Court of Justice first drew inspiration from “constitutional traditions common to the Member States”⁷³. In practice, this meant that the Luxembourg Court followed the case-law of the Strasbourg Court. This changed with the proclamation of the European Union’s Charter of Fundamental Rights in 2000 and the conversion of the Charter into binding law through the Lisbon treaty.

⁷⁰ With the exception of Belarus and Kosovo, which are not Council of Europe member States.

⁷¹ Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, Strasbourg, 11.V.1994, Since its entry into force on 1 November 1998, this Protocol forms an integral part of the Convention (ETS No. 5).

⁷² Solange I, BVerfGE 37, 271 ff.

⁷³ Nold 4/73 [1974] ECR 491, §13

Now two Courts deal with human rights and they have two parallel human rights treaties to interpret. With the Charter a new dynamics developed. Not only the Court of Justice of the EU interprets the Charter, also national Constitutional Courts refer to it⁷⁴. The Charter contains a number of rights which do not exist in the Convention, e.g. Article 8 on data protection. However, many of the fundamental rights contained in the Charter overlap in with rights contained in the Human Rights Convention, for example the right to a fair trial of Article 6 of the European Convention is covered by Article 47 of the Charter. It is these overlapping rights, where there is a danger of divergent interpretation between the two texts. It is important to have a common standard for those.

There is no human rights crisis in the European Union, which would warrant urgent accession to the Convention⁷⁵. However, the emergence of a human rights system with two basic texts, interpreted by two separate courts, could easily lead to a divergence in protection standards and this should be avoided⁷⁶. While we should not exaggerate this problem, there is already an example of a very wide interpretation of the Fundamental Rights Charter, that, if pursued could potentially lead to divergent interpretation. In the case the judgment in *Åklagaren v. Hans Åkerberg Fransson*⁷⁷, the Court of Justice of the European Union used a very wide interpretation of the applicability of the

⁷⁴ A number of Constitutional Courts have referred to the Charter. Most active in this regard were the Constitutional Court of Austria (U466/11-18, U1836/11-13 of 14.03.2012, G 47/2012, G 59/2012, G62,70,71/2012 of 07.06.2014,66/2013 of 12.03.2014, U466/11-18, U1836/11-13 of 14.03.2012, KR 1-6, 8/00 of 12.12.2000) and the Constitutional Court of Belgium (146/2013 of 07.11.2013, 49/2011 of 06.04.2011, 103/2009 of 18.06.2009, 58/2009 of 19.03.2009, 167/2005 of 23.11.2005). Other examples are the Constitutional Courts Croatia (SuS-1/2013 of 14.11.2013), Poland (P 9/04 of 31.01.2005), Romania 967/2012 of 20.11.2012) or Spain 37/2011 or 28.03.2011, 292/2000 of 30.11.2000).

⁷⁵ Odermatt, Jed, The EU's Accession to the European Convention on Human Rights: An International Law Perspective, KU Leuven, Working Paper No. 136 – April 2014, https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp131-140/wp136-odermatt.pdf (accessed 10/2014).

⁷⁶ Polakiewicz, Jörg, Concluding remarks: Present Challenges and Future given at the Conference Fundamental Rights in Europe: A Matter for Two Courts, Oxford Brookes University, Strasbourg, 13 June 2014, available at http://www.coe.int/en/web/dlapil/speeches-of-the-director/-/asset_publisher/ja71RsfCQTP7/content/-fundamental-rights-in-europe-a-matter-for-two-courts-?.

⁷⁷ Case C-617/10 REC, *Åklagaren v. Hans Åkerberg Fransson*.

Convention when it held that the EU Charter applied wherever a state acts “within the scope of European law”⁷⁸.

It is also very important from the viewpoint of the individual to make it clear which human right standards he or she can rely on and which Court will have the final say in human rights matters. The member States, too, insist that the EU, to which they have devolved many competences, is bound by the same standards as they are themselves.

Finally, since Solange I, the European Union has taken up human rights as a key topic, not only within the Union – for instance with the establishment of the Fundamental Rights agency in Vienna – but also in its external relations, where often there is a conditionality between trade or accession agreements and human rights protection. In accession negotiations, now in the Balkans, with Albania, Montenegro and Serbia, the EU strongly insists on improvements in the human rights field⁷⁹.

So far, the EU has developed a reasonably well functioning system of internal control over its own activity. However, there is no external control whether the EU lives up to the standards which it promotes. In order to be credible within the Union and abroad, external control is necessary and the external body to turn to was obviously the European Court of Human Rights. Accession of the EU to the Convention can provide such control and will give the EU additional credibility in human rights matters. EU citizens will have the benefit of being able to address also an outside instance when they are of the opinion that the EU has violated their rights.

e. The solution – accession of the EU to the European Convention on Human Rights

The solution found to ensure a coherent system of human rights protection in Europe was the accession of the EU to the European Convention on Human Rights⁸⁰.

⁷⁸ Polakiewicz, Jörg, *ibid*.

⁷⁹ See conditions for EU membership at http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm.

⁸⁰ This solution had already been envisaged before the Lisbon Treaty, but in 1996, the Court of Justice of the European Communities had found that there was not a sufficient legal basis in

The very idea of the European Union, an international organisation joining the European Convention on Human Rights, which only envisages membership for individual states is daunting⁸¹. Given that it has taken over certain competences from its member states, the European Union already had become member of other international organisations in these fields, for instance the UN Food and Agriculture Organisation or the World Trade Organisation⁸². However, accession to the European Convention on Human Rights does not follow the same logic. The EU does not have a general human rights competence. This accession follows the logic of submitting to external control in human rights matters and a specific basis need to be established on the level of the founding treaties of the EU.

Thanks to accession, the European Court of Human Rights becomes the final interpreter in human rights matters. This goal had to be approached from two sides, the European Union and the Council of Europe:

With the treaty of Lisbon, the EU introduced Article 6.2 into the Treaty on European Union (TEU), which provides that: “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.” This second sentence is already an indicator of a struggle between the EU and member states, which agree to the goal of an external control of acts of the Union, but which do not wish give the EU a general competence in human rights matters, fearing that then the EU would exercise a general control of human rights also in the member states.

On the side of the Council of Europe, Protocol 14, which we have referred to above, added a paragraph 2 to Article 59 of the European Convention on Human Rights providing “The European Union may accede to this Convention.” In view of the specific purpose of accession

the treaties (Opinion 2/94 [1996] ECR I-1759). In order to pursue this goal, the Lisbon Treaty introduced such a legal basis in Article 6.2 TEU.

⁸¹ For criticism of this approach, see Schilling, Theodor, On Equal Footing: The Participation Rights Envisaged for the European Union After Its Accession to the European Convention on Human Rights, Human Rights Law Review, 2014, 14, p. 197–229.

⁸² Odermatt, Jed, *ibid.*

and as foreseen by Article 6.2 of the Treaty on European Union, the European Union is to join the European Convention on Human Rights but not the Council of Europe the international organisation 'managing' the Convention and the European Court of Human Rights. This choice brought about a number of complications.

While these two provisions laid out the basis for accession, they are by no means sufficient and needed to be complemented by a specific accession agreement, which in turn will need to be followed by further changes of internal regulations in the Council of Europe and the Union.

The negotiations had to take into account the specific characteristics of the autonomous legal system of the EU, while preserving the specific features of the European Convention on Human Rights. The negotiation process leading to the Draft Accession Agreement (DAA)⁸³ took place in several fora.

The main negotiations were held in the 47+1 format, i.e. the 47 member states negotiated with the EU. Among the 47 Council members, however, 28 were members of the EU. Therefore, in practice, the 19 non-EU members had a special negotiating position. Not least because of their inferior number as compared to the EU members, they had to pool their interests and indeed they came up with a common negotiating position⁸⁴, mostly insisting on the principle of equal treatment of the EU between the EU and the other members states. However, due to the specific nature of the EU, it was very difficult to follow this principle⁸⁵.

Negotiations took also place in two other fora, first between the Strasbourg and the Luxembourg Courts, resulting in a joint communication of the two Court presidents⁸⁶. Further negotiations

⁸³ Available at [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1\(2013\)008rev2_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf).

⁸⁴ Dzemzowski, Andrew, *The EU Accession to the ECHR: The Negotiation Process*, in *The EU Accession to the ECHR*, Kosta, Vasiliki / Skoutaris, Nikos / Tzevelekos, Vassilis, Oxford and Portland (2014), p. 17-28.

⁸⁵ Schilling, Theodor, On Equal Footing: The Participation Rights Envisaged for the European Union After Its Accession to the European Convention on Human Rights, *Human Rights Law Review*, 2014, 14, p. 197-229.

⁸⁶ Joint communication from Presidents Costa and Skouris, 24 January 2011, available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf.

took place in the Joint Informal Body in which both the EU Parliament and the Parliamentary Assembly of the Council of Europe discussed the election of a judge of the Strasbourg Court in respect of the European Union⁸⁷.

f. Election of a judge in respect of the European Union

As a party to the Convention, the EU should have a judge at the Court, like this is the case for all other member States. Judges of the European Court of Human Rights are elected by the Parliamentary Assembly of the Council of Europe. This Assembly is distinct from the European Union's European Parliament. The Assembly is composed of delegations from the national parliaments of the 47 member states of the Council of Europe, which send, depending on the size of the country, between 3 and 18 national members of Parliament four times a year to Strasbourg for the sessions of the Parliamentary Assembly.

Due to the basic choice that the European Union should join the European Convention on Human Rights but not the Council of Europe, the problem was that the EU would not be represented in the Parliamentary Assembly, which would elect its judge.

In order to overcome this problem, Article 6 of the Draft Accession Agreement provides that when the Parliamentary Assembly elects the judges in respect of the European Union, the Parliamentary Assembly of the Council of Europe will be reinforced with a 48th delegation from the Union's European Parliament, of the same size as the largest member states, i.e. 18 members. This delegation will have full voting rights.

g. System of co-responsibility

Due to the nature of often concurring competences between the European Union and its member states there are many instances when an act can be attributed to both the Union and to one more

⁸⁷ Dzemzewski, Andrew, *ibid.*

of its member States, especially when EU member states implement legislation adopted by the Union.

Therefore, a mechanism had to be devised to provide for joint responsibility in such cases (Article 3 of the Draft Accession Agreement). If the application is directed against an EU member state the EU can – voluntarily – become re-responsible and when the application is directed against the EU, member States can join as co-respondent⁸⁸. It is probable that the EU will always join member States when the conditions are met⁸⁹. The mechanism of co-responsibility intervenes only when applications have already been found admissible.

When the Strasbourg Court finds a violation both the respondent and the co-respondent shall be jointly responsible, unless the Court, on the basis of the reasons given by the respondent and the co-respondent, decides that only one of them be held responsible (Article 3.7 DAA).

The decision on whether the EU or a member State can become co-respondent lies with the European Court of Human Rights, which assesses whether it is “plausible” that the conditions for co-response have been met (Article 3.5 DAA). Even if the standard of control is deliberately low (“plausible”), the issue was discussed whether such an assessment by an external institution is compatible with the autonomy of the legal system of the Union⁹⁰. This will have to be assessed in the pending Opinion by the EU Court of Justice.

When the co-respondent mechanism is invoked and the EU Court of Justice had not yet assessed the compatibility of the challenged provision with EU legislation, “sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment” (Article 3.6 DAA). This so-called “prior involvement mechanism means in practice a privilege for the EU as compared to the other 47 member

⁸⁸ There was discussion on whether the EU and the member States have to inform each other mutually when they are a respondent in an application at the European Court of Justice. In his blog, replies to the positive, referring to the duty of sincere co-operation (Article 4.3 TEU), Johansen, Stian Oby, Some thoughts on the ECJ hearing on the Draft EU-ECHR accession agreement (part 1 of 2) <http://obykanalen.wordpress.com/2014/05/06/some-thoughts-on-the-ecj-hearing-on-the-draft-eu-echr-accession-agreement-part-1-of-2> (accessed 10/2014).

⁸⁹ Appendix II to the Draft Accession Agreement contains a draft declaration by the EU to this affect.

⁹⁰ Johansen, Stian Oby, *ibid*.

states.⁹¹ Their Constitutional or Supreme Courts do not get a chance to assess the compatibility with their Constitution of an act before the case is brought to the Human Rights Court if they have not yet done so already.

The author is of the opinion that such a right should be introduced also for member States, which could opt that such a procedure be made available for their Constitutional and/or Supreme Courts. This would improve the quality of human rights protection at the national level in line with the Brighton Declaration. Of course, national legislation – probably on the constitutional level – would have to be adapted in order to provide for a competence for these highest courts for cases when - according to current procedural law - there is none.

h. EU participation in the Committee of Ministers - Execution of judgements by the Committee of Ministers of the Council of Europe

Another issue is the execution of judgements. According to Article 46 of the Convention, it is the Committee of Ministers of the Council of Europe, which supervises the execution of the judgements of the European Court of Human Rights. Again, all 28 member states of the European Commission are represented in the Committee of Ministers but not the European Commission, which is the ‘Government’ of the European Union. The solution found was to include an EU representative in the Committee of Ministers when it deals with issues relating to the European Court of Human, rights and notably in decision on the execution of judgements. The problem encountered here was that the EU would have some kind of double representation because it would be represented as an organization and through it 28 member states. The danger seen specially by the 19 non EU-member States as that the EU and its member States could vote ‘en bloc’ and thus systematically outvote the other States. Therefore, the Draft Accession Agreement provides for special voting rules

⁹¹ Gragl, Paul, A giant leap for European human rights? The final agreement on the European Union’s accession to the European Convention on Human Rights, Common Market Law Review, Forthcoming, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2352906.

– so-called “hyper-minorities” –, which would avoid the problem of bloc-voting⁹².

i. Current status of accession procedure

Where is this procedure now? The European Commission has submitted the draft agreement to the European Court of Justice for an opinion on its conformity with the EU treaty. In May 2014, the Court of Justice of the European Union held a preparatory hearing in order to define its opinion. At this hearing, the EU institutions and the member states present were in favour of accession and the compatibility of the accession agreement with the EU treaties⁹³.

The Court of Justice will probably issue its opinion in December 2014. It is unlikely that the opinion would find the agreement fully compatible or fully incompatible with the EU treaties. More probable is some middle ground. The opinion could find the agreement compatible under specific conditions. Depending on the scope of these conditions, the adoption of internal EU rules may be sufficient or it may be necessary to re-open the negotiations on the agreement itself. There is, however, a danger that such a re-opening of the negotiations could lead to serious delays because of internal power struggles in the EU.

The author’s guess is that that the Court will find some contradiction with the Lisbon treaty, maybe relating to the provision that it is the European Court of Human Rights, which has to assess whether it is ‘plausible’ that a member State or the EU should become co-respondent (Article 3.5 DAA).

Finally, the agreement will have to be ratified by the EU and all 47 member states. De facto, this gives each member state a veto power. Implementation may thus take time. Therefore, accession will eventually happen, but internal EU Procedures, legal constraints and other obstacles, including political will from the 48 parties involved, may considerably delay the process.

⁹² Gragl, Paul, *ibid*.

⁹³ Johansen, Stian Oby, *ibid*.

The Draft Accession Agreement has to be complemented by internal Rules of the EU in order to be implemented. So far, these internal rules have not been published. The EU Commission probably prefers to wait in order to be able to integrate requirements, which could be set out in the opinion of the Court of Justice.

Even if there is no need to re-open negotiations, the entry into force of the Accession Agreement depends on the ratification by all 48 parties and this means that de facto each Council of Europe member state has a veto or at least delaying power.

IV. Conclusion

We have seen that there are some very positive developments in the human rights field in Europe. Important member States of the Council of Europe, like Turkey, have introduced an individual complaint with the explicit purpose to settle human rights issues on the national level and to reduce the high number of cases at the Strasbourg Court. Such individual complaints have to be designed in a way that makes them an effective remedy which has to be exhausted before a case can be brought before the European Court of Human Rights.

The most efficient remedy – according to Article 35 of the Convention by the European Court of Human Rights – is the full constitutional complaint, which allows challenging also unconstitutional individual acts. Countries, which have such a full individual complaint, like Germany or Spain, have significantly lower levels of condemnation by the Strasbourg Court than those with normative complaints⁹⁴.

The introduction of a full constitutional complaint is therefore an efficient means of human rights protection. At the same time it reduces the work-load of the European Court of Human Rights. Therefore, the Venice Commission recommends the introduction of full constitutional complaints in countries, which already have a normative complaint, like Ukraine, in countries which have a preliminary request to the

⁹⁴ CDL-AD(2010)039rev, paragraph 5.

Constitutional court, like was the case in Turkey and in countries, which have no individual access at all, like in Bulgaria.⁹⁵

The other positive development is the accession of the European Union to the European Convention on Human Rights. This accession will eventually ensure that in Europe there will be a coherent system of human rights protection.

However, we have to see these positive steps also in the context of serious conflicts between the European Court of Human Rights and some of its member states. Due to conflict between the Court and Russia the entry into force of Protocol 14 was delayed. The reason for this conflict are several judgements, which have displeased the Russian authorities, starting with *Ilaşcu v. Moldova and Russia*⁹⁶ where Russia was held responsible for the acts of the *de facto* authorities in another country, in the region of Transnistria in Moldova. Even more resented was the *Kononov v. Latvia* judgement⁹⁷. Russia was not even a party in these proceedings but the European Court of Human Rights found no violation of the Convention when Latvia sentenced Mr Kononov for war crimes, which he committed as communist partisan in 1944.

Another - even more serious - conflict opposes the United Kingdom to the European Court of Human Rights. In the case *Hirst v. UK*, the European Court held that the UK violated the Convention when it denied all prisoners without distinction the right to vote⁹⁸. This judgement has not been implemented in the UK and – probably to avoid outright conflict – the Committee of Ministers postponed this execution to 2015⁹⁹. In the general public, another judgement was even more contentious, *Abu Qatader vs. UK*, where the Court prevented expulsion of an Islamist hate preacher to Jordan because of the danger that he might be tortured in Jordan. This discussion is

⁹⁵ Opinion on the Constitution of Bulgaria adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008), CDL-AD(2008)009, paragraph 88.

⁹⁶ ECtHR, *Ilaşcu and others v. Moldova and Russia*, no. 48787/99.

⁹⁷ ECtHR, *Kononov v. Latvia*, no. 36376/04; On this point see Vermin, J, *Crossing the line*, Russian Law Online, <http://www.russianlawonline.com/content/crossing-line>.

⁹⁸ For arguments for and against implementation, presented to the House of Lords, *European Court of Human Rights rulings: are there options for governments?*, Vaughne Miller, International Affairs and Defence Section, House of Lords Library, Standard Note SN/IA/5941.

⁹⁹ Decision adopted by the Committee of Ministers at the 1208th meeting (23 25 September 2014), http://www.coe.int/t/dghl/monitoring/execution/reports/pendingcases_EN.asp?CaseTitleOrNumber=hirst&StateCode=UK.&SectionCode.

no longer limited to tabloids but also the UK Government wants to adopt a human rights bill, which would break the formal link between British courts and the European Court of Human Rights¹⁰⁰. The issue whether the United Kingdom should leave the European Convention on Human Rights is seriously considered in Parliament¹⁰¹.

Worrying is that even in Switzerland a wave of resentment against the European Court of Human Rights has built up, especially on the right wing of the political spectrum. This may be related to the traditional Swiss insistence on its independence and the rejection of the idea of “foreign judges”. While it is unlikely that Switzerland would leave the European Convention on Human Rights, such discussions probably contributed to the insistence of Switzerland on ‘subsidiarity’ in the process of reform of the Court¹⁰².

We have seen that multi-level human rights protection is a complex system where many players interact. In order to keep this system both coherent and efficient two positive trends can be observed: a reinforcement of effective remedies on the national level and the accession of the European Union to the European Convention on Human Rights, which will prevent the danger of a diverging interpretation of human rights.

Notwithstanding his serious illness, Prof Jean-Claude Colliard remained an active member of the Venice Commission until he passed away. With him, the Venice Commission lost one of its pillars.

¹⁰⁰ Conservatives plan to scrap Human Rights Act – read the full document <http://www.theguardian.com/politics/interactive/2014/oct/03/conservatives-human-rights-act-full-document>.

¹⁰¹ Theresa May: Tories to consider leaving European Convention on Human Rights: <http://www.bbc.com/news/uk-politics-21726612>; see also arguments presented by Vaughne Miller, International Affairs and Defence Section, House of Lords Library, Standard Note SN/IA/6577

¹⁰² Swiss Parliament: 13.3237 – Interpellation, *Kündigung der Konvention zum Schutze der Menschenrechte und Grundfreiheiten*, http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20133237; *La Suisse sera plus isolée si elle dénonce la Convention*, interview with Prof. Walter Kälin, <http://www.tdg.ch/suisse/La-Suisse-sera-encore-plus-isolee-si-elle-denonce-la-Convention/story/22597456/print.html>; Bundesrat vehement gegen Kündigung der Menschenrechtskonvention, <http://www.nzz.ch/aktuell/schweiz/bundesrat-vehement-gegen-kuendigung-der-menschenrechtskonvention-1.18082582>.