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Contacts
Constitutional Court of the Republic of Bulgaria,
1 "Knjaz Dondukov" blvd., Sofia-1594, Bulgaria
Assoc. prof. dr. Radoslava Yankulova, secretary of the Editorial Board
r.yankulova@constcourt.bg, ☎ +359 2 940 23 08

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Doris KÖNIG
Vizepräsidentin des Bundesverfassungsgerichts

David KUHN
Wissenschaftlicher Mitarbeiter am Bundesverfassungsgericht

Antonio FERNÁNDEZ DE BUJÁN
Professor of Roman Law at the Autonomous University of Madrid.
An academic, member of the Royal Academy of Jurisprudence
and Legislation of Spain

Snježana BAGIĆ
Deputy President, Constitutional Court of the Republic of Croatia

DIE VERFASSUNGSBESCHWERDE ZUM BUNDESVERFASSUNGSGERICHT

Doris König, David Kuhn

I. Einführung

Das Bundesverfassungsgericht ist ein Bürgergericht. Es kann im Wege der Verfassungsbeschwerde von „jedermann" mit der Behauptung angerufen werden, durch die öffentliche Gewalt in einem seiner Grundrechte oder grundrechtsgleichen Rechte verletzt zu sein (Art. 94 Abs. 1 Nr. 4a GG, § 90 Abs. 1 des Bundesverfassungsgerichtsgesetzes [BVerfGG]). Der Begriff „jedermann" ist dabei weitgehend wörtlich zu nehmen; insbesondere bedarf es zur Anrufung des Bundesverfassungsgerichts keiner Vertretung durch einen Rechtsanwalt. Auch die formalen Hürden zur Erhebung einer Verfassungsbeschwerde sind grundsätzlich gering. Anträge, die das Verfahren einleiten, müssen lediglich schriftlich beim Bundesverfassungsgericht eingereicht (§ 23 Abs. 1 Satz 1 BVerfGG) und begründet werden (§ 23 Abs. 1 Satz 2 Halbsatz 1, § 92 BVerfGG). Zudem ist das Verfahren kostenfrei (§ 34 Abs. 1 BVerfGG).

Diese zumindest prima facie niedrigschwelligen Zugangsmöglichkeiten dürften – wie vor allem auch die Tatsache, dass das Bundesverfassungsgericht, anders als andere Verfassungsgerichte[1], in seiner nunmehr schon über 70-jährigen Geschichte frei von jeglichen Versuchen politischer Einflussnahme agieren konnte – ein wesentlicher Grund dafür sein, dass das Gericht in der Bevölkerung über ein hohes Maß an Zuspruch verfügt. Ausweislich einer repräsentativen Umfrage aus dem Jahr 2022 setzten 21 Prozent der wahlberechtigten Deutschen ab 18 Jahren sehr großes und weitere 50 Prozent großes Vertrauen in das Bundesverfassungsgericht.[2] Obgleich damit auch das Bundesverfassungsgericht im Vergleich zu früheren Umfragen einen Vertrauensrückgang registrieren muss[3], rangiert es immer noch deutlich vor den sonstigen abgefragten Institutionen, namentlich Bundesregierung und Bundestag.

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[1] Zum vielfach bedenklichen Umgang mit Verfassungsgerichten weltweit *Voßkuhle*, In schlechter Verfassung!, Die Zeit, 16. November 2023.

[2] Vgl. *Best/Decker/Fischer/Küppers*, Demokratievertrauen in Krisenzeiten, 2023, S. 26.

[3] Im Dezember 2020 lag die Vertrauensquote noch bei 80 Prozent, vgl. *Rath*, APuZ 37/2021, S. 25 (25), unter Verweis auf eine Umfrage von infratest dimap.

Der Grundrechtsschutz, den das Bundesverfassungsgericht den Bürgerinnen und Bürgern gewährt, wird allenthalben als effektiv angesehen.[4] Da das Gericht allerdings nicht von sich aus, sondern nur auf Anruf tätig werden kann, steht das hohe Schutzniveau der zur Anwendung gebrachten Grundrechte in untrennbarem Zusammenhang mit dem Instrument der Verfassungsbeschwerde.

II. Die (Erfolgs-)Geschichte der Verfassungsbeschwerde zum Bundesverfassungsgericht

1. Die Verfassungsbeschwerde als herausragender verfassungsprozessualer Rechtsbehelf

Die Verfassungsbeschwerde ist nur einer unter mehreren Rechtsbehelfen zum Bundesverfassungsgericht.[5] Gleichwohl sticht sie unter den beim Bundesverfassungsgericht eingehenden Verfahren sowohl quantitativ als auch qualitativ hervor. So sind beim Bundesverfassungsgericht seit seiner Gründung im Jahr 1951 bis zum 31. Dezember 2022 insgesamt 259.309 Verfahren eingegangen; darunter waren 247.197 Verfassungsbeschwerden.[6] Der Anteil der Verfassungsbeschwerdeverfahren am Gesamtaufkommen des Gerichts betrug mithin bis dato 95,33 Prozent. Demgegenüber erscheint die Erfolgsquote von durchschnittlich 1,69 Prozent[7] verschwindend gering. Sie ist jedoch zum einen Ausdruck dessen, dass die Fachgerichte in der Bundesrepublik Deutschland ihre umfassende materiale Grundrechtsbindung (Art. 1 Abs. 3 GG) weit überwiegend sehr ernst nehmen und – im Falle dort angegriffener grundrechtswidriger hoheitlicher Maßnahmen – gut funktionierende Einrichtungen im Rahmen des mehrstufigen Jurisdiktionssystems sind.[8] Zum anderen ist das Bundesverfassungsgericht, was vielen Beschwerdeführern indes nicht hinreichend bewusst ist, keine Superrevisionsinstanz, die dazu berufen

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[4] Vgl. statt vieler *Rozek*, DVBl. 1997, S. 517 (518): „Hüter der Grundrechte".

[5] Die Zuständigkeiten des Bundesverfassungsgerichts können § 13 BVerfGG entnommen werden.

[6] Vgl. Jahresbericht des Bundesverfassungsgerichts, 2022, S. 65.

[7] Vgl. Jahresbericht des Bundesverfassungsgerichts, 2022, S. 53 (für den Zeitraum der Jahre 2013 bis 2022).

[8] Die Bindungswirkung der Entscheidungen des Bundesverfassungsgerichts gemäß § 31 Abs. 1 BVerfGG stellt deren Beachtung durch die Fachgerichte sicher. In diesem Sinne wirkt die Rechtsprechung des Bundesverfassungsgerichts auf die fachgerichtliche Rechtsprechung ein, wenn und soweit der jeweils zu entscheidende Sachverhalt grundrechtsrelevante Fragen aufwirft.

wäre, jede falsche Anwendung der Vorschriften des einfachen Rechts zu korrigieren.[9] Es beschränkt seine Kontrolle allein darauf, ob spezifisches Verfassungsrecht verletzt ist, was nicht schon dann der Fall ist, wenn eine Entscheidung, gemessen am einfachen Recht, fehlerhaft ist; vielmehr muss der Fehler gerade in der Nichtbeachtung von Grundrechten liegen.[10]

Die geringe Erfolgsquote tut der Beliebtheit der (vor allem: Urteils-) Verfassungsbeschwerde[11] keinen Abbruch. Dies dürfte nicht zuletzt damit zusammenhängen, dass unter der Vielzahl der erhobenen Verfassungsbeschwerden immer wieder aufsehenerregende Erfolge des „einfachen Bürgers" zu verzeichnen sind, der sich dabei im Ergebnis gegen einen vermeintlich übermächtigen „Gegner" – nicht selten: den Staat – durchgesetzt hat. Darüber hinaus waren und sind auf Verfassungsbeschwerden hin ergangene Entscheidungen – ungeachtet der Frage, ob sie im Ergebnis erfolgreich waren – oftmals von großer gesellschaftspolitischer Breitenwirkung. Zu nennen sind beispielhaft und bei weitem nicht abschließend aus der Anfangszeit des Gerichts das Elfes-[12] und das Lüth-Urteil[13] sowie aus der jüngeren Vergangenheit die Entscheidungen zur Suizidhilfe[14], zum Klimaschutz[15], zur Gefangenenvergütung[16] und zur Wiederaufnahme des Strafverfahrens zuungunsten des Freigesprochenen[17].

Die Breitenwirkung des Verfassungsbeschwerdeverfahrens resultiert ferner daraus, dass im Erfolgsfall nicht nur die angegriffene Entscheidung aufgehoben (§ 95 Abs. 2 BVerfGG), sondern zugleich auch ein Gesetz für nichtig erklärt werden kann, wenn die aufgehobene Entscheidung auf einem verfassungswidrigen Gesetz beruht (§ 95 Abs. 3 Satz 2 BVerfGG). Ein derartiger Entscheidungsausspruch reicht in seinen Konsequenzen weit über den konkreten Einzelfall hinaus, der Ausgangspunkt der Befassung des Bundesverfassungsgerichts war. Denn häufig verpflichtet das Gericht den Gesetzgeber, innerhalb einer bestimmten Frist ein neues,

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[9] Vgl. nur BVerfGE 18, 85 (92 f.).

[10] Vgl. BVerfGE 18, 85 (92 f.).

[11] Zu unterscheiden sind grundsätzlich zwei Arten von Verfassungsbeschwerden: Bei der sogenannten Urteilsverfassungsbeschwerde – die das Gros der eingehenden Verfassungsbeschwerden ausmacht – wendet sich der Beschwerdeführer gegen eine gerichtliche Entscheidung, bei der sogenannten Rechtssatzverfassungsbeschwerde ist ein Gesetz, eine Rechtsverordnung oder eine Satzung Beschwerdegegenstand. Die folgenden Ausführungen beziehen sich, soweit nicht anders angegeben, auf die Urteilsverfassungsbeschwerde.

[12] BVerfGE 6, 32 ff.

[13] BVerfGE 7, 198 ff.

[14] BVerfGE 153, 182 ff.

[15] BVerfGE 157, 30 ff.

[16] BVerfG, Urteil des Zweiten Senats vom 20. Juni 2023 - 2 BvR 166/16 u.a. -.

[17] BVerfG, Urteil des Zweiten Senats vom 31. Oktober 2023 - 2 BvR 900/22 -.

verfassungsgemäßes Gesetz zu erlassen. Die Bedeutung der Verfassungsbeschwerde erschöpft sich demnach nicht im subjektiven Grundrechtsschutz, sondern sie trägt auch dazu bei, dass das objektive Verfassungsrecht eingehalten, ausgelegt und gegebenenfalls fortgebildet wird.[18] Auch dies verstärkt den Grundrechtsschutz in der Breite.

2. Historische Entwicklung der Verfassungsbeschwerde

Aus heutiger Perspektive ist die Verfassungsbeschwerde zum Bundesverfassungsgericht – wie die vorstehenden Ausführungen belegen – nicht mehr wegzudenken. Dabei war ihre Aufnahme in den Baukasten der verfassungsprozessualen Rechtsbehelfe keineswegs selbstverständlich[19] und schon gar kein Selbstläufer. Die Mütter und Väter des Grundgesetzes, die Mitglieder des Parlamentarischen Rates, verzichteten aus Uneinigkeit über die Notwendigkeit der Verfassungsbeschwerde sowie aus Unsicherheit über deren Einpassung in das übrige Rechtsschutzsystem darauf, selbige in den Text des am 23. Mai 1949 verkündeten und am Folgetag in Kraft getretenen Grundgesetzes aufzunehmen.[20] Das Gesetz über das Bundesverfassungsgericht vom 12. März 1951[21] sah den außerordentlichen Rechtsbehelf der Verfassungsbeschwerde gleichwohl vor (§§ 90 ff. BVerfGG). Damit hatte der einfache Gesetzgeber von der Öffnungsklausel des Art. 93 Abs. 2 GG a.F.[22] Gebrauch gemacht, wonach das Bundesverfassungsgericht nicht nur in den ihm durch das Grundgesetz zugewiesenen, sondern auch in solchen Fällen tätig wird, die ihm sonst durch Bundesgesetz zugewiesen werden. Im Ergebnis war das Bundesverfassungsgericht somit trotz fehlender Aufnahme der Verfassungsbeschwerde in das Grundgesetz (GG) seit seiner Konstituierung im September 1951 für entsprechende Verfahren zuständig.

Im Jahr 1969 nahm der verfassungsändernde Gesetzgeber die Verfassungsbeschwerde dann doch noch in den Verfassungstext auf und fügte Art. 93 Abs. 1 GG eine neue Nummer 4a hinzu.[23] Ziel war es, die Verfassungs-

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[18] Vgl. BVerfGE 33, 247 (259); 79, 365 (367 f.); 81, 278 (290); 85, 109 (113); 98, 163 (167); 113, 29 (47).

[19] Zu Vorläufern und Vorbildern der Verfassungsbeschwerde insbesondere im 19. und 20. Jahrhundert *Voßkuhle*, in: v. Mangoldt/Klein/Starck, GG, 7. Aufl. 2018, Art. 93 Rn. 165; *Wieland*, in: Dreier, GG, 3. Aufl. 2018, Art. 93 Rn. 9.

[20] Vgl. näher *Voßkuhle*, in: v. Mangoldt/Klein/Starck, GG, 7. Aufl. 2018, Art. 93 Rn. 166; *Schlaich/Korioth*, Das Bundesverfassungsgericht, 12. Aufl. 2021, Rn. 198; jeweils m.w.N.

[21] BGBl. I S. 243.

[22] Diese Bestimmung entspricht heute Art. 93 Abs. 3 GG.

[23] Artikel 1 Nr. 1 des Gesetzes zur Änderung des Grundgesetzes vom 29. Januar 1969, BGBl. I S. 97.

beschwerde dem Zugriff des einfachen Gesetzgebers zu entziehen und ein Gegengewicht zur umstrittenen Einführung einer Notstandsverfassung zu schaffen.[24] Zugleich stellte es der verfassungsändernde Gesetzgeber dem einfachen Gesetzgeber durch den neugeschaffenen Art. 94 Abs. 2 Satz 2 GG aber frei, für Verfassungsbeschwerden die Erschöpfung des Rechtswegs zur Voraussetzung zu machen und ein besonderes Annahmeverfahren vorzusehen.[25] Von beiden Möglichkeiten hat der einfache Gesetzgeber Gebrauch gemacht, wie im Folgenden noch darzulegen sein wird.

III. Die wesentlichen Zulässigkeitsvoraussetzungen der Verfassungsbeschwerde

Die eingangs angesprochene, auf den ersten Blick niedrigschwellige Zugangsmöglichkeit des Bundesverfassungsgerichts darf nicht den Blick darauf verstellen, dass sich Verfassungsbeschwerden einer Vielzahl an Zulässigkeitsanforderungen gegenübersehen, die in der Praxis nur von einem Bruchteil der Verfassungsbeschwerden erfüllt werden. Ohne dass im Rahmen dieser Abhandlung auf die vielfältigen, mit den einzelnen Zulässigkeitsvoraussetzungen verbundenen Detailfragen eingegangen werden kann, die sich aus Art. 93 Abs. 1 Nr. 4a GG, § 13 Nr. 8a, §§ 90 ff. BVerfGG ergeben, sollen nachfolgend die zentralen Voraussetzungen skizziert werden, die eine Verfassungsbeschwerde erfüllen muss, um überhaupt einer Prüfung in der Sache (Begründetheitsprüfung) unterzogen zu werden.

1. Beschwerdeberechtigung

Beschwerdeberechtigt ist „jedermann" im Sinne von Art. 93 Abs. 1 Nr. 4a GG, § 90 Abs. 1 BVerfGG, also jeder, der in Bezug auf das konkret gerügte Grundrecht oder grundrechtsgleiche Recht grundrechtsfähig ist, das heißt Träger des entsprechenden Rechts sein kann[26]; dies können gemäß Art. 19 Abs. 3 GG auch juristische Personen sein. Auf die Staatsangehörigkeit des Beschwerdeführers kommt es dabei grundsätzlich nicht an. Soweit bestimmte Grundrechte wie etwa Art. 8 Abs. 1 GG (Versammlungsfreiheit) oder Art. 12 Abs. 1 GG (Berufsfreiheit) ihrem Wortlaut nach „Deutschen" im Sinne von Art. 116 Abs. 1 GG vorbehalten sind, können sich Ausländer, die der Sache nach eine Verletzung eines solchen „Deutschengrundrechts"

[24] Vgl. *Detterbeck*, in: Sachs, GG, 9. Aufl. 2021, Art. 93 Rn. 3 m.w.N.

[25] Artikel 1 Nr. 2 des Gesetzes zur Änderung des Grundgesetzes vom 29. Januar 1969, BGBl. I S. 97.

[26] Vgl. BVerfGE 39, 302 (312); 115, 205 (227); 129, 78 (91); 138, 64 (82 Rn. 53).

geltend machen wollen, jedenfalls auf den Schutzbereich der allgemeinen Handlungsfreiheit gemäß Art. 2 Abs. 1 GG berufen.[27]

2. Beschwerdegegenstand

Mit der Verfassungsbeschwerde kann gemäß Art. 93 Abs. 1 Nr. 4a GG, § 90 Abs. 1 BVerfGG eine Verletzung von Grundrechten und grundrechtsgleichen Rechten „durch die öffentliche Gewalt" gerügt werden. Öffentliche Gewalt in diesem Sinne umfasst alle drei Staatsgewalten: die gesetzgebende, die vollziehende und die rechtsprechende.[28] Die Verfassungsbeschwerde kann indes nur gegen Maßnahmen der nach Art. 1 Abs. 3 GG an die Grundrechte gebundenen deutschen Staatsgewalt gerichtet werden.[29] Maßnahmen von Organen, Einrichtungen und sonstigen Stellen der Europäischen Union sind nach der Rechtsprechung des Bundesverfassungsgerichts keine öffentliche Gewalt im Sinne von Art. 93 Abs. 1 Nr. 4a GG, § 90 Abs. 1 BVerfGG und können demgemäß nicht unmittelbarer Beschwerdegegenstand einer Verfassungsbeschwerde sein.[30] Solche Maßnahmen können im Rahmen einer Verfassungsbeschwerde jedoch mittelbar – als Vorfrage – Gegenstand der Prüfung durch das Bundesverfassungsgericht sein, soweit sie die Grundrechtsberechtigten in Deutschland betreffen. Dies kann dann der Fall sein, wenn sie Grundlage von Handlungen deutscher Staatsorgane sind oder nicht mehr von dem Integrationsprogramm und der unionsrechtlichen Kompetenzordnung gedeckt sind. In solchen Fällen lösen Maßnahmen der Europäischen Union aus der Integrationsverantwortung folgende Handlungs- und Unterlassungspflichten deutscher Verfassungsorgane aus, die ihrerseits mit der Verfassungsbeschwerde eingefordert werden können.[31]

3. Beschwerdebefugnis

Der Beschwerdeführer kann nach Art. 93 Abs. 1 Nr. 4a GG, § 90 Abs. 1 BVerfGG Verfassungsbeschwerde erheben, wenn er behaupten kann, durch die angegriffene Maßnahme (häufig ein Urteil) oder Unterlassung

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[27] Vgl. BVerfGE 78, 179 (196 f.); 104, 337 (346).

[28] Vgl. *Lenz/Hansel*, 3. Aufl. 2020, § 90 Rn. 155; *Hellmann*, in: Barczak, BVerfGG, 2018, § 90 Rn. 93; *Drossel*, in: Burkiczak/Dollinger/Schorkopf, BVerfGG, 2. Aufl. 2020, § 90 Rn. 56.

[29] Vgl. BVerfGE 1, 10 (11); 6, 15 (18); 22, 91 (92); 58, 1 (27); 66, 39 (56 f.); BVerfG, Beschluss der 2. Kammer des Zweiten Senats vom 26. Mai 2020 - 2 BvR 43/16 -, Rn. 7.

[30] Vgl. BVerfGE 129, 124 (175 f.); 142, 123 (179 f. Rn. 97); 151, 202 (283 f. Rn. 112); 154, 17 (83 Rn. 93) – PSPP-Programm der EZB.

[31] Dazu näher BVerfGE 154, 17 (81 f. Rn. 89) m.w.N.

in einem seiner Grundrechte oder in einem seiner in Art. 20 Abs. 4, Art. 33, 38, 101, 103 und 104 enthaltenen Rechte[32] verletzt zu sein. Hieraus folgt zweierlei: Zum einen muss die Möglichkeit der Verletzung eines vonseiten des Beschwerdeführers rügefähigen Grundrechts gegeben sein[33], wobei hierzu nach der neueren Rechtsprechung des Bundesverfassungsgerichts über den Wortlaut von Art. 93 Abs. 1 Nr. 4a GG, § 90 Abs. 1 BVerfGG hinaus auch die Grundrechte der Charta der Europäischen Union zählen können[34]. Zum anderen muss der Beschwerdeführer von dem angegriffenen Hoheitsakt selbst, gegenwärtig und unmittelbar betroffen sein.[35] Mit diesen Anforderungen wird der Charakter der Verfassungsbeschwerde als Individualrechtsbehelf geschützt und insbesondere die Möglichkeit zur Erhebung einer Popularverfassungsbeschwerde ausgeschlossen.[36] Auch die Möglichkeit der Geltendmachung fremder Rechte im eigenen Namen (sogenannte Prozessstandschaft) scheidet damit aus.[37]

4. Rechtswegerschöpfung

Gemäß § 90 Abs. 2 Satz 1 BVerfGG kann die Verfassungsbeschwerde erst nach Erschöpfung des Rechtswegs erhoben werden, wenn gegen die gerügte Verletzung – wie fast immer – der Rechtsweg zulässig ist. Diese Regelung soll im Interesse der Entlastung des Bundesverfassungsgerichts eine möglichst umfassende Vorprüfung der Beschwerdepunkte durch die zuständigen Fachgerichte gewährleisten.[38] Die Beschwerdeführer sind dabei nicht nur gehalten, den gesetzlich vorgesehenen Rechtsweg formal zu erschöpfen, sondern auch, ihn ordnungsgemäß zu beschreiten.[39] Eine Verfassungsbeschwerde ist danach in der Regel unzulässig, wenn ein an sich gegebenes Rechtsmittel, durch dessen Gebrauch der behauptete Grundrechtsverstoß hätte ausgeräumt werden können, aus prozessualen Gründen erfolglos bleibt.[40] Hat ein Beschwerdeführer demnach beispiels-

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[32] Insoweit wird von den sogenannten grundrechtsgleichen Rechten gesprochen.

[33] Vgl. BVerfGE 83, 216 (226); 125, 39 (73); 127, 87 (111 f.); 129, 78 (91); stRspr.

[34] Vgl. BVerfGE 152, 216 (233 ff. Rn. 42 ff.) – Recht auf Vergessen II; 156, 182 (197 ff. Rn. 36 ff.) – Rumänien II; 158, 1 (23 ff. Rn. 36 ff.) – Ökotox-Daten.

[35] Vgl. BVerfGE 1, 97 (101 ff.); 53, 30 (48); 72, 1 (5); 102, 197 (206 f.); 149, 50 (74 Rn. 67); stRspr.

[36] Vgl. nur *Spanner*, in: Festgabe 25 Jahre Bundesverfassungsgericht, Bd. I, S. 374 (374 f.).

[37] Vgl. BVerfGE 25, 256 (263); 31, 275 (280); 72, 122 (131); stRspr.

[38] BVerfGE 4, 193 (198); 16, 124 (127).

[39] Dazu näher – auch mit Beispielen aus der Rechtsprechung des Bundesverfassungsgerichts – *Hellmann*, in: Barczak, BVerfGG, 2018, § 90 Rn. 360 ff.; *Lenz/Hansel*, BVerfGG, 3. Aufl. 2020, § 90 Rn. 420 ff.

[40] Vgl. BVerfGE 16, 124 (127); 54, 53 (65); 74, 102 (114); stRspr.

weise einen zum Rechtsweg gehörenden Rechtsbehelf nicht form- und fristgerecht eingelegt und bleibt sein Rechtsbehelf aus diesem Grund ohne Erfolg, genügt dies dem Erfordernis der Rechtswegerschöpfung nicht. Denn der Beschwerdeführer selbst hat mit der Verletzung seiner prozessualen Obliegenheit verhindert, eine fachgerichtliche Prüfung auch in der Sache zu erreichen.[41]

Ausnahmsweise kann das Bundesverfassungsgericht gemäß § 90 Abs. 2 Satz 2 BVerfGG über eine vor Erschöpfung des Rechtswegs eingelegte Verfassungsbeschwerde sofort entscheiden, wenn sie von allgemeiner Bedeutung ist oder wenn dem Beschwerdeführer ein schwerer und unabwendbarer Nachteil entstünde, falls er zunächst auf den Rechtsweg verwiesen würde. Eine ungeschriebene weitere Ausnahme vom Grundsatz des § 90 Abs. 2 Satz 1 BVerfGG bildet die Unzumutbarkeit der Rechtswegerschöpfung. Hiernach kann das Bundesverfassungsgericht über eine vor Erschöpfung des Rechtswegs eingelegte Verfassungsbeschwerde sofort entscheiden, wenn die Durchführung des fachgerichtlichen Verfahrens für den Beschwerdeführer unzumutbar ist.[42] In der Praxis ist der Ausnahmefall des § 90 Abs. 2 Satz 2 BVerfGG indes nur selten einschlägig; die Vorschrift wird durch das Bundesverfassungsgericht eng ausgelegt.

5. Grundsatz der Subsidiarität

Der ebenfalls in § 90 Abs. 2 Satz 1 BVerfGG zum Ausdruck kommende Grundsatz der Subsidiarität der Verfassungsbeschwerde verlangt, dass der Beschwerdeführer über das Gebot der Rechtswegerschöpfung im engeren Sinne hinaus alle ihm nach Lage der Sache zur Verfügung stehenden prozessualen Möglichkeiten ergreift, um die geltend gemachte Grundrechtsverletzung schon im fachgerichtlichen Verfahren zu verhindern oder zu beseitigen.[43] Zwar resultiert daraus keine allgemeine Pflicht, verfassungsrechtliche Erwägungen und Bedenken schon in das fachgerichtliche Verfahren einzuführen.[44] Dies lässt aber die Obliegenheit der

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[41] Vgl. *Hellmann*, in: Barczak, BVerfGG, 2018, § 90 Rn. 361; *Henke*, in: Burkiczak/Dollinger/Schorkopf, BVerfGG, 2. Aufl. 2022, § 90 Rn. 167. In der Kammerrechtsprechung wird diese Problematik teilweise auch unter dem Gesichtspunkt der Subsidiarität der Verfassungsbeschwerde behandelt, vgl. etwa BVerfGK 1, 222 (223); BVerfG, Beschluss der 3. Kammer des Zweiten Senats vom 10. März 2016 - 2 BvR 408/16 -, Rn. 3.

[42] Vgl. BVerfGE 110, 177 (189).

[43] Vgl. BVerfGE 68, 384 (388 f.); 74, 102 (113); 77, 381 (401); 81, 22 (27); 114, 258 (279); 115, 81 (91 f.); 123, 148 (172); 134, 242 (285); 149, 407 (410 Rn. 9); 162, 358 (368 Rn. 34) – Wiederaufnahme zuungunsten des Freigesprochenen – eA; stRspr.

[44] Vgl. BVerfGE 112, 50 (60 ff.).

Parteien unberührt, die für die Entscheidung maßgeblichen Tatsachen bereits im Ausgangsverfahren vollständig vorzutragen; ein grundsätzlich neuer Tatsachenvortrag ist im Verfahren der Verfassungsbeschwerde ausgeschlossen.[45] Hat der Beschwerdeführer die Tatsachen dort nicht vollständig vorgebracht, hat er nicht alles ihm Zumutbare getan, um eine fachgerichtliche Entscheidung zu seinen Gunsten herbeizuführen.

Die durch § 90 Abs. 2 Satz 2 BVerfGG vorgesehene Ausnahme vom Grundsatz der Rechtswegerschöpfung erstreckt sich auch auf den Grundsatz der Subsidiarität.[46]

6. Frist

Handelt es sich – wie zumeist – um eine Urteilsverfassungsbeschwerde, muss diese binnen eines Monats nach Zugang der letzten angegriffenen Entscheidung beim Bundesverfassungsgericht erhoben und begründet werden (§ 93 Abs. 1 Satz 1 BVerfGG). Im Falle einer Rechtssatzverfassungsbeschwerde beträgt die Frist ein Jahr; sie beginnt mit dem Inkrafttreten des in Rede stehenden Gesetzes oder dem Erlass des angegriffenen Hoheitsaktes zu laufen (§ 93 Abs. 3 BVerfGG).

7. Substantiierungsobliegenheiten

Schließlich leitet das Bundesverfassungsgericht in ständiger Rechtsprechung aus § 23 Abs. 1 Satz 2 Halbsatz 1, § 92 BVerfGG strenge Substantiierungsobliegenheiten für den Beschwerdeführer ab. Zum einen muss er den die behauptete Rechtsverletzung enthaltenden Vorgang substantiiert und schlüssig vortragen.[47] Dies erfordert, dass die angegriffenen Entscheidungen und andere Unterlagen aus dem fachgerichtlichen Verfahren wie zum Beispiel Schriftsätze und Gutachten vorgelegt oder inhaltlich umfassend wiedergegeben werden, soweit ohne ihre Kenntnis eine Einschätzung, ob die Verfassungsbeschwerde Erfolg haben kann, nicht möglich ist.[48] Das Bundesverfassungsgericht muss in der Lage sein, den angegriffenen Akt ohne eigene Nachforschungen zu überprüfen. Fehlen demnach Unterlagen, die zum Verständnis des Sachverhalts oder der getroffenen Entscheidung notwendig sind, ist die Verfassungsbeschwerde schon aus diesem formalen Grund unzulässig. Zum anderen hat sich der Beschwerdeführer mit den angegriffenen gerichtlichen Ent-

[45] Vgl. BVerfGE 112, 50 (62).

[46] Vgl. BVerfGE 101, 54 (74); BVerfGK 15, 306 (314 ff.).

[47] Vgl. BVerfGE 81, 208 (214); 89, 155 (171); 99, 84 (87); 108, 370 (386 f.); 113, 29 (44); 130, 1 (21); stRspr.

[48] Vgl. BVerfGE 88, 40 (45); 112, 304 (314); 129, 269 (278).

scheidungen inhaltlich auseinanderzusetzen.[49] Aus seinen Ausführungen muss deutlich werden, inwieweit durch die angegriffene Maßnahme das bezeichnete Grundrecht verletzt sein soll.[50] Liegt zu den mit der Verfassungsbeschwerde aufgeworfenen Verfassungsfragen Rechtsprechung des Bundesverfassungsgerichts bereits vor, so ist der behauptete Grundrechtsverstoß in Auseinandersetzung mit den vom Bundesverfassungsgericht entwickelten Maßstäben zu begründen.[51] Wird die Begründung der Verfassungsbeschwerde diesen inhaltlichen Anforderungen nicht gerecht, so ist die Verfassungsbeschwerde ebenfalls unzulässig.

Die allgemeine Begründungslast aus § 23 Abs. 1 Satz 2 Halbsatz 1, § 92 BVerfGG verlangt ferner, dass der Beschwerdeführer zu den übrigen Zulässigkeitsanforderungen der Verfassungsbeschwerde vorträgt, soweit deren Vorliegen nicht aus sich heraus erkennbar ist.[52] Diese Obliegenheit wird beispielsweise dann virulent, wenn sich die Einhaltung der Verfassungsbeschwerdefrist nicht ohne Weiteres aus den mit der Verfassungsbeschwerde vorgelegten Unterlagen ergibt.[53]

Die praktische Bedeutung der den Beschwerdeführer treffenden Substantiierungslast kann kaum überschätzt werden. Viele Verfassungsbeschwerden – ob mit oder ohne anwaltliche Vertretung – erfüllen die durchaus hohen Anforderungen nicht, die damit einhergehen.[54] Eine gewisse Filterfunktion kann den Substantiierungsanforderungen damit nicht abgesprochen werden.

Alles in allem bedarf es eines gewissen Geschicks, um eine zulässige Verfassungsbeschwerde zu formulieren. Die hier nur kursorisch und ausschnitthaft dargestellten Zulässigkeitsanforderungen halten jedenfalls eine Vielzahl an Fallstricken[55] bereit, an denen eine Verfassungsbeschwerde im Einzelfall scheitern kann. Es empfiehlt sich daher, trotz des

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[49] Vgl. BVerfGE 82, 43 (49); 88, 40 (45); 105, 252 (264).

[50] Vgl. BVerfGE 78, 320 (329); 99, 84 (87); 115, 166 (179 f.).

[51] Vgl. BVerfGE 77, 170 (214 ff.); 101, 331 (345 f.); 123, 186 (234); 130, 1 (21).

[52] Vgl. *Magen*, in: Burkiczak/Dollinger/Schorkopf, BVerfGG, 2. Aufl. 2022, § 92 Rn. 19 m.w.N.

[53] Vgl. statt vieler BVerfG, Beschluss der 3. Kammer des Zweiten Senats vom 11. Juli 2018 - 2 BvR 1548/14 -, Rn. 15, Beschluss der 1. Kammer des Ersten Senats vom 4. September 2019 - 1 BvR 1789/19 -, Rn. 3; Beschluss der 1. Kammer des Ersten Senats vom 28. Oktober 2019 - 1 BvR 2237/19 -, Rn. 2.

[54] Siehe instruktiv *Lübbe-Wolff*, EuGRZ 2004, S. 669 (676 ff.).

[55] Nur schlagwortartig hingewiesen sei insoweit auf die fachgerichtliche Anhörungsrüge, die gegebenenfalls vor Einlegung einer Verfassungsbeschwerde erhoben werden muss, um den Zulässigkeitsanforderungen des § 90 Abs. 2 Satz 1 BVerfGG zu genügen. Zugleich kann das Abwarten einer Entscheidung über eine *unzulässige* Anhörungsrüge jedoch dazu führen, die Monatsfrist des § 93 Abs. 1 Satz 1 BVerfGG zu verpassen.

fehlenden Vertretungszwangs jedenfalls bei nicht gänzlich trivialen Fällen einen im Verfassungs(prozess)recht versierten Rechtsbeistand hinzuzuziehen.[56]

IV. Das Annahmeverfahren

Gemäß § 93a Abs. 1 BVerfGG bedarf die Verfassungsbeschwerde der Annahme zur Entscheidung.[57] Dieses in der jetzigen Form seit dem Jahr 1993, im Grundsatz aber schon seit dem Jahr 1963 bestehende Verfahren[58] wurde eingeführt, um eine Überlastung des Bundesverfassungsgerichts zu verhindern und seine Funktionsfähigkeit sicherzustellen.[59] Es gibt ihm einen gewissen Freiraum bei der Behandlung von Verfassungsbeschwerden, der aber gleichzeitig durch § 93a Abs. 2 BVerfGG gesetzlich eingehegt wird.[60] Danach ist eine Verfassungsbeschwerde zwingend zur Entscheidung anzunehmen, wenn ihr grundsätzliche verfassungsrechtliche Bedeutung zukommt (§ 93a Abs. 2 Buchstabe a BVerfGG, sogenannte Grundsatzannahme) oder ihre Annahme zur Durchsetzung der Rechte des Beschwerdeführers angezeigt ist (§ 93a Abs. 2 Buchstabe b BVerfGG, sogenannte Durchsetzungsannahme).

Die Voraussetzungen der Grundsatzannahme liegen nur vor, wenn die Verfassungsbeschwerde eine verfassungsrechtliche Frage aufwirft, die sich nicht ohne Weiteres aus dem Grundgesetz beantworten lässt und noch nicht durch die verfassungsgerichtliche Rechtsprechung geklärt oder die durch veränderte Verhältnisse erneut klärungsbedürftig

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[56] Gemäß § 22 Abs. 1 Satz 1 BVerfGG können sich die Beteiligten in jeder Lage des Verfahrens durch einen Rechtsanwalt oder einen Rechtslehrer an einer staatlichen oder staatlich anerkannten Hochschule eines Mitgliedstaates der Europäischen Union, eines anderen Vertragsstaates des Abkommens über den Europäischen Wirtschaftsraum oder der Schweiz, der die Befähigung zum Richteramt besitzt, als Bevollmächtigten vertreten lassen; in der mündlichen Verhandlung vor dem Bundesverfassungsgericht müssen sie sich in dieser Weise vertreten lassen.

[57] Grundlegend dazu *Maatsch*, in: Emmenegger/Wiedmann (Hrsg.), Linien der Rechtsprechung des Bundesverfassungsgerichts, Bd. 2, 2011, S. 31 ff.; *Scheffczyk*, in: ders./Wolter (Hrsg.), Linien der Rechtsprechung des Bundesverfassungsgerichts, Bd. 4, 2017, S. 63 ff.

[58] Zur Genese des Annahmeverfahrens ausführlich *Graßhof*, in: Schmidt-Bleibtreu/Klein/Bethge, BVerfGG, § 93a Rn. 3 ff. (März 2006); *Scheffczyk*, in: ders./Wolter (Hrsg.), Linien der Rechtsprechung des Bundesverfassungsgerichts, Bd. 4, 2017, S. 63 (65 ff.); *Bindig*, in: Burkiczak/Dollinger/Schorkopf, BVerfGG, 2. Aufl. 2022, § 93a Rn. 6 ff.

[59] Vgl. BTDrucks 12/3628, S. 1; BTDrucks 12/4842, S. 1, 11 f.

[60] *Scheffczyk*, in: BeckOK BVerfGG, § 93a Rn. 1 (Juni 2023).

geworden ist.[61] Demgegenüber steht bei der Durchsetzungsannahme der Gesichtspunkt des subjektiven Rechtsschutzes im Vordergrund.[62] Notwendige, aber nicht hinreichende Voraussetzung ist dafür zunächst, dass die Verfassungsbeschwerde zulässig und begründet ist. Hinzukommen muss das Merkmal des „Angezeigtseins". Auch insoweit kommt dem Bundesverfassungsgericht ein Spielraum bei der Entscheidung über die Annahme zu.[63] Dieser reicht aber nicht so weit, dass die Entscheidung in das freie Ermessen des Bundesverfassungsgerichts gestellt wäre.[64] Dementsprechend hat der Gesetzgeber den Begriff des „Angezeigtseins" durch ein Beispiel in Halbsatz 2 („besonders schwerer Nachteil") konkretisiert und im Rahmen der Gesetzesbegründung weitere Fallgruppen genannt, in denen die Annahme der Verfassungsbeschwerde angezeigt ist.[65] All diesen Beispielen, die in der Rechtsprechung des Bundesverfassungsgerichts weiter ausgeformt wurden[66], ist gemein, dass es sich um Grundrechtsverletzungen handelt, die besonders gewichtig sind und aus diesem Grund die Annahme der Verfassungsbeschwerde angezeigt sein lassen.[67] Für die Praxis wird man davon ausgehen können, dass die Annahme einer zulässigen und begründeten Verfassungsbeschwerde regelmäßig angezeigt ist. Ein Ausnahmefall, in dem eine Annahme trotz zulässiger und begründeter Verfassungsbeschwerde nicht angezeigt ist, liegt beispielsweise vor, wenn deutlich abzusehen ist, dass der Beschwerdeführer im Fall der Aufhebung der angegriffenen Entscheidung mit seinem Begehren im Ergebnis keinen Erfolg haben würde.[68]

Auch wenn es sich bei der Annahmeentscheidung systematisch um eine der eigentlichen Sachentscheidung vorausgehende Entscheidung handelt, fallen Annahme- und Sachentscheidung – sofern im konkreten

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[61] Grundlegend BVerfGE 90, 22 (24 f.); BVerfGE 96, 245 (248); 107, 395 (414).

[62] Vgl. *Nettersheim*, in: Barczak, BVerfGG, 2018, § 93a Rn. 39; *Lenz/Hansel*, BVerfGG, 3. Aufl. 2020, § 93a Rn. 48.

[63] Vgl. BTDrucks 12/3628, S. 9, 13.

[64] Vgl. BTDrucks 12/3628, S. 8.

[65] Vgl. BTDrucks 12/3628, S. 14.

[66] Siehe dazu nur die zahlreichen Beispiele bei *Nettersheim*, in: Barczak, BVerfGG, 2018, § 93a Rn. 42 ff.; *Maatsch*, in: Emmenegger/Wiedmann (Hrsg.), Linien der Rechtsprechung des Bundesverfassungsgerichts, Bd. 2, 2011, S. 31 (42 ff.).

[67] Vgl. *Lenz/Hansel*, BVerfGG, 3. Aufl. 2020, § 93a Rn. 55.

[68] Vgl. hierzu BVerfGE 90, 22 (25 f.); 119, 292 (301 f.); BVerfGK 18, 360 (364); BVerfG, Beschluss der 2. Kammer des Zweiten Senats vom 1. Februar 2017 - 2 BvR 2438/15 -, Rn. 7; Beschluss der 1. Kammer des Zweiten Senats vom 2. Juni 2021 - 2 BvR 899/20 -, Rn. 26; Beschluss der 1. Kammer des Zweiten Senats vom 3. August 2023 - 2 BvR 49/23 -, Rn. 25.

Fall überhaupt in der Sache entschieden wird[69] – in der Praxis des Bundesverfassungsgerichts grundsätzlich zusammen.[70] Dies folgt nicht zuletzt daraus, dass mit der Möglichkeit der Durchsetzungsannahme eine Verknüpfung zwischen Annahme- und Sachentscheidung hergestellt wird. Insoweit kann die Annahmeentscheidung regelmäßig nicht ohne eine zumindest gedankliche Prüfung der Erfolgsaussichten der Verfassungsbeschwerde erfolgen. Ein Rückgang des Maßes an Individualrechtsschutz ist mit dem Annahmeverfahren entgegen anfänglich geäußerter Befürchtungen[71] demgemäß nicht verbunden.[72]

V. Praktische Abläufe innerhalb des Bundesverfassungsgerichts

Das Bundesverfassungsgericht besteht aus zwei Senaten mit jeweils acht Richterinnen und Richtern (§ 2 Abs. 1 und 2 BVerfGG). Im Hinblick auf die anhaltend hohen Verfahrenseingänge, unter denen – wie eingangs dargelegt – die Verfassungsbeschwerden jedenfalls quantitativ dominieren, stellt sich die Frage, wie die Mitglieder des Gerichts die eingehenden Verfahren in angemessener Zeit zur Erledigung bringen können.[73] Hierzu tragen mehrere Faktoren bei:

1. Allgemeines Register

Zunächst nimmt ein Bereich der Justizverwaltung, das sogenannte Allgemeine Register[74], eine Filterfunktion wahr. Im Allgemeinen Register werden unter anderem Verfassungsbeschwerden registriert, bei denen eine Annahme zur Entscheidung nach vorläufiger Einschätzung

[69] Die bloße Ablehnung der Annahme einer Verfassungsbeschwerde zur Entscheidung enthält keine Entscheidung in der Sache, vgl. *Schlaich/Korioth*, Das Bundesverfassungsgericht, 12. Aufl. 2021, Rn. 268; *Voßkuhle*, in: v. Mangoldt/Klein/Starck, GG, 7. Aufl. 2018, Art. 94 Rn. 39.

[70] Vgl. *Nettersheim*, in: Barczak, BVerfGG, 2018, § 93a Rn. 10; *Lenz/Hansel*, BVerfGG, 3. Aufl. 2020, § 93a Rn. 11; *Bindig*, in: Burkiczak/Dollinger/Schorkopf, BVerfGG, 2. Aufl. 2022, § 93a Rn. 17; *Scheffczyk*, in: BeckOK BVerfGG, § 93a Rn. 8 ff. (Juni 2023).

[71] Vgl. *Schlink*, NJW 1984, S. 89 (92 f.) (noch zur früheren Rechtslage); *E. Klein*, NJW 1993, S. 2073 (2074); *Zuck*, NJW 1993, S. 2641 (2646); *Stern*, Staatsrecht, Bd. III/2, S. 1287.

[72] Vgl. *Nettersheim*, in: Barczak, BVerfGG, 2018, § 93a Rn. 8; *Bindig*, in: Burkiczak/Dollinger/Schorkopf, BVerfGG, 2. Aufl. 2022, § 93a Rn. 15.

[73] Durchschnittlich werden 82 Prozent der Verfahren innerhalb des ersten Jahres erledigt, vgl. Jahresbericht des Bundesverfassungsgerichts, 2022, S. 51.

[74] Vgl. hierzu die Regelungen in §§ 63 ff. GOBVerfG.

nicht in Betracht kommt, weil sie offensichtlich unzulässig sind oder unter Berücksichtigung der Rechtsprechung des Bundesverfassungsgerichts offensichtlich keinen Erfolg haben können.[75] Hierzu zählen vor allem Verfahren, in denen die Frist nicht eingehalten oder der Rechtsweg nicht erschöpft ist, sowie Verfahren, in denen der Sachverhalt, der angegriffene Hoheitsakt oder das verletzte Grundrecht nicht ausreichend dargelegt werden. Begehrt der Beschwerdeführer nach Unterrichtung über die Rechtslage gleichwohl eine richterliche Entscheidung, wird die Sache in das Verfahrensregister umgeschrieben und dem zuständigen Berichterstatter vorgelegt. Nicht wenige Eingaben verbleiben allerdings im Allgemeinen Register und bedürfen demzufolge keiner richterlichen Entscheidung mehr.[76]

2. Organisation in Kammern

Auch wenn nach außen zumeist nur die beiden Senate des Bundesverfassungsgerichts in Erscheinung treten, wird das Gros der Verfahren innerhalb der Senate durch die aus jeweils drei Richtern bestehenden Kammern erledigt.[77] Das Kammerprinzip wurde mit Wirkung zum 1. Januar 1986 eingeführt[78] und löste seinerzeit die bis dahin bestehenden Richter-Ausschüsse („Dreier-Ausschuss") ab.[79]

Die Zuständigkeit der Kammern in Verfassungsbeschwerdesachen ergibt sich aus §§ 93b ff. BVerfGG. Danach sind die Kammern zum einen für Nichtannahmeentscheidungen zuständig (§ 93b Satz 1 Var. 1 BVerfGG). Zum anderen können die Kammern einer Verfassungsbeschwerde stattgeben, wenn die Voraussetzungen der Durchsetzungsannahme vorliegen (§ 93a Abs. 2 Buchstabe b BVerfGG, s.o.), die für die Beurteilung der Verfassungsbeschwerde maßgebliche verfassungsrechtliche Frage durch das Bundesverfassungsgericht bereits entschieden und die Verfassungsbeschwerde offensichtlich begründet ist (§ 93b Satz 1 Var. 2 in Verbindung mit § 93c Abs. 1 Satz 1 BVerfGG). Dies gilt indes nicht für eine Entschei-

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[75] Siehe hierzu und zum Folgenden die Erläuterungen auf der Homepage des Bundesverfassungsgerichts.

[76] Im Jahr 2022 sind allein 2.099 eingegangene Verfassungsbeschwerden und sonstige Verfahrensanträge im Allgemeinen Register verblieben, vgl. Jahresbericht des Bundesverfassungsgerichts, 2022, S. 63.

[77] Siehe § 15a BVerfGG zu Fragen der Bildung, Besetzung und Geschäftsverteilung der Kammern.

[78] Artikel 1 Ziffer 3 des Gesetzes zur Änderung des Gesetzes über das Bundesverfassungsgericht und zur Änderung des Deutschen Richtergesetzes vom 12. Dezember 1985, BGBl. I S. 2226.

[79] Zur Entstehungsgeschichte von § 15a BVerfGG *Ulsamer*, in: Schmidt-Bleibtreu/Klein/Bethge, BVerfGG, § 15a Rn. 1 (März 1998).

dung, die ausspricht, dass ein Gesetz mit dem Grundgesetz oder sonstigem Bundesrecht unvereinbar oder nichtig ist; eine solche Entscheidung bleibt dem Senat vorbehalten (§ 93c Abs. 1 Satz 3 BVerfGG). Liegen die Voraussetzungen für eine Kammerzuständigkeit nicht vor (§ 93b Satz 2 BVerfGG) oder kann in der Kammer ein einstimmiger Beschluss nicht herbeigeführt werden (§ 93d Abs. 3 Satz 1 BVerfGG), entscheidet der Senat über die Annahme der Verfassungsbeschwerde.

Von den im Jahr 2022 erledigten 4.716 Verfassungsbeschwerden wurden lediglich 13 durch die Senate entschieden.[80] Diese Statistik veranschaulicht, dass in quantitativer Hinsicht die wesentliche Arbeit in den Kammern des Bundesverfassungsgerichts erledigt wird. Sie darf aber nicht darüber hinwegtäuschen, dass die wegweisenden Entscheidungen durch die Senate getroffen werden und die dort entschiedenen Verfassungsbeschwerden ungleich mehr Zeit in Anspruch nehmen. Die skizzierte Zuständigkeitsverteilung trägt ihren – kaum zu überschätzenden – Anteil dazu bei, dass die zentralen Fragen zur Anwendung und Auslegung der Grundrechte den Senaten vorbehalten bleiben und mit der gebotenen Sorgfalt entschieden werden können.

3. Begründungserfordernis

Ebenfalls von nicht zu überschätzender Bedeutung für die zügige Arbeitsweise des Bundesverfassungsgerichts ist die durch § 93d Abs. 1 Satz 3 BVerfGG eröffnete Möglichkeit, im Fall der Ablehnung der Annahme der Verfassungsbeschwerde von einer Begründung abzusehen. Hiervon wird von den Kammern rege Gebrauch gemacht: Von den im Jahr 2022 durch diese nicht zur Entscheidung angenommenen Verfassungsbeschwerden ergingen 4,6 Prozent mit Begründung, 17,46 Prozent mit einer knappen Tenorbegründung und 77,94 Prozent ohne Begründung.[81]

Zweck der Regelung, die sich immer wieder rechtspolitischer[82] Kritik ausgesetzt sieht, ist es, das Bundesverfassungsgericht zu entlasten.[83] Wer die Abläufe des Gerichts kennt und weiß, mit welcher Akribie an jeder Formulierung eines begründeten Beschlusses gearbeitet wird, braucht

[80] Vgl. Jahresbericht des Bundesverfassungsgerichts, 2022, S. 50, 54.

[81] Vgl. Jahresbericht des Bundesverfassungsgerichts, 2022, S. 54. Als Tenorbee gründung wird eine kurze, gegebenenfalls nur einen Halbsatz lange Begründung bezeichnet, die in der Entscheidungsformel erfolgt.

[82] Die Vorschrift jüngst sogar – wenig überzeugend – als verfassungswidrig erachtend *Hilpert*, Begründungspflicht des Bundesverfassungsgerichts?, 2019, S. 455 f.

[83] Vgl. nur *Voßkuhle*, NJW 2013, S. 1329 (1334 f.), dort auch mit weiteren Erläuterungen dazu, weshalb in der Gerichtspraxis bei Nichtannahmeentscheidungen in der Regel von einer Begründung abgesehen wird.

wenig Phantasie, um festzustellen, dass ein Begründungserfordernis für jede einzelne Nichtannahmeentscheidung das Gericht schnell an die Grenzen des Leistbaren bringen und massiv Zeit in Anspruch nehmen würde, die für die großen Senatsentscheidungen – und andere Verfahrensarten – fehlen würde. Gleichwohl wird von der Regelung des § 93d Abs. 1 Satz 3 BVerfGG nicht in jedem Fall Gebrauch gemacht. Insbesondere dann, wenn sich aus den von den Beschwerdeführern vorgelegten Unterlagen eine verfassungsrechtlich bedenkliche Vorgehensweise der Fachgerichte ergibt, die Verfassungsbeschwerde aber etwa wegen mangelnder Substantiierung dennoch keinen Erfolg hat, machen die Kammern in aller Regel von der Möglichkeit Gebrauch, eine zumindest teilweise begründete Nichtannahmeentscheidung zu treffen und auf die verfassungsrechtliche Problematik hinzuweisen.

4. Wissenschaftliche Mitarbeiterinnen und Mitarbeiter

Schließlich tragen auch die wissenschaftlichen Mitarbeiterinnen und Mitarbeiter dazu bei, dass die Richterinnen und Richter des Bundesverfassungsgerichts ihre Aufgaben effektiv bewältigen können. Angesichts des hohen Arbeitsanfalls stehen jedem Mitglied des Gerichts vier wissenschaftliche Mitarbeiterinnen und Mitarbeiter zur Seite. Sie unterstützen das Mitglied des Gerichts, dem sie zugewiesen sind, bei dessen dienstlicher Tätigkeit und sind an dessen Weisungen gebunden (§ 13 Abs. 1 GOBVerfG). In der Praxis vollzieht sich diese Unterstützungsleistung im Wesentlichen dadurch, dass der wissenschaftliche Mitarbeiter für das jeweilige Mitglied des Gerichts, dem er zugewiesen ist, ein schriftlich ausgearbeitetes, je nach Komplexität des Falls mehr oder weniger umfangreiches Votum vorlegt und einen Entscheidungsvorschlag unterbreitet. Den Richterinnen und Richtern des Bundesverfassungsgerichts ermöglicht dies einen schnelleren Zugang zu dem jeweils zu entscheidenden Fall. Sie können, müssen dem Entscheidungsvorschlag aber selbstverständlich nicht folgen. Alle Entscheidungen des Bundesverfassungsgerichts sind richterliche Entscheidungen.[84]

VI. Fazit und Ausblick

Die Verfassungsbeschwerde zum Bundesverfassungsgericht gewährleistet – ebenso wie die in den meisten Bundesländern bestehende Möglichkeit zur Erhebung einer Landesverfassungsbeschwerde – dem einzelnen Bürger einen effektiven Schutz seiner Grundrechte, eröffnet ihm zudem einen unmittelbaren Zugang zum europäischen Verfassungsge-

[84] *Lenz/Hansel*, BVerfGG, 3. Aufl. 2020, § 90 Rn. 40.

richtsverbund[85] und macht den Rechtsraum Europa nicht zuletzt mit der nunmehr anerkannten Möglichkeit, im Einzelfall auch Grundrechte der Charta der Europäischen Union geltend zu machen, greif- und erlebbar. Daher hat sich die Verfassungsbeschwerde nicht zuletzt aufgrund der auf die hohen Eingangszahlen ausgerichteten Organisation des Gerichts und der Zuarbeit von über 60 wissenschaftlichen Mitarbeiterinnen und Mitarbeitern als effektives Instrument des Grundrechtsschutzes erwiesen. In Deutschland ist sie zum festen und unverzichtbaren Bestandteil der Wächterfunktion des Bundesverfassungsgerichts geworden und wird auch in Zukunft das Vertrauen der Bürgerinnen und Bürger in die Arbeit des Gerichts stärken.

[85] Vgl. BVerfGE 156, 182 (198 Rn. 38).

POPULAR ACTION. ROMAN LAW. HISTORICAL TRADITION. SPANISH LAW*

Antonio Fernández de Buján

I. Preliminary remarks

In Roman legal language, the term *iurisdictio* refers to the power vested in magistrates, the activities they perform, and the function for which the respective powers have been conferred on them.

Having established this and the fact that Roman *iurisdictio* – especially before the classical period – does not entirely correspond to modern-day *jurisdiction* we can now commence an analysis on the basis of Luzzato's generic definition, which refers to a concept that has undergone notable changes over the different periods of development of Roman law and the different forms of process, according to which *iurisdictio* includes 'all the powers conferred on the magistrate entrusted, in Rome, with the administration of civil justice, and from the 3th century A.D. onward – with certain limits – also of criminal justice'[1].

Determining the content and substance of *iurisdictium* has proven to be particularly difficult. Etymologically, the term derives from *ius dicere*, which prima facie appears to refer to the notion of *saying, showing or indicating* i.e. the magistrate says, shows, indicates which is the applicable law, however the same etymological root forms the basis of the terms *iudex* and *iudicium*, and it appears that the judge deprived of *ordo iudiorum privatorum* does not have *iurisdictio*. Therefore, according to legal theory, a philological analysis does not shed sufficient light on the issue of jurisdiction[2].

In any event, as far as jurisdiction is concerned, the Roman political community has always been aware – from the very beginning of its existence – of the imperative need to assume monopoly over the administra-

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[1] Luzzatto, *Giurisdizione, s. v.,* Giurisdizione, Enc del Diritto, p. 1.

[2] See Fernández de Buján, A., *Jurisdicción y arbitraje*, Iustel 2006, pp. 13 ss.

tion of justice in the interests of maintaining law and order and protecting social harmony.

Depending on the interests pursued by the person who brings the action before a magistrate or a court, the actions can be classified as:

(a) Private, which private individuals can bring before court to protect their rights and interests. They can in turn be divided into different types:

– restitutional – for the purpose of recovering an item of property or collecting receivables

– criminal – for private offences and redress or monetary compensation for serious crime which goes beyond mere compensation for damages suffered, or for public crimes, *crimina*; these can be instituted by:

– by the victim or the injured party or a family members of the victim by way of private prosecution

– by the competent magistrate of their own motion

– or by any citizen acting as a public prosecutor.

While the prosecution of private offences by the victim or the injured party, or by popular action (in cases where the law or the edicts so provide) takes place in the context of an ordinary private procedure and is punishable by financial sanctions, prosecution of public crimes takes place in public proceedings, *iudicia publica*, before a permanent and collegiate court, in the republican stage, and is punishable by personal penalties; and

– mixed actions are those which have both components.

(b) Popular action derives its name from the fact that it can be exercised by any person in a given community in defence of public or general interests.

Popular action therefore occupies an intermediate position between private actions for breaches of civil law and criminal prosecutions for private crimes, and criminal prosecutions for public crimes, because although they are accessible to all citizens, *omnes cives*, like criminal proceedings in which public crimes are prosecuted, except those expressly provided by law, they are also similar to private actions and criminal proceedings for private offences, in so far as the proceedings are private in nature and the penalty provided for in the conviction is not personal but pecuniary in nature.

Therefore the essential difference between public actions for public crimes and popular action lies in the nature of the proceedings.

Popular action has its origins in classical Athens, and was further developed in the Roman Republic, where *actio popularis* was used in defence of public or general interests, *pro populo*[3].

[3] Corbino, A., *Diritto Privato Romano,* 419, Wolters Kluivert 2019; Garofalo (cur.), *I beni di interesse pubblico nell`esperienza giuridica romana*, I-II, Napoli 2016: in usu publico e `beni comuni; Fernández de Buján, A., *Recensión a Di Porto,*

In Republican Rome popular procedural legitimation attained such extensive development as have never since been reached in the regulations of any subsequent legal order.

It is for this reason that a historical study of the interdicts and popular actions exercised by Roman citizens in their three subcategories: public crimes, private crimes and unlawful actions in the field of urban planning and environmental law, covering the problems posed by procedural legitimation and the solutions adopted to resolve them, can shed light on the reform of the concept under consideration, and may be useful in addressing a matter of pivotal importance for legal theory and case-law given its close connection with the concepts of sovereignty and citizenship[4].

Res in usu publico e " beni comuni " Il modo de la tutela, Torino, Giapichelli 2013, p. XXVI + 89, en IURA, LXIV, pp. 420-423; Id. *La Acción Popular, un apunte histórico,* La Revista, Thomson Reuters, 2016; Id. *Un apunte sobre legitimación popular,* RGDR, Iustel, n. 29, dcbr. 2017; Id. *La acción popular en derecho romano como garantía de los derechos de la ciudadanía,* Liber amicorum del profesor Francisco Ramos Méndez. Atelier 2018, pp. 851-870; Id. *La acción popular romana, action popularis, como instrumento de defensa de los intereses generales y su proyección en el derecho actual*, RGDR, Iustel № 31, dcbr. 2018, y en *El Cronista del estado Social y Democrático de Derecho*, № 78, novbr. 2018, pp. 30-41; *Actio popularis as an instrument for protection of common interests in ancient Rome and its projection in modern Law,* Law Journal of New Bugarian University (Rivistadi diritto della Nuova Università Bulgara), № 3/2018, p.12-27; Id. *La actualidad de la acción popular,* Discurso de Doctorado Honoris Causa por la Universidad San Pablo Ceu, dos de marzo de 2018, Universidad San Pablo 2018; Id. *„Eam popularem actionem dicimus, quae suum ius populi tuetur". D. 47. 23. 1. Ponencia presentada*, en el Pleno de Numerarios de la Real Academia de Jurisprudencia y Legislación de España, el 28 de mayo de 2018, en Estudios Real Academia de Jurisprudencia y Legislación de España – Thomson Reuters Aranzadi, 2019; Id. *Interdicta publicae utilitatis causa y actiones populares*, RGDR, Iustel, № 32, junio 2019; Id. *Las acciones populares romanas: persecución de delitos públicos, delitos privados y tutela del uso público de los bienes públicos. Proyección en el Derecho actual,* RGDR, Iustel, № 34, diciembre 2019; Id. *La Acción Popular,* Página Tercera de ABC, 7 de septiembre 2020.

[4] According to Ihering, *La lucha por el Derecho* (The fight for the Law), translated by Adolfo Posada, foreword by Leopoldo Alas, Clarín, Madrid, 1921, p. 73, Roman law gave citizens the opportunity – through popular action – to enforce the law and to prosecute violators. Such actions were not limited to cases involving the defence of a public interest, but could also be exercised when an individual had suffered injustice and was unable to defend himself or herself. For example: a sale encroaching on the interests of a minor or a guardian defrauding a person under their responsibility. These actions can therefore be seen as an expression of the ideal, which defends the right itself, irrespective of the individual interest.

II. Identifying *civis* with *populus romanus*

In the legal system of ancient Rome, *civis* was equated with *populus* and considered to be an integral and active part thereof, so that any harm to public interest was considered to directly affect the interests of each and every citizen, and therefore they were entitled to take actions for protection or prosecution by means of interdict or popular action[5].

The concept of people of Rome, *populus romanus*, as holders of rights and obligations would therefore have been a fundamental element in creating the concepts of popular action, *actio popularis*, and *interdicta popularia*, which could be exercised by any citizen to protect public interests, the general interest, referred to in different sources by various expressions such as *utilitas publica*, *utilitas omnium*, *utilitas universorum*, *utilitas communis* and *utilitas rei publicae causa*.

The collective interest, in certain areas, converged directly with the interests of individuals, *utilitas singulorum*. Such is the case of *res publicae in usu publico*, public property for public use.

Popular legitimation was widely recognized and regulated in Roman law, not only because of its own specific interest, but also due to the fact that it affected central aspects of the legal system, as pointed out by Di Porto[6]:

(a) the role of citizens in society and the control over public administration activities.

(b) the role of *civis* in the protection of public property intended for public use.

(c) the role of popular action as a counterweight to the state apparatus, and its close connection with the concepts of citizenship and sovereignty[7]

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[5] Cicero, in *De Republica*, I. 39, states: "Est igitur, inquit Africanus, res publica res populi..." which, in Costa's view, , A propósito di alcuni recenti studi sulle azioni populari romane, en RISG, II, 1891, pp. 358– 374, p. 367, is proof of equating *populis* -the State with *res publica*, whereby people is understood to mean, also in I.39, a group of persons connected with each other by their common understanding of applicable law and by their common interests: ".....populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus", and by *civitas* in I.47, a society of citizens bound by the right: "..... quid est enim civitas nisi iuris societas civium?".

[6] See Di Porto, *Interdetti popolari e tutela delle res in usu publico,* pp. 7 ss., part of A. entitled "Res in usu publico e "beni comuni". Il nodo della tutela", Giappicheli , Torino, 2013, pp. 7 ss.

[7] Scialoja, *Studi giuridici,* III, Roma, 1932-34, pp. 108 ss., and Scialoja, *Prefazione a la obra de Bruns*, en AG, XXVIII,1882, p. 108.

(d) the connection of popular action with the concept of *populus* as a legal entity or as a plurality of citizens who make up the *civitas*[8]*; and*

(e) the place of popular action in public/private dichotomy.

As regards the public/private dichotomy, Scialoja introduces the following gradation of rights, the first three of which are public and the fourth – private:

(a) a right pertaining to the community as an entity in its own right, which is exercised by a body of the community.

(b) a right pertaining to the community as an entity in its own right, which however can be exercised by any of its members

(c) a right that belongs to every member of the community and can be exercised by each and every one of them, which may be referred to as 'diffuse public rights of all members of the community'; and

(d) private rights[9].

Popular actions and interdicts would, according to Scialoja's conception, fall under the third category and would afford effective forms of protection of the aforementioned diffuse or collective rights.

III. Different aspects of popular procedural legitimation

The different forms of popular procedural legitimation, constituted for analogous purposes, of civil or praetorian origin, and of criminal or administrative nature, would have emerged successively over time and coexisted in some of the historical periods.

A probable chronological order of appearance would be:

1. *Pro-populo* actions introduced at the time of *legis actiones*

2. Popular interdicts, *interdicta popularia*, which protect the public use of public property.

3. Popular criminal actions provided for in public laws to prosecute public crimes, *crimina*.

4. Popular criminal actions, provided for in *comitia* (commission), municipal or colonial laws, which essentially pursue private crimes, *delicta* and

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[8] On this see Ihering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung,* Leipzig, 1878; Orestano, *Il "problema delle persone giuridiche" in diritto romano,* I, Torino, 1968; Catalano, *Alle radici del problema delle persone giuridiche,* en Diritto e persone. Studi su origine e attualitá del sistema romano, I, Torino, 1990 and Talamanca, Istituzioni di diritto romano, Milano 1990, pp. 177 ss.

[9] Scialoja, *Prefazione a la obra de Bruns,* cit., p. 117, and Di Porto, *Interdetti popolari e tutela delle res in usu publico,* p. 11. Scaevola's comment on this point leads Di Porto to conclude on p. 13 that *l´azione popolare* is *nodo del diritto romano*.

5. Popular criminal actions, provided for in praetorian or aedilean edicts, specifically referred to as *actiones populares*, which also prosecute private crimes, *delicta*.

In Republican Rome popular interdicts and popular legitimation, which can be exercised by any citizen, are referred to in different sources by the following expressions: *actio popularis*, *omnes cives*, *qui volet ex populo*, *quivis de populo*, *quivis ex populo*, or *quiqunque agere volet*, i.e. anyone can bring an action.

1. *Pro-populo* actions at the *legis actiones* stage

The Institutes of Gaius and Justinian mention an early stage, referred to by the term 'OLIM', in which proceedings could not be initiated by a representative (*alieno nomine agere non licet*)[10], which Gaius places in the *legis actiones* period: "*Olim, quo tempore legis actiones in usu fuissent*", although representation was permitted in specific cases.

The specific cases referred to by Gaius in his Institutes by the term *praeterquam ex certis causis* are not explicitly mentioned by the jurist, however they are included in Justinian's Institutes, which are a transcript of Gaius' Institutes: *pro populo*, *pro libertate*, *pro tutela* and *ex lege Hostilia*.

The first instance in which individuals were given the possibility to act through a representative refers to the right of any citizen, *qui volet ex populo*, to initiate proceedings in the interest of the people, *pro populo*. The other cases in which it was also possible to act through a representative are those in which litigation was brought to defend: the freedom of a person, *pro libertate*, a person under guardianship, *pro tutela*, and an absent person in the interest of the Republic, *rei publicae causa*, as provided for by law, ex *lege Hostilia*[11].

2. Popular interdicts, *interdicta popularia*, which protect the public use of public property.

The second aspect of popular legitimation concerns infringements related to the public use of public property, *res publicae in usu publico*, pursued through popular interdicts that any citizen could file before a magistrate to protect the collective use of different things or places in the

[10] Gaius, *Institutes,* 4. 82: "...Olim, quo tempore legis actiones in usu fuissent, alieno nomine agere non licet, praeterquam ex certis causis...". D. 50. 17. 123 p; Ulpianus XIV Commentary on the *Edict*: "nemo alieno nomine lege agere potest".

[11] Justinian, *Institutes,* 4. 10. p.: "... Olim in usu fuisset alterius nomine agere non posse nisi pro populo, pro libertate, pro tutela. Praeterea ex lege Hostilia...". Likewise, in Theophilus' Paraphrase, 4.10.

public domain, such as public roads, public rivers and streams, riversides, aqueducts and public sewerage.

It should be noted that the emphasis in the expression *res publicae in usu publico* falls on the function of public property: on being intended for public use, rather than on the ownership of the property, and it is this function – that the property is designated for public use, which determines the system of protection that any citizen can apply, as holder of the right of use, and this right is guaranteed by interdict and action.

Interdicts were provisions of an administrative nature employed by magistrates, for the purpose of protecting public or private interests, to put an end to disputes between parties, in summary form and on a provisional basis, without, however, entering into the merits of the case, in view of the possible review of the interim decision in an ordinary trial.

The interdict was declaratory, not punitive, and provided for a prohibition, disclosure or restitution in favor of one of the parties.

Interdictal protection allowed the praetor, as the holder of jurisdictional and administrative powers[12], *inter alia*:

– To prevent people from bringing particular objects into a public area, or doing something that may cause harm, unless permission is given to do so, D. 43.8.2.pr.

– To put a stop to actions that are causing damage to public roads, D. 43.8.2.20

– Provide for public roads to be restored to their previous condition 43.8.2.35

– Afford protection to the tenant of a public place, in order to ensure its peaceful enjoyment, D. 43.9.1.

– Prevent any kinds of disturbances caused by persons carrying out construction works that would interfere with the use of a public road, D. 43.11.1.pr.

– Prohibit constructions on a public river or on its banks or throwing anything in the river that could hinder the docking or sailing of vessels, D. 43.12.1.

– Prohibit any action on a public river or on its banks that would prevent the normal flow of water, D. 43.13.l.pr.

– Prohibit any actions that prevent sailing on a public river, D. 43.14.1.pr.

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[12] In Gaius, *Institutes,* IV. 110: The praetor usually grants as perpetual those actions foreseen in the law or in the decisions of the Senate, and as annual – those deriving from his own jurisdiction –"..... quae ex propia iurisdictione pendent, plerumque intra annum dare."

In addition to actions, the praetor has the power to issue *interdicta, sipulationes praetoriae, missiones in possesionem, restitutiones in integrum, exceptiones, praescriptiones, probationes, cautiones* etc.

– Prohibit any actions that obstruct works carried out for the benefit of a public river or its bank, D. 43.15.1.pr.

These are only some of the examples of interdicts that could be exercised by any citizen, *quivis ex populo*[1314].

3. In relation to the third aspect of popular legitimation, relating to popular criminal actions provided for in public laws that criminalize public crimes, *crimina*, it should be pointed out that already in Athens, in 594 B.C., the legislator Solon established the public nature of all criminal proceedings, and granted every citizen the right to bring charges for any crime, as we are informed from the works of Aristotle and Plutarch[15].

Proceedings for public crimes can be initiated by:

– Exercising of the *ius accusandi* by the victim or the person harmed by the crime.

– Of their own motion, by *accusatio publica,* by the magistrates responsible for prosecuting public crimes[16], or

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[13] In this connection see Di Porto, *Interdetti popolari e tutela delle 'res in usu publico'. Linee di una indagine,* en Diritto e processo nella esperienza romana (Atti del seminario in memoria di G. Provera), cit., XI and pp. 24-35; Alburquerque, JM, *La protección o defensa del uso colectivo de las cosas de dominio público. Especial referencia a los interdictos de publicis locis (loca, itinere, viae, flumina, ripae),* Prólogo A. Fernández de Buján, Dykinsonq 2002, reimpr. 2012; Ponte, V., *Régimen jurídico de las vías públicas en Derecho Romano.* Prólogo A. Fernández de Buján, Dykinson 2007; Gerez., El derecho de aguas en Roma, Prólogo A. Fernández de Buján, Dykinson 2007.

[14] See Palao, *El sistema jurídico ático clásico,* Colección de monografías de Derecho Romano, Dykinson 2007, pp. 566, prólogo Fernández de Buján, A., pp. 11-19, in particular pp. 86, 90, 115, 116, 142 and 476; Aristóteles, *Constitución de Atenas*, 9, amd Plutarco, *Solón,* 18, 5.

[15] The distinction between public crimes, *crimina*, and private crimes, *delicta*, appears in the republican stage, where a distinction was made between crimes, which violate not only individual rights but also the rights of the community – punishable by penalties ranging from those of a personal nature, such as the death penalty, *interdictio aquae et igni, la damnnatio ad metalla o la publicatio bonorum etc.*, to pecuniary sanctions, fines, for less serious cases and offences.

[16] On the nature of *accusatio pública*, its exercise by the injured party by iudicium publicum, and its preservation in legal regimes over successive historical periods, from the origins to the Severan period, see Lauria, *Accusatio-Inquisitio*, Studii e Ricordi, Napoli, 1983, pp. 277 ss, who states that "in the Severan period criminal proceedings would have been initiated not by quivis de populo, but, in most cases, by the injured party" and, more or less nuanced, in Botta, Legittimazione, interesse ed incapacitá all´acusa nei ' publica iudicia '; Cagliari, Edizioni AV, 1966, pp. 462, review by Garofalo in Iura XLVI, 1995, pp. 107-115; Pietrini, *Sull´iniziativa del processo criminale romano (IV-VI Secolo)*, Giuffré, Milano, 1996, pp. 177; Vicenti, *Tra iudicium publicum e publica accusatio,* Labeo, 1998, vol. 44, № 3, pp. 471-488. The

– Popular action, in the cases provided for by law, which was used with varying intensity in the different historical stages[17].

As a paradigm case of popular criminal action, it is worth mentioning the crime of *peculatus*, consisting of the appropriation or abuse by a public official or a private individual of public, sacred or religious objects/property, and counterfeiting of currency or public documents, to which Augustus is believed to have contributed by the adoption of a law *lex rogata – Lex Iulia de peculatus et de sacrilegiis*, promulgated in 8 B.C., which provides for popular legitimation, and which is an update of a similar law adopted earlier at the request of Julius Caesar[18].

Also pertaining to the crime of *peculatus*[19]*, the adoption of a special law (lex rogata*) regulating the crime of *residuis*, consisting of the retention or diversion of public money or public property, which are intended for a specific purpose but used in other ways, is attributed to Augustus. A particular feature of the law is that, in the event of the death of the perpetrator, criminal proceedings may be brought against the heirs, insofar as they have benefited from the criminal offence (*Sententiae Pauli*, 5.27, D. 48.13; CJ 9.28)[20].

D. 48.13.2 states: "The Law of Julius on *peculatus* (law on the diversion and retention of public money) introduces liability for persons who keep

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author underlines on p. 476: "for there to be iudicium publicum, in the late Republican era, Botta and Pietrini both arrive at the same conclusion. According to the mentioned authors, there are two requirements: one of a formal nature – it derives from public law, and the other of a procedural nature – the legitimation is diffuse, in Botta's words, or *accusatio* is available to *quivis de populo* – In Pietrini's.

[17] See Ziegler, *Untersuchungen zur Strafrechtsgesetzgebung des Augustus,* München, 1964; Gnoli, *Ricerche sul crimen peculatus,* Milano, 1979. Id. *Cic Nat deor, 3,74 e l'origine della quaestio perpetua peculatus,* RIL, 1975, 331 ss., 340; Santalucia, *Studi di diritto penale romano,* Roma, 1994.

[18] *Peculatus* refers to the commission of the public crime of embezzlement or appropriation of public, sacred or religious property by a public official or private individual. The expression *peculatum facere* is used in sources to mean, *inter alia*, misappropriation, extortion or racketeering.

See Fernández de Buján, for some legal instruments created *ex novo* or reformed by augustian legislation, Chapter XI. Offences related to the appropriation of public property, counterfeiting of public documents or currency and diversion of public money – *Delitos de apropiación de cosas públicas, falsificación de documentos públicos o de moneda y desviación del dinero público,* Thomson Reuters Aranzadi, Anales Real Academia de Jurisprudencia y Legislación de España, 42, 2017, pp. 285 ss.

[19] See Gnoli, *Sulla repressione penale della ritenzione di 'pecunia residua' nella lex Iulia peculatus,* Istituto Lombardo di Scienze e Lettere, 1973.

[20] According to Mantovani, *Il problema di origine dell´accusa popolare. Dalla <quaestio> unilaterale a la „question" bilaterale,* Padova 1989, pp. 24, originally *iudicium publicum* was a public hearing before a special criminal court (*quaestio*) constituted by *lex publica*.

public money that were entrusted to them for a specific reason for but were not duly spent". An individual is liable for withholding public money under the Law of Julius if the person has kept for himself public funds received from rent, sale or any other means. A person convicted under this law must pay back triple the amount misappropriated.

In other words, if the public money or public property was not returned and used for the intended purpose within one year, a financial sanction would be imposed amounting to three times the amount of the misappropriated money or the value of the respective property. In that case the right to bring action – *ius accusandi* – also extended to *quivis de populo*.

The possibility to protect general interests by initiating a public prosecution[21] to prosecute crimes, *crimina,* dates back to the 3rd century B.C. The proceedings took place before permanent criminal courts, *quaestiones perpetuae[22]. The hearing and punishment of public crimes, as regulated by the public laws, was assigned to the corresponding court, which was called by the name of the crime it dealt with. [23]*

4. Popular criminal actions, provided for in *comitia* (commission), municipal or colonial laws which essentially deal with private crimes, *delicata*

The fourth aspect of popular legitimation, *quivis de populo*, concerns the joint protection of public and private interests through prosecuting certain private crimes, *delicata*, or quasi-criminal offences[24], provided for by law, which are heard in an ordinary private trial, through the exer-

[21] Garofalo states that the proceedings before the *quaestiones* soon became known as "*iudicia publica*" allowing for the prosecution of crimes in accordance with the constituent laws of the *quaestiones* by means of *accusatio publica*, open to *quivis de populo*, Padova 1992, pp. 30 et seq., reed. 1998.

[22] Botta, *Legittimazione, interesse ed incapacitá all´acusa nei ' publica iudicia ',* cit. p. 109. The legal system recognises the importance of the interest of a victim of a crime prosecutable by proceedings initiated and substantiated by the victim by means of *accusatio*. In this connection Botta states that while in *crimen stellionatus* and *crimen expilatae hereditatis*, the *ius accusandi* was reserved to the injured party, in other cases, the *ius accusandi* was extended to the *quivis de populo*, if the violation in question was not limited to the interest of the injured party, but encroached also on the dignity and honor of other persons, the State, morals and traditions, as can be deduced from D. 48.2.16 and D. 40.16.5.1, this being a preferred method of prosecution in the pre-trial phase.

[23] See Mattioli, *Ricerche sullaformazionedella categoría dei cosidetti quasi delitti,* Bologna, 2010.

[24] See, among others, Lozano, *La legitimación popular en el Proceso romano clásico,* Barcelona, 198.2

cise of a criminal action, and are punishable by pecuniary penalties in the form of fines.

In contrast to these popular legitimation criminal actions, standard criminal actions for the prosecution of private offences could only be initiated by the injured party or the victim, and civil actions could be initiated only by the persons strictly concerned, i.e. *ad quem res pertinet* or *cuius interest*, according to the terminology used in the texts.

As a general rule, but not in all cases, the financial penalty provided for in the law was paid to the public treasury[25]. On the other hand, the amount of the fine or pecuniary penalty for offences under the praetorian edicts was awarded to the successful plaintiff who initiated the action.

Although few sources have survived from the first centuries of Roman history, it is worth mentioning the following among the different laws – *comitia* (commission), municipal, colonial, and provincial, of the last centuries of the Republic and the first century A.D.[26], which provide for private crimes, *delicta,* that can be persecuted by *quivis de populo* [27]*:*

– *La Lex Luci Lucerini*, a 3rd century colonial law, which provides for popular legitimation, *qui volet*, for the prosecution of offences such as burying corpses, littering or performing funeral ceremonies in the territory of a sacred place.

– *El Senadoconsult de Pago Montano*

The name refers to a place located on the slope of a mountain, specifically on one of the hills around Rome, called Esquilina, in 1875[28]. The text from the 1st century B.C. prohibits the disposal of waste and rubbish in the vicinity of the Puerta Esquilina because it is considered to be a holy place designated for burials.

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[25] The great number of laws passed during the Republican period (around a thousand) did not, however, reach the extremity denounced by Tacitus, in Annales, Book III, 27, where he states that the excess of laws corrupts the Republic: *corruptissima re publica plurimae leges*.

[26] Sometimes other expressions are used such as *uilibet de populo* or *ei cui placebit*, *omnes cives* eg. in D. 39.1.3.4, *quicumque agere volet* in D. 47. 12. 3.pr., or *quis quasi unus ex populo agit* in D. 3.3.43, pr.

[27] See Scialoja, *Studi giuridici,* Vol. 1, Roma, 1933, pp. 471 ss, and Lozano, *La legitimación popular en el proceso romano clásico,* cit., pp. 319-320.

[28] Given the sacred nature of boundaries in the early centuries, and the fact that their alteration was sanctioned by death penalty according to a law of Numa Pompilius, it is likely that the intentional alteration of estate boundaries would have oscillated between crime and misdemeanor, depending on the period, if we consider the penalties provided for the perpetration of the crime. In different periods the penalty for the crime *termini moti* ranged from a fine (in the Republican agrarian laws) to deportation to an island with partial confiscation of property or *interdictio aquae et igni* (in the post-classical period).

It provides that the plebeian councilors and, in their absence, any citizen, *quivis de populo*, may act by means of an enforcement procedure, *manus iniectio*, consisting of the seizure of property in as security, *pignoris capio*, and the imposition of a fine, in respect of anyone who has acted contrary to senatorial provisions.

This is an antecedent of the *actio de sepulchro violato* provided for in by the praetor's edict as popular action and *actio in factum*, D. 47.12.3. pr.

– The *lex Mamilia* or *lex Iulia Agraria*, adopted between 55 and 59 B.C. as part of the agrarian legislation package put forward by Caesar in view of providing public land to war veterans, according to which any member of the affected community, *qui volet*, can bring an action for the protection of the boundaries of cities, markets, public places or private property, and sanction any intentional removal of such boundaries.

Calistratus, in D. 47.21.3, pr. refers to this law in the following terms: In the agrarian law enacted by Cesar, a financial penalty was imposed on those who intentionally move boundary markers from their respective place and position on the land: for each marker moved or removed the law imposes a fine of 50 aureas to be paid into the public treasury, and further provides that the action and petition can be brought by *qui volet*, that is to say, anyone who wishes to exercise this right.

In other words, for any boundary marker that was moved or removed, the penalty was 50 aureas, to be paid into the public treasury: *quinquaginta aureos in publico dare iubet*. [29]

– The *lex Iulia Municipalis*, the text of which was found on the coast of Asia Minor, in the so-called Tabulae Heracleensis. It was enacted by Cesar in 45 B.C. According to prevailing opinion it was applied to all municipalities and helped many cities and colonies acquire the status of municipality. It provides for numerous actions of popular legitimation such as: action for sanctioning magistrates who distribute cereals to non-listed citizens, action against magistrates who take up public duties and who have been convicted of theft or charged with infamy or who hold public office without having reached the requisite age of 30.

– The *lex Quinctia de aquaeductibus*, adopted during the Principality of Augustus in 9 B.C., which, in the context of the regulation of public water, provides that any citizen, *quivis de populo*, may bring an action against anyone who causes damage to a public aqueduct or its pipes, or anyone who draws water from an aqueduct without due authorization. The law

[29] Murga, *Las acciones populares en la Lex Coloniae Genitivae Iulia o Ursonensis,* Seminario Complutensis de Derecho Romano, 1989, pp. 103-174; Id. *La «popularidad» de las acciones en las leyes municipales de la Bética,* en RIDA. 38 (1991), pp. 219-284.

provides for a financial penalty of up to 100.000 sexterces to be paid into the public treasury.

– The law of the Roman colony of Urso (Osuna, near Seville) – *Lex Ursonensis* or *Lex Coloniae Genetivae Iuliae* (i.e. in honor of Venus, Protector of Gens Iulia) and *lex data*, inscribed in bronze, authorized by the Comitia, on a proposal by Caesar, founder of the city, and adopted in 44 B.C. by Mark Antony[30].

It provides for many actions for popular legitimation, including:

(a) Cremation of corpses or erection of tombstones inside the colony.

(b) Demolition of a building without the permission of the local authorities, *decurions*.

(c) Corruption in elections, for example holding a feast in the period running up to an election for more that eleven guests.

(d) Violation of provisions relating to public worship.

(e) Occupation of seats reserved for magistrates in public performances.

The municipal laws of *Malaca* and *Salpensa* (in the vicinity of Utrera, Seville) both enacted during the rule of Domitian, I A.D., provide for numerous actions of popular legitimation, such as:

(a) Demolition of a building without the authorization of the *decurions*

(b) Damage caused to public or religious property, *Lex municipii Sal pensani* 26, and *Lex Municipii Malacitani* 58 and 62.

(c) Actions aimed at preventing the normal functioning of public assemblies;

(d) Delaying payments owed to the Treasury;

(e) Failure by magistrates to comply with the obligation to take an oath prior to taking up public office.

– Municipal Law of *Irni* (in the vicinity of Seville), which is similar in content to other laws of this type to be found on the on the peninsula[31], including:

(a) Offences committed by the *cives* of the municipality such as: failure to comply with mandatory rules in the field of construction, organizing meetings prohibited by law, or urban planning violations in construction,

(b) Offences committed by municipal magistrates in the course of performing their duties, such as extortion or misappropriation of public funds.

– The *Lex Rivi Hiberiensis*, from the time of Trajan, discovered in 1993 in the present-day municipality of Agon, Zaragoza, the first edition

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[30] See Murga, *Las acciones populares en el municipio de Irni,* BIDR, V. 88, 1985, pp. 209-260.

[31] See Torrent, *Las acciones populares en la Lex Rivi Hiberiensis,* RIDROM, Nº 9, 2012, pp. 104-172; Murga, *Las ganancias ilícitas del magistrado municipal a tenor del c. 48 de la "lex Irnitana",* BIDR, 31-32, 1989-1990, pp. 1-46.

of which dates back to 2006. It contains rules pertaining to an irrigation community, including popular actions against magistrates, *magistri pagi* and public contractors, *publicani*, who have violated the law[32].

5. The fifth aspect of popular procedural legitimation refers to criminal proceedings provided for in praetorian edicts, specifically referred to as '*actiones populares*', in which – as the case with those provided for by law – private crimes, *delicta,* can also be prosecuted.

IV. Concept, terminology, general principles and types of popular action

1. Concept

The term *actio popularis* is used, *expressis verbis*, to refer to the type of action provided for in the edicts of the praetors.

Title 23, Book 47 of the Digest is entirely devoted, in its eight parts, to the concept and requirements of popular actions, under the heading '*de popularibus actionibus*'. The 23rd and last title of Book 47 deals with private trials. Book 48 is entirely devoted to public trials.

D. 47.23.1 contains a definition of popular action, attributed to Paulus: *Eam popularem actionem dicimus, quae suum ius populi tuetur,* which can be translated as: We call popular action that which protects the people's own right[33]

2. Terminology

The term *actio popularis* can be found in 22 pieces of texts of classical Roman jurists, most notably in the commentaries to the Edict of Paulus or Ulpian, or to works by Gaius and Marcianus.[34].

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[32] See, inter alia, Mommsen, *Die PopularKlagen,* ZSS, 1903, pp. 1-12; Bruns, *Le azione popolari romane, trd. Scialoja*, Archivio Giuridico, 1882; Fadda, *L´azione popolare,* Torino, 1894; Danilovic, *Observations sur les "actiones populares, Studi in onore di Giuseppe Grosso,* 1974, vol. VI, 1974, pp. 15-43; Zhimin, *Riflessioni sull´ azione popolare da una prospettiva comparativa, Studi in onore di Luigi Labruna*, Fide. Humanitas. Ius, Vol. VIII, pp. 6065-6077; Miglietta, *voz Azione Popolare. Enciclopedia di bioetica e scienza giuridica, acura de E. Segreccia e A. Tarantino,* Napoli 2009, pp. 1-12; Giagnorio, *Brevi note in tema de azioni populari. Teoria e storia del Diritto Privato,* n. V, 2012, pp. 1-32.

[33] The oldest text in which the adjective *popularis* appears attached to *actio* is by Cicero, Pro Rabirius, 5.14, although it is considered not to be used in the strict sense of the term.

[34] D. 47.2.3; D. 47.2.3.1; D. 47.12.3.12 on actio de sepulchro violato; D. 2.1.7. pr. – actio de albo corrupto, or D. 9.3.5.13 – actio de positis et suspensis.

The term *actio popularis* is often used explicitly to refer to actions of this nature provided for in the edicts of the praetors and in the curules aediles[35], which has led some scholars to believe that only they can be considered *actiones populares*, in the strict sense, although it should also be noted that not all actions of popular legitimation provided for in the edicts of the praetors and the aediles are called *actio popularis* in the sources[36].

3. General principles of popular action

These are mostly contained in Title 23 of Book 47 of the Digest: *De popularibus actionibus.*

Digest. Book 47 on private offences.

Digest. Book 48 on public offences.

Digest. Book 47, Title 23: *De popularibus actionibus*

According to D.47.23.1. any action which defends the people's own right is popular action (Paulus, Commentary on the *Edict,* book 8).

Eam popularem actionem dicimus, quae suum ius populi tuetur.

D.47.23.2. If several individuals intend to use a popular action, the praetor must choose the most suitable one (Paulus, Commentary on the *Edict,* book 1).

Si plures simulant agant populari actione, Paetor eligat idoniorem.

D. 47.23. 3. When several actions are initiated on the same matter this can be contested on the basis of *res judicata* (Ulpian, Commentary on the *Edict,* Book 1). Substantive *res judicata*, in the negative sense.

Sed si ex eadem causa saepius agatur, quum idem factum sit, exceptio vulgaris rei iudicatae opponitur

In popular actions preference is given to one that has the greatest interest (Ulpian, Commentary on the *Edict,* Book 1).

In popularibus actionibus is, cuius interest, praefertur

D. 47.23.4.: In order to have recourse to popular action individuals must have full legal capacity, i.e., must be allowed by *the Edict* to defend a cause in court (Paulus, Commentary on the *Edict,* Book 3).

Popularis actio integrae personae permittitur, hoc est, cui per Edictum postulare licet.

D. 47.23.5: The person against whom popular action has been brought may appoint a *procurator* to defend him, but the plaintiff cannot be represented in court by a *procurator* (Paulus, Commentary on the *Edict,* Book 8)

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[35] See Sanna, *L´Azione popolare como strumento di tutela dei ' beni pubblici ' : alcune riflessioni tra ' bene pubblico 'ambiente nell´ordinamento giuridico italiano e res publicae nel sistema giuridico romano,* en Diritto & Storia, V, 2006, p. 5.

[36] It should however be noted that legal scholars are not in agreement as to whether *actio popularis* applies to all abovementioned cases and to whether the list is exhaustive.

Qui populari actione convenietur, ad defendendum procuratorem dare potest , is autem, qui eam movet, procuratore dare dare non potest .

However, by way or exception, it was possible to be represented in court by a *procurator* in *actio popularis* proceedings. For example, in D. 3.3.42 it is stated that although it is not possible to appoint a *procurator* in popular action proceedings, this can be done in particular private actions, for example in the case of a person who has suffered particularly serious harm because of a prohibitory interdict (*qui de via publica agit privato damno ex prohibitione afficitur)* and in particular the owner of a grave that has been desecrated (*ad sepulcri violati actionem est)*.

D. 47.23.6. Women and persons under guardianship do not have the power to initiate popular action, unless the matter concerns them or their interest. (Ulpian, Commentary on the *Edict,* Book 25).

Mulieri et pupilo populares actiones non dantur, nisi quuum ad eos res pertineat

D. 47.23.8. Popular actions are not transferred the heirs (of the person who has committed the offence) nor extend beyond the period of one year (Ulpian, Commentary on the *Edict,* Book 1).

Omnes populares actiones neque in heredes dantur, neque supra annum extenduntur

4. Types of popular actions

First of all, it should be noted that the cases of popular legitimation provided for in the laws adopted in the Republican period and in the first century of the Principality would have been taken into account by the praetors in the creation of the category *actiones populares*, given that the offences provided for in the praetor's edicts and the offences provided for in the laws were, for the most part, identical or similar, as the interests protected by both types of actions were the same.

Therefore there are no major differences between the '*actiones qui volet ex populo*' pursuant to *comitia* (commission), municipal or colonial laws on the one hand, and the praetorian or aedilian popular actions – on the other. It must be noted however that while in praetorian popular actions the plaintiff intervenes on his own behalf and in defence of an interest he considers to have been injured, either personal or collective, and the pecuniary penalty is generally paid to the plaintiff, in popular legitimation actions provided for by law, the plaintiff intervenes on behalf of the Roman people, so that as a rule the fine is paid to the state or imperial treasury, depending on the historical period.

Popular, praetorian or aedilian actions can be exercised by any citizen to prosecute, *inter alia*, the perpetrators of the following criminal acts[37]:

– Desecration of a grave*, actio de sepulchro violato*[38]*;*

– Placing an object on a public road or suspending an object that may fall on a public road by an occupant of a dwelling, *actio de positis et suspensis*[39]*;*

– *Throwing objects (solid or liquid) from dwellings onto a public road, actio de effusis et deiecitis*[40]*;*

– Damaging or altering the text or terms of a praetor's edict, *actio de albo corrupto*;

– Depositing waste in public places or causing damage of any kind to a public road, *actio de via publica*[41]*;*

– Proceeding to open a testament without due authorization, *actio de testamento aperto*;

– Threatening the safety of pedestrians by keeping or transporting wild animals on public roads, *actio de bestiis or de feriis*[42]*;*

– *Not following or not obeying judicial decisions, si quis iusdicenti non obtemperaverit*, for example, failing to appear before the judge having been duly summoned *si in ius vocat, ito*[43]*.*

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37 Lozano Corbi, *Competencia de los "recuperatores" en la "actio de sepulchro violato",* en Estudios en homenaje al Profesor Juan Iglesias III, pp. 1487-1496.

38 Rodriguez Ennes, *Algunas consideraciones acerca de la "actio de positis vel suspensis",* Revista de la Facultad de Derecho de la Universidad Complutense, 16, 1990, Homenaje al Prof. Juan Iglesias, pp. 255– 260.

39 Rodríguez Ennes, *Notas sobre el elemento objetivo del effusum vel deiectum. Homenaje a Vallet de Goytisolo,* Vol. 2, 1988, pp. 689-696; Id. *El Edicto "de Effussis vel detectis" y la problemática urbanística romana Homenaje al profesor Alfonso Otero,* 1981, pp. 301-323.

40 Takeshi Sasaki, *¿Quién podía solicitar los interdictos sobre el camino público? – Una exegesis de Ulp. D. 43.8.2.,* RGDR, Iustel, 19, 2012; Rodriguez López, *La licencia urbanística y el derecho de sobreedificación,* CTH, 15.1.50, en Hacia un derecho administrativo y fiscal romano / Fernández de Buján ed., Gerez Kraemer, ed., Malavé Osuna, pp. 393-408.

41 Rodriguez Ennes, *Estudio sobre el edicto de feris, Facultad de Derecho. Universidad Complutense*, 1992.

42 As an example of the existence of *actio popularis* over time see Murga, *La "actio condicticia ex lege", una acción popular justinianea*, en RIDA, 15 (1968), pp. 353-387.

43 See Fernández de Buján, *A., Derecho Público Romano,* 22 ed., TR Civitas 2019, en Capítulo XVIII; G. *La romanización de España. El romanismo de las Partidas. La tradición romanística del Código Civil de 1889: Fernández de Buján, A.,* Roman Public Law, 22 ed. TR Civitas 2019, in Chapter XVIII; G. *The Romanization of Spain. The Romanism of the Seven-Part Code. The Roman tradition in the 1889 Civil Code:* 'The application of Roman law, as well as other influences of the metropolis such as language, public works, administrative organization of provinces, municipali-

V. The tradition of popular action in the history of Spanish law

The period of domination, influence and incorporation of the Iberian peninsula into the Republic and later into the Roman Empire lasted six centuries in the various provinces of Hispania and Lusitania: from II BC to IV AD. The applicable law was predominantly vulgar Roman law, so called because it was simplified classical law, with strong influences from popular and provincial elements[44].

The fall of the Roman Empire led to the establishment of Germanic kingdoms on the European continent. On the Iberian peninsula Visigoths are considered to be the successors of Roman emperors and their legislation combines Germanic elements, local traditions and Roman law, the latter being predominant.

According to JA Escudero, in 654, King Rescesvinto officially endorsed, subject to revision by the VIII Council of Toledo – or correction according to King – the great compilation of laws for Goths and Hispano-Romans that constituted the *Liber Iudiciorum*. Perhaps in imitation of the Code of Justinian, *Liber Iudiciorum* was divided into twelve books, and the books were divided into titles and laws[45]. The *Fuero Juzgo*, which is the Roman translation of the *Liber Iudiciorum*, grants the right to bring charges in

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ties and colonies, and classic Greco-Latin culture, then served as a uniting element for the territories of the Iberian Peninsula....'.

[44] See Escudero, JA, *Curso de Historia del Derecho. Fuentes e Instituciones Político– Administrativas,* 2ª ed. Madrid 1995 (History of law. Sources, political and administrative institutions, there is also a 4th edition, 2012), pp. 210 ss and 421 ss: "Because of its ambitious approach, systematic order and wealth of content, the Recesvinto Code, later known as *Lex Visighotorum*, remains in history as the great legal accomplishment of the Visigothic Kingdom... The establishment of the *Liber Iudiciorum* and the free will regime characterized the medieval legal landscape of León and Castile. With regard to the former, rediscovered in Toledo as the law of the Mozarabs, it should be underlined that it was recognized as local law, adopted by several cities, and had a subsequent and indirect role in the formation of territorial law. Such an expansive process was made possible by the translation into Roman of the Visigothic Code – the so-called Fuero Juzgo, a translation made by an unknown author in the first half of the 13th century based on the Vulgate version of the *Liber Iudiciorum*'.

[45] See the edition of the Fuero Juzgo by Juan de la Reguera, 1798, *Colección Leyes históricas de España*, BOE, Madrid, 2015. *Estudios Preliminar de Santos M. Coronas,* Libro VI, Titulo V, Ley XV, p. 169: The closest relatives of the deceased may accuse the murderer. If they do not wish to do so or delay, other relatives or strangers may do so. García Gayo, *Aportación al estudio de los Fueros,* AHDE, 26. 1956, pp. 445 ss, points out: thanks to this translation and its dissemination, the monarchy made use of this text which, due to its marked Roman influence, appeared to be more in keeping with the new legal trends that were then beginning to appear.

cases of homicide to individuals who are not related to the deceased person, if the next of kin do not wish to do so or delay in doing so[46].

Common law, *ius commune*, emerged from the consolidation of Roman law and canon law, *utrumque ius*, into which glossators incorporated texts of feudal law. It is commonly believed that European legal science was born in Bologna in the late 11th century as a result of the autonomous discovery, study and teaching of the law contained in a manuscript of the Digest, which gave rise to communication between independent nations and peoples of Europe, united by the common roots of Roman law, considered to be natural law or written reason, and later – by canon law, which claims to have universality and moral authority[47].

Canon law, the *Decretum Gratiani*[48] *provided for three ways to initiate proceedings: private prosecution, complaint (denunciation), and inquisitio,* giving rise to an investigation based on a complaint from a private individual or of the court's own motion when the latter has become aware of public rumor, *diffamatio*, accusing a person of committing a criminal offence.

In private proceedings, the private prosecutor had to comply with the requirement of *inscriptio*, according to which, in the event of failing to prove the guilt of the accused or the alleged facts, the prosecutor would be imposed the penalty provided for the offence he attributed to the accused. The requirement of *inscriptio* was not applied to the complaint (denunciation) procedure, which in practice resulted in the gradu-

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[46] See Fernández de Buján, A., *Derecho Público Romano* (Romano Public Law), cit: "The Middle Ages are characterizedn by the *fueros* (of German-Roman origin) and the *Partidas*, a monument to common law, with Roman and canon elements.

The influence of Roman law from the 13th century onwards in Universities, in legislation, in negotiations and in the administration of justice, was partly due to the influx of students from Castile and Leon, firstly, and later from other territories, to Bologna and other European universities where the *corpus Iuris* was taught.

Until the 18th century, the *ius commune* was predominant in Spain, along with right in rem and the surviving Germanic institutes (although its influence was greatest in Catalonia, Valencia, Majorca, Castile and Navarre) and had a substantial impact on the legal systems of the new European nations from the 16th century onwards".

[47] In the 12th century, writes Escudero in *Curso de Historia del Derecho* (History of Spanish Law), pp. 413 et seq., a monk called Gratian, master of theology in Bologna, produced a monumental work entitled *Concordia discordantia canonum*, known as *Decretum*, which laid the foundation for the school of exegetes, or decretists, who according to the Decree were assigned the same task as glossators under the *Corpus Iuris Civilis*. The Decree contains a series of pontifical provisions, the decretals, mostly by the jurist popes Alexander III and Innocent III, endorsed by Gregory IX.

[48] See Emeric y Peña, *El Manual de los Inquisidores* (Manual of Inquisitions), Muchnik editors, Barcelona, 1996, pp. 135 ss.

al displacement of private prosecution by the complaint (denunciation), although slanderous complaints (denunciation) were sanctioned and so the complainant had to provide evidence and indications of guilt in the context of the so called *inquisitio cum promovente*[49].

The significance of the complainant – according to Pérez Gil – lies in the fact that for the first time we see a kind of an accuser who is not necessarily directly affected by the crime and who is free from the requirement of *inscriptio*, in the context of an inquisitorial process which, theoretically, was extraordinary in nature but in practice had already become standard[50].

In the Code of Alfonso X the Wise, Castilian law for the first time provided the possibility, as a general rule, of initiating popular action by individuals who were not injured or harmed by the relevant crime: "We hereby establish that anyone can accuse another person of a wrongdoing, unless otherwise provide by law"[51].

The Seven-Part Code of Alfonso X the Wise incorporated into the system of priority sources as enacted by the Order of Alcalá of Alfonso of 1348 provides for popular action, in accordance with the provisions of Roman law, with broad content, Law 2, Title I, Part 7a: "Acusar puede tomo home que non es defendido por las leyes de nuestro libro"[52].

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[49] See Pérez Gil, *La acusación popular* (popular prosecution), op. cit., p. 34.

[50] Fuero Real, *Edición y Estudio Preliminar de A. Pérez Martín,* BOE 2015, Libro IV, Título XX, Ley 1. As stated by Alonso Romero, MP, in *Criminal proceedings in Castile between the 13the and 19th century* (El proceso penal en Castilla. Siglos XIII-XVIII), Salamanca, 1982, p. 35: in the Fuero Real, popular complaint (denuno ciation) is allowed, as a general rule, provided that nothing is specified and no reference is made to persons who are not authorized to make a denunciation.

[51] In relation to popular action in Spanish historical law, in general, see Alonso Romero, *el Proceso Penal en Castilla. Siglos XIII– XIVIII*, cit.; Vergué Grau, *La defense del imputado y el principio acusatorio,* cit., pp. 66 ss, and Pérez Gil, *La Acusación popular. Prólogo Pedraz Peñalva*, Comares, 1998, pp. 31-118.

[52] See Book VII, Title 8, Law 14: "But if the closest relatives were negligent and did not want to accuse the killer, then others can do so and if there are no relatives who can or want to bring charges or demand justice for the death of the person who has been killed, then any person can bring charges in the manner and before the judges as indicated in the title on accusations". See, Pérez Gil, *La acusación popular* (Popular accusation), op. cit., p. 38-40: "This made it possible for criminal proceedings to include objectives that went beyond retaliation for the offence, as they took into account not only strictly private interests violated by the crime but also the interests of society. This, according to the author, aimed to achieve a preventive function by sending a warning to the rest of the community in order to prevent the commission of further crimes /.../ and aimed at making sure that no crimes were unpunished".

"For each offence it is specified who has the right to bring charges, in some cases the number of persons who are allowed to do so is restricted, e.g. in adultery, while in others it is extensive – usually in the case of particularly serious crimes or

In the Seven-Part Code, Pérez Gil notes, we find the actual origin of the possibility for any citizen to bring charges, subject to the exceptions provided for by law, and this system deriving from classical Roman law is adopted in our legal system.

On the other hand, granting the right of prosecution to anyone who wished to exercise it was intended to ensure that no crime went unpunished even if the injured party failed to bring charges[53]... and starting from the general assumption that individuals have the power to bring charges for offences, unless explicitly otherwise provided, the law specifies, as in the Roman system, the persons and the situations to which this right does not apply. This was the basis for an entirely casuistic regime..."[54].

In addition to the possibility to bring action – either private or popular, which gave rise to an accusatory procedure, proceedings could also be initiated either by means of a complaint made by any individual of good reputation or by an enquiry; in both cases the proceedings were of an inquisitorial nature.

However, as Alonso Romero points out, "despite the fact that all citizens were granted the right to prosecution, it became ineffective over time due to the fact that it is rarely used."

It is not only the various inconveniences associated with this type of proceedings that lead to its decline, but rather the gradual increase in the number of public criminal cases assigned to a public prosecutor, whose

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offences involving state-owned assets. On the basis of the general rules governing the prosecution of crimes, in cases of non-exemptions, the law determines, as in the Roman system, the persons and the situations in which power is granted".

[53] See, Pérez Gil, *La acusación popular* (Popular accusation), op. cit., p. 38-40: "This made it possible for criminal proceedings to include objectives that went beyond retaliation for the offence, as they took into account not only strictly private interests violated by the crime but also the interests of society. This, according to the author, aimed to achieve a preventive function by sending a warning to the rest of the community in order to prevent the commission of further crimes /.../ and aimed at making sure that no crimes were unpunished".

"For each offence it is specified who has the right to bring charges, in some cases the number of persons who are allowed to do so is restricted, e.g. in adultery, while in others it is extensive – usually in the case of particularly serious crimes or offences involving state-owned assets. On the basis of the general rules governing the prosecution of crimes, in cases of non-exemptions, the law determines, as in the Roman system, the persons and the situations in which power is granted".

[54] Alonso Romero, *El proceso penal en Castilla. Siglos XIII-XVIII* (Criminal Proceedings in Castile between the 13the and the 18th century), cit., pp. 141-142, and p. 153. The final outcome of the evolution outlined out above can be seen in the Real Cédula (Royal Order) of 8 November 1787, which states that "...in criminal cases initiated by public accusation H.M.'s prosecutor is a party and must enforce and promote the administration of justice even though the proceedings are between the parties, and were not initiated by the prosecutor's own motion...".

role in trial was gradually taking shape as that of the primary prosecuting authority in respect of all types of crime.

In fact, since the beginning of the 18th century, the public prosecutor acted in court alongside the private prosecutor. Gradually, the role of the public prosecutor in the proceedings began to be identified with upholding popular actions to prosecute crimes. „The public prosecutor participated in all trials, while private prosecutions were on the decline." [55].

Thus we may summaries that between the 14th to 19th centuries popular action was regulated in various legal texts in a casuistic manner for the prosecution of certain offences.

At the codification stage[56], which is characterized by regular changes in the popular action criteria, the prevailing opinions in procedural texts were in favor of preserving it, however it is still worth mentioning the Provisional Regulations for the Administration of Justice of 1835, according to which a popular action may be brought to prosecute all types of crimes, with the exception of private offences.

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[55] See Pérez Gil, op. cit., pp 55-118.

[56] See, inter alia, en Armenta Deu, *La acción popular: claves de una reforma que conviene ponderar* (Popular action: key aspects of a reform worth considering), Justicia, Revista de derecho procesal, № 1, 2017, pp. 71-126; Manzanares Samaniego, *La acción popular,* Diario La Ley, № 8772, 2016; Rodríguez Arribas, *Sobre la acción popular,* El Notario del siglo XXI, № 67, 2016, p. 6-11; Editorial de El Notario del siglo XXI: Defendamos la acción popular, № 67, 2016, p. 3-5; Moreno Catena, *El ejercicio de la acción penal. La intervención de la víctima. El ejercicio de la acción popular. Fiscalía europea y derechos fundamentals*, Tirant on line, Valencia, 2015; Gutierrez-Alviz y Moreno Catena, *Artículo 125 CE, La participación popular en la Administración de Justicia*, Comentarios a la Constitución Española de 1978, Dr. Alzaga Villaamil, Tomo IX; Quintero Olivares, *La acción popular: pasado, presente y futuro de una institución controvertida,* Revista de derecho y proceso penal, № 37, 2015, p. 93-131; Gimeno Sendra, *Qué hacer con la acción penal popular,* El Cronista del Estado Social y Democrático de Derecho, № 14, 2010, p. 60-64; Id. *La acusación popular*, Revista del Poder Judicial, № 31, 1993, pp. 87-94; González-Cuellar y Gutierrez, *art. 101 LECRM*, Comentarios a las Ley de Enjuiciamiento Criminal, 2005; Castillejo, *La acción popular. Restricción en su ejercicio,* en Nuevas políticas públicas, 2009, pp. 179-194; Banacloche, *La acusación popular en el proceso penal. Propuestas para una reforma*, Revista de Derecho Procesal, № 1, 2008, pp. 9-54; Oromi Vall-LL1 overas, *El ejercicio de la acción popular* (Pautas para una futura regulación legal), Marcial Pons, 2003, pp. 110-118; Id. *A vueltas con la acción popular: ¿Procede el control judicial de su ejercicio*, en AAVV, Derecho, Justicia, Universidad, Liber amicorum de Andrés de la Oliva Santos, ed, R. Areces, 2016, T.II, pp. 2353-2372.

Luzón Cánovas, *La acción popular. Análisis comparativo con la acusación particular*, Revista jurídica española de doctrina, jurisprudencia y bibliografía, № 2, 2002; Fernández Rodriguez, TR, *La acción popular en el proyecto de Ley Orgánica del Poder Judicial*, *Estudios sobre el proyecto de ley orgánica del poder judicial,* 1985, pp. 263-273.

The Spanish Criminal Procedure Acts of 1872, as well as the current Criminal Procedure Act of 1882, provide that public crimes can be prosecuted by means of popular action.

The doctrine of the time was mostly in favor of introducing popular action, while most difficulties associated with its regulation were connected with the jurisprudence.

Already in previous centuries some jurisprudence judgments argued that while popular action fulfilled an important function in antiquity and in intermediate law, hence its frequent use by citizens, and its unquestioned validity for centuries when there was no public prosecutor to defend legality and the interests of society, the creation and consolidation of this public body resulted, to a certain extent, in a loss of legitimacy of popular prosecution, which would find its essential justification in maintaining the democratic principle of citizens' participation in justice, a liberal conception of political action and subjective rights, following in the Roman tradition, and in the understanding that no crime should go unpunished.

In short, with the creation of the figure of the public prosecutor, preserving popular action would, in practice, have led to delays in proceedings due to accumulation of charges, and moreover it would not have reduced the workload of public prosecutors, who must produce guarantees in order to accuse or bring an appeal on a point of law and respond to libelous accusations. It would rather have had the effect of questioning the impartiality, civic spirit and solidarity of the public prosecutor in many of the cases involving a popular prosecutor. On the other hand, the use of popular action by citizens was highlighted.

We may therefore conclude that opinions in favor of transferring the power to initiate criminal proceedings exclusively to the Public Prosecutor's Office and to individuals harmed by the crime have been progressively gaining ground in jurisprudence argumentations.

Popular action is provided for in the Spanish Constitutions of 1812, 1869 and 1931 and is limited to specific criminal cases:

– The 1812 Constitution provides that popular action can be initiated to prosecute crimes of corruption, bribery, and malfeasance committed by judges and magistrates.

– The 1869 Constitution provides that popular action can be initiated to prosecute offences committed by judges and magistrates. This provides a broader framework for the exercise of popular action and for the liability of those who hold judicial powers.

– The 1931 Constitution provides for popular action in case of infringements in the prosecution of unlawful detention and imprisonment.

Popular action is restricted to unlawful detention and imprisonment, but in terms of personal scope it is extended to cover also agents and officials who have participated in such actions through manifest illegality conduct.

VI. The popular action debate

Popular action is still a topical issue in Spanish, Latin American and international law.

In recent years, a doctrinal and political debate has been ongoing in Spain on the subject of whether it would be advisable to reform the legal regime of popular action by better defining its scope and purpose.

The question of popular procedural legitimation and its role in the administration of justice is, moreover, a central issue in the conception of the State, particularly at certain historical stages, such as the Roman period, as it affects basic institutions such as the administration of justice, democratic tradition, the interrelation between public and private law, and the general interest.

Popular action is referred to in Section 125 of the 1978 Constitution under its Roman name of *actio popularis*, and is part of the classic conception of direct citizen participation in the administration of justice. The Constitution states: "Citizens may engage in popular action and take part in the administration of justice through the institution of the jury, in the manner and with respect to those criminal trials as may be determined by law, as well as in customary and traditional courts."[57]

Popular action in the Spanish legal system is a fundamental and constitutional right, provided for in Article 125 of the Constitution. It is exercised within the framework of the effective judicial protection guaranteed by Article 24 of the Constitution, and in the event that it is violated Spanish citizens have recourse to a complaint procedure before the Federal Constitutional Court (recurso de amparo) for all crimes that can be prosecuted ex officio by the Public Prosecutor's Office. Restrictions include, inter alia, that it cannot be exercised in military criminal law or for private crimes, and it is controversial in the context of the so-called semi-public crimes, i.e. those which can only be prosecuted on the basis of a complaint by the aggrieved party. [58]

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[57] On the topic of the dispute in scientific and judicial literature concerning the constitutional nature of popular action, see Giménez García, *Reflexiones sobre la acción popular en el proceso penal desde la Jurisprudencia de la Sala Segunda del Tribunal Supremo,* Eguuzkilore, 23, San Sebastian, 12/2009, pp. 317-331.

[58] Under Article 270 of the Criminal Procedure Act (LECrm): "All Spanish citizens, whether or not they are aggrieved by the crime, may file a complaint, exercising the *actio popularis* provided for in article 101 of this Law.

Foreigners may also file a complaint for crimes committed against their person or property or the persons or property of their representatives, having previously complied with the provisions of article 280, if they are not included under the last paragraph of article 281."

Currently popular action is guaranteed by Article 24 of the Spanish Constitution which establishes effective judicial protection, and can be exercised by Spanish citizens by initiating proceedings for any of the public crimes that can be prosecuted by the public prosecutor's office of its own motion[59].

Popular action, conceived as a manifestation of the citizen's participation in the administration of justice, is therefore recognized in the Spanish legal system as having an important role in the criminal sphere, in comparison with the limited and subsidiary role attributed to it in other European laws.[60] However in other areas, in particular administrative law and control of constitutionality, the role of popular action is widely recognized.

The Supreme Court in its ruling of 17 December 2007, which gave rise to the so-called Botín doctrine, stated the following in reference to popular action: "If we consider the procedural laws of European democracies, we will see that the legislative trend is extremely restrictive, as generally speaking injured civil parties only have the right to participate in criminal proceedings alongside the Public Prosecutor's Office (Italy, France, Portugal), or only subordinated to the public prosecutor (Germany), or by way of subsidiary participation in the event of the prosecutor's withdrawal (Austria)[61].

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[59] Citizens aggrieved by a crime have the right to appear in criminal proceedings together with the public prosecutor in Germany, Italy, France and Portugal, and in Austria, in the event of withdrawal by the Prosecutor's Office.

On the historical debate concerning popular action in comparative law with particular reference to France, Germany and Italy see Pérez Gil, *La acusación popular,* Comares, 1998, pp. 119-201.

With regard to popular action in Latin America, see Álvarez Suárez, L., *La acción popular como instrumento de acceso a la justicia en el derecho comparado,* en Derechos y obligaciones en el estado de derecho. Actas del III Coloquio Binacional México-España 2017, Oviedo 2017, pp. 629-637, with particular reference to the model Criminal Procedure Code, which, although not binding, establishes an indicative model aimed at harmonizing the regulations of the different Latin American nations.

[60] Concerning the role of the Public Prosecutor's Office in criminal proceedings in comparative law see Diez-Picazo Gimenez, L.M, *El poder de acusar (Ministerio Fiscal y Constitucionalismo)*, Ariel, 2000, pp. 110 ss.

[61] See Sandulli, *L´azione popolare contro le licenze edilizie*, RGE, II, 1968; Spagnuolo Vigorita, *Interesse publico e azione popolare nella legge ponte per l´urbanistica*, RGE, II, 1977; Ferrara, *Interessi collettivi e difusi in Dig. pub.,* VIII, Torino, 1993, pp. 482 ss.; Lanfranchi, *La tutela giurisdizionale degli interessi collettivi e diffus, especialmente Cerri, Diritti di agire dei singuli, delle associazione che la rapresentano, di entitá destinate alla difesa di interesssi collectivi,* Giappichelli 2003, pp. 570; Lombardi, *La tutela delle posizione giuridiche meta-individuali nel processo amministrativo,* Torino, 2008; Cudia, *Gli interessi plurisoggetivi tra diritto e processo amministrativo,* Rimini 2012.

In the 19th century the exercise of popular action, in legal spheres other than criminal law, was provided for in various European countries, in the context of the prevailing political liberalism, in electoral law, local administration and state responsibility, e.g. in the legislations of France and Belgium.

In Italy, popular action is preserved in electoral law. According to the law any citizen can address the Electoral Commission about actions related to registration or refusals in electoral matters, as well as in certain matters of local law, public welfare law, tax law or building concessions, in which citizens, or the entities they are represented by, may intervene by means of popular action to remedy the inaction of public administration or to correct any irregularities committed by the latter[62].

In Portugal, popular action is regulated in Art. 52.3 of the 1976 Constitution and concerns violations in the field of public health, consumer rights, quality of life, environment and the cultural heritage[63].

The Constitution of the German State of Bavaria recognizes the right of any natural or legal person to bring proceedings before the Constitutional Court concerning any provisions of laws, regulations or statutes of the state that violate a constitutional right.

Popular action is also enshrined in the constitutions and legal texts of many Eastern European countries.

The US citizen suits provided for in various pieces of legislation adopted since the 1970s in different states, such as Michigan, Minnesota and Florida, which provide for the right of any citizen, regardless of whether they have personally suffered harm or not, to file charges and prosecute a case predominantly in the field of environmental protection, is an institution that is consistent with the notion of *actio popularis* [64].

The procedural formula known as class actions is considered similar to *actio popularis*, especially as provided for in the legislation of the USA and some other common law countries, according to which one or several members of a group that has been harmed by certain unlawful acts have

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[62] "É conferido a todos, pessoalmente ou através de associações de defesa dos interesses em causa, o direito de acção popular nos casos e termos previstos na lei, incluindo o direito de requerer para o lesado ou lesados a correspondente indemnização, nomeadamente para: (a) Promover a prevenção, a cessação ou a perseguição judicial das infracções contra a saúde pública, os direitos dos consumidores, a qualidade de vida e a preservação do ambiente e do património cultural".

[63] See Voeffray, *L´actio popularis ou la défense de l´interêt collectif devant les juridictions internationales,* Presses Universitaire de France, Paris 2004, pp. 33 ss, and the bibliography cited there.

[64] See Voeffray, *L´actio popularis ou la défense de l´interêt collectif devant lesjuridictions internationales,* Presses Universitaire de France, cit., pp. 24 ss, and the bibliography cited there.

the right to initiate proceedings in order to defend the interests of the entire group.

If the legal action is successful, compensation is awarded to all the members of the group that has suffered harm from the unlawful act.

The essential difference with the Roman *actio popularis*, which could be exercised by any citizen regardless of whether they had been directly harmed or not, is that class action can only be initiated by a victim or victims of the wrongful and harmful act being prosecuted.

These procedures have been recognized in the US and, with some limitations, in other common law countries[65].

VII. Reform of the popular action legal framework

1. Popular action in the Criminal Procedure Act, the Lan d and Urban Planning Act and the Constitution of 1978

The Spanish Criminal Procedure Act of 1872, and the current Criminal Procedure Act (LECrm) of 1882, provide that public crimes may be prosecuted by means of popular action[66].

Article 101 LECrm provides that: Criminal proceedings are public. All Spanish citizens may exercise it in accordance with the requirements of the Law. [67]

For its part, Article 19 of the Organic Law on the Judiciary (LOPJ), in the context of the legal development provided for in the abovementioned

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[65] As early as 1835 the Provisional Regulations for the Administration of Justice established that popular action could be initiate to prosecute different types of crimes, except private offences.

[66] Pursuant to Article 102 of the Criminal Procedure Act (Act LECrm): Notwithstanding the provisions of the previous article, criminal proceedings may not be initiated by:

Those not being entitled to full civil rights.

Those who have been convicted twice by a final decision as the convicted person for the offence of defamation or libel.

The Judge or Magistrate.

Those included in the numbers above may, nevertheless, initiate criminal proceedings for an offence or misdemeanour committed against their person or assets or the person or assets of their spouses, ascendants and descendants, whole or half blood brothers and sisters and relations.

Those included in numbers 2. and 3. may also initiate legal proceedings for offences or misdemeanours committed against the persons or assets which may be under their legal custody.

[67] Popular action is also referred to in Articles 20 and 46 of the Organic Law on the Judiciary (LOPJ).

Article 125 of the Spanish Constitution**,** states: "Citizens of Spanish nationality may bring a popular action in the cases and in the forms laid down by the law"[68].

Military criminal law, civil law, such as Supreme Court Decision of 3 May 2000, criminal liability of minors, and private offences which can be prosecuted only at the request of the injured party, are – according to law – excluded from the scope of popular action. The exercise of popular action is controversial in semi-public offences prosecuted on the basis of a complaint by the injured party.

In addition to popular action in criminal matters, public action – considered to be a special type of popular action, is provided for in administrative law, in the national legislation on urban planning, in Articles 5 and 62 of the Land and Urban Planning Act, in accordance with the provisions of Royal Legislative Decree 7/2015 of 30 October approving the revised text of the law.

According to Article 5 citizens have the following rights.

"All citizens have the right to: a) h. Exercise popular action to ensure compliance with territorial and urban planning demarcations, as well as the decisions resulting from environmental assessments, the instruments provided therein and the projects for their implementation, in accordance with the terms laid down in the regulatory legislation."

According to Article 62.1: "Popular action may be brought before administrative authorities and courts dealing in administrative disputes in order to ensure compliance with the law and other instruments regulating territorial and urban planning.[69]

From a procedural point of view, Article 19.1 (h) of Act 29/1998 Regulating the Jurisdiction for Judicial Review refers to popular action: 1. The following are entitled to be heard by the contentious-administrative courts... (h) Any citizen, acting in the name of the people, in the cases expressly provided for by law."

Popular action, understood as a subjective public right of free access to the courts of justice in the cases provided for by the law, can therefore be defined as:

– A constitutional right, provided for in Article 125 of the Constitution with legal coverage.

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[68] The classification of popular action as public action under Roman law dates back as early as Paulo, 18 Commentary to *the Edict*, D.12.2.30.3: In popularibus actionibus: nam si quis egerit, ita demun consumit publicam actionem, si non per colusionem actum sit".

[69] The relationship between popular action and democratic tradition in Spain has been underlined by Gimbernat Ordeig, en Cerco a la acción popular, El Mundo, el 8 de enero de 2008, and De La Oliva Santos, en Historia, Democracia y Acción Popular, ABC, Tercera, 25. 5. 2011.

– As a fundamental right, since it forms part of the effective judicial protection provided for in Article 24 of the Constitution, therefore in the event of it being violated remedy may be sought before the Federal Constitutional Court (recurso de amparo)

– As a manifestation of the democratic tradition stemming from *actio popularis* and *interdicta popularia* in the Roman Republic to which Hispania belonged as a province for roughly six centuries. Subsequently, the Roman *actio popularis* was referred to as *acción popular* in the Seven-Part Code, and has been preserved in law – with certain interruptions – until present[70].

2. Methodological positions

Broadly speaking, the different views on the reform of popular action range from:

– Maintaining the current status quo

– Limiting it by introducing a closed list of offences that can be prosecuted by popular action and restricting its use to a greater or lesser extent[71]; and

– Strengthening it, by means of appropriate regulation replacing the deficient legislation in force, while respecting the current legal framework that allows any public crime to be prosecuted by means of popular action, except in the cases provided for by law.

According to the acting legislation the following actors have the right to initiate criminal proceedings and to persecute public crimes:

– Persons directly harmed by the crime (by means of private prosecution).

– The Public Prosecutor's Office (by means of public prosecution), and

– Any person with Spanish citizenship who exercises popular action, even if they had not been directly harmed or injured by the crime.

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[70] On the evolution of jurisprudential doctrine regarding the exclusive exercise of popular criminal action in cases of initiating oral proceedings in summary proceedings, or when public rights or interests of a diffuse or meta-individual nature are specifically affected, in the context of Spanish criminal proceedings, see Rodriguez Mourullo, Desarrollo y consolidación de la denominada doctrina Botín, Derecho y Proceso, Thomson Reuters Aranzadi, 40, 10-12/2015, pp. 255-274, and Gimeno Sendra, *La doctrina del Tribunal Supremo sobre la acusación popular: los casos Botin y Atutxa,* La Ley, 2008.

In view of the evolving jurisprudential doctrine and the ensuing doctrinal controversy, it seems reasonable to expect that the future regulation of the popular action legal regime will address the delimitation, probably restrictively, of the crimes for which the exercise of popular action alone is sufficient grounds to start proceedings.

[71] See Hinojosa, *El acusador popular: actualidad y vigencia*, El Notario del siglo XXI, № 67, 2016, pp. 16-21.

3. Arguments for and against popular action

The following arguments have been put forward in favor of popular action:

– It has proven to be an important tool for the investigation and conviction of high-profile cases where the perpetrators could have gone unpunished, had it not been for popular action[72].

– The criminal justice system, De la Oliva underlines, is not there to protect the rights and interests of certain legal entities, but rather to ensure that reprehensible conduct is not left without the relevant response provided by the law: penalties or certain alternative measures. That every citizen has the right to prosecute is entirely consistent with the predominant social interest inherent in criminal law and its essential instrument, criminal proceedings.[73]

– In certain cases the grounds for prosecution differ between the Public Prosecutor's Office and the popular prosecution.[74]

– It can counterbalance the actions the Public Prosecutor's Office in certain cases in which the latter decides not to prosecute, especially in crimes involving politically exposed persons or persons in public office, when its actions may be considered controversial.[75]

– It can strengthen citizens' civic awareness and be an incentive for the competent authorities to defend the general interest.[76]

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[72] See De La Oliva Santos, *La acción popular: singularidad y racionalidad. Unas reflexiones de J. Bentham sobre la acusación penal,* en Estudios, Real Academia de Jurisprudencia y Legislación, 2017, TRAranzadi, 2017, pp. 233-245.

[73] De la Oliva argues in The Popular Action..., cit., p. 235, that the attempts by the Public Prosecutor's Office to exercise a monopoly over prosecution, to the detriment of popular action, would perfectly fit with the logic of the party state (Estado de Partidos).

[74] Different positions on popular action as a counterweight to the actions of the Public Prosecutor's Office can be found in Silvela, *La acción popular*, Revista general de legislación y jurisprudencia, Vol. 36, № 73, 1888, pp. 457-487; Giménez García, *Reflexiones sobre la acción popular,* cit., pp. 330 ss; Pérez Gil, *La acusación popular,* cit., pp. 669-752, and Morales Bravo, *La acción popular como mecanismo de contrapeso al poder del Ministerio Fiscal,* Revista de Derecho, Empresa y Sociedad , № 14, 2019, pp. 110-118.

[75] Ihering, in *The fight for the law* (La lucha por el derecho), cit., pp. 73 ss., emphasizes the importance of popular action, because by defending the rights of others citizens implicitly strengthen their own rights, and also distinguishes between popular actions in which the applicant does not receive any benefit for bringing the action and popular actions in which the successful party in the proceedings receives a benefit.

On the reasons for preserving popular action: popular action as a sign of democracy and democratization of justice, as a participatory right and as a factor for improving the social perception of justice, see Pérez Gil, *La acusación popular,* cit.,

– Cooperation of citizens in the administration of justice.[77]

– Popular action plays a positive role in the following cases: (a) particularly serious cases of corruption, (b) abuse or misuse of power by political groups, PEPs or economic entities, (c) protection of general interests linked to the public use of public property, (d) offences related to collective rights or interests, diffuse or meta-individual rights or interests, such as those affecting the environment, safety at work, urban planning or land-use planning, known as third-generation doctrine, the enjoyment and protection of which is the responsibility of each member of society, or particularly vulnerable groups, like in the case of gender-based violence.

Arguments against popular action:

– It has been abused in political or private conflicts to serve dubious or financial interests or for the purposes of harassment[78].

– In many cases in which popular action has been exercised, the intended public or general interest on which the action was based turned out to be unjustified.

– Popular action does not exist or is subject to substantial limitations in a large number of European Union countries.

– The risk that the exercise of popular action could lead to the privatisation of criminal proceedings, which is contrary to its original purpose.

4. The Draft Criminal Procedure Code of 2013[79]

The Explanatory Memorandum, section III, para. 8, reads as follows: "Furthermore, pursuant to Article 125 of the Constitution, any citizen has the right to exercise popular action to prosecute and secure a conviction for offences in respect of which assuming the public function of prosecution is deemed to be justified:

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pp. 582-620, who is opposed to the preservation of popular action, at least in its current legal regime. Similarly see Pedraz Peñalva's prologue to Pérez Gil's work, pp. XXIII to XXVI. [76]

[77] The excessive media coverage of some cases initiated and resolved by means of popular action in the Spanish courts, especially those in which dubious interests of natural or legal entities involved have been proven, has led broad circles in society to question the current legal regime of popular action.

[78] On 27 July 2011 the Council of Ministers, with Francisco Caamaño as Minister of Justice, approved draft amendments to the Criminal Procedure Act. In relation to popular action, it should be noted that according to this draft public administrations, political parties and trade unions are not allowed to exercise popular action, and popular criminal action cannot be exercised without the Public Prosecutor's Office or the person injured or harmed by the crime if the crime affects individual asset or property and the general interest is not at stake.

[79] In this connection see Scialoja, *Prefazione a la obra de Bruns*, en AG, XXVIII, 1882, p. 108.

– Offences committed by public officials
– Corruption in the public sector
– Offences against diffuse interests; and
– Electoral offences

Thus the popular action institution is reformed, although it is legally restricted, in order to avoid abuse.

In short, the draft Criminal Procedure Code introduces an objective limitation in the regulation of popular action, i.e. a closed list of offences that can be prosecuted and punished as follows:

1. Judicial misconduct.
2. Offences committed by public officials in the exercise of their official functions and by private individuals involved in such offences;
3. Bribery under Articles 419-427 of the Criminal Code;
4. Influence peddling under Articles 428-430 of the Criminal Code;
5. Offences against urban planning and land use under Articles 319 and 320 of the Criminal Code;
6. Environmental crime under Articles 325-331 of the Criminal Code;
7. Electoral offences under Articles 139, 140, 146, 149 and 150 of the Organic Law 5/1985 of 19 June on the General Electoral System;
8. Incitement to discrimination, hatred or violence against groups or associations or dissemination of libelous information about groups or associations under Article 510 of the Criminal Code; and
9. terrorist offences".

5. Proposal for a preliminary draft Criminal Procedure Act of 2020

On 9 September 2020 the Minister of Justice, Juan Carlos Campo, received a proposal for comprehensive regulation from the Committee of Experts responsible for drawing up a preliminary draft Criminal Procedure Act.

The main developments regarding popular action, which entail a clear restriction and substantial curtailing of its exercise, are as follows:

With regard to subjective restrictions in the field of popular action, a new prohibition is added to those already in force, preventing public administrations, political parties and trade unions from exercising popular action in accordance with Article 82.

With regard to objective restrictions, it is established that popular action cannot be brought for civil claims under Article 83 or criminal action in the following cases:

– For private crimes, semi-public crimes and misdemeanors, Article 83.
– In cases of offences protecting individual legal rights when the victim and the prosecutor want the case dismissed, Article 529.

With regard to judicial control of legitimate interest, it is stipulated that persons who initiates popular action must duly prove that they have grounds to initiate proceedings in accordance with Art 84:

– Personal, social or professional relationship or link with the public interest which motivates their involvement in the criminal proceedings

– The importance of their actions for the defence of the public interest.

According to Article 538, in a criminal case, the judge may exclude a prosecutor on the grounds that they are not defending a public interest which is the basis for popular action.

It is also established that the judge may require a security deposit in order to secure appearance in court, Article 84.

The individual initiating public action must appear before the judge responsible for procedural safeguards, Article 475, who may exclude the former if in the course of the proceedings it is established that they have no legitimate interest in bringing the action, Article 476.

VIII. Conclusion

The historical importance of popular action is not sufficiently reflected in the specialized research carried out by Roman law scholars on the subject, and it is not given much attention in the Roman law textbooks of the last 50 years, where it is presented as part of the general classification of actions or in the study of criminal proceedings, which is in contrast to the central role it plays in the conception of the State in the area of justice, especially in the Roman Republican stage, and subsequently for almost another six centuries, given its function as counterweight of the State apparatus, and its close connection with the concepts of citizenship and sovereignty[80].

Currently in Spain there is a doctrinal and political debate on the advisability of reforming the popular action legal regime, by better defining its object and purpose, largely due to the spurious or abusive use of this action in recent years by professional litigators who, like in Republican Rome, exercise it vindictively, for political purposes, for harassment or blackmail, despite the important role that popular procedural legitimation has played in certain areas.

The exercise of popular action in areas such as human rights, the environment or health has also been accepted by the jurisdiction of international courts, as it has frequently been invoked in applications for protection in international practice, which has also given rise to a debate concerning the possibility of introducing specific regulation in this field.

[80] See Voeffray, *L´actio popularis ou la défense de l´interêt collectif devant les-juridictions internationales,* Presses Universitaire de France, Paris 2004, p. 401.

The preliminary draft amendments to the Criminal Procedure Acts (LECrim) of 2011, 2013 and September 2020 provide for restricting the legitimation and the content of popular action.

The current profile of popular action has been shaped by case law, which considers it to be a fundamental right, guaranteed by law, and therefore the legislator must regulate its exercise by means of an ordinary law, which must define the specific cases in which popular action can be used, and lay down limitations or restrictions on its exercise, with the sole precondition that the essence of the right should not be undermined.

Thus, popular action has been excluded from civil, military and juvenile jurisdictions, and in criminal matters it can only be used to prosecute public crimes.

Jurisprudence has generally been in favor of popular action, supplementing its deficient, scarce and fragmented legal basis and broadening the scope of its application. The Public Prosecutor's Office has expressed its support for restricting the exercise of popular action, while scientific doctrine is unanimous on the need for more precise legal regulation.

Popular action should not be understood to be a legal mechanism for controlling the public prosecution, but rather, as stated in the Explanatory Memorandum to the LECrim, as an institution which opens criminal proceedings to a perception that the defence of social interests emanates not from a public authority, but from any citizen who is able to propose an alternative view to that upheld, in all legitimacy, by the Public Prosecutor's Office.

The exercise of popular action has sometimes been the only effective mechanism to enable the prosecution and conviction of extremely serious crimes involving corruption or abuse or misuse of powers by PEPs, political groups or economic entities.

In popular action the individual who brings charges works together with the public prosecution to defend the general interest and can sometimes have a corrective role in the process.

It must be clearly defined in which cases a popular action filed by a private citizen is sufficient grounds in order to initiate criminal proceedings.

There is broader consensus regarding the prosecution of crimes affecting diffuse, collective or meta-individual interests, as it is considered that the defence of the public interest is not limited only to the public prosecution's criterion since its point of view may not be shared by all individuals and some of them may wish to exercise popular action.

As stated in Supreme Court ruling STS 1045/2007: "the indictment submitted by a person initiating popular action is not, in itself, sufficient grounds to launch proceedings, as the relevant competent authority will need to decide whether it is rationally justified."

The use of popular action for malicious reasons or for revenge should not, however, be regarded as sufficient reason for its revocation, although this must be taken into account in a future reform of its legal regime to prevent the risks of misusing the institution for the pursuit of interests that have nothing to do with the process, and emphasize not so much on the control of the Public Prosecutor's Office which, except in rear cases, performs rigorously and effectively its constitutional role to defend legality and the public interest, but rather on the participation of citizens in the administration of justice in defence of the general interest, *utilitas publica*, which has characterized popular action since its very inception in the golden age of democratic Athens and Republican Rome.

The inappropriate, vexatious or abusive use of popular action by professional litigators who resort to it as a form of revenge, for political reasons or blackmail, does not diminish its dissuasive and complementary role, especially in certain very serious cases of particular relevance, such as terrorism, the fight against corruption, territorial planning, the protection of the public use of public property, general interests and rights of diffuse, collective or meta-individual nature.

CONSTITUTIONAL COMPLAINT IN CROATIA

Snježana Bagić

1. Introductory remarks

The Constitutional Court of the Republic of Croatia was established by the 1990 Constitution of the Republic of Croatia, and it heavily relies on the Kelsenian model of constitutional judiciary.[1,2] Article 3 of the Constitution enshrines the highest values of the constitutional order: freedom, equal rights, national and gender equality, peacekeeping, social justice, respect for human rights, inviolability of ownership, preservation of nature and the environment, the rule of law and a democratic multiparty system, and they form the basis for interpreting the Constitution. The Constitution, as the highest legal and political act, establishes democratic development of the state and society by protecting the fundamental values of the social, political and legal order of the Republic of Croatia, especially the human rights and fundamental freedoms, and prioritises them over other values.

In other words, human rights and fundamental freedoms are social values and constitutionally protected values that belong to all people, and their protection is not only the right, but also the constitutional duty of the Republic of Croatia. Accordingly, they require constitutional protection, which is ensured primarily by the judicial branch of power, and subsidiarily by the Constitutional Court through the institute of constitutional complaint.

Although the Constitution gives no detail regulation of the constitutional complaint, but it only defines that the Constitutional Court is authorised to protect human rights and fundamental freedoms violated by individual acts of state bodies, bodies of local and regional self-government and legal persons vested with public authority, it is with no doubt

[1] In fact, Croatia had the Constitutional Court already in 1964, when it was still a federal unit of the Socialist Federative Republic of Yugoslavia. The Federal Constitution of the former SFRY and the constitutions of the former socialist republics that comprised it, including the Constitution of SR Croatia, which were passed in 1963, were a major landmark in constitutional law because they inaugurated constitutional judicature and established separate constitutional courts.

[2] On 5 December 1991, the Parliament of the Republic of Croatia passed the Decision on the Election of Judges of the Constitutional Court of the Republic of Croatia, and the newly elected judges of the Constitutional Court entered into office on 7 December 1991, on the day when the President of the Republic of Croatia swore them in.

that the constitutional complaint protects all personal and political rights and freedoms, as well as all economic, social and cultural rights guaranteed in the Constitution. However, one should bear in mind that pursuant the jurisprudence of the Constitutional Court, certain provisions of the Constitution, including those under the Head III of the Constitution entitled "Protection of Human Rights and Freedoms", do not establish fundamental freedoms and rights of citizens and therefore a person's constitutional right cannot be based on it.[3]

2. Constitutional Court as an Institutional Protector of Human Rights

The Croatian Constitutional Court is a separate constitutional body, which does not belong to the legislative, the executive, or the judicial power.[4] Its position is determined by the basic and most important jurisdiction, which is reflected in the abstract control of laws and by-laws (the protection of constitutionality *in abstracto*), and in particular the protection of human rights and fundamental freedoms guaranteed in the Constitution through the procedure of individual constitutional control (protection of constitutionality *in concreto*). [5]

The Constitutional Court operates solely on the basis of the Constitution and on the Constitutional Act on the Constitutional Court of the Republic of Croatia (hereinafter: the CACCRC).[6]

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[3] For example, in its decision number: U-III-1097/1999 of 13 March 2000 (Official Gazette No 38/00), the Court stated the following position: "The provision of paragraph 1 of Article 19 of the Constitution prescribes the basic guidelines and obligations of the state administration and bodies with public powers when deciding on the rights and obligations of citizens, but it does not prescribe the subjective constitutional right of citizens to legality. The Administrative Court of the Republic of Croatia (not the Constitutional Court) is authorised to control the legality of the administration in administrative court proceedings.".

[4] The Constitutional Court is often regarded as part of the judicial power. However, framers of the Constitution regulated the constitutional judiciary in the separate Head V of the Constitution, while organisation of state power grounded on the separation of power into the legislative, executive and judicial branches is regulated in the Head IV.

[5] The Constitutional Court itself has commented its position in the structure of state power emphasising: "The position and jurisdiction of the Constitutional Court as regulated by the Constitution and the CACCRC are such that the Constitutional Court enjoys the special position and competences, outside the legislative, executive and judicial branches of power established by the principle of the separation of powers in Article 4 of the Constitution. See ruling No U-I-238/1995 and U-I-797/1997 of 11 June 1998 (Official Gazette No 91/98).

[6] Official Gazette No 49/02 of 3 May 2002 – the consolidated text.

Within the limits set by the Constitution and the CACCRC, in the proceedings initiated by a constitutional complaint the Constitutional Court does not exercise either the jurisdiction of an appellate court (whether ordinary or specialised court), or that of the Supreme Court, but it determines whether there has been a violation of human rights in the proceedings that led to the constitutional court proceedings. In providing the constitutional court protection, the Constitutional Court therefore determines, within the limits of the request put forward in the constitutional complaint, and taking into account the assessment of evidence and the facts established in the proceedings before the competent courts or other bodies with public authorities, whether there has been a constitutionally impermissible interference with the constitutional rights in the process of deciding on the rights and obligations of individuals.[7] In doing so, the Constitutional Court sees the previous proceedings as a whole and takes into account the specific circumstances of each individual case.

To this day, the constitutional complaints make the majority of cases the Court files annually – almost 88%. Life has shown that the Constitutional Court often represents for citizens the last hope for their problems to be resolved. And, as a rule, the constitutional courts that deal with constitutional complaints are swamped by their large number. But as they are more or less masters of their own procedure, each constitutional court must not fail to create its own rules to make it possible to deal more efficiently with constitutional complaints and provide the citizens with the highest quality of protection of their human rights. I can witness that we have been inventing, and re-inventing new mechanisms, within the existing legislative framework, to organise our work accordingly.

3. Institute of constitutional complaint

The institute of constitutional complaint was introduced in the Croatian legal order in 1990, with the first Constitution. Although the constitutional complaint is a subsidiary legal remedy for the protection of human rights and fundamental freedoms, which is submitted to the Constitutional Court under the conditions set by the CACCRC, it is often misinterpreted and considered a legal remedy although the Constitutional Court has repeatedly emphasised in its case-law that the constitutional complaint is neither a regular nor an extraordinary legal remedy in the

[7] The Constitutional Court recalled the limits of its jurisdiction in numerous decisions; see, e.g. decision No U-III-104/2001 of 31 July 2001 (Official Gazette No 71/01).

system of domestic legal remedies, but a separate constitutional law instrument for the protection of constitutional rights in individual cases.[8]

3.1. Constitutional grounds for submitting a constitutional complaint

As already mentioned, the main piece of legislation regulating the institute of constitutional complaint is the Constitutional Act on the Constitutional Court.

In accordance with Article 62 of the CACCRC:[9]

a) every natural and legal person deeming that their human rights and/or fundamental freedoms guaranteed in the Constitution have been violated may lodge a constitutional complaint with the Constitutional Court;

b) subject of the constitutional complaint can only be individual enactment of a state body (primarily judicial body), a body of local and regional self-government, or a legal person vested with public authority;

c) these individual enactments decided about the rights and obligations, or about suspicion or accusation for a criminal act;

d) the rights protected in the constitutional court proceedings, both individual or collective rights, are those human rights and fundamental freedoms guaranteed in the Constitution;

e) the constitutional complaint is a subsidiary legal remedy, given that it can be lodged only after all other available legal remedies have been exhausted.

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[8] See, e.g. Decisions No U-III-1747/2009 of 10 November 2009 (Official Gazette No 139/09), U-III 104/2001 of 31 July 2001 (Official Gazette No 71/01).

[9] Article 62 of the CACCRC reads:

(1) Everyone may lodge a constitutional complaint with the Constitutional Court if he deems that the individual enactment of a state body, a body of local and regional self-government, or a legal person with public authority, which decided about his/her rights and obligations, or about suspicion or accusation for a criminal act, has violated his/her human rights or fundamental freedoms guaranteed by the Constitution, or his/her right to local and regional self-government guaranteed by the Constitution (hereinafter: constitutional right).

(2) If some other legal remedy is provided against violation of the constitutional rights, the constitutional complaint may be lodged only after this remedy has been exhausted.

(3) In matters in which an administrative dispute is provided, respective a revision in civil or extra-litigation procedure, remedies are exhausted after the decision has been rendered upon these legal remedies.

However, there are special circumstances, stipulated in Article 63 of the CACCRC,[10] under which it is possible to file a constitutional complaint even though the applicant of the constitutional complaint has not exhausted all available legal remedies. Namely, in cases when the trial court did not decide within a reasonable time about the rights and obligations of a party, or about the suspicion or accusation for a criminal offence, and in cases when the disputed individual act grossly violates constitutional rights and it is completely clear that grave and irreparable consequences may arise for the applicant if the Constitutional Court proceedings are not initiated.[11]

3.2. The content of the constitutional complaint

Article 65 of the CACCRC defines the content of a constitutional complaint, which has to entail: the name and surname, the personal identification number of the citizen, the domicile or temporary residence, respective the firm and the seat of the applicant of the constitutional complaint, the name and surname of his/her representative, the title of the disputed decision, the title of constitutional right that is claimed to have been violated, with indication of the relevant constitutional provision guaranteeing this right, the evidence that the legal remedies have been exhausted and that the complaint is timely submitted (the deadline is 30 days from receiving the

[10] Article 63 of the CACCRC reads:

(1) The Constitutional Court shall initiate proceedings in response to a constitutional complaint even before all legal remedies have been exhausted in cases when the court of justice did not decide within a reasonable time about the rights and obligations of the party, or about the suspicion or accusation for a criminal offence, or in cases when the disputed individual act grossly violates constitutional rights and it is completely clear that grave and irreparable consequences may arise for the applicant if Constitutional Court proceedings are not initiated.

(2) If the decision is passed to adopt the constitutional complaint for not deciding in a reasonable time in paragraph 1 of this Article, the Constitutional Court shall determine a deadline for the competent court of justice within which that court shall pass the act meritoriously deciding about the applicant's rights and obligations, or the suspicions or accusation of a criminal offence. Such deadline for passing the act shall begin to run on the day following the date when the Constitutional Court decision is published in the Official Gazette.

(3) In the decision in paragraph 2 of this Article, the Constitutional Court shall determine appropriate compensation for the applicant for the violation of his/her constitutional right committed by the court of justice by not deciding within a reasonable time about his/her rights and obligations, or about the suspicions or accusations of a criminal offence. The compensation shall be paid from the state budget within a term of three months from the date when the applicant lodged a request for its payment.

[11] See, e.g. decision No U-IIIB-1373/2009, Official Gazette No 88/09.

disputed decision) as well as the signature of the applicant, and finally, the disputed act in original or in a certified transcript has to be enclosed as well.

Participants of the proceedings may undertake actions in the proceedings in person, or through a representative. In that case the complaints should be accompanied by a special authorisation.[12]

The constitutional complaint has to be submitted during the 30 days from the day the disputed decision was received.[13] Supplementation is permitted only if it legally and factually backs up the constitutional complaint.[14]

3.3. Locus standi

Every legal and natural person who fulfils the requirements stipulated in the Constitution and the CACCRC may lodge a constitutional complaint with the Constitutional Court if their constitutional rights have been violated.[15] In other words, the applicant must have a legal and factual interest in challenging the individual act of a state body, a body of local and regional self-government, or a legal person with public authority. To this end, only legal entities that may be the holders of rights and freedoms enshrined in the Constitution are authorised to submit a constitutional complaint. The Constitutional Court has adopted relatively restrictive approach in relation to public law bodies, as the Republic of Croatia is not authorised to lodge a constitutional complaint.[16]

As regards the units of local and regional self-government and their capacity to be parties in proceedings before the Constitutional Court, the Constitutional Court has consistently held that local and regional self-government units, by virtue of their constitutional functions and activities, as entities vested with public authority at the local level, are primarily bodies obliged to protect human rights and fundamental freedoms, and not the bodies that enjoy those rights and freedoms. However, state bodies, including courts, may interfere with or limit the constitutionally guaranteed self-government position of units of local self-government, which includes violating the principle of equality of one unit in relation to other units of local self-government of the same type. Therefore, Article 62 of the CACCRC guarantees the local self-government units (city, municipality) the right to

[12] See Article 24 of the CACCRC.

[13] See Article 64 of the CACCRC.

[14] See, e.g. decision No U-III-802/2010, Official Gazette No 44/11.

[15] In this circle of authorised persons the Constitutional Court has included not only foreign citizens but also foreign legal persons.

[16] The Constitutional examines Court in each individual case if a public body is in any way connected to the state (functionally, organisationally and the like), and evaluates if it is capable of bearing constitutional rights. See, e.g. ruling No U-III-2119/2020 of 18 March 2015 (Official Gazette No 44/15).

lodge a constitutional complaint under the prescribed conditions if the state authority interferes with their self-government mandate. Thus, the local and regional self-government units are entitled to lodge a constitutional complaint, but only provided that they seek protection against the unconstitutional encroachment on their constitutional right to local and regional self-government (also known as a communal constitutional complaint).[17]

3.4. Requirements for the constitutional court review

The requirements for the Constitutional Court review in response to the constitutional complaint are stipulated in the Constitution[18] and the CACCRC.[19] In addition to those already mentioned (see point 3.1 supra), there is another condition that must be met, namely that the matter has not been already decided on the merits (*res judicata*).

Accordingly, in the proceedings initiated by a constitutional complaint the Constitutional Court examines two sets of requirements: procedural requirements, and requirements for deciding on the merits.

3.4.1. Procedural requirements

As already mentioned, the applicants must meet certain procedural (formal) requirements when submitting a constitutional complaint (exhausted legal remedies, locus standi, timeliness of the constitutional complaint, specific content of the constitutional complaint).

Regarding the exhaustion of legal remedies, the constitutional complaint may be submitted only after all available legal remedies are exhausted (including the revision on points of law). If the matter relates to administrative dispute the legal path is considered exhausted by the final decision of the Administrative Court.

The constitutional complaint is timely submitted if it is lodged within 30 days from the date when the disputed individual act was served on the applicant. Although it is preclusive term, the Constitutional Court may permit the restitution into the previous state to the person who for the justified reasons has omitted the term for submission, but only if two conditions are cumulatively met: first, if during the term of 15 days after the cessation of the reason which has caused the omission the applicant submits the proposal for restitution; and the second, the proposal for the

[17] See, e.g. decision No U-III-4868/2017 of 15 February 2018, decision No U-III-3006/2019 of 18 March 2019, decision No U-III-1734/2017 of 10 October 2019, decision No U-III-273/2016 of 17 April 2019, decision No U-III-6136/2016 of 17 September 2020, decision No U-III-6143/2016 of 22 March 2017, decision No U-III-4846/2015 of 11 October 2018.

[18] Article 125 item 4 of the Constitution.

[19] Articles 62 to 80 of the CACCRC.

restitution into the previous state has to be accompanied by a constitutional complaint.[20] However, such cases are rather rare.[21]

The constitutional complaint must have a specific content (see point 3.2 supra). If it does not, the applicant is called to supplement it within a specific time limit. If the applicant fails to comply with the ordered term, the constitutional complaint will be rejected, as well as when the applicant returns it without a supplement, by a 3-memeber chamber.[22]

3.4.2. Requirements for deciding on the merits of the case

There are two main requirements for deciding on the merits of the case: that the applicant's human rights or fundamental freedoms are violated by an individual act of a state body, a body of local and regional self-government, or a legal person with public authority; and that this act violates specifically the constitutional rights.[23] Even where a constitutional complaint is compatible with the Constitution and CACCRC, and all the formal admissibility conditions have been met, the Court may nevertheless declare it inadmissible for reasons relating to the examination on the merits.

In developing the proceedings for deciding on the merits of the case, the Croatian Constitutional Court followed the practice of the European Court of Human Rights. Thus, it will consider any constitutional complaint "ill-founded" if a preliminary examination of the substance of a constitutional complaint does not disclose any appearance of a violation of the rights guaranteed by the Constitution,[24] with the result that it can be declared inadmissible at the outset without proceeding to a formal ex-

[20] It is important to note that after the expiration of three months from the day of omission, the restitution to the previous state may not be sought, and the restitution into the previous state is not permitted if the term for submission of the proposal for permission of restitution into the previous state has been omitted.

[21] So far, there have only been 15 such cases, and only 2 have been granted.

[22] See Articles 19, 72 and 79 of the CACCRC.

[23] According to the case-law of the Constitutional Court, certain provisions of the Constitution do not guarantee the fundamental freedoms and rights that can be protected in the Constitutional Court procedure in response to the constitutional complaint. These are Articles 3, 4, 5, 19.1, 20, 90, 115, 116 and 134 in relation to which there is a vast jurisprudence of the Constitutional Court. See, e.g. decision No U-III-1097/1999of 13 March 2000 (Official Gazette No 38/00) and No U-III-1/2000 of 13 March 2000 (Official Gazette No 38/00).

[24] That is, no substantial constitutional issue is raised as ground for a challenge, the alleged existence of violations of the stated constitutional rights has not been particularly elaborated, the applicant has not shown that trial court had not complied with the provisions of the Constitution on human rights and that it arbitrarily interpreted the relevant provisions of law or other regulations.

amination on the merits (which would normally result in a decision).[25] In other words, the constitutional complaint must entail concrete and substantiated reasons for any violation of particular constitutional right. Otherwise, it will be dismissed on the merits by a 3-member chamber.[26] This approach enables the Constitutional Court to provide the citizens with more effective protection of human rights and fundamental freedoms.

3.5. Organisation of the Constitutional Court bodies for deciding on constitutional complaints

In order to be more efficient, the Constitutional Court has developed a more sophisticated organisation for deciding on constitutional complaints. In other words, it has introduced the so-called filtering mechanisms in order to cope with the huge number of constitutional complaints it receives annually.[27]

Thus, there are:

– one 3-member chamber for deciding on the procedural requirements (the main filtering mechanism),[28]

– three 3-member chambers for preliminary examination procedure (the additional filtering mechanism),[29]

– two 6-member chambers for deciding on constitutional complaints,

[25] Such constitutional complaints usually do not raise *prima facie* substantial issues, and the applicants do not show at the first glance that a trial court has arbitrarily decided their cases, i.e. that it has not respected the constitutional provisions on human rights and fundamental freedoms in its actions or in judgment. Rather, in such constitutional complaints the applicants merely repeat the reasons that they have already put forward in the appellate proceedings. The applicants fail to describe the effect of the judgment or omission of the trial court on their personal situation, i.e. the consequences of the judgment or omission, and how they led to the violation of the constitutional rights.

[26] The Constitutional Court has thus joined other constitutional courts that share the "concentrated" type of constitutional adjudication, in which experience shows the great importance of selection mechanisms particularly in the area of specific constitutional review. A more restrictive decision-making on the requirements for submitting constitutional complaints guarantees the right selection and the possibility to focus on other important cases – especially when the legislation provides for wide jurisdiction, such as in our case. We are convinced that this type of concentration enables the Constitutional Court to fulfil its duties set out in Article 125 of the Constitution.

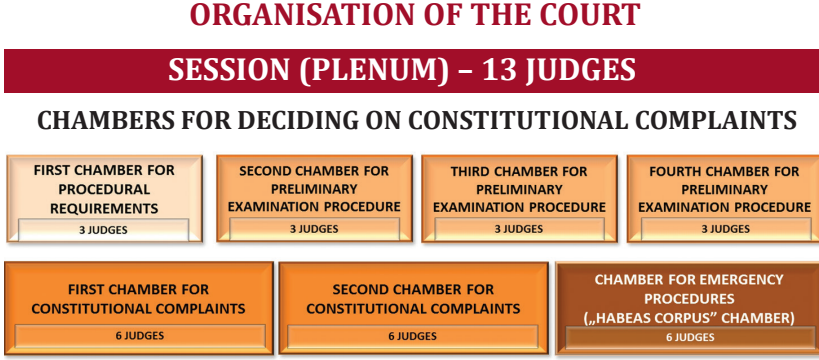
[27] The average number of cases the Court receives yearly is over 7,000, of which around 88% are constitutional complaints, see infra.

[28] This chamber dismiss each year around 1,500 constitutional complaints.

[29] These chambers dismiss around 3,000 constitutional complaints a year.

– one 6-memeber chamber for deciding on emergency procedures (habeas corpus chamber).[30]

It is important to note that all decisions of these chambers must be unanimous (otherwise they are referred to the immediate upper chamber, and the plenum).

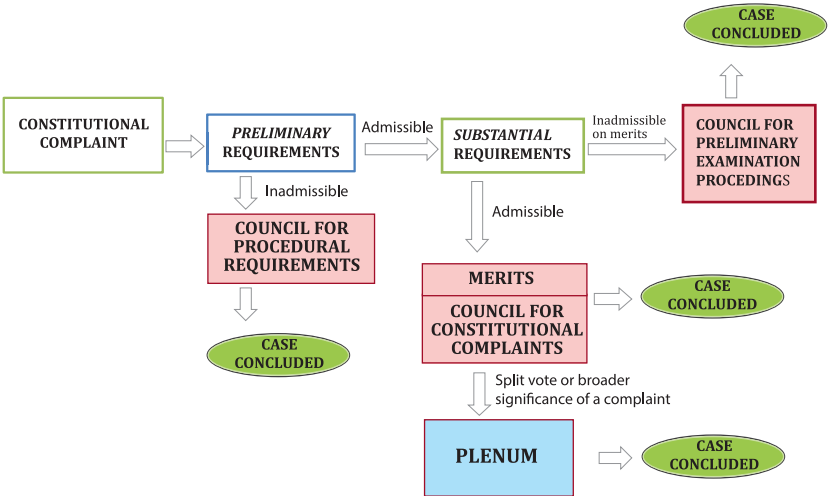


3.5.1. Life of a constitutional complaint

After the competent Service has designated the submission as a constitutional complaint, the Service for the establishment of procedural requirements for deciding on constitutional complaints examines whether it meets procedural requirements (if it is submitted on time, by authorised person etc.). If this is not the case, the constitutional complaint is found inadmissible and will be rejected by the 3-member chamber for procedural requirements. If it meets the procedural requirements, then the Service for preliminary examination procedure will examine whether the substantial requirements are met (i.e., if the complaint raises questions of constitutional significance). If it considers the complaint to be inadmissible, it will be rejected by the 3-member chamber for the preliminary examination procedure. If, on the other hand, the complaint is found to be admissible on the merits, it will be thoroughly examined to determine whether particular constitutional rights have been violated. The decision must be unanimous, otherwise it is forwarded to the plenum of 13 judges. The same happens if the constitutional complaint raises an issue of broader significance.

[30] This chamber was set up after the ECtHR found violations in respect of Croatia in detention proceedings and other urgent cases. See, e.g. *Peša v. Croatia* of 10 October 2010; *Getoš-Magdić v. Croatia* of 2 December 2010;

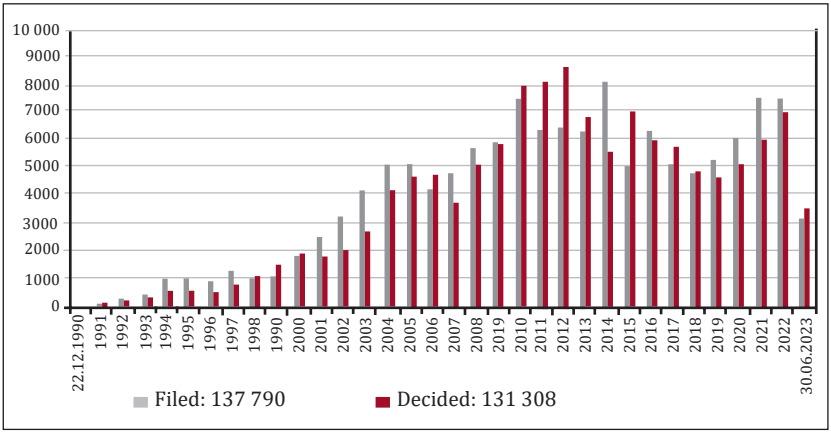
THE LIFE OF A CONSTITUTIONAL COMPLAINT

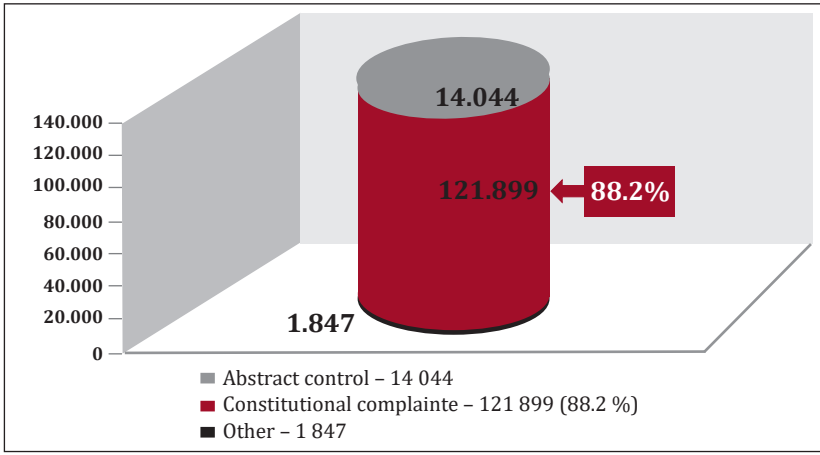


4. Statistics

Life has shown that the Constitutional Court often represents for citizens the last hope to solve their problems. Accordingly, the number of cases has increased numerous times since 1991 until today (e.g., in 1991 – 180 cases, in 2000 – 1954 cases, in 2009 – 6041 cases, in 2018 – 5339 cases; see the table below). Today we file more than 7000 cases a year, of which more than 88% are constitutional complaints.

Filed/decided cases 1990 – 30 June 2023





As we were faced with the backlog of around 9000 cases in 2009, we introduced more restrictive criteria for deciding on the requirements for filing a constitutional complaint. We were not guided only by the number of cases, but also realized that the constitutional complaints are often based on grounds for appeal or revision on points of law, rather than on reasoned constitutional legal arguments that provide valid basis for examining whether a constitutional right has been violated in a specific case. Thus, the allegations in the constitutional complaint are the bases that allow us to select those with reasoned constitutional arguments and to decide them on the merits and dismiss the remainder as manifestly ill-founded.[31]

In addition to these new selection criteria, we have also carried out an internal reorganisation and introduced 3 new three-member chambers for conducting the preliminary examination procedure for constitutional complaints (see point 3.5 supra). Thanks to this new approach, we resolved around 1000 constitutional complaints more in 2010 than in the previous year.

5. Recommendations

First of all, a great advantage of the constitutional courts is that they are, more or less, masters of their own procedure. In this sense, the Constitutional Court must not fail to create its own rules if this can contribute to a more efficiently handling of constitutional complaints. This is what we have done, as described earlier, by reorganising our work within the framework of the Constitution and legislation.[32] In this way we have liv-

[31] On average, the Constitutional Court accepts around 3.8% of constitutional complaints, and rejects/refuses around 96.2% of them.

[32] It should be noted that the CACCRC has the force of the Constitution, and its revision requires a 2/3 majority vote in the Parliament. We have tried to raise

ened up the work of the Court, and also achieved concrete results, even we are now once again struggling with the relatively high backlog (from 3,300 cases in 2009 to 6,500 today).

Secondly, it is important to point out that dealing with constitutional complaints requires the change of perspective, in order to prevent the Constitutional Court from being perceived as some kind of a super-appellate court. As the Constitutional Court is a court of cassation when it comes to constitutional complaints, tensions between the Constitutional Court and ordinary courts usually arise when it comes to how we deal with the facts of the case, and the interpretation and application of the law given by ordinary courts. There is also a lack of understanding of the special tests used by the Constitutional Court to assess violations of fundamental rights. This is the basic problem in Croatia, as many judges still strongly resist the need to change their own legal mind-set, including also the need to change their own attitude not only towards the Convention for the Protection of Human Rights (which has been in force in Croatia since 1997) and the EU Charter of Fundamental Rights, but also towards the national Constitution.

Furthermore, we should not forget the Strasbourg Court and the fact that the Constitutional Court is its most important partner at the national level, and it is up to the Constitutional Court to interpret domestic law in accordance with the case-law of the Strasbourg Court. To this end, we have established a special department that reacts immediately when a new judgement concerning Croatia is delivered: it informs all judges and court advisors, and immediately prepares a summary of the judgement in Croatian, followed by an analysis pointing out the failures of the national authorities. It compares our case-law with that of the Strasbourg Court and draws conclusions about the possible need for changes.

One more point – I would recommend considering the introduction of a fee for applicants for the proceedings before the Constitutional Court, and their mandatory representation by a legal professional. This is not the case in Croatia, but I find it necessary not only to restrict the access to the Constitutional Court to some extent, but also to correct expectations of applicants who usually misinterpret our jurisdiction.[33]

The last point I would like to reflect on concerns the access to a court. Indeed, the long standing practice of the Constitutional Court has been that a ruling on litigation costs preceding the constitutional court proceedings is not an individual act against which a constitutional complaint can be

public awareness of the need to change the CACCRC and the Constitution so that we can provide our citizens with more effective protection of human rights and fundamental freedoms, but so far to no avail.

[33] As the submissions very often do not meet the requirements stipulated by the Constitution and the CACCRC, in order to assist the applicants (and their legal representatives), we have published a free constitutional complaint form on our website with detailed instructions how to complete it. Sometimes, even that is not sufficient.

lodged. The Strasbourg Court reviewed such cases from the aspect of the right of access to a court. It took the view that it would be contrary to the principle of subsidiarity to hold that a constitutional complaint should not have been exhausted just because at the time the Constitutional Court's practice suggested that the decision being contested was not amenable to constitutional review. To do so would not only ignore the fact that such practice may evolve but would, more importantly, remove any incentive for such evolution as applicants would systematically address their complaints to the Strasbourg Court without giving the Constitutional Court a chance to change its practice. This we did in 2017 (see, e.g. decision No U-III-4029/2013 of 19 December 2017; U-III-3689/2018 of 10 December 2019). We have also changed our practice with regard to the costs of Constitutional Court proceedings.[34] Namely, the Constitutional Court has refused to award the applicants the costs of their constitutional complaints regardless of the outcome of the proceedings. However, following the judgment *Kovačević v. Croatia* of 12 March 2022, in which the Strasbourg Court found a violation of the applicant's right of access to a court, we have stopped to mechanically reject the decision on costs of constitutional court proceedings and started to adopt it to the circumstances of each case.[35]

Instead of conclusion and taking into account our experience outlined above, the constitutional court can provide the citizens with the highest quality of legal protection of their human rights only if the institute of constitutional complaint is properly regulated, if the filtering mechanisms are in place and if the internal organisation of the Constitutional Court allows for efficient and expeditious processing of constitutional complaints. Indeed, the Constitutional Court cannot prevent applicants from lodging constitutional complaints, so it is to be expected that most complaints will be manifestly ill-founded. This requires a well thought-out internal organisation of the Constitutional Court that enables it to devote itself to the complaints that point out to the actual violations of human rights and freedoms.

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[34] Article 23 of the CACCRC provides that each participant in proceedings before the Constitutional Court has to bear its own costs, unless the Court decides otherwise.

[35] The rejection is justified by two objectives: to ensure the Constitutional Court's smooth functioning and to protect the State budget. Namely, those intending to lodge constitutional complaints do not run the risk, normally present in civil proceedings, that, if unsuccessful, they would have to bear not only their own costs but reimburse the costs of the opposing party. The absence of such a risk, together with the absence of an obligation to pay court fees in proceedings before the Constitutional Court, may thus result in our becoming overburdened with a large number of unmeritorious constitutional complaints, which could jeopardise our proper functioning.