Conférence des Cours constitutionnelles européennes
Conference of European Constitutional Courts
Konferenz der europäischen Verfassungsgerichte
Конференция Европейских Конституционных Судов

CONSTITUTIONAL JUSTICE: FUNCTIONS AND RELATIONSHIP WITH THE OTHER PUBLIC AUTHORITIES

General report prepared for the XVth Congress
of the Conference of European Constitutional Courts by
The Constitutional Court of Romania

I. THE CONSTITUTIONAL COURT'S RELATIONSHIP TO PARLIAMENT AND GOVERNMENT

Professor Tudorel TOADER, PhD in Law, judge of the Constitutional Court
Marieta SAFTA, PhD in Law, first-assistant-magistrate

1. The role of Parliament (as the case may be, of the Government) in the procedure for appointing judges to the Constitutional Court. Once appointed, can judges of the Constitutional Court be revoked by that same authority? What could be the grounds/ reasons for such revocation?

The status of constitutional judges as entrenched in national legislation, the powers of public authorities in what regards their appointment, or possibility to remove them from office and grounds for dismissal, the duration of their term of office, but also the possibility to receive a new term are as many factors by which the independence of judges, the forms of, or even limitations in carrying out their mandate should be gauged.

1.1. Parliament's role in the procedure for appointing the judges to the Constitutional Court

With their specific characteristics, parliaments have an important, sometimes exclusive role in the appointment of constitutional judges.

a – *Parliament has exclusive power to appoint judges to the Constitutional Court*

Thus, in *Germany*, all constitutional judges are appointed by the Parliament. Half of the justices of a chamber are elected by the *Bundestag*, whereas the other half – by the *Bundesrat*, i.e. by the directly elected parliamentary assembly which represents the people and by the *Länder* representatives, based on the rules of proportional representation. In *Switzerland*, the federal Parliament elects the judges of the Swiss Federal Supreme Court, based on proposal by the Judicial Committee. In *Poland*, the fifteen constitutional judges are individually appointed for a nine-year term of office, by the first Chamber of Parliament. In *Hungary*, the eleven constitutional justices are elected by the Parliament. In *Croatia*, all thirteen justices are elected by the Parliament. In *Montenegro*, the Constitutional Court judges are appointed by the Parliament. In *Lithuania*, all justices of the Constitutional Court are appointed by the institution of legislature – the Seimas.

b – *Parliament appoints part of the judges to the Constitutional Court*

In *France*, all nine members of the Constitutional Council are appointed for a nine-year term of office, three of them being replaced every three years. Upon each renewal, one appointment is made by the President of the Republic, the president of the National Assembly, and the president of the Senate. In *Latvia*, of the seven judges of the Constitutional Court validated by the Parliament, three are proposed by at least ten members of the Parliament. In the *Republic of Moldova*, the procedure for

appointing judges to the Constitutional Court takes account of the principle of separation of powers enshrined in Article 6 of the Constitution, and also of the Court's exclusive jurisdiction to guarantee this principle. Thus, two judges are appointed by the Parliament, two by the Government and two by the Superior Council of Magistracy [Article 136 para. (2) of the Constitution]. In *Portugal*, the Parliament appoints ten out of the thirteen judges. In *Romania*, appointment of constitutional judges is subject to Article 142 para. (3) of the Constitution, namely: three judges are appointed by the Chamber of Deputies, three by the Senate, and three by the President of Romania. It can be noted that the Legislative appoints two thirds of the constitutional judges, while the Executive, through the intermediary of the President of Romania, another third of their total number. In *Spain*, of the twelve constitutional judges, four are appointed by the Congress of Deputies and four by the Senate. In *Armenia*, the National Assembly appoints five of the nine members of the Constitutional Court. In *Belarus*, of the twelve constitutional judges, the Council of the Republic (one of the Houses of Parliament) elects six and gives consent to the appointment of the Chairperson of the Constitutional Court; the other six are appointed by the President of the Republic. In *Turkey*, three of the seventeen justices of the Constitutional Court are elected by the Turkish Grand National Assembly, while the others are selected by the President of the Republic from different sources (members of the judiciary and high public officials).

c – *Parliament appoints constitutional judges based on proposal of the Head of State*

In *Russia*, the judges of the Constitutional Court are appointed by the Federation Council by secret ballot, upon the submission of the President of the Russian Federation. In *Slovenia*, judges of the Constitutional Court are elected by the National Assembly, by secret ballot and with a majority vote of all Deputies, on the proposal by the President of the Republic. In *Azerbaijan*, the appointment of Constitutional Court's judges is made by the Parliament, based on recommendation by the President of the Republic.

d – *Parliament makes proposals to the Head of the State with respect to the appointment of judges to the Constitutional Court*

Thus, in *Austria*, the constitutional judges are appointed by the Federal President who, however, is bound by the recommendations made by the other constitutional bodies. Consequently, of the fourteen constitutional judges, three are appointed upon recommendation by the National Council (the House of Parliament elected through a direct vote based on a proportional system), and three more members are appointed on proposal by the Federal Council (the Parliamentary Chamber appointed indirectly which represents the *Länder* of Austria). In *Belgium*, all twelve judges of the Constitutional Court are appointed by the King based on a list that is alternatively presented to him by the House of Representatives and the Senate. Usually, the King shall appoint the person who ranks first on the list of that House. It appears that appointment as a judge is made in reality not by the King, but either by the Deputies or the Senators. Since parliamentary assemblies practically apply the principle of proportionality in the appointment of judges, the Court's composition will reflect the composition of the assemblies. Hence, a candidate's prospects to come up on the list depend on whether he/she enjoys support from the political group(s) to which the respective position may actually go.

e – *Parliament gives its consent in connection with proposals of the Head of State concerning the appointment of judges to the Constitutional Court*

In *Albania*, the members of the Constitutional Court are appointed by the President of the Republic, with the consent of the Assembly. In the *Czech Republic*, the Constitutional Court's judges are appointed by the President of the Republic, with the consent of the Senate.

f – *Parliament does not participate in the appointment of judges to the Constitutional Court*

In *Luxembourg*, Parliament is not involved in the procedure of appointment of judges, the same in *Ireland*, whose Parliament has no direct role in the appointment of justices to the Supreme Court. Nor does in *Cyprus*, where the President of the Republic makes the appointment of judges to the Supreme Court – in whose jurisdiction fall the proceedings of constitutional reviews. But the President will also seek the Court's opinion, and usually keeps to it. In *Malta*, according to Article 96 of the Constitution, the President of Malta appoints all members of the Judiciary on the advice of the Prime Minister.

1.2. The Government's role in the procedure for appointing the judges to the Constitutional Court

In a number of States, the Government plays an important, sometimes exclusive role, in the appointment of constitutional justices.

a – *Government has exclusive power to appoint judges to the Constitutional Court*

In *Ireland,* for instance, the Cabinet has exclusive competence to nominate candidates as constitutional judges. After having selected a candidate for nomination, the Cabinet recommends the nominee to the President, and the President formally appoints the candidate. In *Norway*, Parliament does not take part in the appointment of judges. Judges are appointed by the King-in-council.

b – *Government appoints part of the judges to the Constitutional Court*

In *Spain,* of the twelve constitutional judges, two are appointed by the Government.

c – *Government makes proposals for the appointment of judges to the Constitutional Court*

As already shown, in *Austria*, constitutional justices are appointed by the Federal President who, however, is bound by the recommendations from the other constitutional bodies. Thus, of the fourteen constitutional justices, the President, the Vice-President and six judges are appointed based on the proposal of the Federal Government. In *Latvia,* of the seven justices of the Constitutional Court who are to be validated by the Parliament, two are proposed by the Cabinet of Ministers. In *Denmark* judges are formally appointed by the Queen via the Ministry of Justice, but the Minister acts upon recommendation from the Council for the Appointment of Judges.

1.3. Once appointed, may the same authority revoke the judges of the Constitutional Court?

In the majority of States, a constitutional judge cannot be dismissed by the appointing authority.

As an exception, revocation is possible in the following instances:

In *Albania*, after being appointed, the judge of the Constitutional Court can be removed only by the Assembly by two-thirds of all its members. In *Armenia*, the National Assembly by a majority vote of the total number of Deputies, or – as the case may be - the President of the Republic, in the cases and procedures prescribed by Law, can terminate the powers of any of its appointees to the Constitutional Court, on the basis of the conclusion of the Constitutional Court. In *Azerbaijan*, the provisions under article 128 of the Constitution define the basis and procedure for the dismissal of the Constitutional Court's judges. Should a judge commit an offence, the President of the Republic, based on conclusions of Supreme Court, may make statement in *Milli Mejlis* (Parliament) of the Republic of Azerbaijan with the initiative to dismiss judges from office. Respective conclusions of Supreme Court must be presented to the President of the Republic within 30 days after his request. Decision on dismissal of judges of Constitutional Court is taken by Milli Mejlis. In *Belarus*, the President is empowered under the Constitution to dismiss the Chairperson and judges of the Constitutional Court on the grounds provided by law with notification of the Council of the Republic. In accordance with article 124 of the Code on Judicial System and Status of Judges, the said powers can also be terminated by the President if a judge voluntary applies for resignation or dismissal, or the Constitutional Court submits for the termination of the powers on the grounds provided in the named Code (notably, appointment to another office or transfer to another position) with notification of the Council of the Republic. Thereat the Constitutional Court's submission shall be adopted by a majority vote of the full composition of the judges thereof. If the Constitutional Court submits for the termination of a judge's powers due to gross violations of his duties, commission of an act incompatible with public service, such submission shall be adopted by no less than a two thirds majority vote of the full composition of judges. In *Russia*, the termination of powers of a judge of the Constitutional Court of the Russian Federation shall be effected by the Federation Council, upon submission of the Constitutional Court.

1.4. Which are the reasons/ grounds for such dismissal?

In *Albania*, the judge of the Constitutional Court can be removed for violation of the Constitution, commission of a crime, mental or physical incapacity, or acts and behaviour that seriously discredit judicial integrity and reputation. The decision of the Assembly is reviewed by the Constitutional Court, which, when it determines the existence of one of these grounds, declares the removal from office. The examination procedure of the Assembly for the removal from office of the member of the Constitutional Court, for one of the aforementioned grounds, is initiated on the basis of a reasoned petition presented by not less than half of all members of the Assembly.

In *Armenia,* the grounds for termination of the powers of the member of the Constitutional Court are envisaged in Part 3, Article 14 of the Law "on The Constitutional Court." Pursuant to it, the membership in the Constitutional Court shall be terminated on the basis of a conclusion of the Constitutional Court by the appointing body when the Member:

1) has been absent for three times within one year from the sessions of the Court without an excuse;
2) has been unable to exercise his/her powers as the Constitutional Court Member for six months because of some temporary disability or other lawful reason;

3) violates the rules of incompatibility prescribed by the Law;
4) expressed an opinion in advance on a case being reviewed by the Constitutional Court or otherwise raised suspicion in his/her impartiality or passed information on the process of the closed door consultation or broke the oath of the Constitutional Court Member in any other way.
5) is affected by a physical disease or illness, which affects the fulfilment of the duties of a Constitutional Court Member.

In *Russia*, termination is possible if the procedure of appointment to the office of Constitutional Court judge was violated, as provided in the Constitution of the Russian Federation and the Federal Constitutional Law.

2. To what extent is the Constitutional Court financially autonomous – in the setting up and administration of its own expenditure budget?

2.1. General aspects

In the majority of States whose courts are members to the Conference, the Constitutions[1] and the infraconstitutional legislation, that is the laws concerning the organization and functioning of the Constitutional Court as well as, in some cases, budget laws or public finance laws contain norms establishing a specific legal regime of financial autonomy for the Constitutional Courts, which is accomplished through a mechanism for their funding, elaboration of their own budget instituted by law, and management of this budget. In a few cases, either there is no such autonomy (for example, the Constitutional Court of *Luxembourg*) or, even if guaranteed, financial autonomy does not exist from a practical point of view (for example, the Constitutional Court of the *Republic of Croatia*).

The legal framework establishing the Constitutional Courts' financial autonomy and its scope present certain particularities, especially in connection with: funding, determination of the budget for expenses, its endorsement (including from the perspective of the margin of appreciation and decision-making entrusted to the executive and legislative authorities involved in this process), management of the endorsed budget.

2.2. Funding of Constitutional Courts

Constitutional Courts (or other constitutional jurisdictions, Supreme Courts or Tribunals, respectively) have their own budget, which is integral part of the State budget approved by the Legislature; the financial resources of the Courts consist in the appropriations transferred by the State on a yearly basis. A particular case appears to be *Portugal* where, besides the financial resources allocated by the State, the

[1] Even though Constitutions contain no specific provisions with respect to financial resources of the Constitutional Court (which generically designates constitutional courts, tribunals or constitutional councils), its financial autonomy derives from the principle of independence of the judiciary, which is enshrined in the basic law. Thus, for instance, the Constitution of the Russian Federation provides in its Article 124 a general guarantee of financial independence of courts, stating that they shall be financed only from the federal budget, and that the funding should ensure the possibility of the complete and independent administration of justice in accordance with federal law. As mentioned in the report by the Constitutional Court of Lithuania, in its Ruling of 22 October 2007 it held that the independence of judges and courts is "*inter alia* ensured by consolidating self-governance of the judiciary, meaning that the judiciary is all-sufficient, and its financial and technical provision."

Constitutional Tribunal also has its own resources. According to Article 47-B of the Organic Law on its organization, functioning and procedure, "*in addition to the state budget appropriations, own funds of the Constitutional Tribunal are deemed to comprise the balance managed and carried over from the previous year, the proceeds of expenses and fines, the profit derived of the sale of publications issued by the Tribunal, or of the services supplied by the documentation department, as well as all the other earnings, which are allocated to it by laws, contracts or in any other way*."

2.3. Drafting the budget for expenses

● In most of the cases, the draft budget of Constitutional Courts (Tribunals) is determined by them and submitted to the executive authority to include it in the draft general budget law and then submitted to the endorsement of the law-making authority.

However, there are also exceptions from the above-mentioned rule.

Thus, the budget of all Courts in *Ireland*, including the Supreme Court, is determined by the Government and submitted to Parliament for approval. The budget is negotiated by a consultative process whereby the Courts Service, an independent statutory body which manages the courts and provides administrative support to the judiciary, makes a submission to the Department of Justice and Law Reform. The Department of Justice then negotiates with the Department of Finance on behalf of the Courts Service, but with the participation of the Courts Service, regarding the level of funding. Arising from this process the level of funding is decided by the Government and submitted to the *Oireachtas* (the National Parliament).

In *Monaco*, the budget of the Supreme Tribunal is integrated in the general budget of courts and tribunals, set and managed by the Director of the Judicial Services (compared to a Minister of Justice).

The Supreme Court of *Norway* does not set up its own budget. However the Court presents a budget proposal to the National Courts Administration (NCA), which is an independent administrative body. The NCA then presents a draft budget for the courts to the Ministry of Justice. The Ministry thereafter presents its framework budget to the Parliament for approval as part of the Government's overall draft annual State Budget. The budget of the Supreme Court is independent of the budget of the lower courts and will thus be dealt with separately.

A similar situation existed in *Germany* where in the first years of activity (1951-1953), the budgetary funds for the Federal Constitutional Court formed an element of the individual budget of the Federal Ministry of Justice. The Federal Constitutional Court was therefore able to register and reason its funding requirements only to the Ministry of Justice, and not directly to the Federal Ministry of Finance and to Parliament's budget committee. A consequence of attribution to the individual budget of the Federal Ministry of Justice was also that the Federal Constitutional Court was not able to independently manage the funds provided for it, and therefore that it was not for instance able to decide for itself on filling posts within the administration of the Court. This state of affairs was however soon regarded as not being compatible with the principle of the separation of powers, or with the legal status of the Court as a constitutional organ. The Federal Constitutional Court has had its own individual budget within the federal budget since 1953. This means that it is able to register its needs independently with the Federal Ministry of Finance.

● There are also cases when the draft budget prepared by the Court is sent or directly presented to the law-maker. In *Belgium*, for instance, according to a customary

rule derived from an agreement between the Chamber of Representatives and the Constitutional Court, the latter determines its budget and, on that basis, it shall submit its appropriations application directly to the Chamber of Representatives, whereas it shall also notify it to the minister for budgetary affairs[2].

In *Switzerland* as well, the Swiss Federal Supreme Court determines its own budget, and presents it to the competent parliamentary committees and in the plenary of the Parliament. The Federal Department of Justice and Police (the Ministry of Justice) has no say within the budget adoption procedure.

● A matter that calls into debate the real nature of the financial autonomy of constitutional courts has to do with the possibility of the executive authority to intervene on the draft budget submitted by the Constitutional Court. There are differences among the participating states in connection with this point.

For instance, in *Poland*, neither the Ministry of Finance, nor the Government have the possibility to interfere with the content of the draft budget sent by the Constitutional Tribunal.

In *Estonia*, the reasonableness and advisability of the budget expenditure is negotiated between representatives of the Ministry of Finance and the Supreme Court (which comprises the Constitutional Review Chamber). Following the negotiations and resolution of disagreements at the governmental level the Ministry of Finance draws up the draft state budget and submits it to the Parliament via the Government. In the budget negotiations with the officials of the Ministry of Finance the Supreme Court is represented by the Director of the Supreme Court and in negotiations with the members of the Government and the Parliament by the Chief Justice. Upon amendment or omission of amounts allocated to the Supreme Court in the draft state budget, the Government of the Republic shall present the amendments with justification therefore in the explanatory memorandum to the draft State budget aimed at the Parliament.

In *Germany*, according to the provisions of the Federal Budget Code (BHO), the Ministry of Finance is not required to accept all registered estimates presented by the Court. In the event that the estimates of the Federal Constitutional Court are derogated from, it is nonetheless safeguarded that its registrations are forwarded to the further deciding agencies. The Federal Budget Code provides that derogations in the draft of the Ministry of Finance from the preliminary estimates of the President of the Federal Constitutional Court, just as derogations from preliminary estimates of the Federal President and of the Presidents of the *Bundestag*, of the *Bundesrat* and of the Federal Audit Office, are to be notified to the Federal Government if they have not been carried out in agreement (§ 28.3 of the Federal Budget Code). A corresponding arrangement is provided for in case the draft adopted by the Federal Government on the basis of the draft of the Ministry of Finance which forms the basis of Parliament's deliberations derogates in a not consented manner from the preliminary estimates of the organs in question (§ 29.3 of the Federal Budget Code). It is ensured by these means that the

[2] Actually in Belgium there is a strong guarantee of budgetary autonomy for the Constitutional Court. To that effect, Article 123, § 1 of the special law provides that "the funding required for the functioning of the Constitutional Court shall be recorded under the budget allocated for *dowries*". At the time the Court had been created, such appropriations were only provided for the Chamber, the Senate and the royal family. Any appropriation titled as *dowry* means that the Court is the one to determine the way in which such allocated funding will be used, as it is not broken down through the budget law: this autonomy related to the financial management of the institution has always been regarded as an indispensable guarantee for its independence.

Federal Constitutional Court is able to submit its budget proposals in unabridged form to the agency which ultimately decides, namely Parliament.

In *Latvia*, the Law on Budget and Financial Management provides that the budgetary request of the Constitutional Court shall not be amended, up to the submission of the draft budget law to the Cabinet, without the consent of the submitter of the request. Consequently, the Minister of Finance does not have the right to introduce amendments into the budgetary request of the Constitutional Court. The Cabinet of Ministers, however, does have the right to introduce such amendments without coordinating them with the Court. The Constitutional Court examines a case on compliance of this provision with the Constitution.

In *Portugal*, the possibility of the Government to amend the draft budget developed by the administrative departments of the Court is not completely excluded either. However – it is emphasized – attention needs to be paid to "the political-constitutional imperative to inform the Parliament as regards the content of this draft, even if not endorsed by the Government (especially when there has been no consultation between the two bodies concerned)".

A special situation is highlighted by the Constitutional Court of the *Republic of Macedonia*. According to the national report, at the end of every financial year, the Constitutional Court drafts a Proposed-Budget for the next year in which it projects its needs for funds for an unobstructed functioning and execution of its competencies. This proposal is submitted to the Ministry of Finance, which prepares the Draft-Budget of the Republic of Macedonia and submits it to the Government, which defines the text and submits it to the Assembly of the Republic of Macedonia for adoption. In this long way the needs are not taken into consideration, and the Court never receives the funds it requests, that is, besides its modesty, in an average it receives 20% less than the funds needed. As the Government is not obliged to take over the projected Budget of the Constitutional Court and include it in the State Budget, the Court is forced to react almost always, even to plead to have an intervention, with an amendment, into the text of the State Budget, in order to have the funds for the Court provided with a view to its normal functioning. This is certainly due, *inter alia*, to the constitutional position of the Government as the only proposer of the Budget before the Assembly and to the fact that the Constitutional Court does not have any instrument whatsoever to fight such setup.

Also, in *Bosnia and Herzegovina*, even if the relevant rules provide that the Constitutional Court is financially autonomous, it is emphasized that this presents a problem which the Constitutional Court is continuously faced with in its practice.

● As to the principles to be observed by the legislative authority upon approval of the Court's budget as part of the general budget, it is worth pointing out that some legislations have established the rule that the resources which are annually allocated for the activities of the Constitutional Court should not be reduced as compared to budgetary appropriations for the previous fiscal year (*Azerbaijan, Georgia*, *the Russian Federation*).

Starting from the reality that, in several States, the Constitutional Court, through its representatives, has no opportunity to assist or actively participate in parliamentary deliberations over the draft budget law, therefore is unable to influence the decision concerning the amount of the funds allocated for the Court's activity, some take the view that the Constitutional Court should be provided a more active role in this respect, reflecting its role and importance and that the budgetary autonomy of the Constitutional Court should be governed by law. To that effect, some national laws set forth the

participation of the representatives of Constitutional Courts (Supreme Courts) in parliamentary debates concerning the budget (for instance: *Cyprus, Montenegro, Poland, Turkey*).

2.4. Management of the expenditure budget

A further component of the constitutional courts' financial autonomy is independence in terms of managing the funds allocated through their budget, within the limits of endorsed budgetary appropriations and, in general, while keeping with the destination of such appropriations.

Most of the Constitutional Courts have pointed out that until now they have not had any problems with the determination of their own budget or with its management.

Still, there are exceptions, one of which is presented by the Constitutional Court of the *Republic of Croatia*, namely that, even if formally the Act on the Court's operation contains the guarantee with constitutional force that "the CCRC may independently distribute the assets approved in the State Budget for the functioning of the activities of the CCRC, in accordance with its annual budget and the law", this formal guarantee has not yet been realized in practice. In everyday legal life the Court is considered an "ordinary" budget user to which not only all the relevant regulations related to budgetary issues apply, but also secondary regulations passed by the Government and the Ministry of Finance, including internal instructions of the Ministry of Finance, especially the State Treasury Department. To conclude, in practice the Constitutional Court enjoys no autonomy in distributing the assets within its annual budget, although this autonomy is expressly guaranteed in its law.

Likewise, the Constitutional Court of the *Republic of Macedonia*, even when using the funds approved in the Budget, has a problem in the enforcement of the payment orders for certain needs.

● As to changing the amount of endorsed funds, such may take place during the year within the budgetary correction procedure. In principle, following the endorsement of the budget by law, the appropriations of the Court cannot be decreased any longer. However, such a possibility is provided, for instance, in *Lithuania*, where the appropriations may be reviewed if the State goes through a severe economic and financial situation. Also, in *Croatia*, even if endorsed and established in the State budget, the appropriations for the yearly budget of the Constitutional Court are not sheltered against the interventions of the executive branch of power during the execution of the budget.

● Constitutional Courts draw up reports concerning the execution of their budgets, which are submitted to the Minister of Finance, respectively, to the Parliament and are subject to inspection by the Courts of Accounts.

Particular aspects are highlighted in the report of the Constitutional Court of *Italy*, where is stated that, within the endorsed budget, expenses are set by the Court and its internal bodies, in full autonomy, without any type of external interferences, including for purposes of audit or control. In that regard, it appears that the Constitutional Court does not fall within the scope of application of Article 103, Paragraph 2 of the Constitution, which provides: "*The Court of Accounts has jurisdiction in matters of public accounts and in other matters laid out by law*." The Court itself - in Case No. 129 of 1981 - decided a dispute stemming from the claim, of the Court of Accounts, to audit the Treasurers of the Presidency of the Republic and of the two Houses of

Parliament. Although the Constitutional Court was not directly involved in the dispute, the *ratio decidendi* of the decision, which rejected the claim advanced by the Court of Accounts, can also be extended to include the Constitutional Court. From that *ratio* it is possible to discern, indeed, that the legal foundation of the Court of Account's jurisdiction to review is not of immediate operation in every case, as it must necessarily face the limits posed by the objective amenability of subjects to review and by the respect for constitutional norms and principles. In particular, the autonomy and independence enjoyed by the highest constitutional organs must be acknowledged not only as consisting in powers of self-organization, but also in the application of constitutional measures, which does not envisage any possibility for invoking administrative or jurisdictional remedies. With regard to the apparatuses at the service of constitutional powers, the exemption from accounts-related judgments (*giudizi di conto*) is the direct reflection of the autonomy enjoyed by the highest constitutional organs, *a fortiori* in light of the absence of detailed and specific constitutional regulation, integrated by unwritten principles consolidated through the constant repetition of uniform courses of conduct. Holding the power to submit the Treasurers of the Presidency of the Republic, and of the lower and upper Houses of Parliament, to auditing review is not, therefore, within the jurisdiction of the Court of Accounts.

3. Is it customary or possible that Parliament amends the Law on the organization and functioning of the Constitutional Court, yet without any consultation with the Court itself?

3.1. Regulating the organization and functioning of the Constitutional Court

Essentially, constitutional justice is institutionalized in the Constitution itself, which necessarily takes that fundamental rules for the organization and functioning of the Constitutional Courts are established at the constitutional level.

Since statutory provisions of the highest rank in the normative hierarchy lie at the foundation of constitutional jurisdiction, to change the provisions regulating the organization and functioning of the Constitutional Court is not quite a simple matter to deal with, the legislature not being in a position to significantly alter the nature of constitutional justice (in that regard, see reports by the Constitutional Courts of *Austria, Belgium, Croatia, Poland*, *Romania).* That is regarded as one of the strongest guarantees in order to preserve the independent position of the Constitutional Court within the system of political power, as it prevents the law-maker to influence its status through frequent changes of the law (see the report of the Constitutional Court of *Croatia*).

The provisions in the Constitution are further developed in special laws, based on which the Constitutional Courts shall adopt their own Rules of organization and functioning.

A particular aspect is highlighted in the report of the Constitutional Court of *Bosnia and Herzegovina,* whose Constitution does not provide that a Law on the Constitutional Court shall be enacted but establishes that the Constitutional Court shall adopt its own Rules. Thus, apart from the Constitution, the only act which regulates the activity of the Constitutional Court is the Rules of the Court of BiH which have force of an organic law. According to these Rules, the Constitutional Court is the only competent authority to amend such. Also, in the *Republic of*

Macedonia the organization and functioning of the Constitutional Court is not subject of any legal regulations, but have been established by the Constitutional Court itself under the Book of Procedures; the possibility for the Constitutional Court to regulate, autonomously, by its own enactment, its manner of operation and internal organization has demonstrated its positive side in the so far practice.

3.2. Relationship between the legislative and the constitutional court in the framework of the procedure to amend the Law on the Court's organization and functioning

As a general rule, the organization and functioning of the Constitutional (Supreme) Court (Tribunal) is governed by law, which means an act adopted by the Legislative that can be amended without consultation of the Constitutional Court, in the sense that no regulation exists such as to oblige the law-maker to do so, seen as a rule stemming out from the general principle of separation of powers.

In a very few cases, it has been pointed out that specific regulations exist nonetheless, either concerning an obligation to send the amending draft law to the Constitutional Court (*Czech Republic*), or that the President of the Constitutional Court has the possibility to attend and speak in the parliamentary session (Standing Rules of the Parliament of *Hungary*). Thus, in the Czech Republic, pursuant to Article 5 para. 1 let. c) of the Legislative Rules issued by the Government, a draft statute or substantive outline thereof shall be given to the Constitutional Court, the Supreme Court, and the Supreme Administrative Court, if it concerns them as organizational components of the state, or their competence, or the procedural rules that govern them, so that the Constitutional Court is always in a position to comment on a potential amendment to the Act on the Constitutional Court. However, its comments are of the nature of recommendations and consultations, and the Constitutional Court does not have a veto in the process. In the event of a draft statute (or amendment) submitted by a subject other than the government, the Constitutional Court is not legally entitled to make comments, though the proponent of the statute or amendment may ask for its opinion, as may Parliament during discussions.

In other states, the amendment of such law was conducted at the very proposal of the Constitutional Court [for instance, the special law on the Constitutional Tribunal of *Andorra* (LQTC) or the law on the organization and functioning of the Supreme Court in *Norway*].

Even if there is no statutory obligation for the legislator to consult the Constitutional Court for the purpose of making amendments to the law concerning its organization and functioning, in practice such consultation actually takes place (*Albania, Austria, Belarus, Belgium, Cyprus, Croatia, Estonia, Germany, Ireland, Latvia, Lithuania, Luxembourg, Portugal, Norway, Republic of Moldova, the Russian Federation, Serbia)*, and some of the reports (*Azerbaijan, Cyprus, Slovenia*) indicate the existence of a practice or a custom in this respect.

Consultation may be more or less formal, it may be under the form of invitations addressed to the Constitutional Court to express an opinion at the onset of the legislative procedure, of requests for an opinion or recommendation, it may materialize in a debate throughout the preparation of the draft law or participation in the committee of experts that contribute to the drafting of a new law or to a major review of the law in force.

In the context, also a constitutional principle has been evoked (*Germany*), that of faithful co-operation between organs (*Organtreue*), which was first mentioned in a set of constitutional complaint proceedings. Although the Federal Constitutional Court initially left it open at that time as to whether such a constitutional principle exists and whether, if so, a complainant in constitutional complaint proceedings can invoke it[3], it explicitly recognised this principle in later rulings[4]. This principle does not imply that, prior to any exercise of its competence which is related in any way with the tasks of another constitutional organ, a constitutional organ would have to consult this other organ. One could however consider whether or not the principle of faithful cooperation between organs could be considered to have been violated if the organisational and procedural basis of the activity of a constitutional organ was to be changed without the organ in question previously having been consulted. For instance, the principle of federal comity (conduct which is well-disposed towards the Federation), on which the principle of faithful co-operation between organs is modelled, has been interpreted by the Federal Constitutional Court in such a way that the duty to give consideration to one another postulated by this principle obliges the Federation to hear the *Land* in question – apart from the cases of particular urgency – prior to making use of the right to issue instructions to which it is entitled with regard to certain administrative matters[5] of the *Länder*.

As an exception from the above-mentioned rule, such consultation is not allowed, and the reasons invoked in this respect are either the separation between the respective activities of the Constitutional Court and of the Parliament, two organs that operate within distinct spheres, which do not intersect even if the laws to be approved concern the Court directly (for instance, *Italy*) or that the operated changes may be subsequently examined by the Court itself within the constitutionality review of laws (for instance, *Armenia*). In that regard, the report by the *Turkish* Constitutional Court points out that, in practice, at least verbal consent of the Constitutional Court is taken into account for the amendment of its law, however, since the Constitutional Court examines the constitutionality of laws, that is seen as a rather delicate issue. It is likely that the law amending the Law on the Organization and Functioning of the Constitutional Court may be brought before the Constitutional Court, and for that reason, the Court avoids to express its views on a draft law. For this reason, also in *Ukraine* such consultations are limited in practice.

4. Is the Constitutional Court vested with review powers as to the constitutionality of Regulations/ Standing Orders of Parliament and, respectively, Government?

4.1. Constitutionality review of Regulations/ Standing Orders of Parliament

Constitutional Courts, in their large majority, have competencies to review the constitutionality of the Standing Orders (or equivalent acts) of Parliament (as a generic name of the legislative authority). This also in consideration of the fact that in many countries the acts regulating the organization and operation of Parliament occupy a

[3] See Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts – BVerfGE 29, 221 <233>.

[4] See BVerfGE 89, 155 <191>; 97, 350 <374-375>; 119, 96 <122>.

[5] See BVerfGE 81, 310 <337>; see also BVerfGE 104, 249 <270>.

special position in the hierarchy of normative acts, thus having (if they are not expressly categorized as laws) the value and force of a law[6], which is why they cannot as a rule be challenged before the ordinary courts but only before the Constitutional Court.

There are also situations where no such jurisdiction has been provided. For example, the Constitution of *Bosnia and Herzegovina* does not explicitly provide that the constitutionality review body has jurisdiction to examine the constitutionality of the Rules on Procedure of the Parliamentary Assembly, and the Constitutional Court so far has not had an opportunity to interpret its jurisdiction in a case on this matter.

The Constitutional Court of *Belgium* does not have jurisdiction to review the rules that govern the operation of the Federal Parliament and Government.

In *Luxembourg*, the Constitutional Court reviews only the constitutionality of laws, and can be referred only via an ordinary or administrative court with a question concerning the constitutionality of a law which is needed in order to adjudicate in the respective case. This Court has no special jurisdiction to review the Standing Orders of Parliament, respectively of the Government.

The Constitutional Court of *Italy* has clearly excluded any possibility to review the Standing Orders of Parliament. A well-established jurisprudence is invoked in their report, and also its leading case, No. 154 of 1985, in which the declaration of inadmissibility of the issue (and, therefore, the impossibility for the Court to engage in an examination of the merits) was justified on the basis of two sets of reasons; the first of these regarded the extraneousness of Parliamentary regulations to the measures envisaged by Article 134, Subsection 1 of the Constitution (according to which "*The Constitutional Court shall pass judgment on [...] controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions*"), and the second related instead to the institutional position of the Houses of Parliament ("immediate expression of the sovereignty of the People"). Considering the first reason, the Court, having found that Article 134 of the Constitution has “rigorously [delimited] the precise and insurmountable boundaries of the powers of the judge with regard to laws of our legal system”, deduced that “since the formulation [of the Article] ignores Parliamentary regulations, only by way of interpretation could it be considered that the latter are therein equally included”. The impossibility of an extensive reading of Article 134 was therefore justified in light of its asserted incompatibility with the system, which beholds the Parliament as the central organ, of which independence must be guaranteed with regard to every other power. Transposing this argument from the organ (Parliament) to the source (regulations), the impossibility to review Parliamentary regulations was made to derive from its especial role of “direct executor of the Constitution”, which itself gives rise to a “peculiarity”, expression of the fact that “the constitutional reservation of regulatory power falls within the safeguards provided by the Constitution to ensure independence of the sovereign organ from every other power”.

Likewise, the Constitutional Court of the *Republic of Moldova* is not vested with such competency.

---

[6] Concerning the legal nature of the Standing Orders of the Chambers of Parliament, the report of the Romanian Constitutional Court shows that such acts do not come in the category of laws, because unlike the latter, they can only regulate the internal organization and operation of the Chambers and are not subject to promulgation by the President of the country. However, in accordance with Article 76 par. (1) of the Constitution, resolutions concerning the Standing Orders of each Chamber shall be passed, just like organic laws, by a majority vote of the members in each Chamber, so as to ensure the widest expression of the will of Deputies and, respectively Senators concerning the regulatory stipulations.

There also exist situations where this prerogative is conditional. For example, in *Albania* the Regulations of Parliament can be object of constitutional review only in cases when there have been affected provisions of constitutional level (decisions no. 29/2009 and no. 33/2010 of the Constitutional Court of Albania).

In *Ireland*, the Supreme Court established in its case-law that the courts cannot intervene in the right of the *Oireachtas* to establish its own rules and Standing Orders. However, it may be noted that some justices of the Supreme Court felt that there may be exceptions to this principle where the rights of an individual citizen are at stake.[7]

● In the cases where the Constitutional Courts do have such power, it is explicitly provided by national Constitutions and by the laws for the organization and operation of the Constitutional Court or, in certain situations, it is inferred by interpretation, while considering that regulations of this type come under a certain category (laws), or their position in the hierarchy of normative acts.

Thus, for instance, the Standing Orders of the National Assembly of the *Republic of Armenia* have the status of a law. Since the Constitutional Court has jurisdiction to exercise constitutionality review of laws, the Standing Orders of the National Assembly can also be subject to constitutionality review.

Similarly, the Constitutional Court of the *Republic of Croatia*, having stated, in principle, on the legal nature of the Standing Orders of the Croatian Parliament in its decision No. U-II-1744/2001 of 11 February 2004, found that such have the legal force of a law. With some specific distinctions (determined, in the case of Austria, by the meanings of the legal term "regulation" in this country), the same reasoning is a common denominator of the Constitutional Court's jurisdiction in *Austria, Estonia, Republic of Macedonia, Poland, Slovenia, Ukraine*.

In the same line, the report by the Constitutional Court of the *Republic of Lithuania* indicates that the Constitution and the Law on the Constitutional Court, in which the competence of the Constitutional Court is defined, do not literally establish that the constitutionality of norms of the Statute of the Seimas or the lawfulness of the provisions of the Working Rules of the Government may become the object of investigation by the Constitutional Court. Such powers of the Constitutional Court stem from the principles of the supremacy of the Constitution, a state under the rule of law, hierarchy of legal acts and other constitutional imperatives. The Constitutional Court has held in its jurisprudence that, under the Constitution, there may not be any such laws adopted by the Seimas the compliance of which with the Constitution and constitutional laws would not be subject to investigation by the Constitutional Court; under the Constitution, there may not be any such other legal acts adopted by the Seimas the compliance of which with the Constitution, constitutional laws and laws would not be subject to investigation by the Constitutional Court; under the Constitution, there may not be any such acts of the President of the Republic the compliance of which with the Constitution, constitutional laws and laws would not be subject to investigation by the Constitutional Court; under the Constitution, there may not be any such acts of the Government the compliance of which with the Constitution,

[7] De Blacam, "Judicial Review" (2nd ed., Tottel, 2009) p.74, referring to *Maguire v. Ardagh* [2002] 1 IR 385; herewith is quoted Article 15.10 in the Constitution of Ireland, which reads: "*Each House shall make its own rules and standing orders, with power to attach penalties for their infringement, and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person or persons interfering with, molesting or attempting to corrupt its members in the exercise of their duties.*"

constitutional laws, laws and Seimas resolutions on implementation of laws would not be subject to investigation by the Constitutional Court (Constitutional Court ruling of 30 December 2003). Therefore, when the Constitutional Court was investigating the constitutionality of the Statute of the Seimas for the first time, substantiated it by the fact that the statute is a legal act adopted by the Seimas which, under the Constitution, has the power of a law, therefore, it had to be assessed both in the formal and substantive sense. All the more so that there may not be any such legal act adopted by the Seimas the compliance of which with a legal act of higher legal power would not be subject to investigation by the Constitutional Court.

Also the Constitutional Court of the *Republic of Slovenia* held in Decision No. U-I-40/96 of 3 April 1997, that it has jurisdiction to review the Rules of Procedure of the National Assembly. It held that the Rules of the Procedure are certainly not a law in the formal sense, but "in a formal sense [...] a unique legal act which regulates questions of the internal organization and operation of the National Assembly, and procedures for adopting the acts of the National Assembly, as well as the relations of the National Assembly to other state organs".[8] Should it appear that the Rules of Procedure of the National Assembly significantly impede the exercise of any constitutional rights or the respect for constitutionally protected legal positions or actually make such impossible, they would be inconsistent with the Constitution to such extent.

In *Germany* there are certain proceedings under which the Rules of Parliament and the Government can become – directly, in part, or only indirectly – the subject of constitutionality review by the Federal Constitutional Court. Thus, in the proceedings for the abstract review of statutes, by request of the Federal Government, of a *Land* Government or of one-third of the members of the *Bundestag* the Federal Constitutional Court can – *inter alia* – review the compatibility of federal law with the Basic Law. According to the prevailing view expressed in the literature and the case-law, "federal law" within the meaning of these provisions, includes legal provisions of all levels, including the rules of procedure of the constitutional organs. In practice, however, the Rules of Procedure of the German *Bundestag* and of the Federal Government have so far never yet been reviewed *in this procedure*. However, provisions contained in the Rules of Procedure of the *Bundestag* have been the subject-matter of a review in disputes between organs (*Organstreitverfahren*) several times.

- Some of the constitutional courts resorted to jurisprudential circumstantiation of the subject matter of constitutionality review in that case.

Thus, for instance, the Constitutional Court of *Romania* established that the object of review is the Standing Orders of Parliament, namely regulations of each of the two Chambers as well as their joint regulations, including resolutions amending or supplementing the Standing Orders of Parliament, respectively resolutions by the Chambers of Parliament having a normative character, which contain stipulations on the organization and operation of Parliament as a whole, or of each separate Chamber. To that effect, the Romanian Constitutional Court has stated that it is not competent to exercise a constitutionality review on the interpretation or application of the Standing Orders of Parliament. By virtue of the principle or regulatory autonomy, as established in Article 64 para. (1) first sentence of the Constitution, the Chambers of Parliament have exclusive jurisdiction to interpret the normative content of their own regulations

[8] Constitutional Court Decision No. U-I-40/96, dated 3 April 1997 (Official Gazette of the Republic of Slovenia, No. 24/97, and OdlUS VI, 46), Para. 3.

and decide upon the manner in which such shall be applied, whereas non-compliance with certain regulatory provisions can be established and settled by means of only parliamentary procedures [Constitutional Court Decisions nos. 44/1993[9], 98/1995[10], 17/2000[11], 47/2000[12]]. Likewise, while observing that in a number of cases the criticism actually concerned the incomplete character of certain provisions in the Standing Orders, or their defective formulation, the Court, also stressing upon the necessity for supplementation or amendment thereof, found that such challenges were exceeding its jurisdiction.[13]

Also in the national report of the Constitutional Tribunal of *Spain* – a clear-cut distinction is made between the Standing Orders of Parliament, which come within the scope of constitutionality review, and other acts issued by the same authority which fall under the jurisdiction of ordinary courts. It is thus pointed out that judicial bodies have jurisdiction to rule with respect to Parliament's disputes in matters of personnel, management and administration of assets, as well as litigations in matters concerning property or material liability. The acts that may become subject to challenge are those approved by the management and administration organs of the legislative Chambers in application of the laws and parliamentary regulations, yet never those laws and regulations themselves without so causing prejudice to the right granted to the courts to raise the question of the unconstitutionality of the parliamentary rules applied. Parliamentary acts that can come under scrutiny by the ordinary courts are those that take effects vis-à-vis third parties other than Members of Parliament: the institution's staff, contractors, etc., but not internal regulations for the organization and operation of that Chamber (*interna corporis*).

● The constitutionality review can be carried out *a priori* – i.e. before the entry into force of the Standing Orders (example: *Monaco*) or their application (*France*), or *a posteriori*, i.e. after their entry into force (*Romania*); certain Constitutional Courts are competent to exercise such review both *a priori* and *a posteriori* (example: Constitutional Court of *Hungary*).

Thus, in *Monaco*, the National Council's Rules of internal organization cannot enter into force before their constitutionality is reviewed by the Supreme Tribunal, and if such provisions are found unconstitutional they cannot be applied. The current Rules of the National Council made an object for examination in two decisions by the Supreme Tribunal. Following a finding of unconstitutionality concerning some of its provisions, by a decision of 28 October 1964, the National Council promptly reviewed those provisions; subsequently, by its decision of 25 May 1965, the Supreme Tribunal found these Rules, in their entirety, to be in compliance with the Constitution and applicable law.

In *France*, under Article 61 para. 1 of the Constitution, the regulations of the parliamentary chambers and amendments thereof are subject to a systematic review exercised by the Constitutional Council.

The Constitutional Court of *Hungary*, within its *ex ante* review powers, performs the preventive norm control of Standing Rules of Parliament [§1 point a) of the CC Act]. Thus before adopting its rules of procedure, Parliament may request the

[9] Published in the Official Gazette of Romania, Part I, no. 190 of 10 August 1993.
[10] Published in the Official Gazette of Romania, Part I, no. 248 of 31 October 1995.
[11] Published in the Official Gazette of Romania, Part I, no. 40 of 31 January 2000.
[12] Published in the Official Gazette of Romania, Part I, no. 153 of 13 April 2000.
[13] Decision no. 317/2006, published in the Official Gazette of Romania, Part I, no. 446 of 23 May 2006.

Constitutional Court to look into their conformity with the Constitution, indicating the provisions thought to be of concern. If the Constitutional Court establishes the unconstitutionality of such provision(s), the Parliament shall eliminate the unconstitutionality [§34 subsections (1), (2)]. This review function can also be exercised *ex post facto* [§1 point b) in the CC Act], in that anyone may initiate proceedings before the Constitutional Court [§21 subsection (2) in the CC Act].

● The constitutionality review can be direct, at the request of entities expressly and strictly stipulated by law (e.g. in *Andorra* – one-fifth of the MPs; in *Romania* – one of the presidents of the two Chambers, a parliamentary group, or a number of at least 50 Deputies or at least 25 Senators); or it can be indirect, within proceedings for the exercise of another other power provided by law.

Examples of indirect review come from *Germany*: in the proceedings of disputes between organs, the Federal Constitutional Court clarifies at the request of organs and sections of such organs which are vested with rights of their own by the Basic Law or by the rules of procedure of a supreme federal organ and assert that the rights or obligations assigned to them by the Basic Law have been violated or directly placed at risk by an act or omission of another organ or a corresponding section of an organ, whether the impugned measure is indeed in breach of the Basic Law. Provisions of the rules of procedure and acts of the application of such provisions may also be reviewed in the disputes between organs.[14] Furthermore, provisions of the rules of procedure of

[14] For instance, a provision contained in the Rules of Procedure of the *Bundestag* which provided that submissions affecting public finances are only deliberated on if they are connected with an equalisation application – to cover the costs or the losses – was already declared unconstitutional in the first year of the activities of the Federal Constitutional Court in a dispute between organs. The Court regarded the constitutional right to take legislative initiatives as being restricted by this in a manner not provided for by the constitution (see BVerfGE 1, 144 <158 et seq.>; by contrast, the provision contained in the rules of procedure which provided for direct assignment of submissions of the nature in question to the budget committee, and hence for the omission of the first of the three readings of a draft Bill in Parliament which were otherwise customary, was regarded as being in conformity with the constitution). Provisions of the Rules of Procedure of the *Bundestag* were also judged as unconstitutional according to which an independent delegate – in the concrete dispute it was a Member of the German *Bundestag* who had been expelled from his parliamentary group – had been excluded from any possibility to work on one of the committees of the *Bundestag*. The Federal Constitutional Court found that such a delegate did not have to be allotted a vote in one of the committees – which would have a disproportionate effect –, but had to be enabled to contribute to at least one of the committees as a member with a right to speak and move motions (see BVerfGE 80, 188 <221 et seq.>). However, in a dispute between organs which had been lodged by Members of the *Bundestag*, orders of the *Bundestag* with which the further debate of the *Bundestag* on a disputed subject-matter had been restricted to a certain number of hours, and each parliamentary group had been allotted a share of the speaking time corresponding to its size, were judged to be constitutional. The possibility to restrict the time for a debate in advance had not been explicitly provided for in the Rules of Procedure of the *Bundestag*; the Federal Constitutional Court however referred to a provision contained in the rules of procedure – adjudged as being in conformity with the constitution –, according to which the *Bundestag* may rule on the ending of a debate; this provision is said to also encompass the right to provide only a certain period for a debate from the outset or to restrict it from a certain time onwards to a concrete further duration (see BVerfGE 10, 4 <13>). Equally, the sub-division of the deliberation time according to the size of the parliamentary group was seen as constitutional (see BVerfG (Federal Constitutional Court) loc. cit. pp. 14 et seq.; the Rules of Procedure also did not contain any explicit provision for this, but only a provision from which it was presumed that it was conditional on this mode of attribution as a matter of course). Also, the Court found – with a narrow voting result – in a dispute between organs in which several delegates spoke against the regulations that had been adopted in 2005 to disclose the income made outside of their mandate, that the statutory provision in this regard was in conformity with the constitution (§ 44a of the Act on the Legal Status of Members of the German *Bundestag*

Parliament and of Government which concern the proceedings to issue legal provisions can also become the subject matter of indirect review by the Court in any proceedings which are related to the validity of the regulations in question.

● As regards the case-law of Constitutional Courts established in the exercise of said powers, it must be noted that the legal issues being touched upon under national reports are, more often than not, quite similar, such as, for instance, the question concerning the majority required for adoption of normative acts or other enactments by Parliament, or that of the rights of parliamentary groups.

Thus, the Constitutional Court of *Croatia*, with its Decision no. UI-4480/2004 of 5 June 2007 (Official Gazette No. 69/07) repealed the provisions of the Standing Orders stipulating the majority required for passing laws and other enactments of Parliament. The Constitutional Court found them in breach of Article 81 para. (1) of the Constitution which reads: "*Unless otherwise specified by the Constitution, the Croatian Parliament shall make decisions by a majority vote, provided that a majority of representatives are present at the session.*"

The Constitutional Court of *Romania* accepted the request concerning the unconstitutionality of the provisions under Article 40 para. (1)[15] of the Regulations of the Joint Sittings of the Chamber of Deputies and the Senate[16], and found them unconstitutional because granting to the president of the Chamber of Deputies a decisive role in the case of even vote comes against constitutional provisions concerning majorities required to adopt enactments, whereas they contain no such mention[17]. In another decision, the Court found[18] that Article 155 para. (3) of the Standing Orders of the Chamber of Deputies, according to which a request to initiate criminal proceedings against a Member of the Government "*[...] is to be adopted with the vote of at least two-thirds of the Deputies*", is in conflict with Article 76 para. (2) of the Constitution, pursuant to which "*(2) Ordinary laws and resolutions shall be passed by a majority vote of the members present in each Chamber*" and, consequently, is unconstitutional. For the same reasons, the Court has also established the unconstitutionality of similar provisions of the Senate Standing Orders[19].

The Constitutional Court of the *Republic of Macedonia*, with its Decision U.no.28/2006 of 12 July 2006, repealed Article 231 paragraph 2 in the part: "*with a majority vote of the total number of representatives*" of the Book of Procedures of the Assembly of the Republic of Macedonia ("Official Gazette of the Republic of Macedonia", no.60/2002). Article 231 paragraph 1 of the same Book of Procedures envisages that the Assembly may work *in camera* if that is proposed by the Parliament Speaker, the Government or at least 20 representatives. Paragraph 2 of Article 231 in the part that was contested with the initiative envisaged that the Assembly decide on the proposal without a debate with a majority vote of the total number of representatives.

(*Abgeordnetengesetz*)) as well as the details of the obligation of disclosure in the "Code of Conduct for Members of the German *Bundestag*" adopted by the *Bundestag*, which according to § 18 of the Rules of Procedure of the German *Bundestag* constitutes an integral component of the rules of procedure (see BVerfGE 118, 277 <323 et seq., 352 et seq.>).

[15] "*In case of an even vote, the vote of the chairperson in the session is decisive.*"

[16] Approved by Resolution of Romania's Parliament no. 4/1992, published in the Official Gazette of Romania, Part I, no. 34 of 4 March 1992.

[17] Article 76 of the Constitution concerning *Passing of bills and resolutions*.

[18] Decision no. 989/2008, published in the Official Gazette of Romania, Part I, no. 716 of 22 October 2008

[19] Decision no. 990/2008, published in the Official Gazette of Romania, no. 716 of 22 October 2008

Taking a starting point Article 70 paragraph 1 of the Constitution of the Republic of Macedonia, under which the sessions of the Assembly are public and paragraph 2 of the same Article which envisages that the Assembly may decide to work *in camera* with a two-third majority vote of the total number of representatives, the Constitutional Court found that the contested Article of the Book of Procedures of the Assembly of the Republic of Macedonia is not in accordance with the Constitution since in order to exclude the public in the work the Assembly envisaged a majority of the representatives that is less than the two-third majority defined in the Constitution.

Concerning relationships within Parliament in terms of organization into parliamentary groups, and with respect to the rights of independent MPs, mention should be made of the *Romanian* Constitutional Court's established case-law[20] on the matter of MPs' unrestrained choice to move from one group to another, to join a parliamentary group or to establish a group of independent MPs. Every time the issue was brought before the Court, it held that parliamentary rules imposing restrictions on such right were essentially in breach of Article 69 para. (2) of the Constitution, which forbids any form of imperative mandate.

In the same context but from a different perspective one should note Decision U.no.259/2008 of 27 January 2010 of the Constitutional Court of the *Republic of Macedonia* that repealed Article 157 of the Book of Procedures of the Assembly ("Official Gazette of the Republic of Macedonia", no.91/2008). In its paragraph 1, the repealed Article 157 envisaged that: "*if a general debate on the proposed laws is not held, the representatives of the groups of representatives may state the view of the group of representatives upon the proposed law at a session of the Assembly in the beginning of the debate*", and under paragraph 2 that the speech may not be longer than ten minutes. With this decision the Constitutional Court stood up in defence of the equal right of the representative who is not a member of a group to take part in the debate on the proposed law in the Assembly. In the reasoning of the Decision, the Court took the opinion that the different position of the group of representatives and an individual representative should not be a problem, for example from the aspect of the length of his/her speech, since the group of representatives speaks in the name of more representatives, and the representative individually. However, in the same sense the question is whether the difference between the representatives may be to a degree as to exclude the representative from the possibility to take part in the debate for the proposed law only because he/she is not a member of a group of representatives and whether such restriction is appropriate to the function and status of a representative pursuant to the Constitution. Accordingly, when the Book of Procedures defined that a debate be opened at a session of the Assembly, then each representative must have a right to participate in the debate and a representative who is not a member of a group of representatives may not be excluded from that right. The question about the length of the discussion, from the aspect whether the representative speaks in the name of the group of representatives or in his/her name, is a different matter. From what has been noted and taking the concept of the Book of Procedures of the Assembly for introduction of groups of representatives and for determination of their position, the Court has found that the representative who has been elected in direct elections and to whom the citizens

[20] Decision no. 44/1993 published in the Official Gazette of Romania, no. 190 of 10 August 1993, Decision no. 46/1994 published in the Official Gazette of Romania, no. 131 of 27 May 1994, Decision no. 196/2004 published in the Official Gazette of Romania, Part I, no. 417 of 11 May 2004.

have transferred their sovereignty, may not be excluded from the possibility to state his/her view on the proposed law for which no general debate has been held, only because of the fact that he/she is not a member of a group of representatives.

4.2. Constitutionality review as regards the Standing Orders/Regulations of the Government

From the examination of the national reports, one may note that those Constitutional Courts which do not have jurisdiction to perform the constitutionality review of the Standing Orders of Parliament also lack jurisdiction to perform the constitutionality review of Rules of the Government. This because of similar reasons, as shown in the report of the Constitutional Court of *Italy*, which points out that the impossibility for the Court to operate a scrutiny for constitutionality is also confirmed in regard to Government regulations; on the one hand, it could be considered possible to simply extend part of the considerations in support of the unreviewability of Parliamentary Standing Orders, and especially in light of the constitutional nature of the organ from which the regulation originates, or on the secondary nature of the rules for the operation and functioning of the Government. Such a placement within the system of legal sources means that the Court cannot, in any sense, scrutinize them (unless in exceptional cases), since its jurisdiction is limited to laws and enactments having force of law.

There are also Constitutional Courts empowered to perform the constitutionality review with respect to the Standing Orders of Parliament, however, unable to perform the constitutionality review of the Rules of Government, such as in *Andorra*, where the special law on the Constitutional Tribunal only provides the constitutionality review of Regulations of the General Council, but remains silent about those on the organization and functioning of the Government

There are cases when the Constitutional Court has exclusive jurisdiction to perform the constitutionality review of legal acts, but does not have any powers of review over the acts of the executive power (for instance, *Belgium*).

In other cases, the particular elements pertaining to constitutionality review of the Standing Orders of the Parliament apply also in case of constitutionality review of the Rules of the Government (for example, *Belarus, Germany, Republic of Macedonia*), as well as when the Court's said prerogative has its own characteristic features or may know further distinctions.

Therefore distinction should be made in relation to:

- the nature and the issuer of the normative act that governs the organization and functioning of the Government;
- the nature of the acts issued by the Government, whereas individual acts are excluded from the scope of the constitutionality review.

Thus, in certain cases, review powers in respect of the Rules of the Government are derived from the Constitutional Court's general competence to conduct constitutional review of all acts issued by the Government, without any distinction whatsoever as to their subject matter. Accordingly, to the extent that the rules of organization and functioning of the Government are established in an act issued by this authority, the respective act implicitly belongs to the sphere of acts subject to constitutional review by the Constitutional Court. For instance, the Cabinet of Ministers of *Ukraine*, within the limits of its competence, issues resolutions and orders that are mandatory for

enforcement. Since one of the powers of the Constitutional Court is to decide on issues of constitutionality of acts of the Cabinet of Ministers, and the Rules of procedure of the Cabinet of Ministers of Ukraine were approved by a Resolution of this Cabinet, then such fall under the review exercised by the Constitutional Court of Ukraine. Similar reasoning shall apply to the power of the Constitutional Court of the *Russian Federation* and of *Lithuania*.

In other States, the rules on the organization and functioning of the Government are established by means of acts issued by another authority which fall under the Constitutional Court jurisdiction. For instance, in *Armenia*, the procedure of functioning of the Government of the Republic of Armenia is defined by a decree of the RA President[21]. Taking into consideration that the RA President's decrees are the subject to constitutional review, also the legal act regulating the working procedure of the Government is subject to examination by the Constitutional Court.

The report by the Constitutional Court of *Romania* points out to the fact that normative acts regulating the organization and functioning of the Government shall be subject to review conducted by the Constitutional Court to the extent that they are primary statutory acts – laws (which are enacted by the Parliament) or ordinances (that shall be issued by the Government). Government Decisions issued for the organization of the enforcement of laws [Article 108 para. (2) of the Constitution], which constitute secondary legislation, escape review by the Constitutional Court, nonetheless they may be subject to the legality review carried out by the administrative courts.

In connection with the distinction based on the nature of acts issued by the Government, it should be mentioned that, generally speaking, only the normative or general acts fall under the Constitutional Court's powers of review. With regard to individual administrative acts that are norms of individual application in respect of a particular person, whose unique effects envisage this one alone, and remain unbinding for the general public, such cannot be subject to constitutionality review, as specifically pointed out in the report of the Constitutional Court of the *Republic of Moldova*. Similar aspects in connection with the distinction operated between individual, and normative, acts are indicated in the reports from the Constitutional Court of the *Czech Republic*, the Constitutional Tribunal of *Poland*, and the Constitutional Court of *Georgia*. The Constitutional Review Chamber of the Supreme Court of *Estonia* exercises its control over the legislation with general applicability: laws adopted by Parliament, respectively regulations adopted by the Government, ministries and local authorities. The Chamber shall not be competent to review the individual acts issued by the Government or the ministries.

At the same time, it should be noted that if the Government acts (including those which regulate its organization and functioning) fall under the category of administrative acts, they will enter the jurisdiction of administrative courts or other authorities. For instance, the report by the Constitutional Court of *Turkey* points to the existence of a separate administrative justice system which provide for the Government's acts (i.e. decisions of the Council of Ministers) to come under examination by the Council of State. The Constitutional Court can only review decrees-law. The report by the Constitutional Court of *Latvia* also makes a similar distinction in that, according to Article 16 para. (4) of the Law on the Constitutional Court, it shall

[21] Decree of the RA President of 18 July, 2007, on Defining the order of organization of the activity of the RA government and other state governing bodies subject to the latter.

adjudicate matters regarding compliance with law of other acts of the Parliament, the Cabinet of Ministers, the President, the Speaker of Parliament and the Prime-Minister, except for the administrative acts.

A special situation is presented in the report by the Constitutional Court of *Austria* which, after showing that "real" regulations (regulations specifying a law) adopted by the Federal Government are subject to constitutional review just as any other regulation, and that the Constitutional Court is not entitled to review internal acts of the Federal Government, points out to the fact that, as regards the Rules of Procedure of the Federal Government, there is a particular situation: they do not exist, a fact quite unusual measured by international standards. The internal rules for Government's operating activities are based on individual decisions and "customs" developed in the legal practice of Federal Governments since 1945. The most important such rule is that decisions of the Federal Government must be adopted unanimously. Since this rule applies undisputedly there is no need for further discussion on the interpretation of rules of procedure because in case of a dispute an agreement in the decision-making process will not be reached anyway.

5. Constitutionality review: specify types / categories of legal acts in regard of which such review is conducted.

A. General and individual acts/ Statutory (normative) and non-statutory acts.

After reading through the national reports submitted by constitutional courts, one could come to a conclusion that a uniform approach as to which categories of acts are subject to constitutional review is quite difficult to make, considering the many particularities in the regulation of powers ascribed to constitutional courts, and the differences between the legal systems in various countries which is determined, *inter alia*, by the structure of these States – unitary or federative, as well as their different conception in regard to the constitutional review.

Furthermore, these reports have addressed the issue in a complex manner, so that merely listing the categories of acts subject to review by the constitutional courts will barely cover a small portion of the rich information conveyed.

Given the complex aspects involved, but also trying to provide a uniform approach, for practical reasons, to serve as a basis for discussion, it seems reasonable to enumerate the categories of acts which are reviewable by the Constitutional Courts, also pointing to certain distinctions or nuances the reports have made under this chapter.

Some of the reports have distinguished between general acts and individual acts, respectively, and in the latter case, also based on the issuing entity.

In specific cases, the sphere of the acts subject to review is established as such, in the sense that various normative or general acts fall under this category.

For example, the Constitutional Court of the *Republic of Belarus* shows that in performing the *a posteriori* constitutional review the Constitutional Court delivers judgments on the constitutionality of the normative legal acts as specified in the Constitution provided that one of the qualified subjects submits the relevant proposal.

The Constitutional Court of the *Czech Republic* performs the review of the laws, as well as of the "other legal regulations". These are legal documents that have been adopted and exist in the required form. The basic requirements for these legal regulations fall into two groups: general (the regulation is of a regulatory nature and is

binding on a wide – indefinite – group of subjects) and specific requirements (the regulation must be duly adopted and published, valid and in effect).

Likewise, in proceedings for the review of constitutionality, the Constitutional Court of *Slovenia* decides upon the constitutionality (and legality) of laws, regulations, local community regulations, and general acts issued for the exercise of public authority.

The Constitutional Court of *Serbia* is competent to perform the review of a large set of acts, issued by various authorities and legal entities, the common feature of which is their general nature, more specifically: laws and other general acts of the National Assembly, President or Government, general acts of the other authorities and State bodies, statutes and other general acts of the authorities from the autonomous provinces, the statutes and other general acts of the local self-governing entities, general acts of the political parties, trade unions, and citizens' associations, general acts of the organizations that exercise public functions, statutes and other general acts of companies and institutions, general acts of chambers and other associations, general acts of funds and other associations, collective agreements.

Actually, the rule is that it falls under the jurisdiction of the Constitutional Courts to carry out review of general acts. Nevertheless, there are cases when the Constitutional Court is competent to take under its review also various individual acts.

Thus, the Constitutional Court of *Austria* indicates that, according to the concept of the Austrian Federal Constitution, every legal act directly interfering with the legal sphere of the addressee is subject to review when it constitutes, abolishes or amends rights and duties. Any such legal act having general effect (i.e. addressing a target group marked by general criteria) is subject to review, as are all individual legal acts provided they are issued by an administrative authority (laws, regulations, agreements concluded between the Federation and the lands, respectively, between the lands in their specific area of jurisdiction). By contrast, individual legal acts by ordinary courts (judgments and decisions) may not be reviewed by the Constitutional Court at all. An exception exists however in the field of asylum law: judgments and decisions of the Asylum Court may be challenged before the Constitutional Court.

The Constitutional Court of *Croatia* performs the constitutionality review of individual decisions of all State/ governmental bodies (including final judgments and rulings of the Supreme Court of the Republic of Croatia, as well as of the other courts), bodies of local and regional self-government and legal entities with public authority, with regard to the violation of human rights and fundamental freedoms, as well as of the right to local and regional self-government, rights that are guaranteed by the Constitution of the Republic of Croatia.

The Constitutional Court of *Lithuania* is competent to review all the legal acts adopted by the Parliament, Government and the President, and decides on their compatibility with the Constitution and the laws, irrespective whether they are statutory or individual, whether they have one time applicability (*ad-hoc*) or permanent validity.

In *Germany*, both provisions adopted by the Government, and any other acts or omissions on the part of the Government may become subject-matter of a constitutional review where the possibility exists that they violate constitutional rights of those who may initiate proceedings of the respective type to protect their rights. Thus, in response to constitutional complaints of parties affected, the Federal Constitutional Court has in several sets of proceedings reviewed information measures of the Federal Government or of individual ministries. Constitutional complaints are normally only admissible once all remedies have been exhausted; the Federal Constitutional Court quashes only the

impugned court decisions, but does not rescind the underlying administrative measure, and refers the case to a court with jurisdiction. The court decisions which have approved the acts of the Federal Government are therefore normally the primary subject-matter of the constitutional court's review in such cases. Indirectly, however, – unless the impugned court decisions do not already need to be rescinded because of procedural errors – there may also be findings on the constitutionality of the underlying governmental acts.

The Constitutional Court of the *Republic of Macedonia*, within the framework of the abstract constitutional review, the Court may review acts of general nature (general acts): laws, by-laws, decisions of the Government or ministries and other public bodies, collective agreements, and programmes and statutes of political parties and NGOs, but may not review the individual acts of the Assembly and the Government. Within the framework of the competence for the protection of the freedoms and rights of the individual and citizen, the Court may appraise individual acts (court judgments and individual acts of the bodies of administration and other organizations carrying out public mandates) or actions which have violated certain rights or freedoms of the citizens, which are safeguarded by the Constitutional Court and may annul the same.

In *Norway*, the courts have the right to review the constitutionality of legislation and to review administrative decisions, however they will not review constitutionality *in abstracto*. The right to review administrative decisions also includes trying the facts of the case.

Also the *Portuguese* Constitutional Tribunal sets forth a distinction in this respect, establishing that, in principle, only the normative acts issued by public entities are subject to its constitutionality review. Yet the Tribunal has abandoned the concept of law in a purely formal sense and developed a broader and, at the same time, formal and functional concept of the legal norm. By this new concept, the review of a legal act should scrutinize into certain cumulative requirements. First of all, its prescriptive character, particularly the prescription of a conduct or behaviour rule; secondly, its heteronomous nature; thirdly, its obligatory character (its binding content). Consequently, various types of legal norms may be subject to constitutionality review. Further to legal norms in a traditional sense (namely general, abstract, imperative rules issued by public entities), there are also other legal acts, namely the public norms with binding external effect, of an individual and concrete nature, as they are set forth in a piece of legislation, but also norms issued by private entities, if such enjoy normative delegated powers assigned to them by the public entities. Thus, in Portugal, the constitutional judge may have to look into the following legal norms as regards their constitutionality: laws adopted by the Assembly of Republic, including law-measures (pieces of legislation having the form of law and the content of an administrative act) and any other laws having individual and concrete content; decree-laws (legislative acts of the Government); legislative acts of the Madeira and Azores autonomous regions; international treaties and agreements in simplified form, including international contract-treaties; regulatory acts issued by the Government, the governments of the Madeira and Azores autonomous regions, local community bodies, by certain administrative authorities (the case of civil governors of the regions in the continental part of Portugal), certain legal entities at public law or, in specific hypotheses, certain non-public entities having delegated normative powers assigned to them by public entities; regulatory decisions (*assentos*) rendered by the Supreme Tribunal of Justice; decisions by the Supreme Tribunal of Justice for the unification of case-law; judge-

created norms (acting in the interpretation of the law) "in the spirit of the system" for the purpose of filling legislative gaps; regulations established by voluntary arbitration jurisdictions; specific or *sui generis* acts, such as those setting forth rules for the operation and organization of the Assembly of the Republic on the basis of the internal normative autonomy thereof (in spite of their being acts *interna corporis*); norms included in the articles of public utility associations; regulations laid down by the associations of public utility or other private entities where they enjoy delegation of authority on the part of the public entities; traditional (customary) norms to the extent that and in the areas where such are accepted as a source of domestic law; norms emanating from competent bodies of the international organizations to which Portugal is a party, and effective in the legal order of Portugal.

Similarly, in respect of its competence to review constitutionality of other acts issued by the bodies of State administration, the Constitutional Court of *Hungary* emphasizes its unified examination practice concerning the other legal means of state administration, which has depended on whether the act in question had normative content. In the early phase of the Constitutional Court's jurisprudence it was declared that the other legal means of state administration will not be determined by their name, but by their content (Decision 60/1992). In majority of the cases the Constitutional Court established – in regard of the act of Parliament taken under purview – whether it was a normative or a concrete decision on the basis of examination of its aims, specifications and duration of rules of behaviour contained in such act (e.g. Decision 50/2003). Whereas there are some norms, which belong to the scope of other legal means of state administration by their names, but not by their content (at first: Ruling 52/1993), the Constitutional Court established for such cases the lack of competency, as the act to be taken under examination had no normative character, and refused the petition. Furthermore, their report indicates there are also other norms, which cannot be considered upon their issue or upon their name as other legal means of state administration, nevertheless they are similar upon their content. In such cases, the Constitutional Court refuses the petition, but the annulment of the examined norm is stated in the heading and it is highlighted that they cannot generate therefore any rights and obligations and no legal consequence can be related to them. On the other hand, a diverging practice has been followed regarding the possibility of examination of laws without normative content. The common element of all the decisions is that the Constitutional Court has taken the Act on the Constitutional Court as initial point. It was changed by the Decision 42/2005, which stated that: "The Constitutional Court has been considering the competence of the abstract posterior review as a competence, which covers all norms (provisions with normative content), originated (and protected by) from the Constitution". Consequently, the Constitutional Court reviewed the constitutionality of a uniformity decision (binding upon lower courts) rendered by the Supreme Court. The concept of law has been approached by the Decision 124/2008 from a different way again. It has set that the "Constitution determines itself, which state authority and in what form can issue laws." In the sense of this decision a law is which may be issued upon the Constitution as such.

B. Primary legislation and secondary legislation

In respect of the acts subject to constitutionality review, some reports make a distinction between primary and secondary legislation (normative acts).

Primary legislation, with its specific characteristics, may be subject to review by Constitutional Courts; secondary legislation however does not in all the cases.

For example, the Constitutional Court of *Belgium* has exclusive competence to review the constitutionality of legislative acts, but no control prerogatives on the acts of the executive.

According to the report of the Constitutional Court of the *Czech Republic*, the Court is not authorized to review the conformity of sub-statutory legal norms, even if they are of varying legal force and conflict with each other. The Constitutional Court has noted in this regard: *"The Constitution does not give the Constitutional Court the power to annul sub-statutory legal regulations of lesser legal force due to inconsistency with sub-statutory regulations of higher legal force, or even due to inconsistency with a sub-statutory regulation of the same legal force. Thus, at the level of abstract review of norms, the Constitutional Court is not a universal guardian for the consistency of a hierarchically structure legal order at all its levels. In our constitutional system, conflict between sub-statutory regulations of varying or the same legal force can be addressed at the level of specific review of norms and their application under Article 95 para. 1 of the Constitution*."

In *Italy*, the Constitutional Court's power of review does not extend to secondary legislation, such as regulations issued by the Government. These acts are, indeed, subjected to a review for legality, or conformity to primary law - a review which falls to be performed by ordinary and administrative judges. Therefore, in light of the fact that regulations must conform to laws, and laws must conform to the Constitution, regulations conform to the Constitution by necessary implication, without any need for a separate review against the Constitution specifically.

Concerning the acts issued by the Government, the Constitutional Court of *Romania* points out that subject to Article 108 paragraph (1) of the Constitution, the Government issues decisions and ordinances. However, it is only Government Ordinances that are primary legislation, just like laws and parliamentary regulations; thus ordinances alone may be subject to constitutionality review by the Constitutional Court [Article 146 let.d) of the Constitution and Article 29 paragraph (1) of Law no. 47/1992]. Government Decisions are issued for organising the enforcement of laws [Article 108 paragraph (2) of the Constitution], so they constitute secondary regulatory acts that cannot be reviewed by the Constitutional Court, however, may be submitted to a legality review carried out by administrative courts.

C. Categories of acts reviewable by the Constitutional Court

In a synthetic presentation, the following acts are concerned:

a) Laws

The national reports have revealed a complex approach to the concept of *law*, as defined under its formal and also substantive aspects.

Some reports indicate that constitutional review can be exerted on laws and normative acts having the force of law, whose sphere is, for example, in *Italy*: laws enacted by the State, delegated legislative decrees (legal measures issued by the executive upon delegation from the Parliament) and decree-laws, legal measures issued by the executive in necessary and urgent response to emergency situations and that, after sixty days, must be converted by the Parliament into laws. The Court can also adjudicate

upon the constitutionality of laws enacted by Regions and by the two Autonomous Provinces to which the Constitution has granted legislative powers (i.e. the Provinces of Bolzano and Trento, which constitute the Region of Trentino-Alto Adige). The Court's capacity for review for constitutionality also extends to Presidential decrees that declare the abrogation of a law or of legal measures operated through a referendum as established by Article 75 of the Constitution. The Regulations adopted by the European Union are not categorized as laws or legal norms having the force of a law for the purpose of constitutionality review, even though the Constitutional Court stated that the European legislation may run counter to "the fundamental principles of the constitutional system or to inalienable human rights" (case no. 98 of 1965, subsequently confirmed repeatedly); in the event that such incompatibility is found, in observance of the dualist concept regarding the relation between the national and the EU legislation, the Court's review would limit exclusively to the Italian legislation for their implementation, to the extent that it transposes EU norms.

Similarly, in *Spain*, in abstract constitutionality review proceedings, both in an appeal and in a matter of unconstitutionality, the Tribunal verifies compliance with the Constitution of "the laws, provisions of regulations or acts having the force of law" or, in concise wording, of any "norms having status of a law", namely: autonomy statutes and other organic laws; other laws, provisions of regulations and of State enactments having the force of law (mention is made that, in case of legislative decrees, which are provisions with force of law adopted by the Government based on a delegation granted by the Parliament, the Tribunal exercises its competence without prejudice to control prerogatives vested in the ordinary courts); international treaties; regulations of the Chambers and of the Cortes Generales (the Parliament); laws, regulatory acts and provisions adopted by the Autonomous Communities, with said exception in cases of a legislative delegation; regulations of the Legislative Assemblies of Autonomous Communities.

A reference to both criteria – the substantive and the formal one – is also made in the report of the Constitutional Court of *Hungary*, as shown above.[22]

However, in most of the cases, the law is regarded in its formal sense, as enactment of a general nature adopted by the legislative power under pre-established procedure.

Normally, all categories of laws – in a formal sense – may be subjected to review by the Constitutional Court. However, particularities in this area determined by the State structure have been revealed in some of the reports from the Constitutional Courts of federative States, and that concerns the competence of such Courts to review the Constitutions of member States of the Federation, as well as other rules adopted by such States.

Thus, the Constitutional Court of the *Russian Federation* has jurisdiction to review the constitutions of its republics. Furthermore, charters, and laws and other normative acts of entities of the Russian Federation, adopted on issues under the jurisdiction of State bodies of the Russian Federation or under the joint jurisdiction of State bodies of the Russian Federation and State bodies of entities of the Russian Federation are subject to review.

But there are also cases when specific categories of laws are excluded from the review conducted by the Constitutional Courts, in consideration of either their typology or their scope of regulation.

---

[22] Supra, point A.

In *Switzerland*, for example, federal laws are excluded from the constitutionality review, because the Swiss Federal Supreme Court has the obligation to apply them (Article 190 of the Constitution). *Abstract review* is excluded in all these cases (Article 189, paragraph 4 of the Constitution). Instead, within *concrete review* proceedings, the Court may find that a federal law violates the Constitution or the international law. In the first situation, it can neither annul the law nor refuse to apply it. It has the possibility to flag unconstitutionality first through its judgment, then also in its annual report which is submitted to the Parliament, namely under the section "Indications for the legislature". Federal orders cannot be brought before the Swiss Federal Supreme Court (Article 189, paragraph 4 of the Constitution). It results that also *abstract review* is excluded for this category of normative acts. However, concrete review by the Federal Court is possible, and its extent depends on whether the order is based directly on the Federal Constitution or a delegation contained in federal legislation. Cantonal laws and ordinances (including communal laws and ordinances) may be subject to *abstract* and *concrete review* without restrictions.

In *Luxembourg*, the Constitutional Court decides upon compliance of the laws with the Constitution, except for the legislation under which treaties are approved.

In *France*, starting from March 1, 2010, the Constitutional Council conducts *a posteriori* reviews by preliminary rulings on the issue of constitutionality of any legal provisions in force, upon referral by the State Council or the Court of Cassation with exceptions raised during trial proceedings, in regard of compliance of such provisions with "*the rights and freedoms guaranteed by the Constitution*".

In *Hungary*, the Constitutional Court shall annul laws and other legal norms which it finds to be unconstitutional. The Constitutional Court may annul laws on the State Budget and its execution, on central taxes, stamp and customs duties, contributions, as well as on the content of the statutes concerning uniform requirements on local taxes only if the content of these statutes violates the right to life and human dignity, the right to the protection of personal data, the right to freedom of thought, conscience and religion or the right connected to the Hungarian citizenship.

As a general rule, constitutional reviews are carried out upon request by the subjects provided by the Constitution, or by the law on the organisation and operation of the Constitutional Court; however, there are also constitutional courts within whose competence falls the systematic review of laws.

For example, the Constitutional Court of *Belarus*, starting from July 2008, conducts mandatory *a priori* reviews of all laws adopted by the Parliament, prior to their promulgation by the President. The Constitutional Council of *France* conducts a systematic review (Article 61, paragraph 1 of the Constitution) of the organic laws, prior to their promulgation, and of law proposals that are approved through a referendum procedure, prior to their being subjected to the referendum.

b) International treaties

International treaties are usually subject to review by Constitutional Courts.

Review is conducted prior to ratification/promulgation, as a preventive measure or, possibly, as a sanction where a treaty was concluded overstepping the boundaries allowed by the Constitution (for example, *Albania, Andorra, the Czech Republic, Russian Federation, France, Lithuania, Latvia, Poland, Romania*) and, in some cases, following ratification (for example, *Serbia, Latvia*).

In most of the reports reference has been made to the category of international treaties in general, although a few of them took to distinctions within this category.

Thus, the Constitutional Court of *Azerbaijan*, for example, examines the interstate agreements of the Republic of Azerbaijan prior to their coming into force and intergovernmental agreements of the Republic of Azerbaijan.

The Constitutional Tribunal of *Portugal* reviews international treaties and agreements in their simplified form, including international contract-treaties.

Review by the Constitutional Court of the *Russian Federation* is carried out on treaties concluded between State bodies of the Russian Federation and state bodies of entities of the Russian Federation, treaties concluded between state bodies of entities of the Russian Federation and international treaties of the Russian Federation that have not come into force.

A special situation in respect of both laws and international treaties can be found in *Austria*, where the Constitutional Court is competent to review the republication of a law or of a state treaty. According to the Austrian Constitution the responsible highest constitutional organs of the Federation and the *Länder* may republish laws and state treaties. This means that the text of a legal norm in force at the relevant time is approved as authentic and that its wording is binding for the addressees in future. The purpose of this provision is to make laws or state treaties in the form of a continuous text easily accessible again if they have become too complicated to be understandable at a glance because of numerous amendments made in the course of time. The Constitutional Court reviews whether the limits for republication have been exceeded, i.e. it examines whether the republished text including all amendments has actually been enacted by the competent legislator in the exact wording that has been republished.

c) Regulations of the Parliament[23], other acts of the Parliament

As a rule, enactments of a general nature adopted by Parliament, other than laws, are subject to review by Constitutional Courts (for example, *Armenia, Azerbaijan, Denmark, Russian Federation, Georgia, the Republic of Moldova, Estonia, Serbia, Spain, Ukraine*).

In *Denmark*, subject to constitutionality review are not only laws, but also decisions by the Parliament.

In *Estonia*, also the resolutions adopted by the Standing Committee of the *Riigikogu* are subject to review by the Constitutional Court.

In *Romania*, apart from the Standing Orders of the Parliament, resolutions by the Plenary of the Chamber of Deputies, the Plenary of the Senate and the Plenary of joint Chambers of Parliament are reviewable.

In *Ukraine*, legal acts of the Supreme Rada of Ukraine (resolutions, statements, etc.), among which "*normative acts of the Presidium of the Verkhovna Rada of Ukraine, which follows from the special status of the Presidium of the Verkhovna Rada of Ukraine in the system of state power of Ukraine before February 14, 1992*", as well as legal acts of the Supreme Rada of the Autonomous Republic of Crimea are subject to review by the Constitutional Court.

d) Decrees/Resolutions/Orders/General acts of the President of the Republic

Some of the Constitutional Courts have the competence to review general acts issued by the President of the Republic (for example, *Armenia, Azerbaijan, Russian Federation, Georgia, the Republic of Moldova, Estonia, Serbia, Ukraine*).

[23] See answers to question no. 4

e) Decrees having the force of law (Decree-Laws)/Ordinances/ Resolutions/General acts of the Government/Council of Ministers

Normative acts of the Government are subject to review by Constitutional Courts in countries such as *Andorra* (decrees issued based on a legislative delegation), *Armenia, Azerbaijan* (resolutions and orders of the Cabinet of Ministers), *Belarus* (resolutions of the Council of Ministers), *Denmark* (executive orders issued by the Government and any decisions issued by an administrative body, including decisions by the Government), *the Russian Federation*, *the Republic of Moldova, Montenegro* (general acts adopted by the Government: regulations, ordinances, decrees etc.), *Georgia, Portugal* (legislative acts of the Government, namely decree-laws), *Romania* (ordinances and emergency ordinances), *Serbia* (decrees, resolutions and other general acts adopted by the Government), *Spain, Ukraine* (acts of the Council of Ministers), *Turkey* (where the Parliament may approve, through a law, authorization of the Council of Ministers to issue "decrees having the force of law").

f) Resolutions of the Prime Minister (e.g. *Armenia*);

g) Normative acts of the central executive administration bodies (e.g. *Azerbaijan*);

h) Acts/Decisions of the local public administration/local autonomous bodies

- decisions of local autonomous bodies (*Armenia*)
- normative acts of the central public administration bodies (*Albania*)
- acts issued by the municipality (*Azerbaijan)*
- decisions of legal entities with public authority, including bodies of local and regional self-government (*Croatia*);

i) Other acts:

Acts of the courts of law (other than individual acts, *supra*, point A) /acts of the General Prosecutor:

- decisions of the Supreme Court (*Azerbaijan*);
- acts of the Supreme Court, the Supreme Economic Court and of the General Prosecutor (*Belarus*);
- regulatory decisions (*assentos*)[24] rendered by the Supreme Tribunal of Justice; decisions by the Supreme Tribunal of Justice for the unification of case-law; judge-created norms (acting in the interpretation of the law) "in the spirit of the system" for the purpose of filling legislative gaps; regulations established by voluntary arbitration jurisdictions (*Portugal*);

Traditional (customary) norms, to the extent and in the areas where these are accepted as a source of domestic law (*Portugal*);

Decisions of election commissions (on avenues of appeal – *Estonia*; in *Lithuania*, the Court examines the decisions made by the Central Electoral Commission or its refusal to adjudicate complaints concerning the violation of laws on elections in cases when such decisions were adopted or other deeds were carried out by the said

[24] A category which is now obsolete.

commission after the termination of voting in the elections of Members of the Seimas or the President of the Republic (the conclusion of the Constitutional Court of 5 November 2004), i.e. the Constitutional Court virtually investigates into the lawfulness of the act of the Central Electoral Commission (whether the Central Electoral Commission has not violated election laws);

Programs of the political parties, in respect of their constitutionality (*Croatia*, *the Republic of Macedonia*);

Statutes of political parties and civic associations, in respect of their constitutionality (*Republic of Macedonia*);

Norms contained in the articles of the associations public utility and in the regulations of associations of public utility or other private entities, where they enjoy delegation of authority on the part of the public entities (*Portugal*);

Norms emanating from competent bodies of the international organizations, and effective in the domestic legal order (*Portugal*).

6. a) Parliament and Government, as the case may be, will proceed without delay to amending the law (or another act declared unconstitutional) in order to bring such into accord with the Constitution, following the constitutional court's decision. If so, what is the term established in that sense? Is there also any special procedure? If not, specify alternatives.

6.a).1. If Parliament and Government, as applicable, proceeds to the amendment of the law (or another act) declared unconstitutional in the sense of bringing it in compliance with the Basic Law, according to the decision of the Constitutional Court.

The question of the measures by means of which the Parliament or the Government will bring an act declared unconstitutional in compliance with the Basic Law is a very complex one, considering the many particularities depending on subject matter and type of the constitutional review or effects of the decisions rendered by the Constitutional Court in conducting such review.

Certain Constitutional Courts make a distinction between the legislature's preventive action, concerting action or inaction, as being general ways of enforcement/compliance with constitutional review judgments, namely depending on the type of decision (if such acknowledges the unconstitutionality of a norm or a normative act, with the effect of invalidation or repeal, or if it confirms a legislative gap, or the unconstitutionality of a particular interpretation of the law), on the type of proceedings under which are rendered or the type of constitutional review – *a priori/a posteriori* and, respectively, *abstract/concrete*.

Generally speaking, without making any distinction based on the said criteria, the authorities will comply with the Constitutional Court's decisions. Even cases have been mentioned that mistakes are eliminated before the Constitutional Court adopts a decision, namely, after a particular case is initiated, the legislator, having established deficiencies in regulatory framework that serves as the grounds for submitting an application to the Constitutional Court, eliminates them by amending the contested

norm (e.g., *Latvia*).

However, the nature and timeliness of compliance measures may quite differ; under this aspect, a number of factors must be considered, mainly those related to the existence of specific deadlines and procedures regulated under the law and to the complexity of the issues raised by the reconciliation of the act declared unconstitutional with the provisions of the Constitution; in some situations, this process requires a longer period of time in order to find a solution.

There have been also cases of non-compliance with the decisions of the Constitutional Court (for example: *Croatia, Luxemburg, Poland, Romania*), which includes the incorporation of a legislative solution declared unconstitutional by the Court in the text of a new legal norm, as well as cases where such compliance is questionable[25] (for example, *Estonia*).

The Constitutional Court of *Croatia,* in regard to a case of non-execution of its decisions, affirms that, although this is a very rare case that happened in the last 20 years, it nevertheless shows that there are no legal mechanisms in the legal order of the Republic of Croatia which could force the Croatian Parliament or the Croatian Government to enforce the Court's decisions. However, the situation is quite different when some other bodies have the obligation to enforce a decision. In these cases Article 31 paragraph 3 of the Constitutional Act on the Constitutional Court applies, which stipulates "*the Government of the Republic of Croatia ensures, through the bodies of central administration, the execution of the decisions and the rulings of the Constitutional Court*".

Also other Constitutional Courts (for example, in the *Czech Republic, Italy, Poland*) indicate the lack of legal means in order to obligate the legislature to adopt new regulations.

Still, the Constitutional Court may sanction a normative act or norm if such has replicated a legislative solution declared as being unconstitutional. The Constitutional Court of *Romania* illustrates a case where, having observed that the unconstitutionality previously found was perpetuated in a new legal norm adopted by Parliament, has established that also the new act is unconstitutional (Decision no. 1018/2010[26]); taking into consideration its previous decision (no. 415/2010) and the Parliament's obligation to adjust the unconstitutional provisions with those of the Basic Law, the Court decided that "adoption by the legislature of norms contrary to what the Constitutional Court established by its decision, whereby it tends to maintain the legislative solution tainted by unconstitutionality flaws, is contrary to the Basic Law". Likewise, the Constitutional Court of Romania censured the legislative procedure used by the Government, in that the provisions of a normative act which had been repealed being declared unconstitutional – Government Emergency Ordinance no.37/2009 – continued to produce effects in the form of a new act - Government Emergency Ordinance no.105/2009 – which took over, with only insignificant changes, the entirety of initial provisions concerning the matter.

[25] Complying with a constitutional review judgment is seen questionable in the following situations: where the Legislature has not amended the provisions that have been declared unconstitutional in a judgment of the Supreme Court, but where the legislation has virtually been brought into compliance with the Constitution or where the legislation has been formally amended, but substantively the unconstitutional situation remains.

[26] Published in the Official Gazette of Romania, Part I, no. 511 of 22 July 2010.

On that occasion[27], the Court decided that such situation "calls into question the constitutional conduct, of a legislative nature, of the Executive in its relation to the Parliament and, last but not least, to the Constitutional Court."

In the report of the Constitutional Tribunal of *Poland* it is shown that the introduction of legislative amendments necessary to re-establish the integrity of the legal system, after the Tribunal repeals non-complying provisions, has represented a serious issue for years. The incompetence of the legislature in this respect impedes the efficiency of the Tribunal decisions and impacts adversely the authority of laws. However, it is mentioned that, recently, the situation has been improved. The introduction of a special procedure in the Senate – which seeks to monitor the Tribunal jurisprudence and to prepare specific legislative initiatives based on such monitoring – should be assessed as very beneficial.

6.a).2. Regulation of terms and procedures. Alternatives

In the majority of countries there is no special procedure or terms regulated under which the Parliament or the Government, as applicable, would have to amend an act, once it was declared unconstitutional, in the sense of harmonizing it with the Basic Law[28] in accordance with the decision of the Constitutional Court, and the conclusion is that, in practice, the actual manner and time interval of compliance with judgment by constitutional courts tend to remain at the discretion of the legislative.

But there are cases where such terms or procedures are regulated, either in Constitution or the normative acts on the organization and operation of the aforementioned authorities, or through laws on the organization and operation of Constitutional Courts. Many of the reports reveal in this context the possibility for the constitutional courts to postpone the entry into force of their decisions of unconstitutionality, which amounts to setting a deadline for the law-maker in order to bring the normative act into line with the Constitution. As for the terms established by the decisions of Constitutional Courts, their purpose is, in most cases, to grant the legislator the time necessary to take the measures required for eliminating a legislative gap or to regulate a specific issue in accordance with the Constitution. This happens because, as stated in some of the reports, the Constitutional Court may neither oblige the legislative to adopt a law, nor may it set terms for this purpose, considering the principle of separation of powers.

a) Terms and procedures regulated by the Constitution

According to Article 147, paragraph (1) of the Constitution of *Romania*, provisions of the laws and ordinances in force, as well as regulations which are held as unconstitutional, shall cease their legal effects within 45 days from publication of the decision rendered by the Constitutional Court if Parliament or Government, as may be applicable, have failed, in the meantime, to bring these unconstitutional provisions into accord with those of the Constitution. For this limited length of time the provisions declared unconstitutional shall be suspended as of right.

According to Article 125, section (3) of the Constitution of the *Slovak Republic*, if

[27] Decision no. 1257 of 7 October 2009, published in the Official Gazette of Romania, Part I, no. 758 of 6 November 2009; see also Decision no. 1.629 of 3 December 2009, published in in the Official Gazette of Romania, Part I, no. 28 of 14 January 2010.

[28] For example: *Armenia, Belarus, Cyprus, Croatia, Estonia, Latvia, Luxembourg, the Republic of Macedonia, Ireland, the Czech Republic, Monaco, Poland, Georgia*.

the Constitutional Court holds by its decision that there is inconformity between legal regulations, the respective regulations, their parts or some of their provisions shall lose effect. The bodies that issued these legal regulations shall be obliged to harmonize with the Constitution, with constitutional laws and with international treaties promulgated in the manner laid down by a law, and in cases stipulated by the Constitution also with other laws, governmental regulations and with generally binding legal regulations of Ministries and other central state administration bodies within six month from the promulgation of the decision of the Constitutional Court. If they fail to do so, these regulations, their parts or their provisions shall lose effect after six months from the promulgation of the decision.

b) Terms and procedures regulated by the Legislative's Standing Orders/Statute

In *Lithuania*, the Statute of the Seimas has had since 2002 a special chapter designed for implementation of the Constitutional Court rulings, conclusions and decisions, which provides for the procedure for implementation of the Constitutional Court rulings by which a certain legal act was recognised as conflicting with the Constitution and concrete terms for doing so. In order to secure that the rulings of the Constitutional Court be properly implemented and that a legal act, which is in conflict with the Constitution, be amended, one of the Deputy Speaker of the Seimas is appointed to be responsible for this procedure at the Seimas. The procedure of implementation of Constitutional Court decision may run till one-and-a-half year. Article 181^2 of the Statute of the Seimas provides that within a month after the receipt of a ruling of the Constitutional Court in the Seimas, the Legal Department of the Office of the Seimas shall submit to the Seimas Committee on Legal Affairs respective proposals on the implementation of this ruling, and the latter shall consider such not later than within 2 months after the receipt in the Seimas of this ruling. At the Seimas, a corresponding committee or a working group set up for this purpose must, not later than within 4 months, prepare and submit to the Seimas for consideration a draft amending that law (or a part thereof) or any other act (or a part thereof) being passed by the Seimas which is not in compliance with the Constitution. If a draft is complex, the Board of the Seimas may expand the time limit of its preparation, but not exceeding 12 months. It may be proposed that the Government prepare a draft amending the appropriate law (or a part thereof). Drafts for amending unconstitutional laws, prepared in order to implement rulings of the Constitutional Court, are deliberated and adopted in the parliament while following the general procedure of legislation established in the Statute of the Seimas. The legislator, while passing new or amending and supplementing the valid laws, may not disregard the concept of the provisions of the Constitution and other legal arguments which are set forth in rulings of the Constitutional Court.

In the same report it is also stated that, in actual practice there are also such situations where the legislator is granted more time than provided for in the Statute of the Seimas so that the corresponding amendments to the legal act (part thereof) recognised as conflicting with the Constitution could be made. This is possible when the Constitutional Court, in the same ruling wherein the legal acts is recognised as being not in line with the Constitution, postpones the official publishing of its own ruling. It means that the legal regulation continues to be in force until the official publishing of the Constitutional Court ruling, even though it was recognised to be in

conflict with the Constitution. The legislator, while being aware of the fact that from a certain day this legal regulation will become invalid, has an opportunity to discuss and prepare for its amendment in advance. The Constitutional Court may postpone the official publishing of its ruling if it is necessary to give the legislator certain time to remove the *lacunae legis* found. The said postponement of official publishing of the Constitutional Court ruling is meant in order to avoid certain effects, unfavourable to the society and the state as well as the human rights and freedoms, which might appear if the relevant Constitutional Court ruling was officially published immediately after its official announcement in the hearing of the Constitutional Court and if it became effective on the same day after it had been officially published (Constitutional Court rulings of 19 January 2005, 23 August 2005, 29 June 2010).

In *Romania,* the Chamber of Deputies amended its Standing Orders[29] in 2010, and introduced certain rules and deadlines as regards the procedure to be followed in the event that the Court has declared the unconstitutionality of legal provisions in an *a priori* or an *a posteriori* review. Thus, according to Article 134 of the Chamber of Deputies' Regulations, in cases of unconstitutionality of laws prior to their promulgation, and where the Chamber of Deputies was the first Chamber notified, the Standing Bureau, in its first meeting held after the publication of the Constitutional Court's decision in the Official Gazette of Romania, shall notify the Committee for Legal Affairs, Discipline, and Immunities and the specialized Standing Committee which was notified in first instance with the draft law or the legislative proposal, in order to reconsider the provisions declared unconstitutional. The same procedure applies also in the situation where the relevant provisions are remitted by the Senate, having acted as the first Chamber notified. The deadline set by the Standing Bureau for the report drafting by the mentioned committees may not be longer than 15 days, such report shall be included in the agenda on a priority basis, and adopted with the majority required by the ordinary or organic nature of the legislative initiative subject to re-examination. Upon re-examination, the necessary technical-legislative correlations will be done and, after adoption, said provisions are sent to the Senate, if the latter is the decision-making Chamber.

According to Article 134^2 of the Chamber of Deputies' Regulations, in cases of unconstitutionality of provisions of the laws and ordinances in force, as well as of those of Regulations which pursuant to Article 147 paragraph (1) of the Constitution cease their legal effects within 45 days from the publication of the Constitutional Court's decision (term during which these are suspended *de jure*), and in the event that the Chamber of Deputies was the first Chamber notified, the Chamber's Standing Bureau shall notify the Committee for Legal Affairs, Discipline, and Immunities, and also the specialized Standing Committee under whose scope of activity the respective legal norm falls, in order to review the provisions, thus harmonizing them with the provisions of the Constitution. The reviewed provisions shall be included in a legislative initiative, which is distributed to the Deputies and, after expiry of the 7-day deadline, inside which amendments may be submitted, the two committees shall, no later than 5 days, draft a report on that legislative initiative, which is taken for debate and adoption by the Plenary of the Chamber of Deputies. Such legislative initiative must be adopted with the majority required by the nature of the legal norm in question and thereafter sent to the Senate.

[29] Resolution no. 14/2010, published in the Official Gazette of Romania, Part I, no. 397 of 15 June 2010.

c) Terms and procedures regulated by the Law on the organization and operation of the Constitutional Court

For instance, in the *Russian Federation*, Article 80 of the Federal Constitutional Law «on the Constitutional Court of the Russian Federation» regulates this issue as follows. In the event that a provision of a federal constitutional law or a federal law (or several such provisions) has been found unconstitutional in its entirety or partially by a decision of the Constitutional Court, or if a need to eliminate a lacunae in legal regulation proceeds from a decision of the Constitutional Court, the Government of the Russian Federation shall, not later than three months after publication of the decision of the Constitutional Court, introduce to the State Duma a new draft federal constitutional law, or a new draft federal law, or several linked new draft laws, or a draft law amending the law found partially unconstitutional. The said draft laws shall be considered by the State Duma extraordinarily. If a provision of a normative act of the Government of the Russian Federation has been found unconstitutional in its entirety or partially by a decision of the Constitutional Court, or if a need to eliminate a lacunae in legal regulation proceeds from a decision of the Constitutional Court, the Government of the Russian Federation shall, not later than two months after publication of the decision of the Constitutional Court, abrogate its normative act and either adopt a new normative act or introduce amendments and/or supplements to the normative act found partially unconstitutional.

In the *Republic of Moldova,* the obligation of public authorities to reach compliance of the laws and other legal norms or of parts thereof that have been declared unconstitutional, with the Constitution is expressly regulated by the Law on the Constitutional Court. According to Article 28^1 paragraph (1) of the Law, the Government, within maximum 3 months from the publication date of the Constitutional Court's decision, submits to the Parliament the draft law amending and supplementing or repealing a normative act or its parts that were declared unconstitutional. The draft law shall be examined by the Parliament on a priority basis. Paragraph (2) of the same article sets forth that the President of the Republic of Moldova or the Government, within maximum 2 months from the publication date of the Constitutional Court's decision, shall amend and supplement or repeal the act or its parts declared unconstitutional and, as applicable, shall issue or adopt a new act. In the event that the Constitutional Court, in examining a case, confirms the existence of gaps in the legislation, due to failure to observe specific provisions of the Constitution, it shall first draw the attention of the relevant bodies, through a letter. The Constitutional Court's observations regarding the gaps (omissions) existing in norms due to the non-observance of certain constitutional provisions, as are mentioned in its letter, are to be examined by the authority concerned, which shall duly inform the Constitutional Court on the examination results, within maximum 3 months.

d) Terms and procedures regulated by other special laws

In *Romania*, Law no. 590/2003 on Treaties[30] specifies in Article 40, paragraph (4), second sentence that if the Constitutional Court, in fulfilling its review powers, decides that the provisions of a treaty which is in force are unconstitutional, the Ministry of Foreign Affairs, together with the ministry or institution under whose jurisdiction falls

[30] Published in the Official Gazette of Romania, Part I, no. 23 of 12 January 2004

the main area regulated by that treaty, shall take steps, within 30 days, to initiate the necessary procedures for the treaty renegotiation or validity termination as against the Romanian party or, as applicable, for the revision of the Constitution.

e) Terms set by the Constitutional Court decisions

The Constitutional Court of the *Republic of Slovenia*, if it finds that a law, other regulation or a general act issued for the exercise of public authority is unconstitutional or unlawful as it does not regulate a certain issue which it should regulate or it regulates such in a manner which does not enable annulment or abrogation, adopts a declaratory decision on such pursuant to Article 48 of the CCA. The legislature (or the authority which issued such unconstitutional or unlawful regulation or general act issued for the exercise of public authority) must remedy the established unconstitutionality or unlawfulness within a period of time determined by the Constitutional Court. The time limit determined by the Constitutional Court depends on the circumstances of the case at issue, and may be a six-month or one-year period in which the legislature must remedy the unconstitutionality or unlawfulness.

For example, in Decision No. U-I-207/08, Up-2168/08, dated 18 March 2010 (Official Gazette of the Republic of Slovenia No. 30/10), the Constitutional Court, upon establishing that Article 25 of the Act Regulating the Protection of the Right to a Trial without Undue Delay was inconsistent with the Constitution, as it did not regulate the status of the injured parties for whom the violation of the right to a trial without undue delay ceased before 1 January 2007, but who did not claim just satisfaction before an international court by this date, the Constitutional Court ordered the legislature to remedy the established inconsistency within six months following the publication of this decision in the Official Gazette of the Republic of Slovenia. In Decision No. U-I-411/06, dated 19 June 2008 (Official Gazette of the Republic of Slovenia, No. 68/08, and OdlUS XVII, 43), the Constitutional Court found that the seventh paragraph of Article 128 of the Aviation Act was inconsistent with the Constitution to the extent that it determines that in addition to the personal data listed in the Aviation Act, also other personal data may be processed. The Constitutional Court ordered the legislature to remedy this inconsistency within one year of the publication of this decision in the Official Gazette of the Republic of Slovenia. Article 142 of the Rules of Procedure of the National Assembly determine that the National Assembly as the legislature may adopt amendments to laws related to proceedings before the Constitutional Court or the decisions of the Constitutional Court (i.e. even when the Constitutional Court found an unconstitutionality regarding the reviewed law) by the shortened procedure. The legislative procedure usually entails three readings, whereas in the shortened procedure the second and the third reading are held at the same session. A special feature of the shortened procedure is that no general debate on the draft law is held. Amendments may be tabled directly at the session up until the beginning of the third reading of the draft law.

In the *Republic of Belarus*, the Constitutional Court, in some of its decisions, set a term for their execution. For example, in 1998 an interdepartmental act of the Ministry of Social Security and the Ministry of Labour was subject to the Constitutional Court review. The Court had to adjudicate upon the types of payments that were not charged with state social insurance contributions. In its judgment of September 24, 1998 the Court set a date (January 1, 1999) from which the rules deemed unconstitutional should not be applied. So, the Parliament had to bring the legislation on state social insurance in accordance with the Constitutional Court judgment by December 31, 1998.

In *Hungary*, within the *ex post facto* review, if the Constitutional Court establishes, *ex officio* or upon anyone's petition that a legislative organ failed to fulfil its legislative tasks issuing from its lawful authority, thereby bringing about the unconstitutionality, it instructs the organ which committed the omission, setting a deadline, to fulfil its task. The Act on the Constitutional Court does not contain sanction, it only prescribes that the organ which committed the omission shall fulfil the task by. The Act on the Constitutional Court does not contain sanction, it only prescribes [§49 subsection (2)] that the organ which committed the omission shall fulfil the task by deadline. Furthermore, the Act on the Constitutional Court renders possible that the Constitutional Court may set a different time for an unconstitutional law to become ineffective or for its applicability in a particular case, if this is justified by the interest in legal certainty or a particularly important interest of the entity initiating the proceedings [§43 subsection (4)].

Similarly, in the *Czech Republic*, the Act on the Constitutional Court states, in § 58 par. 1, that judgments (which annul a legal regulation or part thereof) are enforceable on the day they are published in the Collection of Laws, unless the Constitutional Court decides otherwise. Thus, in order for the Constitutional Court to limit the creation of gaps mentioned above, it often defers the enforceability of its judgments, in order to provide the legislature sufficient time to adopt a new legal regulation that will reflect the Constitutional Court's decision and remove the unconstitutional state of affairs. If the Constitutional Court decides to postpone the enforceability of a judgment in which it annuls a legal regulation or part thereof, its decision on the length of such deferment is influenced primarily by considerations of the complexity of the legal framework to be replaced and the complexity of the legislative process. In general, enforceability can be deferred for up to 18 months.

In *Austria*, the Constitutional Court may set a deadline for the respective normative legal act's expiration which must not exceed 18 months. The normative legal act continues to apply to circumstances realised before the repeal (with the exception of the case that gave reason for it), unless the Constitutional Court in its judgment decides otherwise.

In *Poland*, for the similar reasons as mentioned above, the Tribunal may defer the date at which the provision, on the unconstitutionality (illegality) of which the Tribunal has adjudicated, loses its binding force [the first sentence *in fine* of Article 190 paragraph (3) of the Constitution]. In the case of laws, such period of deferment may not exceed 18 months, counted from the day of publication of the relevant judgement, and with regard to other types of normative acts under examination – it may be no longer than 12. The report also mentions a special procedure that has only been set out in the Rules and Regulations of the Senate (Articles 85a to 85 f of the Resolution of the Senate of the Republic of Poland of 23 November 1990 – The Senate Rules and Regulations[31]). In accordance with that procedure, judgements of the Tribunal are referred, by the Marshal of the Senate, to the Senate Legislation Committee. Next the Committee examines whether it is necessary to take legislative measures in the given area (e.g. in order to eliminate gaps and inconsistencies in the legal system). After considering the matter, the Committee submits, to the Marshal of the Senate, a motion

[31] These provisions, collected in Section IXa entitled "Execution of Judgments of the Constitutional Tribunal", were added to the Rules and Regulations of the Senate, pursuant to Article 1(3) of the resolution of the Senate of 9 November 2007.

to adopt a legislative initiative or informs the Marshal of the Senate that there is no necessity for taking legislative measures. On the basis of the motion of the Legislation Committee, the Senate may refer an appropriate legislative initiative to the Sejm. However, the Sejm may reject the initiative of the Senate.

In order to draw the legislator's attention to the need for amending defective normative solutions, the Tribunal additionally is entitled to: express, in the reasoning for its judgement, the need for enacting amendments which would restore the integrity of the legal system; to issue signalling decisions and to include relevant observations in the annual publication entitled "*Information on Substantial Problems Arising from the Activities and Jurisprudence of the Constitutional Tribunal*".

In the same way, in *Bosnia and Herzegovina*, according to the Rules of the Constitutional Court, a time-limit may be set for the harmonization of the law which is declared unconstitutional by the Constitutional Court, which shall not exceed 6 months.

In *Latvia*, when the Court recognizes a contested norm or act as null and void as from a certain date in future, pursuant to Article 32 (3) of the Constitutional Court Law, the Court may establish another date when contested norms recognized as non-constitutional loose force. The Court usually gives the legislator time to solve the situation if immediate repealing of the norm would cause a worse or inadmissible situation. Usually the legislator is given the term of 6 month to prevent all deficiencies established.

In *Turkey*, the provisions of the laws that have been annulled by the Constitutional Court cease producing effects as from the publication date of the motivated annulment decision in the Official Journal. If the Court deems necessary, it may also decide the date on which the annulment decision comes into force, a date that may not be later than one year from the publication date of the decision in the Official Journal.

In *Ukraine*, where necessary, the Constitutional Court may determine in its decision or opinion the procedure and terms of their execution and oblige appropriate state bodies to ensure execution of the decision or adherence to the opinion. Also, in accordance with Article 70.3 of the Law of Ukraine "On the Constitutional Court of Ukraine" the Constitutional Court has the right to demand from bodies stated in this Article a written confirmation of execution of the decision or adherence to the opinion of the Court.

6. b) Parliament can invalidate the constitutional court's decision. Conditions.

The Constitutions of the various States or their infraconstitutional legislation do not confer to either Parliament or to any other public authority the competence to invalidate decisions of the Constitutional Courts.

In some cases there had existed such a possibility for the Parliament, but that was eliminated, and the Constitution amended in that sense.

In *Poland*, for example, in the period from 1985 (the year of establishing the Constitutional Tribunal) until 1997 (the year of enactment of the present Constitution) the judgments of the Tribunal could be subject to rejection by the Sejm. This was a consequence of the assumption, adopted in the communist doctrine of the constitutional law, that the Sejm was the supreme organ in the area of state authority, superior to all other state bodies (including courts and tribunals). Pursuant to Article 7 of the Act of 29 April 1985 on the Constitutional Tribunal (no longer binding today), the Sejm had the competence to reject a given judgment of the Tribunal on the unconstitutionality of a

statute if - in the view of the Sejm – the said statute did not infringe on the Constitution. The resolution of the Sejm on the rejection of the Tribunal's judgment required a majority vote of at least two-thirds in the presence of at least half of the statutory number of Deputies. The Sejm had no competence to reject a judgment of the Tribunal if it stated the unconstitutionality of a legal act of lower rank than a statute (such judgments were final). The situation changed with the entry into force of the Constitution of 1997. The situation changed with the entry into force of the Constitution of 1997. Since then the Sejm has had no power to reject the Tribunal's judgments. In accordance with Article 190(1) of the Constitution of 1997, all judgments of the Tribunal have become final in the sense that they may not be challenged or rejected by any other organ of public authority. They are of universally binding application, which entails that they bind all organs of public authority – including the Sejm.

Similarly, in *Romania*, that possibility was provided by the 1991 Constitution which, prior to its revision in 2003, established, in Article 145 paragraph (1), that *"In unconstitutionality situations confirmed in compliance with Article 144, letters a) and b), the law or regulation shall be sent for reexamination. If the law is adopted in the same form by a majority of at least two thirds of the number of members of each Chamber, the unconstitutionality objection is eliminated, and promulgation becomes mandatory"*. This provision of the 1991 Constitution, justifiably much criticized in the legal doctrine, allowed for the Parliament to act as a court of cassation in a dispute where it was a party. It was thus possible that an unconstitutional law could become constitutional by the will of a qualified majority of Deputies and Senators, however without a revision of the Constitution undergoing all stages and fulfilling the procedures provided for this specific purpose. Following the 2003 revision of the Constitution, the possibility for Parliament to invalidate a decision of the Constitutional Court was eliminated, so that all decisions of the Constitutional Court are, according to Article 147 paragraph (4) of the Constitution, generally binding.

As shown in some of the reports, even though Parliament is not conferred the competence to invalidate a decision of the Constitutional Court, it may nonetheless, in exercising its constituent powers, revise the Basic Law in such manner as to allow to overcome the effects of a decision of the court of constitutional jurisdiction.

For example, in *Slovenia*, the Constitutional Court held in Decision No. U-I-12/97, dated 8 October 1998, that the legislature must enact a majority voting system for elections of deputies to the National Assembly in accordance with the outcome of the referendum, and the National Assembly subsequently amended Article 80 of the Constitution and determined that the deputies are elected on the basis of the principle of proportional representation (i.e. by means of a proportional voting system).

The *Spanish* Constitutional Tribunal stated in 1992 that the right granted to European citizens under the Treaty of the European Union – signed in Maastricht, to be elected to the governing organs of the local communities was contrary to the Spanish Constitution (Article 13 of the Constitution of Spain: Declaration 1/1992 of 1st July). In order to be able to ratify the Treaty of Maastricht, the Parliament had to revise the constitutional provisions. The reform of 1 August 1992, the first – and for now the only amendment of the constitutional text – was the only way to overcome the objection raised by the Constitutional Tribunal.

In that regard, the Constitutional Court of *Austria* mentions that, in principle, Parliament cannot invalidate a decision of the Constitutional Court, it may, however, enact a new law which might possibly be unconstitutional as well. In this case, the Constitutional Court may review the law again. Since compared to other states, the

Austrian Constitution can be easily amended (the only requirement are the presence of at least half of the members of the National Council and a two thirds majority of the votes cast), there occurred in the past that Parliament (re)enacted a repealed law again in the form of a law amending the Constitution. This practice has been criticised repeatedly by legal doctrine and does not occur often (any more). However, in such a case the Constitutional Court also examines whether the constitutional law possibly entails a total revision of the Constitution. In one specific case the Constitutional Court invalidated a constitutional provision by which constitutionally guaranteed rights were temporarily abrogated for a specific field of law (public procurement), and, as a result, the authority of the Constitutional Court's review undermined.

Particular aspects are stressed upon in the report of the Constitutional Tribunal of *Spain*, which makes a distinction in what concerns the possibility that Parliament invalidates its decisions, based on the object of the constitutionality review or on the ground for unconstitutionality. In that sense, when the Constitutional Tribunal does not declare that the law, but its interpretation and application by the courts is contrary to the Constitution, it is always possible to revise the laws that gave rise to such disaccord in case-law, and the new law may specifically establish the norm that the judicial organs had deducted from previous legislation. Also, if the Constitutional Tribunal declares nullity on grounds related to formal flaws (competence or procedure) or if it interprets a law in its sense according to the Constitution, its decision does not prevent the legislature to amend the law, with the procedure prescribed by the Constitution. Therefore, in such cases, it is possible that the legislature establish a norm different from the one deducted by the Constitutional Tribunal from a previous reading of the law, in light of the Constitution.

7. Are there any institutionalized cooperation mechanisms between the Constitutional Court and other bodies? If so, what is the nature of these contacts / what functions and powers shall be exerted on both sides?

7.1. General aspects

Having examined the institutionalized cooperation mechanisms between the Constitutional Court and other bodies, as revealed by the reports which confirm the existence of such leverage, it can be noted that, in essence, they envisage either application of conjunct competencies, as are established by the Constitution and laws, or individual duties and prerogatives of a specific body or authority or, in a broader sense, the area of research or international collaboration.

The following are mentioned as institutionalized cooperation mechanisms, in relationship to: creation of the Constitutional Court; procedure before the Constitutional Court; other cooperation forms with various bodies in fulfilling their competencies; optimization of the legal order; participation of the Court, its judges or President as members in various bodies or organizations.

7.2. Creation of the Constitutional Court

Judges of the Constitutional Courts are appointed or elected by State authorities, according to a specific procedure,[32] which is regulated by the Constitution or by the Law on the Organization and Operation of the Constitutional Court.

[32] See the answer to question 1 of the Questionnaire.

7.3. Participation in the procedure before the Constitutional Court within the exercise of its powers

Such implication materializes in:

a) referral to the Constitutional Court by the bodies established under the Constitution or law, respectively, in order to review constitutionality of specific legal norms (e.g. *Armenia, Belarus, Belgium, the Czech Republic, Italy, Romania, Poland, Serbia, Slovakia, Ukraine*; in this context, one should underline the specific form of collaboration existing between the Constitutional Court and the courts of ordinary jurisdiction in the procedure concerning exceptions of unconstitutionality, as emphasized, for example, in the reports of the Constitutional Court of *Italy*, and *Romania*)[33];

b) referral to the Constitutional Court for exercising another of its prerogatives (for example, in *Belarus*, upon referral by the President of the Republic, the Constitutional Court presents its conclusions in relation to the existence of acts of blatant systematic violation of the Constitution by the Chambers of the National Assembly. When referred by the Presidium of the Council of the Republic of the National Assembly, the Constitutional Court shall also decide upon the existence of acts of blatant systematic violation of the provisions of laws by the local councils; in *Slovakia*, the Constitutional Court conducts the disciplinary procedure against the President of the Supreme Court of the Republic of Slovakia, the Vice-president of the Supreme Court and the General Prosecutor; also, it gives a consultative approval for the initiation of criminal proceedings against or preventive arrest of a judge or of the General Prosecutor; in *Ukraine*, the bodies of the state power set forth by law and bodies of local autonomy may apprise the Constitutional Court in respect of issues of official interpretation of the Constitution and laws of Ukraine; also, the Verkhovna Rada of Ukraine is entitled to a constitutional petition on issues of observance of the constitutional procedure of investigation and consideration of case of the removal of the President of Ukraine from office in order of *impeachment* (Articles 111, 151 of the Constitution of Ukraine, Articles 13, 41 of Law of Ukraine "On the Constitutional Court of Ukraine"). Granting to the Verkhovna Rada of Ukraine of such conclusion by the Court is the obligatory constituent of the procedure of impeachment. In order to create the preconditions for the adoption of the mentioned conclusion by the Constitutional Court of Ukraine, judges of the Constitutional Court of Ukraine (not more than three persons) are invited to the hearing of the special temporary investigative commission related to the investigation it conducts (Article 175 of the Rules of Procedure). Upon their appeal they are given the floor at the meeting of the special temporary investigative commission for comments concerning violations of the constitutional procedure of investigation, etc.[34]

c) filing of memoranda or opinions in cases pending before the Constitutional Court, upon request/notification by the Court (for example, *Belgium, the Republic of Macedonia, Romania, Serbia*);

d) participation, in determined cases, in proceedings before the Court (for example, in the *Republic of Macedonia*, in the procedure upon a request for the protection of the freedoms and rights, the Constitutional Court compulsory summons the Ombudsman at

[33] See the answer to question 3 of the Questionnaire.
[34] See also the answer to question no. 5 of the Questionnaire.

the public debate, and upon need it may also summon other persons, bodies or organizations; in *Portugal*, the General Prosecutor participates in the procedures before the Tribunal, as may be appropriate in a specific case. Therefore, the General Prosecutor can make submissions during the written stage of the procedure, then take part in the public hearing, and the viewpoints submitted are usually deemed of particular significance; in the *Russian Federation*, there are plenipotentiary representatives of the President of the Russian Federation, the Federation's Council, the State Duma, the Government of the Russian Federation, the Ministry of Justice of the Russian Federation and of the General Prosecutor's Office of the Russian Federation who participate in the proceedings conducted before the Constitutional Court);

e) the obligation of public authorities and any other persons to provide, upon request by the Constitutional Court, information, documents or deeds held by them, as required by the Constitutional Court in order to fulfil its powers (for example, *Armenia, the Republic of Macedonia, the Republic of Moldova, Portugal, Romania, the Russian Federation, Slovakia, Ukraine*) .

In some cases, the information so requested may concern even the manner of interpretation of a legal norm, in jurisprudence or in the legal doctrine – thus, in countries such as *Portugal*, the Constitutional Tribunal may demand information concerning the interpretation of the legal provisions subject to review in the case-law of the Supreme Court and the Superior Administrative Court.

In *Romania,* the Regulations on the Organization and Operation of the Constitutional Court establish that the judge-rapporteur may request specialized consultancy from individuals or institutions, based on prior approval from the President of the Court.

Such cooperation of the State authorities and organisations exercising a public function with the Constitutional Court is not an option but an obligation, being related to the exercise of constitutional jurisdiction functions. In that regard, the Law on the Constitutional Court of the *Republic of Serbia* sets forth that any failure of a public authority or of a person in charge of providing the Court, within the set term, with the appealed document, the requested documents, the relevant data or information necessary during the proceedings and for rendering the Court decision, as well as an omission of other State and public authorities, of organisations exercising public functions, of natural persons or legal entities to provide, within the set deadline, the data and information relevant for conducting the Court proceedings and for rendering the decision represents a misdemeanour and is sanctioned by a fine payment. Likewise, Article 40 of the Law of the *Republic of Armenia* "On the Constitutional Court" prescribes that in case of not meeting or not proper meeting of the requirements of the Constitutional Court or avoiding doing those or breaking the timeframes the Constitutional Court can hold liable the officials of those bodies in the procedure prescribed by Law. Holding accountable is not releasing from the responsibility to meet the requirements of the Constitutional Court. For the actions or inaction described in this Part the natural persons and the head of legal persons can be fined in the amounts determined by Law. Not meeting or not proper meeting of the requirements of the Constitutional Court or avoiding do those or breaking the timeframes set forth by the Constitutional Court once more after the liability measures taken shall cause a criminal charge.

7.4. Other forms of cooperation with various bodies, in fulfilment of their duties and prerogatives

The following can be enumerated:

a) cooperation with the Government Agent representing the State in the proceedings before the European Court of Human Rights, in compliance with the Convention for the Protection of Human Rights and Fundamental Freedoms, where the respective State is a party (providing of information, documents or copies of the requested documents, drafting of conclusions and reports in order to answer *de facto* and *de jure* matters related to the alleged violation of the Convention, organization of direct consultations – see for this purpose the report of the Constitutional Court of the *Czech Republic*);

b) relations with the administration in charge of publication of the Official Gazette of the State, in view of fulfilling the duty for the official publication of the decisions (thus, in *Spain*, the Constitutional Tribunal cooperates with the Ministry of the Presidency [the Government], to which the Official Journal State Agency is subordinated, but also directly with the Agency. Ever since 1982, the Tribunal has concluded collaboration agreements with the body that ensures publication of the State's Official Journal, in order to arrange dissemination of the constitutional doctrine;

c) obligation of the Constitutional Court to inform/communicate its rendered decisions to the authorities established by law (for example, *Belgium, Switzerland, Romania*);

d) obligation of State authorities to enforce decisions of the Constitutional Court (for example, in *Croatia*, Article 31, paragraph 3 of the Constitutional Act on the Constitutional Court, which specifies that „*The Government of the Republic of Croatia ensures, through its central administration bodies, enforcement of the decisions and rulings of the Constitutional Court*".

e) approval of the Constitutional Court's budget[35].

7.5. Cooperation mechanisms aimed at optimization of the legal order

For example, in *Armenia*, according to Article 67 of the Law of the Republic of Armenia „On the Constitutional Court", the Court publishes a report about the situation on executing its decisions at the end of each year. It is sent to the relevant state and local self-government bodies. Also noteworthy is that the RA National Assembly has formed a separate working group from Deputies to prepare suggestions on necessary legislative amendments based on the decisions rendered by the Constitutional Court.

In *Belarus*, one of the forms of cooperation of the Constitutional Court with the President and the Legislative is the Court's annual message on constitutional legality in the State, which is adopted on the basis of verified materials. Such messages foster the optimisation of legal order; moreover, with a view to either fill gaps and settle conflicts of law as well as provide for optimum legal regulation or establish unified law-enforcement the Constitutional Court is entitled to submit proposals to the President, the Houses of Parliament, the Government and other state authorities according to their competence on the required changes and (or) additions to acts of legislation or on the adoption of new normative legal, respectively.

The *Swiss* Federal Supreme Court drafts an annual management report intended for the Parliament, which also contains a section entitled „Indications to the attention of the legislature." In this section, the Tribunal may flag the inconsistencies existing in

[35] See the answer to Question no. 2 of the Questionnaire

legislation or its findings regarding the unconstitutionality of federal norms. The report is then taken to discussion in the specialized commissions of Parliament, which may subsequently initiate the necessary legislative amendments, in order to harmonize the provisions of these federal norms with the Constitution.

In *Germany*, following a long-standing tradition, the Federal Constitutional Court meets at roughly two-year intervals with the Federal Government and meets the Presidium of the *Bundestag* and the chairpersons of the parliamentary groups in the *Bundestag* for a general exchange of information once per legislative term; however, it is very closely observed that ongoing or foreseeable sets of proceedings and legal issues relating to such sets of proceedings are not discussed at these meetings.

In *Serbia*, according to Article 105 of the Law on Constitutional Court, "*The Constitutional Court shall bring to the knowledge of the National Assembly the situations and issues occurred in ensuring constitutionality and legality in the Republic of Serbia, shall issue opinions and shall indicate those cases where adoption and amendment of legislation is necessary or any other steps required for defending constitutionality and legality".*

7.6. Participation of the Court, its judges or its President as members in various bodies or organizations, as applicable

For example, in *Estonia*, the Chief Justice of the Supreme Court is a member of the Council for Administration of Courts. The Council attends to general issues of the administration of justice and issues of the courts of the first and second rank, but does not decide or discuss matters concerning the Supreme Court or the Constitutional Review Chamber.

In *Romania*, according to the provisions of Article 48 of the Regulations on the Organization and Operation of the Constitutional Court, the Court establishes cooperation relations with similar authorities from abroad and may become a member of international organizations in the area of constitutional justice.

7.7. Other forms of cooperation

In their reports, some Constitutional Courts[36] (*Albania, Andorra, Cyprus, Croatia, Luxembourg, France, Ireland, Lithuania, Latvia, Turkey*) point to the fact that normative acts have not established any institutionalized cooperation mechanisms between the Constitutional Court and other bodies.

This notwithstanding, certain forms of cooperation with other institutions or unofficial contacts among institutions have been mentioned, such as, for example, those set forth in point 5 of Article 46 of the Law on the Constitutional Court of the *Republic of Armenia*, according to which, "*Representatives of the President of the Republic, of the National Assembly, of the Government, and of the Court of Cassation, of the Ombudsman, or of the Chief Prosecutor interested in participating in sessions of the Constitutional Court, may submit an application for this purpose to the Constitutional Court and may receive the documents and deeds of the case under review in advance. Also, they may bring clarifications related to the questions asked by the Constitutional Court in a status of invitees to the case hearing*"; in *Azerbaijan,* close contacts between the Constitutional Court and the Ombudsman of the Republic; in *France*, the memoranda of understanding with State authorities (the Presidency of the Republic, the

[36] Supreme Courts, or Constitutional Council, as applicable.

Prime Minister, the Presidency of the National Assembly, and the Presidency of the Senate), which allow for an electronic exchange of documents within proceedings of referral and notification of the file items and of the decisions; while in *Turkey*, occasional cooperation of the Constitutional Court with a series of national public bodies, including the Judicial Academy, universities, some international organizations and other high courts (the High Court of Appeals, the Council of State), contacts that are limited, in general, to symposiums, specific projects etc.

Others have also invoked the spirit of cooperation which is characteristic of constitutional institutions and determines, where necessary, a joint cooperation among different bodies based on mutual respect for their sphere of responsibilities and functions, as well as more or less formal contacts established for the purpose of representation and exchange of ideas, or the participation of members of the Court in workshops and conferences (see the reports of the Constitutional Courts of *Austria* and *Hungary*).

II. RESOLUTION OF ORGANIC LITIGATIONS BY THE CONSTITUTIONAL COURT

Professor Iulia Antoanella MOTOC, PhD in Law, judge of the Constitutional Court
Cristina TURCU, assistant-magistrate
Ioana Marilena CHIOREAN, assistant-magistrate

Introduction

Each Constitution, as the basic law of a State, has the specific regulatory object of organising public powers and regulating the relationships between them, by establishing the State's bodies, by establishing both their composition and the appointment procedures and by establishing the competencies of public authorities and the relationships between them. As Thomas Paine[37] stated, "A Constitution precedes a government; a government is only a brainchild of the constitution," and a constitution establishing a governing also commands both substantial and procedural limits in the exercise of power by such government.

In exercising the duties and jurisdiction specific to the unitary or federal character of the State, such State bodies may, vertically or horizontally, generate legal disputes resulting from legal acts or from the deeds, actions or omissions thereof. As mentioned in Germany's Report, the resolution of disputes between organs *(Organstreit)* is not intended to reconcile subjective rights but rather to clarify the competence system set up by the Constitution.

In most States, such legal disputes are settled by the constitutional courts except for the following states: *Denmark, Ireland*[38]*, Luxembourg, Monaco*[39]*, Norway* and *Turkey*, where such a procedure does not exist.

The analysis of all national reports shows that the control exercised by the constitutional court as regards legal disputes between authorities is not intended to secure their rights but to settle such disputes primarily in order to ensure compliance of the State bodies' conduct with their competence as stipulated in the Constitution, for a good functioning of the State based on the separation of its powers and, finally, for safeguarding the supremacy of the Constitution in a State governed by the rule of law.

1. What are the characteristic traits of the content of organic litigations (legal disputes of a constitutional nature between public authorities)?

In the States where the constitutional court settles legal disputes between institutions, the following main features can be identified depending upon the nature, object, parties and legal grounds of the dispute as well as upon the character of the constitutionality review:

---

[37] Writings of Thomas Paine, Vol.II (1779-1792): The Rights of Man, p.93.

[38] Its Report points out that, if the Government, a state body or a public body exceeds its constitutional or legal responsibilities, any person injured by the act issued by such body may turn to the courts of law.

[39] Where the relationships between the Prince, the Government and the National Council are "government acts," therefore they are exempted from any jurisdictional control.

a) As regards the **nature of the dispute**, it has to be a *legal dispute,* not a political one. Therefore, in all States, the settlement of institutional disputes is not a political, but a jurisdictional procedure. For instance, in *Germany*[40], the political minority uses the settlement procedure of the litigation between constitutional bodies in the attempt of asserting its rights against the majority, the disputes between organs being a crucial instrument of the opposition; in *Lithuania*, the submission of such applications to the Constitutional Court is sometimes used as a legal instrument of political struggle, for instance whenever the opposition seeks to prove that the governing forces adopt acts contrary to constitutional norms or when it seeks to prevent the adoption of certain decisions.

b) As regards the **object of the dispute,** the analysis of the reports reveals the necessity to make a classification according to the structure of the public authority in that State and the specific ties between the "whole" and its "parts," as follows:

- in the case of a unitary state, there may be:
  - *disputes of jurisdiction – horizontally* – between the State bodies. They can be *positive* (when one or several authorities assume powers, duties or jurisdiction incumbent on other bodies) or *negative* (when public authorities decline their jurisdiction or refuse to carry out actions that are amongst their duties), these being the most common ones, which occur in all States, for instance in *Portugal, Serbia, Slovenia, Slovakia* and *Ukraine;*
  - *disputes of jurisdiction – vertically* – between central State bodies and regions, or disputes between regions in *Italy*, or disputes of jurisdiction between central bodies and local autonomous entities, in the *Czech Republic, Montenegro, Serbia, Ukraine*;
  - *disputes related to the defence of local autonomy;* it is the case of *Croatia*, where each local or regional autonomous entity may turn to the Court whenever the State, by its decision, infringes the right to local or regional autonomy secured by the Constitution[41]; furthermore, Article 161 of *Spain*'s Constitution regulates the disputes for the defence of local autonomy or statutory autonomy, which allows the Municipalities, General Councils or other local bodies to defend their autonomy against the laws of the State or of own Autonomous Communities[42].
- in the case of a federative State, there may be *federal disputes* (between the State and the bodies of the entities – communities/regions/ cantons/lands) or between the bodies of the entities themselves, as well as *legal disputes/institutional disputes at the state level* – between the federative State's institutions. This is the case of *Austria, Belgium, Bosnia and Herzegovina, Germany, Russia* and *Switzerland*.

Another feature regarding the object of legal disputes between state bodies – in the

[40] According to the Federal Constitutional Court, the dispute between organs procedure is intended to protect the rights of the state organs in their relationships with one another, but not in terms of general constitutional "supervision" (BVerfGE 100, 266 <268>).

[41] In addition, if the representative body of a local or regional autonomous entity considers that a law regulating the organisation, responsibilities or financing of local and regional autonomous entities does not comply with the Constitution, it can appeal to the Constitutional Court to examine the constitutionality of the law or provisions thereof.

[42] The recent Organic Law 1/2010 of 1 February also stipulates the possibility of settling a dispute for the defence of the statutory autonomy of the historical territories of the Basque Autonomous Community.

States where the constitutional court has an express duty thereupon – is that such cannot envisage violations of fundamental rights and cannot serve as an avenue in order to exercise the constitutionality review of normative acts. This is the case with *Germany*[43], *Ukraine, Romania, Italy* and *the Czech Republic*. Excepted from this rule are *Bosnia and Herzegovina, Albania* and *Ukraine*.

From among other States, in which the constitutional court indirectly sees to the observance of the rules of separation of competencies *via* the constitutionality review, *Portugal's* example is noteworthy, because tends to avoid that the constitutional court should turn itself into a super-court authorised to regulate State institutions or into an arbitrator.

Also a feature related to the object of the dispute is that, in most of the States, such procedures cannot handle conflicts of jurisdiction. For instance, in *Spain* the disputes opposing the executive authorities to the ordinary courts have a specific means for settlement, i.e. the jurisdiction conflicts which are settled by the Tribunal for Jurisdiction Disputes[44]. In the *Czech Republic*, such jurisdictional disputes concerning authority to decide/issue a resolution, where the parties involved are courts and autonomous, executive, territorial, interest-based or professional bodies, or courts in civil proceedings and administrative courts, shall be examined and settled by a special panel made up of three judges from the Supreme Court and three judges from the Supreme Administrative Court. An exception from this rule can be seen in *Slovenia,* where the Constitutional Court decides upon jurisdictional disputes between courts and other state authorities, and in the *Republic of Macedonia*.

c) As regards **parties to the dispute**, they always have to be State bodies. However, depending upon the structure of the public power in the State and also the type of dispute, these may be central state bodies (in *Italy, Germany, the Republic of Macedonia, Montenegro, Poland, Serbia, Slovakia*), local bodies (*Romania, the Republic of Macedonia* and *Slovakia*), autonomous territorial bodies (*Spain, Croatia, Italy, Serbia, the Czech Republic, Ukraine*) or the bodies of the entities in federative states (in *Russia, Germany, Switzerland* and *Bosnia and Herzegovina*).

Furthermore, while in some countries such as *Andorra* and *Albania* any constitutional organs can be a party in the dispute, in other countries such as *Poland* only central state bodies can.

d) As regards the **legal grounds of the dispute,** it must be noted that in all States it takes a relationship under constitutional law which exists between the parties. Therefore, the dispute has to derive from powers stipulated in the Constitution or from the interpretation of constitutional provisions. For instance, in *Germany*[45]*, Lithuania, Slovenia* and *Romania.*

---

[43] For this there is an abstract control of laws, initiated as per Article 93.1 no. 2 of the Basic Law corroborated with §§ 13 no. 6 and 76 and the following of the Law of the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz* – BVerfGG), upon the request of the Federal Government, of a *Land* government or of one-third of the *Bundestag* members.

[44] Presided over by the Chief Justice of the Supreme Court and consisting of an equal number of Supreme Court magistrates and permanent councillors of the State Council (Resolution TC 56/1990 dated March 29, F J 37).

[45] In case of a dispute between organs, the Federal Constitutional Court decides upon the interpretation of the Constitution. Even when the decision is essentially given to settle the dispute between organs, the Federal Constitutional Court may, by the same decision, also decide upon a legal matter relevant for the interpretation of the provision in the Basic Law to which reference was made (cf. § 67 sentence 3 in BVerfGG).

e) As regards the **character of the control exercised by the constitutional court**, from the analysis of all reports it can be seen that such is a concrete, not an abstract one, that the authors of the complaint must have a current and concrete interest in its resolution (*Italy, Latvia, Slovenia* and *Germany*). Furthermore, *Poland*'s Report points out that the dispute must be real, and it may not have a merely hypothetical character.

2. Whether the Constitutional Court is competent to resolve such disputes.

In the majority of States the constitutional court has, pursuant to the Constitution, the jurisdiction to settle legal disputes of a constitutional nature. In the case of *Albania, Andorra*[46]*, Azerbaijan, Cyprus*[47]*, Croatia, Spain, Georgia, Italy*[48]*, Hungary, the Republic of Macedonia, Poland, Russia, Serbia*[49]*, Slovakia, Slovenia*[50]*, the Czech Republic* and *Ukraine,* the constitutional court is empowered to settle *disputes of jurisdiction*. They can be: positive or negative, and can occur both horizontally (between central powers: legislative, executive and judicial) and vertically (between central powers and local powers).

A special situation exists in *Belgium*, where the Constitutional Court has the power to settle only disputes of jurisdiction between the legislative assemblies of the federal State, of communities and of regions.

Moreover, in other states such as *Bosnia and Herzegovina, Italy, Germany*[51]*, Montenegro*[52]*, Romania*[53]*, Slovakia, Switzerland* and *Ukraine*, the national Constitution establishes the constitutional courts' power to examine not only disputes of jurisdiction between State bodies but also *any other disputes arising between them*. Thus, in *Bosnia and Herzegovina*, the Constitutional Court has the jurisdiction to settle positive or negative disputes of jurisdiction or any other litigation arisen in the relationships between the state and the authority of an entity[54] and/or State

[46] Pursuant to article 98 letter d) of the Constitution.

[47] Pursuant to article 139 of the Constitution, the Supreme Court pronounces in last instance on the appeals submitted as regards a dispute of jurisdiction between the Chamber of Representatives and the Communal Chambers or between any of them and the bodies or authorities of the Republic.

[48] Pursuant to article 134 of the Constitution, Italy's Constitutional Court may examine and settle the disputes arising between state powers (for instance, between the legislative and the executive), between central state bodies and a certain region, or between regions.

[49] Pursuant to article 167 par. 2, items 1-4 of the Constitution of the Republic of Serbia.

[50] Slovenia's Constitutional Court decides upon the disputes of jurisdiction between State bodies and local community bodies, upon the disputes of jurisdiction between courts of law and other state authorities, as well as upon the disputes of jurisdiction between the National Assembly, the President of the Republic and the Government (Article 160 par. 1 of the Constitution, points 7, 8 and 9).

[51] Pursuant to article 93.1 no. 1 of the Basic Law.

[52] Any infringement of the Constitution.

[53] The Constitutional Court of Romania has held that the Basic Law stipulates the jurisdiction of the Court to settle any constitutional legal dispute arisen between public authorities and not only the disputes of jurisdiction, positive or negative, arisen from them (Decision no. 270/2008, published in the Official Gazette of Romania, Part I, no. 290 of 15 April 2008) http://www.ccr.ro/decisions/pdf/en/2008/D0270_08.pdf. Furthermore, the Court decided that the notion of constitutional legal dispute refers to any disputed legal situations that arise directly from the text of the Constitution and are not limited only to positive or negative disputes of jurisdiction that might cause institutional blockages (see Decision no. 901/2009, published in the Official Gazette of Romania, Part I, no.503 of 21 July 2009).

[54] Amendment I to the Constitution of Bosnia-Herzegovina, adopted in March 2009, supplemented art. VI with a new paragraph, (4), stipulating that the Constitutional Court of Bosnia and Herzegovina is

institutions. In *Croatia* and *Spain,* besides the disputes of jurisdiction, the Croatian Constitutional Court and the Spanish Constitutional Tribunal, respectively, may also settle a dispute for the defence of local autonomy. In the *Czech Republic*, the Constitutional Court extended this concept beyond the positive or negative disputes of jurisdiction[55]. In *Slovakia*, the Constitutional Court adjudicates on any disputes between State bodies as regards the interpretation of the Constitution or of the constitutional laws, as well as on the complaints submitted by the local public administration authorities against an unconstitutional or otherwise unjustified intervention, in matters related to local autonomy, except for the situation when another court has the jurisdiction to offer legal protection.

In *Germany,* the jurisdiction of settling litigations between the bodies of a *Land* lies in principle with the constitutional court of that land[56].

On the other hand, *Armenia, Belarus, Estonia, France, Ireland, Latvia, Lithuania[57], Luxembourg, the Republic of Moldova, Monaco, Norway, Portugal* and *Turkey* do not have a special prerogative stipulated in the Constitution regarding the jurisdiction of the Constitutional Court to settle such disputes, but in some of these states, i.e. in *Armenia, Belarus, France, Estonia[58]*, *Latvia, Lithuania, the Republic of Moldova* and *Portugal*, the Constitutional Court has the possibility to settle such disputes, indirectly, whenever it exercises an *a priori* or *a posteriori* review of the constitutionality of normative acts. Thus, in *Portugal*, the coexistence of several

---

competent to decide upon any litigation related to the protection of the established status and jurisdiction of the Brčko autonomous district in Bosnia and Herzegovina, litigation that might arise between one or the two entities and the Brčko district or between Bosnia and Herzegovina and the Brčko district, pursuant to the provisions of the Constitution and the sentences given by the Arbitration Tribunal.

[55] In particular by its decisions no. Pl ÚS 14/01, Pl. ÚS 17/06 and Pl. ÚS 87/06. In the case Pl.ÚS 17/06 of 12 December 2006, the Constitutional Court primarily considered the question of whether the matter involved a jurisdictional dispute. After acknowledging that there was a jurisdictional dispute, it then examined the jurisdiction of the body having made the final decision in the matter, and decided that jurisdiction was also subject to the act of another body (joint jurisdiction). In this case, the action of another body was a prerequisite in the adoption of a final decision. The essence of that dispute was whether the minister of justice could decide the appointment of a Supreme Court Justice without the consent of the Chief Justice of the Supreme Court. The Constitutional Court admitted in that context that the Chief Justice of the Supreme Court is a state body, who has an exclusive right of consenting with regard to the appointment of a Supreme Court Justice. Furthermore, it stated that the application is admissible as no other body has the prerogative of deciding in that particular case; it stated that, in its capacity as a constitutionality-protecting judicial body (Article 83 of the Constitution), it could not allow the continuation of a dispute between two important state bodies representing the judicial power, on the one hand, and the executive power, on the other hand, merely because there was no provision regarding who was authorised to settle such dispute. In a democratic state governed by the rule of law it is not possible that an arbitrary act cannot be submitted to control and, thus, cannot be repealed, despite its obvious illegality or non-constitutionality.

[56] Only under exceptional circumstances, when for instance there is no constitutional court in a land, litigation between the bodies of that *Land* can be brought to the Federal Constitutional Court, pursuant to Article 93.1 no. 4 of the Basic Law.

[57] Most disputes between authorities refer to the interpretation and implementation of the constitutional principle of the separation of powers in the state.

[58] It is considered that "organic litigation" might mean the constitutional review of legislation of general application (i.e. laws and other regulations) under the constitutional review procedure, which can be initiated by the President of the Republic, the Chancellor of Justice, local councils and also, in certain instance, courts that initiate the procedure by submitting a judgment or ruling to the Supreme Court. Under such circumstance, the other party involved in the dispute is the *Riigikogu*, the Government, the Ministry or the local public authority that adopted or did not adopt the regulatory act.

regulatory powers, mainly of several law-making powers deriving from the Portuguese Constitution[59], also involves the possibility that a body or an entity violates another body's or entity's responsibilities[60]. That is why, in a way, it may be asserted that the Constitutional Tribunal when, for instance, verifies the constitutionality of a decree-law or of a regional legislative decree as against the specific jurisdiction, or of a regulatory act issued by a local authority, also settles institutional disputes. In *Armenia*, the Constitutional Court is competent to settle only those disputes related to the decision made by electoral commissions on the results of the elections.

Special situations can be encountered in:

- *Austria*, where the Constitutional Court decides: upon the divergent opinions between the Court of Audit and the public administration as regards the interpretation of the legal provisions setting the jurisdiction of the Court of Audit; upon the divergent opinions between the Ombudsman and the federal government or a federal ministry as regards the interpretation of the legal provisions setting the Ombudsman's jurisdiction; upon the disputes of jurisdiction between the Federation and a Land, or between lands, in case both regional authorities claim the same jurisdiction (the so-called positive disputes of jurisdiction); it also decides upon the disputes of jurisdiction between courts of law and administrative authorities as well as between ordinary courts and other jurisdictions, the Constitutional Court included; it is competent to decide whether a legislative or execution act is of the jurisdiction of the Federation or of the lands; it decides whether there are agreements concluded between the Federation and the lands, or between the lands, as well as in connection with the meeting of the requirements under such agreements by the Federation or by the lands; it pronounces on the *impeachment* procedure initiated against the supreme constitutional bodies of the Republic[61].

- *Latvia*, where although the Constitution does not explicitly establish powers to that effect the Constitutional Court settles institutional disputes as well. Taking into consideration the Constitutional Court's powers, adjudication of such matters can be still commissioned to the Court, in its review proceedings, but only when the contested norm or act refers to (or affects) the relationships between state institutions or bodies.

- *Switzerland*, where the Swiss Federal Supreme Court adjudicates – by way of proceedings in one (single) instance – disputes of jurisdiction between federal authorities and canton authorities and also adjudicates on civil law or public law litigations between the Confederation and cantons or between cantons[62].

---

[59] The autonomous regions of Azores and Madeira have legislative and regulatory autonomy. Local bodies have only regulatory autonomy.

[60] For instance, the distribution of the legislative power between Parliament, the Government and the Assemblies of autonomous regions set by the Constitution may indirectly generate a dispute of jurisdiction between constitutional bodies.

[61] Such impeachment procedures are highly uncommon. There were only two instances during the first Republic (between 1918 – 1933) and another during the second Republic (since 1945).

[62] The federal Chancellery, federal departments or, if stipulated by the federal law, their subordinating administrative units have the right to make an appeal, by means of a so-called public law appeal, if the challenged act is likely to violate the federal laws (Article 89 par. 2, letter a of LTF). Similarly, the communes and the other public law collectivities invoking the infringement of the guarantees recognised by the canton constitution or by the federal Constitution may, in their turn, address to the Swiss Federal Supreme Court by means of a public law appeal (Article 89 par. 2, letter c of LTF). In

3. Which are the public authorities among which such disputes may arise?

Depending upon the structure of the public power in the State and upon the jurisdiction of the constitutional court in settling institutional disputes, such disputes may arise as follows:

A. In case of disputes of jurisdiction, horizontally:

- between the central state bodies: in *Montenegro, Poland*[63]*, Romania, Serbia, Slovakia, Spain*[64]*, Italy*[65]*, Ukraine*[66]
- only between legislative, executive and judicial powers: in *Azerbaijan* and *Croatia*
- only between various law-making bodies: in *Belgium*
- only between supreme State bodies: in the *Czech Republic*[67] (Chamber of Deputies, Senate, the President, the Government, the Constitutional Court, and – as the case-law shows – the two supreme courts as well).

B. In case of the disputes of jurisdiction, vertically:

- between central bodies and local bodies: in *Slovakia, the Republic of Macedonia, Romania*
- between State bodies and autonomous territorial bodies: in *Italy*[68]*, Serbia*[69]*, the Czech Republic, Ukraine, Montenegro*.

---

most cases the communes invoke, in support to their request, infringements of the canton constitutional guarantee regarding communal autonomy (cf., for instance, Resolution TF 136 II 274: the appeal against the provisions of the Genovese law on "zones 30 and meeting zones" - *pedestrian and shared streets*).

[63] The bodies of local autonomy units as well as the disputes of jurisdiction between their bodies and the central administration bodies are settled by administrative courts, except for the cases when the law stipulates differently (see art. 4 of the August 30, 2002 Law – Law on the procedures in administrative courts).

[64] But not the King of Spain, whose person is inviolable (Article 56 of Spain's Constitution) and, therefore, it is impossible to initiate a dispute or any kind of legal proceedings against him.

[65] In the sense of the dispute settled by the Constitutional Court, state power can also be one of the independent public entities that do not classify in the traditional trichotomy of roles, but does exercise the functions stipulated by the Constitution, in full autonomy and independence. Examples can be given: the Constitutional Court itself, the President of the Republic and the Court of Audit in exercising its audit role.

[66] The President of Ukraine; a number of at least 45 deputies; the Supreme Court of Ukraine; the Human Right Parliamentary Advocate; the Supreme *Rada* of Ukraine; the Supreme *Rada* of the Autonomous Republic of Crimea (article 150 of Ukraine's Constitution).

[67] The dispute of jurisdiction between the Chief Justice of the Supreme Court and the minister of justice as regards authority to appoint a judge at the Supreme Court (case nr. Pl. ÚS 87/06).

[68] Where the main categories of disputes appear, on the one hand, between bodies or subjects of the state apparatus and, on the other hand, between the state and the autonomous territorial bodies (mainly, the Regions; in theory, also the Provinces and Municipalities can be included here). The latter type of dispute has "standardised" subjects, which means that after the bodies representing the State and the regions are identified, disputes will arise only between these bodies. The former type of disputes, instead, cannot be identified a priori, in the sense that a dispute may arise between different bodies. Still, it is possible to make a distinction between the disputes within the area of a single power and the disputes involving several areas of power: as regards the first case, the internal organisation of the power will establish the body having the jurisdiction to settle the dispute; as regards the latter case, however, there might arise the problem of establishing the proper entity that is equidistant to the two powers in dispute.

[69] Parties in the dispute may be the following authorities: a) courts of law and other State authorities; b) authorities at the level of the republic and those in provinces or the local autonomy entities; c)

C. In cases of disputes for the defence of local autonomy:

- between general institutions of the State and the Autonomous Communities: in *Spain*

- between the State and the representative body of a local or regional autonomous entity (when the constitutionality of a law regulating the organisation, jurisdiction or financing of local and regional autonomous units is challenged) or the representative body of a local or regional autonomous unit or the executive power representative in a county, town or municipality (prefect, mayor of the town or of the municipality) if the issue refers to an complaint regarding the infringement of the right to local or regional autonomy, by an individual act issued by the State bodies, in *Croatia*

D. In case of federative States:

- between the federative State institutions or between the State and the entity bodies or between the bodies of the entities: in *Belgium, Bosnia and Herzegovina*[70]*, Russia*[71]*, Germany*[72], where parties in litigation can be both supreme federal bodies and other participants[73], *Switzerland, Austria* (between the Federation and one land or between lands).

---

authorities in provinces and the local autonomy entities as well as d) authorities of various autonomous provinces or of various local autonomy entities.

[70] Disputes may arise between entities, or between Bosnia and Herzegovina and one or both entities, or between the institutions in Bosnia and Herzegovina. Pursuant to Article VI (4) of the Constitution, the Court is competent to decide upon any litigation related to the protection of the established status and jurisdiction of the Brčko autonomous district in Bosnia and Herzegovina, litigation that might arise between one or the two entities and the Brčko district or between Bosnia and Herzegovina and the Brčko district.

[71] Pursuant to article 125 of the Constitution of the Russian Federation, such disputes may arise: a) between the federal bodies of the state power; b) between the state power bodies of the Russian Federation and the state power bodies of the entities in the Russian Federation; c) between the higher entities of the state bodies in the entities of the Russian Federation.

[72] Among the supreme federal bodies are the *Bundesrat*, the Federal President, the *Bundestag*, the Federal Government, the Joint Parliamentary Commission (*Gemeinsamer Ausschuss*) and the Federal Assembly (*Bundesversammlung*).

[73] Other parties, in the meaning of § 93.1 no. 1 of the Basic Law, vested with rights of their own by the Basic Law or by the regulations of a supreme federal body, are firstly the sections or subdivisions of the supreme federal bodies. Among them are the presidents of *Bundestag* and *Bundesrat*, the members of the Federal Government, political commissions, parliamentary groups, parliamentary groups in sub-commissions and the groups in the meaning of § 10.4 of the *Bundestag* Regulation (GO-BT) (groups of deputies who associate but do not reach the number required to set up a parliamentary group. On the contrary, it is considered that an occasional majority or minority, coagulated as a simple vote, cannot have the capacity of "party." In *Bundesrat* it is considered that parties in institutional disputes can be the president, presidium, commissions and members of *Bundesrat*, in general, as well as the total number of the members of a *Land* in *Bundesrat*.

The applications for the settlement of institutional disputes by the Federal Constitutional Court have been lately filed mainly by the Bundestag parliamentary groups. This is proven by the recent rulings made by the Court in the proceedings of disputes between organs: the order of 4 May 2010 (2 BvE 5/07, EuGRZ 2010, 343), the order of 7 May 2008 (BVerfGE 121, 135), the order of 3 July 2007 (BVerfGE 118, 244).

Unlike § 63 of BVerfGG, which recognizes the possibility of being part of institutional disputes "only" to the component sections of some bodies – *Bundestag*, *Bundesrat* and the Federal Government – which were granted specific rights in the Basic Law or in the *Bundestag* and *Bundesrat* Regulation, Article 93.1 no. 1 of the Basic Law expands the area of participants, also including those in whom rights of their own were vested under the Basic Law or in the regulation of a supreme federal body. This distinction has practical significance as regards the participation of political parties and of the *Bundestag* members in institutional disputes.

In some countries institutional disputes may arise only between constitutional bodies, such as in *Albania*[74]*, Andorra*[75]*, Spain, Romania*[76], while in others they may arise between any State bodies: in *Armenia*[77], *Cyprus*[78]*, Georgia, Montenegro*[79]*, Serbia*[80].

In *Germany* a special situation is related to the possibility of political parties to become parties to disputes between organs. Thus, the Federal Constitutional Court has however afforded[81] to the parties which are active at federal level in the exercise of their functions a quality as an organ and has upheld this case-law despite being the object of considerable criticism in the literature[82] insofar as the constitutional legal dispute relates to the status of a political party as a subject of political will-formation and the opposing party is another constitutional organ[83]. In this field, the parties came so close to state organ will-formation that they were said to have disputes between organs available to defend their status[84]. Outside of this core area, it is however incumbent on the parties to seek their legal protection, after having exhausted the legal remedies before the non-constitutional courts, by means of a constitutional complaint. Also associations of voters and other private associations are not able to be parties in

[74] By its Decision no. 20/2007 the Constitutional Court of the Republic of Albania held that parties in a dispute of jurisdiction can be a constitutional body, on the one hand, and one of its components, on the other hand, as for instance *at least 1/4 of the number of deputies and Parliament*.

[75] Co-Princes, the General Council, the Government, the Superior Council of Justice and the Communes (which are the representative and administration bodies of "parishes" or *parròquies*, public collectivities with legal personality and the right to adopt local regulations, in keeping with the law, in the form of orders, regulations and decrees.

[76] In its Decision no. 988/2008, the Constitutional Court of Romania expressly stated the meaning of the wording "public authorities", in that it means: "*Parliament, made up of the Chamber of Deputies and the Senate, the President of Romania, as unipersonal public authority, the Government, the central and local public administration bodies, as well as the bodies of the judicial authority – the High Court of Cassation and Justice, the Public Ministry and the Supreme Council of Magistracy*."

[77] Institutional disputes may arise not only between constitutional bodies, but also any state bodies.

[78] The Supreme Court pronounces in last instance on the appeals submitted with regard to a dispute of jurisdiction arising between the House of Representatives and the Communal Chambers or any one of them and between any organs of, or authorities in, the Republic. According to the case law of the Supreme Court, organs or authorities are specific juridical creations, bearing the features of individual and concrete organic institutions of government and functioning for and on behalf of a primary legal entity such as the Republic of Cyprus (municipalities, semi governmental organizations).

[79] Parliament, the Government, ordinary courts, local public administration authorities and other state authorities.

[80] Courts of all jurisdictions, the State administration authorities (all ministries, state administration authorities within the ministries (directorates, inspectorates, departments), special organisations (secretariats, bureaus)), authorities of autonomous provinces specified in the charters of those provinces, the local self-government authorities (authorities of municipalities, cities and capital City of Belgrade), the National Bank of Serbia, the State Audit Institution, the Ombudsman, the Commissioner for Information of Public Importance, etc.

[81] Basically, cf. BVerfGE 4, 27 <31>

[82] Cf. Pietzcker, in: Festschrift 50 Jahre Bundesverfassungsgericht Vol. I, 2001, 587 <595>

[83] Cf. BVerfGE 66, 107 <115>; 73, 40 <65>; 74, 44 <48 and following.>; 79, 379 <383>)

[84] The provisions in the Law on Political Parties (*Parteiengesetz*) on the financing of parties equally relate to their constitutional status as factors of constitutional life in the political will-formation, and so the Federal Constitutional Court took them into consideration in the proceedings for resolution of institutional disputes, except for those related to the disbursement or repayment orders of the president of the *Bundestag*, also emerging from parties' funding rules (cf. BVerfGE 27, 152 <157>; Pietzcker, in: *Festschrift 50 Jahre Bundesverfassungsgericht* Vol. I, 2001, 587 <594>). Furthermore, a political party may stand on the institutional disputes procedure if it objects to the publicity advertising the Federal Government during electoral campaign (cf. BVerfGE 44, 125 <136-137>).

disputes between organs.[85]

Other special situations are to be found in *Serbia* and *Ukraine*, where the Ombudsman can be a party in an institutional dispute, while in *Austria* he is party in the opinion divergence procedure between the Ombudsman and the federal Government or a federal ministry as regards the interpretation of legal provisions setting the Ombudsman's jurisdiction.

As to the constitutional court, it can be party in an institutional dispute in *Italy* and the *Czech Republic*, while in *Romania*[86] and *Germany*[87] the Constitutional Court cannot be a party in such a dispute.

4. Legal acts, facts or actions which may give rise to such litigations: do they relate only to disputes on competence, or do they also involve cases when a public authority challenges the constitutionality of an act issued by another public authority? Whether the constitutional court has adjudicated upon such disputes.

As shown by the majority of the reports, the sources that give rise to constitutional legal disputes can be classified into: a) legal acts and b) actions, measures or omissions.

a) In all the States where the constitutional court settles institutional legal disputes, such can be generated by **legal acts** issued by the public authorities involved in the dispute. Thus, in *Spain* the disputes of jurisdiction can be caused by the provisions, decisions and any kind of acts adopted, issued or made by any authority, by the State or by one of the 17 Autonomous Communities.

In *Bosnia and Herzegovina* the following acts can generate disputes of jurisdiction: the Agreement on the establishment of special parallel relationships between the Federal Republic of Yugoslavia and the Srpska Republic[88], which caused a dispute of jurisdiction between the State of Bosnia and Herzegovina and one of the two component entities, the Srpska Republic[89]; the Insurance Agency Law in Bosnia and

---

[85] As they do not meet the prerequisites of § 2.1 of the Political Parties Law – (cf. BVerfGE 1, 208 <227>; 13, 54 <81 and following.>; 74, 96; 79, 379 <384-385>).

[86] Pursuant to Decision no.53/2005 of the Constitutional Court of Romania, published in Romania's Official Gazette, Part I, no.144 of 17 February 2005, the parties in a constitutional legal dispute can be only the public authorities provided in Title III of the Constitution, i.e. *the Parliament of Romania*, *the President of Romania*, *the Government*, *the Public Administration* and *the Judicial Authority*, whereas the Constitutional Court is regulated under Title V of Romania's Constitution.

[87] The Federal Constitutional Court does not act within the state's leadership, it therefore cannot initiate disputes between organs; Stern, in: *Bonner Kommentar zum GG – Zweitbearbeitung* –, Art. 93, margin no. 92 and following).

[88] See the decision made by the Constitutional Court of Bosnia-Herzegovina No. *U 42/01* dated March 5, 2001

[89] In particular, the issue was whether the consent of the Parliamentary Assembly of Bosnia and Herzegovina had to be asked for before ratifying the Agreement. In connection with this aspect, the Constitutional Court found that, pursuant to art. III (2) of the BiH Constitution, an agreement regarding the establishment of a special parallel relationship includes a constitutional restriction on the sovereignty and territorial integrity because the agreements with states and international organisations can be concluded (exclusively) with the consent of the Parliamentary Assembly of Bosnia and Herzegovina. Therefore, an agreement setting up special parallel relationships falls under the Constitutional Court's control because the agreements with states and international organisations require the consent of the Parliamentary Assembly. In this case the Constitutional Court decides that the consent of the Parliamentary Assembly is not required to set up special parallel relationships with

Herzegovina[90], which generated litigation on the distribution of jurisdiction between the state and the entities.

Romania indicates as example the decisions rendered by the High Court of Cassation and Justice in cases where, instead of confining itself to clarify the meaning of certain legal regulations or their scope of application, it also decided, while invoking legislative technique or unconstitutionality flaws, to reinstate in vigour norms whose validity had ceased before, being repealed by normative acts issued by the law-making authority; such decisions accrued to a legal dispute of a constitutional nature between the judiciary, on the one hand, and the Parliament of Romania and the Romanian Government, on the other hand.[91]

In *Italy* the disputes between the State and Regions can also refer to acts other than those having legal force, such cases being specifically termed as "conflicts of attribution."

In *Montenegro* the Constitutional Court decides upon all forms of "breaches of the Constitution" that were caused by an unconstitutional law, regulation or other general or individual act.

b) Moreover, in all the States where the constitutional court settles institutional legal disputes, they can be generated by **actions or measures or omissions,** materialized or not in legal acts of the public authorities involved in the dispute. Thus, in *Germany*[92] any conduct on the part of the opposing party can be regarded as legally material which is suited to harm the legal status of the applicant. An "act" within the meaning of § 64.1 of the Federal Constitutional Court Act is not restricted to only being one single act, but may also be the issuance of a law or cooperation in an act of creating provisions; the resolution of parliament on the rejection of a legal initiative can also be qualified as an act in the dispute between organs. Also, the issuance of or change to a provision of the Rules of Procedure of the German *Bundestag* may constitute an act within the meaning of § 64.1 of the Federal Constitutional Court Act if it is able to mean that the applicant is currently legally affected. The application of the Rules of Procedure themselves, by contrast, is not a permissible object of attack in disputes between organs. The rejection of a motion for recognition as a parliamentary group or as a group in the German *Bundestag* according to § 10.4 of the Rules of Procedure of the *Bundestag* also does not constitute an act which is able to give rise to a dispute between organs. Omission, conversely, means to not carry out an act.[93] A

---

neighbouring countries and, therefore, the Agreement was concluded in compliance with the Constitution of Bosnia and Herzegovina.

[90] In this case, the Constitutional Court adjudicated that the Parliamentary Assembly of Bosnia and Herzegovina is competent to adopt the challenged legal provisions, pursuant to Article IV (4) letter (a) corroborated with Article III (1) letters (a) and (b) of the Constitution of Bosnia and Herzegovina, as they are meant to harmonize the laws on insurance companies as well as with the relevant laws in the European Union, and thus Bosnia and Herzegovina fulfils its obligations under the Stabilization and Association Agreement (Constitutional Court's Judgment no. *U 17/09* of 27 March 2010).

[91] Decision no. 838/2009, published in the Official Gazette of Romania, Part I, no.461 of 3 July 2009.

[92] The subject-matter of disputes between organs is the concrete dispute regarding the competences or the status of constitutional organs. §64.1 sentence 1 of the Federal Constitutional Court Act (BverfGG) defines it in terms of "an act or omission of the opposing party" whereby the applicant's rights and duties stipulated by the Basic Law were harmed or directly endangered. The impugned measure or omission must exist in objective terms and be legally material.

[93] Bethge, in: Maunz/Schmidt-Bleibtreu/Klein/Bethge, *Bundesverfassungsgerichtsgesetz*, §64, marginal no. 36. Even more than with a positive action, the issue of legal relevance appears in the case of an omission. Omissions only take on legal consequences if there is a legal obligation to act (Klein, in:

constitutionally relevant omission may, for instance, consist of the Federal President refusing to sign a federal statute, the Federal Government refusing to respond to a parliamentary question or the Federal Government refusing to permit the *Bundestag* or the committee of inquiry the inspect the files.[94]

In *Italy* the disputes between central State bodies and regions or between regions can arise in connection with any type of measure or act, except for the primary ones, for which there is a special procedure: the one for the review of constitutionality of laws. The disputes between State powers (i.e. the executive, legislative and judicial powers but also between the State and other bodies) can refer to adopted measures but also to a legally relevant conduct or action which allegedly violates the integrity of the autonomy and independence granted to a certain body by the Constitution. The aforementioned actions can consist of deeds, formalised or not in acts, positive or negative, which lead to a certain result. Inactions, in the mentioned meaning, are also to be included here.

In the *Czech Republic* the disputes of jurisdiction, pursuant to Article 120 par. 1 of the Constitutional Court Law, means the disputes between state bodies related to the authority to issue decisions, to implement measures or perform other actions in the area specified in the complaint. In the Czech Republic's legal system, the Constitutional Court cannot decide upon other disputes than those related to the actual putting of regulations into practice. In such procedures, the Constitutional Court cannot verify the constitutionality of normative acts issued by State bodies; therefore it cannot decide on disputes relative to a legislative authority. The review of regulations is part of the second type of procedures.[95]

In regard to the second question, one may separate the following situations:

a) In most States, the situations having generated disputes are linked only to the jurisdiction of the public authorities involved.

Thus, if an encroachment of powers arises due to a law, the dispute has to be settled in compliance with the procedure for the constitutional review of normative acts. It is the case of *Andorra* where, if the infringement of powers was caused by a law of the General Council or by a legislative decree of the Government, the dispute must be settled in compliance with the procedure used in the constitutionality review provided in Chapter II of Title IV of the special Law on Constitutional Tribunal, in all its aspects, including that related to the active procedural capacity.[96]

In the *Republic of Macedonia*, a first case[97] concerned a negative conflict of competence between the Central Registry of the Republic of Macedonia and the Lower Court in Shtip, in which both authorities declared themselves incompetent to act upon a registration for an entry of an administrator in the trade registry. With its decision, the Constitutional Court found that it was the Central Registry of the Republic of Macedonia that was competent for making an entry. With the Decision U.no.143/2008 of 15 October 2008, the positive conflict of interest between the Lower Court from

---

Benda/Klein, *Verfassungsprozessrecht*, 2nd ed. 2001, § 26, marginal no. 1025). If this is not the case, the application for the acknowledgement of an unconstitutional omission must be denied as inadmissible because of the lack of admissible subject-matter (BVerfGE 104, 310).

[94] Bethge, in: Maunz/Schmidt-Bleibtreu/Klein/Bethge, *Bundesverfassungsgerichtsgesetz*, § 64, marginal no. 36.

[95] See Article 87 par. 1 letter a) and letter b) of the Constitution.

[96] This has never been registered with the Tribunal in Andorra.

[97] See Decision U.no.159/2007 of 14 November 2007.

Skopje and the Commission for Securities was resolved. In this case both authorities considered themselves competent to pronounce an interim measure of prohibition to dispose with securities of a trade company, which submitted the proposal for resolution of the conflict of competence. The Constitutional Court decided in favour of the Lower Court, that is, found that it was the Court, not the Commission for Securities that was competent to pronounce the said measure.

In *Italy* the Court pointed out that it is possible to challenge legislative measures through such avenues only if the measure giving rise to the detriment in question could not be the object of a referral order for proceedings made on an interlocutory basis (an exception of non-constitutionality).[98]

b) The situations having generated legal disputes are also linked to the constitutionality of the act in question. Such situations can be seen in *Albania, Bosnia and Herzegovina, Estonia, Latvia, Lithuania, the Republic of Moldova, Montenegro, Russia* and *Ukraine.*

In *Albania*, when the settlement of the dispute of jurisdiction refers to acts issued by the bodies in dispute, the Constitutional Court also examines the constitutionality or legality of such acts in order to settle the dispute.[99]

In *Latvia* the institutional disputes are settled only in jurisdictional framework, when the Court pronounces on the compliance of the challenged norm or act with the higher legal rule. Thus, if certain challenged rule is in any way connected to the jurisdiction of an institution, it will be examined in the concrete case.

In *Lithuania*, the majority of the disputes between state institutions, settled by the Constitutional Court, are related to the interpretation and application of the constitutional principle of separation of powers. Such are the petitions requesting to investigate the constitutionality of legal acts wherein the powers of state institutions are entrenched and their interrelations are regulated, in which the principle may be indicated directly or be implicit.

In the *Republic of Moldova,* the Constitutional Court declared as unconstitutional several Government decisions for having breached upon the principle of the separation

---

[98] The procedure which represents the "normal" way to challenge a law or enactment, but might be affected by some "bottlenecks" - as defined by the ex-President of the Constitutional Court, Gustavo Zagrebelsky - stemming from the fact that if the Court is to be apprised, the relevant law must be applied in a case, a fact that can be all but taken for granted for certain categories of laws, such as electoral laws, those which allocate funds, etc.

[99] In its decision no.20 dated 04.05.2007, the Constitutional Court, considering the right of parliamentary minority (1/4 of the deputies) to establish an investigation commission as a "constitutional authority", has ascertained that the decision of the parliament on the refusal to establish such commission had given rise to a conflict of competences. Consequently, it decided to resolve the conflict of competences arisen between the 1/4 of the deputies, on the one hand, and the parliament on the other, repealing on unconstitutional grounds the act that brought about such conflict – *decision of the parliament*.

In its decision no.22, dated 05.05.2010, the Constitutional Court has ascertained that the way how it has been formulated the object of parliamentary investigation in the decision of the Assembly on the establishment of investigative commission, the investigation carried out by the investigative commission, as well as the establishment of the unlawfulness of KRRT'S decisions by this commission, have given rise to a conflict of competences, bringing about in this way a blocking in the exercise of competences of the appellant, Tirana Municipality. So, the Court decided to resolve the conflict of competences between the Tirana Municipality and the Assembly of the Republic of Albania repealing the decisions of the Assembly of the Republic of Albania "On the establishment of Investigative Commission" and "On the approval of conclusive report of the investigative commission."

of powers. On 5 October 1995 the Constitutional Court examined the Government Decision no. 696 of 30 December 1994 within constitutional review proceedings.

In *Ukraine,* the main characteristic is that such disputes of jurisdiction vary depending upon the object of the petition filed by the subject entitled to address to the Court, concerning the constitutionality of the acts adopted by a body of state power or concerning the official interpretation (usually in systemic connection with the provisions of Ukraine's Constitution[100]). Subject to Article 152 of the Constitution of Ukraine, laws and other legal acts, upon the decision of the Constitutional Court, are declared unconstitutional, in whole or in part, in the event that they do not conform to the Constitution of Ukraine, or if there was a violation of the procedure established by the Constitution of Ukraine for their drafting, adoption or their entry into force. So the Constitutional Court decides on disputes of the constitutional nature between public bodies of state power of Ukraine that are stated in Article 150 of the Constitution of Ukraine regarding issues on the constitutionality of acts of these bodies, including disputes regarding competence as well as those regarding constitutionality of the relevant act.

Special situations can be found in:

- *Serbia*, where institutional disputes brought to the Constitutional Court of Serbia refer to the disputes of jurisdiction between public authorities, but it is possible that an authority in conflict of jurisdiction initiate a review of the constitutionality and legality of a general legal act within the proceedings on a conflict of jurisdiction. In such instances, the Constitutional Court treats the review of the constitutionality and legality of the legal act as a preliminary issue, on which the outcome of the proceedings on the conflict of jurisdiction depends. In such situation, it suspends consideration of the conflict of jurisdiction until the completion of the normative review proceedings. The Constitutional Court may decide to launch the proceedings for the review of a general legal act *ex officio*[101], in which case it suspends the proceeding on the conflict of jurisdiction until the review proceedings is completed.[102]

- *Slovenia*, where in the settlement of a disputes of jurisdiction the Court can decide *ex officio* to exercise the constitutionality control of the regulation if it considers that this contributes to the settlement of the dispute and can repeal or annul the regulation or the general act issued in exercising public authority which is found unconstitutional or illegal in that procedure.[103]

- *Switzerland*, where the Swiss Federal Supreme Court cannot be apprised in

---

[100] Chapter 10 of the Law of Ukraine "On the Constitutional Court of Ukraine" determines the specific features of proceedings in cases concerning constitutionality of legal acts causing disputes regarding competencies of the constitutional bodies of state power of Ukraine, bodies of the Autonomous Republic of Crimea and bodies of local self-government. According to Article 75 of the abovementioned Law, the grounds for a constitutional petition must be a conflict of competencies between the constitutional bodies of state power of Ukraine, bodies of the Autonomous Republic of Crimea and bodies of local self-government if one of the subjects of the right to constitutional petition considers that legal acts of the Supreme *Rada* of Ukraine, acts of the President of Ukraine, acts of the Cabinet of Ministers of Ukraine, legal acts of the Supreme *Rada* of the Autonomous Republic of Crimea which establish the authorities of the mentioned bodies do not conform with the Constitution of Ukraine.

[101] Article 50, paragraph 2, and Article 53 of the Law on the Constitutional Court.

[102] To date, the Constitutional Court has never had to settle cases of conflicts of jurisdiction that would have required to review the constitutionality (and legality) of an act.

[103] Article 61 par.4 of the Constitutional Court Law.

matters concerning legislation, except in order to decide whether a canton rule usurps the legislative jurisdiction of the Confederation but not the other way round.

5. Who is entitled to submit proceedings before the Constitutional Court for the adjudication of such disputes?

The analysis of the reports points to a necessity to classify the entities having the right to apply to the constitutional court – depending on whether there is explicit regulation of the constitutional court's powers to settle institutional disputes. Hence the following differences can be observed:

A. In the States where the constitutional court has the express authority to settle constitutional legal disputes, the following situations can be distinguished:

a) In most of the countries, the entity entitled to approach the constitutional court in order to settle an institutional dispute can be any party to the dispute. This is the case, for instance, of *Albania, Bosnia and Herzegovina, Cyprus, Croatia, the Republic of Macedonia, Montenegro, Serbia, Slovenia, Italy, Germany* and *Russia.*

b) In other states, such as *Azerbaijan, Andorra, Georgia, Spain, Romania, Poland, Slovakia, Ukraine*, the entities having the right to address the constitutional court in order to settle an institutional dispute are expressly and restrictively enumerated by the Constitution and/or by laws and they can be both the public authorities placed "at the apex" of the state powers, and the supreme bodies of autonomous entities. Thus, such entities may be:

- the President of the country: in *Azerbaijan, Georgia, Poland, Ukraine, Romania, Slovakia*,
- the King: in *Spain*
- the Chambers of Parliament/the presidents of one Chamber of Parliament / a certain number of MPs: in *Georgia* (one fifth of the Parliament members), *Poland* (the Marshals of the Sejm and of the Senate), *Romania* (one of the presidents of the two Chambers of the Parliament), *Spain* (Congress/Senate), *Ukraine* (a number of at least 45 deputies, Ukraine's Supreme *Rada* and the Supreme *Rada* of the Autonomous Republic of Crimea),
- the Government/the head of the Government: in *Andorra, Georgia, Romania, Poland, Spain, Slovakia, Croatia*
- one fifth of the total number of members of the National Council of the Republic: in *Slovakia*
- the supreme court: in *Poland* (the President of the Supreme Court/ the President of the High Administrative Court), *Ukraine* (the Supreme Court), *Azerbaijan*
- any court of law: in *Slovakia*
- the Prosecutor General/the Prosecutor General's Office: in *Slovakia* and *Azerbaijan*
- the President of the Superior Council of Magistracy or of the General Council of the Judicial Power: in *Romania* and in *Spain,* respectively
- one-fifth of the number of members of the General Council in *Andorra*
- autonomous entities/their supreme bodies: in *Andorra* (the 3 Communes), *Georgia* (supreme representative bodies in Abkhazia and Ajara)
- authorities of local public administration: in *Slovakia*
- the Ombudsman: in *Ukraine* (Human Right Parliamentary Advocate) and *Serbia*

B. In the States where the constitutional court does not have the explicit authority to settle constitutional legal disputes but it has the possibility to settle such disputes indirectly when exercising an *a priori* or *a posteriori* control of the constitutionality of normative acts, the entities that have the right to approach the constitutional court in order to resolve an institutional dispute are the same public authorities that can lodge an application for reviewing the constitutionality of normative acts. Such situations can be found in *Armenia*, *Belarus, France, Estonia, Lithuania, the Republic of Moldova* and *Portugal.*

6. What procedure is applicable for the adjudication of such dispute?

In all the States where the constitutional court can settle institutional disputes, initiation of proceedings must be made by a written act (application/complaint/resolution), which is drawn up in accordance with certain formal requirements, and motivated.

In some States, there is also a time-limit set during which such complaint can be lodged: for instance, in *Germany* the application must be made within 6 months after the impugned measure or the omission was has become known; in *Cyprus,* the application has to be filed within 30 days of the date when such power or competence is contested; in *Slovenia* the affected authority has to formulate an application for the settlement of the dispute within 90 days from the date when it discovered that another authority intervened or assumed the jurisdiction.

Moreover, in all States the first procedural step is done in writing.

Special situations can be encountered in *Spain*, where there is an obligation to fulfil a preliminary procedure[104] and in *Azerbaijan*, where the examination of the admissibility of the request is compulsory[105].

Another special situation is in *Andorra*, where discontinuation of proceedings by either party results in the annulment of the action. In the *Czech Republic*, before the constitutional court makes its pronouncement, the author of the application – with the consent of the Constitutional Court – is allowed to withdraw it. The Constitutional Court may decide, however, that the interest in settling the disputes of jurisdiction in a

[104] Before apprising the Constitutional Tribunal, the body considering that its powers were trespassed against has to address to the body having abusively exercised such powers, and require the repeal of the decision which caused the undue assumption of powers. To this end it has a one-month period from the date of taking knowledge of the decision which generated the dispute. If the body thus notified affirms that it has acted within the limits of the constitutional and legal exercise of its powers, the body which considers that its powers were unduly overtaken will refer the dispute to the Constitutional Tribunal within one month from that date. It can also do so if the notified body has failed to correct its decision within one month of receiving the notification. Proceedings are simple. Having received the seizing application, the Tribunal sends it within ten days to the challenged body, also setting a deadline of one month in order to formulate submissions as may be deemed necessary.

[105] The request concerning the examination into the disputes regarding the separation of powers between legislative, executive and judiciary powers shall be brought, as a rule, to the Panels of Constitutional Court which adopts within 15 days a ruling on admissibility or inadmissibility for examination. The ruling of Panel of Constitutional Court on admissibility or inadmissibility for examination of such request shall be sent on the day of its adoption to the body or official person who submitted the claim. The examination of a request on the merits by Constitutional Court should be commenced within 30 days after its admission for proceedings.

particular case exceeds the plaintiff's will, so it will continue the procedure. But when it accepts the withdrawal of the application, it stops the procedure. Furthermore, during the procedure, the Constitutional Court can decide to deny the application if: the settlement of the disputes of jurisdiction lies with another body, pursuant to a special law, or the settlement of the disputes of jurisdiction lies with a body higher than the two bodies between which the disputes of jurisdiction appeared.

In other cases, the Constitutional Court pronounces on the merits of the case, deciding which body is competent to settle the problem having generated the dispute. When the disputes of jurisdiction appeared between a State body and an autonomous region, it decides whether the problem is of the jurisdiction of the State or of the autonomous region.

In *Estonia*, the Supreme Court may suspend with good reason the enforcement of the challenged normative act or a provision thereof, until entry into force of the judgment of the Supreme Court, while in *Croatia* the Constitutional Court can order the suspension of procedures before the bodies in dispute, until its decision. Likewise, in *Italy* the plaintiff is ensured a preliminary protection in the form of an order whereby the challenged act is suspended[106].

According to the national reports, there are also oral proceedings (hearings) in the following states: *Belarus, Bosnia and Herzegovina, Romania, Poland*[107]*, Italy*[108]. During such procedure evidence is brought and any clarifications needed for the case are made.

In *Italy* the disputes between State powers show several significant characteristics. The body claiming that its legal authority was violated will apprise the Court, but its application will comprise only the description of facts and probably the responsible act. The Court decides whether the application is admissible; if it is, the Court will establish the body (or bodies) that are to be summoned as defendant. The plaintiff will have the obligation to notify the defendants and to file the application once more with the court registry, together with the proof of the delivery of notifications. From that moment on the dispute between the state powers begins the settlement procedure, which is similar to the one applicable in the constitutionality control and the disputes of responsibilities between the state and the regions. The most important difference is that, with the disputes between state powers, the issuance of a suspending order related to the challenged measure is not possible.

In all States the settlement of the institutional dispute by the constitutional court is made in the Plenum, and in all cases the constitutional court pronounces an act in writing, which is binding on the parties (such being a decision in *Montenegro, Poland, Italy, Romania, Croatia*), and is published in an official publication (only its operative part is published in Poland).

---

[106] The Court can run an investigation as well, which the President of the Court assigns to a judge-rapporteur. Sometimes the investigation is also meant to offer the plaintiff a preliminary protection in the form of an order suspending the challenged act (in the disputes of jurisdiction, this authority has already been recognised by Law no. 87 / 1953; in cases filed directly, suspension of the implementation of a law was approved only by Law no. 131 / 2003).

[107] Mention is made that there is no special procedure for settling institutional disputes, and the same procedure as that for the review of constitutionality / hierarchical conformity of norms has to be followed.

[108] After the investigation is completed, a hearing takes place during which the parties in the dispute can express their opinions, pointing out and integrating, as the case may be, the content of the application or of the initial action, or subsequent conclusions registered around the date of the hearing.

7. What choices are there open for the Constitutional Court in making its decision (judgment).

Depending on whether there is express regulation of the constitutional court's powers to settle institutional disputes, the possible solutions are as follows:

A. In the States where the constitutional court has express jurisdiction to settle constitutional legal disputes, the following solutions can be distinguished:

a) In the majority of States, the adopted solution can be the annulment/ invalidation/repeal of the act having generated the dispute: in *Albania, Andorra, Azerbaijan*[109]*, Cyprus, Montenegro*[110]*, Serbia, Slovenia, Ukraine*[111].

b) In other States the constitutional court establishes the competent body to decide on the case. Thus, in *Croatia*, in the case of a positive/negative dispute of jurisdiction, the Constitutional Court pronounces a decision whereby it establishes the competent body to decide on the case. In *Hungary*, before 2005, the Constitutional Court – either established the competent body and appointed the body bound to take action; or – rejected the application because there was no dispute. In the *Republic of Macedonia* the Constitutional Court establishes the competent body to decide on the case. In *Poland* the Constitutional Tribunal pronounces a decision appointing the competent state body to adopt certain measures or to perform an action (to settle a certain case)[112]. In *Serbia* the Court will pronounce a decision annuling any measures adopted

[109] The Constitutional Court nullified two Orders issued by the head of the executive in Baku.

[110] In this case the decision has repealing (cassation) effects. It puts an end to a constitutional dispute and eliminates an unconstitutional regulation from the legal order, it eliminates violation of human rights and freedoms of citizens, resolves the dispute over jurisdiction, determines whether the President violated the Constitution, decides about banning a political party or non-governmental organization, determines if there was a violation of law in the course of elections.

[111] The Constitutional Court may recognise the interference of one body of state power into the exclusive jurisdiction of another, the lack of the authority of the body of state power in the matter which was disputed, and recognise a normative legal act issued by this body to be unconstitutional. The Constitutional Court may confirm the competencies of the body of state power, by recognising the provisions of the normative legal act by which such powers were stipulated or the act issued by such body in the implementation of its competencies which are disputed, as conforming with the Constitution of Ukraine (constitutional).

[112] The Tribunal defines the area of that body's jurisdiction and the way they "differ" from other State bodies' jurisdiction (see below the comments on the decision in the case Kpt 2/08). To date, the Tribunal has pronounced only in two cases related to disputes of jurisdiction (cases Kpt 1/08 and Kpt 2/08). In the case Kpt 1/08, the First President of the Supreme Court referred to the Tribunal requesting it to settle a dispute over powers which – in his opinion – arose between the President of the Republic of Poland and the National Council of the Judiciary of Poland (KRS) with regard to appointing judges. The dispute arose when the President of the Republic refused to appoint a few judges (in January 2008), although the candidacies were evaluated positively and presented to him by the National Council of the Judiciary. The refusal to appoint the positively evaluated candidates was – according to the First President of the Supreme Court – tantamount to independent "evaluation" of the candidates by the President of the Republic, despite the fact that the power to evaluate candidacies had been granted to the KRS. The Tribunal refused to examine the case in respect of its substance, as it did not consider the case to be a real dispute over powers. Both of the two organs of the state exercised their constitutional or statutory powers within the scope of their competence (the Decision of 23 June 2008, Ref. No. Kpt 1/08). In the case Kpt 2/08, the Tribunal dealt with a dispute over powers which arose between the President of the Republic of Poland and the Council of Ministers (the Government) in the context of distribution of powers as regards representing the Republic of Poland at a session of the European Council. The problem primarily concerned the issue which organ of the state was competent to determine and present the stance of the Republic of Poland, and whether the President of the Republic might decide to participate in such a session. In the Decision of 16 May 2009 (Ref. No. Kpt 2/08), the

by the authority found to be without jurisdiction. In *Romania* the Constitutional Court can pronounce: the acknowledgement of the existence of a dispute between two or several authorities and its settlement consisting in the conduct to be followed; the acknowledgement of the existence of a dispute and also of its extinction because of having adopted an attitude complying with the Constitution; the acknowledgement of the non-existence of a constitutional legal dispute; the acknowledgement of the Court's lack of jurisdiction in examining certain acts of public authorities; the acknowledgement of the non-admissibility of a request for the settlement of a dispute between state "powers." In the *Czech Republic* the Constitutional Court makes a decision on the merits of the case, establishing which body has authority to settle the problem which the dispute concerns;

c) another solution may be rejection of claim, i.e. the acknowledgement of non-foundedness of the application/complaint, as in *Italy* and *Romania*, where the Constitutional Court can find that a constitutional legal dispute does not exist[113].

B. In the States where no express jurisdiction has been ascribed to the constitutional court to settle constitutional legal disputes but where it has the possibility to settle such disputes, indirectly, when exercising an *a priori* or *a posteriori* review on the constitutionality of normative acts, it may be noted that the constitutional court, upon examination on the application or the complaint concerning the unconstitutionality of a particular norm, may pronounces one of the following solutions:

a) it declares the norm as unconstitutional (in its entirety or in part);

b) it declares norm as constitutional;

Such situations can be found in *Albania, Belarus, Bosnia and Herzegovina,*

Tribunal adjudicated that the President of the Republic – as the supreme representative of the Republic of Poland - may decide to participate in a session of the European Council, if he finds it useful for the realisation of the tasks of the President of the Republic specified in Article 126(2) of the Constitution. However, this does not mean that the President alone may determine and present the stance of the Republic of Poland, since - pursuant to Article 146(1) of the Constitution - the internal affairs and foreign policy of the Republic of Poland are conducted by the Council of Ministers. It is the Council of Ministers that exercises general control in the field of relations with foreign states and international organisations (Article 146(4) item (9) of the Constitution). Moreover, the Council also conducts the affairs of the state which are not reserved to other state organs (Article 146(2) of the Constitution). As no constitutional or statutory provisions have stated that the powers to determine and present the stance of the Republic of Poland at the forum of the European Union are granted to any other organ of the state (e.g. the President of Poland), it should be assumed that the said powers fall within the scope of competence of the Council of Ministers. On behalf of the Council of Ministers, the stance of the Republic of Poland is presented by the President of the Council of Ministers (the Prime Minister), who ensures the implementation of the policies adopted by the Council of Ministers (e.g. Article 148(4) of the Constitution), or by a member of the Council of Ministers competent in that regard (e.g. the Minister of Foreign Affairs). However, the Tribunal emphasised that Article 133(3) of the Constitution imposed an obligation on the President of the Republic, the Prime Minister, and the minister competent in that regard, to cooperate with each other in respect of foreign policy. In the context of sessions of the European Council, the said cooperation should involve, *inter alia*, informing the President about the subject of a given session and about the agreed stance of the Council of Ministers in that regard, informing the Council of Ministers by the President of the Republic about his intention to participate in a given session, making arrangements as to the form and extent of such participation (including the President's potential participation in the presentation of the stance of the Republic of Poland determined by the Council of Ministers) as well as observing the agreed arrangements.

[113] The Constitutional Court of Romania acknowledged its lack of jurisdiction in examining several acts by public authorities **(**Decision no.872 of 9 October 2007) as well as inadmissibility of a request for the settlement of the dispute between state "powers." (Decision no.988 of 1 October 2008).

Russia[114]*, Armenia*[115]*, Estonia, Ukraine.*

8. Ways and means for implementing the Constitutional Court's decision: actions taken by the public authorities concerned afterwards.

In all the States, the decision of the constitutional courts on the settlement of institutional disputes is binding.

The analysis of national reports shows that in the majority of cases the public bodies involved in the dispute did comply with the judgment handed down by the constitutional court, in consideration of its binding character.

For instance, in *Germany* the provisions of Article 93.1 no. 1 of the Basic Law in conjunction with § 67.1 sentence 1 of the Federal Constitutional Court Act are conditional, within the interrelationship with the constitutional organs, on the organs observing the finding of unconstitutionality of an act made by the Federal Constitutional Court without the need for the pronouncement of an obligation and its execution. This state of respect (*Interorganrespekt*) between the constitutional organs, emerging from the principle of the rule of law contained in Article 20.3 of the Basic Law and the obligation of the executive and of the legislative to not commit acts that are in breach of the Basic Law, offer a sufficient guarantee that all parties to the proceedings submit to the legal findings of the Federal Constitutional Court.[116]

In most cases[117] there is no special procedure for the enforcement of decisions/rulings made by the constitutional courts, e.g. in *Latvia, Lithuania, Poland, Romania*.

As an exception, in *Albania* the execution of the Constitutional Court decisions is ensured by the Council of Ministers through the relevant public administration bodies. Persons who fail to execute the Constitutional Court decisions or hamper their execution, where the action does not constitute a criminal offence, shall be liable to a fine up to 100 thousand *leke* imposed by the President of the Constitutional Court, whose decision is final and constitutes an executive title. Likewise, in *Montenegro*, the Government of the Republic of Montenegro, upon request by the Constitutional Court, secures the enforcement of the decision of the Constitutional Court and pays for that from its budget.

A special situation is to be found in *Croatia*, where the Constitutional Court

---

[114] Where the Constitutional Court may declare the norm as constitutional (in full or in part) in the constitutional legal meaning given by the Constitutional Court.

[115] The Constitutional Court of the Republic of Armenia has recognized the disputed norm unconstitutional within interpretation given to it by the law-enforcement practice (see decisions CCD-844, 07.12.2009, CCD-782, 02.12.2008) or has recognized the disputed norm as constitutional within the legal positions of the Court (see decisions CCD-833. 13.10.2009, CCD-849, 22.12.2009, CCD-852, 19.01.2010, CCD-903, 13.07.2010).

[116] (Umbach, in: Umbach/Clemens/Dollinger, BVerfGG, 2nd ed. 2005, § 67, marginal no. 17; Schlaich/Korioth, *Das Bundesverfassungsgericht*, 8th ed. 2010, marginal no. 83; Voßkuhle, in: v. Mangoldt/Klein/Starck, GG, Vol. 3, 5th ed. 2005, Article 93, marginal no. 115).

[117] For instance, in Bosnia and Herzegovina there is no enforcement department tasked with such execution. However, in the event of a failure to enforce a decision, or a delay in enforcement or in giving information to the Constitutional Court about the measures taken, the Constitutional Court shall render a ruling in which it shall establish that its decision has not been enforced. This ruling shall be transmitted to the competent prosecutor or another body competent to enforce the decision, as designated by the Constitutional Court.

determines the bodies authorized for the execution of its decisions, as well as the manner of their execution. In determining the manner of the execution of its decisions the Constitutional Court in fact orders the competent bodies to implement general and/or individual measures that could be compared to the measures forced on the responsible contracting states by the European Court of Human Rights.

In *Germany,* the Federal Constitutional Court is also entitled to pronounce a temporary injunction[118]. In such cases, over and above the finding itself, the Court may impose conduct-related obligations on the opposing party[119]; furthermore, where necessary, the Court may also secure the enforcement of its decision via an execution order.[120]

[118] Cf. BVerfGE 89, 38 <44>; 96, 223 <229>; 98, 139 <144>.

[119] Bethge, in: Maunz/Schmidt-Bleibtreu/Klein/Bethge, *Bundesverfassungsgerichtsgesetz*, § 67, marginal no. 36

[120] Voßkuhle, in: v. Mangoldt/Klein/Starck, GG, Vol. 3, 5th ed. 2005, Art. 93, marginal no. 115

III. ENFORCEMENT OF CONSTITUTIONAL COURT'S DECISIONS

Valentin Zoltán PUSKÁS, judge of the Constitutional Court
Károly BENKE, chief-assistant-magistrate

1. The Constitutional Court's decisions:
a) are final;

As a matter of principle in all the States, decisions rendered by the Constitutional Courts are final.

Portugal's is a particular instance, in that a finding of unconstitutionality made by the Constitutional Tribunal within the *a priori* review may be defeated in certain conditions. Thus, where an act has been found unconstitutional, the President of the Republic, who has a mandatory suspensive veto, must return it to Parliament. However, his veto can be overridden if Parliament approves it again by a two-thirds majority of the Members present, where that majority is larger than the absolute majority of the Members entitled to vote. Depending on the case, the act may end up again at the President, and he shall promulgate the law or sign the international treaty – or refuse to do so (Articles 279-2 and 4 of the Constitution of Portugal). In that case, the law or the international treaty cannot be enacted and cannot be applied.

b) may be appealed against, in which case the holder of such right, the terms and procedure shall be pointed out;

In none of the States under survey can the decisions of the Constitutional Court be appealed against.

c/d) cause *erga omnes/inter partes litigantes* effects;

With regard to the binding character of the Constitutional Court decisions, namely in terms of their effects *erga omnes* or *inter partes litigantes*, it should be noted that a decision of unconstitutionality in respect of a normative act will take on *erga omnes* effects in most of the States. Obviously, the situation is quite different in those States having embraced the American model of constitutional review, where either the rule of judicial precedent is applied (*Norway*), or the decision has *erga omnes* effect (*Denmark*).

In order to illustrate these points, but also some specific aspects indicated in the reports from various countries, their respective situation is presented as follows:

- in *Germany*, the Federal Constitutional Court decisions, over and above their *inter partes litigantes* character, which is inherent to any court ruling having the *res judicata* authority, are binding for all courts and for all other public institutions or authorities. The binding effect applies for decisions of the Plenum and for Chamber decisions. However, orders with which a constitutional complaint was not accepted for adjudication are not binding. The *erga omnes* effect of the constitutional court decisions is limited and does not extend to private third parties. A complete *erga omnes* effect is taken on by decisions handed down in the proceedings of abstract and concrete review of laws and in constitutional complaint proceedings which target statutes (normative

acts). Consequently, only those decisions achieve the force of law with which a legal provision is found to be constitutionally null and void, compatible or incompatible with the Basic Law;

- only rulings made in the *amparo* constitutionality review have *inter partes* effects (*Andorra*);

- in *Austria*, decisions rendered within the constitutional review of general normative acts have *erga omnes* effects, but only for the future, while those concerning individual acts take *inter partes* effects. It may be interesting to note that it lies with the Constitutional Court to declare laws as unconstitutional also retroactively, although in principle non-retroactivity shall apply (unlike Germany, where retroactivity is the rule);

- the Constitutional Court has competence to suggest possible ways in order to overcome the unconstitutionality which has been identified. The public authorities and institutions which are the addressees of its decisions must react within the time-limit set by the court for the enforcement and observance of its decisions (*Belarus*);

- in *Estonia*, the constitutional court has the power to delay the entry into force of its judgment, which is seen as a **limitation of the *erga omnes* effect** produced by the decision. Such postponement of the entry into force of the constitutional court decision is also to be found in *Georgia* or in *Poland*, but only in Estonia this is held as a limitation of the *erga omnes* effect of the judgment;

- the decision whereby the Constitutional Court finds that a legal provision is constitutional in a certain interpretation does not bind judges other than the judge *a quo*, hence one may assume that it only produces *inter partes* effects. However, if the ordinary courts seek to apply the interpretation rejected by the Court, it enables the Court to duplicate its initial rejection decision with a judgment that declares the law as unconstitutional - the so-called system of "double judgment" (in *Italy*);

- in *Latvia*, the binding character of the Court decision translates into the obligatoriness of the decision itself and the interpretation given by the Court to the norm being challenged;

- the binding character of the decisions is doubled by the binding content of the act whereby the Constitutional Court has interpreted the Constitution (*Lithuania*);

- in the *Republic of Macedonia*, the extent of the decisions' binding effects depends on which issues they refer to and what their character is;

- in the *Republic of Moldova*, the ruling of the Constitutional Court must be enforced within the time-limits specified in the ruling, whereas it enters into force on the date of adoption;

- since *Norway* adopted the American model of constitutional review of laws, decisions rendered by the Supreme Court in constitutional matters shall be binding only *inter partes*. However, this effect is complemented with the rule of the legal precedent, in that lower courts are bound by judgment made by the higher courts;

- in *Poland, Romania* or *Serbia*, the decisions of the constitutional courts are generally binding;

- in *Russia*, the *erga omnes* effect of the decision also translates into the fact that it can make grounds for the abrogation by the competent authority of any legal provisions similar to those found unconstitutional. Moreover, the revision of court rulings is possible not only in the concrete case concerned, but also in relation to cases of other persons for which the decision presents interest;

- in *Serbia*, decisions on constitutional appeals which find that an individual act or action breached or deprived the appellant(s) of a constitutionally guaranteed human or

minority right may also apply to individuals who have not filed an appeal if they are in the same situation. However, if such connection cannot be proven, the decision shall keep to its *inter partes* character;

- in *Slovenia*, even though the decisions handed down on constitutional complaints have *inter partes* effects, they may acquire *erga omnes* effects but only if the legal regulation on which the challenged individual act was based has been found unconstitutional. However, in principle, the procedure applied for the resolution of constitutional complaints acknowledges only *inter partes* effects to decisions of the Constitutional Court;

- in *Switzerland*, within the abstract review, where the disputed cantonal rule has been annuled, the decision produces *erga omnes* effects. However, no such effects partake of a decision rendered in the concrete review; although a finding of unconstitutionality, even within such review, may as well bestow certain *erga omnes* nuances to the decision, which means that if the unconstitutional norm continues to be applied in a concrete case, anyone concerned may proceed to have it once again declared unconstitutional. Therefore, public authorities, taking into account the situation, will choose not to enforce the unconstitutional norm any longer, despite the fact that the decision made by the Swiss Federal Supreme Court a priori has *inter partes* effects.

Not in the least, it is worth mentioning that in certain countries the Constitution provides *in terminis* that the decisions of the Constitutional Court are enforceable (e.g. *Republic of Macedonia*, *Montenegro*, *Serbia*).

As for the decisions which reject claims of unconstitutionality during the *a posteriori* review, they take on in principle *inter partes* effects, except for countries such as *France* or *Luxembourg*, where a new challenge concerning the unconstitutionality of a norm already contested before cannot be founded on the same reasons or grounds. In *Turkey*, since the binding force of rejection decisions is limited to the case under review, it is possible to make a new claim for annulment of that same norm. Hence, the authority of rejection decisions (which is relative) should be considered in contradistinction to annulment decisions (whose res judicata authority extends *erga omnes*). But if the Constitutional Court rejects the exception of unconstitutionality after having examined the case on the merits, a new exception in regard of the same legal provision may be raised again only after a period of 10 years since publication of the Court's initial decision. One should also note that in *Portugal* or *Romania*, even if the contested normative act has been found in conformity with the Constitution, it can be still challenged anew by another exception (plea) of unconstitutionality, that because the norm's constitutionality is not an absolute one.

By contrast, rejection decisions on applications of unconstitutionality within the *a priori* review take on *erga omnes* effects, which is obviously limited to the circle of the subjects involved in the promulgation (signing-in) procedure.

2. **As from publication of the decision in the Official Gazette/Journal, the legal text declared unconstitutional shall be:**
   a) **repealed;**
   b) **suspended until when the act/text declared unconstitutional has been accorded with the provisions of the Constitution;**
   c) **suspended until when the legislature has invalidated the decision rendered by the Constitutional Court;**
   d) **other instances.**

2.1. A decision which makes a finding of unconstitutionality of a normative act **enters into force** either as of the day when such is delivered or announced (for example, that is the case in *Armenia*, *Belarus*, *Estonia*, *Georgia*, *Ukraine*, *Republic of Moldova*) or as of the date of publication (for example, in *Austria, Croatia, France, Italy, Latvia, Serbia, Turkey, Albania, Romania, the Czech Republic*), or as provided in the decision itself (for example, this is the case in *Azerbaijan* in connection with laws and other normative acts or their provisions, or the intergovernmental agreements of the Republic of Azerbaijan; also in *Belarus*), or on the first day following the publication of the decision (for example, in *Bosnia and Herzegovina, Slovenia*).

An interesting situation can be found in *Azerbaijan*, where the decisions of the Constitutional Court may enter into force at various moments, depending on the subject area concerned:

- from a date specified in the decision itself in cases of finding the unconstitutionality of laws and other legislative acts or their provisions, the intergovernmental agreements of the Republic of Azerbaijan;
- from the date when the decision concerning the separation of the powers between the legislative, the executive and the judiciary, as well as concerning the interpretation of the Constitution and the laws of the Republic of Azerbaijan is published;
- from the date when the decision on other matters under the jurisdiction of the Constitutional Court is announced.

In the *Republic of Moldova,* the rulings made by the Court may enter into force as of the date of publication or the date provided therein, while in the *Czech Republic* the Court can decide that the decision enters into force on the date of announcement.

2.2. However, in most of the countries, national legislation has provided the possibility for the Constitutional Court to **postpone** the entry into force of its decision of unconstitutionality **until a certain date** (up to one year since publication of the decision – *Turkey*, up to six months since publication of the decision – *Bosnia and Herzegovina*, up to six months since delivery of the judgment – *Estonia*, 12-18 months in *Poland*, up to 18 months in *Austria*, one year in *Slovenia*; in that sense, see also the example of *Germany*, *Croatia*, *the Czech Republic* or *Georgia*). In other countries, the length of this time-limit is a matter for the Constitutional Court to decide (*Belarus*, *France*, and *Russia*).

This deadline has no effect on the case that gave reason for repealing the norm, but is applicable to all other decisions to be taken by administrative authorities or the courts until its expiry (*Austria*). So, the norm becomes incontestable for everyone until the expiry of the deadline, after which it *ipso iure* ceases to exist (*Austria*).

Such postponement may be enforced until to the occurrence of a certain event/ act (*Belarus*).

When the Court decides to delay repealing effects, it shall take into account the situation which could develop starting with the moment when the unconstitutional provisions become invalid, namely in that it should not breach the fundamental rights of the applicants and other persons and would not cause significant harm to the interests of the state or society (*Latvia*).

The reasons for such postponement gravitate around the principle of legal security, however, apart from that other aspects may be at stake, such as in order to allow sufficient time for the authority that adopted the unconstitutional legal provision to

repeal it, amend it, supplement it (*Belarus*), respectively, to harmonize the unconstitutional provision with the decision of the Constitutional Court (*Bosnia and Herzegovina*), to avoid regulatory omissions (*Croatia*).

In *Russia*, if the immediate annulment of the normative provisions could have a negative effect on the balance of the constitutional values, the Constitutional Court may stay the enforcement of its ruling and may provide a subsequent date to repeal the legal provisions declared unconstitutional. In *Armenia*, if the Constitutional Court finds that declaring the normative act unconstitutional and, consequently, invalidating it or any of its provisions from the moment of the announcement of the Court decision will inevitably cause such severe consequences for the citizens and for the state authority which will harm the legal security expected from the nullification of the respective act, then the Constitutional Court has the right to declare the act as unconstitutional and, at the same time, to postpone the day when the act becomes invalidated.

If the incompatibility is not eliminated within the time-limit specified, the Constitutional Court will declare in a subsequent ruling that the provisions found unconstitutional are no longer in force (*Bosnia and Herzegovina*).

A special situation can be found in *Germany*, where the Federal Constitutional Court, if it finds that the legal act impugned is incompatible with the Constitution, does not declare it null and void, in order to give the legislature a margin of appreciation and sufficient time to adopt new regulations, in the following cases: (1) if the legislature is to have diverse possibilities to eliminate the breach of the Constitution; and (2) if in the interest of the common good a gentle transition from the unconstitutional to the constitutional legal situation is required, in particular if a state were to be created in the case of nullity which would be even less compatible with the Constitution than the current one. Amongst others, orders of unchanged or indeed modified further application of the unconstitutional law can initially be considered. But if the Federal Constitutional Court is unable to accept the unconstitutional provision as a transitional provision, even in a modified form, the Court itself formulates in turn a transitional provision or one that should serve as "catch-all". When the Federal Constitutional Court makes a declaration of incompatibility, it can also refrain from ordering the continued application of the unconstitutional law altogether. However, in contradistinction to a declaration of nullity – such choice is only justified if the Court also imposes a deadline on the legislature for the enactment of new legislation, in accord with the Constitution, whilst considering a transitional arrangement to be unnecessary until that time. The unconstitutional provision then remains inapplicable in the interim period until the entry into force of the new law; and any court proceedings already pending must be suspended.

Quite the opposite, there are also countries in which the Constitutional Court does not have the power to delay the effects of its decision, i.e. cannot postpone the date when the legal norm found unconstitutional loses vigour – for instance, in *Portugal* or *Romania*.

2.3. Depending on the constitutional system, the decisions of the constitutional courts are governed either by the principle of non-retroactivity or the principle of retroactive application, or they accept both principles with certain nuances, as is shown here below.

The first category includes the following countries: *Romania* [where, according to Article 147 para.(4) final phrase of the Constitution, the decisions "take effect only for

the future"], *Belarus* (where the phrase being used is that the unconstitutional act "shall have no legal force"), *Republic of Moldova* (where the unconstitutional provisions shall become null and no longer applicable as from the adoption of the decision by the Constitutional Court) or *Serbia*.

Germany belongs to the second category where, according to the tradition of the German public law, a provision which violates higher-ranking law shall be null and void *ipso jure* and *ex tunc,* from which the *eo ipso* nullity of a law contrary to the Constitution[121] can be derived.

In *Belgium*, the annulled legal norm disappears from the legal order, as if it had never been adopted. Retroactivity inherent to restoration of a *status quo ante* implies abolishment of the norm *ex tunc*. Retroactivity is thus seen as a logical aftermath of unconstitutionality, that because the annulled provision has been vitiated from the very beginning. With a view to tempering the effects of such annulment, which can severely harm legal certainty, the Court, if it deems necessary, also indicates the effects of invalidated provisions that shall be considered final or those that shall be temporarily maintained for a period which is specified. The Constitutional Court shall annul the contested provision in whole or in part. Consequently, annulment may target all challenged provisions, but also confine itself to a single provision, phrase or even a single word. At other times it may be that the Court decides to *modulate* the annulment: it shall so invalidate a legal provision or its part but only "to the extent that" such is unconstitutional.

In *Ireland*, where The Supreme Court is tasked with the constitutionality review, the law is deemed void *ab initio,* if it is a law enacted after entry into force of the 1937 Constitution; or from the coming into force of the Constitution, if it is a pre-constitutional law.

The third category includes *Austria*: here, even if principally the decision takes effects only for the future, the Court may choose to declare inapplicable a general normative act with retroactive effect (still, this entails difficult questions with respect to the *res judicata* effect of decisions that have been issued but have remained uncontested), alongside with *Armenia* (where the Court's decision will retroactivate only when the provisions recognized unconstitutional are of the Criminal Code or the law on administrative liability), the *Republic of Macedonia* or *Slovenia*, countries where the Constitutional Court may not only repeal a law, but also repeal or annul regulations or general acts adopted to exercise the public authority, as well as adopt a declaratory ruling wherein it may state that the act it reviewed was unconstitutional or unlawful.

In *Italy* or in *Montenegro*, the decision of unconstitutionality produces retroactive effects, except for the cases already finally concluded – *facta praeterita;* it is worth mentioning that the enforcement of the decision of unconstitutionality in pending cases is deemed retroactive as it is enforced to acts which had already occurred. Italy also acknowledges the concept of "intervening unconstitutionality", more specifically, a limitation of the effects of the declaration of unconstitutionality, in that the Court declares that a particular legal provision, which was compatible with the Constitution upon its entry into force, became unconstitutional only later, when certain events arose, so that the effects of the decision will begin only upon the materialisation of such events.

[121] See the example of Denmark, too.

There are also cases when the Constitutional Court has competence to provide that the judgment of unconstitutionality shall take effect as from the date of coming into force of the contested norm (act) or as of the date when it was enforced with respect to the author of the motion (*Latvia*). Moreover, if the Constitutional Court finds that the challenged norm is not conform with a higher-ranking legal act, and declares it null as of the date when the act came into force or was enforced, with respect to the author of the motion or a certain circle of persons, the effects of the decision by the Court shall begin to surface as of the date when the act came into force or was enforced. The procedure is applied by the Constitutional Court to prevent most efficiently the violation of individual rights.

To decide whether to annul or repeal a law, a regulation or a general act, the Constitutional Court must take into account all circumstances which are relevant for the observance of the constitutionality and lawfulness, especially the severity of the breach, its nature and significance with respect to the exercise of the citizens' rights and freedoms or the relationships established based on those acts, the legal certainty, as well as any other aspects which are relevant for the settlement of the case (*Republic of Macedonia* – Article 73 of the Book of Procedures of the Constitutional Court).

2.4. As regards **the effects of substantive law** that are taken by the decisions of constitutional courts or courts of constitutional review, it is possible to discern the following:

1. Effect of repeal or elimination of the unconstitutional norm from the legal system (*Albania, Armenia, Andorra, Estonia, Croatia, Hungary, Italy, Ireland, France, Latvia, Lithuania*, *Republic of Macedonia, Republic of Moldova*, *Poland, Russia*, *Turkey, the Czech Republic, Ukraine, Slovenia, Romania*).

For example, in *Lithuania*, even if the text of the Constitution uses the phrase according to which the provision found unconstitutional "shall not be applied," the Court jurisprudence interprets this phrase in the sense that the unconstitutional norm shall be eliminated from the legal system. The Seimas, the President of the Republic, or the Government, as the case may be, are bound by the Constitution to acknowledge that such a legal act (part of it) shall no longer be valid or (if it is impossible for them to perform this without appropriately regulating the respective social relationships) they shall amend it so as the new regulation should not be in conflict with the legal acts of a higher order, among which (and in the first place) the Constitution. However, even until the date when this constitutional obligation is fulfilled, the legal act (part of it) shall not be applied in any case, and the legal power of the law shall be cancelled[122].

In the *Republic of Moldova*, apart from the repeal effect of the ruling made by the Constitutional Court, the Government, no later than three months of the date of publication, shall submit in Parliament a draft law for the amendment, supplementation or abrogation of the legal act or its parts declared unconstitutional. The respective draft law shall be examined by the Parliament as a matter of priority. In *Russia* too, the repealing of normative provisions found unconstitutional shall not annul the obligation of respective law-making body, which has adopted the provisions, to remove them from the legal system following the procedure and the time limits established by the Federal Constitutional Law. At the same time, the loss of constitutional legitimacy of a normative act shall be "a different sanction, which is much more severe than with mere

[122] The Constitutional Court ruling of 6 June 2006.

abrogation of a legal text"[123] (*Romania*).

2. Material non-enforceability, which is where the unconstitutional act remains in force, so formally it can be applied (*Cyprus, Luxembourg, Norway* and *Belgium*[124] as regards preliminary questions of unconstitutionality). Parliament can repeal the unconstitutional act or if it fails to do so the law remains in existence but should not be applied in any other act or decision taken by the authorities (*Cyprus*). A similar situation is in *Norway*, where the Supreme Court may state that a law is unconstitutional, but cannot declare it invalid as such. It is for the competent bodies to repeal / amend it according to the decision delivered by the Court.

3. Non-enforceability, possibly accompanied by the action of the authority that adopted the unconstitutional legal norm (*Belarus*). Normative acts found unconstitutional shall no longer be applied by courts until the authority that adopted them has introduced the required amendments.

4. Non-enforceability accompanied by invalidation/ repeal, according to the type of review which is carried out. Depending on the nature of its review, the Court will either annul the legal norm or, where such is found unconstitutional, simply discard the norm upon delivery of judgment, because no longer applicable in the instant case. To fill the legal gap created by its decision, the Constitutional Tribunal may order re-entry into force of the norm(s) that may have been repealed under the provision declared unconstitutional (*Portugal*).

In *Switzerland*, while no duty arises for the law-maker as far as the constitutionality review of the federal laws is concerned, where it comes to cantonal laws, instead, a norm which is found unconstitutional within the abstract review must be repealed, and that which is found unconstitutional within the concrete review shall be invalidated, to the effect that neither authorities can enforce it, nor must private individuals observe it anymore. However, abrogation / amendment of such norm are to be dealt with by the law-making authority.

5. Finally, in *Germany*, the decision by which the Federal Constitutional Court declares the legal act as unconstitutional does not have a constitutive character; it has neither a quashing, nor an invalidating or a reforming impact on the law, but only makes a finding and at the most eliminates the legal appearance in terms of the validity of the law.

Unconstitutionality may be expressed either by finding the legal act incompatible with the Basic Law or by declaring it null and void. However, the material advantage of finding the incompatibility resides most particularly in that, unlike the declaration of nullity, it does not create direct facts, and the declaration of incompatibility may be accompanied by transitional enforcement arrangements ordered by the Federal Constitutional Court. Hence, the legal consequences of the declaration of

---

[123] Decision no.414 of 14 April 2010, published in the Official Gazette of Romania, Part I, no.291 of 4 May 2010.

[124] The legal norm found unconstitutional shall continue to exist in the legal order and must be applied in any situation outside the dispute in which the preliminary question has been raised, even though the provision is declared unconstitutional. A preliminary ruling shall be binding only for the courts, and not for the administrative authorities or the private persons. The finding of unconstitutionality comprised in the preliminary ruling has no incidence on court decisions with res judicata authority, where such are based on the unconstitutional norm. Unlike cases when it deals with an appeal for annulment, this procedure does not enable the Court to temper effects of its ruling on a preliminary question. But indeed, also in that case a finding of unconstitutionality is likely to impair the legal certainty. Sometimes the Court itself tries to modulate the temporal effects of its ruling.

incompatibility are determined by the content of the enforcement order issued by the Federal Constitutional Court concurrently with the decision itself.

2.5. Effects on individual acts

Apart from its direct effects on the normative act found unconstitutional, a decision of unconstitutionality may also have incidence on individual acts adopted by the administrative authority or courts in application of the unconstitutional text. Thus, in *Austria*, the finding of unconstitutionality of the law on which a decision of a last instance administrative authority or the Asylum Court (for asylum-seekers) was based, when the decision itself has been challenged before the Constitutional Court, entails the annulment thereof, and the administrative authority will be obliged to issue a decision in conformity with the Constitutional Court's legal opinion.

This is also the case in *Belgium* – where the annulment of a legal norm dispossesses court decisions based on the invalidated norm of their legal grounds, although the rulings themselves do not altogether vanish *ipso facto* from the legal order. A six months' time limit begins to run on the date of publication in the Official Gazette (*le Moniteur belge*) of the annulment decision, allowing a withdrawal appeal be lodged against the respective court decisions. As for the administrative acts issued on the basis of an invalidated norm, special remedies are provided under the organic law, and such may be used within six months from publication of the Court decision in the Official Gazette. However, where the Court decides to maintain the effects of the invalidated provision, then it is no longer possible to launch any legal proceedings in order to annul the acts based thereupon.

In other States, *Lithuania* for instance, the decisions based on the legal acts recognized as being in conflict with the Constitution or the law shall no longer be executed if they had not been already executed before the ruling of the Constitutional Court has produced its effects. At the same time, a duty arises for all State institutions to revoke their sub-statutory acts (provisions thereof) which are based on the act declared unconstitutional. In the same way, in *Montenegro*, the Court's decision of unconstitutionality suspends the irrevocability clause of individual acts, while the competent authority, at the request of the person concerned, following specific terms and conditions will have to amend the individual act that is based on the unconstitutional law.

In *Serbia*, anyone whose rights have been violated by an individual act adopted on the basis of a general act declared unconstitutional is entitled to file a request with the competent authority in order to have the respective act amended in line with the decision of the Constitutional Court, within 6 months. If the amendment of the individual act cannot obviate the consequences of the application of the general act found unconstitutional, the Constitutional Court may order that such consequences be removed by *restitutio in integrum*, damage compensation or in another manner. Such arrangement stems from the fact that a final individual act adopted on the basis of an unconstitutional normative act may no longer apply or be enforced. Any already initiated enforcement of such an act shall be discontinued.

Also in the *Republic of Moldova* the acts issued to enforce normative acts or parts thereof declared unconstitutional shall become null and shall be repealed. In the *Republic of Macedonia* as well, the general act found unconstitutional ceases effects and may not be a legal ground for the adoption of individual acts in the future or for the enforcement of individual acts adopted on its basis.

In *Germany*, if the Federal Constitutional Court, on the basis of constitutional complaint, finds not also the law, but only measures taken by the authorities or certain court rulings to be unconstitutional – then it shall establish which provisions of the Basic Law were violated by the concrete act or omission. Such finding of unconstitutionality already involves binding effects. Furthermore, the Federal Constitutional Court quashes the impugned decision, refers the matter back to the competent court, according to the judicial proceedings, which so eliminates the challenged decision, whereas the court to which the case was remitted shall be bound by this finding of unconstitutionality.

2.6. Suspension by the constitutional court of the challenged legal norm

This institution is present in States such as *Germany, Armenia, Belgium* or *Lithuania*. In *Belgium* or in *Germany*, suspension lies at the Court's own discretion, while in *Lithuania*, it is *ex officio* in the case of a certain type of complaints.

In *Belgium*, for example, the Constitutional Court may suspend the legal norm that is the subject of an appeal for annulment. The Court takes the view that suspension is assimilated to a temporary annulment. Nonetheless, unlike annulment as such, suspension does not have retroactive effects. In *Lithuania*, according to the Constitution, a legal act shall be suspended when the President of the Republic or the Seimas *in corpore* shall refer the Constitutional Court with an application to rule on its constitutionality. Once it has been found, following the examination of the case, that the challenged act is in line with the Constitution, its legal effects are reinstated.

2.7. Specific aspects concerning a finding of unconstitutionality rendered in proceedings on exceptions of unconstitutionality

- *Austria*: in the specific case at the Constitutional Court (the situation of constitutional complaints) that gave reason for the norm review procedure, the decision of the Constitutional Court must be based on the so-called "adjusted legal situation" (*"bereinigte Rechtslage"*). This means that the Court, when assessing the case, must disregard the invalidated legal norm (the so-called "premium for the catcher"). Therefore, in most cases, the Constitutional Court also annuls the administrative authority's decision in the continued proceedings, as the legal situation has to be assessed as if the invalidated normative act had never existed;

- following the constitutionality review of normative acts that are no longer in force, the judgment of the Supreme Court shall produce *inter partes* effects, but the challenged act shall be deemed unconstitutional as from the date of submission of proceedings before the Court (*Estonia*). In *Romania*, however, a decision of unconstitutionality in regard of norms that are no longer in force shall have *erga omnes* effects, limited to the cases pending with the administrative authorities and/or the courts, while the contested act is deemed unconstitutional as from the date of publication of the Constitutional Court decision.[125]

[125] See Decision no.766 of 15 June 2011, published in the Official Gazette of Romania, Part I, no.549 of 3 August 2011.

3. Once the Constitutional Court has passed a judgment of unconstitutionality, in what way is it binding for the referring court of law and for other courts?

According to the American model of constitutional review, decisions delivered by the Supreme Court are binding for all lower courts, as well as for the Court itself (*Cyprus, Estonia, Ireland, Luxembourg, Monaco*, *Norway*). At the same time, the courts at lower levels will generally pursue to align their own case-law with the Supreme Court, in order to avoid that appeals be upheld against their own rulings (*Switzerland*).

In the European model of constitutional review, the decision of unconstitutionality rendered within the concrete review shall be binding not only for the referring court but also for all other national courts (*Germany, Lithuania, France, Hungary, Latvia, Republic of Moldova, Poland, Romania, Turkey*). In some instances, nonetheless, the legal text found unconstitutional shall continue to exist in the legal order and must be applied in any situation outside the dispute that gave rise to the preliminary question, even though such provision has been declared unconstitutional. But a court which – in a different dispute – may see itself confronted with an issue bearing upon the same subject matter will no longer have to refer to the Court; in that case, upon making its judgment, the court shall apply the solution given by the Court, which is binding thereon (*Belgium*[126]). A court ruling or judgments already pronounced will not lose their *res judicata* authority on account of a decision of unconstitutionality being handed down in proceedings concerning a question of unconstitutionality (*Belgium, Spain*). A binding decision means that both its operative part and the reasoning are binding[127] (*Germany, Lithuania, Romania*). Moreover, the courts are bound by the temporary injunctions ruled by the Federal Constitutional Court (*Germany*), but purely procedural rulings are not binding (*Germany, Romania*).

The consequences of the Constitutional Court decision are essentially quasi-normative (*Romania*). Also, the judgment determining that adoption of an act of legislation or execution falls into the competence of the Federation or the *Länder* has the rank of a constitutional law, therefore may only be amended by another constitutional law (*Austria*).

If the Constitutional Court decides that the legal norm impugned is unconstitutional and therefore invalid "in terms of the aspects mentioned in the decision" or "in connection with certain provisions," the bindingness of that decision means that courts of general jurisdiction must apply the respective provision in conformity with the Constitution and the aspects highlighted by the Constitutional

[126] Since a preliminary ruling is only binding on courts and not administrative authorities or private individuals, the finding of unconstitutionality within the preliminary procedure allows a new time-limit to run for the submission of an appeal in annulment, which is part of the leverage in abstract review proceedings. The ruling of the Constitutional Court has *res judicata* authority as of the date it is received by the judge *a quo*.

[127] In the Czech Republic, a controversy exists in the legal doctrine as to the binding nature of the "essential grounds" set forth in the reasoning of the Constitutional Court decisions, while the Court itself has not yet taken an approach in a consistent manner; the Court's case-law tends rather to consider these grounds (*ratio decidendi*) not as a binding precedent *de jure* for the public authorities and institutions, still binding for the Court itself, which cannot deviate from them unless by reconsidering its jurisprudence. Nonetheless, such grounds are observed *de facto* by public authorities and institutions.

Court (*Romania, Armenia, Italy*[128], *Belgium, Spain*[129]). Thus, in proceedings on a constitutional complaint, when the Constitutional Court annuls a court decision, the case is returned to that court, which must reopen proceedings and make another ruling (*the Czech Republic*[130]). In proceedings related to complaints lodged against decisions of ordinary courts or other public authorities concerning violations of the rights and fundamental freedoms under the Constitution and the ECHR, the Court, while granting the appeal, shall quash the challenged decision, and refer the case back to the court in order to reopen judicial proceedings, and the latter shall be bound by the decision of the Constitutional Court (*Bosnia and Herzegovina*). The Constitutional Court may also establish the manner in which its decision shall be implemented, which is binding for the ordinary courts (*Slovenia, Serbia*); if the court decisions, regardless of their level of jurisdiction, are invalidated by the Constitutional Court, then such shall cease legal effects as of the date they have been handed down (*Albania*)[131].

The Constitutional Court judgment of unconstitutionality constitutes the grounds for revision of a court decision, if the latter has not yet been executed (*Russia, Ukraine*). Following a finding of unconstitutionality, the respective decision shall be regarded as a new circumstance which was not taken into account at the initial trial of the case, therefore serve as a ground for the review of the judicial act rendered by the ordinary court against the person, on the basis of whose individual application the Constitutional Court declared that norm as unconstitutional and invalid (*Armenia, Azerbaijan*). Furthermore, subject to review based on the decision of unconstitutionality given by the Constitutional Court are the acts of ordinary courts against those persons which upon the date of adoption of the decision of the Constitutional Court on the issue of constitutionality of the legal provision enjoyed the possibility to exercise their right to apply to the Constitutional Court (*Armenia, Azerbaijan*).

A final criminal sentence, which was grounded on a legal provision that has been subsequently declared unconstitutional and repealed, shall cease effects from the date of entry into force of the Court's decision (*Croatia*). Likewise, if the decision of unconstitutionality envisages criminal or administrative cases concerning sanctionatory proceedings in which – following the declaration of nullity of the legal

---

[128] If a legal text establishing an exception in a particular case was annulled, then the judge will have to apply the general rule; if, instead, a law abrogating another law was declared unconstitutional, it is possible to "revitalize" the abrogated law. Judgments can be defined as ablative (in that they declare the unconstitutionality of a legal norm "to the extent that" it establishes a certain state of affairs), additive (as they declare the unconstitutionality of a legal norm "inasmuch as it does not" establish a certain outcome), substitutive (as they declare the unconstitutionality of a provision "to the extent that" it provides for one result "rather than" another), principle-additive (through which the Court declares the unconstitutionality of a regulation, however it does not specify the content that the legal norm should include, but limits itself to suggesting what the judge should bring about on applying the principle), and interpretative, which in a certain sense uphold the constitutionality of the law (Italy).

[129] All judges and all courts shall interpret and apply the laws and the regulations according to "the constitutional provisions and principles, in line with the interpretation arising from the decisions rendered by the Constitutional Tribunal, within any of its proceedings" (Spain).

[130] When the Constitutional Court, finding that a normative act is unconstitutional, decides to defer the enforceability of the judgment to a later time, the courts of general jurisdiction must interpret such problematic norms in a constitutional manner, i.e. in accordance with the conclusions of the Constitutional Court, even though the norm in question formally remains part of the legal order.

[131] The case shall be sent for review to the court whose ruling was quashed.

norm applied – there results a reduction of punishment or sanction, or an exclusion, exoneration or limitation of liability, such judgment shall be subject to review (*Spain*). Judgments of the Supreme Court in constitutionality review cases shall bring about procedural consequences in civil, criminal and administrative court procedure and serve as the basis for revision in all the three procedures (*Estonia*); the Constitutional Court shall also order the review of the criminal proceedings concluded with a non-appealable verdict (*Hungary*). At the same time, insofar there is no more possibility to suspend proceedings in the court *a quo* upon referral to the Constitutional Court with an exception of unconstitutionality, the finding of unconstitutionality handed down following such referral shall serve as grounds for the revision of the court decision delivered in the meantime, upon request, both in civil and in criminal cases (*Romania*). Even if the procedural laws do not comprise any specific provision on the possibility to apply for the retrial of a case, on account that the law based on which the court returned its final judgment has been annulled by the Constitutional Court, such a legal remedy should be allowed by the courts because of the *erga omnes* effect of unconstitutionality decisions (*Republic of Macedonia*).

Everyone whose right was violated may apply to the competent authority to change/annul the individual act adopted on the basis of the unconstitutional law (*Republic of Macedonia, Montenegro, Croatia*). When issuing a new individual act, the issuing authority shall be obliged to obey the legal opinion expressed by the Constitutional Court in the decision repealing the act whereby the applicant's constitutional right was violated (*Croatia*). However, if the consequences from the implementation of the general act or regulation which was annulled by a decision of the Constitutional Court cannot be removed with a change of the individual act, the Court may order that such consequences be removed by restoration to previous condition, with damage compensation or in some other way (*Republic of Macedonia*). In *Croatia*, any natural or legal person who applied for review of the provision of a law or another regulation, and the Constitutional Court accepted such claim and repealed the provision of the law, or of the other regulation, has the right to submit a request to the competent body to change the individual act whereby his/her right was violated, and which was issued on the basis of the repealed provisions. If the damaging effects that are the consequence of the violation of the party's rights cannot be redressed, the party concerned may, within the term of six months from the day when the Court's decision was published in the Official Gazette, lodge a request with the competent court to redress these effects by compensation for damage.

Specific aspects presented in some of the national reports

- In *Portugal* there is no genuine exception of unconstitutionality, insofar as the ordinary courts themselves can deal with questions of unconstitutionality – having the authority to examine the constitutionality of norms and decide on their non-applicability (diffuse control). This is rather an avenue for reviewing court decisions, but only on points concerning an issue of constitutionality. For this reason, the Constitutional Tribunal shall only be referred in order to adjudicate on issues of constitutionality as an appellate court;

- rejection decisions in unsuccessful appeals of unconstitutionality or disputes in defence of local autonomy will afterwards impede that the issue be raised again by either of these two avenues [appeal or question of unconstitutionality], if grounded on violation of the same constitutional provision (*Spain*);

- in its proceedings on the constitutional complaint, the Constitutional Court decision is binding on the court whose individual act or action the Court found to be violating or denying a person of his/her human or minority rights and fundamental freedoms, and shall be enforced in the manner specified by the Constitutional Court (*Serbia*).

4. Is it customary that the legislature fulfils, within specified deadlines, the constitutional obligation to eliminate any unconstitutional aspects as may have been found – as a result of *a posteriori* and/or *a priori* review?

4.1. Replies to the questionnaire have particularly tackled with cases where the constitutional courts postpone the entry into force of their decisions of unconstitutionality, which amounts to setting a deadline for the legislature in order to bring the act in line with the decision of the Constitutional Court (*Austria, Slovenia*). Setting a deadline in which the lawmaker should take steps, maintaining the effects of an unconstitutional normative act until a given future date, finding a legislative gap as unconstitutional, all these techniques are but forms of self-limitation for the constitutional judge who, far from suppressing the power to legislate, actually restores these powers to the law-maker (*Belgium*).

Harmonization of an unconstitutional text can be done either by amendments to the act concerned or its abrogation followed by the adoption of a new normative act regulating the social relations envisaged by the respective unconstitutional act (*the Czech Republic, Norway*). It is customary for the legislature to comply with such a mandate by the deadline set, even where the subject-matter of regulations to be made is politically controversial (*Germany, Austria*). If the legislature fails to take action by that deadline, the decision of the Constitutional Court shall enter into force (*Germany, Austria*).

Quite the opposite, in other constitutional systems - the legislature is under no obligation to repeal a law that was declared unconstitutional but in practice it complies with the decision of unconstitutionality (*Cyprus, Luxembourg*). Likewise, in *Switzerland*, at the federal level, no obligation arises for the law-maker in instances where the Swiss Federal Supreme Court has found a federal law unconstitutional within proceedings of concrete review of constitutionality.

4.2. In connection with deadlines set for the lawmaker in order to take steps, the legislation of the *Republic of Moldova* establishes that the Government must take action within two months from the date of publication of the Constitutional Court ruling; while Article 147 para. (1) of the Constitution of Romania sets an obligation for the Parliament or the Government, as the case may be, to bring the unconstitutional act in line with the decision rendered by the Constitutional Court in the *a posteriori* constitutional review, within 45 days from the date of publication. Similarly, time limits for this purpose are also set in *Lithuania*.

In other States, even though national legislation does not provide for a deadline or the manner in which the legislature should take action (*Serbia, Russia, Portugal, Norway, Denmark, Republic of Macedonia, Georgia, Armenia, Azerbaijan, Romania*[132], *Belarus, Belgium*), still it will do so promptly (*Andorra*), so that the

[132] In the *a priori* constitutional review.

decisions of unconstitutionality are adequately enforced (*Montenegro, Croatia, Azerbaijan;* in the *Republic of Moldova,* only 2 rulings remained unexecuted in 2009; in *Lithuania*[133]*,* out of 144 decisions finding unconstitutional acts, 101 were enforced*; in Hungary,* the legislature has not yet fulfilled its obligation to eliminate unconstitutional omissions in 18 cases out of 103 in all; in *Belarus*, 215 out of 292 decisions of the Constitutional Court have been executed in full, the rest have been executed in part or are being executed; in *Bosnia and Herzegovina,* for the period August 2009 - March 2010, all decisions relating to the abstract review of constitutionality have been enforced), since the law-maker is under an obligation to execute the decisions of the constitutional court (*Belgium*). In *Albania*, instead, where the normative act is invalidated and the new relationships call for juridical regulation, the decision of the Constitutional Court is notified to the relevant bodies, so that they undertake the measures laid down in its decision, without having a time limit provided in that sense.

Owing to the Constitutional Tribunal's prestige, its decisions are fully complied with by all other judicial bodies, political and administrative bodies (*Portugal*). It is often the case that the legislature eliminates the situation of unconstitutionality even before the Constitutional Court adopts a decision (*Latvia*), that is to say after a particular case is initiated, the legislature, having established deficiencies in regulatory framework that serves as the grounds for submitting an application to the Constitutional Court, eliminates them by amending the contested norm.

Furthermore, with a view to increasing the number of enforced decisions, the following points have been made:

- the Constitutional Court may come to prepare a package of proposals on change and addition to its own Law on the organization and operation, directed on the further perfection of execution of decisions of the Constitutional Court (*Azerbaijan*);
- the Constitutional Court is also authorized to give recommendations to the legislative and executive authorities concerning envisaged changes to a normative act according to legal positions of the Constitutional Court or concerning the adoption of regulations on the legal question considered by the Constitutional Court (*Azerbaijan*);
- subject to the Law of 25 April 2007, a parliamentary committee has been set up, being tasked to track legislative developments and draft, as appropriate, legislative initiatives for enforcing the decisions of the Constitutional Court (*Belgium*);
- exchange of letters between the Constitutional Court and Parliament (*Republic of Moldova*).

In quite exceptional cases, albeit rarely, when the legislature was reluctant to eliminate certain provisions, the Constitutional Court saw itself compelled to invalidate subsequent legislation that was adopted in disregard of constitutional doctrine (*Spain, Republic of Macedonia*).

As a conclusion, heed should be paid to the classification made in the report from *Estonia* in regard of the Legislature's conduct when confronted with various decisions of unconstitutionality, namely:

- extraordinary events when the legislature has very quickly and accurately complied with the judgments of the constitutional review court;
- ordinary events where the time spent by the lawmaker for implementation is in correlation with the complexity of the issue;

[133] The Lithuanian Report mentions that the response of the lawmaker usually takes place "accordingly and promptly."

- slow events where the time spent is obviously too long, that is where the Parliament (*Riigikogu*) is manifestly lacking political willingness to attend to the problem pointed out by the Court.

Such classification is also applicable to situations existing in *Turkey* or in *Romania*.

4.3. In some other States, the Court's judgment of unconstitutionality does not generally require further action on the part of the legislature to remove the situation of unconstitutionality, because the decision itself has already taken the effect that the act is repealed (*Poland, Armenia*). However, a legislative intervention within preset deadlines will be particularly needed where the Constitutional Court has found the legal norm under examination as unconstitutional "in the frames of legal positions expressed in the decision" or in "this or that part" (*Armenia*), in the case where the Constitutional Court – by its decision – has created a legal gap (*Armenia, Belgium, Poland, Hungary*), where a preliminary ruling is handed down (*Belgium, Switzerland* – in the case of cantonal norms), where such concerns a principle-additive judgment (*Italy*), where the unconstitutionality has been established, but not declared as such (*Italy*, if the Court does not proceed to annul the law, but rather highlights doubts as to its constitutionality, and so the legislature must intervene as soon as possible in order to avoid a situation of unconstitutionality) or where the Court draws the attention to Parliament in respect of an incoherence with the Constitution (*Republic of Moldova*).

In certain cases, the legislature's obligation appears to run in the direction of making amendments to the Constitution, which would allow the contested regulation to become part of the positive law (see, for instance, the case of *Ukraine*, where the Constitutional Court found the Rome Statute of the International Criminal Court to be unconstitutional, and the treaty has remained non-ratified because of a lack of political willingness in what concerns a revision of the Constitution).

4.4. In the case of the *a priori* review, a finding of unconstitutionality ends the legislative process with respect to the bill, although it remains open to the Government or Legislature to introduce a similar bill which avoids the unconstitutional aspect(s) identified by the decision (*Ireland*).

5. What happens if the legislature has failed to eliminate unconstitutional flaws within the deadline set by the Constitution and/or legislation?

5.1. There are also situations when it is not obvious from the decision of unconstitutionality what changes must be made in order to make the provision comply with the Constitution, so it may take quite some time and consideration to decide upon a new formulation or new political solution (*Norway*). There also may be cases when the legislature does not know how to implement the Constitutional Court ruling whereby a particular legal act has been declared unconstitutional. Then, the Speaker of the Seimas applies to the Constitutional Court with a petition requesting to construe the provisions of a previously adopted ruling, and after such interpretation is received, corresponding measures are taken (*Lithuania*).

5.2. Every State has designed a system aimed at imposing an obligation of compliance with the constitutional court decisions on the lawmaker, and to determine it take action to that effect. Such systems involve an administrative or, as the case may be,

criminal coercitive component, but also constitutional facets.

The first category includes administrative (*Republic of Moldova* and *Albania*) or criminal liability (*Russia, Bosnia and Herzegovina, Montenegro*) for failure to enforce the decisions of the Constitutional Court.

A more diversified array of instruments falls under the second category, which places at the forefront the necessity to have decisions of constitutional courts enforced by the legislature. In that sense the following examples are relevant:

- if the legislature fails to comply with the decision of the Federal Constitutional Court whereby it demands adoption of new legislation, the Court may impose various execution measures (*Germany*). Accordingly, where deadlines set for the legislature have not been observed, the Court may act as a positive quasi-lawmaker (and, for instance, decide on the cuantum of maintenance allowances for civil servants with three and more children). It may also instruct the legislature to adopt a new regulation by a set deadline and may order that the previous law be applied "until this time at most". Such a situation occurred when certain provisions concerning taxes, although declared unconstitutional, had not been followed by new legislation, so that the respective legal text had not been applied subsequent to that date. Also, if deemed necessary, the Court could have imposed a retroactive limitation of the duration of the continued application of legal provisions, thus exerting pressure on the legislature by the threat of loss of tax revenue for the budget (*Germany*);

- the competent bodies (Parliament or Government) may request a prolongation of the deadline set for the legal provisions declared unconstitutional to lose their legal force, in which case the Constitutional Court must return a decision (*Croatia, Belarus*). Such practice has led to the unreasonably long extension of the term set for unconstitutional laws to lose their force, with all damaging consequences deriving from it (*Croatia*);

- there are no legal mechanisms in the legal order which could force the Parliament or the Government to enforce the Court decisions repealing laws or other regulations, or their separate provisions, for their unconstitutionality (*Croatia*). The Supreme Court does not have any specific means either, to oversee the observance of its judgments (*Estonia*);

- the legislature's failure to act can sometimes give rise to an unconstitutional state of affairs (*the Czech Republic*). However, omission of the legislature to enact a new law may not constitute a big problem in those cases which are not so important for the public opinion (*Turkey*);

- in exceptional situations, whereas the Constitutional Tribunal considers that a legislative intervention is necessary in order to bring the laws in line with the Constitution, it has also suggested a "reasonable deadline" for the lawmaker to take action, even if, in principle, no such time limits are provided under the Spanish law uptill when the lawmaker should act with a view to complying with the constitutional decisions (*Spain*);

- failure to conform with a previous decision of the Constitutional Court may result in the unconstitutionality of the law adopted in disregard of said decision (*Armenia*);

- in certain circumstances, the lawmaker is likely to be held accountable and obliged to pay damage compensation if it has adopted a legal norm found unconstitutional (*Belgium*);

- the law (respectively, the general normative act) shall cease to exist (*Austria, Spain, Romania*), which means that a certain area of the social relations might remain

unregulated, thus legal gaps occur. Such lacunae may be eliminated within the process of interpretation and application of the law by the courts of general jurisdiction and specialized tribunals (*Lithuania*). Where the legislative body has not filled legal gaps, such can be overcome in extremis through the precise application of the Constitution by the courts (*Republic of Macedonia*). Also, since the legislature failed to reach a political compromise acceptable to all parties, the court had to solve the issue on the basis of constitutional values and the general legislation (*Estonia*). Moreover, if the legislature fails to remove unconstitutional flaws, a person could exercise his or her rights, for instance, by directly applying the Constitution and the interpretation included in the judgment of the Constitutional Court (*Latvia*);

- if the legislature had not remedied the established unconstitutionality, since the Court can abrogate a law, it may also suspend a law (temporarily exclude its application), which must be seen as a milder intervention than abrogation, when the threatened constitutional values cannot be protected in the usual manner (*Slovenia*);

- the constitutional liability provides for measures such as a dissolution of the legislative (representative) body of State power or a discharge of the chief official of an entity (*Russia*);

- in the event of a failure to enforce a decision, or a delay in enforcement or in giving information to the Constitutional Court about the measures taken, the Constitutional Court shall render a ruling in which it shall establish that its decision has not been enforced and it may determine the manner of enforcement of the decision. This ruling shall be transmitted to the competent prosecutor or another body competent to enforce the decision, as designated by the Constitutional Court (*Bosnia and Herzegovina*).

6. Is legislature allowed to pass again, through another normative act, the same legislative solution which has been declared unconstitutional?

6.1. First of all, a distinction should be made between formal and material requirements. If the law has been found unconstitutional on formal grounds, compliance with the specific requirement (adoption of the act concerned by the competent body, provision of the legislative solution under a certain type of normative act) gives the possibility to re-enact the same solution, as regards the substance previously contained in the respective regulation (*Estonia, Spain, Denmark*).

Insofar as unconstitutionality refers to points of substance, it appears that the answers can be categorized according to the criterion whether or not domestic legislation contains an interdiction.

In a number of States, such as *Russia* or *Lithuania*, a prohibition is inscribed in the Law on the organization and operation of the Constitutional Court. The express interdiction to repeatedly adopt a legal regulation which has been declared in conflict with the Constitution is also endorsed by the Constitutional Court's case-law (*Lithuania*).

An interdiction as such is not established by legislation in the majority of States, which does not necessarily mean that the legislature is automatically entitled to consecrate once again the legislative solution declared unconstitutional. Such possibility has been restrained either: (1) by the interpretation of the constitutional and legal texts regulating the effects of the decisions of the constitutional courts (*Armenia, Cyprus, Georgia, Ireland, Latvia, Republic of Moldova, Montenegro, Turkey*); or (2) by

the case-law of constitutional courts (*Germany, Croatia, Spain, France, Azerbaijan, Belarus, Republic of Macedonia*, *Poland, Romania, Serbia, Ukraine*); or (3) the possibility recognized to the constitutional courts to invalidate once more the legislative solution, as being unconstitutional (*Austria, Italy*, *Luxembourg, Norway*, *Slovakia, Slovenia, Switzerland, the Czech Republic*), as follows:

That is a situation which has in view the meaning and effects stemming out from the binding character of the constitutional court decisions;

Recognition by the Constitutional Court as unconstitutional of any legal norm makes impossible not only for the lawmaker to adopt another norm with an identical content, but also for the courts to apply similar provisions from other normative acts (*Azerbaijan*).

The interdiction of re-instating a legislative solution is not an absolute one in *Germany* or *Croatia*, where, as a matter of principle, the legislature cannot have the right to pass again a legislative solution declared unconstitutional if all relevant aspects and circumstances have remained unchanged.

A special situation is to be found in *Germany*, where the First Chamber (Senate) of the Federal Constitutional Court considers in this respect that the legislature has a special responsibility for adjusting the legal system to changing social demands and changed ideas concerning legal order, and consequently, it can in principle also comply with this responsibility by adopting a new provision the content of which is identical. What is more, if the legislature were subject to an obligation, this would lead to the "paralysis" of the Court's case-law, so that decisions which have once been handed down by the Court would hence be established for all time, and would leave the legislature without any latitude to adjust as necessary to social and economic developments in a modern, free, dynamic society. However, in the case of the repetition of a provision, the First Chamber demands that the legislature does not disregard the grounds found by the Federal Constitutional Court for the unconstitutionality of the original law, and that special reasons are to be required in order to use such legal construct.

The Second Chamber (Senate), even though does not share these views, considers that the legislature may re-adopt the legislative solution found to be unconstitutional under the condition of changed factual circumstances, as well as new legal arguments for the lawmaker.

If a change occurred with the factual and legal circumstances, a provision that was at some point in time declared unconstitutional may not be incompatible with the Constitution any longer, given the new factual and legal status (*Italy*).

6.2. Since other States have never been confronted with such a situation, legal doctrine considers that the lawmaker is barred from adopting a legal provision identical to the one declared unconstitutional (*Belgium*), or the doctrine is controversial as to whether decisions of unconstitutionality shall be binding only for the executive and the judicial branches, or for the legislative as well (*Portugal*). In accordance with the special law, that new legal norm might as well be suspended by the Court, without any further pre-requisites such as to adduce solid evidence and to prove damage otherwise difficult to redress (*Belgium*).

6.3. The impossibility to pass again the legislative solution declared unconstitutional may be overcome by making amendments to the Constitution, that

especially where the European accession process is at stake (*Spain*, *France, Hungary*), but also when the legislature refuses to become any more subjected to a certain jurisprudence of the Constitutional Court (*Hungary*).

7. Does the Constitutional Court have a possibility to commission other state agencies with the enforcement of its decisions and/or to stipulate the manner in which they are enforced in a specific case?

From the reports presented it follows that, in principle, based on the criterion whether national legislation has ascribed to constitutional courts the power to commission other bodies with the enforcement of their decisions and/ or provide the manner in which they shall be executed, there are two categories of States, namely:

A) States where no such leverage exists (*Armenia, Azerbaijan, Cyprus, Hungary, Ireland, Latvia, Lithuania, Luxembourg, France, Republic of Moldova, Montenegro, Romania, Poland, Russia, Slovakia, the Czech Republic, Turkey*[134]). If so, it remains a task for the administrative and judicial authorities to see to it that the Court decision shall be observed, therefore the execution of the judgments made by the Court largely depends upon cooperation on part of other subjects within the legal system (*Italy*). At the same time, even if the Constitutional Tribunal may decide to provide some guidelines as to the way of implementing in its decision, their effectiveness depends on the authority of the Tribunal and the extent to which executive organs are open to cooperation with the Constitutional Tribunal (*Poland*).

B) States where, in some way or another, the constitutional courts may have a role in designating the body which is authorized to enforce their decisions and/ or in establishing the manner of enforcement. It is worth mentioning, for example, that:

- in *Albania*, execution of the Constitutional Court decisions is ensured by the Council of Ministers through the relevant public administration bodies, but the Constitutional Court may itself designate another body tasked with the execution of its decision, and where appropriate, the manner of its execution. Moreover, the President of the Constitutional Court, whose decision is final and constitutes an executive title, may impose an administrative fine if the decision of the Court is not observed;

- in *Austria*, execution of decisions rendered by the Constitutional Court is implemented by the ordinary courts or by the Federal President, according to the distinctions made in the Federal Constitution. Where the Federal President is the one authorized to enforce such decisions, then the request to the President has to be made by the Constitutional Court. Furthermore, the execution shall, in accordance with the President's instructions, lie with the Federal or the *Länder* authorities, including the Federal Army, appointed at his discretion for the purpose;

- in *Croatia*, the Government ensures the execution of the Court decisions and rulings through the bodies of the central administration; however, the Court itself may determine which body shall be tasked for the execution of its decision or its ruling, as

[134] Indeed, if no such possibility is provided by national legislation in regard of the constitutional review of norms, it is nonetheless possible for the Constitutional Court, upon examination of a constitutional complaint, to determine that the violation of a constitutionally guaranteed freedom stems from the decision of a court, and to refer the case to the competent court so that it puts an end to the violation and repairs the damage.

well as the manner in which the decision or ruling must be executed. Consequently, the Court in fact orders the competent bodies to implement general and/ or individual measures which derive of its decisions. At the same time, the Court is authorized to indicate the procedure, the deadlines and the specific means for the enforcement of its decisions (*Russia*), but it may also place an obligation on the competent state bodies to ensure execution of its decision or adherence to its opinion (*Ukraine*);

- in the *Republic of Macedonia*, the decisions of the Constitutional Court are enforced by the body that adopted the law, the other regulation or general act which was annulled or repealed by the decision of the Constitutional Court. If necessary, the Court requests from the Government of the Republic of Macedonia to ensure the enforcement of its decisions;

- in *Germany*, the Court itself may ensure the execution of its decisions by means of independent transitional arrangements or orders on the further application of laws which have been rejected. The Federal Constitutional Court was given jurisdiction for also executing its decisions; consequently, the Court itself may state in the respective decision by whom it is to be executed, it may further on regulate the "method of execution" in individual cases and issue all orders required to effectively "enforce" its decisions. The Federal Constitutional Court is also entitled to task individuals, authorities or organs which are subject to German state power to carry out concrete execution measures. Therefore, the Federal Constitutional Court knows two forms of tasking to execute decisions: the Court may either task an agency in general terms to execute decisions and leave it to implement the execution measures at its own discretion, or the Court may entrust an agency with a concrete execution measure which is precisely determined, and hence make the tasked party "the executing organ" of the Federal Constitutional Court. Inasmuch as it may be necessary, it can also commission other agencies to implement temporary injunctions.

Where the Court has held a political party to be unconstitutional, it shall mandate the *Länder* Ministers of the Interior to dissolve the party and to implement the ban on replacement organisations;

- in *Serbia*, the Constitution has vested the Constitutional Court with the power to issue a special ruling regulating the manner in which its decision will be enforced and which is also binding. Enforcement is either made directly or via a competent state administration authority in the manner laid down in the Constitutional Court ruling;

- the Court may determine which authority should implement the decision and the manner of implementation, if necessary. This practically entails an authorisation for the Constitutional Court to fill the legal gap arising from its finding of unconstitutionality. In terms of their legal nature, such a decision differs from those rendered within the constitutional review. Moreover, determining the manner of its implementation may also temporarily fill the unconstitutional legal gap (*Slovenia*);

- in the case of the *amparo* constitutional review, the organic Law of the Constitutional Tribunal provides that it may order "who shall bear the responsibility to enforce judgment and, as the case may be, resolve the incidents arising in the course of enforcement." Executory provisions may also be included in the decision passed or in any other subsequent acts. The Tribunal may also declare null any decision that would go against the one being handed down in the exercise of its powers (*Spain*);

- in cases where the Supreme Court, in addition to adjudicating the constitutionality issue, also decides on matters pertaining to the specific case, it has

developed a very accurate procedure for compliance with its judgments (*Estonia*);

- in the *Republic of Moldova*, the Government has issued a decision concerning the legal mechanism applicable for its actions and also actions to be taken by subordinate public authorities for the enforcement of the Constitutional Court rulings, while in the *Republic of Macedonia*, the direct monitoring of the enforcement of the decisions of the Court is within the tasks and responsibilities of its Secretary General;

- in *Norway*, which applies the American system of constitutional review, the decisions of unconstitutionality will be enforced *inter partes*, which means, in terms of their enforcement, that if one of the parties does not fulfil its obligation, the other party may seek assistance from the enforcement authorities.