

THE BULLETIN

This special edition of the Bulletin on Constitutional Case-Law is dedicated to the descriptions of Constitutional Courts and equivalent bodies (Constitutional Councils, Supreme Courts with constitutional powers). These descriptions will enable readers to place the case-law of these courts, published in the Bulletin and the CODICES database, into their context.

It sets out descriptions of a whole range of Constitutional Courts in a standard layout (Introduction – Fundamental texts – Composition and organisation – Jurisdiction – Nature and effects of judgments – Conclusion) so as to provide a quick overview and facilitate comparisons of courts.

Descriptions of 60 Constitutional Courts or equivalent bodies in the Venice Commission's member, associate member and observer states are brought together in this Special Edition, in which Europe, Africa, Asia and the Americas are all represented.

All the contributions were either supplied or updated by the liaison officers, whom I should like to thank most sincerely for their work, as the preparation of this document would have been much more difficult without their active involvement.

In our fast-moving world, courts and equivalent bodies, like all living things, evolve, adapt and change. It is therefore difficult to give a description of all the courts in this volume, and it is even more difficult to guarantee that the information provided will remain completely accurate over time.

I therefore invite you to refer to CODICES, the Venice Commission's database on constitutional case-law, which – alongside the descriptions of the courts – includes some 8 000 précis and the full texts of court judgments, constitutions and legislation on constitutional courts, and is updated regularly (www.CODICES.coe.int). Searches can be carried out easily using the Systematic Thesaurus and the Alphabetical Index.

I hope that you will find this special Bulletin on Constitutional Case-Law a useful tool and enjoy reading it.

T. Markert

Secretary of the European Commission for Democracy through Law

THE VENICE COMMISSION

The European Commission for Democracy through Law, better known as **the Venice Commission**, has played a leading role in the adoption of constitutions in Central and Eastern Europe that conform to the standards of Europe's constitutional heritage.

Initially conceived as an instrument of emergency constitutional engineering against a background of transition towards democracy, the Commission since has gradually evolved into an internationally recognised independent legal think-tank. It acts in the constitutional field understood in a broad sense, which includes, for example, laws on constitutional courts, laws governing national minorities and electoral law.

Established in 1990 as a partial agreement of 18 member states of the Council of Europe, the Commission in February 2002 became an enlarged agreement, comprising all 47 member States of the organisation and working with some other 14 countries from Africa, America, Asia and Europe.

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Court of Justice of the European Union

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Strasbourg, October 2014

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Albania

Constitutional Court

I. Introduction

1. Date and context of creation

Albania, as a state, set up a Constitutional Court under Constitutional Law no. 7561 of 29 April 1992 "On an addendum to Law no. 7491 of 29 April 1991 "On the main constitutional provisions". Articles 17 to 28 of this Law institute the Constitutional Court and establish its status, powers, structure, composition, operation and jurisdiction, as well as laying down the principles it must follow when deciding constitutional issues. The Court commenced its functions on 1 June 1992, when its first members swore an oath in the presence of the President of the Republic.

2. The Constitutional Court in the new Constitution

The Constitution of Albania, which was adopted by referendum and entered into force on 28 November 1998, kept the Constitutional Court of Albania as an institution and established that it is the constitutional jurisdiction for monitoring the compatibility with the Constitution of laws and other normative instruments.

The Constitutional Court of Albania is not part of the ordinary judicial system; it is a separate court responsible for monitoring the compatibility with the Constitution of laws and other normative instruments. With the Constitution of Albania, the Constitutional Court acquired an important institutional role. Articles 124-134 of the Constitution deal with the Constitutional Court as an independent constitutional tribunal. It guarantees compliance with the Constitution and decides in last instance on its interpretation (Article 124 of the Constitution). In its decision making role, the Constitutional Court is subject solely to the Constitution. These provisions deal with the composition of the Court, appointment and status of its President and judges, the type and scope of its powers for monitoring constitutionality, the persons and bodies by which cases may be referred to the Court and the binding force and application of its decisions. The new Constitution has slightly modified the Constitutional Court's attributes and limited the range of people able to seize the Court.

II. Basic texts

- The Constitution of Albania, in force as from 28 November 1998;
- Law no. 8577 of 10 February 2000 "On the organisation and functioning of the Constitutional Court of Albania".

III. Composition, procedure and organisation

1. The Constitutional Court is the highest authority, upholding and guaranteeing compliance with the Constitution, which it has ultimate power to interpret. It functions independently and is subject only to the Constitution (Article 124 of the Constitution).

The Constitutional Court is composed of nine members, who are appointed by the President of the Republic with the consent of the National Assembly. Judges are appointed for nine years; they may not be re-appointed. One third of the members of the Court are replaced every three years. The President of the Constitutional Court is appointed from the ranks of its members by the President of the Republic with the consent of the Assembly for a three-year term. Judges are appointed from among lawyers with a diploma in higher legal studies and at least 15 years' professional experience (Article 125 of the Constitution).

2. The office of judge is incompatible with any other public office or private occupation (Article 130 of the Constitution). Constitutional judges may not be criminally prosecuted without the prior consent of the Constitutional Court. They can be detained or arrested only if apprehended in the commission of a crime or immediately thereafter. If the Constitutional Court does not give its consent for the arrested judge to be prosecuted, the competent body must release him or her (Article 126 of the Constitution).

3. The term of office of a judge of the Constitutional Court ends when he:

- a. is sentenced in a final decision for commission of a crime;
- b. fails without reason to perform his or her duties as judge for more than six months;
- c. reaches the age of 70;
- d. resigns;
- e. is declared incompetent to act in a final judicial decision.

4. The term of office of a judge is terminated by decision of the Constitutional Court. If the seat of a judge falls vacant, the President of the Republic, with the consent of the National Assembly, appoints a new judge, who completes the term of office of his or her predecessor (Article 127 of the Constitution).

IV. Referral

1. The following may refer a case to the Constitutional Court:

- a. the President of the Republic;
- b. the Prime Minister;
- c. one fifth of the deputies of the Assembly;
- d. the Chairman of the State Audit Office;
- e. any court, as provided for in Article 145.2 of the Constitution;
- f. the People's Advocate;
- g. local government bodies;
- h. bodies representing religious communities;
- i. political parties and other organisations;
- j. individuals.

The bodies referred to in f, g, h, i and j may initiate an action only for issues involving their interests.

2. Each application to the Court is submitted to the President of the Court, who appoints a judge to prepare a report on the case for preliminary consideration (Article 27 of the Law on the organisation and functioning of the Constitutional Court). A chamber composed of three judges, including the rapporteur, considers the admissibility of the application. Where the decision on admissibility has not been rendered unanimously, the case is laid before the plenary court, which takes a majority decision (Article 31 of the Law). An application is declared inadmissible when its subject-matter does not fall within the jurisdiction of the Court or when the person making the application does not have the right to do so.

3. The Court is convened by its President. It meets in plenary session and is chaired by its President. The provisions of the Constitution as well as those of Law no. 8577 of 10 February 2000 concerning the organisation and functioning of the Constitutional Court set out the guarantees needed to ensure the independence of the judges and the Court. The activity of the Court conforms to the basic principles of constitutional law and fair trial. Proceedings are usually conducted in public in the presence of both parties. The parties may be legally represented (Articles 20-27 of the Law concerning the organisation and functioning of the Court). There is no charge for the proceedings before the Constitutional Court.

V. Jurisdiction

In pursuance of Article 131 of the Constitution, the Constitutional Court decides on:

- a. the compatibility of the law with the Constitution or with international agreements within the meaning of Article 122 of the Constitution;
- b. the compatibility of international agreements with the Constitution prior to their ratification;
- c. the compatibility of normative acts of central or local bodies with the Constitution and international agreements;
- d. conflicts of jurisdiction between branches of power and between central and local government;
- e. the constitutionality, pursuant to Article 9 of the Constitution, of parties and other political organisations and of their activities;
- f. removal of the President of the Republic from office and verification of his or her incapacity to exercise his or her functions;
- g. disputes relating to the right to stand for election and the incompatibility of the functions of the President and deputies as well as establishing the lawfulness of their election;
- h. the constitutionality of a referendum and verification of its results;
- i. the final adjudication of complaints by individuals alleging violation of their constitutional rights to a fair trial after all legal means for the protection of those rights have been exhausted.

VI. Nature and effects of decisions

1. The decisions of the Court are taken by a majority. Judgments must give reasons in writing and must be signed by all the Court's members who took part in the sitting. The Constitutional Court, in its decision, can only rule as to whether or not the act under consideration conformed with the Constitution.

2. The decisions of the Court are final; they are binding and of general application, and they usually enter into force on the day of their publication in the Official Gazette (Article 132 of the Constitution). The Court may decide that the decision which declares the unconstitutionality of a provision or a legal text which enters into force on a later date than that of the publication of the decision. The decisions are usually not retroactive. However, a decision may be retroactive when it invalidates a judgment in a criminal matter if the judgment already being executed was based on the provision abrogated or declared unconstitutional by the Constitutional Court. A decision can also have retroactive effect upon yet unachieved consequences of the abrogated norm (Article 77 of the Constitution). When a decision

invalidates a judicial decision, the latter loses its judicial force as from the date of its adoption, and the case is returned to the same court to be heard again. Decisions of the Constitutional Court interpreting the Constitution are retroactive (Article 79 of the Law on the organisation and functioning of the Constitutional Court).

3. The decisions of the Constitutional Court are binding and enforceable. The Council of Ministers enforces decisions through the relevant administrative bodies. The Court may appoint another body to enforce its decision and may specify the enforcement procedure. For exceptional cases, the law provides for sanctions to be imposed when a person does not execute the decision or interferes with its execution.



Algeria Constitutional Council

I. Introduction

Algeria's constitutional history shows that the process which led to the adoption of the present form of the Constitutional Council went through four stages.

First, it was in 1963, following the elaboration of the country's first constitution, after independence that a Constitutional Council entrusted in accordance with Articles 63 and 64 of the Constitution:

“with ruling on the constitutionality of legislative laws and ordinances” was created. However, this Council was not put into place and it could not carry out its constitutional prerogatives due to the political situation which prevailed then.

The second stage was the Constitution of 26 November 1976. It does not refer explicitly to constitutional review (constitutional control) although it stipulates in its Article 186 “political control vested in leading organs of the Party and the State shall be carried out in conformity with the national Charter and with the provisions of the Constitution”.

In the third stage, the idea of the creation of a constitutional review mechanism became the subject of political debate again. Indeed, in December 1983, the 5th FLN party Congress called “for the creation of a supreme body under the authority of the President of the Republic, Secretary General of the party entrusted with ruling on the constitutionality of laws with a view to guaranteeing the respect of the supremacy of the Constitution, reinforcing the legitimacy and the sovereignty of law and fostering and enhancing accountable democracy in our country”. This recommendation was not constitutionalised.

In the fourth stage, the Council was finally set up again on the occasion of the important constitutional revision of 23 February 1989 which in addition to the establishment of political pluralism, public freedoms and the adoption of the principle of separation of powers, created a Constitutional Council and granted it more important prerogatives than those of 1963, notably in the area of constitutional review and electoral disputes as well as consultative prerogatives in some particular circumstances.

The rebirth of the Constitutional Council, an important step in the process of achieving the rule of law, was followed by the constitutional revision of 28 November 1996, which introduced other innovations. Indeed, it extends the prerogatives (jurisdiction) of the Constitutional Council to include mandatory control of organic laws before their promulgation and grants the power of referral to a new constitutional authority, the President of the Council of Nation (second Chamber of Parliament), and raised the number of the Council members from seven to nine.

II. Basic Texts

The Constitutional Council is governed by the Constitution of 23 February 1989, which defines its membership, prerogatives (jurisdiction), the authorities which may refer matters to it, as well as the effects of its decisions. Other texts complete the list of its jurisdiction and determine its rules. These are the organic law concerning the electoral system and the regulation setting out the rules of its functioning. The organisation of the Constitutional Council at an administrative level is defined by two texts: the presidential decree relating to the rules governing the organisation of the Constitutional Council and the status of some of its staff as well as the decision governing the internal organisation of the administrative services of the Constitutional Council (currently under review).

III. Composition, procedure and organisation

1. Composition

Following the Constitutional revision of 28 November 1996, the Constitutional Council is made up of nine members. The President of the Republic appoints three members, two are elected by the People's National Assembly, two by the Council of the Nation, one is elected by the Supreme Court and one member is elected by the Council of State.

The President of the Constitutional Council is appointed for a single mandate of six years. Other members are elected or appointed for a single mandate of six years. However, half of the membership is renewed every three years.

Certain provisions of the Constitution and the Organic Law concerning political parties guarantee the independence and impartiality of members of the Constitutional Council. Thus, the term of office for the members of the Council set at 6 years is non-renewable and their functions are incompatible with those of a member of parliament of government or any other public or private activity. The affiliation of any member of the Constitutional Council to a political

party is unlawful. The interruption of a member's mandate (term of office) may occur following his or her death, resignation, or lasting impediment. Moreover, members are under an obligation of restraint, which prohibits them from adopting any public position on questions concerning the deliberations of the Constitutional Council.

Members may, if they wish, take part in cultural or scientific activities if they are not liable to affect the independence or neutrality of the Constitution.

2. Procedure

There are two kinds of proceedings before the Constitutional Council: proceedings relating to the review (control) of constitutionality and proceedings relating to the review of the legality of national political consultations.

In both kinds of review, the procedure is written and deliberations are held behind closed doors. The latter are also subject to the rule of quorum under which the effective presence of at least five members is required. Deliberation is carried out behind closed doors by a majority of the members of the Constitutional Council. In case of equality of votes, the President or the session's chairman shall exercise a casting vote.

Concerning the review of constitutionality, proceedings are initiated by letter or reference to the President of the Constitutional Council by one of the three constitutional authorities with power to do so.

The opinions and the decisions of the Constitutional Council are reasoned and given in the national language (Arab) within twenty days after the date of referral.

Concerning the review of the legality of national political consultations, the proceedings are organised on the basis of the adversarial system.

The Constitutional Council declares the results of referendums, elections of the President of the Republic and legislative elections.

3. Organisation

The internal administration of the Constitutional Council is governed by the presidential decree relating to the rules governing the organisation of the Constitutional Council and the status of some of its staff, and by the decision relating to the internal organisation of the administrative service of the Constitutional Council.

It has a general secretariat headed by a Secretary General assisted by directors of studies and research, and a centre for constitutional studies and research, which will be set up shortly, and an administrative service made up of the department for documentation and the department for staff and resources.

In financial matters, the President of the Constitutional Council is the authorising officer; he may delegate the Secretary General or any other accounting or financial officer in the institution to sign on his or her behalf.

IV. Jurisdiction

The Constitutional Council has many competences. It carries out review (control) of the constitutionality and compatibility of certain legal texts with the Constitution. It also rules on the legality of referendums, the election of the President of the Republic and parliamentary elections, as well as having other competences in certain exceptional situations.

1. Review of legal texts

The Constitutional Council rules, on an optional basis, on the constitutionality of treaties, laws and regulations, and on a compulsory basis, on the compatibility of organic laws and rules of procedure of both houses of parliament with the Constitution.

The Constitutional Council delivers decisions in the first case and opinions in the second.

The Constitutional Council has delivered to date a small number of decisions and opinions because of the limited and restrictive nature of the references being made to it.

It is important to note that the Constitutional Council has never had a reference made to it concerning a law approving an international agreement or a regulatory act.

2. Jurisdiction over electoral matters

The Constitutional Council rules on the legality of referendums, elections for President of the Republic and parliamentary elections.

The control of legality of major national political consultations includes the examination of appeals made under the conditions and in accordance with the procedures set out in the electoral law and the control of campaign accounts.

3. Jurisdiction over other matters

The Constitutional Council is consulted by the President of the Republic prior to a declaration of a state of exception and prior to the conclusion of armistice agreements and peace treaties.

The President of the Constitutional Council is consulted by the President of the Republic in case of a declaration of a state of emergency (martial law).

The Council's opinion is also required in the case of a Constitutional revision.

V. Nature and effects of decisions

The Constitutional Council rules on the constitutionality of treaties, laws and regulations, either by way of an opinion, in event that they are not yet in force, or by a decision if they are in force.

No appeal lies from the decisions of the Constitutional Council. These are final decisions, and they are binding on the public authorities.

Where the Constitutional Council declares a treaty, agreement or convention to be unconstitutional, its ratification cannot take place. Where the Constitutional Council declares a legislative or regulatory provision to be unconstitutional, that provision ceases to have effect as of the day of the decision of the Council.

VI. Conclusion

The advances of the Constitutional Council in more than twenty years of existence, by successive touches, allow other positive developments to be foreseen for the future. The extension of the right to referral to other actors remains its main goal-enabling a greater contribution to be made to the democratic process in the country.



Andorra

Constitutional Court

I. Introduction

The Andorran people approved its Constitution as the highest rule of the legal system, governing the functioning of its democratic State and binding on all public institutions and citizens. To guarantee its pre-eminence and application, the people vested the Constitutional Court as guarantor of the terms set forth in the Constitution.

For that reason the Constitutional Court has an exceptional role within the framework of state institutions: it hands down court rulings on the constitutionality of laws, international treaties, prerogatives exercised by the State and local councils in the event of conflict between them and the effectiveness of fundamental rights established by the Constitution itself. This makes the Court the judicial body at the apex of supervision of the juridical order, crowned by supreme constitutional law.

II. Basic texts

- Constitution of the Principality of Andorra of 28 April 1992;
- Special Law on the Constitutional Court of 3 September 1993;
- Special Law amending the Special Law on the Constitutional Court of 14 December 1995;
- Special Law amending the Special Law on the Constitutional Court of 22 April 1999;
- Special Law amending the Special Law on the Constitutional Court of 28 June 2002.

III. Composition, procedure and organisation

1. The Constitutional Court is made up of four constitutional judges, two of whom are nominated by the two Co-Princes respectively and two by the General Council from among persons over the age of 25 years with recognised experience and knowledge of legal and institutional matters.

The term of office of constitutional judges is eight years from the date of publication of their appointment, and no constitutional judge may be re-elected for a consecutive term. In accordance with the rotation system provided for in this Law one constitutional judge must leave office every two years

and be replaced by another judge nominated by the organ which chose the outgoing judge.

Constitutional judges cease to hold office in the following circumstances: upon expiry of their term of office, voluntary resignation, death, on grounds of personal or legal incapacity, if they are convicted of an intentional offence or if the Court imposes a disciplinary penalty for a very serious offence.

The office of constitutional judge is incompatible with the exercise of any other public office, the exercise of activities associated with the representation, management or defence of, or the provision of advice in connection with, the private interests of third parties on Andorran territory, any steering function within political parties, trade unions or associations, whether national or foreign, and any other activity that may jeopardise independence and impartiality in the performance of their duties.

The office of President, held for two years, is assigned in an order of succession established according to which organs appointed the judges in question (First transitional provision of the Law). Each of the constitutional judges will hold the office of President at some time during their term of office. The office of Vice-President is held by the constitutional judge who, by virtue of the organ which appointed him, is to be President for the following term of office. The Vice-President carries out the duties of the President in the event of the latter's physical incapacity or where those duties are expressly delegated to him.

2. The organs of the Constitutional Court are: the plenary session of the Court, the President, the Vice-President and the judge-rapporteurs.

The plenary session of the Court, as a collegiate body, is the highest organ of the Constitutional Court and operates as a single chamber made up of the four constitutional judges. However, the Court may be composed of three judges where it sits as a disciplinary court or in the absence of one of the four judges. Nevertheless, for cases relating to constitutionality one of them must be the judge-rapporteur.

The Constitutional Court exercises prerogatives relating to its jurisdiction and internal regulatory and administrative functions (Articles 23 and 24 of the Law).

The Constitutional Court adopts its decisions by a majority of votes. Deliberations and votes are not public. Where votes are evenly divided the judge-rapporteur, drawn by lot, has the casting vote.

The formalities associated with the material management and implementation of the Court's prerogatives are performed by the members of the permanent administrative office at the service of and dependent on the Court.

The posts in this office are the registrar of the Court and the officer-counsel.

IV. Referral

Proceedings may be lodged with the Court through submission of an application by the following:

- a. the Co-Princes (jointly or individually);
- b. the General Council;
- c. one fifth of the *ex officio* members of the General Council;
- d. the head of the Government;
- e. local authorities;
- f. any ordinary court;
- g. the Higher Council of Justice;
- h. natural or legal persons or associations.

V. Jurisdiction

Article 98 of the Constitution lists the areas of jurisdiction of the Constitutional Court:

1. Direct appeals of unconstitutionality against laws, legislative decrees and the Rules of Procedure of the General Council;
2. Interlocutory proceedings of unconstitutionality of the aforementioned norms requested by ordinary courts;
3. Preliminary opinion on constitutionality of international treaties;
4. Preliminary opinion on the compatibility of legislation with the Constitution requested by the Co-Princes;
5. Disputes as to constitutionally established jurisdiction between the General Council and the Government, as general organs of the State, and local councils, as organs of the parishes, or between the councils themselves;
6. Positive and negative disputes as to constitutional powers between the Co-Princes, the General Council, the Higher Council of Justice and the Government;
7. "*Empara*" appeals (applications for constitutional protection).

VI. Nature and effects of decisions

1. The decisions and judgments of the Constitutional Court delivered during the aforementioned procedures or appeals always state the reasons on which they are based.

2. The statement of the reasons for decisions and judgments ruling on procedures or appeals must include a clear and precise account of the Court's interpretation of the content of the relevant constitutional provisions and the grounds on which the challenged measure or rule is or is not compatible with the Constitution.

3. A decision or judgment ruling on a case which has been declared admissible cannot contain different considerations from those submitted by the parties in their respective claims.

4. In determining the constitutionality of a measure or rule referred to it the Constitutional Court applies the Constitution in accordance with the instructions and values expressly contained therein and determines whether the measure or rule is valid or void without passing judgment on the expediency of the measures adopted by the public authorities.

5. Where the constitutionality of a legal rule in its entirety, or certain provisions thereof, is challenged and the Court finds that there is only one interpretation compatible with the Constitution and one or more other interpretations that are incompatible, it must declare that the measure in question is temporarily inapplicable until the organ which issued it has corrected the unconstitutional elements. The new measure adopted will cancel the previous measure, although it will remain subject to the general system of supervision of constitutionality.

6. The precedents established by the Court are binding on the Court itself.



Argentina

Supreme Court of Justice of the Nation

I. Introduction

The Supreme Court of Justice of the Nation of the Republic of Argentina was set up under the 1853-1860 national Constitution, which laid down the national institutional framework. Under Article 1 of the Constitution the nation “adopts for its government the federal, republican, representative form, as established by the present Constitution”.

By virtue of the State’s federal nature, there are a national judicial authority and provincial judicial authorities, whose powers are demarcated in the Constitution itself and by the laws laying down how the Constitution is to be implemented.

The Supreme Court “represents national sovereignty in the matters over which it has jurisdiction, and in exercising its powers it is as independent as the Congress is to pass legislation or as the executive is in the exercise of executive responsibilities” (Supreme Court Judgment of 8 August 1972).

The Supreme Court was set up in 1863; its rules of procedure were adopted on 11 October of that year and four days later it delivered the first judgment in the Official Digest.

II. Basic texts

The Constitution provides that: “The Judicial power of the Nation shall be exercised by a Supreme Court of Justice and by the other lower courts established by the Congress within the territory of the Nation” (Article 108).

Main provisions concerning the Supreme Court’s jurisdiction:

- Original jurisdiction: Article 117 of the Constitution and Article 24.1 of Legislative Decree 1285/58;
- Appellate jurisdiction: Article 14 of Law 48; Article 6 of Law 4055 and Articles 24.2 to 24.6 of Legislative Decree 1285/58.

Main provisions on proceedings before the Supreme Court:

- Articles 254 to 258, 280, 281 and 285 of the Code of Civil and Commercial Procedure.

III. Composition, procedure and organisation

1. Composition

The Constitution does not specify the number of judges in the Supreme Court.

In 1862, the Congress adopted the Federal Judicature Act, an organic law under which the Supreme Court was composed of five judges. Legislation increased the number to seven in 1960 and then it was decreased to five again in 1966. Finally, in 1990, the Congress increased the number to nine.

Judges of the Supreme Court are appointed by the executive. The appointments must be approved by the Senate by a two-thirds majority of members present at a public sitting convened for the purpose (Article 99.4 of the Constitution).

To be eligible to be members of the Supreme Court, judges must meet the following requirements: they must have been practising lawyers for eight years and must meet the requirements for membership of the Senate, i.e. be aged 30 or over and have been Argentinian citizens for at least six years (Article 111 of the Constitution).

The judges remain in office provided they are of good conduct (Article 110 of the Constitution). However, to retain their positions when they reach 75 years old, they must be reappointed and reappointment requires the Senate’s prior approval. When they reach 75 years old, judges are appointed for a five-year term, renewable indefinitely by the same procedure (Article 99.4 of the Constitution).

Removal from office requires special proceedings (“political trial”), which may be brought if a Supreme Court judge is accused of serious negligence or a crime or a serious offence under general law. The charge may be brought only by the Chamber of Deputies, by a two-thirds majority of members present, and is then referred to the Senate, which is required to take a decision on it. A finding of guilt requires a two-thirds majority of members present, and the judgment simply has the effect of removing the accused from office, although he or she may also be banned from performing any honorary, confidential or salaried work for the Nation. Thereafter, he or she may be charged in accordance with the law and tried

by the ordinary courts (Articles 53, 59 and 60 of the Constitution).

The Supreme Court draws up its rules of procedure and appoints its staff (Article 113 of the Constitution). It has accordingly drawn up the National Court Regulations, which deal with various aspects of the organisation and functioning of the courts generally and the Supreme Court in particular.

The President and Vice-President of the Court are elected by its members, by an absolute majority, for a three-year term. They may be re-elected. The President represents the Supreme Court at official ceremonies, before other public authorities and in dealings generally with the administrative authorities and with institutions or individuals.

Judges' remuneration cannot be reduced in any way while they remain in office (Article 110 of the Constitution).

Before taking office, Supreme Court judges swear before the President of the Court to do their duty by administering justice properly and lawfully in accordance with the Constitution (Article 112 of the Constitution).

Among other incompatibilities with holding office, judges are not allowed to practise a profession or perform other public or private work. They may, however, engage in university teaching or participate in research committees.

2. Procedure

The Supreme Court is a standing body which is not divided into chambers. It functions as a single collegial body and its decisions are majority ones. Judgments are drafted impersonally but judges are allowed to deliver personal opinions, which may be concurring or dissenting.

The Supreme Court sits weekly, *in camera*, to deliberate on current cases, sign judgments and organise its work.

Procedure before the Supreme Court is written, although there can be hearings in exceptional cases. In cases coming under the Court's original jurisdiction, every stage of which is dealt with by the Court, evidence is taken at hearings.

Lawyers do not require special authority to appear before the Supreme Court.

3. Organisation

Each of the Supreme Court judges has three or four legal assistants plus administrative staff.

The Supreme Court is assisted by six judicial secretariats, each with a registrar and legal assistants; one of the secretariats is responsible for cases coming under the Court's original jurisdiction.

The registrars have the rank of second-instance judges and the assistants that of first-instance judges. All must be lawyers.

In addition, there is a secretariat responsible for case law, a secretariat for comparative legal research, a department for general administration and departments for information technology and statistics.

The Court has a large central library which is open to the general public.

IV. Jurisdiction

Under Article 117 of the Constitution, the Supreme Court has two types of jurisdiction: original (*originaria*) jurisdiction in respect of "all cases concerning ambassadors, ministers or foreign consuls and all cases to which one of the provinces is party", and appellate jurisdiction, to which the rules and exceptions laid down by the Congress apply.

Under Supreme Court case law the Congress can neither extend nor reduce the Court's original jurisdiction as laid down in the Constitution.

Under its appellate jurisdiction, which comprises cases brought before it by *recurso extraordinario* (extraordinary appeal), the Supreme Court performs one of its main institutional functions: that of interpreter and ultimate custodian of the Constitution and of the rights and guarantees which the Constitution lays down (Supreme Court Judgment of 17 October 1864). The appellate jurisdiction is basically designed to uphold the principle of the supremacy of the national Constitution, the laws which the Nation has promulgated under it and treaties entered into with foreign powers.

The extraordinary appeals which the Court deals with are cases tried by the lower federal courts or the provincial courts as courts of last instance and in which, among other requirements, a federal issue arises. Federal issues have to do with interpretation of federal law (the Constitution, international treaties, laws enacted by the Congress and decisions of the executive with federal implications) or with the validity

of laws or measures which directly or indirectly run counter to the Constitution.

An important point here is that the 1994 constitutional reform assigned constitutional status to the collection of international instruments which constitute the International Charter of Human Rights, the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.

The Supreme Court's main judicial function is thus, on the one hand, the review of constitutionality and on the other, the interpretation of federal law.

As the Court is not empowered to deliver advisory rulings, it needs to have specific disputes referred to it.

Review of the constitutionality of laws, measures and decisions of governors or officials is judicial in nature (it can only be performed by the judiciary), diffuse (it is a power of all judges, whether federal or provincial) and auxiliary or indirect (it can only be performed as an aspect of an ordinary dispute and in so far as it does not encroach on law relied upon by a party with a specific interest).

On 4 December 1863, the Supreme Court performed its first review of constitutionality, quashing a decree of the executive which "encroached on the powers of the legislature". Shortly afterwards it had occasion to review provincial government measures and laws of the National Congress. In a judgment of 14 April 1988 it held:

"Of crucial importance in our constitutional system is the power and therefore the duty of the courts to consider laws in the specific cases referred to them and compare those laws with the text of the Constitution to see whether they are in conformity with the Constitution, refraining from applying them if they do not so conform".

The extraordinary appeal must be lodged with the court which delivered the judgment challenged. That court must decide whether the extraordinary appeal is admissible and, if so, refer it to the Supreme Court. If the extraordinary appeal is ruled inadmissible, the appellant can lodge a complaint appeal (*recurso de queja*) directly with the Supreme Court, which must decide whether the extraordinary appeal should have been declared admissible and, if appropriate, deal with the merits of the case.

The Supreme Court likewise has jurisdiction to determine other, ordinary appeals (for example, in cases concerning extradition of criminals, cases in which the Nation is one of the parties and cases in

which a financial amount laid down in law is exceeded) and to deal with certain conflicts of jurisdiction between courts of different judicial districts.

Most of the cases with which the Supreme Court deals are extraordinary appeals or complaint appeals. For example, in 1997, the Court had 5,299 cases referred to it, 59% of which were complaint appeals, 15% extraordinary appeals, 2.5% ordinary appeals and 23.5% conflicts of jurisdiction. Also, in 1997, the Court had to deal with 133 cases coming under its original jurisdiction. A high percentage of complaint appeals are rejected as falling outside the Supreme Court's jurisdiction.

V. Nature and effects of decisions

Decisions of the Court are final and are not reviewable by anybody, whether judicial or non-judicial.

In cases involving original jurisdiction or ordinary appeals, the judgment determines the parties' claims, dismissing or accepting all or part of them. In extraordinary appeals, the Court may confine itself to setting aside the challenged judgment and sending the case back to the lower court concerned so that it can deliver a new judgment in accordance with the Supreme Court's judgment. The Court determines conflicts of jurisdiction by deciding which court is competent to deal with the case in question.

The effect of the Court's judgments is confined to the particular cases in which they are delivered (for example, a ruling that a law is unconstitutional prevents that law's being applied in that specific case but does not repeal or cancel the law). However the Supreme Court's judgments have an institutional authority which is accepted by all institutions, whether national or provincial.

Since 1866, the Court has published an Official Digest (*Fallos de la Corte Suprema de Justicia de la Nación*) in which the main judgments are reproduced. Several private publishing houses likewise publish the judgments. All the Court's judgments can be consulted by the general public.



Armenia

Constitutional Court

I. Introduction

1. Date and context of creation

In December 1988, a Constitutional Control Committee was set up under an amendment to the Constitution of the Soviet Union. The Law of the Union relating to this Committee also provided for creating a Constitutional Control Committee in each Republic of the Union, which never actually happened.

In 1991, moreover, the Armenian legislative had considered setting up a Constitutional Court, although it never actually did so (two laws, namely the Law on the President of the Republic of 1 October 1991 and the Law on the Supreme Council of the Republic of Armenia of 19 November 1991, simply alluded to such a Constitutional Court). However, no law or amendment to the Constitution of the Armenian SSR was ever adopted to put this declaration of intention into effect.

The new Constitution promulgated by referendum on 5 July 1995 finally set up the Armenian Constitutional Court. The Law on the Constitutional Court was adopted by the National Assembly on 20 November 1995 and signed by the President of the Republic on 6 December 1995. On 5 and 6 February 1996, the members of the Constitutional Court were appointed and the Court began operating on 6 February 1996, when its members were sworn in before the National Assembly.

In 2005 Constitutional reforms took place in the Republic of Armenia (on 27 November 2005 the text of the Constitution (with the Amendments) was adopted by the referendum). The Amendments directly concerned the system of constitutional justice. Firstly, Article 93 of the Constitution enshrined: "The Constitutional Court shall administer the constitutional justice in the Republic of Armenia." According to Article 94 of the Constitution "The powers, the procedures of formation and activities of the courts shall be defined by the Constitution and laws. "As a result of the Constitutional Amendments the scope of the persons applying to the Constitutional Court, as well as the scope of the objects of the constitutional control, was substantially extended and the Institute of the Individual Constitutional Complaint was established (Article 100.6 of the Constitution).

The Constitutional amendments objectively put forward the necessity of fundamental amendments to the Law on "The Constitutional Court". By the legislative initiative of the Government the new draft of the Law on "The Constitutional Court" was presented to the National Assembly. The draft Law passed detailed examination in the European Commission for "Democracy through Law". The new Law came into force on 1 July 2006.

According to the requirements of the Law, the Constitutional Court adopted the new Rules of Procedure, on the basis of which the organisation of the admission of Individual Complaints and the preliminary works for the examination of the cases is ensured, as well as the peculiarities of the judicial service in the Constitutional Court are determined.

The Law on "The Constitutional Court" more clearly defined the state-power status of the Constitutional Court, stating in Article 1 of the Law that "The Constitutional Court is the highest body of the constitutional justice which provides supremacy and direct enforcement of the Constitution in the legal system of the Republic of Armenia." The Law made serious amendments to the procedures of the constitutional proceedings, stipulated the principle of *ex officio* clarification of the case circumstances, the procedural specifics of the examination of various cases were determined, the legislative prerequisites for the inculcation of the institute of the Individual Complaints were created.

According to Article 116 of the Constitution, Article 101.6 came into force on 1 July 2006, by which time all necessary legislative and organisational guarantees for admission and consideration of the Individual Complaints were created. The Constitutional Court was established.

2. Position in the judicial hierarchy

The Armenian Constitutional Court is a judicial body which is separate and independent from the executive, the legislative and the judiciary. It is responsible for supervising the constitutionality of laws and other legislative instruments.

According to the Constitution, the legal system of the Republic of Armenia comprises three judicial levels: Courts of First Instance, Courts of Appeal and the Court of Cassation. The Constitutional Court does not form the apex of any judicial hierarchy, as it is outside to the ordinary judicial system, of which the Court of Cassation constitutes the highest level of jurisdiction. The case-law of the Constitutional Court cannot be criticised by the other Courts.

II. Basic Texts

- Articles 51, 55.10, 57, 59, 83, 86, 109 and Article 92, 93, 94, 96, 97, 98, 99, 100, 101 and 102 of Chapter 6 of the Constitution;
- The Law on the Constitutional Court of 1 June 2006.

III. Composition, procedure and organisation

1. Composition

The Constitutional Court comprises nine members. Membership of the Constitutional Court is open to any citizen of the Republic aged 35 or over. The members (including the President) discharge their duties until the age of 65 according to transitional provisions, namely Article 117.13 of the Constitution, the incumbent members of the Constitutional Court shall continue to remain in office until the age of 70 years.

The National Assembly and the President of the Republic are jointly empowered to appoint members of the Constitutional Court.

Five members of the Constitutional Court are elected by the National Assembly upon the recommendation of the Chairman of the National Assembly. The other four members are appointed by the President of the Republic, at his or her discretion.

The President of the Constitutional Court is not elected by the members of the Constitutional Court. He or she is appointed from the Court membership by the National Assembly on a nomination from the Chairman of the Assembly. However, if the National Assembly fails to appoint the President of the Constitutional Court within 30 days after the office of the President of the Constitutional Court is vacant, the President of the Republic must do so in its place.

Persons fulfilling the following conditions are eligible for membership of the Constitutional Court:

- citizens of the Republic, at least 35 years old, who hold electoral rights and do not have citizenship of any other country;
- higher legal education qualifications or an academic degree in Constitutional Law;
- at least 10 years of legal work experience;
- command of the Armenian language.

Members of the Constitutional Court may not be engaged in any entrepreneurial activity nor shall he or she hold any office in state or local self-government bodies not related to his or her duties, hold any position in commercial organisations, or engage in

any other paid occupation, except for scientific, educational and creative work, which shall not hinder them from fulfilling the duties of being a Member of the Constitutional Court.

The constitutional principle is that a member of the Court Constitutional Court cannot be dismissed. Decisions to dismiss a Court member must be taken by the person or body (i.e. the President of the Republic or the National Assembly; in the latter case, by a majority vote of the total number of Deputies) having appointed the member in question. Where such a question has been raised, the Constitutional Court must consider the case in the member's absence, and must issue a conclusion on the termination of the member's office by a majority of at least two thirds of the Court membership (i.e. 6 out of 9). Once the conclusion has been issued, the actual decision on the Constitutional Court member's dismissal must be taken by the authority having appointed him or her (however, in practice no member of the Constitutional Court has ever been dismissed since its inauguration).

The independence of the members of the Constitutional Court is guaranteed by their submission to the Constitution and the Law on the Constitutional Court. It is prohibited to influence a member of the Constitutional Court, and anyone attempting to do so is liable to prosecution.

Court members cease to discharge their functions when they:

1. have reached the age of 65;
2. have died;
3. have had his or her citizenship withdrawn or has been granted a foreign citizenship;
4. has applied in writing to the body that has appointed him or her, requesting to terminate his or her powers and has informed the Constitutional Court of that appeal within 10 days has repeated his or her resignation;
5. is determined by a Court of Law to be unable to work, missing or dead;
6. has been found guilty by a Court of Law;
7. has been appointed with a violation of Constitution, which was proved by a Court of Law.

On a conclusion from the Constitutional Court, members of the Court must be dismissed if they:

1. have been absent for three times within one year from the sessions of the Court without an excuse;
2. have been unable to fulfil his or her powers as the Constitutional Court for six months member

because of some temporary disability or other lawful reason;

3. violate the rules of incompatibility related to a Constitutional Court Member as prescribed by this Law;
4. express an opinion in advance on the case being reviewed by the Constitutional Law or otherwise raised suspicion in his or her impartiality or released information on the process of the closed door consultation or broke the oath of the Constitutional Court Member in any other way;
5. are affected by a physical disease or illness, which affected the fulfilment of the duties of a Constitutional Court Member.

2. Proceedings

Proceedings before the Constitutional Court are governed by the Law on the Constitutional Court.

According to the Constitution, the following are entitled to apply to the Constitutional Court:

1. the President of the Republic – in cases stipulated in Article 100.1, 100.2, 100.3, 100.7 and 100.9 of the Constitution;
2. the National Assembly – in cases stipulated in Article 100.3, 100.5, 100.7 and 100.9 of the Constitution;
3. at least one-fifth of the total number of the deputies – in cases stipulated in Article 100.1 of the Constitution;
4. the Government – in cases stipulated in Article 100.1, 100.6, 100.8 and 100.9 of the Constitution;
5. bodies of the local self-governance on the issue of compliance to the Constitution of the state bodies' normative acts violating their constitutional rights;
6. every person in a specific case when the final judicial act has been adopted, when the possibilities of judicial protection have been exhausted and when the constitutionality of a law provision applied by the act in question is being challenged;
7. courts and the Prosecutor General on the issue of constitutionality of provisions of normative acts related to specific cases within their proceedings;
8. the Human Rights' Defender – on the issue of compliance of normative acts listed in Article 100.1 of the Constitution with the provisions of Chapter 2 of the Constitution;
9. candidates for the President of the Republic and Deputies – on matters listed in Article 100.3.1 and 100.4 of the Constitution.

The Constitutional Court issues decisions and conclusions on application only: it is not empowered to consider cases on its own initiative. Applications are transmitted to the Constitutional Court in writing and presented to the President of the Constitutional Court.

If it is evident that the issue brought in the appeal is not subject to the review of the Constitutional Court or if it is presented to the Court by bodies, person(s) who are unauthorised to make an appeal to the Court, the Court Staff shall return the application within five days.

The procedure of admission of an individual constitutional application to the Constitutional Court prescribed by Article 101.6 of the Constitution is determined by the Rules of Procedure of the Constitutional Court.

Every application submitted to the Court is considered at meetings of its members; if the application concerns a subject within the Court's jurisdiction, if it complies in formal terms with all the procedures set out in the Law on the Constitutional Court and if the applicant is entitled to apply to the Constitutional Court, the President of the Court appoints one or more members of the Court to conduct the preliminary study of the case.

On completion of the preliminary study of the case, the Constitutional Court member(s) who conducted the study must report to the President of the Court on the results of the case study.

The President of the Constitutional Court must convene the Court members to settle the issue of admissibility. If the application is ruled admissible, the President of the Constitutional Court then convenes a sitting of the Constitutional Court. The persons and bodies concerned are informed of the Constitutional Court's decision to accept the case for adjudication.

The Constitutional Court appoints one or more rapporteurs. The rapporteur(s) and the President of the Constitutional Court select the persons to be summoned to the sitting. The case-file created by the rapporteur(s) must be sent to each member of the Constitutional Court, must mandatorily be transmitted to the parties, and may be sent to other persons summoned to the sitting (experts and witnesses), on a decisions from the President of the Constitutional Court.

The parties may appear before the Constitutional Court either in person or through their representatives. No party may have more than three representatives. Parties are entitled to consult all the documents in the case-file.

The Court may request and obtain additional information and documentation. Requests and invitations from the Constitutional Court are binding upon State bodies, public figures, institutions, enterprises, organisations and citizens.

As a general rule, sittings are public and adversarial. By a majority vote, the Constitutional Court shall decide to hold a session or part of a session in the absence of the media and the public for the interest of community morals, public order and state security, and for the privacy of the parties and the case. With the initiation of the Constitutional Court or with the motion of any party of the trial the issue of hearing *in camera* is also examined and solved in the closed session.

During the sitting the President of the Constitutional Court must verify the presence of the majority of Court members, the parties and the other persons summoned. He or she then declares the sitting open and informs the parties of their rights and duties. After the opening presentation by the rapporteur(s), the Court members and parties may put questions to the latter. All the parties express their points of view and put forward arguments on the case, without any limit on speaking time.

The Constitutional Court may adjourn proceedings if it considers that it needs to clarify any circumstances that will decisively affect the final decision or conclusion.

The Court deliberates *in camera*. Members of the Constitutional Court are not entitled to abstain or refuse to vote. The Court can only adjudicate if the majority of its membership attends the sitting (the Court has no separate chambers). The President holds the casting vote. While making decisions on the cases determined by Article 100.1 and 100.2 of the Constitution, the Constitutional Court member can present a descending opinion on the final as well as on the reasoning part of the decision, which is published in the Constitutional Court Bulletin together with the Court decision.

Proceedings before the Court must in all cases be recorded in writing. The decisions and conclusions adopted by the Court are announced publicly at the sitting.

Any Court decision or conclusion must be sent within three days of their adoption to all the parties involved and to the President of the Republic, the National Assembly, the Government, the Court of Cassation, the Ombudsman and the Chief Prosecutor.

During 2006-2007 on the basis of 62 individual constitutional applications the challenged norms of the laws have been declared as contradicting the Constitution in 24 cases. The general statistics indicate, that 11.9% of individual application were admitted as constitutional complaints. The 31% of the admitted individual applications have been satisfied recognising the challenged provisions contradicting to the Constitution.

3. Organisation

The Head of the Staff is responsible for all the Court's administrative work. This includes appointing staff and managing human resources, running the library and publishing the Bulletin of the Constitutional Court.

There is a total staff of 41 (excluding technical services). Nine of the staff members are assistants to the members of the Court.

The Constitutional Court has five advisers.

Legal aid is provided by the Legal-advisory Department, which comprises of three divisions: Division of analyse of individual applications, Expertise-analytic Division and Division of International treaties.

The President of the Constitutional Court manages the financial resources and the staff of the Court.

The President of the Court shall present annually to the Government the appropriations needed for the functioning of the Constitutional Court. The Court budget is set annually by the National Assembly in the state budget. The Constitutional Court manages independently its financial resources

IV. Jurisdiction

The Constitutional Court shall, in conformity with the procedure defined by law:

1. determine the compliance of the laws, resolutions of the National Assembly, decrees and orders of the President of the Republic, decisions of the Prime Minister and bodies of the local self-government with the Constitution;
2. prior to the ratification of international treaties determine the compliance of the commitments stipulated therein with the Constitution;
3. resolve all disputes arising from the outcomes of referenda;
4. resolve all disputes arising from decisions adopted with regard to the elections of the President of the Republic and Deputies;

5. declare insurmountable or eliminated obstacles for a candidate for the President of the Republic;
6. provide a conclusion on the existence of grounds for impeaching the President of Republic;
7. provide a conclusion on the incapacity by the President to discharge his or her responsibilities;
8. provide a conclusion on terminating the power of a member of the Constitutional Court, detaining him or her, agreeing to involve him or her as an accused or instituting a court proceeding to subject him or her to administrative liability;
9. provide a conclusion on the grounds to discharge the head of community;
10. in cases prescribed by the law adopt a decision on suspending or prohibiting the activities of a political party.

V. Nature and effects of decisions

The Constitutional Court shall adopt decisions and conclusions in conformity with the procedure and terms stipulated in the Constitution and the Law on the Constitutional Court.

The decisions and conclusions of the Constitutional Court shall be final and shall come into force following the publication thereof.

The Constitutional Court may adopt a decision stipulating a later term for invalidating a normative act contradicting the Constitution or a part thereof.

On matters stipulated in Article 100.1-100.4 and 100.9 of the Constitution the Constitutional Court shall adopt decisions whilst on matters stipulated in Article 100.5-100.8 it shall issue conclusions. The conclusions and the decision on matters stipulated in Article 100.9 shall be adopted by at least two-thirds of the total number of the members whilst the remaining decisions shall be adopted by a simple majority of votes.

If the conclusion of the Constitutional Court is negative, the issue shall be removed from the scope of competence of the relevant body.

The decisions and conclusions of the Court are published in the official press and the Bulletin of the Constitutional Court (*Teghekagir*).



Austria

Constitutional Court

I. Introduction

1. Date and circumstances of establishment

After the decline of the Austro-Hungarian Monarchy in 1918, in the republican era, the decisive step towards the creation of constitutional justice in Austria was the Federal Constitution Act as of 1 October 1920 (*Bundes-Verfassungsgesetz*, B-VG) by which also the Constitutional Court was established, in more or less the same organisational form and entrusted with basically the same powers as it exists today.

Based on the ideas of Hans Kelsen, the most important achievement was the Constitutional Court's power to assess the constitutionality of laws and to repeal them in case of their unconstitutionality, a power that was concentrated and monopolised with the Court as an independent institution specialised in constitutional questions. Pursuant to Hans Kelsen's conception, it is the Constitutional Court's task to guarantee the primacy of the Constitution and to safeguard the constitutionality of any state action ("guardian of the Constitution").

In the second half of the twentieth century, the idea of constitutional justice based on this concept found general approval and spread widely in Europe and in other continents.

2. Position in the court hierarchy

In Austria there are three supreme legal authorities of the same rank in Austria: The Supreme Court is the last instance in civil and criminal matters since 1848, the Administrative Court, created in 1875, reviews the lawfulness of judgments of the Administrative Courts of First Instance, and the Constitutional Court.

The Constitutional Court does not have the power to review judgments and decisions of the Supreme Court and the Administrative Court. However, if these courts (as well as any other ordinary court of second instance and the Administrative Courts of First Instance) seriously doubt the constitutionality of a law or a legal provision which they have to apply in proceedings before them, they are obliged to file an application for norm review with the Constitutional Court.

II. Basic texts

- Articles 126a, 137 – 148, 148f Federal Constitution Act (*Bundes-Verfassungsgesetz*, B-VG).
- Constitutional Court Act (*Verfassungsgerichtshofgesetz*, VfGG).
- Rules of the Court (*Geschäftsordnung des Verfassungsgerichtshofes*).

III. Composition, procedure and organisation

1. Composition (Article 147 B-VG)

1.1. The Constitutional Court is composed of the President, the Vice-President, 12 additional judges and 6 substitute judges.

1.2. Appointment of judges

The power of appointment lies with the Federal President, who acts on proposals made by the Federal Government in appointing the President, the Vice-President, six judges and three substitute judges (who must be chosen among judges, public officials, and university professors of law), on proposals by the National Council (chamber of deputies) in appointing three judges and two substitute judges, and on proposals by the Federal Council (chamber of parliament representing the *Länders'* interests in the legislative process) in appointing three judges and one substitute judge. The National Council and the Federal Council may also propose advocates for appointment.

All judges of the Constitutional Court must have completed their legal studies and must have practiced a legal profession for at least ten years which requires the completion of these studies. Three judges and two substitute judges must be resident outside the Federal capital, Vienna.

Public officials on active service who are appointed judges or substitute judges are exempt from all official duties, with their pay terminating. All other judges may continue to pursue their original legal profession beside their function as judges of the Constitutional Court.

1.3. Term of office

The judges (including the President and the Vice-President) and all substitute judges serve until the end of the year in which they reach the age of 70.

1.4. Status of judges

Members of the Federal Government or *Land* (regional) Governments and members of any general representative body or of the European Parliament may not serve in the Court. Persons who are employed by or hold office in a political party cannot be judges of the Constitutional Court.

The judges of the Constitutional Court are independent in the performance of their office. Judges may only be dismissed by a two-thirds majority decision of the Constitutional Court itself and only for reasons specified in the Federal Constitution Act or the Constitutional Court Act, for instance if their conduct in performing their duties or otherwise shows them to be unworthy of the trust their position demands, if they violate professional secrecy, or if they are physically or mentally incapacitated.

2. Procedure

The President convenes the Court Sessions which usually take place four times per year (February/March, June, September/October and November/December) and last three and a half weeks each. If necessary, he or she may also convene interim Sessions.

The reporting judges who prepare the Court's judgments and decisions are elected by the plenary for three years. Currently, the Vice-President and almost all judges are serving as reporting judges. The President assigns to them all applications filed with the Court. It is the reporting judges' task to take all necessary procedural steps in the course of preparatory proceedings and to prepare a draft decision for deliberation in a Court session.

The Constitutional Court gives decisions on application only. It may, however, review the constitutionality of a law or the lawfulness of a regulation *ex officio* if it has to apply the respective law or regulation in proceedings.

Generally, decisions are taken by simple majority of votes. Principally, the President does not have the right to vote, he or she has however a casting vote in case of equality of the votes. For certain cases specified in the Constitutional Court Act, unanimity is required.

In principle, decisions are given by the plenary of the Court (President, Vice President and twelve judges). There are no separate Chambers within the Court, but pursuant to the Constitutional Court Act certain decisions may be taken by a reduced composition. In practice, because of the huge workload, the vast

majority of cases are decided by the President, the Vice-President and four judges.

Judicial proceedings before the Court must be in writing. The Court may also give a decision after a public hearing, however, relative to the number of cases this does not occur often. Principally, applications and complaints to the Court must be filed by a barrister.

Some applications are subject to time limits. All judgments and decisions are given in writing and forwarded to the parties.

3. Organisation

The Constitutional Court is under the control of the President, he or she presides over the deliberations and hearings. The President is also in charge of the administrative matters of the Court. In his or her absence he or she is represented by the Vice-President.

In addition to the judges, the Constitutional Court's staff counts about 100 persons, more than half of them directly support the judges in their judicial work.

The budget of the Constitutional Court is part of the Federal budget adopted by Parliament.

IV. Jurisdiction

As is its organisation, so are the powers of the Constitutional Court regulated by the Federal Constitution Act itself (Articles 126a, 137 – 148, 148f *Bundesverfassungsgesetz* – B-VG).

Article 126a

Disputes between legal entities and the Audit Office on the interpretation of the legal provisions which prescribe the competence of the Audit Office.

Article 137

Pecuniary claims against the Federation, the *Länder*, the municipalities and municipal associations which cannot be settled by the ordinary judiciary or by the decision of an administrative authority.

Article 138.1

Conflicts of jurisdiction between courts and administrative authorities, between the Administrative Court and all other courts, especially the Constitutional Court itself, between ordinary and other courts, between the *Länder* and between a *Land* and the Federation.

Article 138.2

Upon application of the Federal or *Land* government the Constitutional Court decides *ex ante* whether a legislative or administrative act falls under the responsibility of the Federation or a *Land*.

Article 139

Review of the lawfulness of regulations issued by Federal or *Land* authorities.

Article 139a

Decision on the unlawfulness of pronouncements on the republication of a law or a state treaty.

Article 140

Review of the constitutionality of laws.

Article 140a

Review of the lawfulness of international treaties.

Article 141

Pronouncement upon challenges to the main political elections (Federal President, popular representative bodies, European Parliament, *Land* governments and municipal authorities entrusted with executive power) as well as professional elections (elections to representative professional bodies entitled to determine their own statutes).

Pronouncement on the loss of a seat in a popular representative body or a representative professional body or in the European Parliament (with regard to Austrian members).

Article 142

Decision on indictments concerning the constitutional responsibility of the highest Federal and *Land* authorities for violations of the law committed in the performance of their official duties (Federal President, members of the Federal or a *Land* government).

Article 143

Jurisdiction where officials mentioned in Article 142 are charged with criminal offences connected with their official duties.

Article 144

The Constitutional Court pronounces on complaints against judgments of an Administrative Court of First Instance, if the complainant alleges an infringement of a constitutionally guaranteed right by the contested judgment or an infringement by application of an unlawful regulation, an unconstitutional law or an unlawful international treaty.

Article 145

Decision on violations of international law. Compliance with this Article is not subject to review by the Court since the specific Federal Act provided for in Article 145 has never been enacted.

Article 148f

Disputes between legal entities and the Ombudsman board on the interpretation of the legal provisions which prescribe the competence of the Ombudsman board.

V. Nature and effects of decisions

1. Types of decisions

- Decisions on procedural issues (*Beschlüsse*);
- Judgments on the merits (*Erkenntnisse*).

2. Legal effect of decisions

The Constitutional Court's decisions are final and binding. Their specific legal effects vary considerably due to the wide scope of the Constitutional Court's powers.

The Constitutional Court's repeal of a law or a regulation has *erga omnes* effect.

VI. Conclusion

The Constitutional Court as an institution, as well as its Case-Law, is broadly accepted in Austria, by other state organs as well as by individuals. According to annual surveys the Court ranks among Austria's most trustworthy institutions.



Azerbaijan

Constitutional Court

I. Introduction

The Constitutional Court of the Republic of Azerbaijan was formed on 14 July 1998. The question of the formation of the Court is regulated by Articles 86, 88, 102, 103, 104, 107, 130, 153 and 154 of the Constitution.

II. Basic texts

- Constitution of Azerbaijan Republic, adopted on 12 November 1995. Modifications introduced by referendum held on 24 August 2002 and 18 March 2009);
- Law on the Constitutional Court;
- Civil Procedure Code (came into force on 1 July 2000);
- Rules of Procedure of Constitutional Court;
- Statute of the Staff of Constitutional Court.

III. Composition, procedure and organisation

1. Composition

Judges of Constitutional Court shall be appointed by Parliament (*Milli Mejlis*) upon proposals of the President of Azerbaijan Republic. Constitutional Court may commence implementation of its authorities upon appointment of no less than 7 judges.

Judges of Constitutional Court shall be appointed for the term of 15 years. The re-appointment of judge of Constitutional Court shall be inadmissible.

Chairman and Deputy Chairman of Court shall be appointed by the President of Azerbaijan Republic.

2. Structure

The following entities function within the Staff of Constitutional Court: Constitutional Law Department, Department for Human Rights and Public Relations; Administrative and Criminal Law Department; International Relations Department; Civil Law Department; International Law Department; Department for Reception of Citizens and Complaints; General Department; Department for Legal Provision and Systematisation of Legislation; Sector for Supervision of Execution of Court.

Decisions; Sector for Organisation of Court Sessions; Assistants and Advisors to Chairman and Judges. The current supervision of staff is implemented by Head of Staff (Secretary General) and his or her Deputy.

In addition, the material, technical, financial and economical maintenance is realised by Logistics Department.

IV. Jurisdiction

The Constitutional Court shall resolve the following issues based upon the request of the President of the Republic of Azerbaijan, the Parliament (*Milli Mejlis*), the Cabinet of Ministers, the Supreme Court, the Prosecutor's Office and the Supreme Parliament (*Mejlis*) of Nakhchivan Autonomous Republic:

- compliance of the laws of the Republic of Azerbaijan, decrees and orders of the President of the Republic of Azerbaijan, decisions of Parliament (*Milli Mejlis*), decisions and orders of the Cabinet of Ministers, normative legal acts of the central executive authority bodies with the Constitution;
- compliance of the decrees of the President of the Republic of Azerbaijan, decisions of the Cabinet of Ministers, normative legal acts of the central executive authority bodies with the laws of the Republic of Azerbaijan;
- compliance of decisions of the Cabinet of Ministers, normative legal acts of the central executive authority bodies with decrees of the President of the Republic of Azerbaijan;
- compliance of decisions of the Supreme Court with the Constitution and laws of the Republic of Azerbaijan, in cases considered by the law;
- compliance of municipal acts with the Constitution, laws of the Republic of Azerbaijan, decrees of the President of the Republic of Azerbaijan, decision of the Cabinet of Ministers (in Nakhchivan Autonomous Republic, as well as with the Constitution and laws of Nakhchivan Autonomous Republic, decisions of the Cabinet of Ministers of Nakhchivan Autonomous Republic);
- compliance of interstate agreements of the Republic of Azerbaijan that are not in force with the Constitution;
- compliance of intergovernmental agreements of the Republic of Azerbaijan with the Constitution and laws of the Republic of Azerbaijan;
- compliance of the Constitution of Nakhchivan Autonomous Republic, laws, decisions of the Supreme *Mejlis* and Cabinet of Ministers of Nakhchivan Autonomous Republic with the Constitution;

- compliance of laws of Nakhchivan Autonomous Republic, decision of the Cabinet of Ministers of Nakhchivan Autonomous Republic with the laws of the Republic of Azerbaijan;
- compliance of decision of the Cabinet of Ministers of Nakhchivan Autonomous Republic with decrees of the President of the Republic of Azerbaijan and with decisions of the Cabinet of Ministers;
- disputes concerning separation of powers between legislative, executive and judiciary powers.

The Constitutional Court shall interpret the Constitution and laws of the Republic of Azerbaijan at the request of the President of the Republic of Azerbaijan, the *Milli Mejlis*, the Cabinet of Ministers, the Supreme Court, the Prosecutor's Office and the Supreme *Mejlis* of Nakhchivan Autonomous Republic.

Everyone has the right to file complaints to the Constitutional Court, in accordance with rules specified by laws, against legal and normative acts of executive authorities and municipalities, as well as rulings of courts which violate individuals' rights and freedoms, in order to restore the violated rights and freedoms.

Within the rules established by the laws of the Republic of Azerbaijan, the courts may request the Constitutional Court to interpret the Constitution and laws of the Republic of Azerbaijan regarding the exercise of human rights and freedoms.

The Human Rights Commissioner of the Republic of Azerbaijan can file an inquiry to the Constitutional Court regarding legal and normative acts of executive authorities and municipalities as well as rulings of courts, which violate human rights and freedoms in accordance with rules specified by laws.

The Constitutional Court of the Republic of Azerbaijan may implement other duties established by this Constitution.

Laws and other acts, or their separate provisions, intergovernmental agreements of the Republic of Azerbaijan shall lose their force within the timeframe established in the decision of the Constitutional Court of the Republic of Azerbaijan. Interstate agreements of the Republic of Azerbaijan do not come into force.

V. Nature and effects of decisions

The quorum for the sitting of the Constitutional Court shall consist of six judges. Each judge has the right to have a dissenting opinion. Such an opinion is subject to publication together with the decision.

Decisions of the Constitutional Court are final and cannot be cancelled, changed or officially interpreted by any body or official.



Belarus

Constitutional Court

I. Introduction

The Constitutional Court of the Republic of Belarus was established in April 1994 according to the Constitution of the Republic of Belarus. It is a judicial body to review the constitutionality of normative legal acts in the State.

Constitutional justice in Belarus keeps improving and developing. Initially, 1994 – 1996, the Constitutional Court was set up as a separate and independent body exercising the subsequent review of the constitutionality of normative legal acts, having the right to initiate proceedings.

At the second stage (1996 – 2007) the constitutional legal status of the Constitutional Court was specified; the Court was included in the judiciary; it lost the right to initiate proceedings, the list of subjects entitled to apply to the Constitutional Court was reduced. In this period the Constitutional Court exercised subsequent constitutional review of normative legal acts requested by the authorised subjects. It adopted decisions with a view to fill constitutional legal gaps in legislation on applications of citizens and organisations.

In 2008, the powers of the Constitutional Court were extended at the legislative level aiming to increase its role in the life of society and the State. The Constitutional Court was empowered to exercise obligatory preliminary review of the constitutionality of laws adopted by Parliament before the signing by the President. Preliminary review of the constitutionality of all the laws adopted by Parliament becomes the basic kind of activities of the Constitutional Court. Indirect access of citizens to the constitutional justice was implemented.

In January 2014, in order to improve the constitutional proceedings to increase the efficiency of the Constitutional Court, the Law “On the Constitutional Proceedings” was adopted, the provisions of which ensure transparency, clarity and consistency of procedures for all participants of the constitutional proceedings. Indirect access of individuals to constitutional justice gets further legislative regulation.

II. Basic texts

The legal basis for the organisation and activities of the Constitutional Court comprises:

- Constitution of the Republic of Belarus of 1994 with alterations and addenda adopted at the republican referenda of 24 November 1996 and of 17 October 2004;
- Code of the Republic of Belarus on Judicial System and Status of Judges of 29 June 2006 (with later alterations and addenda);
- Law of the Republic of Belarus of 8 January 2014 "On Constitutional Proceedings"; and
- Rules of the Constitutional Court approved by the Decision of the Constitutional Court of 8 April 2014.

III. Composition, procedure and organisation

1. Composition

The Constitutional Court is formed of 12 judges. Six judges are appointed by the President of the Republic and six are elected by the Council of the Republic of the National Assembly – a house of Parliament.

Citizens of the Republic of Belarus, having higher legal education and high moral standards, being highly qualified specialists in the field of law and having, as a rule, a scientific degree, can be appointed (elected) judges of the Constitutional Court.

The Constitutional Court judges are appointed and elected for a term of eleven years and may be re-appointed and re-elected. The retirement age of the members of the Constitutional Court is 70 years.

The Chairperson of the Constitutional Court is appointed by the President of the Republic with the consent of the Council of the Republic of the National Assembly from amongst the judges of the Constitutional Court for a 5-year term.

The Deputy Chairperson of the Constitutional Court is elected by the Constitutional Court from amongst its judges upon the recommendation of the Chairperson of the Constitutional Court for a 5-year term.

2. Procedure

The Constitutional Court is competent to decide when no less than eight judges of the Constitutional Court have been appointed (elected).

The procedure of consideration of cases in the Constitutional Court, making decisions, performance of procedural actions by Judges and participants of the constitutional proceedings are regulated by the Law "On the Constitutional Proceedings".

Cases shall be considered by the Constitutional Court collectively in open court session. Cases shall be considered in a closed court session when this is necessary in order to protect the information constituting state secrets or other secrets protected by law contained in the case materials.

Consideration of cases in the Constitutional Court is based on adversarial character of the proceedings and the equality of the parties. The parties have equal rights to representation and examination of evidence, making requests, expressing opinions on any issue relevant to the case.

Proceedings in the Constitutional Court are conducted orally. When considering cases, the Constitutional Court hears the parties, their representatives, experts, specialists and witnesses and reads out the documents relating to the case.

In certain cases specified by the Law "On the Constitutional Proceedings" the Constitutional Court shall consider cases with the use of written form of the constitutional proceedings on the basis of written documents and other materials submitted and requested while preparing the case for the consideration in a court session. It is also permitted to use elements of the oral form of the constitutional proceedings.

While reviewing the constitutionality of a normative legal act, the Constitutional Court determines its conformity to the Constitution, instruments of international law, ratified by the Republic of Belarus, the laws of the Republic of Belarus, decrees and edicts by the President of the Republic:

1. in substance of norm;
2. in form of the normative legal act;
3. with regard to distribution of powers between state bodies;
4. on procedure of adoption, signing, publication and entry into force.

When considering issues the Constitutional Court is not bound by the arguments and reasons of the parties concerned.

The Constitutional Court may also decide on acts that are not referred to in the application, if they are based on the act already reviewed or reproducing certain provisions of the reviewed act.

While reviewing an act the Constitutional Court takes into consideration both its literal meaning as well as the meaning given to it in its application in practice.

3. Organisation

The Constitutional Court is a judicial body to review the constitutionality of normative legal acts in the State, exercising the judicial power in constitutional proceedings.

The Secretariat of the Constitutional Court is in charge of organisational, material and technical aspects of the Constitutional Court's activities. The Secretariat ensures the functioning of the Court in administration of justice, Case-Law generalisation, analysis of court statistics, systematisation of legislation, performance of other functions. It also provides the organisational support of Court's activities.

There is the Academic Consultative Council, attached to the Constitutional Court. The relevant regulations are approved by the Constitutional Court. The members of the Academic Consultative Council are approved by the Constitutional Court on the recommendation of the Chairperson of the Constitutional Court.

IV. Jurisdiction

The Constitutional Court is empowered:

- to review the constitutionality of normative legal acts, obligations under treaties and other international commitments of the Republic of Belarus, acts of international bodies to which the Republic of Belarus is a party, under the subsequent review procedure;
- to exercise obligatory preliminary review of the constitutionality of the laws, adopted by the National Assembly, before their signing by the President of the Republic;
- to make decisions on conformity of laws adopted by the National Assembly (except laws prepared in connection with conclusion, execution, suspension and termination of international treaties of the Republic of Belarus) to the Constitution before their signing by the President of the Republic in the exercise of obligatory preliminary review;
- to state the position about the constitutionality of international treaties before the President of the Republic of Belarus signs the normative legal acts on expressing consent of the Republic of Belarus to obligations under these treaties;

- to deal with the facts of instances of systematic or flagrant violations of the Constitution by the houses of Parliament, the facts of systematic or flagrant violations of legislative requirements by a local Council of Deputies;
- to make an official interpretation of decrees and edicts by the President regarding constitutional rights, freedoms and duties of citizens;
- to state the position of the Constitutional Court on the acts adopted (issued) by foreign states, international organisations and (or) their bodies and affecting the interests of the Republic of Belarus as to their conformity to the universally acknowledged principles and rules of international law.
- to review the constitutionality of guidelines for rule-making and law-enforcement practice of state bodies including judicial and law-enforcement bodies;
- to make decisions on elimination of legal gaps, collisions and legal uncertainty in normative legal acts;
- to adopt annual messages to the President of the Republic and the Houses of the National Assembly of the Republic of Belarus on constitutional legality.

The President of the Republic, houses of Parliament – the House of Representatives of the National Assembly and the Council of the Republic of the National Assembly, the Supreme Court, the Council of Ministers (the Government) are entitled to submit proposals to review the constitutionality of normative legal acts to the Constitutional Court.

Other state bodies, as well as public associations, other organisations and individuals shall initiate the review of the constitutionality of normative legal acts with bodies and officials entitled to request the Constitutional Court to review constitutionality of the act (indirect access).

V. Nature and Effect of Decisions

The judgments and decisions of the Constitutional Court shall be final and not subject to appeal or protest; shall have the direct effect and do not require confirmation by other state bodies, other organisations, officials; shall enter into force on the date of their adoption unless other term is fixed in these acts.

Legal acts as well as their particular provisions, declared under the procedure to be contrary to the Constitution, do not have legal force.

The recognition of normative legal acts as not being in conformity with the Constitution shall be grounds for their termination, making appropriate alterations and (or) addenda to or adopting new normative legal acts on the same subject. The Constitution shall be directly applied until the termination of the validity of such normative legal acts, making alterations and (or) addenda thereto or adoption of new normative legal acts.

VI. Conclusion

The Constitution is the legal foundation for building a democratic social state based on the rule of law in Belarus. Proclaiming the principles of democracy, separation of powers, the rule of law, the Constitution establishes the fundamental rights and freedoms of citizens of the Republic of Belarus and guarantees for their legal protection. The Constitutional Court is called up to provide the supremacy of the Constitution and its direct effect in the territory of the Republic of Belarus, to ensure conformity of normative legal acts of state bodies to the Constitution, establishment of lawfulness in rule-making and law enforcement.



Belgium

Constitutional Court

I. Introduction

The Belgian constitutional system – Constitutional review in Belgium

Belgium is a constitutional monarchy with a representative system of government. The fundamental rules governing rights and freedoms, the organisation of the state and the operation of its institutions, chiefly the legislature, the executive and the judiciary, were established by the Constitution of 7 February 1831.

The constitutional amendment procedure is complex. Over the first 150 years, following the adoption of the Constitution, only three revisions were made (1892-93, 1919-21 and 1965-68). Since 1970, however, several constitutional reforms have resulted from the demand for self-government by Belgium's two main cultural and linguistic communities, the Dutch-speaking and the French-speaking. Today, Belgium is a federal state, as provided in Article 1 of the Constitution; it is structured around three communities (Flemish, French and German-speaking) and three regions (Flemish, Walloon and Brussels-Capital) enjoying considerable autonomy and the power to enact statutes and regulations with force of law or equivalent rank. This structure is superposed on the division of the country into provinces and municipalities, whose elected bodies have considerable administrative autonomy.

Following the consecutive revisions a coordinated version of the Constitution was produced, and the current text is dated 17 February 1994.

The precursor of the Constitutional Court was the Court of Arbitration, established in 1980, at a time when Belgium was gradually being transformed into a federal state. The Court of Arbitration owed its name to its original mission, which was to act as arbitrator between the different legislatures of the Federal State, the Communities and the Regions by monitoring the conformity of laws, decrees and ordinances with the power-assigning rules in the Constitution and the laws on institutional reform.

The designation “Constitutional Court” since May 2007 is more in keeping with the actual jurisdiction of this court of law, which has been gradually extended to include the review of laws, decrees and ordinances with Title II of the Constitution (Articles 8 to 32 on the rights and freedoms of the Belgians) and with Articles 170 and 172 (legality and equality of taxes) and 191 (protection of foreign nationals).

Citizens’ fundamental rights and freedoms are protected by the letter of the Constitution, but individuals and corporations may also appeal to the courts relying on directly applicable rules of international law, including those embodied in the European Convention on Human Rights, which override domestic law, particularly, statute law.

In Belgium it was traditionally acknowledged that it was not for the courts to determine whether laws were in compliance with the Constitution. However, since 1946, there has been a form of preventive review by the legislation section of the *Conseil d’Etat*, which may issue opinions, without binding effect, *inter alia* on the constitutionality of the preliminary drafts of laws or equivalent statutes. The section of this judicial body dealing with administrative matters may, at the request of interested parties, order the retroactive annulment of measures taken by the government and local authorities (provinces and municipalities) in breach of higher reference standards, namely the Constitution, laws and directly applicable rules of international law.

In their concrete normative review, the courts are empowered by Article 159 of the Constitution not to apply to the case before them such government and local authority measures as conflict with the aforementioned standards.

Since a Court of Cassation decision of 27 May 1971, the law itself has been subject to review by the ordinary courts in the light of provisions of international law having direct effect.

As a general rule, the Belgian courts have nevertheless consistently refrained from verifying the constitutionality of legislation, except for giving interpretations in accordance with the Constitution.

It was the gradual transformation of Belgium, a unitary state up to 1970, into a federal state consisting of three communities and three regions that led to the introduction of judicial review of the constitutionality of statutes and regulations ranking as law.

The allocation of separate powers to the above political entities prompted the Constituent Assembly in 1980 to set up the Constitutional Court as a new

judicial authority for the settlement of conflicts arising from the exercise of legislative power respectively by the federal state (through laws) and the communities and the regions (through decrees or, in the case of the Brussels-Capital Region, through ordinances). The Court’s powers were subsequently extended (see below).

II. Basic texts

The constitutional and legislative texts relating to the Court of Arbitration are as follows:

- Article 142 of the Constitution:

“There is, for all of Belgium, a Constitutional Court, the composition, competencies and functioning of which are established by law”.

This Court gives decisions by means of judgments on:

1. conflicts described in Article 141;
2. violation through a law, a decree or a rule, as described in Article 134, of Articles 10, 11 and 24;
3. violation through a law, a decree or a rule, as described in Article 134, of Articles of the Constitution determined by law.

The Court may be solicited by any authority designated by law, by any person who can justify an interest or, on an interlocutory basis, by any court.

The Court renders a decision on each referendum referred to in Article 39bis, before it is organised, in accordance with the conditions and procedures prescribed by law.

The law may, in the cases and in accordance with the terms and conditions it foresees, give the Court the power to decide, by way of a judgment, appeals made against decisions rendered by legislatures or their bodies, in matters pertaining to the control of expenditures in respect of elections to the Chamber of Representatives.

The laws described in paragraph 1, 2 and 3, and in paragraph 3 are adopted by majority vote, as described in the last paragraph of Article 4”.

- The special Act of 6 January 1989 on the Constitutional Court (*Moniteur belge*, 7 January 1989 – amended on a number of occasions) superseding the Act of 28 June 1983 concerning the organisation, jurisdiction and functioning of the Constitutional Court;

- The Act of 6 January 1989 concerning the emoluments and pensions of judges, legal advisers (référéndaires) and registrars of the Constitutional Court (*Moniteur belge*, 7 January 1989, erratum, *Moniteur belge*, 1 February 1989).

Updated versions of all these texts are available (in French and Dutch) on the Constitutional Court's web-site (www.cons-court.be) under "Basic texts".

III. Composition, procedure and organisation

1. Composition of the Court

The Court consists of twelve judges appointed for life by the Crown from a list of two candidates submitted alternately by the Chamber of Representatives and by the Senate; this list is approved by a two-thirds majority of the members present.

Six judges belong to the French language group and six to the Dutch language group. The judges in each group elect a President, who presides over the Court for one year in rotation with the other President. Each language group includes three judges with at least five years' experience as a member of a parliamentary assembly, and three judges are required to have held judicial posts in Belgium for at least five years (as a professor of law, senior judge of the Court of Cassation or the *Conseil d'Etat* or legal adviser at the Constitutional Court). At least one judge in this last category must have an adequate knowledge of German. Finally, as regards gender balance and equality, the Law sets out rules that guarantee a minimum number of judges from the least-represented group.

Forty is the minimum age of appointment. Judges are eligible for retirement at the age of seventy. Disqualification from eligibility for office for holders of other posts, duties or occupations is strictly regulated. Judges cannot be removed from office except in the event of a serious disciplinary offence and by decision of the full Court, taking the form of a judgment.

2. Functioning of the Court

Cases are in principle heard by a single bench of seven judges. In addition to the two Presidents, who sit on all cases, five judges are appointed on a rota basis. Important cases are heard by the full Court (ten or twelve members) where the Presidents deem necessary or two judges so request.

The Court takes decisions by an ordinary majority of votes cast (4/3) and the results of voting are not made public. Where a decision is taken by the full

Court, the President in office has a casting vote in the event of a tie in the voting. Deliberations are secret. No provision is made for judges to issue concurring or dissenting opinions.

The Presidents and judges of the Court are assisted by advisers, who are legal specialists appointed by competitive examination (24 at most, with parity between Dutch and French speakers). The Court is also assisted by two registrars and some sixty staff members (performing documentary, translation, secretarial, accounting, information technology and other duties).

The Court itself determines the organisational and linguistic rules applicable to its administrative staff, which must be approved by royal decree. The Court appoints and dismisses its own administrative staff.

The Court's operating budget is determined annually by the federal parliament under a special budgetary law.

3. Procedure before the Court

Procedure before the Court is governed by the Institutional Act of 6 January 1989 itself (for the current versions of this Act, see the "Basic texts" section of the web-site www.const-court.be available in Dutch, French, German and English). It is essentially written and adversarial. The rules of procedure on cases arising from applications for annulment and from questions on preliminary points of law are basically the same, except – naturally – as regards referral and the effects of the Court's decision.

In order to avoid any excess case-load, all cases are "screened" under a summary procedure. Cases which are manifestly inadmissible or clearly outside the Court's jurisdiction may be dismissed by a "select panel" made up of the President and two reporting judges. Similarly, cases which are manifestly unfounded, preliminary questions which clearly call for a negative reply and cases which may be settled by a "judgment rendered through a preliminary procedure" (on account of the nature of the case or the relatively straightforward problems it raises) may be determined (by an ordinary bench) following a written procedure, in which the only participants are, in principle, the applicants or the parties to the proceedings before the referring court. The authorities normally informed automatically of all cases are not involved in this preliminary procedure, except where the reporting judges recommend, in their submissions to the Court, that a judgment be given finding a violation of the Constitution by the provision under consideration.

Unless this preliminary procedure is applied, an announcement is published in the *Moniteur belge* (Official Gazette) to the effect that a case has been brought before the Court. Applications lodged with the Court may be consulted at the registry during the thirty days following this announcement. The various legislative assemblies and executive bodies receive separate notification, as do the parties in lower court proceedings which have given rise to preliminary questions. They then have forty-five days in which to send the Court their written arguments (“memorial”) and any supporting documents. Third parties with an interest in the case may also submit written observations to the Court within thirty days of publication of the above-mentioned announcement in the *Moniteur belge*. All parties who made written submissions within the time-limits are then allowed thirty days more in which to file a memorial in reply. In cases concerning applications for annulment, a rejoinder to the applicant’s memorial in reply may then be submitted within thirty days.

The case-file containing all documents and procedural records may be consulted by the parties at the registry. The Court is furthermore empowered to order extensive investigatory measures for the purpose of obtaining additional information and to take statements from the parties or other individuals and agencies.

At the end of the time allowed for the exchange of memorials and for the reporting judges and their legal advisers to prepare the case for hearing, the Court considers whether the case can be dealt with. An order setting the case down for hearing is then issued, which sets out whether a hearing will take place and states any questions raised. All parties have the possibility of asking the Court to hold a hearing if none has been foreseen.

If a hearing takes place, which is public, one of the judges reports on the case. A second reporting judge from the other language group may make a supplementary report. All parties having lodged written submissions may also make oral pleadings (in French, Dutch or German with simultaneous interpretation) both in person and through counsel.

The Court’s judgments are drafted in French and Dutch. They are also drafted and delivered in German where they concern applications for annulment or proceedings instituted in German. Judgments are published (in the form of excerpts) in all three languages in the *Moniteur belge* and (in full) in French and Dutch on the Court’s web-site (www.const-court.be) (in principle within 48 hours). They can be delivered during a public hearing if the

President decides to do so; otherwise publication on the site shall constitute delivery of the judgment.

Since 1 June 1997 it has been possible to consult the *Moniteur belge* free of charge on the following web-sites: <http://www.just.fgov.be> or <http://moniteur.be>.

The maximum time taken to deal with a case (requests for suspension and selective screening procedures excluded) is one year. The number of cases has increased (7 cases in 1985, the first year of operation; 42 in 1991; 81 in 1992; 140 in 1998 and 191 in 2002), but stable since then at around 200 cases a year.

IV. Jurisdiction

1. Creation and functions of the Constitutional Court

As mentioned in the introduction, it was Belgium’s transformation into a federal state that led to the establishment of the Constitutional Court.

The Constitutional Court was originally conceived as an independent judicial authority answerable neither to the legislature, the executive nor the judiciary.

The Court, which owes its existence to its original function of federal arbitrator, was vested by the current Article 142 of the Constitution with sole authority to review, following their enactment, statutes and regulations ranking as law for the purpose of verifying their conformity with the rules determining the respective powers of the state, the communities and the regions. These rules are set forth in the Constitution and also in certain laws (usually passed by a special majority) enacted pursuant to the Constitution. Statutes and regulations which rank as law cover both substantive and procedural provisions adopted by the legislative bodies of the federal state, the communities (decrees) and the regions (decrees and ordinances), including those ratifying treaties.

The jurisdiction of the Court was extended in 1988 to include review of compliance with Articles 10, 11 and 24 of the Constitution. This constitutional amendment was effected under the Act of 6 January 1989 on the Court of Arbitration, passed by a special majority, which governs virtually all aspects of the Court’s jurisdiction, composition and operation, including procedure and effects of decisions. A law passed by ordinary majority on the same date deals with the emoluments and pensions of the Court’s judges, advisers and registrars.

Articles 10, 11 and 24 of the Constitution concern the principles of equality and non-discrimination and rights and freedoms in respect of education.

When determining compliance with the principles of equality and non-discrimination, the Court relied indirectly on other provisions of the Constitution and of international law (in particular the European Convention on Human Rights and the EU treaties) as well as on general principles.

In passing the special Act of 9 March 2003 (published in the *Moniteur belge* of 11 April 2003), the federal parliament availed itself of the possibility of extending the Court's jurisdiction to review of compliance with other constitutional provisions, provided for in Article 142 of the Constitution. The Court's frame of reference for direct review of the constitutionality of legislation is now not just Articles 10, 11 and 24 of the Constitution, but the whole of Title II (Articles 8 to 32) and Articles 171, 172 and 191.

Title II of the Constitution (Articles 8 to 32) sets out the fundamental constitutional rights and freedoms. Article 170 deals with the requirement of lawfulness regarding taxation, and Article 172 with the principle of equality in tax matters. Article 191 guarantees that foreigners living in Belgium in principle enjoy the same constitutional rights as Belgian nationals.

Three special acts of 6 January 2014, extended the jurisdiction of the Court to cover federal loyalty (Article 143.1 of the Constitution), preventive control of regional public consultations and appeals against sanctions of the Parliamentary Oversight Committee of election expenses of members of the House of Representatives.

2. Methods of referral

A case may be brought before the Constitutional Court in two ways. Firstly, a case may be brought in the form of an application for annulment, which may be lodged by any authority designated by law or any person who can justify an interest. Secondly, any court may refer a preliminary question to the Constitutional Court.

a. Application for annulment

The following authorities and individuals may avail themselves of this remedy before the Court:

- the supreme administrative bodies of the federation (Council of Ministers) and of the federated entities (the governments of the communities and the regions);
- the presidents of the legislative assemblies (at the request of two-thirds of their members);
- Belgian or foreign natural and legal persons, including both private-law and public-law corporations.

The latter category must be able to justify an interest in requesting annulment. This means that they must show in their application to the Court that the contested provision is likely to have a direct adverse effect on them personally.

The "arguments" must be set out in the application. In other words, it must be specified which of the rules with which the Court guarantees compliance are allegedly violated and by which provisions. It must also be explained in what respect those rules are considered to be violated.

As a general rule, with certain exceptions, applications must be lodged not more than six months after the *Moniteur belge* publishes the challenged provision. Its effect is not suspended by the application, but in order to guard against the possibility that it may cause damage which is not readily redressable during the lapse of time between the introduction of the application and the delivery of judgment, and that a subsequent retroactive annulment may no longer have any effect, the Court may, at the applicant's request, which must be made within three months of the contested provision's publication, order its suspension where serious arguments for its annulment are advanced. Such suspension is, however, valid for not more than three months, during which period the Court must accordingly rule on the annulment request.

b. Interlocutory procedure

The Court of Arbitration has sole jurisdiction to determine the conformity of laws, decrees and ordinances with the rules on the division of powers between the state, the communities and the regions, and with Articles 8 to 32, 170, 172 and 191 of the Constitution. Any court faced with such a problem must in principle refer a preliminary question to the Constitutional Court. The proceedings in the referring court are suspended pending the Constitutional Court's reply. If the Constitutional Court issues a decision to the effect that the provision in question conflicts with the relevant constitutional standards, the referring court can no longer apply the provision in its subsequent proceedings on the case. The provision nonetheless remains in force under the legal system. It is then for parliament to take any necessary measures. If the Constitutional Court declares it unconstitutional, a new six-month period is given so as to ask for the annulment of the provision.

This allows the Court to eliminate any *erga omnes* consequences.

Breach of constitutional rules by measures without force of law originating from any lower authority is sanctioned by the ordinary and administrative courts themselves, which, in accordance with Article 159 of the Constitution, declare those measures inapplicable to the cases before them.

V. Nature and effects of decisions

The Court's decisions are final and cannot be appealed against.

The effects of judgments differ depending on whether they are pronounced in respect of an application for annulment or in response to a preliminary question.

If the application is founded the challenged provision is annulled in full or in part. Judgments annulling challenged provisions have absolute binding force from their publication in the *Moniteur belge*. The annulled provision is deemed never to have existed, but the Court can moderate the retroactive effect of the annulment by deciding that certain effects thereof may continue to apply.

Instruments, regulations and court decisions founded on annulled provisions still stand. However, in addition to the ordinary remedies which may remain available to the parties concerned, the law provides that court decisions or administrative measures founded on a subsequently annulled provision may be rendered unenforceable. Special means of appeal are available to the prosecuting authorities and to interested parties for this purpose, and they must normally avail themselves of this remedy within six months of the publication of the Court's judgment in the *Moniteur belge*.

In proceedings which raise preliminary points of law, courts required to deliver judgment in the same case (same parties), such as appeal courts, must adhere to the Court's response. Those courts may no longer apply the provision held to be unconstitutional even where it remains in force in the system of law. A court encountering the same provision in another case may apply the same solution or, alternatively, is required to refer a new preliminary question. Moreover, where the Court finds a violation, a further six-month period commences within which an application for annulment of the provision in question may be lodged. Finally under the law, the Court has the power to maintain the effect of a law that was judged to be contrary to a reference norm. It extended this power to the procedure on preliminary questions.



Bosnia and Herzegovina Constitutional Court

I. Introduction

In terms of history and issue of transition from a socialist system, Bosnia and Herzegovina provides a rare example of a country in transition from a socialist system which nevertheless has a history of having a constitutional court, since the former Yugoslavia was the only country which had a system of the constitutional courts already in socialist regime. The first Constitutional Court in former Yugoslavia was created as early as 1963. This date coincided with the starting point of the history of a constitutional court in Bosnia and Herzegovina. In accordance with the federal structure of the former SFRY, not only was there a Constitutional Court at the federal level, but prior to the dissolution of former Yugoslavia, the six Republics and even the two Autonomous Provinces – Kosovo and Vojvodina – also had their own Constitutional Courts.

The Constitutional Court of Bosnia and Herzegovina was established for the first time on 15 February 1964 pursuant to the Constitution of 1963. Its existence was confirmed in the Constitution of 1974. The jurisdiction of this Constitutional Court consisted primarily of an abstract normative control. Thus, it would take decisions as to the conformity of the (Republic's) laws with the Constitution, and as to the constitutionality and legality of other regulations and general and self-management acts. It would also be called upon to resolve disputes between the Republic and other political-territorial units, in particular, conflicts of jurisdiction as between the courts and other bodies of political-territorial units. The 'Law on the Constitutional Court' regulated issues concerning the organisation, jurisdiction and procedures before this Constitutional Court.

II. Basic texts

The Constitution (Annex 4 of the General Framework Agreement for Peace in Bosnia and Herzegovina), which entered into force on 14 December 1995, now provides the legal framework for the organisation and functioning of the Constitutional Court. This gives it a completely new political and legal foundation as compared with that of the previous period.

In the first place the Constitution elaborates in its Preamble certain basic normative principles, such as the respect for human dignity, liberty and equality; the respect for peace, justice, tolerance, and reconciliation and the respect for democratic governmental institutions and fair procedures, all of which being together representative of the best means for creating peaceful relations within a pluralistic society. Additionally, Article II of the Constitution not only contains a comprehensive catalogue of human rights and fundamental freedoms, but also declares the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols to be directly applicable in Bosnia and Herzegovina. Moreover, it is provided that the European Convention shall also have priority over all other laws.

The position of the Constitutional Court is provided for in Article VI of the Constitution which defines not only its jurisdiction, but also provides for its organisational structure and its procedure as well as for the final and binding character of its decisions. Defining the normative requirements for progress towards a democratic political system and modifying the internal structure of the state, the Constitution updated in this way the constitutional position of the Constitutional Court and made it compatible with the standards of a constitutional judiciary – both as an independent ‘guardian of the constitution’ and as an institutional safeguard for the protection of human rights and freedoms as laid down not only in the provisions of Article II of the Constitution, but also in the instruments contained in Annex I thereto.

III. Composition, procedure and organisation

1. Composition (and Procedure)

The Constitutional Court takes decisions in the plenary sessions (nine judges), the sessions of the Grand Chamber composed of five judges and the sessions of the Chamber composed of three judges.

The Plenary Court takes decisions by the majority of votes of all members of the Constitutional Court on cases arising out of its competence under Articles VI.3.a, VI.3.c and IV.3.f of the Constitution and Article VI.4 of the Constitution (Disputes arising under conflict of jurisdiction and an abstract review of constitutionality, Appellate Jurisdiction, Referral of an issue by other courts, Unblocking of the Parliamentary Assembly, Brcko District) and cases arising out of its competence under Article VI.3.b of the Constitution, which are included in the agenda of the session of the Constitutional Court, as well as decisions about other issues set forth in the Constitution and the Rules of the Constitutional Court.

The Grand Chamber takes the decisions on cases arising out of the competence of the Constitutional Court under Article VI.3.b of the Constitution (appellate jurisdiction) which are not included in the agenda of the session of the Plenary Court. The Grand Chamber takes a unanimous decision in that regard. If a unanimous decision is not taken, the case shall be referred to the Plenary Court and the draft decision amended pursuant to the proposal that received support from the majority of the members of the chamber.

The Grand Chamber is composed of judges elected by the competent Entity Legislature according to the order of precedence referred to in Article 98 of the Rules of procedure with one member rotating every month. The President of the Constitutional Court presides at the meetings of the Grand Chamber. In the event that he or she is unable to attend, one of the Vice-Presidents whom he or she designates is replacing him or her.

The Chamber is composed of the President of the Constitutional Court and two Vice-Presidents from among the judges elected by the competent Entity Legislature. The President of the Constitutional Court presides at the meetings of the Chamber. The Chamber takes unanimous decisions about requests for the adoption of interim measures and on the occasional appointment of Judge Rapporteurs to cases as well as their release from the cases.

2. Organisation

The Court was established following the election and appointment procedures in May 1997 when the first session of the Constitutional Court was held. The basic task of that session was to establish procedures enabling the Court to function. Rules of Procedure were adopted at the session held on 29 July 1997. They have since been amended six times. Finally, on its session held 23 July 2005, the Court adopted the Rules of the Constitutional Court. The Constitutional Court elects a President and three Vice-Presidents from among the judges by a secret ballot. The President and three Vice-Presidents are elected by rotation of the judges. The term of office of the President of the Court lasts for three years. The Rules of the Court also contain provisions as to incompatibility and immunity. The position of judge is deemed incompatible with membership in a political party or political organisation in Bosnia and Herzegovina, as is membership in a legislative, executive or other judicial authority either in Bosnia and Herzegovina or in the Entities thereof. Any other position that could affect the impartiality of the judge is likewise deemed incompatible.

A judge may be dismissed from office before the end of his or her term if he or she requests it, is sentenced to a term of imprisonment, permanently loses the ability to perform his or her functions, or performs public or professional duties incompatible with the position of a judge of the Constitutional Court. As the judges may be dismissed from the office on the basis of a consensus of other judges it is the Court which establishes the existence of reasons for dismissal of the judge from the office before the end of his or her term. The organisation and functioning of the Constitutional Court shall be based on the principle of financial independence.

The seat of the Court is in Sarajevo. The sessions are, by rule, held in the seat of Court, but the Court may decide that the session be held outside of the seat of the Court.

IV. Jurisdiction

In general, the jurisdiction of the Constitutional Court is defined under Article VI.3, VI.4 of the Constitution (added by the Amendment I to the Constitution) and Article IV.3 of the Constitution. Within its overriding duty to "uphold" the Constitution, it consists of five types of jurisdiction. The proceedings to be followed and type of decision to be given, will depend upon the type concerned and the nature of the case.

Essentially, the distinction between these various types of jurisdiction is based on the extent to which the Constitutional Court, in addition to the classical task of upholding constitutionality, also has, in certain types of disputes, a more direct relation with the judicial or legislative authority concerned.

V. Nature and effects of decisions

Decisions which the Constitutional Court takes in accordance with its competencies and in accordance with the Rules of the Constitutional Court are the following:

- Decision on admissibility of request/appeal;
- Decision on the merits of request/appeal (complete or partial);
- Decision on repeal of a provision which is incompatible with the Constitution;
- Decision on termination of the proceedings;
- Decision on an interim measure.

Article VI.4 of the Constitution provides that the decisions of the Constitutional Court are final and binding but it does not provide for the mechanisms of their enforcement. When we say that they are final, this means that there is not a legal remedy against

them before a higher national instance. Thus, these decisions are formally given a binding effect.

The manner in which the decisions are to be enforced is specified by the Rules of the Constitutional Court, which stipulate that the decisions of the Constitutional Court are final and binding and that the state authorities are obliged, within its competencies established by the Constitution and law, to enforce the decisions of the Constitutional Court. However, the manner in which the decisions of the Constitutional Court are to be enforced is different from the manner in which the decisions of the ordinary courts are enforced. The Constitutional Court has not a department for enforcement of decisions, nor can the police authorities assist it in enforcement of decisions.

Upon the expiry of the time limit to enforce the decisions of the Constitutional Court, the Constitutional Court adopts the ruling on non-enforcement and refers it to the Main Prosecutor of the Prosecution's Office, since Article 239 of the Criminal Code provides that failure to enforce a decision of the Constitutional Court constitutes a criminal offence punishable by the prison sentence ranging from 6 months to 5 years. The Criminal Code incriminates not only the refusal to enforce decisions but also preventing their enforcement and other manner of prevention of their enforcement.

In deciding disputes arising under conflict of jurisdiction, i.e. a review of constitutionality of the Entities' constitutions and laws, the Constitutional Court shall take a decision on admissibility or a decision on the merits of a case.

The Constitutional Court shall take a decision on admissibility in case where the formal admissibility requirements have not been met.

The Constitutional Court shall take a decision on the merits of a case, by which it grants a request, in case where it establishes a violation of the Constitution or laws of Bosnia and Herzegovina or where it establishes the existence of or the scope of a general rule of public international law pertinent to the decision of the Constitutional Court. The Constitutional Court shall reject a request where it establishes that there is no violation of the Constitution or there is no violation within the meaning of the competence of the Constitutional Court arising under Article VI.3.c of the Constitution.

The Rules of the Constitutional Court stipulate that the Constitutional Court shall, in a decision granting a request, decide whether the decision takes effect *ex tunc* or *ex nunc*. In a decision establishing

incompatibility with Article VI.3.a or VI.3.c, the Constitutional Court may quash the general act or some of its provisions, partially or entirely. In case where the Constitutional Court quashes the general act or its provisions, it shall cease to have effect on the first day following the date of publication of the Constitutional Court's decision in the Official Gazette. Exceptionally, the Constitutional Court may by its decision establishing the incompatibility with Article VI.3.a or VI.3.c of the Constitution grant a time-limit for harmonisation, which shall not exceed 6 months. If the established incompatibility is not removed within the given time-limit, the Constitutional Court shall, by its decision, declare that the incompatible provisions cease to have effect. The incompatible provisions shall cease to have effect on the first day following the date of publication of the Constitutional Court's decision in the Official Gazette. As to the decisions on review of constitutionality of normative acts, such decisions have an *erga omnes* effect.

In deciding cases falling within its competences under Article VI.3.b of the Constitution, in a decision granting an appeal, the Constitutional Court shall quash the challenged decision and refer the case back to the court or the body which took that decision, for renewed proceedings. If the law regulating the competence for acting in the respective legal matter was amended prior to taking of a decision by the Constitutional Court, the court or the body which took the quashed decision is obligated to refer the case to the competent court or the body without delay.

The court or the body whose decision has been quashed is obligated to take another decision and, in doing so, it shall be bound by the legal opinion of the Constitutional Court concerning the violation of the rights guaranteed under the Constitution and the fundamental freedoms of the appellant. In such situations, the court or the competent body shall act in an expedited manner. Exceptionally, if the Constitutional Court finds that an appeal is well-founded, it may, dependent on the nature of the constitutionally established rights and fundamental freedoms, decide on the merits of a case and refer the decision to the competent body in order for that body to secure the appellant's constitutional rights that have been violated. The decisions taken by the Constitutional Court within its appellate jurisdiction have an *inter partes* effect.

VI. Conclusion

Since its establishment under the new Dayton Constitution (1997) and irrespective of the difficulties it has had in its work, the Constitutional Court has undoubtedly made an immense contribution to the

development of democracy and the rule of law, the legal certainty in the country and, particularly, to the protection of fundamental human rights and freedoms. Decisions of the Constitutional Court have been a real contribution of the Constitutional Court to the protection and promotion of the rule of law in Bosnia and Herzegovina.



Brazil

Federal Supreme Court

I. Introduction

The Federal Supreme Court has succeeded the former Supreme Court of Justice as of 11 October 1890, according to the Decree 848, edited by the Temporary Republic Government, ruling about the organisation of the Federal Supreme Court, making it the Summit Organ of Brazilian Justice. Subsequently stated in the Republican Constitution of 1891, the organ was installed in 28 February 1891, date of its first Plenary Session, under the Presidency of Justice Sayão Lobato, who, until then, was the president of the Supreme Court of Justice. In the same Session, the Court elected its first President, Justice Freitas Henriques.

I. Basic Texts

- Constitution of the Federative Republic of Brazil of 5 October 1988, with the alterations introduced by Constitutional Amendments no. 1/1992 through 64/2010 and by Revision Constitutional Amendments no. 1/1994 through 6/1994, Constitutional Amendment no. 65, 2010, Constitutional Amendment no. 66, 2010;
- Internal Regulation of the Federal Supreme Court.

II. Composition, procedure and organisation

After several changes on the number of members, the Federal Supreme Court, today, is composed by eleven members, who act in assemblies or in the Plenary of the Court. It is important to add that three of the members of the Supreme Court are also members of the Electoral Superior Court, being that the Presidency and Vice Presidency of such Superior Court belong to two of the aforementioned three members of the Federal Supreme Court.

Current Structure of the Federal Supreme Court

The Brazilian Federal Supreme Court is composed by eleven Justices, chosen among native Brazilian citizens, over thirty-five and less than sixty-five years old, notable legal knowledge and soundness of character (Article 12.3.IV and Article 101, both from the Federal Constitution).

Furthermore, citizens who are related in blood or are kinsmen to any Justice in the Court, in ascending, descending or collateral line, until third degree, will not be appointed Justice of the Federal Supreme Court. (Article 18 of the Internal Regime of the Federal Supreme Court).

The process of nominating someone for the lifelong office of Justice of Federal Supreme Court (Article 95 from the Constitution and Article 16 of the Internal Regime of the Federal Supreme Court), described in Article 101 from the Constitution, begins with the appointment of the person by the President of the Republic, in accordance with all the constitutional conditions. After that, the nominee must be approved in a public oral examination in the Citizen, Constitution and Justice Commission and through absolute majority of votes in the Federal Senate. Once the name is approved by the Senate, the chosen person will be nominated by the President of the Republic and is able to take office in a solemn session in the Plenary of the Court.

Once in Office, the Justice will only forfeit the position by resignation, compulsory retirement (at 70 years old) or impeachment. Federal Constitution, in Article 52.II, assigned to Federal Senate the competence to sue and sentence the Justices of Federal Supreme Court, in crimes of responsibility. The same Article, in its sole paragraph, establishes that the condemnation, which will only be valid through the majority of two thirds of the Senate, shall be limited to loss of the position, with disqualification, for eight years, to serve public office, without damage to other legal sanctions.

The President of the Supreme Federal Court serves office for a mandate of two years without the possibility of immediate re-election. The scrutiny is secret and the minimum quorum for election is the favourable vote of 8 Justices among the total of 11 Justices in the Court, including those that are absent in the voting session, since it will be accepted voting through a second sealed letter, which will be opened in public by the current President. According to the Internal Regime Article 13, during this period the President is responsible for representing the Court before other Powers, presiding the sessions, deciding urgent matters during Court recess and others.

Functioning of the Supreme Court

The Federal Supreme Court (STF), summit organ of the Brazilian Judiciary Power, sit in the Federal Capital, Brasília/DF, and has jurisdiction over the entire national territory. The Judiciary Power is also composed by the following organs: *Conselho Nacional de Justiça* (CNJ – National Council of

Justice); *Superior Tribunal de Justiça* (STJ – Superior Court of Justice); *Tribunais Regionais Federais* (TRF – Federal Regional Courts) and *Juízes Federais* (Federal Judges); *Tribunal Superior do Trabalho* (TST – Labour Court); *Tribunais Regionais do Trabalho* (TRT – Regional Labour Courts) e *Juízes do Trabalho* (Judges of Labour); *Tribunal Superior Eleitoral* (TSE – Electoral Court); *Tribunais Regionais Eleitorais* (TRE – Regional Electoral Courts) and *Juízes Eleitorais* (Electoral Judges); *Superior Tribunal Militar* (STM – Military Court); *Tribunais e Juízes Militares* (Military Judges); and *Tribunais e Juízes dos Estados e do Distrito Federal e Territórios* (TJ – Courts and Judges of the States, the Federal District and Territories).

The Constitution of 1988 states that, in Article 102, the competence of the Federal Supreme Court is to, primarily, the safeguard of the Constitution. Among the constitutional competences of the Court a few are highlighted: the attribution to try and decide the direct action of unconstitutionality, declaratory actions of constitutionality, allegation of disobedience of a fundamental precept and extradition requested by a foreign State. It is also in the Federal Supreme Court where are decided cases of common criminal offenses against the President of the Republic, Vice-President, members of the National Congress, the Court's own Justices and the Prosecutor General of the Republic.

Nowadays, the majority of sentences in the Court are decided on extraordinary appeal or a bill of review in decisions that examine the constitutionality of sentences decided by any other organ of the judiciary Power and of public acts in general.

The Federal Supreme Court, maximum organ of Brazilian Justice, has performed a vital role in guaranteeing fundamental rights and defending the Constitution, influencing the life of every citizen in our country.

The organs of the Federal Supreme Court are the Plenary, two assemblies and the President.

The Plenary is composed by eleven Justices and is presided by the President of the Court. The assemblies are, each one, composed of five Justices. The most senior Justice presides the assembly.

The Justices meet, ordinarily, three times a week for deciding cases. On Tuesdays, there are sessions for the two assemblies, each composed by five Justices except for the President of the Court, which does not participate in any of the assemblies. On Wednesdays

and Thursdays the eleven Justices meet in the plenary sessions of the Court.

An interesting aspect of Brazilian constitutional jurisdiction is the wide publicity and the organisation of trials and lawsuits.

On the contrary of what happens in several systems of constitutional justice, in which the actions of unconstitutionality are decided in private sessions, the trial sessions at the Federal Supreme Court are public.

Article 93.IX of the Constitution of 1988 prescribes that “all judgments by agencies of the Judiciary shall be public”, “the law may limit attendance at determined occasions to only parties themselves and their attorneys, or only to the latter when the preservation of the right of intimacy of the interested parties in secrecy does nor prejudice the public interest in information.

The debates are transmitted live through the “TV Justice”, open channel of television, and through “Radio Justice”, both reaching the entire territory.

Created by Law 10.461/2002, “TV Justice” is a non-profitable, public television channel coordinated by the Federal Supreme Court, whose main objective is to publicise the activities of the Judiciary Power, the General Attorney's Office, Public Litigation and Public Defence. It is a channel to bring closer citizens and judicial organs or the ones qualified by the Constitution as essential to the Justice. In a common language of easy comprehension by the common citizen, the TV Justice aims at clarifying, informing and teaching people how to defend their rights. With the advent of TV Justice, the activities in the Judiciary Power have become more and more transparent for the Brazilian population, contributing to the opening and democratisation of such Power.

The Judgment sessions are conducted by the President of the Court. After the reading of a descriptive report of the constitutional controversy by the Justice-Rapporteur of the process and after the oral interventions by the attorneys and he representative of the Prosecutor General's Office, there is an opportunity for each Justice to vote. In the processes of abstract control of constitutionality, a minimum quorum of 8 Justices is required. The constitutional query will be decided if there is at least six votes in the sense of approving or of rejecting the action.

The votes are only revealed in public trial sessions. Thus it is common for the votes to produce intense debate among the Justices, all transmitted live by

television. When feeling the need to reflect more about the theme in debate, it is allowed, to the Justices, to request the examination of the process at hand.

Finalising the judgment, it is up to the rapporteur or the responsible for the winning vote, to write the agreement, which will be publicised in the Justice Gazette, whose publication is daily, of national circulation and part of the official Brazilian press.

Besides the publication of the agreement in the Justice Gazette (in printed and digital versions), the integrity of the trial is available to everyone at the official Federal Supreme Court homepage (www.stf.jus.br).

The wide publicity and peculiar organisation of the trials make the Federal Supreme Court a forum for argumentation and reflection for the society and democratic institutions.

The President of the Court is elected through secret elections, by the Justices, for a mandate of two years, with a forbidden consecutive re-election. Although there are not any regiment provisions in this sense, there is a tradition to always elect for president the most senior Justice that has not yet been president.

Among the attributions of the President, there is the prerogative to guard the Court, represent it before the other organs and authorities; direct the functioning and preside the plenary sessions; execute and enforce execution of orders and decisions of the Court; decide, at recess or vacations, matters of urgency, vest the Justices and others.

The President is also responsible for acts of private competence of the Federal Supreme Court such as the proposition of a Bill on the creation and extinction of positions and establishment of salaries of their members, as well as it is a private competence to internally divide and organise Judiciary Power (Article 96.I.d and 96.II of the federal Constitution). It is also in the myriad of private competences of the federal Supreme Court the proposition of a bill for a complementary law about the Statute of Judicature (Article 93 of the Federal Constitution). Because the article precisely restricts the competence for proposing a bill, the Federal Supreme Court can only do so on these matters.

Administratively the following are subordinated to the President: the Office of the Court, the General-Office of the Presidency, Office of Security, Office of Internal Control and the Strategic Management Advisory.

- Office of Court

The competence of the Office of Court (ST), directed by the General-Director, includes the execution of judiciary and administrative services for the Court, according to guidelines established by the President or the Court. Subordinated to this Office are: Judiciary Office, Office for the sessions, Office of Documentation, Office of Administration and Finance, Office of Human Resources, Office of Integrated Services in Health and the Office of Information Technology.

- Judiciary Office

The objective of this Office is to develop activities such as protocol, documents for lawsuits, classification and distribution of deeds, judicial execution, expedition, discharge and process information, as well as support the cabinets of Justices and their advisors.

- Sessions Office

The objective of this Office is to support the trial sessions of the Plenary and the assemblies, make stenographic transcripts of the sessions, control the votes and make a compilation of agreements.

- Office of Documentation

It holds the competence to find, analyse and publish the jurisprudence of the Court; find, preserve and publish its bibliographic, museologic and documental memory both of administrative and judiciary nature, also widening and facilitating access to their services and products.

- Finance and Administration Office

The objective of this Office is to develop activities such as: administrating materials and patrimony and public tender, controlling contracts and acquisitions, budgets and finance, maintenance and building conservation.

- Human Resources Office

It develops activities for administrating personnel, including matters such as recruiting and selecting, managing functional data, studies and opinions on the rights and duties of each employee, payment sheet and its consequences, training and developing employees, administrating performance evaluation, functional progression and promotion, retirement and pensions.

- Office of Integrated Services in Health

It offers, as emergency care, direct medical and dental services, including nursing and social assistance services as well. It also makes health inspections and administers the social benefit plan for the Court and health plan for Justices, employees, dependents, pensioners and special beneficiaries, according to specific regulation.

- Office of Information Technology

It aims to develop computer systems and related devices in the Court, prospecting and absorbing new technology, administering an information network and data bank, technically supporting software and equipment and the performing special services in the Court.

- General Office of the Presidency

The General Office of the Presidency (SG), a direct and immediate assistance unit to the President of the Court, composed by the General Office, the International Relations Advisory Section and Parliament Articulation Section and the Office of Social Communication, to all of which compete to support the external relations of the Court, assist the President in the fulfilment of duties and work agenda, advise on planning and fixating the guidelines for administration, as well as performing other attributions stated in law and the Internal Regime, including the Court's official representation.

- Office of Security

The Office of Security (SEG) is responsible for controlling access to Court and also ensuring the safety of patrimony, authorities, employees and people in general inside the Court, controlling the fleet of official vehicles and the use of the garage. It is also responsible for controlling material transportation and other related matters.

- Office of Internal Control

The Office of Internal Control (SCI), specialised unit of control and auditing, is responsible for accompanying the budgetary, financial, accounting, operational, patrimonial and personnel administration and supervising them according to the principles of legality, morality and legitimacy, as well as executing work programs; guiding the performance of administrators, checking the regular and rational use of public resources and estate and evaluating the results according to economy, efficiency and effectiveness.

IV. Jurisdiction

The Competence of the Federal Supreme Court (essentially, the guard of the Constitution) – Federal Constitution, Article 102, head.

- Constitutionality Control System

The Constitutional Jurisdiction in Brazil can be currently characterised by the originality and diversity of instruments to ensure the constitutionality of acts of public power and protection of fundamental rights, as the writ of security, *habeas corpus*, mandate of injunction, public civil action and class action. Also the Direct Action of Unconstitutionality (ADI), Unconstitutional Direct Action by omission (ADO), Declaratory Constitutionality Action (ADC), Allegation of Disobedience of Fundamental Precept (ADPF). These Actions are relevant for both forms of Control of Constitutionality: the diffuse and the abstract forms.

- Diffuse Control of Constitutionality

The model of diffuse control adopted by the Brazilian Judiciary system allows any judge or Court to declare the unconstitutionality of laws and norms, not depending on the type of process filed. Similar to the North American experience, the judge has the power to practice the control of constitutionality of acts of the public power, specially, through the writ of security, the *habeas corpus*, *habeas data*, mandate of injunction, the Public Civil Action and the Class Action. A few of such actions, due to their relevance, will be further detailed as it follows.

- *Habeas Corpus*

Habeas corpus is a special instrument designed to safeguard the traditional liberties offered in the Brazilian Constitutional System. In the current system of the 1988 Constitution, such writ shall be granted to protect the individual against any restrictive measure of the public power that might limit individual freedom of movement, which must be understood in a broad sense, affecting every authority measure that may constraint individual freedom.

- Writ of Security

The Writ of Security is a processual instrument that safeguards constitutional rights since the Constitution of 1934, with the exception of the Constitution of 1937, and again ensured by the current Constitution in its Article 5.LXIX, that reads: "a writ of security shall be issued to protect a liquid and certain right not protected by *habeas corpus* or *habeas data*, when the party responsible for the illegality or abuse of

power is a public authority or an agent of a legal entity performing governmental duties.” The constitutional text also stated the collective writ of security, which can be petitioned by a political party with representation in the National Congress, or by an union, professional organisation or association legally organised and operative for at least one year, to defend the interests of its members or associates. (Article 5^o.LXX.a and 5^o.LXX.b of the Constitution).

- Habeas Data

As an specialisation of instruments for the defence of individual rights, the Constitution of 1988 granted the *habeas data* as an institute destined to assure the access to personal information pertaining the petitioner in records or data banks of government agencies or entities of public character and also to allow for the correction of such data (article 5.LXXII).

- Mandate of Injunction

The Constitution of 1988 attributed a particular meaning to the control of constitutionality of the so called legislative absence. The Article 5.LXXI, of the Constitution expressly stated the granting of Mandate of Injunction will be possible through the non-existence of norm regulating a constitutional right, making it infeasible to be exercised, therefore, affecting constitutional rights.

- Class Action and Public Civil Action

In addition to the processes and the systems designed to defend individual positions, judiciary protection can also be triggered through the use of mechanisms for defending individual and collective interests, such as class action and public civil action.

Constitution states that the objective of class action is to annul an act harmful to the public patrimony, regarding administrative morality, environment, historical and cultural patrimony. Considering the purely public character of this action, the author is, exempt of judicial costs and succumbing onus, unless it is proved that the author is acting in malicious intent.

The Public Civil Action is a significant instrument to defend diffuse and collective interests and, although it is not particularly its objective, by definition, to defend individual or singular positions, it has also been considered an important instrument for the defence of general rights, especially consumer's rights.

- Abstract Constitutionality Control

The Abstract Control adopted by the Brazilian system focuses on the Federal Supreme Court and its competence to petition and sentence autonomous actions (ADI, ADC, ADO, ADPF) in which constitutional controversy is presented through the Direct Action of Unconstitutionality (ADI). The Unconstitutional Direct Action by Omission (ADO), Declaratory Constitutionality Action (ADC), Allegation of Disobedience of Fundamental Precept (ADPF).

According to the Constitution, the following authors have the legitimacy to petition the above mentioned actions: The President of the Republic, the Executive Committee of the Federal Senate, the Executive Committee of the Chamber of Deputies, the Executive Committee of the Legislative Assembly or the Legislative Chamber of the Federal District, the Governor of Estate or of the Federal District, the Advocate General of the Union, the Federal Council of the Brazilian Bar Association, political parties with representation in the National Congress and syndical confederations or national class entities.

- Direct Action of Unconstitutionality

The Direct Action of unconstitutionality (hereinafter, “ADI”) is an instrument to declare the unconstitutionality of law or federal norms according to the current Constitution.

The legislation that regulates the institute of the Direct Action of unconstitutionality (Law 9.868/99) gives the possibility to the Rapporteur to admit participation of *amicus curiae* in the process, as well as hold public hearings to listen to society, especially for specialists on the subject being decided.

The decisions in the Direct Action of Unconstitutionality have effects *ex tunc, erga omnes* and a binding effect for the whole Judiciary Power and for the Direct and Indirect Public Administration. It is important to highlight that the binding effect does not include the Legislative Power.

The legislation that regulates the ADI (Law 9.868/99) also gives the possibility for the Plenary of the Court to modulate the effects of the decisions regarding the abstract control of norms.

The usage of this technique of modulating effects allows the Federal Supreme Court to declare the unconstitutionality of a norm:

- a. after the decision has become final and binding (declaration of unconstitutionality *ex nunc*);

- b. from the moment after the decision is final and binding, to be stated by the Court (declaration of unconstitutionality with effectiveness *pro futuro*);
- c. without the annunciation of nullity of the norm; and
- d. with retroactive effects, except for specific situations.

- Declaratory Action of Constitutionality

The Declaratory Action of Constitutionality (hereinafter, "ADC") is an instrument destined to the declaration of constitutionality of Law or federal norm. It has been considered, also, as an ADI in reverse. It is an action designed to solve relevant doubts and controversies in the interpretation of the Constitution.

In the same way as ADI there is a possibility that the Rapporteur admits the participation of *amicus curiae* in the process and hold public hearings. Also the decisions uttered in a Declaratory Action of Constitutionality also have *ex tunc, erga omnes* and obliging effects for the whole Judiciary Power and for the direct and indirect public administration. There is also the possibility of modulating effects of decisions in ADC.

Law 9.868/99 enables the Federal Supreme Court, through an interlocutory measure, to determine to Judges and Courts the suspension of decisions involving the application of the law or the norm, object of ADC, until its definite decision.

- Action of Unconstitutionality by Absence

The Constitution of 1988 granted a particular significance to the control of Constitutionality of the so called legislator absence. The Direct Action of Unconstitutionality by Absence (ADO) is an instrument destined to the gauging of unconstitutionality by omission of organs competent to the concretisation of a certain constitutional norm, regarding federal or estate norms, legislative or administrative activity, being that it can somehow affect the effectiveness of the Constitution.

It is also admitted the possibility of participation of *amici curiae* and holding public hearings.

The Plenary of the Court adopted the understanding that, during the prolonged duration of absence, it is possible that the decision uttered by Federal Supreme Court create measures to regulate the subject matter of absence during a specific period or until the norm to fill the gap is edited. It is important to note that, in these cases, the Court did not assume the compromise of a typical legislative function, but

merely a possibility of a temporary regulation of the matter by the Judiciary.

- Allegation of Disobedience of Fundamental Precept – ADPF

Changes occurred in the Brazilian system of control of constitutionality after 1988 radically altered the relation between concentrated and diffuse systems. The amplification of the right to petition a direct action and the creation of the declaratory action of constitutionality strengthened the concentrated control. However it remained an expressive residual space for the diffuse control regarding the subjects not susceptible by examination of the concentrated control, such as direct interpretation of constitutional clauses by judges and courts, pre constitutional law, constitutional controversy on revoked norms, control of constitutionality of municipal law in face of the Constitution. In terms of the Law 9.882/99, the Allegation of Disobedience of Fundamental Precept (hereinafter, the "ADPF") is fit to avoid or repair grievance to a fundamental precept, as a result of an act of public power.

As a typical instrument of the concentrated form of control of constitutionality, the ADPF can either give the opportunity to impugn or direct question a law or federal, estate or municipal norm or cause a provocation from concrete situations that lead to the law or norm being impugned. In the first case, there is control of norms in a principal character, which operates directly and immediately in relation to the law or norm. In the second case, the legitimacy of the Law is questioned having in sight its application in a given concrete situation (incidental character).

Law 9882/99 imposes that the ADPF will only be admitted if there is no other efficient way to sane the grievance (Article 4.1). The decision in ADPF can also suffer modulating effects.

The sole paragraph of Article 1 explains that ADPF is also fit in case of relevant constitutional controversy in federal, state or county law, including the ones prior to the Constitution (pre-constitutional laws).

Similarly to the other instruments of abstract control, the Rapporteur of ADPF can admit the participation of *amici curiae* and is able to hold public hearings. In fact, one of the most important public hearings happened in ADPF 54, in which the subject was abortion of anencephalic foetus.

- Singularities of the system of coexistence between the diffuse and the concentrated forms of control of constitutionality

The Federal Supreme Court and the supervision of constitutionality of decisions uttered by other judges and courts: the Extraordinary Appeal.

The extraordinary appeal consists of a processual – constitutional instrument destined to assure the verification of an eventual front to the Constitution, as a consequence of a judicial decision uttered in last or only instance by the Judiciary Power. (Federal Constitution, Article 102.III).

Until the Constitution of 1988 came in force, it was the extraordinary appeal, also due to the amount of suits, the most important process pertaining to the Federal Supreme Court. This exceptional remedy developed according to the experience of the North American writ of error and introduced in the Brazilian Constitutional system through the Constitution of 1891, as established in Article 59.1.a, and it can be petitioned by the party that succumbed, in cases such as: direct offense to the Constitution and declaration of Constitutionality of treaty or federal or state law expressively impugned in face of the Federal Constitution (Federal Constitution, Article 102.III.a, 102.III.b and 102.III.c. Constitutional Amendment 45/2004 changed the Constitution in order to admit extraordinary appeal also when the decision upholds a law or act of local government in face of the Constitution (Federal Constitution, Article 102.III.d).

In the realm of the Reform of the Judiciary Power implemented by Constitutional Amendment 45, of 2004, as expressed in Article 102.3, the Constitution was altered to add the new institute of the general repercussion, created with the known objective of solving the numeric crisis of the Extraordinary Appeal. The mentioned article currently prescribes that “In order for the Court to examine the admissibility of an extraordinary appeal, which may be rejected only by manifestation of two-thirds of its members, the appellant must demonstrate the general repercussions of the constitutional questions argued in the case, as provided by law”.

This article was recently edited through Law 11.418, of 19 December 2006. Such Law deals with significant changes in the extraordinary appeal, whose admission shall pass by the decision of the Court regarding the general repercussion of the subject of the appeal. According to the legal innovation, the general repercussion will be considered in the appeal as an examination of the relevance of questions raised in the appeal from the economic, political, social and judicial point of view, which trespasses the subjective interests of the cause. There will always be general repercussion

when the appeal impugns decision contrary to the compendium or jurisprudence dominant in Court (Article 543.A.3). The adoption of the new institute shall highlight the objective character of the extraordinary appeal.

The Law also made it possible for the Court, in addition to the general repercussion, to admit the intervention of third parties (*amicus curiae*).

If the Court denies the existence of general repercussion, the decision will be valid for all appeals dealing with the same subject, which will be preliminarily rejected.

In order to avoid an avalanche of processes in the Supreme Court, the Courts original to the action that generated the appeal will be able to select one or more controversial representative appeals and forward them – only these – to the Federal Supreme Court. If denied the existence of general repercussion, the appeals will be suspended and will be examined by the original Courts, which will be able to declare them aggrieved or revoked.

In the measure that it tends to drastically reduce the numeric volume of processes in the Supreme Court and to limit the object of trials to objective constitutional matters, the new demand of general repercussion in the extraordinary Appeal generates promising prospective to the constitutional jurisdiction in Brazil, especially as to the assumption by the Federal Supreme Court of the true role of Constitutional Court.

- The Federal Supreme Court and the edition of compendiums of binding effect to the other judges and courts

Since 1963, the Federal Supreme Court edits precedents, consolidated jurisprudential orientations, with the objective of orientating the Court itself and the other courts as to the dominant understanding of the Federal Supreme Court on certain matters. Up to the year of 2008, 736 Compendiums were edited.

The Amendment 45/2004 authorised the Federal Supreme Court to edit the so called “Precedent of binding effects”. In Article 103.A of the Constitution, the precedent of binding effects must be approved by a majority of two thirds of the votes of the Supreme Court (eight votes) and deal with constitutional matter which has been object of several repeated decisions. The constitutional norm explains that the compendium will aim at overcoming current controversies – on the validity, interpretation and effectiveness of certain norms – capable of generating juridical insecurity and

relevant multiplication of suits, including, current matters about interpretation of constitutional norms and the discussion of these in light of infra constitutional norms.

The precedent of binding effect, on the contrary of the objective process, it derives from decisions mostly in concrete cases in the incidental form, in which there is also, not rarely, a reclamation for a general solution. It can only be edited after the decision of the Plenary of the Federal Supreme Court or after repeated decision of the groups.

These requisites define the very content of the precedent of binding effects. As a rule, they will be formulated from procedural or homogeneous questions, involving social welfare, administrative, tributary or even processual, susceptible of uniformisation and standardisation. According to Article 103.A.2 of the Constitution, the approval, as well as the review and the cancelling of the precedent, may be requested by those capable of bringing by a direct action of unconstitutionality.

As a consequence of its binding factor and its force of Law for the Judiciary Power and for the Administration, it is required that precedents of binding effects be published in the Official Gazette of the Union, thus, ensure an adequate knowledge by those who must obey the precedent.

Therefore, once the precedent is edited, any judicial decision or administrative act that disobey it, deny it or apply it wrong, a reclamation to the Federal Supreme Court will be fit.

The possibility of reviewing or cancelling the precedent is extremely relevant because the nature of the society and Law are in constant transformation. In this sense, it is vital to have the possibility for altering precedents of binding effects, so they can be better adequate to new needs. However, in the same way that the adoption of a precedent of binding effect does not occur from one moment to the next, demanding that the subject that has been object of repeated decisions, be altered or modified also demands a careful discussion. It is important to register that, up to the year of 2008 there have been edited thirteen precedents of binding effect.

- The Constitutional Reclamation against decisions of other judges and Courts that usurp the constitutional competence of the Federal Supreme Court or violate its decisions

The Constitution of 1988 also prescribes another constitutional action of a genuine Brazilian creation: the Constitutional Reclamation, to preserve the

competence of the Federal Supreme Court and the authority of its decisions.

This reclamation is the fruit of jurisprudential creation, which, would derive from the idea of the implied powers approved by the Constitution and the Court. The Federal Supreme Court has decided to adopt this theory for the solution of several operational problems. The lack of definite lines in the institute of reclamation caused its initial concept to rely on the implicit powers theory.

In 1957, it was approved that reclamation be included in the Internal Regiment of the Federal Supreme Court.

The Federal Constitution of 1967, which authorised the Federal Supreme Court to establish the legal discipline of the deeds under its competence, giving it the power equivalent to federal law to the norms of Internal Regiment, definitely legitimating the institute of reclamation, now funded on a constitutional disposition.

In the advent of the Constitution of 1988, the institute finally acquired constitutional status (Article 102.I.I). The Constitution also determined that the reclamation would be petitioned before the Superior Court of Justice (Article 105.I.f) and would be equally destined to the preservation of the competence of the Court and to guarantee the authority of its decisions.

The EC 45/2004 instituted the precedent of binding effect in the realm of the competences of the Federal Supreme Court and prescribed that its observance be ensured by reclamation (Article 103.A.3).

The constitutional form adopted render, therefore, the admissibility of the reclamation against an act of the Administration or against a judicial act, in disobedience of precedent of binding effect.

The procedural structure of the reclamation is very simple and it basically coincides with the procedure adopted by the writ of mandamus. The basic rules are written in Articles 156 – 162 of the Internal Rules of the Federal Supreme Court (RISTF) and in Articles 13 to 18 of Law 8.038/90.



Bulgaria

Constitutional Court

I. Introduction

Prior to the adoption of the new Constitution of the Republic of Bulgaria on 12 July 1991 there was no specialised body in the Bulgarian legal system to monitor the constitutionality of laws. This role was performed by Parliament. The Constitution of 1991 provided for the establishment of a Constitutional Court and envisaged the adoption of a special Constitutional Court Act, which was passed by Parliament on 16 August 1991. Proceeding from this Act, the Constitutional Court adopted Rules governing its organisation and activities.

II. Basic texts

The Constitutional Court Act contains provisions of a material and procedural nature. It enshrines important rules concerning the Court's organisation, composition and activity, and formulates its principal objective – to ensure the supremacy of the Constitution. It stipulates that the Constitutional Court is independent from the legislature, the executive and the judiciary and in its work is guided exclusively by the provisions of the Constitution and of this Act. This implies that the Court is not an integral part of the judiciary and enjoys an autonomous status among the state's higher institutions. In case of discrepancy between the Constitutional Court Act and other laws, the former prevails.

The Rules on the Organisation and Activities of the Constitutional Court contain provisions of two categories: organisational and technical, and procedural. The provisions of the second category are of major importance for the constitutional process. It is also important that as a normative act and as a legal source for the Constitutional Court, the Rules are adopted by the Court itself, which is a further proof of its autonomy with respect to the other higher state bodies.

III. Composition, procedure and organisation

1. Composition

The Constitutional Court is composed of twelve judges. One third of them are elected by Parliament, another third are appointed by the President of the Republic and the remaining third are elected at a

general meeting of the judges of the Supreme Court of Appeals and the Supreme Administrative Court. Those eligible for appointment as judges of the Constitutional Court are lawyers of high professional and moral standing and with at least fifteen years of experience as lawyers. They are elected or appointed for a period of nine years and are not eligible for re-election or re-appointment. One-third of the Court's members are renewed every three years from each quota in a rotation order established by the Constitutional Court Act. The Act stipulates the procedure for terminating the term of office of a Constitutional Court judge following a decision of the Court. The judges enjoy the same immunity as Members of Parliament.

According to the Constitution, being a Constitutional Court judge is incompatible with being a Member of Parliament, holding a government or public office, being a member of a political party or a trade union and with practising commercial or any other paid professional activity.

After the judges were sworn in on 3 October 1991, the Court held its first session and elected by secret ballot the Chairman of the Court for a term of three years.

2. Procedure and organisation

The Constitutional Court does not have the right to initiate proceedings. The Constitution sets out those bodies and persons who have the right to approach the Court – no fewer than one-fifth of all Members of Parliament, the President of the Republic, the Council of Ministers, the Supreme Court of Appeal, the Supreme Administrative Court and the Chief Prosecutor.

Motions should be written in Bulgarian, meet all the requirements set out in the Constitutional Court Act and in the Rules on the Organisation and Activities of the Constitutional Court and should be accompanied by reasons. In the case of a dispute on the distribution of powers between bodies of local government and the central executive bodies, motions should be accompanied by evidence in writing to the effect that the subject of the dispute has been discussed by the concerned parties.

After reviewing the accuracy of the submitted documents, the Chairman of the Court initiates proceedings, designates one or more judges as rapporteurs and sets a date for the hearings. The rapporteur prepares the case for trial and writes the respective reasons. The Court determines the interested institutions and persons, notifies them and gives them the opportunity to present their considerations and evidence in writing.

A constitutional case takes place in two stages. During the first stage issues pertaining to the admissibility of the motion are resolved. The second stage focuses on the hearing and the adjudication of the case on its merits. However, this does not rule out a review of admissibility. Only documentary evidence is admissible, except in impeachment cases against the President and the Vice-President of the Republic, when any evidence is permitted.

The Constitutional Court sessions are held without the participation of the interested parties, with the exception of cases on impeachment brought by Parliament against the President or the Vice-President of the Republic, or on the establishing of the incompatibility of a Member of Parliament. The Constitutional Court may decide at its own discretion to hold an open session, in which case it has to inform the interested parties whose representatives have to present written authorisation.

Should the Constitutional Court establish that a motion originates from bodies or persons other than those who have the right to do so, or that the motion goes beyond the Court's sphere of competence, or that other procedural impediments exist, the proceedings are not initiated or are terminated and notification to that effect is sent to the interested parties. The Court rules on the admissibility of a motion by issuing a resolution and on the merits of a dispute by passing a decision.

The Court is deemed in session when at least two-thirds of the judges are present and in cases on impeachment of the President and the Vice-President of the Republic, it is deemed in session if at least three-quarters of all members are present. A ruling of the Constitutional Court requires a majority of more than half of the votes of all judges. A decision to revoke the immunity of a Constitutional Court judge or establish the inability of a Constitutional Court judge to perform his or her duties is adopted by a majority of two-thirds of the votes of all judges. Voting is open. No abstentions are allowed. Voting takes place by way of secret ballot only on motions concerning the President and the Vice-President of the Republic and when revoking immunity or establishing the inability of a Constitutional Court judge to discharge his or her duties.

Judges who disagree with an adopted decision or resolution may express a dissenting opinion in writing. This does not apply when voting is by secret ballot.

IV. Jurisdiction

The powers of the Constitutional Court, as defined by the Constitution, are as follows:

The Constitutional Court provides binding interpretations of the Constitution. This implies that the Court gives official and binding interpretations with a view to establishing unity and stability of understanding of the essence and the content of constitutional norms to the extent to which they underlie the rule of law and are subject to direct execution. More often than not the requests for constitutional review are triggered by practical considerations related to differing interpretations of constitutional norms. The Court requires the applicants to substantiate the need for interpretation and to give relevant reasons. When providing reasons for a certain interpretation, the Court explains in a detailed and well-grounded manner its understanding of the relevant norm, and in its ruling, which normally has a normative form, it provides a concise answer to the question raised.

The Constitutional Court rules on motions for establishing the unconstitutionality of laws and other legislative acts passed by Parliament, as well as of Presidential decrees. This is an *a posteriori* control on conformity with the Constitution, for which there is no fixed term. Many questions of this kind have been considered and resolved so far:

- whether constitutional control should cover laws passed prior to the entry into force of the new Constitution. The Court has ruled that such laws are not within its area of competence (four judges have expressed dissenting opinions);
- whether all acts – with the exception of laws – passed by Parliament and the President of the Republic are subject to constitutional control. The Court has concluded that in principle all acts are subject to control, however it is arguable whether that should include wholly discretionary acts deriving from public policy, such as the exceptional allocation of personal pensions, pardoning ordinances, etc.

The Constitutional Court rules on disputes regarding the distribution of powers between Parliament, the President and the Council of Ministers, as well as between organs of local government and central executive bodies. Pursuant to the Constitutional Court Act, such disputes are reviewed by the Court only after the subject of the dispute has been discussed among the concerned parties.

The Constitutional Court rules on the compatibility of the Constitution and international treaties concluded by the Republic of Bulgaria, and on the compatibility of domestic laws with norms of international law and international treaties to which Bulgaria is a party. This subject matter raises many issues: the correlation between the domestic legislation and international law; the powers of the Court *vis-à-vis* the fundamental constitutional norm, which establishes the primacy of international treaties over the norms of domestic law; how to act in the event of non-conformity between the Constitution and an international treaty (on this matter the Constitutional Court takes the view that supremacy should be accorded to the Constitution); and at what point to judge the constitutionality of an international instrument (prior to or after its ratification).

The Constitutional Court also rules on disputes concerning the constitutionality of political parties and associations. Up until now, the Court has reviewed only one case of this type. Some problems emerged with regard to the correlation of the powers of the Constitutional Court and the Supreme Court and whether Members of Parliament from a party which has been declared unconstitutional, lose their status.

The Constitutional Court rules on disputes concerning the legality of the election of the President and the Vice-President of the Republic.

It establishes the circumstances under which the prerogatives of the President and the Vice-President of the Republic are suspended before the expiry of their term of office.

The Constitutional Court also rules on the legality of the election of Members of Parliament. The Court has had no such case up to now.

The Constitutional Court establishes the ineligibility for election of Members of Parliament or the incompatibility between the functions of an Member of Parliament and the performance of other activities.

The Constitutional Court rules on accusations brought by Parliament against the President and the Vice-President of the Republic. This concerns political responsibility.

The Constitutional Court revokes the immunity and establishes the inability to discharge his or her duties or the incompatibility of a Constitutional Court judge.

According to the Constitution, no ordinary law can vest new powers in the Constitutional Court or suspend or restrict its powers envisaged therein. This is an important constitutional safeguard for the

Court's stability since it rules out any alteration of the latter's powers through ordinary legislative procedure. Such alterations may be effected only by amending the Constitution under certain conditions.

V. Nature and effects of decisions

The Constitutional Court's acts are final and binding upon all government bodies, legal persons and citizens.

It is important to note that all acts which are found to be unconstitutional by the Constitutional Court lose their legal force. Acts issued by an incompetent body become null and void. All legal implications of an act which has been declared unconstitutional are to be remedied by the issuing authority.

If a negative decision is given on a motion, filing a motion with the Court on the same matter for a second time is prohibited.

The decisions adopted by the Constitutional Court and the reasons attached to them are published in the Official Gazette within fifteen days of their adoption and enter into force three days after their promulgation. Decisions concerning the election of the President, the Vice-President or a Member of Parliament, as well as those related to the status of a Constitutional Court judge, come into effect as of the day of their adoption.



Canada

Supreme Court

I. Introduction

1. The authority to establish a final court of appeal with a wide national jurisdiction was reposed in the Parliament of Canada by Section 101 of the Constitution Act, 1867.

Since 1875, the Supreme Court of Canada has been charged with fulfilling the mandate stated in Sections 35 and 52 of the Supreme Court Act which is to “have and exercise an appellate, civil and criminal jurisdiction within and throughout Canada” and again to “have and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada”.

2. The Court is the highest court of the land and as such it is one of Canada’s most important national institutions. As the final general court of appeal it is the last judicial resort for litigants, either individuals or governments. Its jurisdiction embraces both the civil law of the province of Quebec and the common law of the other nine provinces and three territories.

The Court hears cases from the provincial and territorial courts of appeal and from the Federal Court of Appeal and Court Martial Appeal Court. In addition, the Court is required to deliver its opinion on any question referred to it by the Governor in Council. The importance of the Court’s decisions for Canadian society is well recognised. The Court assures uniformity, consistency and correctness in articulation, development and interpretation of legal principles throughout the Canadian judicial system.

II. Basic texts

- Constitution Act, 1867;
- Supreme Court Act;
- Rules of the Supreme Court of Canada.

III. Composition, procedure and organisation

1. Composition

The Supreme Court consists of the Chief Justice of Canada and eight puisne justices appointed by the Governor in Council from among superior court judges or from among barristers of at least ten years’ standing at the Bar of a province or territory. The

Chief Justice is sworn as a member of the Privy Council of Canada prior to taking the oath of office as Chief Justice.

No Justice may hold any other remunerative office under the federal or provincial government, nor engage in any business enterprise. The Justices must devote themselves exclusively to their judicial duties. A Justice holds office during good behaviour, until he or she retires or attains the age of 75 years, but is removable for incapacity or misconduct in office before that time by the Governor General on address of the Senate and House of Commons.

The Chief Justice presides at all sittings of the Court at which he or she is present. The Chief Justice divides the work of the Court by choosing the panels of Justices to hear the cases and motions brought before it.

2. Procedure

In most cases, appeals are heard by the Court only if leave is first given. Such permission, or leave to appeal, is given by the Court if, in the opinion of the panel, the case involves a question of public importance or if it raises an important issue of law (or a combination of law and fact) that warrants consideration by the Court. The Court grants leave to appeal based on its assessment of the public importance of the legal issues raised in a given case. The Court thus has control over its docket and is able to supervise the growth and development of Canadian jurisprudence.

Applications for leave to appeal are determined by the Court on the basis of written submissions filed by the parties. The Court considers between 550 and 600 applications for leave to appeal each year. An oral hearing will be held when so ordered by the Court. Applications for leave to appeal are dealt with by three Justices; and when an oral hearing has been ordered, there is a time limit of fifteen minutes for each side, with five minutes for reply.

There are instances where leave is not required. In criminal cases, for example, an appeal may be brought as of right where one judge in the court of appeal dissents on a point of law.

Appeals are heard once the parties and any interveners have prepared and filed with the Court the required documents, including factums stating the issues as well as the arguments to be presented, and a record of evidence and documentation from the lower court file. A date is chosen and the hearing of the appeal is scheduled by the Registrar.

The Supreme Court holds three sessions per year during which it hears some 70-80 appeals. The Court sits only in Ottawa, although litigants can present oral arguments from remote locations by means of a video-conference system. The Court's hearings are open to the public and most hearings are recorded for delayed telecast in both official languages. Most hearings are also webcast live and any webcast can be accessed from the Court's Website at any time. When in session, the Court sits Monday to Friday, usually hearing one appeal a day. A quorum consists of five members for appeals, but most are heard by a panel of seven or nine Justices.

The decision of the Court is sometimes rendered at the conclusion of the hearing, but more often, judgment is reserved to enable the Justices to write considered reasons. Decisions of the Court need not be unanimous; a majority may decide, with dissenting reasons given by the minority. Each Justice may write reasons in any case if he or she chooses to do so.

3. Organisation

Answering directly to the Chief Justice, the Registrar is responsible for all administrative work in the Court and exercises the quasi-judicial powers conferred by the Rules of the Court. This responsibility includes the appointment and supervision of Court staff and the publication of the Canada Supreme Court Reports. The Registrar and the Deputy Registrar are appointed by the Governor in Council. The Supreme Court staff comprises close to 200 employees, all members of the federal public service.

Each Justice of the Court has three law clerks, usually recent law school graduates, who provide him or her with research assistance. Their one-year term is regarded as meeting in whole or in part the articling requirements set by the various provincial law societies as a condition for admission to the practice of law. A judicial assistant and a court attendant for each Justice ensure the efficient management of his or her office. An Executive Legal Officer, whose responsibilities include media relations and a Legal Officer are attached to the office of the Chief Justice.

The judicial support functions are provided by the Court Operations Sector. This Sector includes the Registry Branch, responsible for case management and hearings, the Law and Reports Branches, responsible for legal support to the Court, editing and summaries of reasons for judgment, translation and publication of Court judgments, and the Library and Information Management Branch. The administrative support necessary to the Justices and Court staff is provided by the IT Solutions and Development Sector, the Corporate Services Sector, which is

responsible for accommodation, procurement, finance, security and human resources management for the Supreme Court of Canada, and the Judicial Support Services and Protocol Branch, which is responsible for management support for the Justices' chambers including the Chief Justice's chamber, the Justices' dining room, the law clerk program, the Registrar's correspondence and dignitary visits.

IV. Jurisdiction

The Supreme Court of Canada hears appeals from the court of last resort, usually the provincial or territorial courts of appeal, and the Federal Court of Appeal, and the Court Martial Appeal Court.

In addition to being Canada's court of final appeal, the Supreme Court performs a unique function. It can be asked by the Governor in Council to hear references, that is, to consider important questions of law such as the constitutionality or interpretation of federal or provincial legislation, or the division of powers between the federal and provincial levels of government. Any point of law may be referred to this Court. The Court is not often called upon to hear references, but its opinions on the questions referred to it by the government can be of great importance.

Constitutional questions may, of course, also be raised in regular appeals involving individual litigants or governments or government agencies. In such cases the federal and provincial governments must be notified of the constitutional question and may intervene to argue it.

V. Nature and effects of decisions

1. The Supreme Court of Canada is Canada's highest court. It is the final general court of appeal, the last judicial resort for all litigants, whether individuals or governments. Its jurisdiction embraces both the civil law of the province of Quebec and the common law of the other provinces and territories.

2. On constitutional questions, the effect of a decision may be that a piece of legislation is struck down for being ultra vires the federal or provincial legislative powers or for being inconsistent with the Canadian Charter of Rights and Freedoms.



Chile

Constitutional Tribunal

I. Introduction

The Constitutional Tribunal has been established by the Chilean Constitution in its Chapter VIII (Articles 92 to 94). A complementary Law (17.997) establishes, among other issues, the procedure of the Tribunal.

Historical backgrounds are to be found in the former Constitution of 1925, particularly in the reform of 1970, when the Constitutional Tribunal was established for the first time in the Chilean constitutional system through a constitutional amendment. This first Tribunal was in function until 1973, when it was dissolved by the Military Junta. This Tribunal had the primary function to resolve questions of constitutionality brought forward during the legislation process.

The Constitutional Tribunal was re-established by the Constitution of 1980, although its main functions were the preventive control of bills.

In 2005, through constitutional amendment, the Tribunal presented its most important reform, with a remarkable increase in its attributions, particularly the posterior control of legal precepts (until then an exclusive competence of the Supreme Court) and the possibility to declare a Law as unconstitutional.

II. Basic texts

- Chapter VIII of the Constitution;
- Law no. 17.997, Organic Constitutional Law on the Constitutional Court.

III. Composition, procedure and organisation

1. Composition

The Constitutional Tribunal is a collegiate tribunal and consists of ten members (called '*Ministros*'), who are elected by the three state powers – according to Article 92 of the Constitution – as follows:

- Three members are appointed by the President of the Republic;
- Four members are elected by the National Congress: two are appointed directly by the Senate and the other two are also appointed by

the Senate, but after proposal of the Chamber of Deputies;

- Three members are appointed directly by the Supreme Court.

The term served by all judges is nine years, and the composition of the Court is partially renewed every three years.

The supreme authority in the Tribunal is the President, who is elected by the judges for a two-year term.

The Organic Law on the Tribunal also contemplates the figure of the substitute judges (2), who may replace judges and form part of the plenary Court or of either of the chambers only if the respective quorums (8 and 4) required to hold a sitting are not achieved.

2. Procedure

Chapter VIII of the Chilean Constitution (Articles 92 to 94) establishes general procedure rules that apply to cases before the Constitutional Tribunal. Detailed procedure rules are established in the Organic Law on the Constitutional Tribunal – Law no. 17.997 (Articles 33 to 145).

According to Article 93 of the Constitution, the Constitutional Tribunal is competent to decide cases concerning:

- a. Constitutionality review:
 - Preventive constitutionality control of legal precepts can be optional, if submitted by the President of one of the National Congress's Chambers, or mandatory, regarding laws that interpret constitutional precepts, Organic Laws and International Treaties concerning Organic Laws issues. Preventive control – optional or mandatory – is also possible regarding constitutional amendment bills and International Treaties submitted to the National Congress's approval;
 - Posterior constitutionality control of legal precepts is through inapplicability and unconstitutionality actions. The former aims the inapplicability of a legal precept on a pending case; the latter pursues the unconstitutionality declaration and consequent expulsion of a norm from the Chilean legal system;
 - Constitutionality control of Executive power's decrees and resolutions can be previous or posterior to its enactment;

- Unconstitutionality actions can also challenge functioning rules dictated by the Supreme Court, the Appeals Courts and the Elections Court.
- b. Jurisdiction conflicts between state powers and justice courts.
- c. Inability, incompatibility, resignation and dismissal of public offices holders, such as the Republic President, State Ministers and parliament members.
- d. Democracy protection issues: unconstitutionality of organisations, political movements or parties.

The Organic Law on the Constitutional Tribunal establishes general procedure rules which apply to all cases before the Tribunal. Furthermore, each action has its own special procedure rules.

In the next sections, general procedure rules will be summarised, as well as special procedure rules related to some of the Tribunal's competences.

General Procedure Rules

The processing of cases and matters before the Tribunal is subject to the provisions of Articles 33 to 47 of the Organic Law on the Constitutional Tribunal, Law no. 17.997.

These rules establish the Court's faculty to order the joinder of cases with other related cases that justify a single procedure and decision. The matters are decided in the order of their submission before the Tribunal. However, priority may be given on justified grounds and by a reasoned decision.

The Court may extend constitutional and legal deadlines through a reasoned decision issued before the expiry of the time-limit in question. It may also order the measures it deems appropriate to the case in order to achieve the best possible examination and resolution of the matter being heard. This way, the Court may ask any power, public body or authority, organisation or political movement or party, according to the circumstances, for any background information or records it deems appropriate. Furthermore, it may dictate, invalidate or reaffirm interim orders, such as the proceedings stay, at any procedural moment.

The Court's judgments must comply with Civil Procedure Code rules, when appropriate. Those judges who dissent from the majority's opinion have their dissent recorded in the judgment.

All judgments are published on the Court's website. In specific cases, sentences are published in the *Diario Oficial* (Official Gazette) within three days of their delivery. It is impossible to appeal the Court's decisions, although it may amend them on its own motion or at the request of a party, in case of factual errors.

Final judgments are personally notified to the parties involved or, if that is not possible, a correspondence is sent to the address provided. In the case of notifications to the House of Representatives and to the Senate, official letters are sent to their respective Presidents. The Court may authorise other forms of notification, if requested.

In some cases, public hearings are mandatory and, in other cases, optional. The hearings duration, form and conditions are established by the Court in a procedural order.

Time-limits established in the Organic Law are computed according to the days elapsed and do not stay during public holidays. The expiry of a time-limit laid down for an action or a decision of the Court does not prevent it from issuing an order or a decision at a later date.

Until the admissibility decision, a submission may be withdrawn by the plaintiff, in which case it will be treated as not having been submitted. Once a case has been declared admissible, the plaintiff may also withdraw it. In this case, the parties and the constitutional bodies concerned will be notified and given a five days deadline to make any observations they deem relevant.

The proceeding's desertion is possible only in those inapplicability actions submitted by one of the parties of the case in which the challenged rule may be applied. On the other hand, proceedings are deemed abandoned if all parties have ceased to prosecute them for three months.

Special Procedure Rules

a. Mandatory review of constitutionality

Bills that interpret a rule of the Constitution, constitutional organic laws and treaties about matters related to constitutional organic laws are sent to the Constitutional Tribunal by the President of the originating Chamber of Parliament in a five-day time-limit.

If during the debate on the bill or treaty a constitutionality question arises, the Tribunal must have access to the record or minutes of the sessions where the question was debated or raised.

The Court shall decide the matter within a period of thirty days, which may be extended for fifteen days in specific cases, through a reasoned decision. The decision about the matter itself also has to be reasoned, and must be communicated to the originating Chamber of Parliament.

In the case of treaties declared completely unconstitutional, the President of the Republic shall be prevented from ratifying and promulgating it. In the event of partial unconstitutionality the President of the Republic shall be empowered to decide whether the treaty shall be ratified and promulgated without the impugned provisions, provided this is permissible under the provisions of the treaty itself and the general rules of international law.

After the review of constitutionality has been performed by the Court, the originating Chamber shall send the bill to the President of the Republic for promulgation, excluding those provisions that have been declared unconstitutional by the Court.

In the case of an international treaty partially declared unconstitutional, the decision taken by Parliament, with the corresponding quorum, shall be communicated, along with the provisions held unconstitutional, so that the President of the Republic can decide whether to make use of the power previously referred.

Once the Court declares the constitutionality of the provisions of a treaty, of a constitutional organic law or of a bill interpreting a rule of the Political Constitution, these norms can no longer be challenged on the grounds of the same defects raised before.

b. Inapplicability Action

The inapplicability action can be submitted by the judge or by the parties on a case in which the challenged legal provision may be applied.

If the question is raised by a party, it shall be accompanied by a certificate issued by the court hearing the case, confirming the proceeding's existence, its current state, the fact that the petitioner is a party and the names and addresses of the parties and their councillors.

If the question is raised by the court hearing the case, it shall lodge the application on its own motion and

accompany it with a copy of the main documents in the record, indicating the names and addresses of the parties and their councillors. In this case, the court will register the application and notify the parties thereof.

In any case, the application must contain a clear explanation of the facts and legal principles on which it is based and of the way they violate the Constitution. It shall also indicate the constitutional provisions allegedly infringed.

An inapplicability action may be based on any pending judicial proceeding whenever the application of a legal provision that may be decisive for the case's resolution conflicts with the Constitution.

In order to be accepted, the application must comply with the above mentioned requirements. If it does not, it is rejected by means of a reasoned decision issued within three days from the date of its referral to the Court and is treated, for all legal purposes, as having not been lodged. However, if it has defects of form or omits background information that should accompany the application, the Court allows the parties a period of three days to solve the defects of form or to provide the missing information.

Once the application has been accepted, the Constitutional Court notifies the case's original judge or court, who registers that on the correspondent record. The petitioners may request a public hearing to discuss the action's admissibility; if the Tribunal assents, the parties are given five days to prepare their arguments and the Tribunal may request access to the original case's records.

In the following cases, the action's inadmissibility is declared:

1. If the application was not lodged by a person or body having legal standing;
2. If the question regards a legal rule previously declared compatible with the Constitution by the Tribunal, whether in a preventive or in a *posterior* review, on the grounds of the same constitutional violation;
3. If there is no pending judicial proceeding or if it has come to an end;
4. If the question regards a rule that does not have the status of a law;
5. If the challenged rule is not applicable or would not be decisive for the resolution of the case; and
6. If the petition has no plausible groundings.

Decision declaring the action's (in) admissibility cannot be appealed.

A stay of the original proceeding can be requested in the application or subsequently, before the same chamber that decides the admissibility. Once the stay is ordered, it stands until the judgment is dictated. However, at any time, the designated chamber may lift it in a reasoned decision. The rejection of the proceeding stay request does not prevent the parties from repeating it in the course of the action's examination.

Once the application is declared admissible, the Court notifies the case's original judge or its parties, allowing them twenty days to submit observations and background information.

At the same time, the Court informs the House of Representatives, the Senate and the President of the Republic about the application, sending them a copy of it. If they deem it appropriate, they may submit observations and background information regarding the case within twenty days.

Once the above-mentioned procedural steps are completed, or the statutory time-limits for doing so expired, the Court's President includes the action in the plenary Court's hearing list.

Once the case is heard, the Court shall give its judgment within thirty days. This period may be extended up to fifteen days in special cases, through a reasoned decision.

The judgment on the question of inapplicability is notified to the party or parties that lodged the application and communicated to the case's original judge or court. It is also communicated to the House of Representatives, the Senate and the Republic's President.

The inapplicability sentence's effects are limited to the original case's resolution.

If the inapplicability question was raised by a party and is dismissed in the final judgment, the Court shall order the payment of court fees by the petitioner. However, the Court may discharge it if there were plausible groundings for bringing the action.

c. Unconstitutionality Action

The unconstitutionality action may be initiated by the Constitutional Tribunal on its own motion or by the persons having legal standing to present a Public Action.

When the Court proceeds on its own motion, it makes a declaration to that effect in a preliminary reasoned

decision, which must identify the inapplicability judgment on which it is based and the constitutional provisions that may have been infringed.

If the unconstitutionality action is submitted on a public action, the petitioner shall give plausible grounds for the application, identifying precisely the previous inapplicability judgment on which the action relies and the constitutional arguments on which it is based. If the application fails to satisfy one of these requirements, it will not be accepted.

However, in the event of defects of form or omission of indispensable background information the Court allows the parties three days to fix it.

The Court has a ten days deadline to rule on the action's admissibility. When the petitioner asks for a public hearing to discuss the admissibility and the Court accedes, the parties have ten days to prepare their arguments.

The unconstitutionality submitted on a public action will be inadmissible in the following cases:

1. If there was no previous sentence declaring the inapplicability of the challenged legal rule; and
2. If the question is based on a defect of unconstitutionality that is different from the one on which the previous inapplicability declaration was grounded.

The action's inadmissibility is notified to the petitioners and communicated to the House of Representatives, the Senate and the President of the Republic. The admissibility decision is also communicated to these bodies, which have twenty days to submit any observations and background information they deem relevant. It is impossible to appeal against the decision declaring the question's admissibility or inadmissibility.

Once the above-mentioned procedural steps are completed, or the statutory time-limits for doing so expired, the Court's President includes the case on the plenary Court's list of hearings.

The time-limit to rule the unconstitutionality action is thirty days from the case's consideration. This time-limit may be extended for fifteen days on a reasoned decision of the Court.

The unconstitutionality sentence is published according to the general procedural rules. A rule declared unconstitutional is repealed from the date of the sentence's publication in the Official Gazette, without retroactive effect.

When the question was raised on a public action, the Court shall order the payment of court fees by the petitioners if the application is dismissed in the final judgment. However, the Court may release petitioners from this payment if they had plausible grounds for bringing the action; an express declaration to this effect shall be made in the Court's decision.

2. Organisation

The Tribunal operates in plenary session to exercise most of its powers, especially the constitutionality control; it may also function in two chambers. To function in plenary a quorum of 8 members is required and the agreements are settled by simple majority. The chambers make an admissibility test of the inapplicability actions and the request for suspension of procedures appealed within those actions.

IV. Jurisdiction

The Constitutional Tribunal has several competences, all established in Article 93 of the Constitution, and its procedures are regulated by the Organic Law of the Tribunal. The competences given to this constitutional organ and its current procedures are as follows:

a. Constitutional Control: the Tribunal does a preventive and an *a posteriori* control of legal precepts. The constitutional control of the Tribunal can be classified as follows:

- The preventive control of constitutionality of legal precepts: Preventive controls are classified as facultative and mandatory. The preventive control is facultative in case of requirement of the President or the National Congress. It is mandatory when deals with the control of laws that interpret constitutional precepts, Organic Laws and International Treaties that regulates issues of Organic Laws. There is also a preventive control – facultative and mandatory – for constitutional amendments bills and International Treaties that have to be approved by National Congress.
- The posterior control of legal precepts' constitutionality is made through inapplicability actions and unconstitutionality actions. The inapplicability actions pursuant that the Tribunal declares the inapplicability of a legal precept when a trial is pending, in order to establish the constitutionality of the particular norm. The unconstitutionality action aims at having a norm declared as unconstitutional and expelled from the legal system.

- The Tribunal exercises *a priori* as well as *a posteriori* control of norms of decrees and resolutions of the executive.
- Finally the Tribunal exercises control of Supreme Court's and Appeal Court's decrees that regulates the functions of the judicial system (*Autoacordado*), as well as decrees of the Election Tribunal.

b. Judgment on conflicts of jurisdiction: the Tribunal resolves conflicts between different state powers, when this competence is not attributed to the Senate.

c. The Tribunal has also to judge cases of inability, incompatibility, resignation and dismissal of public offices holders, such as presidency, ministry and parliament members.

d. The Tribunal declares the unconstitutionality of organisations, political movements or parties. It has also to judge the constitutionality of the acts of the President in Office or the president elect.

V. Nature and effect of decisions

The decisions of the Constitutional Tribunal are final; although the Tribunal has itself the possibility, in conformity with the law, of correcting the factual errors which it may have made.

According to Article 94 of the Constitution, the provisions that the Court declared unconstitutional may not become law or decrees having the force of law in case they have been examined by the Tribunal.

The legal precepts declared unconstitutional, through the inapplicability of laws, decrees or a judicial order, are deemed to have been abrogated with the publication of the judgment accepting the complaints in the Official Bulletin.

However in such cases, the judgments do not have retroactive effect.



Croatia

Constitutional Court

I. Introduction

The Republic of Croatia became a sovereign and independent state on 8 October 1991, after the dissolution of the former Yugoslavia. At the same time, the Constitutional Court of the Republic of Croatia, which was for the first time established in 1964 (pursuant to the 1963 Constitution and later on confirmed by the 1974 Constitution), became the Constitutional Court of the new state.

According to the 1990 Constitution with its amendments and the 1999 Constitutional Act on the Constitutional Court with its amendments, which are both still in force, the Constitutional Court guarantees compliance with and application of the Constitution. The Constitutional Court is independent of all state bodies.

1. Date and context of establishment

In terms of history, constitutional judicature in the Republic of Croatia is divided into two periods: the first one from 1963 to 1990 and the second one after 1990.

1.1. Constitutional judicature in the former Socialist Republic of Croatia (1963-1990)

The Federal Constitution of the former Yugoslavia and the constitutions of the former socialist republics within it, including the Constitution of the Republic of Croatia, which were all passed in 1963, introduced the constitutional judicature.

Due to the application of the federal principle in the constitutional order of the former Yugoslavia, the hierarchy of constitutional and statutory provisions was extended in the following way: Federal Constitution, the Federal Law, the Constitution and the Law of the Republic. The Law of the Republic had to be in conformity with the Constitution, but also with the Federal Law and the Federal Constitution. The Constitution had to be in conformity with the Federal Law and the Federal Constitution and the Federal Law had to be in conformity with the Federal Constitution.

In accordance with the above-mentioned hierarchy of legal acts in the former Yugoslavia, the division of competences between the Federal Constitutional Court of the former Yugoslavia and the constitutional courts of the former socialist republics within it, including the Croatian Constitutional Court, was made as follows: the Federal Court was reviewing the conformity of a particular act with the federal Constitution, the federal law and other federal regulation, while the republics' courts were reviewing the conformity of a particular act with the constitution of the republic, the laws or other regulations of the republic.

In Croatia, the Constitutional Court started to work on 15 February 1964, after Parliament passed the Act on the Croatian Constitutional Court. Later on, there were some changes in the organisation and jurisdiction of the Constitutional Court, the last ones provided by the 1974 Constitution, as well as the Decision on Organisation of the Constitutional Court and the Rules of Procedure of the Constitutional Court.

The main jurisdiction of the Constitutional Court was abstract normative review and that was changed by the 1990 Constitution.

1.2. Constitutional judicature in the Republic of Croatia after 1990

On 22 December 1990, the Parliament of the Republic of Croatia passed a new Constitution. This Constitution – with its amendments – is still in force.

In accordance with the 1990 Constitution, the Constitutional Court was composed of eleven judges elected by the House of Representatives at the proposal of the House of Counties of the Parliament of the Republic of Croatia, for a term of eight years, from among outstanding jurists, especially judges, public prosecutors, lawyers and university professors of law. The Constitutional Court elected a President of the Court for a term of four years. The judges of the Constitutional Court could not perform any other public or professional duty and enjoyed the same immunity as members of the Croatian Parliament.

A judge of the Constitutional Court could have been relieved of an office before the expiry of the term for which he or she was elected if he or she had so requested, if he or she was sentenced to a term of imprisonment, or if he or she was permanently incapacitated for performing his or her office which was determined by the Constitutional Court itself.

Under the Constitution of 1990, the Constitutional Court was competent to:

- decide on the conformity of laws with the Constitution and could repeal a law if it found it to be unconstitutional;
- decide on the conformity of other regulations with the Constitution and laws and could repeal or annul any other regulation if it found it to be unconstitutional or illegal;
- protect the constitutional freedoms and rights of man and citizen in proceedings instituted by a constitutional complaint;
- decide on jurisdictional disputes between the legislative, executive and judicial branches;
- supervise the constitutionality of the programs and activities of political parties and could have banned their work if their programme or their activities had threatened violence against the democratic constitutional order, independence, unity or territorial integrity of the Republic of Croatia;
- supervise the constitutionality and legality of elections and the republic referendum and decide on electoral disputes which did not fall within the jurisdiction of courts;
- determine, at the proposal of the Government of the Republic of Croatia, that the President of the Republic was permanently unable to perform his or her duties, in which case the duties of the President of the Republic were temporarily assumed by the Speaker of the Croatian Parliament;
- decide on the impeachment of the President of the Republic by a two-thirds majority vote of all the judges (in proceedings initiated by a two-thirds majority vote of all representatives of the House of Representatives of the Croatian Parliament).

The internal organisation of the Constitutional Court was regulated by its Rules of Procedure.

The 1990 Constitution also provided that a constitutional act would regulate conditions for the election of judges of the Constitutional Court and the termination of their office, conditions and time-limits for instituting proceedings for the review of constitutionality and legality, the procedure and legal effects of its decisions, protection of constitutional freedoms and rights of man and citizen, and other issues important for the performance of duties and work of the Constitutional Court, and that this constitutional act was to be passed in the procedure determined for amending the Constitution.

In March 1991, the Croatian Parliament passed the first Constitutional Act on the Constitutional Court of the Republic of Croatia.

The first set of Amendments to the 1990 Constitution were passed by Parliament in 1997 and they did not change the jurisdiction of the Constitutional Court.

In September 1999, Parliament passed the new Constitutional Act on the Constitutional Court of the Republic of Croatia.

The second set of Amendments to the 1990 Constitution were passed by Parliament in 2000, and they significantly extended the Court's competences, as well as the number of judges which was increased from eleven to a total of thirteen. Since then, the competences of the Court, as well as the number of judges, have not been changed.

The 1999 Constitutional Act on the Constitutional Court was not amended.

The third set of Amendments to the 1990 Constitution were passed by Parliament in 2001 and aligned the existing constitutional terminology, in the part relevant to the Constitutional Court, with the terminology in the European Convention on Human Rights. Also, reference to the House of Representatives and the House of Counties of the Croatian Parliament was erased from the constitutional provisions because Parliament was reorganised from the bicameral to unicameral one.

In March 2002, the Constitutional Act on the Revisions and Amendments to the Constitutional Act on the Constitutional Court was passed, bringing the text of the 1999 Constitutional Act on the Constitutional Court into accordance with the extended competence of the Constitutional Court determined in the Amendments to the Constitution in 2000. The Constitutional Act on the Constitutional Court is still in force.

The fourth set of Amendments to the 1990 Constitution were passed by Parliament in 2010 and their main aim was to create and strengthen the constitutional basis for the entry of the Republic of Croatia into full membership of the European Union. The Amendments, as regards to the Constitutional Court, prescribed that the judges be elected by a two-thirds majority vote of all members of the Croatian Parliament and extended the judge's mandate. Namely, the mandate of a judge can be extended, in exceptional cases up to six months, where upon expiry of an incumbent's term of office a new justice has not been elected or has not assumed office.

The Fifth Amendment to the 1990 Constitution was adopted on 1 December 2013 following a state constitutional referendum that had been called by the Croatian Parliament, on the basis of a citizens' constitutional initiative to amend the Constitution, whereupon the definition of marriage as the union for life between a man and a woman was included in the Constitution.

2. Position in the hierarchy of courts

The Constitutional Court is not a part of the judicial power of the state. This is obvious from the structure of the text of the Constitution: the basic provisions related to the Constitutional Court are set out in Chapter V of the Constitution while the provisions regulating the organisation of the Government are set out in Chapter IV of the Constitution.

Due to the Court's constitutional power to repeal laws and other regulations (i.e. sub-laws, by-laws or secondary legislation) and also to quash judgments of ordinary and specialised courts, including the judgments of the Supreme Court of the Republic of Croatia as the highest court in the country, the Constitutional Court is often referred to as the "fourth branch of state power" (in addition to the legislative, executive and judicial).

II. Basic texts

- The provisions regarding the Constitutional Court are set out in Chapter V (Articles 122-127) of the Constitution, *Narodne novine* (Official Gazette) nos. 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14), but also in Articles 6.4, 89.2, 95.6, 97.2-3, 105.2-5, 105a.2-3 and 120.3-5 of the Constitution.
- The Constitutional Act on the Constitutional Court (Official Gazette nos. 99/99, 29/02 and 49/02 – consolidated text) regulates conditions and procedure for the election of judges of the Constitutional Court and termination of their office, conditions and terms for instituting proceedings for the review of constitutionality of laws, and review of constitutionality and legality of other regulations, procedure and legal effects of its decisions, protection of human rights and fundamental freedoms guaranteed by the Constitution and other issues of importance for the performance of duties and work of the Constitutional Court.
- The Rules of Procedure of the Constitutional Court (Official Gazette nos. 181/03, 16/06., 30/08, 123/09, 63/10 and 121/10) regulate the internal organisation of the Constitutional Court.

III. Composition, procedure and organisation

1. Composition

The Constitutional Court is composed of thirteen judges.

Judges are elected by a two-thirds majority of the members of the Croatian Parliament from among notable jurists, especially judges, public prosecutors, attorneys and university professors of law pursuant to the procedure and method provided by the Constitutional Act on the Constitutional Court (hereinafter, "CACCRC"). The committee of the Croatian Parliament competent for the Constitution conducts the proceedings for electing a judge and proposes the list of candidates for the election by the Croatian Parliament.

Judges are elected from among Croatian citizens, jurists with at least 15 years of experience in the legal profession (or at least 12 years of experience in the legal profession if a judge has obtained a doctoral degree in law), who have become distinguished by their scientific or professional work or public activities.

The President of the Constitutional Court is elected at the Plenary session of the Constitutional Court by the judges themselves. The Deputy-President is elected at the Plenary session of the Constitutional Court by the judges on the proposal of the President of the Constitutional Court, with the prior consent of the nominee. In both cases majority votes of all the judges are required, but the President of the Constitutional Court is elected by a secret ballot.

The term of office of a Constitutional Court judge is eight years (without restrictions on re-election). It can be extended, in exceptional cases, up to six months, where, upon expiry of a current judge's term of office, a new judge has not been elected or has not assumed office.

The term of office of the President of the Constitutional Court is four years and of the Deputy-President two years. In both cases re-election is possible.

The elected judges of the Constitutional Court assume their office on the day of expiry of the term of office of their predecessors.

The judges assume their offices upon taking the following oath before the President of the Republic: "I do solemnly swear that I will faithfully execute the office of the judge of the Constitutional Court of the Republic of Croatia in accordance with the Constitution and laws of the Republic of Croatia".

The office of the Constitutional Court judge is incompatible with any other public or professional duty except a university lecturer of law (but on part-time basis and to a smaller extent), other scientific or expert activities and membership activities in institutes and associations of jurists, as well as in humanitarian, cultural, sports and other associations. A judge cannot be a member of any political party nor can he or she in his or her public activities and behaviour express personal support to any political party.

Judges enjoy the same immunity as the members of the Croatian Parliament. No judge of the Constitutional Court can be responsible under the criminal law, detained or punished for an opinion expressed or vote cast in the Constitutional Court.

Criminal proceedings against a judge cannot be instituted without the approval of the Constitutional Court and a judge cannot be detained without it, except if he or she has been caught in the act of committing a criminal offence for which a penalty of imprisonment of more than five years is provided by law. In such a case, the state body which has arrested the judge instantly notifies the President of the Constitutional Court thereof. The Constitutional Court may decide that the judge, against whom criminal proceedings have been instituted, may not perform his or her duties at the Constitutional Court while the proceedings are pending.

A judge of the Constitutional Court may be relieved of office prior to the expiry of his or her term of office at his or her own request, if he or she has been sentenced to imprisonment for a criminal offence and if he or she has become permanently incapable of performing his or her duty. Grounds for relieving a judge of office before the expiry of his or her term of office are determined by the Constitutional Court.

While the proceedings to relieve a judge of office are pending, he or she may be suspended from performing a duty if the Constitutional Court decides so. The decision on suspension of a judge is rendered by the majority of votes of all the judges, at the proposal of the President of the Constitutional Court. The decision on a proposal for the suspension of the President of the Constitutional Court is also adopted by the Constitutional Court by the majority of votes of all its judges.

2. Procedure

Different types of proceedings are provided by the Constitutional Act on the Constitutional Court depending on subject matter of the issue in the case (see IV. Jurisdiction).

Proceedings before the Constitutional Court are initiated by different kind of written applications (e.g. requests, proposals, constitutional complaints, appeals) provided by the Constitutional Act on the Constitutional Court. The applications are submitted by state bodies, natural and legal persons or others who have *locus standi* pursuant to the Constitutional Act on the Constitutional Court.

The Constitutional Court proceedings are conducted by the judges. A judge who conducts the proceedings performs the duty of a judge-rapporteur. He or she is assisted by a legal advisor.

The procedure is written, but in some cases the Constitutional Court may render a decision after a consultative meeting or a public hearing (extremely rare in comparison to the number of cases).

The Constitutional Court decides in different types of cases in a different composition and votes by a different majority.

The Constitutional Court proceeds in the Plenary session of the Constitutional Court and in chambers (i.e. panels) of six or three judges.

The Constitutional Court has the following chambers: two chambers (each chamber consists of six judges) deciding on the merits of constitutional complaints; four chambers (each chamber consists of three judges) ruling on the procedural requirements for deciding on constitutional complaints; four chambers (each chamber consists of three judges) deciding on electoral disputes; and two chambers (each chamber consists of six judges) deciding on appeals against decisions of the State Judicial Council to relieve a judge of office, and decisions of the State Judicial Council on the disciplinary responsibility of a judge (i.e. Constitutional Court proceedings of appeal).

The two chambers, that proceed in the Constitutional Court proceedings of appeal, decide by a majority vote of all its members. If there is a deadlock (i.e. if three judges vote for the proposed decision and three against it) the Plenary session of the Constitutional Court will decide the case.

All other above-mentioned chambers have to reach a decision or a ruling unanimously with all of its members present. If not, the case will be decided by the majority vote of all the judges at the Plenary session of the Constitutional Court.

In the cases (see IV. Jurisdiction) that do not come under the jurisdiction of the above-mentioned chambers, the Constitutional Court decides at its Plenary session. It decides the cases by a majority

vote of all the judges (Article 27.1 CACCRC and Article 45.1 of the Rules of Procedure), except when it decides on the impeachment of the President of the Republic when a two-thirds majority vote of all the judges (Article 105.3 of the Constitution) is required.

A judge may give a separate (i.e. dissenting) opinion if he or she does not agree with a decision or a statement of reasons (Article 27.4-5 CACCRC and Articles 50-52 of the Rules of Procedure of the Constitutional Court), but in practice the judges also give concurring opinions (they agree with the decision but state different reasons).

As a general rule the work of the Constitutional Court is public, but in some type of cases such as electoral disputes, the chamber of three judges renders a decision *in camera*. Also, due to justified reasons a possibility for exclusion of the public from certain proceedings is provided by the law.

3. Organisation

In addition to the judges and the Secretary General, the Constitutional Court has a staff of almost 100 employees.

The budget of the Constitutional Court is part of the State Budget adopted by Parliament. The Government determines the proposal of the Constitutional Court's annual budget at the proposal of the Constitutional Court itself.

The President of the Constitutional Court acts on behalf of and represents the Constitutional Court and is the head of its administration. The Secretary General and the Head of the President's Office are directly responsible to the President for their work and management of organisational units.

The organisational units of the Constitutional Court are: the Office of the President of the Constitutional Court and the General Secretariat of the Constitutional Court.

The Office of the President of the Constitutional Court deals with matters related to the scope of duties of the President, matters of protocol, public relations, international relations and tasks related to the official needs of judges.

The General Secretariat of the Constitutional Court is run and administered by the Secretary General (he or she is appointed by the Session of the Constitutional Court for a term of four years and can be re-appointed).

The General Secretariat is composed of the two main units: Department of Constitutional Court advisors and General Administration.

Department of Constitutional Court advisors includes: Legal Advisors' Section (composed of legal advisors who prepare and process the Constitutional Court cases assigned to the judge-rapporteurs and to them, draft decisions and rulings in the cases and perform other non-judicial tasks); Section for Establishment of Procedural Requirements for Deciding on Constitutional Complaints (it processes and drafts rulings in cases under the jurisdiction of the chambers that rule on the procedural requirements for deciding on constitutional complaints); and Record and Documentation Centre (prepares Sessions of the Court and the Chambers, checks the drafts of decisions and rulings against the jurisprudence of the Constitutional court and performs other tasks) which embraces the Service for Automated Data Processing of Constitutional Court work and jurisprudence and the Library.

General Administration is composed of three sub-units: Secretary General's Office; Secretariat for the Court Operations; and Secretariat for Finances, Accounting and Property Management.

IV. Jurisdiction

The jurisdiction of the Constitutional Court is set out in the Constitution. It is further elaborated in the Constitutional Act on the Constitutional Court, which has been passed in accordance with the procedure determined for amending the Constitution.

In accordance with the Constitution, and the Constitutional Act on the Constitutional Court, the Constitutional Court:

Abstract review (*a posteriori*) of legislation's constitutionality and legality

- decides on the conformity of laws with the Constitution (Articles 125.1.1 and 126.1 of the Constitution and Articles 35-61 CACCRC) – the Constitutional Court will repeal a law (in whole or in part) if it finds that it is not in accordance with the Constitution;
- decides on the conformity of other regulations (i.e. sub-laws or secondary legislation) with the Constitution and law (Articles 125.1.2 and 126.2 of the Constitution and Articles 35-61 CACCRC) – the Constitutional Court will repeal or annul a regulation (in whole or in part) if it finds that it is not in accordance with the Constitution or the law;

- may review the constitutionality of a law, and the constitutionality and legality of other regulations which are no longer in force, provided that from the expiry of their legal force until the submission of a request or proposal to initiate the proceedings no more than one year has passed (Articles 125.1.3 and 126.3 of the Constitution and Article 56 CACCRC) – if the Constitutional Court finds that the law is not in accordance with the Constitution, or that the other regulation is not in accordance with the Constitution and the law, it will pass a decision declaring the unconstitutionality and illegality of the law or the regulation.

Constitutional complaints (protection of human rights and fundamental freedoms)

- decides upon constitutional complaints against individual decisions of governmental bodies, bodies of local and regional self-government and legal persons vested with public authority, when these decisions violate human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by the Constitution (Article 125.1.4 of the Constitution and Articles 62-80 CACCRC) – the Constitutional Court can dismiss the complaint by a ruling if all requirements provided by the Constitutional Act on the Constitutional Court for deciding on the merits of the case are not met, and if they are, the Court can accept the complaint as well-founded (and quash the individual act by which a constitutional right has been violated) or rejected it as ill-founded by a decision.

Constitutional Court proceedings of appeal

- decides on appeals against decisions of the State Judicial Council to relieve a judge of office, and decisions of the State Judicial Council on the disciplinary responsibility of a judge (Article 120.3-5 of the Constitution and Articles 97-102 CACCRC).

Elections and Referenda

- supervises the constitutionality and legality of elections and national referenda, and decides the electoral disputes that are not within the jurisdiction of courts (Article 125.1.9 of the Constitution and Articles 87-96 CACCRC);
- determines, at the request of the Croatian Parliament and in the case when ten percent of the total number of voters in the Republic of Croatia request calling a referendum, whether the referenda question is in accordance with the Constitution, and whether the requirements for

calling the referenda provided by the Constitution are met (Article 95 CACCRC);

- decides the conflicts of competence between the legislative, executive and judicial branches (Article 125.1.6 of the Constitution and Articles 81-82 CACCRC).

Jurisdictional disputes

- Monitoring the compliance with the Constitution and law, and supervisory control over passing the enactments needed for the enforcement of the Constitution, laws and other regulations;
- monitors the realisation of constitutionality and legality and notifies the Croatian Parliament about instances of unconstitutionality and illegality observed thereto (Article 125.1.5 of the Constitution and Article 104 CACCRC);
- has supervisory control over passing enactments needed for the enforcement of the Constitution, laws and other regulations – the Court will notify the Government if it finds that the competent body has not passed an enactment that was obliged to pass or the Court will notify the Croatian Parliament if the Government has not passed an enactment that was obliged to pass (Article 125a of the Constitution and Article 105 CACCRC).

Political parties' programs and activities

- supervises the constitutionality of programs and activities of political parties and may, in conformity with the Constitution, ban their work (Article 125.1.8 of the Constitution and Articles 85-86 CACCRC) – political parties are unconstitutional if by their program or violent activities they aim to disrupt the free democratic order or endanger the existence of the Republic of Croatia.

President of the Republic

- decides upon the impeachment of the President of the Republic (Articles 83 and 84 CACCRC) – proceedings may be instituted by the Croatian Parliament (a two-thirds majority vote of all members is required) and the Constitutional Court decides by a two-thirds majority vote of all the judges (Articles 105.2-5 and 125.1.7 of the Constitution);
- decides that the President of the Croatian Parliament assumes the temporary duty of the President of the Republic – in cases when the President of the Republic is prevented from performing the duties for a longer period of time as a result of illness or incapacity (Article 97.2 of the Constitution);

- gives preliminary approval for detention and institution of criminal proceedings against the President of the Republic (Article 105a.2-3 of the Constitution);
- perform other duties specified by the Constitution: i.e. before assuming duty, the President of the Republic of Croatia takes a solemn oath before the President of the Constitutional Court (Article 95.6 of the Constitution), and the President of the Republic submits his or her resignation to the President of the Constitutional Court (Article 97.3 of the Constitution).

V. Nature and effects of decisions

In general, when deciding on the merits of a case, the Court renders a decision and, in all other cases, a ruling.

In certain types of cases the Constitutional Court renders some other enactments such as for example a notification (or a report) in the cases regarding monitoring the compliance with the Constitution and law, and supervisory control over passing the enactments needed for the enforcement of the Constitution, laws and other regulations.

The Constitutional Court's decisions and rulings are final (i.e. non-appealable) and are binding *erga omnes*. Every natural and legal person is bound by them.

On the one hand, the courts, as well as all others bodies of central government and local and regional self-government, are obliged within their constitutional and legal jurisdiction, to enforce the decisions and rulings of the Constitutional Court. The Government of the Republic of Croatia ensures, through the bodies of central administration, the enforcement of the decisions and the rulings of the Constitutional Court.

On the other hand, the Constitutional Court can determine the body authorised for the enforcement of its decision, and the manner of the enforcement. Regarding the manner of the enforcement of its decisions the Constitutional Court in fact orders the competent bodies to implement general and/or individual measures that may be compared to the ones that the European Court of Human Rights orders within its jurisdiction.

The repealed law or other regulation, or their repealed provisions, lose their legal force on the day of publication of the Constitutional Court decision in the Official Gazette, unless the Constitutional Court determines another time-limit.

The legal effects of the Constitutional Court decisions repealing laws due to their unconstitutionality and repealing or annulling other regulations due to their

unconstitutionality and illegality (as well as just determining the unconstitutionality of laws and unconstitutionality and illegality of other regulations which were no longer in force at the time of rendering the decision) imply the right of affected persons to require the elimination of the consequences of any application of the unconstitutional norms under the conditions provided by Articles 56-59 CACCRC.

Furthermore, when the Court by the final judgment refuse to apply the regulation because of its unconstitutionality or illegality, but the Constitutional Court finds that such unconstitutionality or illegality does not exist, everyone whose right has been violated may request a change of the final judgment of the Court within one year from the publication of the Constitutional Court decision.

Moreover, in the proceedings initiated by a constitutional complaint, if the Constitutional Court finds the constitutional complaint well founded, it will quash the impugned individual act by which the complainant's constitutional right was violated and it will remit the case to the competent judicial or administrative body, body of unit of local and regional self-government, or legal person vested with public authority. The competent body is obliged to obey the legal opinion of the Constitutional Court expressed in the statement of reasons of the decision while rendering the new individual act.

The important decisions and rulings, and notifications of the Constitutional Court are published in the *Narodne novine* (Official Gazette) and on the website of the Constitutional Court (including translations in English for some of them). Their summaries are published in the annual edition of Selection of Decisions of the Constitutional Court. The edition is bilingual (Croatian and English).

VI. Conclusion

The Republic of Croatia has accepted classical European model of constitutional judicature and its Constitutional Court is perceived as a guardian of the Constitution.



Cyprus

Supreme Court

I. Introduction

Date of establishment: 16 August 1960

Position in the hierarchy of the Courts: The Supreme Court of the Island.

II. Basic texts

- Article 133 of the Constitution – The Supreme Constitutional Court;
- Article 153 of the Constitution – The High Court;
- The Administration of Justice (Miscellaneous Provisions) Law 1964 (no. 33/64) – Amalgamation of the Supreme Constitutional Court and the High Court.

III. Composition, procedure and organisation

1. Composition

- number of judges: 13, including the President;
- procedures for appointment of judges and president: appointed by the President of the Republic;
- terms of office: Retiring age (68).

They are, as a rule, selected from among the most senior of the judges serving in the lower courts but the President of the Republic may appoint anyone who is a lawyer of high professional and moral standard. They retire at the age of 68 and may be dismissed on the ground of misconduct.

2. Procedure

- Hours of sitting of the Court: the time of sitting for the hearing of cases is between 9.30 am – 1.00 pm. the Court is usually sitting at 8.45 am for taking cases fixed for directions;
- Cases are as a rule heard at first instance by one Judge and thereafter on appeal by a bench of at least five. Any constitutional matter is tried by at least 7 judges. Appeals from lower courts in both civil and criminal cases are heard by a bench of three. Judgment is given in open Court. The judges are not conducting any investigation;

- Quorum rules: there are no rules but as a matter of practice the Court decides as to the composition of the Full Bench and/or Appeal Courts for a specific period.

The parties or their advocates, address the Court in writing and orally. They limit their address on the skeleton which they have submitted earlier.

3. Organisation

Recruitment of staff is under the power of the Civil Service Commission.

IV. Jurisdiction

- The nature of the constitutional control exercised: Mandatory.
- The nature of the texts reviewed: Constitutional laws, institutional acts, ordinary laws, regulatory texts, court decisions.
- Any other disputes for which the court has jurisdiction: Any other law, by-law and rule or regulation which may be contrary to the Constitution.

V. Nature and effects of decisions

1. Types of decision: Declaratory.
2. Legal effects of decisions: Final and conclusive.
3. Publication – arrangements for access to complete texts: All judgments are published in volumes and complete texts are available.
4. The judgments of the *Court (The Cyprus Law Reports)* are published in Greek since 1988.

VI. Conclusion

There are difficulties as the Turkish community does not participate at present. Any reform will probably be made only together with the solution of the Cyprus problem.



Czech Republic

Constitutional Court

I. Introduction

1. The Constitutional Court of the Czech and Slovak Federal Republic (hereinafter, "CSFR") was in operation from February 1992 until 31 December 1992 when the CSFR dissolved. The Constitution of the Czech Republic, adopted on 16 December 1992, made provision in Chapter 4 for the establishment of the Constitutional Court of the Czech Republic (hereinafter the "Court"). The statute regulating its operations in detail (Act no. 182/1993 Sb., on the Constitutional Court) was adopted on 16 June 1993, after which in July 1993 the first 12 members were appointed and the Court began operations. By January 1994, three other members had been appointed, making up the total membership of 15 provided for in the Constitution. Of the current Justices, four were formerly Members of Parliament, four were former Justices of the CSFR Constitutional Court, four are professors, five are professional judges and several had been lawyers in private practice.

2. The Court does not form part of the system of ordinary courts.

II. Basic texts

- Chapter Four, Articles 83-89 of the Constitution;
- Act no. 182/1993 Sb., on the Constitutional Court.

III. Composition, procedure and organisation

1. Composition

The Constitution provides that the Court shall consist of 15 Justices and there are currently 15 sitting Justices. All members are appointed by the President with the consent of the Senate (the Senate was not yet established when the first 15 Justices were appointed, so the Assembly of Deputies approved them in its stead). The Chairperson of the Court and two Vice-Chairpersons are appointed by the President (consent of the Senate is not required). The Justices are appointed for a 10-year term of office and there is no restriction on reappointment.

The minimum qualifications for appointment as a Justice of the Court are that the person have a character beyond reproach, be eligible for election to the Senate (which means that they must be over 40 years of age and be eligible to vote), have a university legal education and have been active for at least ten years in the legal profession. There is no limitation on a person's eligibility to be appointed merely because he or she was a member of the Government or of Parliament prior to his or her nomination. However, while holding office, a Justice may not be a member of a political party. In addition, a Justice is restricted from holding any other compensated position or engaging in any other profit-making activity with the exception of managing his or her own assets and engaging in scholarly, teaching, literary, or artistic activities.

Justices assume their office upon taking the following oath of office administered by the President:

"I pledge upon my honour and conscience that I will protect the inviolability of natural human rights and the rights of citizens, adhere to constitutional acts, and make decisions according to my best convictions, independently and impartially."

Justices enjoy a general immunity from criminal prosecution: they may not be prosecuted for misdemeanours and may be prosecuted for felonies only if the Senate consents to the prosecution (failing which, they are for ever exempt from prosecution for the act at issue). They may be arrested only if caught in the act of committing a felony (*flagrante delicto*) or immediately afterwards. A Justice has a privilege to refuse to testify concerning matters about which he or she learned in connection with his or her judicial duties, and otherwise has a positive obligation to maintain confidentiality about such matters.

A Justice may be deprived of his seat only in a very limited number of cases: loss of eligibility for the Senate, final conviction for an intentional criminal offence, or a decision by the Court's Plenum to terminate his or her office due to a disciplinary infraction. The definition of a disciplinary infraction is any conduct which "lowers the esteem and dignity of the office or tends to undermine confidence in the independent and impartial decision-making of the Court, as well as any other culpable violation of the duties of a Justice" or any conduct qualifying as a misdemeanour.

The Court administration is directed by the Chairperson. Each Justice has his or her own staff made up of a legal assistant and a secretary. More detailed rules are contained in Act no. 182/1993 Sb.

2. Procedure

The Court acts in its Plenum or in three-Justice chambers (of which there are four). Only the Plenum may decide to annul an Act of Parliament or another generally applicable enactment or make decisions concerning the impeachment or incapacity of the President or the dissolution of a political party. All other matters are heard by chambers: constitutional complaints by persons or municipalities, electoral or eligibility disputes concerning Members of Parliament and conflicts of competence between central State authorities and local autonomous bodies.

Oral hearings are not mandatory if parties agree to dispense with them. For the Plenum to make a decision, at least 10 Justices must be present. A super-majority of 9 Justices is required to vote in favour of a decision to annul an Act of Parliament, as well as for decisions concerning the impeachment or incapacity of the President.

IV. Jurisdiction

The Court has jurisdiction over the following matters:

1. Abstract constitutional review of enacted norms (*ex post facto* or repressive control):

a. Petitions lodged as a prerogative of office (*ex officio*):

- i. Acts of Parliament, if proposed by the President or a group of either 41 deputies or 17 senators;
- ii. other enactments, if proposed by the government or a group of either 25 deputies or 10 senators.

b. Petitions lodged incidental to a dispute:

Within the context of a specific dispute, an ordinary court hearing a case, a panel of the Court when deciding a constitutional complaint, or a person in conjunction with his or her submission of a constitutional complaint, may submit a petition to annul an Act of Parliament or another enactment.

2. Concrete constitutional review of decisions and official Acts – Constitutional complaints:

- a. a person submitting a complaint must claim that their constitutionally protected rights have been violated and that they have exhausted all other legal remedies. Citizens do not have a general right to complain of unconstitutionality (*actio popularis*). A petition to annul an Act of

Parliament or other enactment may be attached only if it formed the basis of the violation;

- b. a municipality or self-governing region must claim that the State has encroached upon its right to self-government;
- c. a political party or movement must claim that it was dissolved by the government in violation of the Constitution or laws.

3. Cases concerning impeachment of the President or his or her incapacity to hold office.

4. Disputes concerning a member of Parliament's election or eligibility for office.

5. Jurisdictional disputes between State bodies and self-governing regions.

6. Decisions on how to implement decisions of international tribunals. The Court has no preventive norm control and has no power to give advisory opinions.

7. Decisions on the matter of the referendum on the Czech Republic's Accession to the European Union, on the failure to call such referendum and on the lawfulness of the manner in which a referendum is held.

V. Nature and effects of decisions

1. If the Court finds a legal provision to be unconstitutional, it annuls it in whole or in part. Generally, the provision shall be annulled on the day the judgment is published in the Collection of Laws, unless the Court decides otherwise (delays it, for example, to allow Parliament time to adopt substitute legislation). Judgments concerning the impeachment or incapacity of the President or a Member of Parliament's election or eligibility for office are enforceable when announced by the Court. Other judgments are enforceable when an official copy of it has been delivered to the parties.

2. Article 89 of the Constitution states that all judgments of the Court are binding on all governmental bodies and persons (*erga omnes* effect). It is still unclear whether that holds true as well for constitutional complaints, or whether they have merely *inter partes* effects. If the judgment annulled a provision on the basis of which a person was criminally convicted, the case may be reopened. Otherwise, legal decisions made or legal relations created on the basis of an unconstitutional statute remain unaffected if they arose prior to the statute being declared unconstitutional.

3. Judgments annulling an Act of Parliament, or other enactment, or concerning the impeachment, or incapacity of the President, must be published in the *Sbírka zákonu české republiky* (Collection of Laws). Other judgments containing legal principles of general significance may be published in the Collection of Laws. The Court publishes its own collection at least once annually (*Sbírka nálezu a usnesení Ústavního soudu*). This collection contains all of its judgments (including concurring and dissenting opinions).



Denmark

Supreme Court (*Højesteret*)

I. Introduction

There is no special constitutional court in Denmark. The examination of the constitutionality of acts or administrative regulations is left therefore to the ordinary courts of law.

In 1660, an absolute monarchy was introduced in Denmark and it was made statutory by The Kings Acts of 14 November 1665. Already in 1661, the King had issued a decree about the highest court of the Kingdom, the Supreme Court. Regardless of the fact that the Supreme Court was formally under the authority of the King, quite soon it acquired a status in practice which was essentially independent of the King, who intervened in very few cases. However, it was only with the transition to a constitutional monarchy, introduced after a revolutionary wave by the Constitution of June 1849, that the courts of law were formally separated from the legislative and the executive powers.

II. Basic texts

- Constitution (Sections 59-65);
- Administration of Justice Act.

III. Composition, procedure and organisation

1. Structure of the Judiciary

The Danish judiciary, which is regulated by the Administration of Justice Act, consists of courts of law at three levels: the District Courts, the High Courts, and the Supreme Court. As a general rule, however, a case can only be tried in two instances.

Most cases – both civil cases and criminal cases – start in the District Court with a right of appeal to the High Court. However, if the case concerns a matter of principle, an independent board, (*Procesbevillingsnaevnet*), chaired by a Supreme Court judge and composed of 2 judges from the lower courts, a practising lawyer and a professor of law, may grant leave for the case to be tried before the Supreme Court in the third instance. For certain minor cases, an appeal to the High Court also depends on leave being granted by an independent board.

Cases concerning trial of administrative decisions are as a general rule tried before the High Court at first instance with the possibility of an appeal to the Supreme Court. Further, the District Courts have the possibility, when requested by one of the parties, of referring civil cases on a matter of principle to the High Court, from whose decisions a right to appeal to the Supreme Court is automatic.

Criminal cases, where the offence is punishable by imprisonment for four years or more, and criminal cases concerning political crimes, are tried before the High Court at first instance with lay judges assisting. When sentences are appealed to the Supreme Court, this Court may evaluate only the legal basis: it cannot change the assessment of evidence.

However, the Administration of Justice Act has been amended in 2006. As from 1 January 2007 all cases, civil as well as criminal, shall start before the district court. An appeal may, as a matter of right, be brought to one of the two High Courts. A further appeal to the Supreme Court requires leave from the above-mentioned board. When requested by a party, the district court may refer a civil case involving questions of principle to the High Court, which will then be the court of first instance. In such a case, an appeal to the Supreme Court needs no leave. The reform will enable the Supreme Court to concentrate on cases involving questions of principle or raising a point of general interest.

As a consequence of the distribution of competence between District Courts, High Courts and the Supreme Court and of the possibility of granting leave to try cases on matters of principle before the Supreme Court, cases concerning the compliance of acts or administrative provisions with the Constitution, EC law and the European Convention on Human Rights will normally be tried in the last instance by the Supreme Court. However, there is nothing to prevent such a case from being decided finally at a lower level.

2. Composition of the Supreme Court

The Supreme Court is composed of its President and 18 other judges. Like the judges of the lower instances, Supreme Court judges are formally appointed by the Queen on the recommendation of the Minister of Justice. The latter is advised by an independent Council for the Appointment of Judges (*Dommerudnaevnelsesraadet*). The Council is chaired by a Supreme Court judge and composed of two of the judges, one a practising lawyer and two members representing the general public. The Council will submit the name of only one candidate to the Minister, who is supposed to follow the

recommendation of the Council. The appointments are unlimited in time, but subject to the normal age of retirement (70 years) and it follows directly from the Constitution that judges can only be removed by a court decision.

3. Procedure and organisation of the Supreme Court

The Supreme Court functions in two chambers usually composed of five judges. The Supreme Court may decide, however, that a larger number of judges or all of them shall participate in a case. This is particularly the case in decisions on the constitutionality of an Act.

The procedure of the Supreme Court is more formal than in the lower instances but in principle it is regulated by the same provisions of the Administration of Justice Act. Cases are usually tried verbally but the initial preparation will be written. Certain types of decisions, including especially procedural decisions, are dealt with on a written basis. In such cases the Supreme Court makes its decision in a committee comprising three judges.

It is common practice that a party is represented by a lawyer before the Supreme Court. It is a condition for being entitled to plead before the High Courts that the lawyer in question has passed a special test in procedure and, before the Supreme Court, that the lawyer in question shall have at least five years regular practice in procedure before the High Courts.

Court decisions of broader interest, i.e. decisions made by the Supreme Court and selected decisions of the High Courts, are published in a weekly periodical, *Ugeskrift for Retsvaesen*.

IV. Jurisdiction

By the Constitution, whose most recent amendment was by Act no. 169 of 5 June 1953, the courts of justice were given explicit powers to decide on questions concerning the limits of the administration (Section 63 of the Constitution). At the same time a provision was introduced in the Constitution establishing special constitutional courts, but this provision has never been used, nor are there any plans for using it. If such courts of justice should be established, their decisions must be subject to appeal to the highest court of the Kingdom, the Supreme Court.

The Constitution does not explicitly state that the courts of justice have authority to test the constitutionality of enactments. This has been invariably assumed in theory as well as in practice, so

that such a power of review is regarded as established by constitutional practice.

The testing of the constitutionality of an Act can assume the following forms:

- testing of whether the legislative procedure has been adhered to;
- testing of whether the separation of powers has been adhered to;
- testing of whether an Act is materially constitutional, having regard for example to civil and political rights.

Legal action can be taken only by a party with a particular and individual interest in having a decision on a question. Thus, the concept of “popular complaint” is unknown in the Danish administration of justice. Nor has the *Folketing* (Danish Parliament) any possibility of having opinions from the courts on the constitutionality of a Bill. Such questions are usually settled by the Parliament asking the Minister of Justice for opinions.

In practice, the courts of law have been cautious in considering the constitutionality of Acts, thereby according the legislative power a margin of appreciation in difficult questions of evaluation or construction.

V. Nature and effects of decisions

Review of the constitutionality of an Act takes place in tandem with the consideration of all other legal and factual circumstances of a case. If a court of law should find an Act unconstitutional, it cannot repeal it, but is limited to deciding whether the Act shall be applied in the concrete case put before the court for adjudication. If an Act has been considered to be invalid in a concrete case, the decision nonetheless has a general and normative value, because as a precedent it means that the application of the Act will be paralysed in all similar future cases.



Estonia

Supreme Court

I. Introduction

History of the Supreme Court of Estonia (acting as Constitutional Review Court)

The highest court of the Republic of Estonia was founded by the Supreme Court Act, passed on 21 October 1919, and by the Constitution, adopted on 11 June 1920.

The Supreme Court (*Riigikohus*) was first and foremost a court of cassation. There were three departments (the Civil, Criminal and Administrative Departments) in the Court; the highest body was the Plenary of the Court.

The Court was liquidated in 1941, as a result of annexation of the Republic of Estonia to the Soviet Union in 1940.

The foundations for the restoration of the activities of the Supreme Court were laid by the Constitution of the Republic of Estonia, adopted by a referendum held on 28 June 1992. In addition to the powers of a court of cassation, the Supreme Court is also endowed with the competences of a constitutional review court. The first session of the re-established Supreme Court was held in May 1993.

Position in the Hierarchy of Courts

The Supreme Court is the highest court in the state and reviews decisions of lower courts in cassation proceedings. The Supreme Court is also the constitutional review court.

Constitutional review decisions of the Supreme Court are binding on the whole legal system. No other court has the competence to overrule or question the constitutional review decisions of the Supreme Court.

II. Basic texts

- Sections 15, 149.3 and 152 of the Constitution;
- Sections 26.3, 29, 30 and 129 of the Courts' Act;
- Constitutional Review Court Procedure Act;
- Rules of the Supreme Court of Estonia.

III. Composition, procedure and organisation

1. Composition

The Supreme Court may hear cases in Civil, Administrative Law, Criminal and Constitutional Review Chambers and in Supreme Court *en banc* (i.e. the Plenary of the Court). Special Panels, consisting of members of the different Chambers, are set up if it is necessary to overcome the differences of opinions on application of law or jurisdictional disputes between Civil, Administrative Law or Criminal Chambers of the Court. Each of the 18 Justices of the Supreme Court belongs to the Civil, Administrative Law or Criminal Chamber. For adjudication of constitutional review matters a Constitutional Review Chamber, consisting of 9 justices, has been set up.

The Chief Justice of the Supreme Court is *ex officio* the chairman of the Constitutional Review Chamber. Other eight members of the Chamber are elected by the Supreme Court *en banc*, on the proposal of the Chief Justice. The members of the Constitutional Review Chamber are elected from among the members of the Civil, Criminal and Administrative Law Chambers.

Every year, on the proposal of the Chief Justice, the Supreme Court *en banc* appoints two new members to the Constitutional Review Chamber and releases two most senior members of the duties of the member of the Constitutional Review Chamber, taking into account the opinion of and bearing in mind, as much as possible, the equal representation of the Administrative Law, Criminal and Civil Chambers within the Constitutional Review Chamber.

2. Procedure of the Constitutional Review Chamber

The Supreme Court hears constitutional review cases in Constitutional Review Chamber or the Supreme Court *en banc*. Depending on the nature and subject matter of the issue at stake, the Constitutional Review Chamber reviews cases in panels of three, five or nine justices.

When the Supreme Court receives a petition to declare a Member of Parliament (*Riigikogu*), the President of the Republic, the Chancellor of Justice or the State Auditor incapable of performing his or her duties for an extended period, to terminate the authority of a member of Parliament or the activities of a political party, the matter is to be heard by the Supreme Court *en banc*. Also, when constitutional review proceedings are initiated by the Administrative Law, Civil or Criminal Chamber or a Special Panel of

the Supreme Court, the matter shall be heard by the Supreme Court *en banc*.

The Constitutional Review Chamber may refer a matter to the Supreme Court *en banc* for a hearing on its own initiative. In interpreting the contested norms in concrete norm control procedure, the Constitutional Review Chamber of the Supreme Court follows the interpretation by the other Chambers of the Supreme Court, if applicable. In cases, where uniform application of the norm seems to be of general importance and a Supreme Court level interpretation of the contested norm is lacking, the Chamber might refer the case to the Supreme Court *en banc* which consists of the Civil, Administrative Law and Criminal Chambers of the Supreme Court (being *de facto* the three highest courts of the three jurisdictions) and which will then rule on constitutionality of the provision at stake.

Whereas the Supreme Court decides whether to grant leave for appeal in regular cassation cases, all constitutional review matters have to be heard by the Court.

IV. Jurisdiction

It follows from the Constitutional Review Court Procedure Act that petitions may be submitted to the Supreme Court by the President of the Republic, Chancellor of Justice, local government councils and the courts. As of December 2005, the Parliament may request the Supreme Court to give an opinion on how to interpret the Constitution in conjunction with European Union law.

Individuals may approach the Supreme Court in constitutional review matters only in very limited cases. An individual who is of the opinion that his or her rights have been violated, may file with the Supreme Court a complaint against the resolutions of Parliament and the Board of the Parliament and the decisions of the President of the Republic and a complaint or a protest against the decisions and acts of electoral committees.

The ancillary powers of the Supreme Court include the competence of holding a Member of Parliament, the President of the Republic, the Chancellor of Justice or the State Auditor to be incapable of performing his or her duties for an extended period; termination of the mandate of a Member of Parliament; giving a consent to the Chairman of the Parliament, acting as President of the Republic, to declare extraordinary elections to the Parliament or to refuse to proclaim laws and termination of the activities of a political party.

Section 152.2 of the Constitution stipulates that the Supreme Court shall declare invalid any law or other legislation that is in conflict with the provisions and spirit of the Constitution.

According to Sections 15, 24, 31, 36 and 46 of the Constitutional Review Court Procedure Act, the Supreme Court has the power:

1. to hold a legislative act, which has not entered into force, to be unconstitutional;
2. to hold a legislative act or its provision, which has entered into force, to be unconstitutional and invalid;
3. to hold a legislative omission to be unconstitutional;
4. to hold an international treaty, which has or has not entered into force, to be unconstitutional;
5. to annul a decision of the Parliament to submit a draft act or other national issue to a referendum;
6. to hold the contested legislative act, international treaty or the respective legislative omission to have been unconstitutional at the time of submitting the petition;
7. to give an opinion on how to interpret the Constitution in conjunction with European Union law;
8. to annul a decision of Parliament, the Board of the Parliament or the President of the Republic;
9. to hold a Member of Parliament, the President of the Republic, the Chancellor of Justice or the State Auditor to be incapable of performing his or her duties for an extended period;
10. to terminate the mandate of a Member of Parliament;
11. to give a consent to the Chairman of the Parliament, acting as President of the Republic, to declare extraordinary elections to Parliament or to refuse to proclaim laws;
12. to terminate the activities of a political party;
13. to annul the decision of an electoral committee;
14. to hold a procedural act of an electoral committee to be contrary to the law;
15. to oblige an electoral committee to adopt a new decision or to undertake a new procedural act;
16. to annul the voting results in a polling station, constituency borough, town, county or state, presidential or parliamentary elections, if the infringement of law has or might influence the voting results essentially;
17. to annul the mandate in case the division and registration of mandates of Members of Parliament, Members of European Parliament, members of local government council, their deputies and additional mandates was not made according to the law;
18. to dismiss a motion.

V. Judgments of the Constitutional Review Chamber

Supreme Court judgments on questions of constitutionality are final and binding for all courts and governmental authorities, national and local, as well as for all individuals and legal persons. The opinions of the Supreme Court on how to interpret the Constitution in conjunction with European Union law, are however not legally binding.

The judgments and opinions of the Constitutional Review Chamber and the Supreme Court *en banc* are published in the *Riigi Teataja* (Official Journal of Estonia) and on the official webpage of the Supreme Court. On the latter, the constitutional review judgments of the Supreme Court, which have been translated into English, are also available.



Finland

Supreme Administrative Court

I. Introduction

Under the Constitution of Finland, the Supreme Administrative Court is the court of last resort in administrative cases. In criminal and civil cases, the highest judicial powers are vested in the Supreme Court. Both courts were established in 1918.

The Constitution requires that any use of public powers be based on law. Anyone who is dissatisfied with an administrative decision pertaining to his or her rights or obligations may challenge the lawfulness of the decision before an administrative court. The right of appeal in such cases is mainly covered by the provisions of the Administrative Judicial Procedure Act.

The majority of the categories of cases handled by the Supreme Administrative Court are not subject to the requirement of leave to appeal. As a rule, therefore, the parties have a right to appeal and the Supreme Administrative Court issues a decision on merits.

Administrative courts apply the Administrative Judicial Procedure Act. The Act contains a provision placing the authorities, i.e. the administrative courts, under an obligation to ensure proper examination of the case. Thus, the parties to the proceedings are usually able to pursue their cases without professional legal help, which facilitates the lodging of appeal and access to legal remedies.

II. Basic texts – Supreme Administrative Court

- Constitution of Finland (731/1999);
- Supreme Administrative Court Act (1265/2006).

III. Composition, procedure and organisation

1. Composition

The Supreme Administrative Court is divided into three chambers, focusing on different categories of cases. The first chamber handles, among others, cases concerning building and planning, environment and water rights, immigration and asylum; the second chamber cases concerning taxation, trades, transport and communication and the third chamber cases concerning social welfare, health care, competition

and public procurement, state and local authority officials. The chambers do not, however, exclusively handle cases concerning these issues but may in exceptional cases examine any types of cases falling within the Court's jurisdiction.

The cases are usually decided by a chamber composed of five judges. In cases referred to in the Water Act and the Environmental Protection Act as well as in cases concerning certain intellectual property rights such as patents, the chamber is composed of the judges and two expert members having competence in the relevant field. Cases involving a significant interest may be decided by a composition of all the judges of the Chamber or be subject to the Court's plenary review. For the purpose of deciding on leave to appeal, a chamber composed of three judges is sufficient.

1.1 Number of judges

Under the Supreme Administrative Court Act, the judges of the Supreme Administrative Court include the President and a minimum of fifteen permanent justices. There may also be additional justices appointed for a limited period of time.

1.2 Appointment of judges and President

The President and justices of the Supreme Administrative Court are appointed by the President of the Republic – justices upon a proposal by the Court. The Supreme Administrative Court shall make a reasoned proposal for the appointment of a justice. The proposal shall be delivered to the Government in order for the draft decision on the appointment to be presented to the President of the Republic (Act on Judicial Appointments no. 205/2000). The qualifications of justices and the criteria of their appointment are based on the Act on Judicial Appointments.

The expert members are also appointed by the President of the Republic.

1.3 Term of office

The President and the permanent justices serve, as of their appointment, until the age of retirement.

Expert members are appointed for a term of four years. They are eligible for reappointment.

1.4 Status of judges

Despite their appointment by the President of the Republic, the appointments of justices are not political

ones due to the fact that they are based on a proposal made by the Court itself.

Under the Constitution (Section 103), neither the President or justices nor the court referendaries may be removed from office without a lawful investigation and judgment.

The referendaries of the Supreme Administrative Court act under the same responsibility as justices. They have no right to vote but may, in case they disagree with the outcome of the case, present a dissenting opinion which is attached to the decision.

The judges of the Supreme Administrative Court are not eligible to Parliament (Section 27 of the Constitution). They may, however, hold other trust positions or functions while serving as judges, provided that they inform the Court of such positions or functions. Under Section 14 of the Act on Judicial Appointments, persons to be appointed to a position of permanent judge must give a declaration of interests prior to their appointment and must, after the appointment, provide information on any changes in such interests.

The grounds of disqualification of judges are based on the provisions of Chapter 13 of the Code of Judicial Procedure (as amended by Act no. 441/2001). Under these provisions, judges may not participate in the consideration of any case in which there is reason to doubt their impartiality.

2. Procedure

After the institution of proceedings in the Supreme Administrative Court, a notary carries out an initial preparation of the case, including compilation of the case file and of the parties' written submissions and observations.

Before the examination of the case by a chamber, the referendary establishes the questions of law and the facts of the case and prepares a draft decision. In order to establish the facts of the case, the Supreme Administrative Court may arrange an on-site inspection or an oral hearing if necessary. Inspections are mainly arranged in cases relating to the environment. The deliberations and the issue of the decision take place after the referendary has presented his or her written and oral statements in the chamber's session.

The Constitution requires that all use of public powers be based on law. Anyone who is dissatisfied with an administrative decision pertaining to his or her rights or obligations may challenge the lawfulness of the decision before an administrative court. The right of

appeal in such cases is mainly covered by the provisions of the Administrative Judicial Procedure Act (586/1996) which is applied by all administrative courts, including the Supreme Administrative Court.

Under Section 33 of the Administrative Judicial Procedure Act, the Supreme Administrative Court is under an obligation to ensure that all facts of the case are established and must, where necessary, request a party or authority to submit further evidence. The Court must also *ex officio* obtain evidence to the extent it is necessary in view of equality, justice and the nature of the case. Thus, the procedure has been made simple for individual parties and it is also possible to pursue one's case without external legal help, which reduces the costs of proceedings.

3. Organisation

In addition to the justices, the Supreme Administrative Court has approximately 40 referendaries and 40 other employees. They are headed by the Secretary General. Apart from the permanent personnel, there may be temporary personnel.

The total operational costs of the Supreme Administrative Court were approximately 9,7 million euro in 2009. Of these, the share of wages amounts to 80 percent. As for the cost-efficiency and productivity of the court's work, the average costs of each case were 2458 euros.

IV. Jurisdiction

According to Section 3 of the Constitution, the judicial powers are exercised by independent courts of law, with the Supreme Court and the Supreme Administrative Court as the highest instances. Under Section 98 of the Constitution, the Supreme Administrative Court and the regional Administrative Courts are the general courts of administrative law. Furthermore, under Section 99 of the Constitution, the Supreme Administrative Court is the court of last resort in administrative cases.

The Supreme Administrative Court has competence to examine appeals against decisions of a variety of state and local authorities, including the Government and Ministries, provincial state offices, review boards, administrative courts and the Market Court. In these cases, the competence of the Supreme Administrative Court derives from the ordinary appeal procedure. Decisions of the Insurance Court may be subject to extraordinary appeal, and the Supreme Administrative Court may in most categories of cases annul the decision of the Insurance Court if such a procedural error has taken place in the examination of the case as may have essentially affected its outcome.

In the first instance, appeal against decisions of the state and local authorities, the Evangelical-Lutheran Church and the Orthodox Church is usually lodged with a regional Administrative Court. In respect of certain subject-matters, the first-instance appellate court is a specialised court, i.e. the Market Court or the Insurance Court. However, a request for review to the authority which made the original decision is often necessary before appeal may be made to the first appellate authority or court.

The majority of the categories of cases handled by the Supreme Administrative Court are not subject to the requirement of leave to appeal. As a rule, therefore, the parties have a right to appeal, and the Supreme Administrative Court issues a decision on merits. The most important categories of cases where, under the applicable law, a request for leave to appeal must be filed, are those concerning taxation, immigration and asylum, and subsistence allowance. Leave to appeal may, however, be granted on various grounds and not exclusively because of a need to issue a precedent.

In respect of the decisions of certain administrative authorities, including those of the Government and Ministries, appeal is made directly to the Supreme Administrative Court without prior appeal to a regional administrative court. However, such appeal may only be founded on the illegality of the decision.

There is no separate court in Finland for the examination of the constitutionality of laws but, under Section 106 of the Constitution, it is possible for any court of law to refrain from the application of an act of Parliament if it would be in evident conflict with the Constitution.

In addition to the administration of justice, the Supreme Administrative Court has certain advisory functions. The Court supervises the administration of justice by lower administrative courts. Furthermore, the Supreme Administrative Court provides each year, upon request, several opinions on questions of law, particularly in the field of administrative law. Under Section 77 of the Constitution, the President of the Republic may request the Court to provide an advisory opinion before approving a bill. Under Section 7 of the Supreme Administrative Court Act, the Supreme Administrative Court provides opinions for the Government on questions concerning legislation in the field of administrative law, particularly concerning draft bills. In practice, opinions are also given to Ministries on committee reports relating to the drafting of a bill. Under Section 99.2 of the Constitution, the Supreme Administrative Court may also submit proposals to the Government for legislative measures.

V. Nature and effects of decisions

The majority of decisions issued by the Supreme Administrative Court are decisions on appeal. In these cases, the decision is a final and binding decision on the merits of the case. The Supreme Administrative Court either upholds the lower authority's or court's decision as such, or amends it or changes the statement of reasons. In cases where the original decision is repealed, it may be referred back to the source authority for reconsideration. In cases where leave to appeal is required, the Supreme Administrative Court decides the question of admissibility of the appeal and the merits of the case by the same decision. In case leave to appeal is refused, however, the Court only examines the merits to the extent it is necessary for deciding the question of leave to appeal.

In cases of extraordinary appeal, the appellants request the annulment of an already final and binding decision, which may be either a decision of a lower administrative court or authority or a decision of the Supreme Administrative Court itself. In these cases, the Supreme Administrative Court examines the alleged procedural error, mistake of law or other error which is contended to have essentially affected the outcome of the decision, or the existence of allegedly new evidence, without examining the merits of the case. The Supreme Administrative Court may annul the decision if one of the conditions set forth in the Administrative Judicial Procedure is satisfied.

The Supreme Administrative Court may order the losing party to pay the legal costs of the opposite party but does not usually award damages. Cases concerning damages for an offence in office or a violation of official duty are in most cases handled by civil and criminal courts.

The Supreme Administrative Court may also issue interim orders, in connection with the examination of appeals, prohibiting the implementation of the lower authority's or court's decision until a final decision on the merits has been given by the Supreme Administrative Court.



France

Constitutional Council

I. Introduction

The Constitutional Council was created by the Constitution of the Fifth Republic on 4 October 1958. It is a court with competence for various matters, including, in particular, the constitutional review of legislation.

The Constitutional Council is not situated at the summit of a hierarchy of judicial or administrative courts. The Constitutional Council is not a supreme court placed above the *Conseil d'État* and the Court of Cassation.

II. Basic texts

- The Constitution: Title VII, Articles 56 to 63 and Article 54 (Title VI); Articles 7, 16, 37, 41, 46, 74 and 77;
- Ordinance no. 58-1067 of 7 November 1958
- Decree no. 59-1292 of 13 November 1959 on the obligations of members of the Constitutional Council;
- Decree no. 59-1293 of 13 November 1959 on the organisation of the General Secretariat of the Constitutional Council

Priority preliminary rulings on the constitutionality of enacted legislation (*La question prioritaire de constitutionnalité*)

- Institutional Law no. 2009-1523 of 10 December 2009 on application of Article 61-1 of the Constitution;
- Decision no. 2009-595 DC of 3 December 2009, concerning the institutional law on application of Article 61-1 of the Constitution;
- Decree no. 2010-148 of 16 February 2010 implementing Institutional Law no. 2009-1523 of 10 December 2009 on application of Article 61-1 of the Constitution;
- Decree no. 2010-149 of 16 February 2010 on continuation of legal aid in the event of examination of a priority preliminary question on constitutionality by the *Conseil d'État*, the Court of Cassation or the Constitutional Council;
- Rules of Procedure of the Constitutional Council concerning priority preliminary rulings on constitutionality.

Review of legislation pertaining to the overseas territories

- Institutional Act no. 99-209 of 19 March 1999 on the Statute of New Caledonia (Article 99 to 107);
- Institutional Act no. 2004-192 of 27 February 2004 on the Autonomous Statute of French Polynesia (Article 12);
- Code of Local Government: Articles L.O. 6213-5 (Saint-Barthélemy) and L.O. 6313-5 (Saint-Martin).

Presidential elections

- Referendum Act no. 62-1292 of 6 November 1962 on the election of the President of the Republic by direct universal suffrage;
- Decree no. 2001-213 of 8 March 2001 implementing the Law of 6 November 1962 on the election of the President of the Republic by direct universal suffrage (Official Gazette of 21 March 1999);
- Constitutional Council decision of 24 February 1981 (drawing lots to establish the list of candidates).

Electoral disputes – Incompatibilities

- Regulation governing the procedure to be followed before the Constitutional Court in complaints concerning the conduct of referendums;
- Regulations governing the procedure to be followed before the Constitutional Council in disputes concerning the election of deputies and senators;
- Electoral Code (Articles directly concerning the Constitutional Council): L.O. 136, L.O. 136-1, L.O. 137 to L.O. 153, L.O. 159, L.O. 160, L.O. 176-1, L.O. 179 to 189, L.O. 292, L.O. 297, L.O. 303, L.O. 319, L.O. 325.

III. Composition, procedure and organisation

1. Composition

The Constitutional Council is composed of nine members. The members of the Council are appointed by the President of the Republic and by the Presidents of each of the Parliamentary Assemblies (Senate and National Assembly). Since the constitutional reform of 23 July 2008, the appointment process includes a referral for opinion to the Constitutional Law Committee of each chamber of parliament, under procedures that vary according to the appointing authority. The appointment of a candidate proposed by the appointing authority can be blocked by a three-fifths majority vote.

One third of the Council's members are renewed every three years. The President of the Republic and the President of each chamber each appoint one member to the Council every three years. Members may not be reappointed. However, if they were appointed to replace a member who resigned or was unable to serve his or her full term of office, upon expiry of the latter the replacement member may be appointed for a nine-year term, provided that he or she served as a replacement member for less than three years. The members are appointed for a non-renewable nine-year term. However, where a member is appointed to replace another member who is unable to complete his or her term of office, the term of office of the replacement may be extended for the duration of a complete mandate if, on expiry of the mandate of the member who was replaced, his or her replacement has not occupied the post for more than three years.

The members appointed take an oath before the President of the Republic.

Former Presidents of the Republic are *de jure* members of the Constitutional Council

The President of the Constitutional Council is appointed by the President of the Republic from among the members.

There is no age or occupation requirement in order to become a member of the Constitutional Council. The office is nonetheless incompatible with being a member of the Government or the Social and Environmental Council or with the Office of Rights Defender (Ombudsperson). It is also incompatible with any electoral mandate. Members are also subject to the same professional incompatibilities as Members of Parliament. During their term of office, members of the Council cannot be appointed to public posts or be promoted on merit if they are civil servants.

Members of the Constitutional Council can freely relinquish their functions and can be compulsorily retired from office in the event of incompatibility or permanent physical incapacity established by the Constitutional Council.

2. Procedure

The Constitutional Council is a court whose sessions are organised as and when applications are referred to it.

When asked to give a ruling on the constitutionality of legislation before it is enacted, the Constitutional

Council must deliver its decision within one month or within eight days in urgent cases.

When asked to give a priority preliminary ruling on the constitutionality of enacted legislation, the Constitutional Council has three months to deliver a decision. During this period the parties are afforded the possibility of submitting observations under an adversarial procedure.

The Constitutional Council only sits and passes judgment in plenary session. Its deliberations are subject to a quorum rule which requires the actual presence of seven judges. If opinions are equally divided, the President has the casting vote. There is no provision for dissenting opinions. The Council's discussions, in select or plenary session, and its votes are neither conducted in public nor published.

Each case is examined by a member of the Council, appointed rapporteur by the President. This does not apply to electoral disputes. In electoral disputes the examination of the case is entrusted to one of the three sections composed of three members chosen by lot, each of whom must have been appointed by a different authority.

The procedure is written and both parties are represented. However, the parties in electoral disputes may ask to be heard. Moreover, when a priority question on constitutionality (*question prioritaire de constitutionnalité*) is examined, a hearing is held.

3. Organisation

A Secretary General appointed by decree by the President of the Republic heads the administrative services and the judicial service which is composed of administrative staff of the parliamentary assemblies, members of the judiciary or administrative courts and academics.

A documentation service assists in legal research operations. The secretariat also comprises of: financial service, an external relations service, an information technology service and a registry for electoral disputes. The remainder of the staff are responsible for reception, secretarial, catering and transport services.

The Constitutional Council is financially autonomous. The President of the Council establishes its budget, the amount of which is included in the Finance Bill under the heading public authorities (*pouvoirs publics*).

IV. Jurisdiction

The powers of the Constitutional Council can be divided into two categories:

1. Judicial authority, covering two types of disputes:

a. Normative reviews

As the court responsible for assessing the constitutionality of legislation, the Constitutional Council performs both *ex ante* and *ex post* reviews.

Ex ante reviews:

The Constitutional Council is required on a mandatory basis to examine organic laws and the rules of procedure of the houses of parliament prior to promulgation of the former and prior to the entry into force of the latter. It may also be required to examine international undertakings prior to their ratification or approval. As regards ordinary legislation, the Council may be required to examine laws prior to their promulgation. In the latter two cases, the referrals to the Council are made in different ways, depending upon the act under review, i.e. either by a political authority (the President of the Republic, the Prime Minister or the president of the National Assembly or the Senate), or by at least 60 Members of Parliament or 60 senators.

Since 1999, the Constitutional Council has also had the power to examine the constitutionality of dependent-territory laws passed by the Congress of New Caledonia.

Ex post reviews:

Since 1 March 2010 and following the constitutional amendment of 23 July 2008, the Constitutional Council has had the power to consider whether a legislative provision already in force violates the rights and freedoms guaranteed under the Constitution, acting on referrals by the *Conseil d'État* or the *Cour de Cassation*. In such cases, the constitutional reviews are conducted on the initiative of applicants, since the questions are raised in applications filed during proceedings before a court. Such cases involve applications for priority preliminary rulings on questions of constitutionality QPC (*Question prioritaire de constitutionnalité*).

As the court responsible for delineating the statutory and regulatory fields, the Constitutional Council may also be asked by the president of the relevant house of parliament or by the Prime Minister during parliamentary discussions, or *ex post* by the Prime

Minister, to issue rulings with a view to reclassifying certain legislative provisions, i.e. amending by decree legislative provisions whose content is regulatory in nature.

Following the amendment of 23 July 2008, the Constitutional Council may be called upon to verify whether the conditions under which bills are tabled comply with those laid down in an organic law (Organic Law 2009-403 of 15 April 2009).

Lastly, the Constitutional Council rules on the division of powers between the State and certain overseas territories (to date: French Polynesia, Saint-Barthélemy and Saint-Martin).

b. Electoral and referendum disputes:

The Constitutional Council decides on the lawfulness of presidential elections and the conduct of referendums of which it announces the results. It also decides on the lawfulness of parliamentary elections and the rules on eligibility and incompatibility of Members of Parliament.

Referrals on electoral matters to the Council, which are readily available to the electorate, have increased considerably following the enactment of legislation on the organisation and supervision of the funding of electoral expenses on which, in the case of parliamentary and presidential candidates, the Council adjudicates. On 4 October 2012, the Council had given 2871 decisions on electoral questions and 889 on legislation (including 650 DC).

2. Consultative powers

The Constitutional Council gives its opinion when officially consulted by the Head of State, whenever Article 16 of the Constitution is applied and, thereafter, on decisions taken within that context.

It verifies that the implementation conditions continue to be met at the request of either the President of one of the chambers of parliament or of 60 deputies or senators after 30 days or of its own motion after 60 days or at any time thereafter.

Moreover, the Government consults the Council on texts concerning the organisation of the election of the President of the Republic and referendums. The Council also issues observations on past parliamentary and presidential elections, as well as on upcoming elections, with the aim of proposing to the public authorities all kinds of measures likely to improve the conduct of such elections.

V. Nature and effects of decisions

All decisions are reached by the same formal procedure, comprising:

- the approval of the applicable texts and procedural stages;
- the presentation of the reasons in the form of recitals analysing the arguments put forward, setting out the principles applicable to the case and replying to the application;
- an operative part, divided into articles, sets out the solution adopted.

1. Types of decision

The various types of decision can be identified by the letters which follow the registration number of the application.

Decisions are classified as follows:

- decisions on the constitutionality of legal rules carry the letters DC (review of conformity) or LP (laws passed by the Congress of New Caledonia);
- decisions on applications for a priority preliminary ruling on the constitutionality of enacted legislation, which carry the letters QPC;
- decisions on the division of powers between legislative and regulatory authorities carry the letters L (laws down-graded to regulations) or FNR (*fin de non recevoir* – objection as to admissibility, i.e. examined while the law was still being drafted);
- the decisions on the division of powers between the state and overseas communities authorities carry the letters L-OM;
- decisions on parliamentary electoral disputes carry the letters AN (*Assemblée nationale*) or S (*Sénat*) and an indication of the constituency or *department*;
- decisions relating to the incompatibility rules for Members of Parliament (carrying the letter I) or to their removal from office (carrying the letter D);
- decisions relating to presidential elections (carrying the letters PDR).

2. Legal effects of decisions

The decisions of the Council are binding on the public authorities and all administrative and judicial authorities. No appeal lies against them. The legal force of the decision attaches not only to the judgment itself but also to the necessary reasons in support of it. However, the Constitutional Council does allow appeals on matters of material error in electoral cases.

Decisions on conformity (DC) lead to the total or partial striking down of the law but not its annulment, since they are handed down before promulgation of the law, the legal act required to bring it into force.

Rules of procedure of either chamber of parliament that are held to be unconstitutional cannot be applied.

Where a clause of an international commitment is ruled to be unconstitutional by the Constitutional Council, authorisation to ratify or approve the commitment concerned may be given only after an amendment of the Constitution.

Where a decision of unconstitutionality is given by the Constitutional Council in response to an application for a priority preliminary ruling on the constitutionality of enacted legislation, the provision(s) in question are repealed with effect from the date of publication of the decision or a later date specified in the decision. Under Article 62 of the Constitution, the Council may determine conditions and limits for challenging the effects of an unconstitutional provision.

The effects of decisions concerning electoral disputes range from the voiding of ballot papers to the electoral procedures themselves and can include declaring that a candidate is ineligible and/or dismissing an elected candidate from office.

3. Publication

The Council's decisions are notified to the parties and published in the "*Journal Officiel de la République Française – Lois et décrets*" (Official Gazette of the French Republic) with the text of Parliament's referral (since 1983) and the Government's observations (since 1995).

An annual compendium of decisions is drawn up under the high authority of the Council about three months after the end of the reference year. It comprises the full text of decisions (not of opinions), and an analytical table, with an English translation since 1990.

Since 1996, the Constitutional Council has also published a quarterly review entitled "*Les cahiers du Conseil constitutionnel*" (formerly published twice yearly).

Lastly, all decisions since the Constitutional Council was first established are available on the Council's website (www.conseil-constitutionnel.fr) in some cases along with comments by the Council's legal service.

VI. Conclusion

Since 2010, the annual number of decisions by the Constitutional Council has multiplied two or threefold as compared with the period prior to the reform that introduced priority preliminary rulings on the constitutionality of enacted legislation and by a far greater factor compared with the period prior to the introduction of referrals by Members of Parliament in 1974.

The remarkable growth in Constitutional Council case law is essentially the result of a combination of two elements:

- first of all, a case-law development, since in its decision of 16 July 1971 on “Freedom of association”, the Constitutional Council unambiguously recognised that the Declaration of the Rights of Man and the Citizen of 26 August 1789 and the Preamble to the 1946 Constitution, both of which are referred to in the Preamble to the 1958 Constitution, form part of the reference constitutional standards and can therefore be relied on in constitutional review proceedings. This major advance in the case-law confirmed the Council’s role as the guarantor of rights and freedoms;
- Secondly, institutional changes, since at least two key constitutional reforms for the Council have taken place: in 1974 it became possible for a minority of Members of Parliament (60 deputies or 60 senators) to refer an ordinary law to the Council, a right previously confined to the President of the Republic, the Prime Minister and the President of either chamber of parliament; in 2008, with the introduction of priority preliminary rulings on the constitutionality of enacted legislation it became possible for any party to proceedings before any court to challenge the applicable law as incompatible with constitutionally guaranteed rights and freedoms, a matter which can now be referred to the Constitutional Council by either the Court of Cassation or the *Conseil d’État*.



Georgia

Constitutional Court

I. Introduction

The Constitutional Court was established in 1996. The legal basis of its organisation and activity is the Constitution, the Organic Law “On the Constitutional Court”, the Law “On the Constitutional Legal Proceedings” and the Rules of the Constitutional Court. In 2002-2006 the afore-mentioned legislative basis was improved – amendments were made to the Organic Law “On the Constitutional Court” and to the Law “On the Constitutional Legal Proceedings”. The adopted amendments established more precise and facilitated constitutional procedures.

According to the amendments of 7 September 2006 to the Organic Law “On the Constitutional Court” the seat of the Constitutional Court shall be in Batumi. The Constitutional Court has moved from Tbilisi to Batumi on 5 July 2007.

The Constitutional Court maintains active relations with international organisations and Constitutional Courts of other countries. The Constitutional Court is a full member of the Conference of European Constitutional Courts.

II. Basic texts

- Constitution of Georgia;
- Law on the Constitutional Court (adopted on 31 January 1996);
- Law on Constitutional Proceedings (adopted on 21 March 1996);
- Law on social guarantees for members of the Constitutional Court (adopted on 25 June 1996);
- Rules of the Constitutional Court.

III. Composition, procedure and organisation

The Constitutional Court consists of nine judges – the members of the Constitutional Court. Three members of the Constitutional Court are appointed by the President, three members are elected by Parliament by no less than three fifths of the number of Members of Parliament and three members are appointed by the Supreme Court. The term of office of a member of the Constitutional Court is ten years.

A member of the Constitutional Court is independent in carrying out his or her duties. He or she evaluates the factual circumstances and reaches a decision only in accordance with the Constitution. Interference in the activity of a member of the Constitutional Court is not allowed. The Constitution secures the personal immunity of a member of the Constitutional Court. The legislation provides for other guarantees with the view of securing independence of a member of the Court.

The Constitutional Court elects the President of the Constitutional Court from among its members for a term of five years. A candidate to the office of the President of the Court is nominated by an agreed proposal of the President, the President of the Parliament and the President of the Supreme Court. The President of the Court may not be re-elected.

Two Vice-Presidents of the Constitutional Court and the Secretary to the Court, are elected by the Plenum for a term of 5 years upon the proposal of the President of the Constitutional Court. A Vice-President may not be re-elected. A Vice-President of the Constitutional Court presides over sittings of a Board, performs particular functions under the instructions of the President of the Constitutional Court. In case of absence of the President of the Court or his or her inability to perform functions, one of the Vice-Presidents acts on the President's behalf under the instructions of the latter.

The Secretary to the Constitutional Court is in charge of organising the sittings of the Plenum and Boards, taking the minutes of the sittings, distributing court materials as well as taking measures intended to enforce judgments of the Constitutional Court, etc.

The Constitutional Court consists of the Plenum and two Boards.

All nine members of the Constitutional Court are represented at the Plenum. Each of Board consists of four judges. The composition of the Boards is approved by the Plenum upon the proposal of the President of the Court. While considering and adjudicating upon a case, the Board acts on behalf of the Constitutional Court.

The Staff of the Constitutional Court provides legal and administrative support necessary for the proper functioning of the Court. The Staff is guided by the Chief of the Staff. The administrative structure of the Court is as follows: Secretariat of the President of the Constitutional Court, Department of Research and Legal Provision, Organisational Office, Finance Office and Court Security Office.

IV. Jurisdiction

The Constitutional Court is the judicial body of constitutional review equipped with the authority to examine constitutionality of normative acts, secure effective separation of powers, protect human rights and freedoms as well as provide constitutional safeguards for public order.

The Constitutional Court performs its functions in line with the principles of legality, judicial independence, collegiality, transparency, equality of parties and adversarial nature of the proceedings, immunity and tenure of the members of the Constitutional Court are guaranteed by the corresponding legislation.

Pursuant to the Article 89.1 of the Constitution, the Court can be addressed either by a constitutional claim or a constitutional submission.

The following shall have the right to lodge a constitutional claim or a constitutional submission to the Constitutional Court: the President; no less than one fifth of the Members of Parliament; Courts of General Jurisdiction; the higher state bodies of Abkhazia and the Autonomous Republic of Adjara; the Public Defender; Citizens, other individuals residing in Georgia and legal entities of Georgia.

Pursuant to the Article 89.e of the Constitution and Article 19.1 of the Organic law on the Constitutional Court, the Constitutional Court on the basis of a constitutional claim or a submission is authorised to consider and decide on:

1. Conformity with the Constitution of the Constitutional Agreement, normative resolutions of Parliament, normative acts of the President, the Government and of the Adjarian and Abkhazian (Autonomous Republics) supreme state bodies, as well as of the adoption, signature, publication and entry into force of Georgian legal acts and resolutions of Parliament

The Constitutional Agreement

The Constitutional Agreement regulates the relationship between the State and the Autocephalous Orthodox Church, which should be in conformity with universally recognised international standards of human rights and fundamental freedoms.

Laws

The Constitutional Court examines not only the conformity of the substance of laws with the Constitution, but also their procedural (adoption,

signature, publication and entry into force of laws) compliance as provided in the Constitution.

Normative Resolutions of Parliament

The object of the consideration of the Constitutional Court can only be normative resolutions adopted by Parliament. Non-normative resolutions of Parliament are aimed to regulate administrative issues and stay out of the Court's competence.

Normative Acts of the President

Pursuant to the Law on Normative Acts, normative acts of the President include: Presidential Decree and Order. A Decree of the President is a normative act of the same force as the law and is issued by the President in only those cases that are envisaged in the Constitution. In particular, presidential decrees are issued in the case of state emergency and in exceptional cases involving taxation and budgetary issues.

In all other instances, the President issues a presidential order. An individual order is the one by which the President grants office to the Members of the Government, the judges of the courts of general jurisdiction and Members of the Constitutional Court. The President as a Commander-in-Chief of the Georgian armed forces issues an order, which either can be a normative or alternatively an individual legal act.

Normative Acts of the Government

Normative act of the Government is a resolution. Resolution of the Government is adopted on the basis of the Constitution, applicable laws and other normative acts.

Normative Acts of the Governments of Abkhazian and Adjarian Autonomies

Pursuant to the Law on Normative Acts, normative acts of supreme bodies of the Governments of the Autonomous Republics of Adjara and Abkhazia include: the Constitution of an Autonomous Republic, laws of an Autonomous Republic, and resolutions of the Supreme Council of an Autonomous Republic. The Court examines the constitutionality of these acts in part of its substance, because the rules of adoption, issuance and entry into force of these acts are not defined by the Constitution.

The President, the Government and no less than one fifth of the Members of Parliament shall have the right to lodge a constitutional claim with the Constitutional Court concerning conformity with the Constitution

normative acts of higher state bodies of Abkhazia and the Autonomous Republic of Adjara.

2. Disputes between State Bodies regarding their Competencies

The Board of the Constitutional Court reviews disputes on the matters related to the competencies of the state bodies. The competence of a state body must be violated by a normative act. The relief of the constitutional claim concerning the dispute between state bodies on competence related issues results in the invalidation of the normative act in question from the moment of its issuance.

The President and no less than one fifth of the Members of Parliament shall have the right to lodge a constitutional claim with the Constitutional Court, if they believe that the scopes of the constitutional powers of Parliament or another state body are infringed upon; the state bodies listed in Article 89 of the Constitution shall also have such a right, if they believe that the scopes of their constitutional powers have been infringed upon.

3. Constitutionality of Formation and Activity of Citizens' Political Unions

The formation and participation in the activities of a political party or a political union is the constitutionally guaranteed right of citizens. At the same time, the Constitution establishes certain limitations. The formation and functioning of civic and political associations aimed at overthrowing or forcibly changing the constitutional order, infringing upon the independence and territorial integrity of the country or conducting propaganda of war or violence, provoking national, local, religious or social animosity, is not allowed. In case of the non-conformity with the abovementioned limitations, the act may be deemed unconstitutional.

The President, no less than one fifth of the Members of Parliament and the higher state bodies of Abkhazia and the Autonomous Republic of Adjara shall have the right to lodge a claim with the Constitutional Court concerning constitutionality of the formation of political associations of citizens and their activity.

4. Disputes about the Constitutionality of Elections and Referenda

Consider disputes on constitutionality of provisions on referenda and elections as well as dispute on constitutionality of referenda and elections held on the basis of above mentioned provisions.

The President, and in some cases the Public Defender, have the right to lodge a constitutional complaint to the Constitutional Court.

5. Review of normative acts concerning rights and fundamental freedoms

The Court may consider, on the basis of a claim of a person or a Public Defender, constitutionality of normative acts in relation to fundamental human rights and freedoms enshrined in Chapter Two of the Constitution. The second chapter of the Constitution addresses universally recognised human rights and fundamental freedoms. The Constitutional Court has the authority to examine the compliance of normative acts with constitutionally guaranteed human rights and freedoms.

Citizens, legal entities and other individuals residing, as well as the Public Defender shall have the right to lodge a constitutional claim, if they believe that their rights and freedoms recognised by Chapter Two of the Constitution are infringed or may be directly infringed upon.

6. Constitutionality of the recognition of the powers of a Member of Parliament or of the premature termination of these powers

The Constitutional Court shall be authorised to consider constitutionality of international treaties and agreements before or after their ratification.

The President, the Government and no less than one fifth of the Members of Parliament have the right to lodge a constitutional claim on constitutionality of international treaties and agreements or particular provisions thereof, whereas a constitutional submission shall be lodged by no less than one fifth of the Members of Parliament.

7. Constitutionality of the recognition of the powers of a Member of Parliament or of the premature termination of these powers

The President, no less than one fifth of the Members of Parliament, as well as a citizen whose office as of a member of Parliament is not recognised or is pre-term terminated by Parliament shall have the right to lodge a constitutional claim on constitutionality of the decision of Parliament on recognition of the office or pre-term termination of the office of a Member of Parliament.

8. Issue of violation of the Constitution by the President, the President of the Supreme Court, the Member of Government, the Prosecutor General, the President of the Chamber of Control and Members of the Council of the National Bank

The Constitution outlines the impeachment procedure of the President, the President of the Supreme Court, a Member of Government, the Prosecutor General, the President of the Chamber of Control and against Members of the Council of the National Bank. If the issue of the termination of office is raised with an accusation of the violation of the Constitution, a conclusion of the Constitutional Court is necessary. The Plenum of the Court considers the case of impeachment during a special session.

In the above mentioned cases, no less than one third of the total number of Members of Parliament have the right to lodge a constitutional submission with the Constitutional Court.

9. Disputes regarding the Constitutional Law on the Status of the Autonomous Republic of Adjara

The President, the Government and no less than one fifth of the Members of Parliament, Supreme Council of the Autonomous Republic of Adjara have the right to lodge a constitutional claim with the Constitutional Court.

10. Review the compatibility of normative acts of the Supreme Council (the Parliament) of the Autonomous Republic of Adjara

Parliament has the right to lodge a constitutional submission by the resolution with the Constitutional Court on conformity of normative acts of the Supreme Council of the Autonomous Republic of Adjara with the Constitution, the Constitutional Law "On the Status of the Autonomous Republic of Adjara", the constitutional agreement, international treaties and agreements and laws.

11. Submissions of Courts of General Jurisdiction

If the court of general jurisdiction throughout the trial concludes that the law or the normative act which the court shall apply for deciding a case, wholly or partly contravenes the Constitution, it shall terminate proceedings and apply to the Constitutional Court. The case shall be reopened once the Constitutional Court delivers its verdict on the matter.



Germany

Federal Constitutional Court

I. Introduction

1. Date and context of establishment

The Federal Constitutional Court (*Bundesverfassungsgericht*) is the first body of its kind in German constitutional history. It was established in 1951 as a reaction to the erosion of the Constitution during the totalitarian rule of National Socialism, which showed the need for a special body to protect human rights, democracy, the rule of law and the federal structure as laid down in the Constitution.

2. Position in the hierarchy of courts

The Court has the power to reverse, upon constitutional complaint, any decision of any other German Court which is held to violate fundamental rights. It is, however, not an instance of revision above the normal stages of appeal. It will interfere with the application of ordinary law by the regular courts only in cases of failure to comply with the rules and principles of the Constitution.

II. Basic texts

- Basic Law (*Grundgesetz* – GG) of 1949, most recently amended in 2012.
- Law on the Federal Constitutional Court (*Gesetz über das Bundesverfassungsgericht* – BVerfGG) of 1951, most recently amended in 2012.
- Rules of Procedure of the Federal Constitutional Court (*Geschäftsordnung des Bundesverfassungsgerichts* – GOBVerfG) of 1986, most recently amended in 2002.

III. Composition, procedure and organisation

1. Composition

The Federal Constitutional Court is composed of 16 justices (§ 2.1 and 2 BVerfGG).

One half of the Court's members are elected by the *Bundestag* (Federal Parliament), the other half by the *Bundesrat* (the second legislative chamber), which is composed of representatives of the federal states (§ 5.1 sentence 1 BVerfGG). In both chambers, a two-thirds majority is required for election; the

President and the Vice-President of the Court are elected alternately by the *Bundestag* and the *Bundesrat* (§ 9.1 sentence 1 BVerfGG). Following their election, all justices are appointed by the Federal President (§ 10 BVerfGG).

The term of office for a justice is 12 years, but does not extend beyond the age of retirement, which is 68 years (§ 4.1 and 2 BVerfGG). Justices cannot be re-elected (§ 4.2 BVerfGG).

In order to qualify for appointment as a justice to the Federal Constitutional Court, candidates must be forty years of age and possess the qualifications for judicial office as specified in the German Judiciary Act (§ 3.1 and 2 BVerfGG). Except for three justices of each Panel who must have served in one of the highest federal courts of justice (§ 2.3 BVerfGG), they may come from different professions. During tenure, the mandate of a justice of the Federal Constitutional Court is incompatible with all other professional activities except those of a professor of law at a German university (§ 3.3 and 4 BVerfGG).

Justices do not enjoy immunity. A justice is released from service on his or her demand (§ 12 BVerfGG). With the authorisation of the Court, a justice can be taken out of active service in case of permanent incapability to fulfil his or her duties (§ 105 BVerfGG), or dismissed if convicted of committing a dishonourable act or sentenced to over six months' imprisonment, or in case of a breach of duties so offensive that remaining in office is intolerable (§ 105 BVerfGG).

The Federal Constitutional Court is divided into two Panels (Senate), each composed of eight justices (§ 2.1 and 2 BVerfGG). The Court's President presides over one Panel while the Court's Vice-President presides over the other one (§ 15.1 BVerfGG). The Panels work independently of each other, yet both speak for the Court. Their respective competences (cf. § 14 BVerfGG) as well as the reporting justice for a given case (§ 15a.2 BVerfGG) are predetermined partly by law, partly by a schedule of responsibilities adopted by plenary decision. A plenary decision on a pending case is rare and only passed if one Panel wants to deviate from the ratio *decidendi* of a decision of the other Panel (§ 16.1 BVerfGG). The justices are also sitting in minor adjudicating bodies, the so-called Chambers (*Kammern*), consisting of three justices each (§ 15a BVerfGG), with three chambers for each Panel.

2. Procedure

The Federal Constitutional Court is a permanent court. In general, each Panel meets twice a month for two or three days in order to deliberate on the judgments or, less frequently, hold public hearings. Most other decisions are made by the Chambers by circulating drafts. Most cases are decided based on written procedures. Public hearings before the Panel are rare, lasting one or two days; they are sometimes mandated by law, but discretionary in constitutional complaint proceedings.

The decisions of a Panel are usually passed by an absolute majority. The Presidents's or Vice-President's vote does not carry greater weight than that of any other justice. If the Panel is divided four to four, the applicant will not win the case (§ 15.4 BVerfGG). If a justice disagrees with the majority, he or she may write a dissenting opinion (§ 30.2 BVerfGG).

Most cases (around 99%) are decided by the Chambers, to implement doctrine that has already been clarified by a Panel, in individual constitutional complaint proceedings (*Verfassungsbeschwerden*) and in proceedings on the concrete review of statutes (*konkrete Normenkontrollverfahren*). Chamber decisions can only be passed unanimously (§ 93d.3 BVerfGG), which is why there may be an intense exchange of memoranda or *ad hoc* meetings. If there is no consensus, only a Panel decision can break the impasse. Chambers may refuse the admission of an individual constitutional complaint for decision if it has no fundamental constitutional importance or if a decision is not necessary to protect fundamental rights (§§ 93a and 93b BVerfGG). A Chamber may grant the relief sought by such a complaint if certain requirements are met.

Most of the Court's work is based on circulating draft treatments of the case with a draft judgment and the full file with all relevant material, including scholarly work and comparative law. This is prepared by the reporting Justice and to a large degree by the clerks. It relies heavily on what the parties submitted. In all types of proceedings, applications must be submitted in writing, state reasons and contain the necessary evidence (§ 23.1 BVerfGG). Here, the parties must not be represented by an attorney or a professor of law at a German university (§ 22.1 BVerfGG), while they may ask for financial support to hire one (based on the fundamental right of equal access to justice for the poor, applicable before the Federal Constitutional Court as well), and must be represented in oral arguments before the Federal Constitutional Court.

There are time limits for applications: An individual constitutional complaint must be brought within one month after the challenged decision or act has been served by a public authority or a court (§ 93.1 BVerfGG). If the complaint is directed against a statute, the time limit is one year (§ 93.3 BVerfGG). In case of a conflict between supreme federal bodies or between the Federation and the *Länder* (federal states), a party has to initiate proceedings within six months (§§ 64.3, 69 BVerfGG). Pursuant to the first sentence of § 22.1 BVerfGG, the parties may be represented at any stage of the proceedings by an attorney or a professor of law at a German institute of higher education. In oral arguments before the Federal Constitutional Court, they must be represented in this manner.

The proceedings are free of charge (§ 34.1 BVerfGG). Only in case of an abuse of the constitutional jurisdiction may a party or its attorney be charged with a fee of up to € 2,600.00 (§ 34.2 BVerfGG).

Constitutional complaints which are clearly inadmissible or obviously do not have sufficient prospects of success are assigned to the Court's General Register (§ 60 GOBVerfG). Only if a complainant, after being informed about this by the Court, insists on a judicial decision, is the constitutional complaint transferred to the register of proceedings (§ 61.2 GOBVerfG) and thus enters into the admission procedure.

3. Organisation

The Federal Constitutional Court is a constitutional body and therefore not subject to supervision by any Ministry. The budget of the Federal Constitutional Court is part of the federal budget adopted by Parliament.

The President represents the Court and heads its administration. Fundamental organisational decisions are taken by the plenary (the 16 justices sitting together), which also decides on the preliminary estimates of the budget (§ 1.2 and 3 GOBVerfG). In practice, the President entrusts the chief administrative officer (*Direktor beim Bundesverfassungsgericht*) with most of the administrative tasks (§§ 14, 15 GOBVerfG).

In addition to the justices, the Federal Constitutional Court has a staff of almost 250. Each justice works with four research assistants, as clerks, of his or her own choice. The majority of these assistants are judges or public prosecutors from the civil, criminal, administrative, social, financial, or labour courts, and are usually delegated by the states which employ

them to the Court for about three years. Other research assistants come from universities or from federal or state administrative positions.

IV. Jurisdiction

The competences of the Federal Constitutional Court are determined by the Basic Law and by statute. The Court may not act of its own motion, but only in response to an application.

The most important competences of the Federal Constitutional Court are:

1. Constitutional complaint (Article 93.1 no. 4a GG, §§ 13 no. 8a, 90 *et seq.* BVerfGG)

This is by far the most common type of proceedings. Everyone may lodge a constitutional complaint on the assertion that his or her fundamental rights have been directly infringed by an act of public authority, such as a decision of a court, legislation or a measure of an administrative body.

A constitutional complaint requires admission for decision. The Court has to accept it if it is of fundamental constitutional significance or if it is necessary to accept the case in order to enforce the complainant's rights, e.g. in cases where the complainant would otherwise suffer severe harm (§ 93a sec. 2 BVerfGG). A constitutional complaint may be brought only after exhaustion of all remedies offered by other courts (§ 90 sec. 2 BVerfGG).

2. Proceedings on the constitutionality of statutes

Only the Federal Constitutional Court may declare a statute incompatible with the Basic Law. If a court considers a statute to be unconstitutional and therefore wishes not to apply it in a specific case, it must submit it to the Federal Constitutional Court (concrete review of statutes (*konkrete Normenkontrolle*), Article 100.1 GG, §§ 13 no. 11, 80 *et seq.* BVerfGG). Additionally, the Federal Government, a State Government or one fourth of the members of the Bundestag may initiate abstract proceedings for the review of statutes (abstract review of statutes (*abstrakte Normenkontrolle*), Article 93.1 no. 2 GG, §§ 13 no. 6, 76 *et seq.* BVerfGG).

3. Constitutional disputes (Article 93.1 no. 1 GG, §§ 13 no. 5, 63 *et seq.* BVerfGG)

The jurisdiction of the Federal Constitutional Court may also be invoked if differences of opinion arise between constitutional bodies (organ disputes) or between the Federation and the *Länder* (State-Federal conflicts) regarding their respective

constitutional rights and duties. In organ disputes, the matters at issue may concern questions of the law that governs political parties, elections, or parliament. State-Federal conflicts frequently have to do with questions of the distribution of powers in the federation.

Additionally, the Court is competent, *inter alia*, for proceedings concerning the scrutiny of elections (Article 41.2 GG, §§ 13 no. 3, 48 BVerfGG) or the ban on political parties (Article 21.2 GG, §§ 13 no. 2, 43 *et seq.* BVerfGG), as well as for constitutional complaints that are lodged by municipalities (Article 93.1 no. 4b GG, §§ 13 no. 8a, 91 BVerfGG).

V. Nature and effects of decisions

The decisions of the Federal Constitutional Court are final and cannot be appealed. However, some cases are brought to international courts, namely the European Court of Human Rights in Strasbourg. Decisions passed by the Court pursuant to oral arguments are issued as judgments; decisions handed down in the absence of oral argument are passed as orders (§ 25.2 BVerfGG).

The decisions of the Federal Constitutional Court are binding upon federal and *Land* (state) constitutional bodies as well as on all courts and other authorities (§ 31.1 BVerfGG). Decisions concerning the compatibility or incompatibility of law with the Constitution have the force of law (§31.2 BVerfGG).

In proceedings involving review of a statute, including constitutional complaint proceedings, the Federal Constitutional Court may hold laws or regulations null and void (§ 78 BVerfGG). The norms in question then immediately cease to operate. More often, the Court chooses to declare statutes to be incompatible with the Constitution (but not void). In this case, and unless the Court sets a time limit, the statute remains in force until its legislative abrogation, for which the Constitutional Court may also set a time limit.

If a statute is declared null and void or incompatible with the Constitution, non-appealable administrative acts or court rulings passed on the basis of this statute remain in force. Only the act which was the object of the case before the Constitutional Court is directly voided as a consequence of the nullity of the legislative act upon which it was based. For all final criminal convictions based on a rule which has been declared null and void or incompatible with the Basic Law, new proceedings may be instituted in accordance with the provisions of the Code of Criminal Procedure (§ 79 BVerfGG).

In constitutional complaint proceedings that challenge a court ruling, the Federal Constitutional Court may quash the decision of a court and remit the case (§ 95.2 BVerfGG). As a general rule, the Federal Constitutional Court does not replace the prior court's ruling with its own.

If a decision in principal proceedings cannot be made in good time, the Federal Constitutional Court may, on application or of its own motion, grant a temporary injunction where this is urgently necessary to avert serious detriment, to prevent imminent violence, or for any other important reason (§ 32 BVerfGG).

All Panel decisions are published in the digest *Entscheidungen des Bundesverfassungsgerichts* (abbreviated BVerfGE); of the Chamber decisions, the more important ones can be found in the digest *Kammerentscheidungen des Bundesverfassungsgerichts* (BVerfGK). The Court also publishes press releases of the Panel and of the most important Chamber decisions.

All press releases and important decisions passed since 1998 are available on the Federal Constitutional Court's website, www.bundesverfassungsgericht.de, as are statistics on the proceedings before the Court. Many decisions are also published in law reviews and entered into the legal database JURIS.

Selected decisions and press releases in English are available via the English version of the Federal Constitutional Court's website and published in the series *Decisions of the Bundesverfassungsgericht* vol. 1-5, each with a thematic focus.



Greece

The Hellenic Council of State

I. Introduction

The historical role of the Council of State

The Hellenic Council of State (*Symvoulion tis Epikrateias*), as we know it today, was established by the Constitution of 1911 and began operating in 1929. However, in modern Greek history one comes across the institution by the name of "Council of State" at two more dates before 1911.

It was in 1833, under the regime of absolute monarchy, that the Council of State was introduced as a double-natured institution, that is, as a consultative organ and as a Supreme Administrative Court. From 1835 onwards, the Council of State performed the role of a "King's Council" (*Conseil du Roi*), which was quite important in a regime presenting no elements of a representative assembly. The most important moment in the nine-year history of the Council of State of the time was its active participation in the revolution of the 3 September 1843, which led to the adoption of the Constitutional Pact of 1844. Nonetheless it didn't cease to be considered as an organ associated with absolute monarchy and was therefore abolished by an express provision of the Constitution of 1844.

Later on, the Council of State was re-established by the Constitution of 1864 as a purely law-making body. In this form it operated from February until November of 1865, when it was abolished by a Resolution of Parliament since in the minds of the politicians of that era, it was still associated with the monarchy.

The institution of the Council of State was established for a third time by the Constitution of 1911 with the aim to serve as the basic guarantor of the principle of the rule of law. This constituted a goal set by the first government of Eleftherios Venizelos. The French *Conseil d'État* was the declared source of inspiration of the constitutional legislator of 1911 and the basic competences of the re-established Council of State had to do with the elaboration of legislative proposals and draft regulatory decrees and also with the disciplinary jurisdiction exercised upon civil servants (the permanency of whom was also guaranteed by the Constitution of 1911).

Notwithstanding the above-mentioned competences, the most important competence of the Council of State as Supreme Administrative Court was, without doubt, the hearing of applications of annulment of individual or normative administrative acts. However, due to the political circumstances of that era, the involvement of the country in the Balkan wars, the First World War and the expedition to Asia Minor, the first sitting of the Council of State in its contemporary form didn't take place until May 1929. The competences of the Court were guaranteed by the Constitution of 1927. As opposed to the Constitution of 1911, the Constitution of 1927 contained no provisions regarding law-drafting capacities of the Council of State.

In order to evaluate the mission and work of the Council of State, one needs to take into account that modern Greek political history, especially in the period after 1929, was particularly disturbed by two dictatorships, the Second World War, foreign occupation and a civil war and was not settled until after 1974. The Council of State, as a supreme court of judicial review which rules on sensitive matters of public law, is not supposed to be influenced by the political climate in which it is called to exercise its functions. Although it may never have questioned political power directly, it has always sought to secure certain basic democratic principles, the same ones that had necessitated its establishment. Particularly characteristic of its role is its stance against the dismissal by the dictatorship of 21.4.1967 of twenty-nine judges of the civil courts. The Council of State annulled these dismissals on the grounds that the judges had not been granted the right to a prior hearing. As a result of this decision, the President of the Council of State at the time, Mr Stasinopoulos, one vice-president and eight councillors of state were forced to resign from service.

Nonetheless, even in recent time, there have been moments of tension between the Council of State and the executive power, particularly due to the highly-developed environmental jurisprudence of the Court.

II. Basic texts

The Hellenic Constitutions of 1911, 1927 and 1952 contained detailed provisions on the judicial power in general and on the Council of State, in particular. The Constitution in force of 1975, as amended in 1986 and 2001 refers to the Council of State in Article 95. At the same time, it guarantees the individual right to judicial protection (Article 20.1).

According to Article 95.1 of the Greek Constitution, the jurisdiction of the Supreme Administrative Court pertains mainly to:

- a. the annulment upon petition of enforceable acts of the administrative authorities for excess of power or violation of the law;
- b. the reversal upon petition of final judgments of ordinary administrative courts, as specified by law (revision);
- c. the trial of substantive administrative disputes submitted thereto as provided by the Constitution and the statutes (e.g. disputes arising out of actions brought by civil servants seeking recourse against decisions of service councils by which they are being lowered in rank or dismissed);
- d. the elaboration of all decrees of a general regulatory nature.

The jurisdiction and general operation of the Council of State is regulated by Presidential Decree 18/1989.

As governmental activity expanded and as the addressees of administrative action became more familiar with seeking recourse to the Council of State, the Court became increasingly loaded with cases, which consequently caused a delay in the process of issuing judgments. Based on constitutional provisions as formulated in 1975 and revised in 2001, the legislator chose to transfer competences to annul administrative acts mainly to administrative courts of second instance (in which cases the Council of State acts as a court of appeal against judgments reached by these courts) and also submitted a number of administrative-law disputes to substantial judicial review exercised by administrative courts (in which cases the Council of State acts subsequently as a court of revision). The increase in the number of pending files before administrative courts brought about an increase in the number of applications for revision too. In addressing this problem the legislator established, first in the mid-90's and subsequently in the years 2001 (Statute 2944/2001), 2009 (Statute 3772/2009) and 2010 (Statute 3900/2010), a condition of admissibility of the application for revision, pertaining to the economic object of the dispute. Nowadays, an application for review against a judgment made by an administrative court is deemed, in principle, inadmissible, if the economic object does not exceed 40,000 euros.

Fundamental reform has been undertaken by two basic legal instruments: Law 3900/2010 on "Rationalisation of procedures and acceleration of the administrative trial and other provisions", which entered into force on 1 January 2011, sought to address the problem of delays in the administration of

justice owed to the great number of pending cases before the administrative courts. The reformation of the statutory provisions concerning the Council of State was first decided by the Plenary Court (Decision 4/2010) and focused on one basic goal: the introduction of structural measures which could accentuate the position of the Council of State as the highest court of administrative justice through the acceleration of its procedures and through the transfer to ordinary administrative courts of certain categories of cases of lesser importance.

Subsequently, Law 4055/2012 on “Fair trial and its reasonable duration” aimed in particular at the acceleration of the trial before the Council of State by introducing new procedural mechanisms for certain categories of cases that required rapid treatment by the Court. These mechanisms sought to enhance the role of the Council of State as guarantor of the country’s economic development and progress.

III. Composition, procedure and organisation

1. Composition

The Council of State is composed of the President, ten Vice-Presidents, fifty-three councillors, fifty-six associate councillors and fifty assistant judges who are involved in the exercise of judicial duties. All the members of the Court are judicial functionaries within the meaning of the Constitution, which means that they are appointed for life and enjoy functional and personal independence (Article 87-91 of the Constitution). Councillors perform the duty of judge-rapporteurs and take part in the judging panels with a decisive vote. Associate judges carry out the same duties but take part in the judging panels with an advisory vote and with a decisive vote in the commission of elaboration of regulatory decrees and of petitions for temporary legal protection. Assistant judges support the councillors in the investigation and preparation of cases.

The President and Vice-Presidents of the Court are chosen by the Cabinet following an interview conducted by the Conference of the Presidents of the Parliament, while councillors and associate judges are promoted to the respective rank by decision of the supreme judicial council on the Council of State and on administrative justice. The President, Vice-Presidents, councillors and associate judges of the Court are placed in their posts by presidential decree. Assistant judges are appointed by presidential decree following successful participation in the entrance and final examinations of the National School of Judges and Judicial Functionaries, where Law-School graduates receive special judicial training. According to Article 88.6 of the Constitution, 1/5 of the posts of

justices is filled by promotion of presidents or ordinary judges of administrative courts of appeal.

As mentioned above, all judges enjoy functional and personal independence. In the discharge of their duties, judges are subject only to the Constitution and the laws; in no case whatsoever are they obliged to comply with provisions enacted in violation of the Constitution (Article 87.2 of the Constitution). The courts are bound not to apply a statute whose content is contrary to the Constitution (Article 93.4 of the Constitution). Assistant and Associate Judges are inspected by judges of a superior rank, as specified by law (Article 40-44 of the Regulation of the Council of State, as amended by Law 4055/2012).

2. Procedure

The Council of State hears cases in panels of five or seven judges or in full bench – “in plenum”. The Court exercises its jurisdiction in plenum for cases of special importance or in Sections. The plenary Court has special competence. It is competent only as to:

- a. cases which are brought before it by an act of the President by reason of their greater importance and more particularly when they relate to matters of more general importance;
- b. questions or cases which have been referred to it by a decision of one of the Sections for the same reason.

The competences of the Sections are basically determined by law: Section 1 deals with matters of state insurance/benefit such as health, disability, pensions, etc. and also compensation payable by public authorities for damage caused by its agents, etc. Section 2 deals with tax, trademarks, patents, competition, books of account in respect of public contracts. Section 3 deals with the organisation and workings of the civil and other public services, (including further education), employment issues, disciplinary procedures, and the legal and accountancy and some other professions. It also has the duties of an electoral court. Section 4 deals with anything the other sections do not deal with, but in particular grants and other support for development, road/rail communications, vehicle regulation and immigration and asylum. Section 5 deals with town and country planning and the environment and advises the government on proposed subordinate legislation (by Presidential Decree). Section 6 deals with compulsory purchase, the emergency commandeering of services, etc, conscription, and the rules governing public contracts. The plenary Court is now also competent to determine the competences of each Section (Article 4.1 of Statute 3900/2010), while disputes on the allocation

of competences between the different Sections of the Court are now solved by the President of the Court (Article 4.3 of Statute 3900/2010).

The Sections are presided by the Vice-Presidents and issue their rulings upon majority of the cast votes in formations of five (the Vice-President or his or her alternate and two councillors with rights to speak and vote as well as two associate judges with rights to speak) or seven judges (the Vice-President or his or her alternate and four councillors with rights of discussion and vote as well as two associate judges with rights of discussion) according to the importance of the questions posed. According to the Constitution, only the plenary session of the Court may rule on cases raising issues of unconstitutionality of the applied laws. The Presidents of the Sections, in cooperation with the President of the Court, are responsible for deciding on the importance of each case by introducing them to a five-member or seven-member formation or to the plenary Court (Article 4.5 of Statute 3900/2010). In particular, applications for annulment of administrative acts issued in the application of Statute 3894/2010 "Acceleration and transparency in the implementation of Strategic Investments" may be introduced directly in the plenary Court by virtue of Article 63 of Statute 4055/2012. The Presidents of the Sections may also refer cases to the competent administrative courts (Article 45 of Statute 4055/2012). Petitions for temporary legal protection (injunctions and other interlocutory measures) are answered by each Section of the Court in formations of three judges, whereby councillors as well as associate judges have rights of discussion and vote.

With the aim to encourage the rapid expedition of cases, Law 4055/2012 established two new kinds of applications to the Council of State: the application for acceleration of justice filed by any of the litigant parties whose case has not been discussed within twenty-four months of the deposit of the initial writ (Article 59 of Statute 4055/2012); the application of preference lodged by the Minister for stated reasons of public interest that demand the rapid discussion of a particular case (Article 62 of Statute 4055/2012).

According to the Constitution, the sittings of all courts are public, except when the court decides that publicity would be detrimental to the good usages or that special reasons call for the protection of the private or family life of the litigants (Article 93.2 of the Constitution). Every court judgment is specifically and thoroughly reasoned and is pronounced in a public sitting. A law specifies the legal consequences ensuing and the sanctions imposed in case of violation of the preceding section. Publication of the dissenting opinion is compulsory. A law specifies

matters concerning the obligatory entry of any dissenting opinion into the minutes as well as the conditions and prerequisites for the publicity thereof.

Legislation provides for the preliminary examination of remedies (filter procedure) by a three-member committee of the competent Section, which deliberates *in camera*. In such judicial formations associate judges participate with a decisive vote (Article 7 of Statute 3900/2010). If the remedy is obviously inadmissible or unfounded, it is dismissed or referred to the competent administrative court. The person who has lodged the remedy is informed of the decision and may, within a time-limit of thirty days, lodge an application for the trial of the case in the courtroom upon payment of an extra court fee. Law 4055/2012 has extended the competence of this committee to cases of obviously well-founded applications (Articles 45.2 and 113 of Statute 4055/2012).

The State or any other legal person of public law which has been served with an application for judicial review is under an obligation to send to the judge-rapporteur of the case, at least thirty days before the day of the hearing, the file of the case accompanied by a report prepared by the administration. The report must contain the views of the administration on the grounds of review and give a clear account of the relevant factual circumstances. If the administration fails to send the file requested within the legal time-limits, the Council of State may issue an interlocutory decision that orders the administration to send the file or the information which has been requested. If the competent administrative authority still does not conform to this decision, then a presumption of admission arises in favour of the applicant and at the same time, disciplinary measures may be taken against the civil servant who failed to conform with the order of the Court (Articles 43 and 113 of Statute 4055/2012 and Article 24 of Presidential Decree 18/1989).

During the preliminary proceedings, the parties may get in contact with the assistant of the judge-rapporteur and inform themselves of the file of the case or submit data and memoranda. Both the assistant and the judge-rapporteur draw up a detailed report in which they state the facts of the case and their reasoned opinion. The report of the judge-rapporteur alone is accessible to the parties and only insofar as it sets out the elements of the case necessary for the Court to reach a decision, but not as it contains the reasoned opinion of the judge-rapporteur (Article 6.1 of Statute 3900/2010).

The hearing of the case begins with the report by the judge-rapporteur. Then the attorney representing the applicant may address the Court putting forward the

arguments for accepting the application. This is followed by the addresses of the attorneys of the State authorities, against which the application is directed, and of any intervening parties. The representatives of the parties may agree not to plead the case orally but refer to the report of the judge-rapporteur, the consequence of which is that their case is given priority over the others in the discussion (Article 6.4 of Statute 3900/2010). Only senior attorneys and members of the Legal Council of the State have the right to appear and plead before the Council of State. In the case of recourse sought by civil servants, the applicant may exceptionally plead in person. After the hearing the case enters into conference (deliberation process) which must necessarily be attended by all judges who took part in the oral hearing. During the deliberations each member of the conference express his or her opinion, which is followed by a vote in reverse hierarchical order. The judgment is made by an absolute majority. If during the vote more than two different opinions are expressed, those who form the weakest minority must accede to one of the stronger opinions. If more than one of the weaker opinions attract an equal number of votes, then a vote is held to eliminate one of them, in which case those who support the opinion which has been eliminated must accede to one of the opinions that rest until a majority is reached. Any dissenting opinions are recorded in the judgment together with the advisory opinions of the associate judges, all mentioned by name.

The judgment is pronounced during a public hearing, in which the participation of the same judges who tried the case is not required. As regards the Court's decisions issued upon applications for interim relief in disputes arising out of competition procedures for the allocation of public contracts, the operative part of the judgment (the order) is issued within a time-limit of seven days (Article 63 of Statute 4055/2012).

Legislation provides for the functioning of a committee with three members attached to each section of the Court, which has the competence to control the execution of judgments issued by each section. Associate judges, who have been the judge-rapporteurs in the decision, the proper execution of which by the administration is under control, may participate in this committee with a decisive vote (Article 2 of Statute 3068/2002).

3. Organisation

Since November 2008, the Council of State has its own Regulation which was issued upon delegated authority following a decision by the plenary Court (9/2008) and was published in the Government's Gazette

(no. 123247, Official Gazette "B" 2323/13.11.2008). This Regulation is presently under reform.

The Secretariat of the Court is organised as a Directorate and is divided into ten sections (six of them attached to each section, accompanied by the Sections of documentation, administration and economics, registry/processing of applications and information technology) and three independent offices (offices of inspection of judges and management of ordinary administrative courts, filing of applications, archives). There is a separate office for jurisprudence and research, competent also for the organisation of the Court's library, which answers directly to the President of the Court. Since 2000 the Court's secretariat is computerised and there is an electronic database containing the Court's jurisprudence as well as jurisprudence of the Special Highest Court and of the Court of the European Union. By way of a presidential decree, an electronic justice system of depositing judicial writs (e-justice) is soon to start operating also in the Council of State via the so-called "Unified Information Technology System of the Bar Associations of Greece".

The management of the organisation, budgets, accounting and facilities of the Court is undertaken mainly by the Ministry of Justice, Transparency and Human Rights. The Minister may delegate part of its competences to the President of the Council of State. The President of the Council of State may delegate further part of his or her administrative duties to judicial committees, which are constituted for a two-year term and are assisted in this work by the competent court secretaries.

IV. Jurisdiction

The Hellenic Council of State is the Supreme Administrative Court of Greece. It is placed at the top of the hierarchy of ordinary administrative courts (administrative courts of first instance and administrative courts of appeal). The Council of State and the ordinary administrative courts decide on all matters of administrative-law disputes: money claims, the function of the civil service, social security claims, public works' and supplies' competitions, compensation claims against the State, challenges to the legality of administrative acts in general.

Petitions for judicial review (annulment) of enforceable acts of the administrative authorities for excess of power are heard, in principle, by the Council of State, which decides in first and last instance. The Council of State has a general competence in annulment disputes but according to Article 94.1 of the Constitution, certain categories of judicial review (annulment) cases may fall under the

jurisdiction of administrative courts, following a special provision by law, for reasons pertaining to their nature and their importance. On the contrary, it is the ordinary administrative courts that have the original competence to decide cases by exercising full jurisdiction, while the Council of State has the competence to hear petitions for reversal of final judgments reached by the appellate or first – and – last instance administrative courts in such cases. In certain categories of cases the Council of State has also the competence to decide by exercising full jurisdiction, either by virtue of an express constitutional provision (as in cases of licensing or in cases of downgrading of civil servants) or by virtue of a law issued upon constitutional authorisation. By means of a presidential decree issued upon proposal of the Minister of Justice following the congruent opinion of the plenary Court, certain categories of judicial review cases may be transferred from the Council of State to the ordinary administrative courts as judicial review or full jurisdiction cases (Article 46 of Statute 3900/2010). Finally, the elaboration of all decrees of regulatory nature falls under the jurisdiction of the Council of State which has the competence to give an opinion concerning the legality thereof.

The Council of State is the Supreme Administrative Court of Greece with authority to decide on the most important issues of public life. Law 3900/2010 enhanced its character of a Court providing the highest judicial authority on public law matters, by introducing new mechanisms of exercising jurisdiction. As from 1 January 2011 any application for judicial remedy pending before the administrative courts may be brought for judgment by the Council of State following an act of the President of the Court, the senior Vice-President and the President of the competent Section, issued upon request of one of the parties, when an issue of general interest with effects on a larger number of people is at stake (“model” or “pilot” trial – Article 1.1 of Statute 3900/2010). Ordinary administrative courts may request a preliminary ruling from the Council of State when they are faced with a similar issue (Article 1.1 of Statute 3900/2010). Notwithstanding the provisions governing the revision before the Council of State, judicial recourse may now be sought against decisions of ordinary administrative courts that hold a statutory provision unconstitutional or contrary to any other higher legal authority, when the issue at question has not been judged before by the Council of State (Article 2 of Statute 3900/2010). Also the standards of admissibility of applications for revision or appeal have been raised and finally, large categories of cases presenting issues of lesser importance, about which the Court has formed a constant

jurisprudence, have been transferred to the ordinary administrative courts and to the courts of appeal in particular (Articles 47-49 of Statute 3900/2010).

V. Nature and effects of decisions

The final judgments of the Council of State are irrevocable and not subject to any review save in the event of opposition by third parties who had a right to participate in the initial hearing but were not invited by the Court (Article 51 of Presidential Decree 18/1989) and in the event of contestation as to the constitutionality or the meaning of a statutory provision applied in a judgment of the Council of State which comes contrary to a judgment on the same provision, pronounced by the Special Supreme Court with authority to settle constitutional disputes (Article 100 of the Constitution).

According to the Constitution, the administration is bound to comply with the judgments of the courts and of the Council of State in particular and any violation of this principle provides grounds for review for the subsequent administrative action. The administration must refrain from any action contrary to the decided issues and must even use means of positive action to validate the effects of the pronounced judgment. A breach of this obligation renders liable before the criminal and civil courts any responsible civil servant.

The judgments of the Council of State establish the highest authority on legal precedent for the lower administrative courts and set the standards for the interpretation of the Constitution and the laws and for the advancement of legal theory and practice. Like all judicial decisions, the judgments of the Council of State provide “*erga omnes*” the authority of “*res judicata*” and are subject to compulsory enforcement against the Public Sector, local government agencies and public law legal persons.

Throughout its history the Council of State has sought to secure, by means of its rich jurisprudence, its basic judicial weapon, that is, the recourse sought by citizens via the application for annulment, against interventions undertaken mainly by politically irregular regimes, which at times gained power and aimed at the weakening of this recourse. For example, the Council of State has declared unconstitutional and rendered invalid legislative provisions that did not allow for the filing of an application for annulment. But even during periods of democratic government the Council of State has guarded the rule-of-law principles by deeming as unconstitutional, provisions, by which administrative acts that had been challenged before the Court, have been retroactively validated or by which normative administrative acts, that had been issued without valid legislative

delegation, have also been retroactively validated or provisions that have required the prior granting of leave by a hierarchically superior authority to the interested party before filing an application for annulment. In any case, according to standard case-law of the Council of State, a legislative provision that states that an administrative act issued in its execution, shall not be submitted to judicial review, cannot exclude the filing of an application for its annulment. In the more recent years, the Council of State has ruled against governmental attempts to regulate by law administrative issues so as to escape judicial review. It has also addressed especially issues raised by the severe governmental measures taken in the implementation of the country's international obligations to minimise its national debt, by deciding that the right to judicial protection requires that parliamentary legislation may also fall under judicial review when it is formulated in a way that does not allow room for the administration to issue directly challengeable administrative acts.

VI. Conclusion

It is commonly accepted that the Council of State has performed its assigned role successfully. The press and the legal community often refer to judgments made by the Court on major legal matters, sometimes in a praising tone, other times with a more critical approach. It is not unusual that tensions, with which the political power refuses to deal directly, are relieved through judgments made by the Court.

Notwithstanding the great affairs of the State that the Council of State is called to rule upon, decisions reached by the Court on matters which may not attract publicity but are still of crucial importance to the addressee of administrative action, are of equal value. The profile of the Court has been hammered through all these cases, the Court itself has won recognition in the citizens' conscience and the efforts of its founders have been justified to a great extent. It is therefore self-evident that a future constituent body charged with constitutional revision should be especially careful in an eventual effort to rearrange the judicial system, which could affect the role of the Council of State.

The Council of State is called today to confront, within the framework of its constitutional capacities, the living problems that a fluid political environment poses, whereby standard notions, well-known to public lawyers for decades, are rapidly changing. The Court is called to impose respect of the limits set by the Constitution during a time of retreat of state activity, to draw a fine balance between the unhindered development of private economic activity and the protection of public interest, to secure the

constitutionally guaranteed, yet unstable, welfare state, to protect the citizen from the evolution of technology and the various methods of control and attendance of the citizen's general activity. Contemporary problems may not be the same as the ones that the Court was called to address in the earlier years, especially due to the pressing demands of the economic crisis which calls for a different understanding and application of public law. However, the essence of the Court's contribution remains the same as was defined in 1911: upholding the rule of law. The work of the Court demands from its members a high sense of duty, dedication to the mission of administering justice and serenity. The great challenge, for both the statutory and the constitutional legislator, is to secure the conditions for the unobstructed discharge of judicial duties so that the Court meets successfully the demands of its mission, even through the years of hard questioning of basic democratic principles and fundamental liberties.



Hungary

Constitutional Court

I. Introduction

1. The institution of a Constitutional Court was first introduced to the Constitution in 1989. The detailed provisions on the Court were enacted in October 1989 by Act XXXII of 1989 on the Constitutional Court, and soon afterwards the first five members of the Court were elected by Parliament. The Constitutional Court commenced its functions on the 1 January 1990. The 2010 constitutional amendments and the Fundamental Law entered into force on 1 January 2012 have altered the position of the Constitutional Court in the Hungarian legal system. The constitutional developments affected the composition of the Court, the nomination and the election of the Justices as well, as the functioning of the Court.

2. The Constitutional Court is an independent Court that is not part of the hierarchy of the ordinary courts.

II. Basic texts

- Articles 24 and 37 of the Fundamental Law;
- Articles 19, 22 and 29 of the Transitory Provisions to the Fundamental Law;
- Act CLI of 2011 on the Constitutional Court.

III. Composition, procedure and organisation

1. Composition

According to Article 24.4 of the Fundamental Law the Constitutional Court is a body composed of fifteen members. Every member and the President of the Constitutional Court are elected for twelve years by Parliament. Hungarian citizens with a law over 45 years old and are theoretical lawyers of outstanding knowledge or have at least twenty years of professional work experience in the field of law may be elected as Members of the Constitutional Court. Members may not be re-elected. An *ad hoc* nominations committee of Parliament, made up of at least nine and at most fifteen members nominating Constitutional Court justices, reflects the number of Members of Parliament in the parliamentary groups of parties. The candidates are heard by the Parliament's standing committee dealing with constitutional matters. The members of the Constitutional Court are elected by the votes of two thirds of all Members of

Parliament. Parliament elects new members of the Constitutional Court within 90 days prior to the expiry of the predecessor's term of office. If Parliament fails to elect a new member by this time limit, the mandate of the incumbent Member of the Constitutional Court extends until the entry into office of their successor.

The members of the Court take an oath before Parliament before taking office. Members of the Constitutional Court shall not be members of a political party and shall not engage in any political activity.

No person who, in the course of four years preceding the election, has been a member of Government or a leading official in any political party or who has held a leading state office shall be eligible to become a member of the Constitutional Court. The mandate of the member of the Constitutional Court is incompatible with any other position or mandate in state or local government administration, in society, or with any political or economic position, except for positions directly related to scientific activity or work in higher education, providing that such provisions do not interfere with their work as Members of the Constitutional Court. The members shall not pursue any gainful occupation, with the exception of scientific, educational, artistic, proofreading, editorial and intellectual activities falling under intellectual property rights protection.

A member of the Constitutional Court enjoys immunity in many aspects identical to that of Members of Parliament. Without the consent of the plenary Constitutional Court, criminal proceedings or contravention proceedings may not be instituted or continued and coercive measures of criminal proceedings may not be applied against a member of the Constitutional Court. Only the plenary Constitutional Court has the right to suspend the immunity of a member. No member of the Constitutional Court shall be answerable for the activities carried out or statements of fact or opinion made while exercising the competences of the Constitutional Court.

A member of the Constitutional Court shall, if there emerges any cause of incompatibility, put an end thereto. Failure to do so shall result in his or her membership being declared discontinued by the Plenary Court.

The mandate may be discontinued by discharge if the member of the Constitutional Court, for a reason not imputable to him or her, becomes unable to perform the duties deriving from the mandate.

The mandate may be discontinued by exclusion if the member of the Constitutional Court, for a reason imputable to him or her, does not meet his or her duties, or becomes unworthy of the office, and therefore, may be excluded by the Plenary Court. The member shall be excluded if he or she intentionally commits a publicly prosecuted criminal offence, has not participated in the work of the Constitutional Court for one year for reasons imputable to him or her, or has intentionally failed to meet his or her obligation to make a declaration of assets, or intentionally made a false declaration on important information.

2. Organisation

Detailed rules on the organisation and proceedings of the Constitutional Court should be defined by its Rules of Procedure and the Organisational and Operational Regulations that are to be adopted by the Plenary Court.

At present all judges have a staff of their own consisting of three legal advisers. The administrative and preparatory functions are carried out by the office of the Secretary-General of the Court (the Secretary-General is not a member of the Court, but holds an administrative position).

The budget of the Court is defined by Parliament on the proposal of the Court.

IV. Jurisdiction

1. Competences

The jurisdiction of the Hungarian Constitutional Court includes:

a. Preliminary norm control of:

- enacted but yet not promulgated statutes (upon the request of Parliament or the President of the Republic);
- certain provisions of international treaties (upon the request of the President of the Republic or the Government).

b. *Abstract posterior* norm control of:

- legislative acts and sub-legislative legal norms, such as ministerial decrees (upon the request of the Government, one fourth of all Members of Parliament or of the Commissioner for Fundamental Rights).

c. Judicial initiative for norm control in concrete cases

Upon noting the unconstitutionality of a legal regulation applicable in the course of the adjudication of a concrete case in progress, the judge hearing that case shall suspend the judicial proceedings and submit a petition initiating the proceedings of the Constitutional Court.

d. Constitutional complaint

- Normative constitutional complaint

1. A person affected by a concrete case may lodge a constitutional complaint for the violation of their rights guaranteed by the Fundamental Law if the injury is consequential to the application of the unconstitutional legal provision and if the possible legal remedies have already been exhausted or no possibility for legal remedy is available.

2. The proceedings may also be initiated by exception when such legal provisions become effective without a judicial decision and there is no legal remedy or the complainant has already exhausted the possibilities for remedy (exceptional complaint).

The Prosecutor General can also challenge the legal regulation applied in concrete cases tried with the participation of the prosecutor, if the person concerned is unable to defend his or her rights personally or if the violation of rights affects a larger group of people.

- Constitutional complaint against judicial decision

Persons affected by judicial decisions contrary to the Fundamental Law, may submit such a complaint if the decision made regarding the merits of the case, or other decision terminating the judicial proceedings violates fundamental rights and the possibilities for legal remedy, have been exhausted or no possibility for legal remedy is available.

e. Examination of conflicts with international treaties

The Court examines legal regulations on request (one quarter of Members of Parliament, the Government, the President of the Curia, the Prosecutor General, the Commissioner for Fundamental Rights or judges) or *ex officio* in the course of any of its proceedings.

f. Constitutional appeal related to popular referenda

Anyone can submit a petition for a review of parliamentary resolutions ordering a referendum or

dismissing the ordering of a referendum to be obligatorily ordered.

g. Opinion on dissolution of a local representative body

The Government can request the Court to express its opinion on whether the operation of representative bodies of local governments and nationality self-governments, is contrary to the Fundamental Law.

h. Opinion concerning churches operating contrary to the Fundamental Law

The Government can request the Court to express its opinion on whether the operation of an acknowledged Church, based on the Act on Churches, is contrary to the Fundamental Law.

i. Impeachment of the President of the Republic

The Court has impeachment jurisdiction over the President of the Republic for wilful violation of the Fundamental Law or other statute in connection with the exercise of the President's official functions or intentionally committing a criminal offence.

j. Conflict of competences

The Court can resolve the conflict of competence arising between state organs or between a state organ and local government organs.

k. Examination of sub-legislative legal norms and normative decisions

A *posteriori* norm control and in constitutional complaint proceedings, the Court may examine the conformity of local government decrees if the purpose of the review is the determination of conformity with the Fundamental Law exclusively.

In the course of norm control, in concrete cases on judicial initiative, in the course of examinations of conformity with international treaties and in constitutional complaint proceedings, the Court can review normative decisions and orders and decisions on the uniform application of the law.

l. Interpretation of the Fundamental Law (advisory opinion)

On the petition of Parliament or its standing committee, the President of the Republic or the Government, the Court provides an interpretation of the provisions of the Fundamental Law regarding a certain constitutional issue, provided that the

interpretation can be directly deduced from the Fundamental Law.

2. Procedure

The Constitutional Court proceeds by plenary session or by panels composed of five members or the Court makes its decisions acting as a single judge. The panels proceed in all cases that do not come under the plenary session's jurisdiction. The Court decides in plenary session in preliminary norm control proceedings, in the impeachment proceeding and when it provides an interpretation of the Fundamental Law. The Court also decides in plenary session on the annulment of an Act that is contrary to the Fundamental Law or to an international treaty and on the annulment of an Act in a case examined, on the merits, by the panel.

The Court decides on the merit of the petitions on the basis of the documents at its disposal. The Court may order oral hearing. In such cases public hearing shall be held on the basis of the decision of the presiding judge of panel or in case of plenary session proceedings of the President, at the request of the petitioner or the adverse party.

V. Nature and effects of decisions

1. The decision of the Constitutional Court is final and cannot be appealed. If the Constitutional Court finds a legal provision unconstitutional, then the Court annuls it wholly or partly. However, under Article 37.4 of the Fundamental Law, as long as the level of state debt exceeds half of the National Domestic Product, the Court – within its competence concerning norm control and constitutional complaint – may examine and annul the Acts related to the state budget, central taxes, stamp duties and contribution's, custom duties and central requirements related to local taxes, only if the petition refers exclusively to the right to life and dignity, the protection of personal data, the freedom of thought, conscience and religion or the rights connected to the Hungarian citizenship. The Court may annul without restriction, the above Acts if the procedural requirements laid down in the Fundamental Law, for the making and promulgating of such Acts, have not been observed.

In addition, Article 27 of the Transitory Provisions to the Fundamental Law prescribes that Article 37.4 should remain in force for Acts that were promulgated when the state debt to the National Domestic Product ratio exceeded 50% even if the ratio no longer exceeds 50%.

If the Court declares that a judicial decision is contrary to the Fundamental Law, it annuls the decision and it may also annul judicial decisions or the decisions of other authorities which were reviewed by the given decision.

The Court can exceptionally call upon the court to suspend the execution of the contested decision, if it is justified with regard to the expected length of the Constitutional Court proceedings or to the expected decision, in order to avoid serious and irreparable damage or disadvantage or for any other important reason, if the court did not suspend the execution of the decision. The Court may also suspend the entry into force of a legal regulation, provided that the avoidance of serious and irreparable damage or disadvantage or the protection of the Fundamental Law or of legal certainty, necessitates immediate measures.

2. The rulings of the Court generally have *erga omnes* effect. Decisions on conflict of competences naturally have primarily *inter partes* effect. All the Constitutional Court's decisions exert a binding effect on all organs of the State.

3. The most important decisions of the Court are published in the *Magyar Közlöny* (Official Gazette). All the decisions of the Court are published in the monthly Gazette edited by the Court (*Alkotmánybírósági Határozatok*). The Court also publishes a volume every year containing all the decisions of the respective year.



Iceland Supreme Court

I. Introduction

The Supreme Court of Iceland was established by Law no. 22/1919. The Court first assembled in session on 16 February 1920. The Court, whose jurisdiction includes constitutional and administrative matters, is the highest judicial body in Iceland. There are only two judicial instances in Iceland, and judgments of the Court can therefore not be appealed. The Court may resolve any issues concerning laws, administrative regulations, or international agreements to which Iceland is a party.

II. Basic texts

The functions of the Court are now governed by Law no. 75/1973 (the Supreme Court Act), as amended by Law no. 67/1982.

III. Composition, procedure and organisation

1. Composition

The judges of the Supreme Court are eight in number and are appointed by the President of Iceland according to proposals made by the Government. Applications for the office of Judge of the Supreme Court are referred to the Court for its opinion and the opinion of the Court is forwarded to the Minister of Justice. The judges of the Court are appointed until the age of retirement.

According to the Supreme Court Act, qualification requirements for judges of the Supreme Court are the following:

- a. The general qualifications for judicial office;
- b. A degree in law from the University of Iceland with examination grades in the first class;
- c. An age of not less than 30 years; Having for a period of not less than three years served as a professor of law at the University of Iceland, a lawyer representing litigants before the Supreme Court, a Secretary of the Supreme Court, a judge of a District Court, a General Secretary of a Government Ministry or a Commissioner of Police in Reykjavik or served for not less than five years as a deputy at the Ministry of Justice or the office of the Director of Public Prosecutions;

- d. or having, as a deputy of a district court judge in a town in Iceland, handled judicial cases independently.

A judge of the Supreme Court may be disqualified from hearing and adjudicating a case, because of being a relative of a party or by reason of having dealt with a case at an earlier stage. The President of the Supreme Court, and his or her alternate, are elected by the judges of the Court for a term of two years.

The President directs the work of the judges, but day-to-day administration of the Court is in the hands of the Secretary. According to the Supreme Court Act the Secretary shall meet the general qualifications for judicial office.

2. Procedure

The Supreme Court of Iceland is divided into two chambers: one chamber of five judges and one of three judges. A chamber of three judges resolves cases of a minor nature and interlocutory or summary appeals. Various cases, such as cases involving the Constitution of the Republic of Iceland, are adjudicated by seven judges.

Apart from the judges and the Secretary two judicial assistants with legal training, and secretarial staff, serve with the Court.

Argumentation is presented orally before the Supreme Court, except in cases of interlocutory or summary appeals, where a written submission is made. Oral presentation takes place every day of the week except weekends, generally taking between one to four hours, and frequently more than one case is heard in the same day. The time available for the representatives of the parties to deliver their speeches is generally not limited, but they are required to notify the Court in advance of how much time they will require for each case and are expected to stay within those limits. Judgments are rendered within four weeks after receiving a case for adjudication.

Judgments in cases which have been orally submitted are pronounced every Thursday. The parties receive a transcript of each judgment immediately after it has been pronounced. Judgments in cases of interlocutory or summary appeals are rendered as soon as each case is tried. The judgments of the Supreme Court are printed and published in book form, two or three volumes annually, and a Registry containing an index of reference words, names and statutes and a brief excerpt of each case.

IV. Jurisdiction

The Supreme Court of Iceland is the highest judicial body in Iceland. Both constitutional and administrative matters come under its control. The nature of its constitutional control is general. The Court may resolve any issues concerning ordinary laws, constitutional laws, administrative regulations and international treaties to which Iceland is a party to.

The conditions for appeal to the Supreme Court are enumerated in the Supreme Court Act. Furthermore, the Court may grant leave of appeal even if those conditions are not fulfilled. Leave of appeal is granted by three judges.

V. Nature and effects of decisions

Judgments of the Court cannot be appealed, the Court being the highest judicial body in Iceland. A case adjudicated by the Supreme Court may only be reopened if there are compelling reasons to believe that the facts were not correctly brought to light during its trial by the Court. An application for retrial is decided on by the Court in plenary session.

The complete text of the judgments of the Court are printed and published in book form annually, accessible to the general public. The language is Icelandic.

VI. Conclusion

A bill amending the Supreme Court Act has been submitted to the legislative assembly, the *Althing*. The bill proposes, *inter alia*, that the judges of the Court be nine in number, and that interlocutory appeals be, in some circumstances, resolved by one judge.



Ireland

Supreme Court

I. Introduction

Article 34.1 of the Constitution of Ireland provides that “justice shall be administered in Courts established by law by Judges appointed in the manner provided by this Constitution...” Article 34.4.1 provides that “the Court of Final Appeal shall be called the Supreme Court”.

The present Supreme Court was established by the Courts (Establishment and Constitution) Act 1961. It replaced the former Supreme Court which was in existence immediately before the coming into operation of the Constitution and which, in accordance with Article 58, had continued to exercise jurisdiction.

As the Court of Final Appeal, the Supreme Court has jurisdiction to determine all appeals from decisions of the High Court including matters as to the constitutional validity of laws and questions of constitutional rights under the process of judicial review, in addition to cases without any specific constitutional issue, for example civil law cases.

The Supreme Court may also hear appeals from the Court of Criminal Appeal once that Court has certified a point of law is one of exceptional public importance and that an appeal is in the public interest.

Under Article 26 of the Constitution, the sole first instance jurisdiction of the Court is deciding on the constitutionality of a Bill which has been referred to the Court for that purpose by the President of Ireland, prior to the Bill being signed. Should the Court decide that the Bill, or any of its provisions, is incompatible with the Constitution, it may not be signed or promulgated as law by the President.

The Court also has sole responsibility where the question of the permanent incapacity of the President is in issue.

II. Basic texts

- *Bunreacht na hÉireann* (The Constitution of Ireland)

The jurisprudence of the Supreme Court is governed by the provisions of the Constitution

generally. Articles of specific relevance are: Articles 6, 12.3.1, 26, 34, 35, 36 and 40.4.3.

- Courts (Establishment and Constitution) Act 1961
- Courts (Supplemental Provisions) Act 1961;
- Law Reform Commission Act 1975;
- The Rules of the Superior Courts 1986 as amended;
- Courts and Courts Officers Act 1995;
- Courts Service Act 1998;
- Courts and Courts Officers Act 2002;
- Civil Liability and Courts Act 2004;
- Civil Law (Miscellaneous Provisions) Act 2008;
- Civil Law (Miscellaneous Provisions) Act 2011.

III. Composition, procedure and organisation

1. Composition

The Supreme Court is constituted of its President (the Chief Justice) and such number (at present seven) of ordinary Judges as may be fixed by the *Oireachtas* (Parliament). The President of the High Court is *ex officio* an additional Judge of the Supreme Court. In certain circumstances the Chief Justice may request any ordinary Judge or Judges of the High Court to sit as a Judge of the Supreme Court.

The Judges are appointed by the President of Ireland on the advice of the Government, as provided in the Constitution, and hold office until they reach the age of 70 years.

A person who has been a practising barrister or solicitor of not less than twelve years' standing is qualified for appointment as a Judge of the Supreme Court. The President of the High Court and ordinary Judges of the High Court and Supreme Court are qualified for appointment as Chief Justice.

A Judge is independent in the exercise of judicial functions subject only to the Constitution and the law, and may not be a member of the *Oireachtas* (Parliament) or hold any other office or position of emolument.

The Constitution provides that a Judge shall not be removed from office except for stated misbehaviour or incapacity and then only on resolutions passed by *Dáil Éireann* (House of Representatives) and *Seanad Éireann* (Senate) calling for his or her removal, whereupon the President shall, by sealed order, remove the Judge from office.

2. Procedure

The usual hours of sitting of the Court are 11.00 to 16.00 with a break from 13.00 to 14.00.

In matters relating to the constitutional validity of any law or the permanent incapacity of the President, the Court must consist of five members. However, on occasion the Chief Justice may direct that seven members of the Court should hear a particular case. When the Court deals with other matters the Chief Justice may determine that an appeal is to be heard and determined by three Judges.

The Judgment of the Court may be delivered *ex tempore* but in many cases (and always in constitutional matters) it is in the form of a reserved written decision. On a question of the constitutional validity of any proposed legislation which has been referred to the Court by the President, the decision of the majority of the Judges is pronounced as the decision of the Court without disclosing the existence of any other opinion. In other matters each Judge may deliver his or her own Judgment.

Cases are heard on oral advocacy in open Court. Written submissions are lodged electronically with the Supreme Court Office in advance, by leave of the Court. Parties may appear in person or may be represented by a lawyer.

3. Organisation

Members of Staff are employed by the Court's Services.

- a. Registrar – manages the Office of the Supreme Court and administration for the Court, acts as Registrar to the Chief Justice and the Court, also attends at hearings, various committees and prepares Orders of the Court;
- b. Deputy Registrar – may replace the clerk, shall serve as clerk to the Court of Criminal Appeal;
- c. Court clerks (2) – make up the registry and serve to manage documentation and deal with judgments, individual complaints, enquiries and archives;
- d. Junior clerk (1);
- e. Clerical Assistant (1).

Staff numbers are determined by the Government in conjunction with the Chief Executive and the Board of the Courts Service and recruitment is carried out by

the Public Appointments Service. One staff pool caters for both the High Court and the Supreme Court, which includes secretarial assistance for Judges;

The Chief Justice is assisted with legal research and administrative tasks by the Executive Legal Officer and a Judicial Clerk. The Judges of the Supreme Court receive legal research assistance from Research Assistants (5).

IV. Jurisdiction

The jurisdiction exercisable by the Supreme Court may be classified as follows:

- a. Appellate Jurisdiction – from all decisions of the High Court except where legislation provides otherwise and, on points of law, from decisions of the Court of Criminal Appeal;
- b. Consultative Jurisdiction – on points of law referred by lower Courts such as the Circuit Court, and the District Court on appeal from the High Court;
- c. Original Jurisdiction:
 - i. reference of Bills by the President of Ireland to decide whether any provision thereof is repugnant to the Constitution; and
 - ii. to decide on any question of permanent incapacity of the President of Ireland.

The work of the Court may involve review of ordinary laws, Court decisions and administrative acts.

V. Nature and effects of decisions

1. The Supreme Court may affirm, vary, set aside or reverse decisions of the High Court and decide questions of law arising.
2. Declare that legislative provisions are or are not valid in accordance with the Constitution.
3. Answer questions of law referred by lower Courts.
4. Refer questions of European Union Law for the opinion of the Court of Justice of the European Union based in Luxembourg.

The written Judgments of the Supreme Court are reported officially by the Incorporated Council of Law Reporting for Ireland which usually publishes four volumes of law reports each year.

The judgments are also available electronically on the Supreme Court website (www.supremecourt.ie) and the Courts Service website (www.courts.ie).

VI. Conclusion

The Supreme Court of Ireland is the ultimate guardian of the Constitution of Ireland. The Constitution entrusts the Court with the power of judicial review of legislation and it has the ultimate responsibility to ensure that the Constitution is respected by all branches of government. The Supreme Court has a duty to interpret the Constitution and in doing so its role might be described as explaining what the Constitution means to the People of Ireland.



Israel

Supreme Court

I. Introduction

The Israeli Supreme Court convened for the first time on 15 September 1948. Since then, the Supreme Court has been at the apex of the court system in the State, the highest judicial instance. It sits in Jerusalem and has jurisdiction over the entire State.

Israel's three-tiered court system – Magistrates' Courts, District Courts and the Supreme Court – was established during the British Mandate period (1917-48). With independence in 1948, Israel passed the "Law and Administration Ordinance, 5708-1948" Section 17, stipulating that laws prevailing in the country prior to statehood would remain in force insofar as they did not contradict the principles embodied in the Declaration of Independence or would not conflict with laws to be enacted by the Knesset (Parliament). Thus, the legal system includes remnants of Ottoman law (in force until 1917), British Mandate laws (which incorporate a large body of English common law), elements of Jewish religious law and some aspects of other systems. However, the prevailing characteristic of the legal system is the large corpus of independent statutory and case law, which has been evolving since 1948.

II. Basic Texts

The "Courts Law, 5717-1957," left the existing British court structure in place (with minor modifications), delineated the courts' powers and made specific provisions for them. In 1984, "Basic Law: The Judiciary and the Courts Law (Consolidated Version), 5744-1984", was enacted to replace the earlier version. It provides that judicial authority in Israel is vested in courts and tribunals. The courts have general judicial authority in criminal, civil and administrative matters, while the tribunals have specific authority in certain specific matters.

III. Composition, procedure and organisation

1. Composition

The number of Supreme Court justices is determined by a resolution of the Knesset. At the present time, there are 15 Supreme Court Justices. The President of the Supreme Court is the head of the Court and

serves as the head of the judicial system as a whole. The President is assisted by the Deputy President.

“Basic Law: The Judiciary” as well as “Courts Law (Consolidated Version), 5744-1984”, stipulate the method for making judicial appointments; qualifications for the appointment of judges; mode of appointing judges (by the President of the State, upon the proposal of an Appointments Committee); provisions for the independence of judges and the operation of the Judges’ Disciplinary Tribunal.

A judge’s term begins with the declaration of allegiance and ends with the mandatory retirement age of 70, resignation or death, and at the election or appointment to a position which forbids one from being a Knesset member. A judge may also be removed from office by resolution of the Judges’ Nominations Committee or by a decision of the Judges’ Disciplinary Tribunal.

2. Procedure

The Court is in session year round except for a recess from the 16 July until the 31 August. During this recess period, the Court will reconvene for urgent cases, criminal appeals and sentencing.

The Court normally consists of a panel of three Justices. A single Supreme Court Justice may rule on interim orders, temporary orders or petitions for an order *nisi* and on appeals on interim rulings of District Courts or on judgments given by a single District Court judge on appeal. The Supreme Court sits as a panel of five Justices or more in a “further hearing” on a matter in which the Court previously sat as a panel of three Justices. In matters that involve fundamental legal questions and constitutional issues of particular importance, the Court may sit as an expanded, odd-numbered panel of more than three Justices.

In a case in which the President of the Supreme Court sits, the President is the presiding judge; in a case in which the Deputy President sits and the President does not sit, the Deputy President is the presiding judge; in any other case, the judge with the greatest seniority is the presiding judge. Seniority is calculated from the date of the Justice’s appointment to the Supreme Court.

3. Organisation

Justices have staffs consisting of one secretary, two legal advisors (lawyers), and two clerks. The current President of the Supreme Court has three administrative assistants, two clerks, three legal advisors, two comparative law clerks and one senior legal advisor.

The salary of judges and their pensions are determined by law or by resolution of the Knesset or one of its committees. However, the law does not permit a resolution specifically intended to lower the salary of judges. Similarly, the budget of the Judiciary is set by the Knesset.

IV. Jurisdiction

The Supreme Court is an appellate court as well as the High Court of Justice. As an appellate court, the Supreme Court considers both criminal and civil cases and other decisions of the District Courts. It also considers appeals on judicial and quasi-judicial decisions of various kinds such as matters relating to the legality of Knesset elections, disciplinary rulings of the Bar Association, prisoners’ petitions and administrative detention.

As the High Court of Justice, the Supreme Court rules as a court of first and last instance, primarily in matters regarding the legality of decisions of State authorities: government decisions, those of local authorities and other bodies and persons performing public functions under the law. It rules on matters which the High Court of Justice deems necessary to grant relief in the interest of justice and which are not within the jurisdiction of another court or tribunal.

In 1992 the Knesset enacted “Basic Law: Freedom of Occupation” (which deals with the right to follow the vocation of one’s choosing) and “Basic Law: Human Dignity and Liberty” (which addresses protections against violation of a person’s life, body or dignity). These Basic Laws, as well as the other nine Basic Laws (on the Judiciary, Parliament, the Government, the Army, State Comptroller, etc.) have constitutional status and therefore give the Court the power to overturn Knesset legislation which conflict with their principles. Thus, in recent years, the Israeli Supreme Court began to use these Basic Laws to conduct judicial review of Knesset legislation.

V. Nature and effects of decisions

The Supreme Court of Israel is the highest judicial authority in Israel; its precedents are binding on all lower courts as well as on all persons and State institutions. It is not binding on the Supreme Court itself.

Supreme Court opinions are published in Hebrew in a series called *Piskei Din*. Official printed versions are available soon after a final judgment is rendered. Decisions are also available on the Internet immediately after pronouncement. A number of past judgments, which have been translated into English,

have been published in a series entitled "Selected Judgments of the Supreme Court of Israel" and in the new series entitled "*Israel Law Reports*". Translated judgments are also available on the Israeli court system web site, at: <http://elyon1.court.gov.il/verdictssearch/EnglishVerdictsSearch.aspx>.



Italy

Constitutional Court

I. Introduction

The 1947 Constitution granted jurisdiction in the sphere of constitutional justice to a body specifically created for that purpose, the Constitutional Court.

II. Basic texts

Granting the Constitutional Court jurisdiction to decide on constitutional legitimacy was not unanimously approved by the Constituent Assembly and there continued to be some reluctance even once the articles relating to the Court (Articles 134-137 of the Constitution) and *ad hoc* Constitutional Act no. 1/48 had been approved. This is evidenced by the fact that it took five years to complete all the relevant provisions of the Court (Constitutional Act no. 1/53 and Ordinary Act no. 87 of the same year) and that it was only in 1956, eight years after its Basic Charter had come into force, that the Court was finally able to commence its activities. Lastly, in 1967, by means of a Constitutional Act, Parliament amended some of the norms relating to the members of the Court in a decidedly unfavourable way, expressly prohibiting the renewal of the term of office of constitutional judges, even if not consecutive, and reducing the length from 12 to 9 years.

Although the Constitutional Court exercises its functions in a judicial manner (the Court's decisions, which take the form of judgments or orders, are taken following a genuine hearing in the Court and, for the most important issues, with the participation of the parties to the case in which a "question of constitutionality" has been raised) it is not part of the judiciary, as it is a "constitutional" body, like the President of the Republic, the Chamber of Deputies, the Senate and the Government.

III. Composition, procedure and organisation

The Constitutional Court comprises of 15 judges, with a term of office lasting 9 years. It reaches decisions in plenary sitting, with a minimum of 11 judges.

Hearings may be public or held in chambers.

The composition is as follows:

- five members are elected by parliament meeting in joint session (the Chamber of Deputies and the Senate of the Republic) by a qualified majority (two thirds of the members of the Assembly at the first two rounds, three fifths with effect from the third round);
- five members are appointed by the President of the Republic;
- five members are elected by the supreme, ordinary and administrative courts (three by the Court of Cassation, one by the Council of State and one by the Court of Auditors).

The President of the Court is elected from among its members. In principle, the President's term of office lasts three years (but in any event, ceases upon expiry of the judge's own term of office) and is renewable (however, to date no judge has completed two full terms of office as President); the President appoints a Vice-President who replaces him or her in his or her absence. If both the President and the Vice-President are absent, the Court is presided by the oldest serving judge who, on a proposal from the President, may be given the title of Vice-President.

The judges of the Constitutional Court, enjoy the same prerogatives as Members of Parliament, are chosen from among the following three groups: university professors, barristers with at least 20 years' experience and judges from supreme courts (Court of Cassation, Council of State, Court of Auditors). There is no lower or upper age-limit.

The seat of the Constitutional Court is in Rome, in the *Palazzo della Consulta*, an 18th century building constructed to house a papal tribunal (the "*Sagra Consulta*"). The court has administrative and financial autonomy: it organises its own departments, and has its own financial resources which are directly allocated by the Ministry of the Economy and Finance and which appear in the state budget. Each judge has his or her own private office, comprising "Assistants" (personally chosen by the judges from the judiciary (ordinary or administrative courts) or academia, who assist the judges in the exercise of their judicial duties) and administrative staff. The Court departments have their own staff, recruited by competitive examination and subject to the Staff Regulations approved by the Court in pursuance of its regulatory autonomy.

IV. Jurisdiction

The main powers assigned to the Court are set out in Article 134 of the Constitution, the first under Title VI "Constitutional Guarantees", of which the first Section

(Articles 134 to 137) covers the Constitutional Court. Firstly, the Court is called upon to decide on the constitutional legitimacy of acts emanating from central and regional government and from the autonomous provinces of Trento and Bolzano (acting in the context of the Trentino-Alto Adige region) and equivalent regulatory acts (acts having the force of law, as referred to in Article 77 of the Constitution).

The review of constitutionality is carried out in two ways. First, the Court may receive requests for advisory rulings from judges who in hearing a case before them, and when required to apply a particular norm, have some doubt about its constitutionality and therefore refer the constitutional legitimacy of this norm to the Court for review. Second, a matter may be referred to the Court through legal proceedings brought by the state against the acts of the regions (and the two autonomous provinces) for a violation of the Constitution, or by the regions (and the two autonomous provinces) against state laws or acts having force of law, if they believe that these laws or acts have violated their legislative powers, as derived from the Constitution and other constitutional acts.

In accordance with Article 134, the Court also decides on "conflicts of jurisdiction" both among the powers of the state and between the state and the regions or the autonomous provinces. A conflict may arise when a state "power" (of which the most important are: the legislative, executive, judiciary and the head of state) exercises a responsibility for which another power believes it has jurisdiction, in accordance with the constitutional norms. The power in question may appeal to the Constitutional Court to assert its jurisdiction and request the annulment of the act in question. A similar conflict may emerge and result in a Court judgment where the state, or a region or province, through its action, would appear to be exercising a responsibility which could constitute encroachment on the jurisdiction of a region or province or of the state. There too, an appeal may be submitted by the party who considers that its jurisdiction has been violated.

The Constitutional Court also decides, in its capacity as High Court of Justice, on any charges of high treason or breaches of the Constitution brought by Parliament against the President of the Republic, as provided for under Article 90 of the Constitution. In this particular case, the body acting as High Court of Justice comprises the 15 ordinary members plus 16 extraordinary members drawn by lot from among 45 citizens eligible for the Senate. In contrast, following the 1989 Constitutional reform, the Court no longer has its original jurisdiction to rule on allegations of offences or crimes committed by ministers in the exercise of their duties.

Lastly, the Constitutional Court is empowered to decide on the admissibility of abrogative referendums, by verifying that these do not relate to the matters excluded by Article 75 of the Basic Charter (finance laws, amnesty and sentence remission laws, laws authorising ratification of international treaties) and that the request for an abrogative referendum satisfies the conditions laid down by the Court, as established by its case-law and its fundamental ruling no. 16 of 1978.

V. Nature and effects of decisions

Decisions as to unconstitutionality have effects not only in the case in which the question of constitutional legitimacy has been raised, but also *erga omnes* and *ex tunc*, once the judgment has been published in the Official Gazette. Court decisions based on provisions declared void by the Court remain in force if they are *res judicata*. This rule is mitigated in criminal cases where a more favourable criminal penalty is applicable. Decisions rejecting the question of constitutional legitimacy have effect only between the parties to the proceedings *a quo* but the same question may be raised once again in a subsequent stage of the proceedings or in another case.

VI. Conclusion

In 2010, the Court received:

a. questions for review of constitutionality

- of which 408 were for an advisory ruling: 7 by the Court of Cassation, 90 by the Courts of Appeal and ordinary courts, 2 by the Council of State, 53 by the regional administrative courts, 20 by the Court of Auditors, 14 by the tax judges, 207 by magistrate courts, 1 by an arbitrators' tribunal, 5 by the judge responsible for the enforcement of sentences, 4 by the juvenile court, 1 by the National Bar Council, 1 by the Supreme Water Tribunal ("*Tribunale superiore delle Acque Pubbliche*"), 1 by the district court, 1 by the Court President, 1 by the banking and financial ombudsman ("*arbitro bancario finanziario*");
- and 123 relating to legal proceedings: 40 brought by the regions or autonomous provinces against the laws of the state, and 83 brought by the state against the laws of the regions or autonomous provinces.

b. appeals relating to conflicts of jurisdiction between the state and the regions (and autonomous provinces)

- 11 in all, of which 6 from the regions or autonomous provinces against the state and five from the state against a region or autonomous province.

c. appeals relating to conflicts of jurisdiction between the powers of the state:

- 18 in all.

In this same year, the Court published 376 decisions (210 judgments and 166 orders). 211 of these were delivered following a request for advisory ruling, 141 further to legal proceedings; 12 following a case regarding a conflict of jurisdiction between the state and the regions, and 3 following a case regarding a conflict of jurisdiction between the powers of the state.



Japan

Supreme Court

I. Introduction

The present Constitution of Japan was promulgated on 3 November 1946 and enforced on 3 May 1947. Under the present Constitution, the Diet legislates for the benefit of the people, the Cabinet exercises its executive power for the people, and the Courts administer justice to secure the human rights for the people, with all such powers being delegated by the people.

The whole judicial power is vested in the Supreme Court, which is the highest court in the land, and such lower courts as are established by law. No extraordinary court, such as the Administrative Court or the Military Court, is permitted to be established, nor is any organisation or administrative organ permitted to be given final judicial power. Thus, the courts are the final adjudicators of all legal disputes, including those between citizens and the state arising out of administrative actions.

II. Basic texts

- Provisions on judicial power are laid down in Articles 76 to 82 of the Constitution;
- The basic regulations of the powers, organisation, jurisdiction, etc. of the Supreme Court are provided in the Court Act (Act no. 59 of 1947).

III. Composition, procedure and organisation

1. Composition

The Supreme Court is composed of the Chief Justice and fourteen Justices.

The Chief Justice is appointed by the Emperor as designated by the Cabinet. Other Justices of the Supreme Court are appointed by the Cabinet and then the appointment is attested by the Emperor.

Justices of the Supreme Court are appointed from among people with a broad vision and extensive knowledge of the law. At least ten Justices must be selected from among people who have distinguished themselves as judges, public prosecutors, attorneys, and professors or associate professors of law; the rest do not need to be jurists.

The people review the appointment of Supreme Court Justices in the first general election of members of the House of Representatives following their appointment. Subsequent reviews are held every ten years in general elections. A Justice is dismissed if the majority of voters favour his or her dismissal.

Justices of the Supreme Court must retire at the age of 70.

2. Procedure

Every case on appeal is first assigned to one of three Petty Benches, each composed of five Justices. If a case proves to involve a constitutional issue, namely, an issue involving the constitutionality of any law, order, rule, or disposition, except when there is a precedent involving the same issue, the Grand Bench composed of all fifteen Justices hears it and reaches a judicial decision.

Appeal proceedings in the Supreme Court commence with the filing of a petition for final appeal by a party who is dissatisfied with the judgment or decision of a lower court, generally of a high court. Since the Supreme Court primarily judges questions of law, it renders judicial decisions, as a rule, after an examination of documents alone (appellate briefs and records of the lower courts).

When the Supreme Court finds there to be no grounds for a final appeal in a civil case, or finds it clear that there are no grounds for a final appeal in a criminal case, it may dismiss the appeal without proceeding to oral arguments. If the Supreme Court finds there to be grounds for a final appeal, however, the Court renders a judgment after hearing oral arguments.

3. Organisation

There are two parts in the Supreme Court which are in charge of litigation and judicial administration.

The Supreme Court has the Grand Bench and the three Petty Benches (Each Justice of the Supreme Court belongs to one of the three Petty Benches). To assist the Justices of the Supreme Court in their judicial duties, a fixed number of Judicial Research Officials are assigned to the Supreme Court.

In order to carry out administrative affairs such as the budget of the courts, the Supreme Court has the General Secretariat (Secretary Division, Public Information Division, Information Policy Division, General Affairs Bureau, Personnel Affairs Bureau, Financial Bureau, Civil Affairs Bureau, Criminal Affairs Bureau, Administrative Affairs Bureau and

Family Bureau), the Legal Training and Research Institute, the Training and Research Institute for Court Officials, and the Supreme Court Library as its internal organisations for judicial administration.

III. Jurisdiction

The Supreme Court exercises appellate jurisdiction over final appeals and appeals against a ruling as provided specifically in the codes of procedure. In addition, it has original and final jurisdiction in proceedings involving the impeachment of commissioners of the National Personnel Authority.

A final appeal to the Supreme Court is permissible in the following instances:

- 1 an appeal lodged against a judgment rendered in the first or second instance by a high court;
- 2 a direct appeal sought against a judgment rendered in the first instance by a district court or a family court, or against a judgment in the first instance that a summary court has rendered in a criminal case;
- 3 an appeal filed with a high court and transferred to the Supreme Court for one of a specific reason;
- 4 a special appeal to the court of last resort filed against a judgment rendered by a high court acting as the final appellate court in a civil case, or filed against a small claims judgment after an objection rendered by a summary court; and
- 5 an extraordinary appeal to the court of last resort lodged by the Prosecutor-General against a final and binding judgment in a criminal case.

In civil cases, a final appeal to the Supreme Court may be lodged only on the grounds of violation of the Constitution and grave contraventions of provisions on procedure in the lower courts that are given in the Code of Civil Procedure as absolute reasons for a final appeal. However, upon petition, the Supreme Court may accept a civil or administrative case that it finds to involve an important issue concerning the construction of laws and regulations, as the final appellate court. In criminal cases, the reasons for a final appeal are limited to those involving a possible violation of the Constitution, misconstruction of the Constitution or conflicts with Supreme Court precedent if present, or conflicts with high court precedent in its absence. However, just as with civil and administrative cases, upon petition, the Supreme Court may accept a criminal case that it finds to involve an important issue concerning the construction of laws and regulations, as the final appellate court.

When the Supreme Court finds there to be no grounds for a final appeal in a civil case, or finds it clear that there are no grounds for a final appeal in a criminal case, it may dismiss the appeal without proceeding to oral arguments. If the Supreme Court finds there to be grounds for a final appeal, however, the Court renders a judgment after hearing oral arguments.

An appeal against a ruling to the Supreme Court is permissible in the following instances:

- 1 an appeal filed against a ruling in a civil case (including personal status cases) or a domestic relations case (adjudication cases and conciliation cases) either on the grounds of violation of the Constitution or with the permission that the high court must give when it finds a case to involve an important issue concerning the construction of laws and regulations; and
- 2 a special appeal filed against an order or direction in a criminal case that is not allowed an ordinary appeal pursuant to the Code of Criminal Procedure or an appeal filed against an order, etc. issued by a court of second instance in a juvenile case, on the grounds of a constitutional violation, misconstruction of the Constitution, or conflict with judicial precedent.

In addition to the primary function of exercising judicial power, the Supreme Court is vested with rule-making power and the highest authority of judicial administration.



Kazakhstan

Constitutional Council

I. Introduction

In Kazakhstan the process of establishing a constitutional justice body began at the dawn of the independence of the Republic. In 1989 the Constitution of Kazakh SSR of 1978 was amended. The amendments foresaw the establishment of constitutional control, which finally was not established.

The first body of the highest judicial body to defend the Constitution – the Constitutional Court – was established in accordance with the Constitutional Law of 16 December 1991 “Of the Republic of Kazakhstan state independence”. On the basis of this Law the following legal acts: “On the Constitutional Court of the Republic of Kazakhstan” and “On the Constitutional Court Procedure” were adopted in 1992. After their adoption and on the proposal of the President of the Republic, N. A. Nazarbayev, the Supreme Council elected the chairman, deputy chairman and nine justices of the Constitutional Court. The Constitutional Court deals with cases of constitutional control/review.

As a result of the adoption by referendum, of constitutional amendments on 30 August 1995 a new body of constitutional justice was established i.e. the Constitutional Council and the Constitutional Court was abolished.

II. Basic texts

- The legal status of the Constitutional Council is regulated in Section VI of the Constitution on “Constitutional Council”, which includes the competence, subjects and consequences of the appeal, the order of staff formation, juridical law and qualification of the Constitutional Council decisions.
- The organisation and activity of the Constitutional Council is regulated by the Law “On the Constitutional Council of the Republic of Kazakhstan” in more details. A range of questions on constitutional proceedings are regulated by procedural and other legal acts.

III. Composition, procedure and organisation

The order of constitutional institution of legal proceedings and preparation of materials for consideration, the order of appeals consideration and other questions are regulated by the rules of procedure decreed by the Order of the Constitutional Council. The staff activity is regulated by the provision on staff.

The Constitutional Council consists of seven members, including the Chairman. The Chairman and two members are appointed by the President, two-by the Senate of Parliament and two by Mazhilis of Parliament, for six years. The Constitution sets out the succession, stating that half of the members of Constitutional Council is renewed every three years. To provide such a rotation, three of the members of the first staff were appointed for a term of three years in 1996 and substituted in 1999. Lifetime members of the Constitutional Council are the ex-Presidents by law.

Member of the Council have to be citizen of the Republic of Kazakhstan, over 30 years old, residing on the territory of the Republic, having an advanced legal education and experience of no less than five years. The indicated requirements do not apply to the former Presidents of the Republic.

The Chairman and members of the Council have a special status, their immunity is guaranteed by the Constitution. During their term, the Chairman and members of Council cannot be arrested, brought to court, imposed an administrative penalty and are not criminally accountable without the consent of Parliament, except in cases where they are detained on the scene of a crime or committing serious crimes.

During their term, the members of the Council cannot be substituted. Their powers can be ceased or suspended only in cases provided for by the Law on “the Constitutional Council”.

The Chairman and the members of the Council are not accountable for questions of constitutional procedure.

IV. Jurisdiction

The Constitution and the Constitutional Law “On the Constitutional Council of the Republic of Kazakhstan” determines who has the right to appeal and the jurisdiction of the Constitutional Council. The President of the Republic, the Chairman of the Senate, the Chairman of Mazhilis, no less than one of the fifth of the whole number of deputies of

Parliament, the Prime Minister and courts of the Republic.

The Constitutional Council solves questions of the validity of presidential election, parliamentary elections and republican referenda: it considers orders adopted by Parliament and its Chambers, considers international treaties entered into by the Republic and their compliance with the Constitution, provides the official interpretation of Constitutional norms, in separate cases, provided for by the Constitution, provides resolutions, checks the constitutionality of norms of legal acts and other normative acts on courts' appeals.

The Constitutional Council reports annually to Parliament on the results of the constitutional lawfulness of the general constitutional procedural practice.

Constitutional procedure can be instituted only by those having standing. The order adopted by the Council, may be interpreted by the Council, on petition of state bodies and officials bound to execute its decision.

The courts may appeal to the Constitutional Council with presentations of examining the constitutionality of norms of laws in force and other normative legal acts, which have to apply in their proceedings. The Constitution entitles the Constitutional Council to give the official interpretation of Constitutional norms, that is ascertainment and interpretation of the contents and sense of constitutional norms. The official interpretation of Constitutional norms is the normative interpretation, which is given by the Constitutional Council, in accordance with the literal meaning of norms of the Constitution with the help of different ways of elucidation and extracting their meaning.

V. Nature and effects of decisions

Type of decisions

The decisions of the Constitutional Council are divided into final ones and others, which are implemented by other constitutional powers. The decisions are taken in the forms of orders; among them are normative orders, resolutions and messages. Normative orders of the Constitutional Council become part of the law in force and their juridical power is higher than legal acts, as they can annul in part or in whole any law or other normative legal act contradicting the Constitution.

The Constitutional Council takes decisions collegially by majority of the whole number of its members, in an open vote. Upon request of one of the members

voting can be conducted in secret. Where votes are divided into two equal parts, the vote of the Chairman of the Constitutional Council is decisive and in all cases he or she votes last. The members of the Council are obliged to vote. The member of a Council, who does not agree with its final decision, is entitled to express his or her dissenting opinion in written form.

The decision of the Council may be reconsidered on the initiative of the President of the Republic and on the Council's own initiative if the norm, on the basis of which the decision was taken, changed; or there was a change of substantial circumstances.

To protect the rights and freedoms of the man, or woman, and citizen, guaranteeing national security, sovereignty and integrity of the state, the decision of the Constitutional Council may be reconsidered on the initiative of the President of the Republic. In such cases, the Constitutional Council can submit an order cancelling the decision in force in whole or in part.

Effect of decisions

The Constitution consolidates the compulsory juridical force and sets up an immediate order of coming into effect of the decisions of the Constitutional Council. The decisions of the Constitutional Council are final for the subject of the appeal and may not be appealed.

The orders of Constitutional Council can only be based on the Constitution and other normative legal acts must not contradict them.

The President of the Republic can object to decisions of the Council in whole or in part. The objections are brought no later than a month from the day the text of the decision is received. It is called by necessity of immediate reaction of the President of the Republic as the guarantor of the Constitution. The Constitutional Council is entitled to overturn the President's objections by a vote of two-thirds of the whole number of the members of the Council. In this case, the order of the Constitutional Council preserves its juridical force.

The Constitutional Council can define the order and terms of bringing into effect its decisions. The Constitutional Council is informed by the appropriate state bodies and officials about the measures taken to enforce the decisions of the Constitutional Council.

International treaties of the Republic, recognised as not constitutional cannot be signed or ratified and brought into effect. Law and other normative legal

acts, acknowledged to be unconstitutional and infringing rights and freedoms of man and citizen set out in the Constitution, lose their juridical force, are not applied and are abolished. The decisions of courts and other law enforcement bodies, based upon such a law or other legal act are not to be brought into effect.

The elections of the President and deputies of Parliament, republican referendum acknowledged by the Constitutional Council to contradict the Constitution, are declared not valid.



Republic of Korea Constitutional Court

I. Introduction

Date and context of establishment

The origins of constitutionalism in Korea in this modern sense may be traced back to the late nineteenth-century. Although still a subject of some controversy, the Fourteen-point Hongbeom promulgated in January 1895 may be viewed as the first modern constitution of Korea. It was an expression of the Joseon Dynasty's will to institute reforms toward a more democratic government. After the Japanese occupation in 1910, the Korean people's resistance against imperialism culminated in the 1 March Independence Movement of 1919 and a government-in-exile was established in Shanghai, China, which adopted a written constitution in which, fundamental principles such as popular sovereignty, parliamentary representation, separation of power, guarantee of basic rights and the rule of law, were embodied.

However, the proper history of constitutional adjudication as a means of proclaiming and implementing the Constitution as the highest norm, had not started until the government of the Republic of Korea was established based on the Founding Constitution made by the founding National Assembly formed through the first modern election in 1948, three years after the liberation from the Japanese occupation. It is significant that Korea, a newly independent state which regained its national sovereignty after nearly forty years of colonial occupation, chose to adopt a system of constitutional adjudication in order to implement the rule of law.

Although the Republic of Korea has always had some form of a constitutional litigation or judicial review system, such as the Constitutional Committee (1948-1960, 1972-1988), the Constitutional Court of the Second Republic (1960-1961) and the Supreme Court (1961-1972), according to change of each regime based on the constitutional revisions caused by either people's longing for democracy or authoritative power. Looking back, none of these constitutional systems was very active, and some of them were merely ornamental. In this regard, it can be said that there was no real constitutional adjudicative practice in Korea until the Constitutional Court was finally established.

The Constitutional Court was established in September 1988 by the current Constitution, the outcome of constitutional revision in 1987. This marked the ninth time that the Korean Constitution was revised. However, it was the first time that took place as a result of the people's demand for a system in which they could freely choose their own government. It was the first time that a national desire for strengthening the protection of basic rights, and for a new constitution, was the motivating factor in the revision process. The new constitution was thus made through a democratic procedure, with extensive negotiations on the part of the politicians representing the government and the opposition parties and under the critical scrutiny of a mature citizenry.

According to Article 113.3 of the current constitution, the organisation and management of the Constitutional Court is to be regulated by an Act of the National Assembly. The Constitutional Court Act was passed on 5 August 1988, almost a year after the Constitution was promulgated which mandated the establishment of such a court. The Act went into effect on 1 September 1988.

II. Basic texts

- Chapter 6 of the Constitutional Court, Articles 111, 112, 113 of the Constitution, last revision of 1987;
- The Constitutional Court Act, last revision by Act no. 10546 in 2011;
- Rules of the Constitutional Court.

III. Composition, procedure and organisation

1. Composition

The Constitutional Court is composed of 9 Justices and all of them are appointed by the President of South Korea as standing full-time members. Among the Justices, three are elected by the National Assembly; three are designated by the Chief Justice of the Supreme Court and remaining three are appointed by the President of South Korea after a Personal Hearing held by the National Assembly (Articles 3 and 6 of the Constitutional Court Act).

The term of office is 6 years (Article 7 of the Constitutional Court Act).

To be appointed as a Justice, one must be at least forty years of age and have fifteen years or more of experience as:

1. a judge, prosecutor or attorney;

2. a worker in a law-related area in a state agency, a public or state corporation, a state-invested or other entity, with a license to practice law;
3. a faculty member (assistant professor or higher) in the discipline of law at an accredited college, with a license to practice law (Article 5.1 of the Constitutional Court Act).

In order to facilitate the Court's execution of the powers granted by the Constitution as the highest court on constitutional interpretation, the Justices were given a status independent from other state agencies as well as from the people. Justices cannot be dismissed except upon being impeached or sentenced to a criminal punishment of at least imprisonment (Article 8 of the Constitutional Court Act).

2. Procedure

The Constitutional Court is a permanent court and independent from other courts, such as the Supreme Court, and it decides only on matters prescribed by the Constitution. Cases are generally reviewed by the Full Bench, composed of all 9 Justices and decided by the majority vote, with the attendance of seven or more Justices. However, it requires a vote of six or more Justices for decisions as follows: a decision of unconstitutionality of law; a decision of impeachment; a decision of dissolution of political party or an affirmative decision regarding the constitutional complaint (Article 113.1 of the Constitution).

Apart from exceptions, adjudication of the Constitutional Court should be decided by the Full Bench composed of all 9 Justices and its presiding justice is the President of the Constitutional Court. However, for the prior review of constitutional complaint filed by an individual for fundamental rights or constitutionality of law, the Constitutional Court is divided into 3 Panels to dismiss the case which does not meet the justiciability requirements set out in the Article 72.3 of the Constitutional Court Act. A constitutional complaint by an individual is allocated to a Justice who is chosen, in turn, to be the Presiding Justice for that case and assigned to the Designated Panel of which the Presiding Justice is a member. The allocation of cases must be done without delay after the filing, and the allocation is done according to the case type. For cases classified as an "Important Case" by the President of the Court, their allocation is done independently of the case type.

In general, the review process of impeachment, dissolution of a political party or competence dispute, is to be conducted through oral pleadings, while the review process of the constitutionality of statutes and

constitutional complaint by an individual is to be conducted through written pleadings. The Full Bench, however, may hold oral proceedings if it is deemed necessary.

Time-limit on filing a complaint varies depending on the types of claims as follows: an individual wishing to make a constitutional complaint for fundamental rights must file his or her case within 90 days after the existence of the cause is known and within 1 year after the cause occurs; the constitutional complaint regarding unconstitutionality of statute must be brought within 30 days after the request for such review is dismissed; in case of competence disputes between state agencies or local government, a complaining party must file within 180 days after the cause occurs (Articles 63 and 69 of the Constitutional Court Act).

When a private person is a party in any proceeding, such a person has to be represented by an attorney, provided that this does not apply when such a person is an attorney (Article 25 of the Constitutional Court Act). If such a person has no financial resources to retain an attorney, the Constitutional Court may appoint counsel, if the Court considers that it is necessary in the public interest (Article 70 of the Constitutional Court Act).

3. Organisation

The President of the Constitutional Court is appointed by the President of the Republic of Korea among the Justices with the consent of the National Assembly. The President represents the Constitutional Court, takes charge of the affairs of the Court and directs and supervises those public officials under his or her authority (Article 12 of the Constitutional Court Act).

The budget of the Constitutional Court is appropriated independently in the State Budget (Article 11 of the Constitutional Court Act).

The Secretary General, under the direction of the President, takes charge of the Department of Court Administration, directing and supervising those public officials under his or her authority. The Secretary General may attend the National Assembly or the State Council and speak about the administration of the Constitutional Court (Article 17 of the Constitutional Court Act).

This Department of Court Administration is composed of the Planning and Coordination Office, the Administration Management Bureau, the Judgment Affairs Bureau, and the Judicial Records and Materials Bureau. The Public Information Office is under the direction of the Secretary General.

The Council of Justices is the final decision making body regarding the administration of the Constitutional Court. The Council of Justices is composed of the nine justices, with the President as the Chairman. The Council of Justices requires the attendance of at least seven justices and the majority vote to decide. The President may put a matter to a vote. Matters decided by the Council of Justices include: the establishment and revision of the Constitutional Court Act; filing a recommendation for legislations concerning the Constitutional Court to the National Assembly; a budget request; expenditure of reserve funds and settlement of accounts; appointment and dismissal of the Secretary General, Deputy Secretary General, research officers and public officials of the Rank 3 and higher. The Council also decides on other matters raised by the President of the Constitutional Court.

The Constitutional Court has Constitution Research Officers, Assistant Constitution Research Officers and Academic advisers, the numbers of which are specified in the Constitutional Court Act. The Constitution Research Officers are engaged in studies and research concerning the deliberation and adjudication of cases under the order of the President of the Constitutional Court. The President of the Constitutional Court may authorise the Constitution Research Officers to hold concurrent offices other than studies and researches concerning the deliberation and adjudication of cases.

IV. Jurisdiction

Article 111.1 of the Constitution permits the Constitutional Court to make decisions on five matters: the constitutionality of law requested by the other courts; impeachment; dissolution of a political party; competence disputes between State agencies or between State agencies and local governments, and between local governments; and constitutional complaint by an individual for his or her fundamental rights guaranteed by the Constitution or constitutional validity of law only after the court denies to request the Constitutional Court for review. The Constitutional Court, however, cannot have jurisdiction on the decisions of other courts including the Supreme Court.

V. Nature and effects of decisions

1. Types of decision

1. Decisions on procedure

Through the prior review of constitutional complaint filed by an individual for fundamental rights or constitutionality of law, 3 Panels composed of

3 Justices of the Constitutional Court is may dismiss the case which does not meet the justiciability requirements set out in the Article 72.3 of the Constitutional Court Act.

2. Decisions on the merit

Article 45 of the Constitutional Court Act, specifies only two possible decisions in cases of constitutionality review – constitutional or unconstitutional, provided that if it is deemed that the whole provisions of the statute are unable to enforce due to a decision of unconstitutionality of the requested provision, a decision of unconstitutionality may be made on the whole statute. The Constitutional Court, however, has adopted various terms, such as: “limited constitutionality”, “limited unconstitutionality” or “incompatibility with the Constitution” to suit the particular needs of each case, since it found that it was impossible to deal with all the myriad issues arising from constitutionality review with just two terms.

A. Unconstitutionality decision

A decision of unconstitutionality has a binding force on all state agencies, immediately nullifies the relevant provisions, and even applies retroactively in case of criminal statutes.

B. Adoption of modified decisions

a. Incompatibility with the Constitution

Instead of holding the provision unconstitutional and striking it down immediately, the Constitutional Court has issued a holding of incompatibility because of an anticipated confusion in the legal order that might arise if the provision was voided. In other words, the Court made a decision of incompatibility because, when there are multiple ways of restoring the constitutional order, the formative legislative powers of the National Assembly should be respected. The Court also made it clear that this incompatibility decision was a form of the decision of unconstitutionality provided for in Article 47 Section 1 of the Constitutional Court Act and that it was naturally binding on all other state agencies in the same manner as other decisions of the Court. The Court further modified the decision of incompatibility by ordering the tentative application of the outlawed provisions until the legislature cured the defects by a deadline set by the Court. In principle, a decision of incompatibility does not entail a temporary application of statute that was found to be unconstitutional, but rather a prohibition against applying the invalidated law and an immediate suspension of the underlying proceeding at the ordinary court that gave rise to the constitutional challenge.

b. Limited constitutionality and Limited unconstitutionality

The Constitutional Court, in addition, declared that decisions of limited constitutionality, limited unconstitutionality, and incompatibility with the Constitution are all binding decisions of unconstitutionality. It reconfirmed that limited constitutionality and limited unconstitutionality are merely two sides of the same coin and are fundamentally the same in partially invalidating a statute.

Although some criticise the Court for abusing these modified forms of decision, there is hardly any scholar of public law who flatly denies the practical need for such modified decisions.

C. Preliminary Injunctions

The Constitutional Court Act provides for such a provisional remedy in relation to proceedings for dissolution of political parties and competence disputes, but not in relation to requests for constitutionality review on laws or constitutional complaints. However, for the purpose of preventing irreparable damage to the petitioner or in order to ensure the timely restoration of the constitutional order, preliminary injunctions are needed in other types of constitutional adjudication as well. Until a clear provision is added to the Constitutional Court Act, provisions of other statutes on preliminary injunctions will have to be applied to procedures for constitutional adjudication as well.

D. Permissibility of re-adjudication

The Constitutional Court reversed its earlier decision and held that a new adjudication may be allowed if there was an omission or failure to rule on an important issue that could affect the decision of the Court

E. Application I of other laws

The Constitutional Court Act provides that the Civil Procedure Act, the Administrative Litigation Act and the Criminal Procedure Act may be applied, *mutatis mutandis*, to the procedures of constitutional adjudication (Article 40). The Rules of Adjudication of the Constitutional Court were adopted on 7 December 2007 for the purpose of dealing with this problem. The Rules provide detailed guidelines on matters delegated by the Constitutional Court Act to a regulation of the Court, and on the permissibility and limits of application, *mutatis mutandis*, of other procedural laws. It also includes rules on other procedural matters unique to constitutional adjudications.

2. Legal effects of decisions

Once the Constitutional Court decides on the unconstitutionality of a statute, such a decision shall be binding upon the ordinary courts, other state agencies and local governments. The statute, or its partial provision, decided as unconstitutional shall lose its effect from the date on which such decision is made, provided that the statute, or its partial provision regarding criminal penalties, shall lose its effect retroactively. In such case of criminal penalties, a retrial may be allowed with respect to a conviction based on such a statute or provision decided as unconstitutional. The provisions of the Criminal Procedure Act shall apply *mutatis mutandis* to such retrial (Article 47 of the Constitutional Court Act).

VI. Conclusion

The Constitutional Court is now beginning to firmly establish itself in minds of the people as the final defender of their basic rights, although critics still argue that: the Constitutional Court should have the power to review the ordinary courts' decisions, executive orders, regulations and administrative actions over which ordinary courts now have jurisdiction, in order to make the binding effects of the Constitutional Court's interpretation of the Constitution secure.



Latvia

Constitutional Court

I. Introduction

The idea that Latvia needed an institution for realising constitutional control appeared in the 1930s, when Pauls Šimanis, Member of the *Saeima* (Parliament), mentioned it in his article "Eight years of the *Satversme* (Constitution) of Latvia". He pointed out that separation of powers "shall be ensured only if there is an independent court chamber which may control whether the decisions of Parliament and executive institutions comply with the Constitution, as well as repeal the decisions when the necessity arises". Upholding the idea on 8 May 1934, Hermanis Štegmanis, Member of Parliament, submitted a motion to supplement the Constitution with Article 861, envisaging the creation of a specific State Court, granting it the mandate to examine compliance of the acts, passed by the State President and the Cabinet of Ministers, with the Constitution. Unfortunately, this motion did not receive the required 2/3 majority vote.

At the time when democracy was restored in Latvia, the need to establish the Constitutional Court was not questioned. Item 6 in the Declaration of 4 May 1990 on "Renewal of the Independence of the Republic of Latvia" envisaged "during the transition period, to consider possibility to implement those constitutional and other legislative acts of the Latvian SSR which are in effect in Latvia at the moment of adopting this decision, insofar as they do not contradict Articles 1, 2, 3 and 6 of the Constitution of the Republic of Latvia. Conflicts in the implementation of legislative acts shall be resolved by the Constitutional Court of the Republic of Latvia".

In December 1992, the Law on "Judicial Power" passed by the Supreme Council, envisaged the creation of the Constitutional Supervision Chamber at the Supreme Court. However, this norm was never implemented.

In July 1993, the 5th Parliament commenced its activities. The Government, established by it, began elaborating the Constitutional Court Draft Law with the aim of creating an independent institution – the Constitutional Court. In February 1994, the Cabinet of Ministers approved it and in March the draft law was submitted to Parliament. The elaboration of the draft law was started by the 5th Parliament and was

continued by the 6th Parliament whose Legal Affairs Committee improved it; likewise, amendments to the Constitution were drafted. Both draft laws were passed only in June 1996.

Article 85 of the Constitution, in the wording adopted on 11 June 1996, is still in effect. It reads as follows:

“In Latvia there shall be a Constitutional Court, which, within its jurisdiction as provided for by law, shall review cases concerning the compliance of laws with the Constitution, as well as other matters regarding which jurisdiction is conferred upon it by law. The Constitutional Court shall have the right to declare laws or other enactments or parts thereof invalid. The appointment of judges to the Constitutional Court shall be confirmed by the *Saeima* for the term provided for by law, by secret ballot with a majority of the votes of not less than fifty-one members of the *Saeima*”.

The above Article is incorporated into Chapter VI of the Constitution under the title “Courts”. Thus, the Constitutional Court is an institution of the judicial power, even though it is not included in the legal system of general jurisdiction.

II. Basic texts

- Article 85 of the Constitution;
- Constitutional Court Law adopted by Parliament on 5 June 1996 (Amendments by Laws adopted by Parliament on: 11.09.1997, 30.11.2000, 19.06.2003, 15.01.2004, 18.10.2007, 06.03.2008, 12.12.2008, 01.12.2009, 10.12.2009, 16.12.2010 and 19.05.2011);
- Rules of Procedure of the Constitutional Court passed at the plenary session of the Justices of the Constitutional Court on 30 January 2001.

III. Composition, procedure and organisation

1. Composition

The Constitutional Court consists of seven justices approved by Parliament for a term of ten years. Three justices of the Constitutional Court are approved upon the proposal of no less than ten Members of Parliament, two upon the proposal of the Cabinet of Ministers and two justices upon the proposal of the Plenary Session of the Supreme Court. The Plenary Session of the Supreme Court may select candidates for the office of a justice of the Constitutional Court only among judges of the Republic of Latvia.

The justices of the Constitutional Court must meet the following requirements laid down by law:

1. a person is a citizen of the Republic of Latvia;
2. has an impeccable reputation;
3. is over 40 years old, on the day when the proposal regarding the confirmation as a justice of the Constitutional Court was submitted to the Parliament Presidium;
4. has acquired a higher professional or academic education (except the first level professional education) in law and also a master's degree (including a higher legal education, which in regard to rights is equal to a master's degree) or a doctorate;
5. has at least 10 years of service in a legal speciality or in a judicial speciality in scientific educational work at a scientific or higher educational establishment after acquiring a higher professional or academic education (except the first level professional education) in law.

According to the Law, lists of nominees for the office of justices of the Constitutional Court shall be published in the Official Gazette “*Latvijas Vestnesis*” no later than five days after their submission to Parliament's Presidium.

A justice of the Constitutional Court, after approval by Parliament, takes up his or her duties of office after swearing the oath before the President of the State. If a judge of another court, who has already sworn the oath, is chosen as a justice of the Constitutional Court, he or she shall not swear the oath again and shall take up the duties of his or her office immediately after the approval has been given.

There are restrictions on work and political activities of the justices of the Constitutional Court, i.e. justices may not fill another office or have other paid employment except in a teaching, scientific and creative capacity. A justice must not be a Member of Parliament or a local government council. The office of a justice of the Constitutional Court is incompatible with membership of a political organisation (party) or association. A justice of the Constitutional Court may be a member of other public organisations or associations: however, he or she must not use this right in such a way as to harm their dignity and reputation as a judge, the independence of the Court, and impartiality.

The Constitutional Court and justices act independently in fulfilling their duties and are bound only by law. Direct or indirect interference with the actions of the Constitutional Court in relation to the activity of the justice is not permissible. The

Constitutional Court judge is inviolable: a justice of the Constitutional Court may not be arrested or prosecuted on criminal charges without the consent of the Constitutional Court, and he or she may be detained, forcibly held and subjected to a search only with the consent of the Constitutional Court.

A justice of the Constitutional Court may be subject to disciplinary proceedings for an administrative violation, failure to perform his or her duties, inappropriate conduct, etc. The Constitutional Court adopts decisions in disciplinary cases by a majority vote.

If the Constitutional Court has agreed to the prosecution of a justice of the Constitutional Court on criminal charges, the authority of this justice shall be suspended until the time the decision in the relevant case comes into legal effect or the relevant criminal charges are dismissed. If a justice of the Constitutional Court is subject to disciplinary proceedings because he or she has committed an act incompatible with the status of a justice, the Constitutional Court may suspend the authority of this justice until the completion of the investigation, but not for longer than one month.

A justice of the Constitutional Court may be released from office by the decision of the Constitutional Court, if he or she is unable to continue working because of reasons of health. A justice of the Constitutional Court is removed from office, if he or she is convicted of a crime and the judgment has come into legal effect. A justice of the Constitutional Court may be released from office by the Constitutional Court decision, if he or she has broken restrictions concerning other paid employment and participation in public affairs, has committed a shameful act, which is incompatible with the status of a judge, or regularly fails to perform his or her duties of office and has been charged with disciplinary liability in this regard.

2. Procedure

According to Section 26.1 of the Constitutional Court Law “[t]he procedure for reviewing cases is provided for by this Law and the Rules of Procedure of the Constitutional Court. Envisaging of procedural terms and procedural sanctions – fines shall be carried out in accordance with the rules of the Civil Procedure. Other procedural issues, not regulated in the Constitutional Court Law and the Rules of Procedure of the Constitutional Court, shall be determined by the Constitutional Court”.

The application must be submitted to the Constitutional Court in written form. The Panel, consisting of three justices, examines the application and takes the decision to initiate a case or refuse to

initiate it. The Panel is elected for a year by an absolute majority vote by full membership of the Court.

The Panel reviews cases in closed sessions, with only the members of the Panel participating. If it is necessary the members of the Panel may invite the applicant, the employees of the Constitutional Court or other persons to attend the session.

When reviewing the applications the Panel has the right to refuse initiating a case, if:

1. the case is not within the jurisdiction of the Constitutional Court;
2. the applicant is not entitled to submit the application;
3. the application does not comply with the requirements of Articles 18 or 19-19.3 of the Constitutional Court Law;
4. an application is submitted regarding a claim that has already been adjudicated; or
5. legal substantiation or the facts included in the application has not essentially changed compared to previous application, in respect of which the Panel has already adopted a decision.

When reviewing the constitutional claim, the Panel may refuse to initiate a case if the legal justification of the claim is evidently insufficient to satisfy the claim.

The Panel adopts the decision to initiate the case or to refuse initiating it within a month of receiving the submitted application. In complicated cases the Constitutional Court may adopt the decision to extend this term to two months.

After the case is initiated, the Chairperson of the Constitutional Court shall ask one of the justices to prepare it for adjudication.

The case shall be prepared not later than within five months. In especially complicated cases, the Constitutional Court, in the body of three justices at the assignment sitting, may adopt a decision to extend this term, but no more than by two months.

The preparation of the case shall be completed by a decision of the Chairperson of the Constitutional Court to forward the case for review, appointing the body of the Court session and setting the time and place for assignment sitting.

The Constitutional Court, in its full membership, shall adjudicate matters regarding:

1. compliance of laws with the Constitution;

2. compliance of other acts of Parliament, the Cabinet, the President, the Speaker of Parliament and the Prime Minister, except for administrative acts, with the law;
3. compliance of Latvian national legal norms with those international agreements entered into by Latvia that are not in conflict with the Constitution;
4. compliance of regulatory enactments of the Cabinet with the Constitution;
5. compliance of international agreements signed or entered into by Latvia (also until the confirmation of the relevant agreements in Parliament) with the Constitution; and
6. compliance of other normative acts or parts thereof with the Constitution.

Other cases are reviewed by three judges of the Constitutional Court.

If the entire Constitutional Court reviews a case, it includes all the justices of the Constitutional Court who are not excused from participating in the Court session because of ill-health or other justified reasons. In this case, there must be at least five justices of the Constitutional Court.

The session shall be chaired by the President of the Constitutional Court or his or her deputy. If a case is reviewed by three justices of the Constitutional Court, the participating judges are selected by the President of the Constitutional Court and these justices shall elect the Chairperson of the session from among themselves. No justice of the Constitutional Court may refuse to take part in a Court session.

There are oral Court proceedings and Court proceedings in writing. In cases when the documents attached to the case suffice, it is possible to hold Court proceedings in writing, without the participants in the case attending the Court session. The decision to hold Court proceedings in writing is adopted at the preparatory meeting by the Court.

Oral sessions of the Constitutional Court shall be open except in cases when this is contrary to the interests of protecting state secrets, commercial secrets, as well as protecting the inviolability of the private life of a person.

The parties to the case – the applicant as well as the institution or official who issued the contested act – may perform procedural actions at the Constitutional Court himself or herself or be represented by his or her respective representative. The parties to the case may employ the assistance of a sworn advocate, but they are not obliged to do so.

Following a session of the Constitutional Court, the justices meet to reach a decision. The decision is reached by a majority vote in the name of the Republic of Latvia. The justices may vote only “for or against”. In the case of a tied vote, the Court reaches a decision that the disputed legal norm (act) complies with the legal norm of higher rank.

The judgment shall be reached not later than 30 days after the Constitutional Court session. The President of the Court signs the judgment. A justice, who has voted against the opinion given in the judgment, shall present his or her individual opinion in writing, which is attached to the case file, but is not announced at the Court session.

The decision of the Constitutional Court is published in the *Latvijas Vestnesis* (Official Gazette) not later than five days after its pronouncement. The Constitutional Court publishes the collection of decisions of the Constitutional Court, which comprises all decisions in full, including the dissenting opinions of justices.

IV. Jurisdiction

According to the Law, the Constitutional Court reviews cases concerning:

1. compliance of laws with the Constitution;
2. compliance of international agreements signed or entered into by Latvia (even before Parliament has confirmed the agreement) with the Constitution;
3. compliance of other normative acts or parts thereof with the legal norms (acts) of higher legal force;
4. compliance of other acts (with an exception of administrative acts) by Parliament, the Cabinet of Ministers, the President, the Speaker of Parliament and the Prime Minister with the law;
5. compliance with the law of Regulations by which a minister, authorised by the Cabinet of Ministers, has suspended binding regulations issued by a local government council;
6. compliance of the national legal norms with the international agreements entered into by Latvia, which are not in conflict with the Constitution.

The following have the right to submit an application to initiate a case:

1. Regarding compliance of laws and international agreements signed or entered into by Latvia with the Constitution, compliance of other normative acts or parts thereof with the legal norms (acts) of higher legal force, as well as compliance of national legal norms of Latvia with the international agreements

entered into by Latvia, which are not in conflict with the Constitution:

1. the President;
2. the Parliament;
3. not less than twenty deputies of Parliament;
4. the Cabinet;
5. the Prosecutor General;
6. the Council of the State Audit Office;
7. a local government council (*Dome*);
8. the Ombudsman, if the authority or official, who has issued the disputed act, has not rectified the established deficiencies within the time period specified by the Ombudsman;
9. a court, on adjudicating a civil matter, criminal matter or administrative matter;
10. the Land Register Office judge in performing an entry of immovable property or associated corroboration of rights thereof in the Land Register;
11. a person in the case of the fundamental rights being infringed upon as defined in the Constitution; or
12. the Judicial Council in the frameworks of jurisdiction established by law.

2. Regarding the compliance of other acts (with an exception of administrative acts) of Parliament, the President, the Speaker of Parliament and the Prime Minister with the Constitution and other laws:

1. the President;
2. the Parliament;
3. not less than twenty deputies of Parliament;
4. the Cabinet; and
5. the Judicial Council in the frameworks of jurisdiction established by law.

3. Regarding compliance with the law of an order, by which a minister, duly authorised by the Cabinet of Ministers, has rescinded the binding regulations, issued by a local government council (*Dome*).

The application of a person, whose fundamental rights established by the Constitution have been violated, is called the constitutional claim. There are special provisions regarding submission of the constitutional claim. The Law provides that any person, who holds that his or her fundamental rights, established by the Constitution, have been violated by applying a normative act, which is not in compliance with the legal norm of higher legal force, may submit a claim (an application) to the Constitutional Court. The constitutional claim shall be submitted only after exhausting the ordinary legal remedies (a claim to a higher institution or official, a claim or application to a court of general jurisdiction, etc.) or in the absence of other means. A

constitutional claim may be submitted to the Constitutional Court within six months from the date of the decision of the last institution becoming effective. If it is not possible to protect the fundamental rights established in the Constitution by applying general legal remedies, it shall be possible to submit a constitutional complaint (application) to the Constitutional Court within six months from the date of infringement of the fundamental rights.

If the review of the constitutional claim is of general significance or if legal protection of the rights with general legal means cannot avert material injury to the applicant of the claim, the Constitutional Court may decide to review the claim (application) before all the other legal means have been exhausted.

V. Nature and effects of decisions

The decision of the Constitutional Court is final. It comes into effect at the time of its pronouncement. A decision of the Constitutional Court is binding on all State and municipal institutions, offices and officials, including the courts, also natural and legal persons.

Any legal norm (act), which the Constitutional Court has proclaimed as incompatible with the legal norm of higher force, shall be considered invalid as of the date of publishing the judgment of the Constitutional Court, unless the Constitutional Court has ruled otherwise.

If the Constitutional Court finds any international agreement signed or entered into by Latvia to be incompatible with the Constitution, the Cabinet of Ministers is immediately obliged to see to it that the agreement is amended, denounced or suspended or the accession to that agreement is withdrawn.



Lithuania

Constitutional Court

I. Introduction

It was the Constitution of 1992 which, for the first time in the history of Lithuania, foresaw the establishment of the Constitutional Court, although the institution itself was formed and started its activities in the spring of 1993.

The Constitutional Court does not belong to the system of ordinary courts and, therefore, does not carry out usual functions of justice. However, according to its specific purpose – to guarantee the supremacy of the Constitution in the legal system and to ensure constitutional legality, according to the established powers – to nullify *de facto* unlawful legal acts, the Constitutional Court is by no means the supreme institution in the hierarchy of courts.

II. Basic texts

Chapter 8 (consisting of 7 Articles) of the Constitution concerns the Constitutional Court, its purpose, the procedure of its formation, the independence of judges of the Constitutional Court, their rights of inviolability and the termination of their powers, the competence of the Court and the subjects who shall have the right to address the Court as well as the jurisdiction of the decisions of the Constitutional Court. The Status of the Constitutional Court and the procedure of the execution of powers are established by the Law on the Constitutional Court adopted by the *Seimas* (Parliament) of the Republic of Lithuania on 3 February 1993.

III. Composition, procedure and organisation

1. Composition

The Constitutional Court consists of 9 judges appointed for an unrenovable term of nine years. According to the rotary principle, established by the Constitution, one-third of the Court is reconstituted every three years. In order to form the legal ground for the rotation mentioned, upon the initial appointment of Constitutional Court judges, three of them were appointed for a three-year term, three for a six-year term and three for a nine-year term. According to the Law, the judges who were not appointed for a full term may hold the same office for one more term after an interval of at least three years.

Parliament appoints an equal number of judges to the Constitutional Court from candidates nominated by the President of the Republic, the Chairperson of Parliament and the Chairperson of the Supreme Court; the procedure shall also be used for the renewal of the composition of the Court. Parliament appoints the Chairperson of the Constitutional Court from among the judges thereof who are nominated by the President of the Republic.

To become a Constitutional Court judge, the following requirements are set out by the Law: citizens of the Republic of Lithuania who have an impeccable reputation, who are trained in law and who have served, for at least 10 years, in the legal profession or in an area of education related to his or her qualifications as a lawyer. According to the law, the names of candidates are to be announced in the press prior to the consideration thereof in Parliament.

Before entering office, persons appointed to become Constitutional Court judges swear, before Parliament, to be faithful to the Republic of Lithuania and the Constitution. Constitutional Court judges who either do not take the oath in the manner prescribed by law, or who take a conditional oath, lose the status of a judge.

The restrictions on work and political activities which are imposed on court judges also apply to judges of the Constitutional Court, i.e. judges of the Constitutional Court may not hold any other elected or appointed office, may not be employed in any business, commercial or other private institution or company, with the exception of educational or creative work; they may not participate in the activities of political parties or other political organisations.

The Constitutional Court, as well as its judges in fulfilling their duties, acts independently of any other State institution, person or organisation and observes only the Constitution. The person of a Constitutional Court judge is inviolable: a judge may not be found criminally responsible, may not be arrested, and may not be subjected to any other restriction of personal freedom without the consent of the Constitutional Court.

The powers of a Constitutional Court judge may be suspended by a decision of the Constitutional Court upon:

- consent granted according to the procedure established by the Law to institute criminal proceedings against the Constitutional Court judge;

- a resolution of Parliament to initiate impeachment proceedings in Parliament against the Constitutional Court judge after the findings of the special interrogatory commission; or
- the declaration of the judge as missing by an effective court order.

The powers of a judge of the Constitutional Court shall be terminated:

- on the expiration of the term of office;
- upon the death of the judge;
- upon voluntary resignation;
- when the judge is incapable of fulfilling his or her duties for health reasons; or
- upon removal from office by Parliament according to impeachment proceedings.

2. Procedure

All the procedures of the Constitutional Court may be grouped in the following way: preliminary investigation of material, preparatory procedures and procedures of judicial trial.

All the petitions and requests presented to the Constitutional Court for consideration must undergo preliminary investigation. The President of the Constitutional Court shall charge one (usually) or several justices to perform this upon setting the term for this work. A justice performing preliminary investigation shall ascertain the absence of grounds for refusal to examine the petition or inquiry or to return of the petition to the petitioner; establish which issues must be clarified before the case is prepared for the hearing.

Preparatory procedures, i.e. preliminary investigations of the issues accepted in the Court for consideration and preparation of cases for the Court hearing, are performed by judges of the Constitutional Court. In procedural sittings of the Constitutional Court, disputed questions of case preparation, as well as decisions to assign the case for hearing in the Court sitting, are considered. The constitutional justice cases may be investigated in a public hearing or under written procedure. The Constitutional Court both investigates cases and reaches conclusions, provided that no less than two-thirds of all the judges of the Constitutional Court are participating.

A case will only be investigated by the Constitutional Court once the parties to the case have been notified of this (a week before the public hearing and two weeks before the written procedure). The following persons are considered parties to the case: the petitioner – a subject who is granted by

law the right to apply to the Constitutional Court with a petition and the person concerned – the state institution which has adopted the disputed legal act, or a state officer, in respect of whom the case is being investigated.

The constitutional justice case will be investigated under written procedure if the justice who prepares the case for the hearing finds that there is enough data to consider a case under written procedure and if the parties to the case did not submit a written request to investigate the case in a public hearing. While considering a case under written procedure, upon assessment of the material of the case, the Constitutional Court may adopt a decision to assign the case for consideration under oral procedure in a public hearing.

While investigating a case in a public hearing, the Constitutional Court must listen to the statements of the persons participating in the case, the testimony of witnesses, the findings of experts and must examine other evidence and listen to pleadings in court. Constitutional Court judges who have participated in pleadings in court shall retire to the deliberation room to make a ruling. During the deliberation, only Constitutional Court judges may be present. Rulings are made by majority vote. In the event of a tie vote, the vote of the Chairperson of the hearing shall be decisive. Judges do not have the right to refuse to vote or to abstain from voting. Adopted rulings are presented in writing and signed by all the participating judges. Having adopted a ruling, the Chairperson of the sitting shall read it aloud in the court room, after which it will be published.

A justice of the Constitutional Court, who disagrees with an act adopted by the Court, shall have the right to set forth in writing his or her reasoned dissenting opinion within three working days of the announcement of the corresponding act in the courtroom. The dissenting opinion of the justice shall be attached to the case.

The hearing of the case must be finished and the final ruling or conclusions passed within four months of the day the petition or inquiry is received by the Constitutional Court, unless otherwise provided by the Constitutional Court. The Constitutional Court may not prolong the 4-month term when it considers a case regarding the compliance with the Constitution of a law or other legal act that regulates the taking over of the land for the needs of society in the course of implementation of the projects of special importance for the state.

3. Organisation

The Constitutional Court freedom and independence from other institutions shall be ensured by financial, material-technical, as well as organisational guarantees secured by law. The Constitutional Court shall be financed from the State budget by ensuring the possibility to the Constitutional Court to independently and properly perform the functions of constitutional supervision. The estimate of expenditure shall be approved by the Constitutional Court which shall also independently dispose of the funds that are allocated to it.

The Constitutional Court has an apparatus which is headed by the Chancellor of the Constitutional Court. The Chancellor is subordinated to the President of the Constitutional Court. The structure of the apparatus of the Constitutional Court is established as follows: the Chancellor; the Deputy Chancellor; advisors to the President; assistants to the President; the President's Secretariat; the Law Department; the Division of Information and Technologies and the Library; the General Division; the Finance Division and the Economy Division.

IV. Jurisdiction

The main functions of the Constitutional Court are:

- the judicial review of laws and other legal acts adopted by the institutions of the highest executive powers;
- the drawing of conclusions on questions foreseen in the Constitution.

While performing the function of judicial review, the Constitutional Court considers and adopts rulings concerning the conformity of laws and legal acts adopted by Parliament with the Constitution.

The Constitutional Court also considers the conformity with the Constitution and laws of:

- legal acts of the President; and
- legal acts of the Government.

In the Republic of Lithuania only constitutional review *a posteriori* takes place i.e. the constitutionality and legality of the adopted and already functioning laws as well as other mentioned legal acts are being investigated. This kind of review is passive, i.e. it is performed only when competent subjects address the Constitutional Court, in the manner prescribed by law, requesting it to examine the compliance of concrete legal acts with the Constitution.

The right to file a petition with the Constitutional Court concerning the compliance of a legal act with the Constitution, is vested in:

- the Government, groups consisting of at least 1/5 of all Members of Parliament and the courts, for cases concerning a law or other act adopted by Parliament;
- groups consisting of at least 1/5 of all Members of Parliament and the courts, for cases concerning an act of the President of the Republic; and
- groups consisting of at least 1/5 of all Members of Parliament, the Court and the President of the Republic, for cases concerning Governmental acts.

According to the Constitution, the Constitutional Court presents conclusions concerning:

- possible violation of election laws during presidential elections or elections to Parliament;
- whether the President of the Republic's health is not limiting his or her capacity to continue in office;
- conformity of international agreements of the Republic of Lithuania with the Constitution; and
- compliance with the Constitution of concrete actions of Members of Parliament or other State officers against whom impeachment proceedings have been instituted.

Parliament may request conclusions from the Constitutional Court on the questions mentioned above and, in cases concerning Parliamentary elections and international agreements, the President of the Republic may also request a conclusion. Here it should be noted that the conclusion concerning an international agreement may be requested prior to ratification thereof by Parliament.

The Constitutional Court has the right to refuse to accept cases for investigation, or to prepare conclusions, if the appeal is not based on legal grounds.

V. Nature and effects of decisions

The Constitutional Court adopts decisions, rulings and conclusions.

The Constitutional Court adopts interim decisions and injunctions while preparing cases for court hearings and during a sitting prior to the determination of the case.

The Constitutional Court determines cases concerning the constitutionality and legality of laws and other legal acts by means of final rulings. The Constitutional Court announces rulings in the name of the Republic of Lithuania. There are two types of rulings:

- recognising that a legal act is in conformity with the Constitution and laws; and
- recognising that a legal act contradicts the Constitution and laws.

Upon the request of the parties to the case, of other institutions or persons to whom the ruling of the Constitutional Court was sent or on its own initiative, a ruling of the Constitutional Court may be officially construed. The decision on construing the Constitutional Court's act is then adopted.

Laws of the Republic (or a part thereof) or other Parliamentary acts (or a part thereof), acts of the President of the Republic, or acts of the Government (or a part thereof) are not applicable from the day when a Constitutional Court Ruling, that the act in question (or a part thereof) contradicts the Constitution, is published. The same consequences arise when the Constitutional Court adopts a ruling that an act of the President of the Republic or act of the Government (or a part thereof) is in contradiction with laws.

Rulings of the Constitutional Court are final and are not subject to appeal.

Upon examination of an inquiry, the Constitutional Court adopts a conclusion. On the basis of the conclusions of the Constitutional Court, Parliament has the final decision.

The rulings and conclusions of the Constitutional Court, as well as, if necessary, other decisions thereof, are published in a separate chapter of the *Valstybes žinios* (Official Gazette) and newspapers. Rulings of the Constitutional Court become effective on the day that they are published.

VI. Conclusion

The Constitutional Court, celebrating its 20th anniversary in 2013, successfully exercises constitutional control in the established manner over the lawfulness and constitutionality of adopted legal acts and removes the legal norms which are in conflict with the Constitution, from the legal system of the state.



Luxembourg Constitutional Court

I. Introduction

The process of setting up a system of constitutional review by a specific court in Luxembourg was not an easy task.

The first authoritative legal opinions advocating such a measure, date from 1973 and it took nearly a quarter of a century for the project to come to fruition. The Luxembourg Constitutional Court began operating on 31 October 1997, with the adoption of its rules of procedure.

This makes Luxembourg the last state to date in western Europe to have set up a Constitutional Court.

II. Basic Texts

- Act of 12 July 1996 amending Article 95 of the Constitution (Article 95ter);
- Act of 27 July 1997 on the Organisation of the Constitutional Court.

III. Composition, procedure and organisation

1. Composition

The Constitutional Court is made up of nine members, namely: a president, a vice-president and seven judges.

The President of the Supreme Court of Justice, the President of the Administrative Court and the two Judges of the Court of Cassation are members of the Constitutional Court by right.

The other five members of the Constitutional Court, who must be qualified judges, are appointed by the Grand Duke on the joint advice of the Supreme Court of Justice and the Administrative Court.

The President of the Supreme Court of Justice serves as the President of the Constitutional Court and the President of the Administrative Court acts as Vice-President.

The members of the Constitutional Court continue to perform their duties in the courts in which they sat before and if they cease to work as judges, they automatically relinquish their posts in the Constitutional Court.

The Court sits, deliberates and gives judgments as a bench of five judges.

2. Procedure and organisation

The President decides on the composition of the Court for each case and appoints a reporting judge. The President and the Vice-President are entitled to sit on all cases.

The parties have thirty days following the date of service of the preliminary question, to file written submissions and hence become parties to the proceedings. They have another thirty days after filing these submissions, to file additional submissions.

During a further thirty-day period following the expiry of the aforementioned periods, the Court must hold a public hearing of the report of the reporting judge and the oral submissions of the parties. The parties are entitled to make submissions to the Court and argue their case before it through any lawyer registered on List 1 of the roll of lawyers.

The Court must give a reasoned judgment on the case within two months of the conclusion of the hearing. The judgment must be published in the Official Gazette within thirty days.

Proceedings before the Constitutional Court are free of charge.

IV. Jurisdiction

The Constitutional Court gives rulings on the compliance of laws with the Constitution, save for laws approving treaties.

When a party raises a question about a law's conformity with the Constitution before an ordinary or administrative court, the latter is expected to refer the matter to the Constitutional Court.

The Court need not do so if it considers that a decision on the matter raised is not necessary for it to deliver its judgment, that the constitutionality issue is without foundation or that the Constitutional Court has already ruled on a question related to the same matter.

If a court considers that a question concerning a law's conformity with the Constitution arises and a ruling on the matter is needed for it to give its judgment, it must raise the matter of its own motion.

V. Nature and effects of decisions

"The referring court and any other court called on to deal with the same case shall abide by the Constitutional Court's ruling when determining the case" (Article 15.2 of the Act of 27 July 1997).

Courts therefore will not apply any law held to be unconstitutional.

The Constitutional Court performs its review on a purely abstract level, taking no account of the facts of the case.

In principle, its judgments have only a relative binding effect, constituting *res judicata* only with regard to the parties to the proceedings. However, as the courts below need not put a preliminary question if "the Constitutional Court has already ruled on a question submitted to it concerning the same matter", this might be termed an "extended relative effect", heightened by the fact that judgments are published in the Official Gazette.

Nonetheless, the ruling that a law is unconstitutional does not remove it from the national legal system and initially only has any effect on the specific case being examined.

It is regarded as the task of the legislature to remedy the situation by amending the law in question or revising the Constitution.

However, it is also entirely free to decide whether or not to do so.



Malta

Constitutional Court

I. Introduction

The Constitutional Court is composed of three judges (the Chief Justice and two other judges) and is at the apex of the courts' structure. Its jurisdiction is appellate except in cases connected with elections and vacancy of parliamentary seats. The court hears and determines appeals from decisions of the First Hall of the Civil Court on applications for redress in respect of alleged violations of the human rights protected by the Constitution and by the European Convention on Human Rights and appeals from decisions of any court of original jurisdiction on questions as to the interpretation of the Constitution and as to the validity of laws.

II. Basic Texts

Namely, the Constitution.

III. Composition, procedure and organisation

Section 95.2 of the Constitution provides that:

“One of the Superior Courts, composed of such three judges as could, in accordance with any law for the time being in force in Malta, compose the Court of Appeal, shall be known as the Constitutional Court”.

Judges are appointed by the President of Malta acting in accordance with the advice of the Prime Minister (Section 96 of the Constitution). Furthermore the President of Malta shall assign to each of the judges the court or the chamber of the court in which he or she is to sit, and may transfer a judge from one court or chamber of a court to another. A judge may be removed from office by the President of Malta upon an address by the House of Representatives supported by the votes of not less than two-thirds of all the members thereof and praying for removal on the grounds of proved inability to perform the functions of his or her office or of proved misbehaviour (Section 97.2 of the Constitution). The salaries and allowances payable to judges shall be a charge on the Consolidated Fund and their salaries and terms of office cannot be altered to their disadvantage during their tenure of office (Section 107 of the Constitution). The Chief Justice is one of the members of the Constitutional Court as he or she also presides in the Court of Appeal.

Section 95.5 of the Constitution guarantees the composition of the Constitutional Court at all times.

“If at any time during an election of members of the House of Representatives and the period of thirty days following any such election, the Constitutional Court is not constituted as provided in this Section, the said Court shall, thereupon and until otherwise constituted according to law, be constituted by virtue of this subsection and shall be composed of the three more senior of the judges then in office, including, if any is in office, the Chief Justice or other judge performing the functions of Chief Justice; and if at any other time the said Court is not constituted as provided in this Section for a period exceeding fifteen days, such Court shall, upon the expiration of the said period of fifteen days and until otherwise constituted according to law, be constituted by virtue of this subsection and shall be composed of the three more senior judges as aforesaid.”

IV. Jurisdiction

Under Section 95.2 of the Constitution, the Constitutional Court shall have jurisdiction to hear and determine:

- a. “such questions as are referred to in Section 63 of the Constitution; [1]
- b. any reference made to it in accordance with Section 56 of this Constitution and any matter referred to it in accordance with any law relating to the election of members of the House of Representatives; [2]
- c. appeals from decisions of the Civil Court, First Hall, under Section 46 of this Constitution; [3]
- d. appeals from decisions of any court of original jurisdiction in Malta as to the interpretation of this Constitution other than those which may fall under Section 46 of this Constitution; [4]
- e. appeals from decisions of any court of original jurisdiction in Malta on questions as to the validity of laws other than those which may fall under Section 46 of this Constitution; and
- f. any question decided by a court of original jurisdiction in Malta together with any of the questions referred to in the foregoing paragraphs of this subsection on which an appeal has been made to the Constitutional Court.

Provided that nothing in this paragraph shall preclude an appeal being brought separately before the Court of Appeal in accordance with any law for the time being in force in Malta.”

1. Section 63 of the Constitution concerns the determination of questions as to membership of the House of Representatives such as whether any member of the House has been validly elected; whether any member is bound by law to cease to perform his or her functions as a member of the House of Representatives.

2. In terms of Section 56 of the Constitution the Electoral Commission may suspend a general election if for example it has reasonable grounds to believe that illegal or corrupt practices or other offences connected with the elections have been committed or there has been foreign interference. In this case the Commission is bound to refer the issue immediately to the Constitutional Court for the total or partial annulment of the election. The Constitution also provides for such reference to be made, not later than three days after the publication of the official election result, by any voter.

3. Appeals from decisions delivered by the Civil Court, First Hall, concerning allegations made by individuals that any fundamental freedom as entrenched in Sections 33 to 45 of the Constitution has been, is being or is likely to be contravened in relation to him or her. These articles guarantee such fundamental freedoms as: the right to life, protection from forced labour, inhuman treatment, privacy of property, freedom of expression. However, no such appeal shall lie where the court of first instance has declared that an application is merely frivolous or vexatious.

All human rights issues are in effect channelled into one centralised court of original jurisdiction, the ordinary “superior” court of civil jurisdiction, saving of course an appeal as of right to the Constitutional Court. Thus, if a human rights issue is raised in criminal proceedings, the court is bound to refer the issue to the First Hall of the Civil Court unless it is of the opinion that the raising of the question is merely frivolous or vexatious; the Civil Court will give its decision on any such question referred to it and the court in which the question arose, shall dispose of the question in accordance with the decision delivered by the Civil Court saving the right of appeal to the Constitutional Court.

Furthermore, the European Convention Act (Act XIV of 1987) provides that the Constitutional Court has the jurisdiction to hear and determine appeals filed under this Act, which incorporated the substantive provisions of the European Convention on Human Rights and its first Protocol, appended to the Act itself, into domestic law.

4. Decisions of the Constitutional Court are not subject to appeal. Judgments do not contain dissenting opinions. In this respect Article 218 of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) provides that:

“In a court consisting of more than one member, the decision of the majority shall form the judgment which shall be delivered as the judgment of the whole court.”

5. Section 95 of the Constitution may only be amended by a two-thirds majority of all members of the House of Representatives (Section 66 of the Constitution).

6. According to Act XIV of 1987 (Chapter 319 of the Laws of Malta), the Constitutional Court also has the function of enforcing judgments delivered by the European Court of Human Rights. The procedure contemplates the filing of an application by the interested party, which must be notified to the Attorney General (Article 6 of the relevant Act).

7. Although the Constitutional Court has the jurisdiction to declare the constitutionality or otherwise of a law, it cannot annul a law. It then rests with Parliament to take the relevant action it deems necessary to comply with the court’s decision. In this respect Article 242 of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) stipulates that:

“When a court, by a judgment which has become *res judicata*, declares any provision of any law to run counter to any provision of the Constitution of Malta or to any human right or fundamental freedom set out in the First Schedule to the European Convention Act, or to be *ultra vires*, the registrar shall send a copy of the said judgment to the Speaker of the House of Representatives, who shall during the first sitting of the House following the receipt of such judgment inform the House of such receipt and lay a copy of the judgment on the table of the House.”

IV. Procedure

Article 4 of Legal Notice 35 of 1993, entitled Regulations Regarding Practices and Procedures of the Courts provides that:

“The application to appeal (in the Constitutional Court) shall be made within eight working days from the date of the decision appealed from, and the respondent may file a written reply within six working days from the date of service. The Court

which gave a decision subject to appeal to the Constitutional Court, may in urgent cases upon demand, even by any of the parties immediately upon delivery of such decision, abridge the time for making the appeal or for the filing of a reply.

If no such demand is made by any of the parties immediately upon the delivery of the judgment, any one of the parties may make such a demand by application, upon which, the court which gave the decision shall, after summarily hearing the parties if it thinks necessary, give the requisite order.”



Mexico

Electoral Court of the Federal Judiciary

I. Introduction

Over the past 20 years the approach in which electoral disputes are settled in Mexico has shifted substantially from a predominantly political to a purely jurisdictional system.

In 1987, the first Electoral Tribunal (*Tribunal de lo Contencioso Electoral*, TRICOEL) was created with the capacity to resolve electoral conflicts derived from federal elections, that is, electing members of both chambers of Congress as well as the President of our nation. Nonetheless, Mexico had a mixed electoral justice system. In fact, the Court's rulings could be amended by decisions made by the Electoral Colleges of both chambers of Congress. These institutions were, at the time, the only ones empowered to declare an election void.

In 1990, the Federal Electoral Court (*Tribunal Federal Electoral*, TRIFE) was created as an autonomous jurisdictional institution. Nevertheless, the mixed nature of the system remained. Therefore, TRIFE's decisions were subject of revision of and could be amended by the vote of two thirds of Congress constituted as an Electoral College.

In 1993, two substantive constitutional amendments were implemented. First, the Federal Electoral Court became “the highest jurisdictional authority in Electoral matters” and at the same time, the self-evaluation system regarding the election of Congress was eliminated. However, the mixed system was still in practice for the Presidential Election, as it had to be validated by the Chamber of Deputies.

In 1996, as a result of a thorough constitutional reform, the Electoral Court of the Federal Judiciary (*Tribunal Electoral del Poder Judicial de la Federación*, TEPJF) was created. Since then its rulings on Congressional and Presidential elections disputes are final and unappealable. The Electoral Court is also empowered to solve controversies that may arise from the Presidential Election, to conduct the final vote tally, and to validate the election. Needless to say, the reforms had an enormous impact on Mexico's electoral system.

II. Basic Texts

- Article 99 of the Constitution provides that: “With the exception of the dispositions of Section II of Article 105 of the Constitution [regarding actions of unconstitutionality that are competence of the Supreme Court] the Electoral Court shall be the highest jurisdictional authority on the subject matter and shall constitute a specialised body of the Federal Judiciary.”
- Articles 41.VI, 60.2 and 60.3 of the Constitution are also relevant regarding the attributions of the Electoral Court of the Federal Judiciary.
- Law of the Federal Judiciary (*Ley Orgánica del Poder Judicial de la Federación*): Title Eleven, Articles 184 – 241.
- Federal Electoral Code (*Código Federal de Instituciones y Procedimientos Electorales*, COFIPE), Articles 3.1; 7.1.b; 31.2; 37.1.c; 46.4; 47.3; 54.2; 84.1.g and 84.1.h; 85; 102.1; 103.VII; 120.1.g; 138.3; 187.6; 194.4; 195.4; 210.5; 210.6; 213.6; 264.1; 276.1.b; 295.1 b and h; 295.8; 295.9; 301.1.a and 301.1.b; 305.1.d; 310; 311.2; 322.4; 334.3; and 363.
- Law of Electoral Dispute Resolution (*Ley General del Sistema de Medios de Impugnación en Materia Electoral*).

III. Composition, procedure and organisation

1. Composition

The Electoral Court of the Federal Judiciary is composed of a High Chamber and five Regional Chambers. The High Chamber is a permanent body located in Mexico City and is composed of seven Electoral Justices. Since 1996, the Justices are proposed by the Supreme Court of Mexico and appointed by two-thirds of the Senate. After the 2007 Constitutional Reform, Electoral Justices are designated for a nine-year period. The Chief Electoral Justice is elected among the members of the High Chamber for a period of four years and can be re-elected for an additional term.

The Regional Chambers are permanent electoral bodies located in the following cities: Guadalajara, Monterrey, Xalapa, Mexico City and Toluca. These cities represent the five constituencies in which the country is divided for electing proportional representation congressmen. Each Regional Chamber is composed of three Electoral Justices, elected in the same way as the Justices of the High Chamber.

2. Organisation

Both the High Chamber and the Regional Chambers have a General Secretariat of Agreements, whose head is the registrar.

The Court has an Administration Commission, which is in charge of the administration, vigilance, discipline, and judicial career of staff in the Electoral Court.

The Electoral Court also has an Internal Oversight Committee and thirteen Coordinations: Advisors of the Presidency; Jurisprudence and Judicial Statistics; Relations with Electoral Bodies; Information, Documentation and Transparency; Social Communication; Juridical Affairs; Institutionalisation of the Gender Perspective; Human Resources; Services and Acquisitions; Financial Affairs; Institutional Protection; Technical Administration; and the Centre of Judicial and Electoral Training.

Several Law Clerks work with each of the Electoral Justices and are responsible for the study and analysis of the projects of the cases in question (the ones that were assigned to the corresponding Electoral Justice).

3. Procedure

The system of the Court is written and inquisitorial.

The Electoral Court sits weekly for previous sessions on Mondays and deliberate on current cases in public sessions on Wednesdays.

Electoral Justices are allowed to deliver particular votes, which may be concurring or dissenting.

IV. Jurisdiction

The Federal Constitution, the Law of the Federal Judiciary, the Federal Electoral Code and the Law of Electoral Dispute Resolution, grants the Court the authority to solve electoral disputes. Electoral disputes are managed at various levels. The High Chamber is empowered to hear claims against presidential, gubernatorial, and congressional elections (congressmen elected by proportional representation). This chamber also resolves parties' challenges to decisions made by the Federal Electoral Institute of our country (hereinafter, "IFE"). Regional Chambers are empowered to settle disputes related to congressional elections (legislators elected by majority), as well as of city councils and heads of administrative and political institutions of the local governments within their jurisdiction.

Through a Nonconformity Proceeding, the Court can solve disputes in federal legislative and presidential elections. The interested parties may contest the results registered in a specific voting district within a four day period from the following day after each district finishes the tallying of votes. The entire presidential election must be contested within the four days of IFE's announcement of results.

The Electoral Court can resolve appellate challenges against actions and decisions issued by the Federal Electoral Institute. Most of these decisions have to do with economic sanctions to political parties.

Challenges against rulings and decisions issued by competent state authorities to organise, evaluate or settle disputes in local elections that might entail decisive results for the development of an electoral process or to its final electoral results can be revised by the Electoral Constitutional Review.

In order to work out challenges against actions and decisions infringing the political rights of citizens to vote, to stand for elections, to organise themselves in political associations, and to become affiliated to a political party, a Proceeding for the Protection of the Political and Electoral Rights of Citizens can be presented to the Electoral Court.

The Electoral Court is also competent to solve labour disputes between itself and its employees and between the Federal Electoral Institute and its employees.

It is important to mention that the Court has the power to exercise constitutional review and ensures the compliance of the electoral laws with the Federal Constitution.

The High Chamber of the Electoral Court has the power to make the final vote tallying for the presidential election, identify the candidate that achieved the highest number of votes based on the results registered in the final tally, and declare the validity of the election.

The High Chamber and the Regional Chambers shall declare the nullity of an election only by the causes expressly established by law.

V. Nature and effects of decisions

Decisions of the Court are final and are not reviewable by anybody, whether judicial or non-judicial. All the Court's judgments are accessible and can be consulted by the general public.

The effect of the Court's judgments is confined to the particular cases in which they are delivered (for example, a ruling that a law is unconstitutional prevents that law's being applied in that specific case but does not repeal or cancel the law). However, it is relevant to note that the Electoral Court can issue jurisprudence.

The High Chamber issues jurisprudence after three non-interrupted rulings with the same criterion on the application, interpretation, and integration of a specific norm in similar cases. Jurisprudence can also be issued when resolving a difference of criteria between two or more Regional Chambers or among the High Chamber and a Regional one.

Regional Chambers issue jurisprudence after five non interrupted rulings with the same criterion on the application, interpretation, and integration of a specific norm in similar cases and after the High Chamber ratifies the criteria.



Moldova

Constitutional Court

I. Introduction

1. Date of establishment and context

On 29 July 1994, the Parliament of the Republic of Moldova, which had become an independent State on 27 August 1991, adopted the new Constitution, which contains provisions for the creation of the Constitutional Court, its composition and powers, and also its place among public authorities.

On 13 December 1994, Parliament adopted Law no. 317 on the Constitutional Court, which regulates the structure of the Court, the statutes of the judges of the Constitutional Court, powers of the President of the Court and other relevant provisions.

On 23 February 1995, the Constitutional Court was established.

On 16 June 1995, Parliament adopted the Code of Constitutional Jurisdiction, under which the Court adopts judgments, decisions and opinions.

2. Position within the hierarchy of courts

The Constitutional Court is not part of the country's ordinary law court hierarchy. The Court is the sole organ of constitutional jurisdiction, autonomous and independent of the legislative, executive and judicial authorities. The Constitutional Court is responsible for guaranteeing the primacy of the Constitution, ensuring the principle of the separation of powers within the State between the legislative, executive and judiciary, guaranteeing the responsibility of the State towards the citizen and of the citizen towards the State. The Constitutional Court interprets the Constitution in response to applications and reviews the constitutionality of laws and decisions of Parliament, decrees of the President of the Republic and acts of Government.

II. Basic texts

- The Constitution of the Republic of Moldova, Title V "Constitutional Court", Articles 134-140 and Title VII "The Final and Transitory Provisions", Article 141.2;

- Law on the Constitutional Court no. 317-XIII, 13 December 1994, with further modifications and completions;
- Code of Constitutional Jurisdiction no. 502-XIII, 16 June 1995, with further modifications and completions.

III. Composition, procedure and organisation

1. Composition

The Constitutional Court comprises six judges, appointed for a term of office of six years. Two of the judges are appointed by Parliament, two by the Government and two by the High Council of the Judiciary.

Under the Constitution, the judges of the Constitutional Court must have higher legal training, a high level of professional expertise and at least 15 years' experience in a legal profession or as a university law lecturer or researcher.

The Law on the Constitutional Court sets the age limit for appointment as a Constitutional Court judge at 70 years.

Under the Constitution, the judges of the Constitutional Court are independent in the exercise of their functions, irremovable and subject only to the Constitution.

The suspension or termination of a judge's term of office is declared solely in the following circumstances:

1. expiry of the term of office;
2. resignation;
3. suspension of the term of office in the event of:
 - a. the judge being unable to discharge their duties because of ill health;
 - b. violation of the oath or the obligations pertaining to the office;
 - c. conviction of an offence by a court of law;
 - d. incompatibility;
4. death.

The suspension or termination of a judge's term of office may be declared only by the Constitutional Court.

The office of judge is incompatible with any other public or private remunerated activity, other than of an educational or academic nature. The law stipulates that a Constitutional Court judge may not be a member of a political party or any other political organisation on the day he or she is sworn in.

After taking an oath before the authorities appointing them, the judges of the Constitutional Court elect the President of the Constitutional Court by secret ballot.

2. Procedure

The procedure followed by the Constitutional Court is governed by the Constitution, the Law on the Constitutional Court and the Code of Constitutional Jurisdiction.

The Constitution and the Law on the Constitutional Court state that the following entities are entitled to apply to the Constitutional Court:

- a. the President of the Republic;
- b. the Government;
- c. the Minister of Justice;
- d. the Supreme Court of Justice;
- e. the Prosecutor general;
- f. a member of Parliament;
- g. a parliamentary group;
- h. the parliamentary advocate (ombudsman);
- i. the National Assembly of Gagauzia (Gagauz-Yeri – an autonomous territorial unit of the Republic of Moldova) if the rights of Gagauzia are considered to be unconstitutionally restricted.

The Constitutional Court may consider applications only from the entities listed in the Law on the Constitutional Court.

Citizens are not entitled to apply directly to the Constitutional Court. Citizens do have access to the Constitutional Court, however, via the Supreme Court of Justice in the context of objections of unconstitutionality established during its examination of a case. They may also have applications lodged by the parliamentary advocate and other entities entitled to refer matters to the Constitutional Court. The Constitutional Court cannot examine cases at its own initiative.

Applications must be written in the official state language – Romanian, according to requirements under the law.

The application is examined in two phases: examination of admissibility and examination on the merits.

If the application meets the requirements laid down by the court procedure, the President forwards it for preliminary examination to one or more judges of the Court, a sub-division of the Court Secretariat or an assistant judge. The report on the preliminary examination must be submitted within 60 days following

the registration of the application at the latest. If it is necessary to carry out further investigations, that time limit may be extended by 30 days.

After completing their preliminary examination of the application, the reporting judges submit a report on their findings. The judges of the Court decide whether the case-file is admissible and in a fit state to be entered on the list of cases for the Court's public session. After the application has been accepted for examination on the merits and has been entered on the list of cases, the president of the Court appoints a reporting judge and sets the time limit for examining the application and submitting the report.

The reporting judge prepares the case for examination; provides the respondent with a copy of the application and the enclosed documentation, studies the written objections to the application and requests the necessary material from the respective bodies and expert appraisals; they may request the opinion of the Advisory and Scientific Council on the problem under consideration; they may take other investigative steps.

After preparing the case-file, and no later than ten days before the court sitting, the reporting judge informs the court judges and participants in the proceedings of the place, date and time of the sitting.

The parties participate in the examination of the case in person or indirectly through representatives. Lawyers, specialists in the given field and other persons may participate in the capacity of representatives, on the basis of a power of attorney. Several representatives may participate on behalf of one party. The powers and rights of the representatives are set out in the power of attorney.

The parties to the proceedings enjoy equal procedural rights and have access to the case-file material. In cases brought to settle objections of unconstitutionality of legal acts challenged by the Supreme Court of Justice resulting from specific civil or criminal cases, the parties to the cases concerned are entitled to have access to the case-file material.

The Court may request and obtain information and additional material necessary to the examination of the case from any authority, individual, institution or public organisation. The requests and summons of the Constitutional Court are binding on all public authorities, officials, institutions and organisations. Failure to comply with the Court's requests is a punishable act.

The Court exercises its jurisdiction in public plenary sittings based on the adversarial principle.

The quorum required for a plenary sitting is two thirds of the Court's judges. A case is examined at a single sitting.

The Court may not examine another case before pronouncing judgment on the current case or a decision to suspend its examination.

The Constitutional Court may decide to hold a sitting *in camera* if publicity linked to the case could be damaging to the interests of the State and public order.

After examining the case, the Court deliberates in chambers. Its deliberations are secret and the Court's judges are bound by secrecy.

In the exercise of its powers, the Court adopts judgments and decisions and issues opinions. When settling a problem on its merits, it passes a judgment or issues an opinion; if the matter is not settled, a decision is adopted.

Opinions may be issued on initiatives to revise the Constitution, circumstances justifying the dissolution of Parliament or the dismissal from office of the President of the Republic or an interim president, as well as the inability of the President of the Republic to discharge his or her duties for more than 60 days, verification of the constitutionality of a political party, etc.

The acts of the Court are adopted by a vote by simple majority of the judges. The judges may not abstain or refuse to vote. In the event of there being an equal split of votes on the adoption of a judgment on the constitutionality of a normative act or an international treaty, the normative act or international treaty is presumed to be constitutional and the case is suspended. In other cases where voting is equally split, it is considered that the judgment, opinion or decision is not adopted and examination of the case is postponed to a later date. Any separate opinion of the judge may be annexed to the final judgment or decision.

The Court's judgment and opinions are adopted in the name of the Republic. The judgments of the Constitutional Court cannot have retrospective effect, are final and may not be appealed or challenged in any way.

The laws and other legal acts or provisions that have been declared unconstitutional become null and void upon adoption of the court judgment and may not be applied in future.

Any revision of a Court judgment or opinion is carried out solely at the initiative of the Court, by decision of the majority of the judges.

A Court judge who disagrees with the judgment pronounced or the opinion issued, may set out a dissenting opinion in writing. The judgments and opinions of the Constitutional Court and dissenting opinions where these exist, are published in the *Monitorul Oficial* of the Republic within 10 days following their pronouncement.

3. Organisation

The Secretary General is responsible for organising and coordinating the activities of the subdivisions of the Court; is responsible for developing the draft plan of the examination of the applications, presents the agenda of the sessions to the Court judges and judges assistants; monitors the transmission of acts adopted by the Constitutional Court to the relevant public authorities; signs the resolutions adopted by the Plenum of the Constitutional Court in administrative matters; makes recommendations and consults the President of the Court on issues related to the exercise of the constitutional jurisdiction and general management of the Court; is responsible for organising the agenda, meetings and business meetings of the President of the Court; performs other tasks upon instruction by the President of the Court.

Within the Secretariat of the Court there are the following main subdivisions:

- The Legal Department – Registry is responsible for the development and preparation of draft judgments, decisions and opinions, as well as oversight of the activities of subordinate units. The Registry is responsible for the registration of referrals and pleadings necessary for their treatment. The draft plan of the examination of the applications.
- Section of Legal Expertise – develops draft judgments, opinions and decisions and maintains the correspondence between the Court, authors of complaints and competent authorities.
- Section of Research and Analysis – analyses the practice of other constitutional courts, regularly informs about the European Court of Human Rights case law and Venice Commission recommendations.
- Editorial Section – prepares the acts adopted by the Court, verifies the accuracy of the legal content, provides precise and appropriate language of the act adopted.
- Service of Registry, Records and Archive – submits to the President the complaints received

from the Court for the appointment of the judge-rapporteur and assistant judge and establishment of the period of review, as appropriate.

- The External Relations Department – is responsible for the development and coordination of international relations; hosting delegations, bilateral relations with organisations of which the Constitutional Court is a full member, the Conference of European Constitutional Courts and ACCPUF World Conference on Constitutional Justice as well as that of the Venice Commission of the Council of Europe.
- The Finance Department – is responsible for administrative and personnel management of the Court, preparation and execution of the budget, building maintenance and general stewardship.

The rules on organisational structure and human resources of the Secretariat are adopted by the Constitutional Court.

It is the President of the Constitutional Court who manages the Court's financial and human resources.

The Constitutional Court has its own budget, which is an integral part of the state budget. The Court's budget is approved by Parliament at the same time as the state budget.

There is an Advisory and Scientific Council operating at the Constitutional Court.

IV. Jurisdiction

In accordance with Articles 135 and 141.2 of the Constitution, and in line with the procedures laid down by the Code of Constitutional Jurisdiction, the Constitutional Court:

- a. In response to applications, reviews the constitutionality of laws, regulations and decisions of Parliament, decrees of the President of the Republic, decrees or orders of the Government and also the international treaties to which the Republic is party. This is *ex post facto* review; any normative act, and also any international treaty to which the Republic is party, are considered to be constitutional until proven to be unconstitutional before the Constitutional Court. Only the normative acts adopted after the entry into force of the new Constitution on 27 August 1994 are subject to constitutional review.

The Constitutional Court has the competence to rule on its own jurisdiction. If, during the proceedings, it appears that other bodies are competent, the Court passes on the case to those bodies. The Constitutional Court itself determines the limits of its jurisdiction. While reviewing a normative act challenged in an application, the Court may pass judgment on other normative acts whose constitutionality hinges fully or partially on the constitutionality of the act challenged.

- b. Interprets the Constitution. Most of its interpretations relate to the powers of public authorities and respect for the principle of separation and collaboration of powers within the State.
- c. Rules on initiatives to revise the Constitution. Under the Constitution those entitled to initiate a revision of the Constitution must have the backing of an opinion of the Constitutional Court adopted by at least four judges before being able to present draft constitutional laws. Although the Constitutional Court's opinion on such a draft is not binding on Parliament, Parliament does take these opinions into account in practice.
- d. Confirms the results of republic-wide referendums.
- e. Confirms the results of elections for the President of the Republic and of Parliament.
- f. Finds whether or not there are circumstances justifying the dissolution of Parliament, the dismissal of the President of the Republic or an interim president from office or situations when the President of the Republic cannot carry out his or her functional duties for a period exceeding 60 days.
- g. Rules on the unconstitutionality of legal acts referred to it by the Supreme Court of Justice.
- h. Rules on issues relating to the constitutionality of a political party.

The Constitution expressly determines the powers of the Constitutional Court, which may not be supplemented or restricted by laws. The powers of the Constitutional Court may be modified only by a corresponding amendment to the Constitution.



Monaco

Supreme Court

I. Introduction

The Supreme Court of Monaco was set up under the Constitution of 5 January 1911.

Pursuant to the 1911 Constitution, which was a legacy of Sovereign Prince Albert I, the Principality became a proper constitutional monarchy.

The Constitution was based on democratic organisational principles concerning public authorities (an elected parliament and government, a municipality and independent courts). Title II established fundamental rights and freedoms.

In order to protect and safeguard these rights and freedoms, the Constitution also made provision for a higher court, the Supreme Court, which is considered to be the oldest constitutional court in the world.

More specifically, Title II of the Constitution, entitled "Public rights", included an Article 14, reading as follows:

"A Supreme Court shall be established to rule on appeals concerning the infringement of the rights and freedoms enshrined in this Title."

Under Article 58, the Supreme Court has five members appointed by the Prince on proposals from the Council of State (one seat), the National Council, i.e. the Monegasque parliament (one seat), the Court of Appeal (two seats) and the Civil Court of First Instance (one seat). The organisation and operational rules of the Court were based on the Order of 21 April 1911, Article 1 of which stated:

"The Court shall rule on appeals relating to infringements of the rights and freedoms enshrined in Title II of the Constitution which do not fall within the jurisdiction of the ordinary courts. There shall be no appeal against its judgments."

The time limit for appealing against decisions by a lower court was two months "from the date on which the fact on which the appeal [was] based took place or from the date on which the interested party became aware of it". Because of the First World War,

the Monegasque Court was not set up until 1919. It handed down its first decision on 3 April 1925.

The new Monegasque Constitution, adopted in 1962, confirms the existence of fundamental rights and freedoms, adding economic and social rights, including freedom of association (Article 30), the right to take industrial action (Article 28), freedom of employment (Article 25) and the right to strike (Article 28), to the classic rights of the type enshrined in the 1911 Constitution (individual freedom and security, requirement that indictable offences and punishments be defined by law, right to respect for private and family life and confidentiality of correspondence, right of ownership, abolition of the death penalty).

Article 90 confirms the establishment of the Supreme Court. More elaborate organisational and operational rules are laid down in Sovereign Order no. 2,984 of 16 April 1963.

II. Legal Basis

- Constitution of the Principality of Monaco, 17 December 1962 (as amended by Act no. 1249 of 2 April 2002);
- Order no. 2984 on the Organisation and operational rules of the Supreme Court, 16 April 1963 (as amended by Orders nos. 3612 of 15 July 1966, 4,653 of 9 February 1971 and 6820 of 14 April 1980).

III. Composition, procedure and organisation

1. Composition of the Supreme Court

The Supreme Court is composed of five full members and two deputy members, appointed by the Prince for a term of four years on proposals from the National Council, the Council of State, the Crown Council, the Court of Appeal and the Court of First Instance. These institutions all put forward a full member; only the National Council and the Council of State also put forward a deputy. For each seat, whether for a full or deputy member, two names must be put forward.

In practice the proposals are sent to the director of judicial services, who forwards them to the Prince. Under Article 89 of the Constitution, the Prince has the option of not accepting the proposals and of requesting new ones.

The appointment of the members of the Supreme Court is pronounced by Sovereign Order. The Order also designates, from among the said members, the President of the Court and the Vice-President, who is

responsible for standing in for the President if the latter is absent or unable to attend.

Article 2 of Sovereign Order no. 2,984 of 16 April 1963 states that: members must be at least 40 years old and “chosen among particularly competent jurists”. In practice, they are either eminent professors of public law or senior members of the French *Conseil d’Etat* or Court of Cassation.

2. Operation of the Court

The Supreme Court sits in Monaco either in plenary or as a three-member administrative section.

It sits and considers judgments in plenary in the case of constitutional matters, in its capacity as the court ruling on conflicts of jurisdiction, and in the case of administrative matters when these are referred to it by order of the President of the Supreme Court or a decision by the administrative section.

It sits and considers judgments as an administrative section in all other cases.

The plenary court is composed of five full members of the Court. If one of the members is absent or unable to attend, the President calls on one or two deputies, according to their length of service or, failing that, age.

The administrative section is composed of three full members of the Court, nominated each year and for each session by the President. The Court is presided over by the President, or by one of the members nominated, according to length of service or, failing that, age.

3. Proceedings before the Court

Sovereign Order no. 2,984 of 16 April 1963, lays down the rules governing proceedings before the Supreme Court. These are similar to those in force in the French administrative courts. The gist of the rules may be summarised as follows:

a. Commencement of proceedings

Cases may be referred to the Court by any natural person or legal entity with the capacity to bring proceedings and able to prove an interest, in the case of both administrative and constitutional matters. For instance, any law may be repealed on the grounds of unconstitutionality on the initiative of a natural person or legal entity, either Monegasque or foreign. This distinctive feature is particularly worth highlighting as it is fairly unusual in States governed by the rule of

law for individuals to have direct access to the constitutional court via legal proceedings or the lodging of an objection.

The time limit for appealing in respect of both constitutional and administrative matters is two months, either from completion of the statutory disclosure formalities (notification, formal service and publication of the law or legal transaction being referred to the court), or from the date on which the fact upon which the proceedings are based became known to the interested party.

Applications for an assessment of validity or for an interpretation referred to the Court must also be lodged within two months of the date on which the relevant court decision became final.

In the case of administrative matters, an appeal on grounds of abuse of authority may be preceded by an administrative appeal either to the authority responsible for the decision or to a higher administrative authority. The administrative appeal must be lodged within the above-mentioned time limit. If it is dismissed or if there is no response from the competent authority within four months, the applicant has a further two months in which to appeal to the Supreme Court.

The cases in which it is possible to appeal on grounds of abuse of authority are the same as in French administrative law, namely:

- defects in respect of external compliance with the law: lack of jurisdiction, procedural errors;
- defects in respect of internal compliance with the law: breach of law, unlawful grounds, misuse of authority.

Appeals to the Supreme Court are not suspensive but may be accompanied by an application for a stay of execution of the contested decision, lodged under the same conditions, especially with regard to the time limit.

A summary application may also be made to the President of the Supreme Court, requesting the latter to take all the necessary measures without prejudice to the case.

The appeal to the Supreme Court must be signed by a counsel for the defence from the Bar of the Principality. It may, however, be drawn up by a foreign lawyer with the assistance of a Monegasque lawyer for the purposes of procedural formalities. It is lodged with the Registry against a receipt.

In the event of an appeal to a court without jurisdiction, the time limit for bringing proceedings is preserved.

b. The course of proceedings

The authorities have two months in which to lodge a counter-appeal, to which the appellant may give a reply, to which the authorities may, if appropriate, issue a rejoinder. The reply and rejoinder must be lodged within one month. Unless the President of the Court authorises otherwise, a maximum of four documents may be exchanged. This affects the time it takes to judge cases – on average six months.

The President of the Court assigns a reporting judge to each case. As soon as the exchange of written documents has been completed, the President closes the proceedings and sets a date for the hearing.

The applicant may discontinue proceedings either in the course of the proceedings or at the hearing. The relevant decision is taken by order of the President in the first case and by the Court in the second case.

c. The hearing

The Court sits in the Monegasque Law Courts. Hearings are public. In the case of constitutional matters, it is compulsory for the Court to sit in plenary.

Supreme Court hearings are serviced by one of the Principality's court ushers, while the Chief Registrar is responsible for the registry.

The Attorney General takes on the role of public prosecutor in the Supreme Court and pleads at the hearings.

Once the parties have been called, the President gives the floor to the reporting judge, who sums up the facts, submissions and pleadings, without giving an opinion. Although the proceedings are in writing, it is common practice for lawyers to plead.

After the hearing, the members of the court withdraw to consider the judgment in chambers.

IV. Jurisdiction

The Supreme Court's jurisdiction covers both administrative and constitutional matters and is provided for in Article 90 of the Constitution.

In constitutional matters the Supreme Court rules on applications to have decisions set aside, validity

assessed and compensation awarded in connection with infringements of constitutional rights and freedoms resulting primarily from the law reflecting, in accordance with Article 66 of the Constitution, the joint will of the Prince and the National Council

Two distinctive features of Monegasque public law are worthy of mention here.

First, as far as action for damages is concerned, the Constitution introduced this highly specific means of redress, as an exception to the rule, whereby action for damages against public corporations falls, pursuant to the Organisation of the Courts Act (no. 783 of 15 July 1965), within the jurisdiction of the ordinary courts, in cases concerning damage caused by a law that the Court has declared unconstitutional (as indeed in the case of an unlawful administrative decision). Moreover, as Article 90-A-2 uses the expression "application for compensation in respect of an infringement of the rights and freedoms...", it is not necessary for a law or legal transaction to be the cause. The infringement need only result from a physical decision by a public authority, in other words patently illegal action by an authority. In Monaco, therefore, patently illegal action by an administrative authority does not, as in France, come under the jurisdiction of the ordinary courts but under that of the Supreme Court.

Secondly, as far as the determination of validity is concerned, this remedy enables members of the public to lodge an objection on grounds of unconstitutionality, a procedure which no means exists in all states governed by the rule of law. The procedural arrangements are identical to those applying to administrative decisions.

Lastly, it should be noted that the Supreme Court has, secondarily, jurisdiction to rule on the constitutionality and lawfulness of the National Council's rules of procedure. Decisions on the subject were handed down in the period following the 1962 Constitution.

In administrative matters, the Supreme Court rules on applications to have decisions by various administrative authorities and Sovereign Orders implementing laws set aside, and on the award of the resulting compensation. In practice, most of the Court's judgments are handed down following such applications.

Secondarily, it has jurisdiction to hear:

- appeals on points of law against final decisions by the administrative courts;

- applications for an interpretation and assessment of the validity of decisions by the various administrative authorities and of Sovereign Orders implementing laws, and conflicts of jurisdiction.

V. Nature and effects of decisions

Decisions must be read out at a public hearing by a member of the Court within 15 days of the proceedings; this usually takes place the day after the proceedings.

Decisions must include various compulsory elements and be reasoned.

Should a claim for damages for harm resulting from the unconstitutionality of a law or the unlawfulness of an administrative decision be brought before the Court, the latter, if it sets aside the law or decision, must, in the same ruling, determine the compensation to be awarded.

The Court may also, before ruling, order all the relevant investigations.

Court decisions are sent to the Minister by the President and published in the Monegasque Official Gazette.

They may be appealed against by a third party. The appeal is admissible only if it is lodged by someone whose rights have been disregarded, with the exception of persons called on by the President, in the course of the proceedings, to intervene. No other means of redress is accepted, except for the purposes of rectification of a clerical error.



Morocco

Constitutional Council

I. Introduction

The Constitutional Council was created in the revised 1992 Constitution. Its establishment represents a part of the Kingdom's wider reform efforts since 1990 to foster the rule of law and protect human rights. Constitutional justice in Morocco, however, was developed in the original 1962 Constitution, which instituted within the Supreme Court a Constitutional Chamber that has been exercising its jurisdiction continuously for some thirty years.

Aware of the characteristic purpose of constitutional courts, Morocco decided under the new Constitution, adopted by referendum on 1 July 2011, to create a Constitutional Court. The new Court will replace the present Council.

The Constitutional Council will continue to perform its functions until the installation of the Constitutional Court. The Court's competences as well as the criteria for appointing members have been determined by the present Constitution.

II. Composition, procedure and organisation

1. Composition

Established in the 2011 Constitution, the Constitutional Court is composed of 12 members. The King appoints six of them, including the presiding judge; however, the Secretary General of the Higher Council of Ulemas proposes one of them. Each House of Parliament (House of Representatives and House of Councillors) determines half of the remaining six members, who are selected by a two-thirds majority in a secret ballot vote.

Furthermore, under the 2011 Constitution, the appointing authorities must henceforth choose the constitutional judges "among personalities highly qualified in the legal field and possessing judicial, doctrinal or administrative competence, having served in their profession for over fifteen years and being recognised for their impartiality and probity" (Article 130 of the Constitution). Unlike the 2011 Constitution, the 1996 Constitution did not require any specific standing for the appointments. In practice,

however, the members were generally chosen from among law faculty professors, magistrates and lawyers.

Members of the Council are appointed for a non-renewable, nine-year term. Reconstitution of a third of the membership occurs every three years. The principle of not re-electing members guarantees the independence of the institution and of its members.

Moreover, to ensure their independence and guarantee impartiality, the Constitutional Council is subject to rules of incompatibility and a duty of strict restraint (secrecy of deliberations and votes, and no public stance or consultation on questions in the Council's remit). They are also obligated to declare their assets to a body attached to the Court of Audit, within three months following their appointment.

2. Procedure

The procedure before the Constitutional Court is free of charge, conducted in writing and, where rules of litigation are concerned, is organised on an adversarial principle. In electoral cases, it can give rise to various measures of investigation (on the spot inquiry, hearing of witnesses, etc.).

The Constitutional Court is convened at the summons of its presiding judge or, if he or she is prevented from so doing, it is convened by the most senior member, who then presides over it. Indeed, the Court delivers its decisions collectively, as a full bench, by a two-thirds majority. It can deliberate when at least nine (9) of its members are present. Here the principle of collective decision constitutes a guarantee of the judges' independence and impartiality. The presiding judge convenes the sessions, directs the proceedings, designates the reporting judges and has a special constitutional status.

3. Organisation

The internal administration of the Constitutional Council is founded on the rules established by the basic institutional statute. It comprises a study unit directly answerable to the President of the Constitutional Council and a nucleus of departments headed by a secretary general appointed by *Dahir* (royal decree) and placed under the President's direct authority. These departments are the Registry Department, the Documentation and Co-operation Department, the Administrative and Financial Department and the Accounting Department. The Constitutional Council sees to its own management and has its own budget.

III. Jurisdiction

Where jurisdiction is concerned, the Constitutional Court exercises the powers vested in it by the articles of the Constitution or by the provisions of institutional statutes. The powers principally fall into three broad categories: review of constitutionality, apportionment of prescriptive powers between the parliament and the government and review the legality of operations relating to referenda and for the election of Members of Parliament.

A constitutional review is performed *a priori*. It is abstract, focused and exclusive. It is mandatory regarding institutional statutes and the rules of procedure of the two Houses of Parliament. However, it remains discretionary regarding the (ordinary) laws. Before promulgation, they may be referred to the Constitutional Court by the King, the Head of the Government, the President of the House of Representatives and the President of the House of Councillors, or by one-fifth of the members of the House of Representatives or by forty members of the House of Councillors.

Regarding the apportioned powers of Parliament and the Government, the Court, in a sense, has jurisdiction to regulate the law-making activity of public authorities. This jurisdiction clearly reflects its position and role to protect the legal order and to balance the powers between the two institutions. Accordingly, the Constitution empowers it to make determinations under two specific procedures for legislative inadmissibility raised by the Government (Article 79 of the Constitution) and for the amendment by decree of instruments adopted in legislative form (Article 73 of the Constitution).

The 2011 Constitution widened the Constitutional Court's jurisdiction. It can now be asked to rule whether an international undertaking contains a provision contrary to the Constitution (Article 55 of the Constitution). It can also entertain an objection of unconstitutionality raised in the course of proceedings, where one of the parties submits that the law on which the outcome of the litigation depends has detrimental effects on the fundamental rights secured by the Constitution. Thus Article 133 of the Constitution provides that: "The Constitutional Court has jurisdiction to hear and determine an objection of unconstitutionality in the course of proceedings, where one of the parties submits that the law on which the outcome of the litigation depends infringes the rights and freedoms secured by the Constitution". The operability of this objection of unconstitutionality is subject to the enactment of an institutional statute that sets out the conditions and terms of application of this article.

The Court also determines the propriety of referendum operations, announcing the referendum results and the legality of the election of Members of Parliament, which may be contested by the constituents themselves.

IV. Nature and effects of decisions

The Constitutional Council rules, in its various fields of jurisdiction, by decisions that, except for electoral litigation is concerned, are declaratory decisions. That is, declaration of compliance or non-compliance with the Constitution, ascertainment of the legislative or regulatory character of the provisions brought before it, proclamation of referendum results, declaration of mandatory resignation, incompatibility, vacancy of seats in parliament, etc. In electoral litigation, it rules by dismissing the claim or annulling the impugned election or reversal of the results.

The Constitutional Council takes the form of a genuine collegial body governed by the principle of equality. Each member possesses the same rights in the deliberations and the decisions are reached by two-thirds majority (8/12) of the members who constitute it, notwithstanding the diversity of the authorities involved in appointing them. The President convenes the meetings, directs the debates and designates the rapporteurs with a special status.

The Constitutional Council's decisions have an *erga omnes* effect, as it is valid for all. They are final and not subject to any appeal except, of course, to correct a substantive error. They are binding on public authorities and on all administrative and judicial bodies.



Netherlands

Supreme Court and Council of State

I. Introduction

1. A brief history

The Republic of the United Provinces (1581-1795), which covered most of the territory that is now the Netherlands, grew out of a military alliance against Spanish efforts to establish central control of the Dutch provinces. In terms of the legal system, there were significant differences between – and even within – the provinces. Only two – Holland and Zeeland (the most important provinces) – had a common court of appeal, the Supreme Court of Holland and Zeeland, established in 1581. At the same time, the Council of State, which until that time had been no more than an advisory body to the sovereign, acquired judicial powers in important administrative matters involving the Republic.

In 1795, the Republic was overthrown and replaced by the Batavian Republic, a French vassal state, which in 1806 made way for the Kingdom of Holland under Louis Napoleon. A National Court of Appeal was set up in the Batavian Republic and the Kingdom of Holland, based on the Tribunal de cassation (later the *Cour de cassation*). After the restoration of Dutch independence in 1813, a constitutional monarchy – the Kingdom of the Netherlands – was established. The Hague Court of Appeal became the Supreme Court of Appeal of the Kingdom of the Netherlands, and thus the highest court of appeal for the entire country.

Since 1838, on the basis of the constitution of 1814-1815, the Supreme Court of the Netherlands has acted as a court of cassation in civil and criminal cases; its remit was later extended to include fiscal cases. Its chief task is to safeguard the uniformity and quality of the application of the law. Since 1815, the Council of State's main purpose has been to advise the Crown and the government. The Council gives its opinion on legislation before it is submitted to parliament. In the course of the twentieth century the Council of State has been accorded judicial powers in the field of administrative law. Prior to that, it had acted in an advisory capacity in administrative appeals to the Crown.

During the XIXth and early XXth centuries, the Netherlands was gradually transformed into a parliamentary democracy. The Kingdom of the Netherlands presently comprises the Netherlands (in Europe), and Aruba, Curaçao and Sint Maarten (in the Caribbean). These countries all have equal status within the Kingdom. The Caribbean islands Bonaire, Sint Eustatius and Saba are special municipalities (public bodies) of the country the Netherlands. Relations between the countries of the Kingdom are regulated by the Charter for the Kingdom of the Netherlands.

2. The judiciary: Articles 112-122 of the Constitution

The administration of justice in criminal and civil cases largely occurs at two instances (usually the district court and court of appeal, sometimes at the sub-district court and district court) which are responsible for hearing the facts, after which there is the possibility of appeal in cassation to the Supreme Court.

Various procedures are possible in administrative cases. The district courts act as courts of first instance, unless legislation provides that one of the three special administrative courts (the Administrative Jurisdiction Division of the Council of State, the Board of Appeal for Social Security and the Appeals Tribunal for Trade and Industry) acts as a court of sole and last instance. Only in tax law cases can an appeal in cassation be lodged. In every other field of administrative law, final appeals are heard by one of the three special administrative courts just mentioned. Against their judgments, no appeal in cassation can be lodged.

In most administrative law cases, there is no direct appeal to a court from a decision by an administrative authority; an administrative application must first be lodged with the same or another, usually higher, administrative authority. In cases where an administrative appeal lies to the Crown, the Council of State issues an advisory opinion before the Crown takes a decision. The Council of State also hears disputes between administrative authorities which are not brought to court.

II. Basic Texts

Article 116 of the Constitution charges the legislature with responsibility for the organisation of the judiciary. This is regulated by the Judiciary (Organisation) Act (Sections 72-83 of which apply to the Supreme Court) and by the Council of State Act. Article 73.2 and 73.3, of the Constitution, stipulates that the Council of State or a division of the Council, is responsible for investigating administrative disputes where the

decision has to be given by Royal Decree and for advising on the ruling to be given in the said dispute and may be required by Act of Parliament to give decisions in administrative disputes. This is regulated by the Council of State Act.

- Members of the judiciary responsible for the administration of justice and the Procurator General at the Supreme Court are appointed for life (Article 117 of the Constitution).
- Members of the Supreme Court are appointed from a list of three persons drawn up by the Lower House of Parliament (Article 118 of the Constitution).
- The members of the Council of State are also appointed for life (Article 74 of the Constitution).
- The constitutionality of Acts of Parliament and treaties may not be reviewed by the courts (Article 120 of the Constitution). There is, however, constitutional review *ex ante* by the Council of State in its opinion.
- Except in cases laid down by Act of Parliament, trials are held in public and judgments must specify the grounds on which they are based. Judgments are pronounced in public (Article 121 of the Constitution).

III. Composition, procedure and organisation

1. Composition of the Supreme Court

The Supreme Court has a President, a maximum of seven vice-presidents and up to 26 justices. The average age on appointment is around 50 years old and the maximum age for a member of the court is 70 years old. Attached to the Supreme Court is the Procurator General's Office, the Procurator General is its head. There is also a deputy procurator general and a maximum of 22 advocates general. The average age on appointment is around 45 years old and again the maximum age is 70 years old.

Members of the Supreme Court are appointed by the Crown, i.e. the government and the Queen. When a vacancy arises, the Supreme Court submits to the Lower House of the States General a non-alphabetical list of six candidates nominated by majority vote by the members of the Court and the Procurator General. The Lower House, which is not obliged to appoint one of the individuals on the list, usually nominates the first three names on the list. The Crown – Government and Queen – chooses one of these three individuals, and usually appoints the first name on the list. The Supreme Court is thus supported by controlled co-option, as it were. The most senior vice-president, in terms of years of service, is usually appointed president and the most senior justice vice-president. The members of

Procurator General Office are appointed by the Crown on the recommendation of the Minister of Justice, who usually follows the recommendation of the Procurator General, made in consultation with the Supreme Court. Recently, the Supreme Court and the Office of the Procurator General decided to place a call in the legal trade press with an invitation to submit names of possible candidates for the position of Advocate-General or Justice. It is not possible to apply for an appointment to the Supreme Court or its Procurator's General Office; appointments are made by selection and do not form part of a normal career on the bench or in the prosecutions department. Approximately half the members of the Supreme Court and Procurator's General Office have been members of the judiciary. The others have been practising lawyers or academics.

2. Procedure and organisation at the Supreme Court

The Supreme Court has three divisions: one for civil cases (including compulsory purchase and enterprise section cases), one for criminal cases and one for fiscal cases. Each division, which comprises some ten justices, appoints sections in which five or three justices sit. When a division makes a decision, it has the status of a Supreme Court decision. There are no formal arrangements for consultation between the divisions before a decision is made, since Dutch law does not provide for plenary sessions except on ceremonial occasions. However, the divisions do hold informal consultations on important judgments that have implications for the entire legal system, such as when the law is being reviewed in the light of a treaty. In this way, legal uniformity is guaranteed wherever possible within the Court, without any need for statutory provisions to that end.

Cases are brought before the Supreme Court by summons or a petition for cassation; the defendant in cassation proceedings may conduct a defence; there is an opportunity for opening statements by counsel or written explanation of the positions in cassation and reply and rejoinder. The Procurator General then presents its advisory opinion. (The Procurator General always submits an advisory opinion in civil and criminal cases, and in fiscal cases if necessary, prior to the Supreme Court decision. This is an independent opinion issued by the Supreme Court, tailored specifically to the case in question, supported by reasons and based on case law and the literature. The Supreme Court and Procurator General are supported by a research department consisting of around 90 mainly younger lawyers, and by some 60 administrative and technical support staff.) The Court then considers the case. Its judgments are handed down in public, except in fiscal proceedings instituted prior to 1 January 1994 in which no fine was imposed.

Judgments are given in public in fiscal cases brought since 1 January 1994. Cassation in the interests of the uniform application of the law is possible on the recommendation of the procurator general. This type of cassation has no bearing on the legal position of the parties.

3. Composition of the Council of State

Apart from Her Majesty the Queen, who is the President, the Council of State consists of the Vice-President, who is in charge of the daily organisation and functioning of the Council of State, and a maximum of 10 members. These members also belong to one or both of the two Divisions: the Advisory Division and the Administrative Jurisdiction Division. In addition, the two Divisions consist of State Councillors and Extraordinary Councillors. At present there are about 40 State Councillors in addition to the members of the Council. The maximum number of members and State Councillors, who simultaneously function in both Divisions, is limited by law to ten. The Vice-President, members and State Councillors are appointed for life by the Crown, on the recommendation of the Council of Ministers. The Council of State's opinion is sought before the appointment of the Vice-President; the latter makes recommendations for appointments of Council members and State Councillors.

4. Procedure and organisation at the Council of State

The Council of State in plenary session adopts, on the proposal of the Vice-President, provisions regulating its work and, in so far as necessary, the other matters that relate to the body as a whole and do not solely concern the functioning of each separate Division. The Advisory Division of the Council of State deliberates and decides on opinions to be issued regarding matters of legislation under the chairmanship of the Vice-President. The Administrative Jurisdiction Division exercises the Council's judicial functions. Its President is exclusively responsible for its functioning. The Administrative Jurisdiction Division administers justice in panels comprising one or three members. It hears administrative law disputes, sometimes being the court of first and final instance, sometimes the court of appeal and final instance. It should be noted that in many administrative disputes a notice of objection has first to be submitted to and dealt with by the appropriate administrative authority before the case can be brought to court.

The case is brought before the Administrative Jurisdiction Division by means of a notice of appeal. The other party in the dispute may conduct a defence. The facts of the case are usually examined

during a hearing, which interested parties, witnesses, experts and interpreters can be summoned to attend. The parties are given an opportunity to explain their positions. The Division then deliberates on the case and pronounces judgment in public.

IV. Jurisdiction

Powers of the Supreme Court and the Council of State

The Supreme Court reviews the judgments of lower courts in the light of the law, including treaties, in virtually every conceivable type of dispute between parties. This includes disputes involving the Government, provided no other court has been declared the highest court responsible for setting such a dispute. If no other legal procedure with sufficient safeguards is available, or has been available, the civil courts regard themselves as competent to hear any case where it is established that the Government has committed a tort. In this way, the civil courts afford additional legal protection. Here too, appeal in cassation lies to the Supreme Court.

The Advisory Division of the Council of State explains, in its opinions, any constitutional, legal or other shortcomings of draft legislation, before the Bill is sent to Parliament. The Administrative Jurisdiction Division passes judgment as the highest court with general jurisdiction in administrative law disputes between members of the public and the authorities. This Division thus reviews the legality of decisions of administrative authorities and the judgments of administrative courts at first instance.

Neither the Supreme Court nor the Council of State may review the constitutionality of legislation in the formal sense, i.e. Acts of Parliament enacted by the Crown and the States General (Article 120 of the Constitution). However, a Bill, initiated in 2002 and currently under consideration by Parliament, proposes the possibility for the courts to review legislation for their conformity with the classic basic rights in the Constitution. However, at present, the courts must restrict their review for constitutionality to regulations issued by the Crown (such as Royal Decrees and orders in council) and local authority bye-laws. They must also review laws and regulations for their conformity with the provisions of treaties, including the European Convention on Human Rights and the International Convention on Civil and Political Rights, as well as the law of the European Union. The courts are not allowed to apply legislation in a pending case if such would amount to a breach of a self-executing provision of a treaty to which the Netherlands are a party or in a decision of an international organisation with a binding character

(Constitution, Article 94). In this way, therefore, there is a form of judicial constitutional review of legislation in the form of review of conformity with fundamental rights and the law of the European Union.

V. Nature and effects of decisions

1. Supreme Court

The Supreme Court may declare itself incompetent to pass judgment or declare inadmissible the appeal in cassation submitted by either party. It may dismiss the appeal. It may quash the disputed judgment and refer the case back to the court that dealt with the facts of the case to settle the dispute, or settle the matter itself after it has quashed the judgment. As with all court judgments, the Supreme Court must explain the grounds on which its judgment is based. However, the reasons given may be brief if the appeal is unlikely to succeed and the case does not require legal questions to be answered in the interests of the uniform application or development of the law.

Appellants in civil and criminal cases wishing to gain access to the Supreme Court have to appoint legal counsel. A petition for cassation can only be drawn up and submitted by a lawyer. The petition has to contain in detail the objections to the judgment of the lower court. Cassation is possible on the grounds submitted only if, in short, insufficient reasons were given for the disputed judgment or if the law was violated. The facts are not examined in cassation proceedings.

In fiscal cases, legal counsel is not necessary (an appellant can write his or her own petition for cassation), but only a lawyer may appear in the appellant's defence. In fiscal cases, the petition for cassation is governed by the General Administrative Law Act (*Algemene wet bestuursrecht*) which states (in Article 6:5) that the petition must include the grounds of the appeal. Court fees are payable for access to the Supreme Court.

2. Council of State

The Administrative Jurisdiction Division of the Council of State may annul the administrative decision challenged before it. It may also declare itself incompetent or declare an appeal inadmissible. Acting as the court of second instance competent to hear the facts, it may also uphold or quash a judgment by a district court. If the Administrative Jurisdiction Division quashes a judgment, it may if necessary refer the case back to the district court or settle the matter itself. If the Administrative Jurisdiction Division is acting as the court of first

authority. In the latter case it may order the administrative authority to take a new decision, or may settle the matter itself. Access to the Administrative Jurisdiction Division is subject to the payment of court fees.



Norway

Supreme Court

I. Introduction

The Norwegian Constitution of 17 May 1814 is – after the United States Constitution – the oldest written constitution in effect today. The Constitution has no provision concerning judicial review.

Judicial review has, however, been practised by the Supreme Court since the last half of the 19th century, and the Supreme Court's competence to exercise judicial review is therefore considered a well-established customary law.

II. Basic texts

The Constitution is based on the principle of separation of powers. Provisions on judicial power are laid down in Articles 86-91 of the Constitution's Section D;

According to Article 88 of the Constitution "The Supreme Court pronounces judgment in the final instance";

The rules of power, competence, composition, organisation, qualification of judges, etc. are stated in the Courts of Justice Act of 13 August 1915 no. 5. The rules of procedure are stated in the Civil Procedure Act of 17 June 2005 no. 90 and the Criminal Procedure Act of 22 May 1981 no. 25.

III. Composition, procedure and organisation

The Supreme Court consists of the Chief Justice of the Supreme Court (the President) and 19 judges, all of them jurists with the very best qualifications. The Chief Justice and the judges are appointed by the King in Council for the period until they reach 70 years old. On average they are 50 years old when they are appointed and, according to Article 91 of the Constitution, they may not be appointed before attaining 30 years of age. The judges are senior staff officials and cannot be dismissed except by a court's judgment.

The Supreme Court operates in two Chambers of five judges. The judges circulate between the Chambers. According to Article 5 of the Court of Justice Act, the Court shall sit as a Grand Chamber with 11 judges in cases of specific importance. This may include

questions of whether a legal provision is “in contravention of the Constitution”, but normally such cases will be heard in plenary session. Plenary session is used in the most important cases.

IV. Jurisdiction

The Supreme Court is, as a rule, the highest judicial tribunal, both in civil cases and in criminal cases, and both in disputes between citizens and between the state and citizens.

Judicial review is limited to cases where an actual conflict, either civil or criminal, is brought before the court for resolution. As cases involving judicial review are handled by the ordinary courts, a case will start in the District or City Court and eventually be handled by the High Court before it reaches the Supreme Court. The review is subject to certain limitations resulting from general principles of procedure. The Court can only intervene in relation to an act that has already come into force and a court case must be brought by someone – normally an individual – having sufficient legal interest in the matter. In this way the Court has a concrete controversy as the foundation of its decision. Judicial review is exercised on the basis of a process which is oral and adversarial.

As regards the relationship between international law and internal Norwegian law, the principle is that national law has preference (the dualistic system). In practice, however, statutes will be interpreted in the light of and are presumed to be in accordance with, international treaties ratified by Norway. In some new Norwegian statutes, there are specific provisions which state that a statute shall not be applied if the court finds it to be contrary to international law.

On July 1994, an article was added to the Norwegian Constitution stating that, the authorities of the State are obliged to respect and ensure human rights, and that specific provisions for the implementation of treaties relating thereto shall be determined by law.

Through the Human Rights Act, adopted on 31 May 1999, the European Convention on Human Rights of 4 November 1950 and two UN Conventions, the international covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, both of 16 December 1966, were formally incorporated into Norwegian legislation. In 2003, the UN Convention on the Rights of the Child of 1989 was incorporated and in 2009 the UN Convention on the Elimination of All Forms of Discrimination against Women of 1979.

According to Section 3 of this Act, in case of conflict, these international instruments shall take precedence over national legislation.

V. Nature and effects of decisions

When the Supreme Court finds that a law is unconstitutional, the law is only set aside to the extent required by the individual case. This gives the Court an opportunity to interpret the law rather than declare the law unconstitutional.

A decision involving judicial review will formally have effect only with respect to the parties. The precedential effect of the decision will depend upon how general or how specific the reasons given for the setting aside of the law in the particular controversy were.

The decisions are printed in the Norwegian Law Gazette (*Norsk Retstidende*), edited by the Norwegian Bar Association.



Peru Constitutional Tribunal

I. Introduction

The 1979 Constitution created, for the first time in Peru, the Constitutional Guarantees Court (Article 296) and pointed out it was the supervisory authority of the Constitution. At that time, with nine members, three appointed by the Congress, three by the Executive Power and three by the Supreme Court.

With the 1993 Constitution, Parliament changed the name to the Constitutional Court and stated in Article 201 that, the Constitutional Court is the controlling body of the Constitution. It is autonomous and independent of other constitutional bodies and subject only to the Constitution and its Organic Law.

II. Basic texts

- Constitution of Peru (1993);
- Organic Law of the Constitutional Court – Law no. 28301 (2004);
- Constitutional Procedure Code – Law no. 28237 (2004);
- Standards Regulation of the Constitutional Court (Administrative Resolution no. 095-2004-P/TC).

III. Composition, procedure and organisation

The Constitutional Court elects a President and Deputy-President from among its regular members. But no member can be an official candidate for the Presidency. They may be re-elected at the end of their term of office (The Rules of Procedures of the Constitutional Court, Article 14).

The Constitutional Court considers and decides cases in plenary sessions and in sessions of two chambers, which comprises of three judges each. The chambers are equal and independent of each other.

The Constitutional Court may consider at the plenary session any question within its competence.



Poland Constitutional Tribunal

I. Introduction

1. Date and circumstances of its establishment

The Constitutional Tribunal was first set up by the Act of 26 March 1982, revising the Constitution of 1952 which was in force at the time. The Tribunal's jurisdiction, organisation and procedure were further defined, pursuant to Article 33a.6 of the Constitution, by the Constitutional Tribunal Act of 29 April 1985. In accordance with the Act, the Tribunal began functioning on 1 January 1986.

2. Position in the hierarchy of State authorities

Under the new Constitution of 1997 the Constitutional Tribunal is a judicial body bestowed with specific tasks and occupies an independent position in the system of government, separate from the legislative, judicial and administrative authorities.

The Tribunal's decisions are final and universally binding.

II. Basic texts

The basic regulations of the powers, composition and legal status of the Constitutional Tribunal are set out in the Constitution of 1997, in a separate part of Chapter VIII (titled "Courts and tribunals") devoted to the Tribunal (Articles 188 to 197).

These basic constitutional provisions are further specified by the Constitutional Tribunal Act 1997 (hereinafter, "CTA"). The Act sets out in detail all matters concerning the legal position of judges, the bodies of the Tribunal and the various procedures before it.

The internal structure and functioning of the Tribunal and the Office of the Tribunal is regulated in by-laws adopted by the General Assembly of Judges.

III. Composition, procedure and organisation

1. Composition (Article 194 of the Constitution)

1.1 Number of judges

The Tribunal is comprised of 15 judges, including the President and the Vice-president.

1.2 Appointment and dismissal of judges

Constitutional Tribunal judges are elected by the *Sejm* (lower house of parliament) for a non-renewable 9-year term of office. The President and Vice-president are nominated by the President of the Republic from amongst the candidates presented by the General Assembly of Judges of the Constitutional Tribunal.

Only persons who possess an outstanding knowledge of the law and are qualified to serve as judges in the Supreme Court or Chief Administrative Court may be elected to the Constitutional Tribunal (Article 5 CTA).

The office of a judge may expire only as the result of the following:

1. resignation from office;
2. the decision of a physician's commission stating a permanent incapacity to perform the duties of a judge on account of illness, disability or weakness;
3. conviction for a criminal offence by a valid court judgment;
4. a legally valid disciplinary decision sentencing him or her to removal from the office of a judge of the Tribunal.

The expiration of office is effected in the form of a resolution adopted by the General Assembly of Judges of the Constitutional Tribunal (Article 11 CTA). It is not possible for the *Sejm* to dismiss a judge, nor is it possible to remove him or her from office on the basis of a decision of any other State organ.

1.3 Status of judges

The judges of the Tribunal are independent and subject only to the Constitution in the exercise of their office.

A judge of the Constitutional Tribunal shall not be held criminally responsible or deprived of liberty without prior consent granted by the General Assembly of Judges of the Tribunal. A judge may only be detained or arrested when apprehended in the

commission of an offence and only when detention is necessary for securing the proper course of proceedings.

The office of Constitutional Tribunal judge is incompatible with Parliament membership, with State service and with other posts which would interfere with a Constitutional Tribunal judge's performance of his or her duties, damage his or her dignity or cast doubt on his or her impartiality.

2. Procedure

2.1 General description of proceedings

Proceedings before the Tribunal are instituted by an application of an entitled subject, a question of law of a court or a constitutional complaint. It is possible to challenge the constitutionality of the entire statute or individual provisions thereof. The Tribunal's examination is limited to the scope of the charges contained in the application.

2.2 Types of proceedings

- Abstract review of norms

In an "abstract" review of a legal norm, the Tribunal reviews the relevant legal provisions without reference to a particular case in which the provisions were applied.

Pursuant to Article 191 of the Constitution, the following entities are authorised to initiate the abstract review of norms:

1. the President of the Republic, the Marshal of the *Sejm*, the Marshall of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Chief Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Commissioner for Citizens' Rights,
2. the National Council of the Judiciary, provided that the relevant provisions relate to the independence of the courts and judiciary,
3. the constitutive organs of units of local self-government, the national organs of trade unions as well as the national authorities of employers' organisations and occupational organisations, churches and religious organisations – provided that the normative act relates to matters within the scope of their activities.

In general, an abstract review has the nature of a subsequent (*a posteriori*) review, meaning that it is initiated following the promulgation of the challenged normative act. The President of the Republic of Poland may, however, also initiate an abstract review in accordance with the procedure of preliminary (*a priori*) review: he may refrain from signing a bill already adopted by parliament and apply to the Constitutional Tribunal for examination of the bill's conformity with the Constitution (Article 122.3 and 122.4 of the Constitution). The President may follow the same procedure in relation to international agreements prior to ratification thereof (Article 133.2 of the Constitution).

- Referral of a question of law by a court

In such cases the review of norms is "specific" ("concrete") in the sense that it is initiated by a court in connection with a particular case currently being examined by that court. Pursuant to Article 193 of the Constitution, any court may refer a question of law to the Constitutional Tribunal as regards the conformity of a normative act with the Constitution, ratified international agreements or statute, where the answer to such a question will determine an issue currently pending before that court.

- Constitutional complaint

The Polish legal system does not contain a mechanism of constitutional complaint which may be used directly against the decisions of courts or administrative authorities. The procedure of a "constitutional complaint", contained in Article 79 of the Constitution, is a particular method of initiating the specific review of norms. A natural or legal person whose case has been finally settled by a court judgment (or a decision of an organ of the administration), may question before the Tribunal the conformity of the legal provisions forming the basis of this decision with constitutionally guaranteed rights and freedoms. The Constitutional Tribunal's judgment in such cases has universally binding force (see Article 190 of the Constitution), meaning that it will also be applicable in cases other than the one involving the current complainant. In this regard, the review of norms initiated in accordance with the procedure of constitutional complaint does not differ from the abstract review of norms or the review of norms following the referral of questions of law by courts.

- Preliminary consideration of applications and constitutional complaints

This procedure applies in respect of applications lodged in accordance with the procedure of abstract

review by entities having competences to initiate the review only in respect of provisions concerning the scope of their activities (see above: abstract review of norms, item c) and with respect to constitutional complaints. The Tribunal will refuse to proceed with such a case where the formal requirements for applicability of these procedures have not been fulfilled, or where the application is evidently unfounded. Where the Tribunal chooses to discontinue proceedings in this manner, it will not proceed to consider the merits of the application, nor will it pass judgment thereupon.

- Review of the constitutionality of the purposes or activities of political parties;
- Settlement of disputes over authority between central constitutional organs of the State.

In both of the above mentioned types of review, the Constitutional Tribunal undertakes a function other than the review of norms.

The review of the constitutionality of the purposes or activities of political parties may take different forms, either by preventive or consequent review. To date, the Tribunal has rarely performed preventive review of the articles of political parties, as initiated by the court holding the records of political parties.

The Constitutional Tribunal was vested with the second of the aforementioned competences pursuant to the Constitution of 2 April 1997. To date, the Tribunal has not heard a case relating to a dispute over authority between central constitutional organs of the State.

- Signalisation

The Tribunal occasionally pronounces so-called "signalisation" judgments in which the Tribunal points out to the competent law-making bodies the existence of inconsistencies or lacunae in legal provisions (Article 4.2 CTA). Unlike in other cases, the Tribunal acts *ex officio* in this case. The Tribunal's considerations are not, however, binding for the addressees of the signalisation.

2.3 Composition of judicial panels

The Tribunal is not divided into chambers or other units. The adjudicating bench (panel) is created *ad hoc* for each case and the selection of the chairman of the bench, the reporting judge and the remaining judges are done alphabetically. Decisions are delivered, depending on the type of case, by a single judge, a three-judge panel, a five judge panel or the Tribunal in plenary session.

3. Organisation

Practical and administrative organisation of the Tribunal's work is the responsibility of its President and the Office, which is subordinate to him.

IV. Jurisdiction

The Constitution dated 2 April 1997, comprises four areas within the jurisdiction of the Constitutional Tribunal:

1. the review of norms: abstract and specific; *a posteriori* and *a priori* – Article 188 sub-sections 1-3, Article 122.3 and 122.4, Article 133.2 of the Constitution; a particular procedure to review norms is the adjudication of constitutional complaints (Article 79 and Article 188.5 of the Constitution);
2. adjudication of disputes of authority between central constitutionally recognised State bodies (Article 189 of the Constitution);
3. deciding on the conformity of the Constitution of the purposes or activities of political parties (Article 188.4 of the Constitution);
4. recognising the temporary incapacity of the President to perform his or her office (Article 131.1 of the Constitution) and vesting the performance of his or her duties in the Marshal of the *Sejm* (Article 131.1 of the Constitution, Article 2.3 CTA).

A notable difference in comparison to the previous Constitution, is the removal from the Tribunals prerogatives of the competence to issue universally binding interpretations of laws. The Tribunal has, however, adopted the practice of passing the so-called "interpretative judgments" by which it asserts the constitutional validity or lack thereof under the condition that a certain interpretation of a given norm is applied. This practice is subject to controversy and opposed by the Supreme Court.

V. Nature and effects of decisions

1. Types of decisions

The Constitutional Tribunal delivers judgments when deciding a case regarding constitutional validity of norms or the constitutionality of political parties on its merits. A judgment of the Tribunal, declaring a provision (act) to be unconstitutional, results in the provision being removed from the legal order. The judgments are final and universally binding after their promulgation. Judgments are published in the official publication in which the challenged normative act was originally published. If the act was not published, judgments are promulgated in the *Monitor Polski*

(Official Gazette). The Tribunal may delay the loss of binding force of the provision found to be unconstitutional by up to 18 months.

When a given norm is found to be unconstitutional the acts and decisions made previously on the grounds of this norm are not subject to automatic annulment. Article 190.4 of the Constitution provides, however, that the Tribunal's decision on the non-conformity of the normative act (provision) under review constitutes the "basis for re-opening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to the given proceedings". Detailed regulations are incorporated in the procedural codes.

In cases where a judgment is not required, the Tribunal issues orders. They are usually procedural decisions (discontinuing the case or refusing to proceed with further action on the application) but may also regard substantive matters, that are do not directly involve the review of legal norms (i.e. settlement of competency disputes, vesting the powers of the President, which may no longer perform his or her duties, in the Marshal of the *Sejm*).

VI. Conclusion

The Polish Constitutional Tribunal is similar to the judicial institutions set up in western European countries to safeguard the Constitution and laws, although it has certain unique features. The Tribunal currently plays a very important part in shaping Poland's legal system. Many of its landmark judgments have amounted to no less than major reforms of substantial fields of the law, securing its role as a *de facto* "negative" legislative power. It is also, through the mechanism of constitutional complaint, a guardian of human and civic rights *vis-à-vis* the State authorities.



Portugal

Constitutional Court

I. Introduction

The 1911 Republican Constitution was the first in Portugal to provide for the judicial review of the constitutionality of laws. The courts were empowered to check that laws were in keeping with the Constitution and were all required to evaluate the constitutional legitimacy of the applicable law or regulation whenever a question of constitutionality was raised by one of the parties in judicial proceedings.

The next Constitution of 1933 maintained and even broadened this monitoring system, inasmuch as courts were entitled *ex officio* to raise the question of constitutionality. In practice, however, the system did not work. Court decisions on constitutional questions were extremely rare between 1911 and 1976.

An effective system for monitoring constitutionality, with a combination of diffuse and concentrated judicial review procedures, was not established until the introduction of the 1976 Constitution in the wake of the Revolution of 25 April 1974. Initially, from the moment at which the new Constitution was approved by the Constituent Assembly (2 April 1976) until its first revision (by Constitutional Law no. 1/82 of 30 September 1982), the Council of the Revolution was charged with the constitutional review function in its role as “guarantor of compliance with the Constitution”. The Constitutional Commission (a consultative body that assisted the Council with constitutionality-related questions) also had specific competences in the review field (to hear appeals against decisions taken by courts in the exercise of their diffuse review powers).

The 1982 revision of the Constitution then led to the establishment of a constitutional organ *per se* – i.e. a specialised organ entrusted with reviewing constitutionality – the Constitutional Court.

The Constitutional Court does not form part of any court hierarchy, but its decisions are binding on all courts and its rulings in abstract appeal cases are binding on all public authorities.

II. Basic texts

The Court’s composition and powers are defined in the Constitution (Articles 221-224 and 277-283), but its powers can be broadened by the ordinary law. This has occurred on several occasions, notably with regard to electoral disputes and political parties.

The Court’s organisation, *modus operandi* and procedure are governed by Law no. 28/82 of 15 November 1982, as amended by Laws nos. 143/85 of 26 November 1985, 85/89 of 7 September 1989, 88/95 of 1 September 1995 and 13-A/89 of 26 February 1989 and by Organic Law no. 1/2011 of 30 November 2011. The full text is available at www.tribunalconstitucional.pt.

III. Composition, procedure and organisation

1. Composition

The Court is made up of thirteen Justices: ten are appointed by the Assembly of the Republic (the Parliament), with a two-thirds majority of Members of Parliament; the other three are co-opted by the first ten. At least six of them must be chosen from among the judges of the remaining courts, while the remainder must be trained jurists.

The Justices are sworn in before the President of the Republic. Their nine-year term of office cannot be renewed.

The Justices select a President and Vice-President from their own ranks for a renewable four-and-a-half-year term of office.

Justices are independent and enjoy security of tenure, which can only be terminated by death, permanent physical incapacity, resignation, acceptance of responsibilities incompatible with the office, or on disciplinary grounds decided by the Court itself.

They resemble the judges of other courts with regard to responsibility for the decisions they take. Their status, in terms of rights, honours and other benefits, is identical to that of the Justices of the Supreme Court of Justice.

They may not perform any other public or private functions, apart from teaching or researching in the legal field, which must be unpaid.

Justices of the Constitutional Court are not allowed to do work for political parties or associations or to take part in public party-political activities.

2. Procedure

The Court follows several different types of procedure, depending on the category of the case before it. Lots are drawn to appoint a Justice as rapporteur for a given case and it is he or she who presents the draft decision. Either the decision or the findings must be approved by a majority of the Justices concerned (all thirteen in the case of the Plenary; five in that of a single Chamber). In the event of a tie, the President (or Vice-President when presiding over a Chamber) has the casting vote. If the rapporteur's proposal is defeated, the case file is transferred to another rapporteur.

When the Court is asked to conduct an *ex post hoc* abstract review of constitutionality, a copy of the file and a memorandum on it are given to each Justice before the case is distributed to a rapporteur. The memorandum is written by the President of the Court, who formulates both the admissibility questions and the questions of substance to which the Court must give an answer. After not less than fifteen days, the memorandum is debated and the Court sets out guidelines for the case. The rapporteur is then chosen, either by lot or, if the Court so decides, by the President.

The Court sits in Plenary for abstract (*a priori* or *ex post facto*) review cases, and as a Chamber (there are three Chambers, each composed of four Justices plus the President or Vice-President) in concrete review cases. However, the President may decide that certain of the latter should be heard in Plenary, in order to avoid the possibility of subsequent case-law divergences between the three Chambers.

If any Chamber of the Constitutional Court decides a question of constitutionality or legality in a way that contradicts an earlier decision on the same norm, the new decision can be appealed to the Plenary. The Public Prosecutors' Office must obligatorily lodge such an appeal, if it was either appellant or respondent in the case in question.

Whenever a given norm has been found unconstitutional in three concrete cases, the Constitutional Court can organise an *ex post facto* abstract review of its constitutionality or legality. If the norm is again declared unconstitutional, the decision possesses generally binding force. Any Justice of the Court and the Public Prosecutors' Office can take the initiative to bring such proceedings.

The Public Prosecutors' Office is legally required to appeal to the Constitutional Court against the decision in every case (diffuse concrete review) in which: a court has refused to apply a norm contained

in an international treaty, a legislative act or a regulatory decree, on the grounds that the norm is unconstitutional; a norm which the Constitutional Court has previously found to be unconstitutional is nonetheless applied by another court; a court has refused to apply a norm contained in a legislative act on the grounds that it contradicts an international convention; or a court applies a norm contained in a legislative act when the Constitutional Court has already ruled to the contrary with regard to the same norm.

The Court does not sit in public. All evidentiary material in the proceedings must be given in written form. The parties are represented by counsel and provision is made for adversarial hearings in all proceedings.

The Court's Judicial Secretariat is made up of a central section and four case sections. Three of the latter are responsible for work linked to the Constitutional Court's jurisdictional functions with regard to the review of constitutionality. The fourth handles non-litigious cases (particularly those concerning political parties, coalitions, the election of the President of the Republic, the election of Portuguese Members of the European Parliament and the recording and treatment of the declarations required of political officeholders and similar officials).

3. Organisation

Each Justice is assisted by an aide whom he or she selects (in practice, from among assistants to law faculties, judges or senior officials) and by a secretary. The President's office comprises an executive officer, three assistants and two secretaries.

The prosecuting authorities are represented at the Court by the Attorney General, who may delegate this role to the Deputy Attorney General or one or more members of the Public Prosecutors' Office.

The Secretariat-General of the Constitutional Court includes the Judicial Secretariat, the Administrative and Financial Division, the Documentary Support and Legal Information Unit (NADIJ) and the IT Centre.

The Secretary-General is appointed by the President of the Court, who must first consult the Plenary. Under the President's overall superintendence, he or she is in charge of directing the work of all the Court's departments and services except the Offices of the President, Vice-President and Justices and the Public Prosecutors' Office.

The Documentary Support and Legal Information Unit has its own documentation centre and library.

IV. Jurisdiction

1. Review of constitutionality

1.1 Principle of the request

Under the so-called procedural principle of the request, in both abstract (prior or *ex post facto*) and concrete review cases the Constitutional Court can only declare the unconstitutionality of those norms it has specifically been asked to review. However, it can find such a norm unconstitutional on the grounds that it is in breach of one or more constitutional norms or principles other than those invoked by the petitioner or appellant.

1.2 Prior review

The President of the Republic can ask the Constitutional Court to review the constitutionality of Laws passed by the Assembly of the Republic, Executive Laws approved by the Government and international treaties, before he or she enacts or promulgates them. The Court will then consider the specific provisions in the instrument in question whose constitutionality the President of the Republic has questioned and asked to be reviewed. If it does indeed find such a provision to be unconstitutional, the President cannot enact or promulgate the instrument, but the Assembly (laws) or the Government (executive laws) can remove or amend the unconstitutional provisions. However, in the case of laws passed by the Assembly, the latter has the option to confirm them by a two-thirds majority vote, whereupon the President can enact them despite the Court's Ruling, although he or she is not obliged to do so.

The Prime Minister or one-fifth of the Members of Parliament, can ask for a *prior* review of institutional acts – laws relating to elections, referenda, the Constitutional Court or defence and martial law – that must be approved by an absolute majority of Members of Parliament.

Representatives of the Republic (central government representatives to the Azores and Madeira Autonomous Regions) can ask the Court for a *prior* review of the norms contained in regional legislative instruments.

1.3 *Ex post facto* abstract review

This type of review is applicable to all legal norms contained in laws or regulations. The entities with the legitimacy to ask for such a review are the President of the Republic, the President of the Assembly of the Republic, the Prime Minister, the Ombudsman, the

Attorney-General, one tenth of the Members of the Assembly of the Republic and, where a violation of the rights of the autonomous regions is alleged, Representatives of the Republic, regional assemblies or one-tenth of their members and presidents of regional governments.

Declarations of unconstitutionality in abstract review proceedings possess generally binding force and cause the rule in question to be set aside. A declaration of unconstitutionality with generally binding force has effect as of the entry into force of the norm in question. Its effects are thus *ex tunc* and it also causes the revalidation of any norms the unconstitutional norm may have repealed or revoked. However, the Constitutional Court can restrict the effects of such declarations of unconstitutionality in cases in which there are substantiated reasons of legal certainty, fairness or an exceptionally important public interest for doing so.

1.4 Concrete review

A concrete review presupposes that the question of constitutionality was first raised in an ordinary court within the context of a pre-existing dispute. The fact is that no court judgment can apply norms that contravene the provisions of the Constitution or the principles enshrined therein. If an ordinary court decides that a norm is unconstitutional or that a question of constitutionality raised by one of the parties is not valid, the party is entitled to bring the matter to the Constitutional Court. The diffuse review system is thus supplemented by a concentrated review procedure.

The effects of the Court's decisions in concrete review proceedings, are limited to the specific case brought before the court.

1.5 Review of omissions

The Court can decide that the Constitution has been violated by a failure to adopt legislative measures – i.e. by an omission. The entities with the legitimacy to bring such cases before the Court are the President of the Republic, the Ombudsman and, if the rights of an autonomous region (there are two of these – the Azores and Madeira) are involved, presidents of regional assemblies.

If the Court finds that the Constitution has been violated by omission, it accordingly informs the entity with the power to take the necessary remedial measures.

1.6 Review of legality

The Court can censure four types of illegality:

- incompatibility of norms issued by the central government with the statutes of autonomous regions;
- incompatibility of regional norms with either regional statutes or national laws;
- incompatibility of any norms with a Law that possesses superior force; and in some cases,
- incompatibility of national norms with international conventions.

The procedures for reviewing legality are similar to those for the review of constitutionality, but they do not include either prior checks, or checks on failures to take measures (omissions).

2. Other competences

2.1 The President of the Republic

The Constitutional Court has various competences with regard to the President of the Republic:

- to confirm his or her death or declare his or her permanent physical disability;
- to verify temporary impediments that prevent him or her from performing his or her duties;
- to verify cases in which he or she loses his or her office by absenting his or herself from Portuguese territory without authorisation from the Assembly of the Republic; and
- to decide on his or her removal from office if the Supreme Court of Justice finds him or her guilty of a crime committed in the performance of his or her duties.

These powers must be exercised by the Plenary.

2.2 Electoral disputes

The Constitutional Court possesses ultimate decision-making authority with regard to the legality and validity of electoral procedures.

In the case of the election of the President of the Republic and of Members of the European Parliament, this authority is direct. In parliamentary elections, local elections and elections to the legislative assemblies of the autonomous regions, the Court rules on appeals against decisions taken by courts or electoral administrative organs.

Such decisions are taken by the Plenary and the procedure is a particularly fast one.

2.3 Political parties

The Court is responsible for registering political parties, coalitions and federations of parties. Since the passage of Law no. 72/93 of 30 November 1993 and subsequent Laws, it also annually checks the parties' accounts. The current legislation in this respect is Organic Law no. 2/2003 of 22 August 2003.

2.4 Organisations professing racism or a fascist ideology

The Court has the power to dissolve any organisation that professes or otherwise displays racism or a fascist ideology.

2.5 National or local referenda

The President of the Republic must obligatorily submit all draft referenda submitted to him or her by the Assembly of the Republic or the Government to the Constitutional Court for the prior review of their constitutionality and legality.

This review applies to national, regional and local referenda and includes verification of the requisites regarding the universe of voters, to whom the referendum will be put.

The Constitution also excludes certain matters – measures regarding taxation or amendments to the Constitution itself, for example – from the possible scope of referenda.

2.6 Declarations of assets and income by political office-holders

Any citizen can consult the declarations of the assets of persons exercising political or equivalent responsibilities.

The Court defines the *modus faciendi* of the access to these declarations. The declarant may object to the divulgation of his or her declaration if he or she invokes a relevant reason. In these cases, it is up to the Court to decide if the invoked reason(s) (are) relevant as well as to decide about the possibility and the terms of the divulgation of the declaration.

3. Political Accounts and Financing Entity

The Constitutional Court is also home to the Political Accounts and Financing Entity (hereinafter, the "ECFP"). This independent organ provides technical assistance when the Court reviews and inspects the annual accounts of political parties and the accounts of election campaigns for all elected political entities

(President of the Republic; Assembly of the Republic; Portuguese Members of the European Parliament; the Legislative Assemblies of the Autonomous Regions and elected local authority organs).

The ECFP was created by Law no. 19/2003 of 20 June 2003, on the Financing of Political Parties and Election Campaigns and its organisation and *modus operandi* are regulated by Organic law no. 2/2005 of 10 January 2005. In practice, it was actually formed, and its first members took office, on 30 January 2005.

The ECFP is made up of a President and two members, and at least one of the latter must be a chartered accountant (ROC). They are appointed by the Constitutional Court in Plenary, with at least eight favourable votes required for election, for a four-year term of office that can be renewed once.

The ECFP particularly possesses the competence to:

- a. Prepare files regarding the political-party and election accounts that are to be reviewed by the Constitutional Court;
- b. Verify that the expenses declared in such accounts match those that have actually been incurred;
- c. On its own initiative or at the request of the Constitutional Court, carry out any type of inspection of specific acts, procedures or aspects of financial management regarding political-party or election accounts.

It is also competent to issue regulations standardising generic procedures and recommendations, which the entities that are subject to its control and inspection powers are required to comply with.

Political parties (with regard to both their day-to-day and their electoral activities), coalitions standing for election, candidates for election to the Presidency of the Republic and organised groups of voters involved in elections must submit accounts and campaign budgets to the Constitutional Court. In addition, they must notify the ECFP of any political propaganda activity or election campaign actions they intend to undertake and of the resources they employ therein whenever the latter's costs exceed the legal limits.

The ECFP can impose fines (amounts laid down by law) for any failure to fulfil these duties to notify and collaborate with it. Its decisions in such cases can be appealed to the Constitutional Court.

V. Nature and effects of decisions

The Law governing the Constitutional Court determines which Constitutional Court decisions must be published in the *Diário da República* (Official Journal) and whether this publication should be in Series I or Series II.

The law specifically requires that some rulings be published in either Series I, which is reserved for the most important public acts, or Series II. However, when the Court considers that other rulings are also particularly important to the legal community, it can decide to have them published in Series II as well.

The full text of all the Court's Rulings is available on the website of the Constitutional Court of Portugal at www.tribunalconstitucional.pt.

The Constitutional Court website includes a smaller English-language section, which contains the most essential information on the Court, its organisation, the statute governing its Justices, its competences and *modus operandi* and its relations with its counterparts in other countries. It also offers both summaries of selected rulings, and a brief history of the Court.



Romania

Constitutional Court

I. Introduction

In Romania, the Constitution, as approved by referendum on 8 December 1991, has set up the European model in matter of constitutional review and entrusted the Constitutional Court, conceived as a distinct and independent authority, with the mission to ensure the supremacy of the Constitution. The composition of the first Constitutional Court, was established in June 1992, the first decisions bearing the date 30 June 1992.

Over time, the Constitutional Court has become gradually, but surely, an essential component of the rule of law, contributing decisively to the affirmation of democracy revived after the Revolution of December 1989. The role of the Constitutional Court, as guarantor for the supremacy of the Constitution, which sees to the observance of the principles and values of democracy and of the rule of law, as well as to the protection of rights and freedoms, has been shaped and enriched to meet new requirements imposed by the evolution of social life in Romania, by assimilation of practice of long-standing democracies or that of the European Court of Human Rights.

Recognition of the position acquired by the Constitutional Court among State authorities was done implicitly on the occasion of constitutional revision, in 2003, by extending the jurisdiction of the Court and by enshrining at constitutional level the *erga omnes* nature of its decisions, something which until then had sometimes been questioned in specialised literature and in judicial practice. In fact, the 2003 revision of the Constitution marks, in terms of scale and significance, a milestone in the country's constitutional evolution, as the amendments – addressing a large number of texts of the Basic Law, were mainly aimed at ensuring the constitutional basis for integration into the European Union and NATO and also bringing Romania closer to the common constitutional traditions of the Member States of the European Union.

II. Basic Texts

The Constitution, approved by national referendum on 8 December 1991 (as amended and supplemented by Law no. 429/2003 on the revision of the Constitution, published in the Official Gazette, Part I,

no. 758 of 29 October 2003, republished, as subsequently updated in terms of texts numbers and names, in the Official Gazette, Part I, no. 767 of 31 October 2003) stipulates, under Articles 142-147, Title V, the setting up of the Constitutional Court.

In compliance with those provisions, Law no. 47/1992, republished in the Official Gazette, Part I, no. 807 of 3 December 2010, established the rules on the organisation and operation of the Constitutional Court, detailed under the Regulations of the Court, approved by the Plenum of the Court in March 2012.

III. Composition, procedure and organisation

1. Composition

The Constitutional Court consists of nine judges, appointed for a nine-year term of office, which cannot be prolonged or renewed.

Judges of the Constitutional Court must have graduated law and enjoy high professional eminence and at least 18 years' experience in the legal field or academic professorial activity.

Three judges are appointed by the Chamber of Deputies, three by the Senate and three by the President. Thus, all the judges are appointed by the public authorities elected by universal vote.

The Court, every three years, is renewed with a third of its Judges and each of the public authorities entitled to appoint judges shall appoint a judge. In order to ensure the application of the renewal system, Judges of the first Constitutional Court were appointed for periods of three, six and nine years, respectively. For each of these terms, the President of Romania, the Chamber of Deputies and the Senate appointed one Judge each.

The judges are independent and irremovable during their term of office.

After appointment, each judge takes an individual oath before the President of Romania and the Presidents of the two Chambers of Parliament, to enter the term of office henceforth. The first Court took this oath on 6 June 1992.

The office of judge is incompatible with any other public or private office, except that of an academic professorial activity. Judges are also forbidden any affiliation to a political party.

Judges must, subject to the law, fulfil their office in impartially and respect for the Constitution and refrain themselves from any activity or conduct which is contrary to the independence and dignity assigned to their office.

The judges enjoy immunity. They cannot be held responsible for opinions and votes given in the adjudication of cases, nor can they be arrested or criminally prosecuted against, without permission granted by the Standing Bureau of the Chamber which appointed them or, as the case may be, by the President of Romania. Jurisdiction for trial is vested in the High Court of Cassation and Justice.

The President of the Constitutional Court shall be elected by judges by secret vote for a three-year term and is eligible for a new term of office. The President's prerogatives are stipulated in the Organic Law of the Court and in its Regulations of Organisation and Operation.

2. Procedure

Institutions of proceedings can be made before the Constitutional Court only for the cases expressly provided under Article 146 of the Constitution, republished, or under its Organic Law. Institutions of proceedings shall be made in writing and they shall be motivated.

The President of the Constitutional Court, having received the act of reference, shall designate the Judge-Rapporteur and the assistant-magistrate, by his or her dated signature, and shall set the date of the hearing in the cases provided by law. Depending on the nature and on the author of the act of reference, he or she shall request the viewpoints of the authorities provided by law.

Based on the documents and on the submitted viewpoints, a report is drawn up which provide substance to the debate.

All Judges of the Constitutional Court have to participate in the Plenum sessions, except where some of them are not in attendance for justified reasons.

The working quorum is two thirds of the judges, who shall decide by a majority vote, except where the law requires a qualified majority. Judges must give their vote, whether affirmative or negative, since abstention is not allowed.

Sessions are presided over by the President of the Constitutional Court. In the absence of the President of the Court, the sessions are presided over by a

Judge designated by the President. Sessions must also be attended by the assistant-magistrate assigned to the Judge-Rapporteur and, in cases provided by law, by the representative of the Public Ministry and by other persons or authorities summoned to this end.

Debates shall take place on the basis of the act on the case submitted to the Court act and of its other deeds, with no other than the Judges partaking therein, without the parties being summoned, except in the cases provided under Article 146.d, 146.e and 146.k of the Constitution, republished. The President can invite anyone whose presence is deemed necessary, to give clarification.

Deliberation shall be in secret, and only the Judges who have also taken part in the debate proceedings and the assistant-magistrate assigned to the case are allowed to attend.

The result of the deliberation is recorded in the minutes, which is signed by the Judges who have taken part in the session and by the assistant-magistrate.

Judges who have given a negative vote may formulate a separate opinion. With regard to the reasoning of the decision, it is also possible to write a concurring opinion. The separate (dissenting) and, as the case may be, concurring opinion shall be published in the Official Gazette, Part I, together with the decision.

3. Organisation

The Constitutional Court carries out its proceedings in the Plenum.

Apart from jurisdiction powers discharged, the Plenum also adopts specific regulations and normative for the implementation of legal provisions, approves the Constitutional Court's draft budget, the plan of international relations and any other measure required for a smooth running of the Court's activity.

The Constitutional Court comprises of:

- a unit of Assistant-Magistrates (First Assistant-Magistrate, Assistant-Magistrates-in-chief, Assistant-Magistrates and junior Assistant-Magistrates). The Unit of Assistant-Magistrates carries out its activity under the direction of the President of the Constitutional Court;
- departments subordinated to the President of the Constitutional Court (Office of the President of the Constitutional Court, External Relations,

Press Relations and Protocol Departments – functions under the coordination of the Assistant-Magistrate-in-chief – Director of the Office of the President of the Constitutional Court, and the Internal Audit Departments);

- departments subordinated to, or coordinated by the First Assistant-Magistrate (Research, Documentation and Library Departments /Clerk, Registry and Archive Departments);
- the General Secretariat of the Constitutional Court, headed by a Secretary General, in charge of the organisation and carrying out of the Court's administrative activities.

IV. Jurisdiction

The purpose of the Constitutional Court is to guarantee the supremacy of the Constitution.

To this purpose, the Court exercises the following prerogatives, stipulated in:

1. Article 146 of the Constitution

- a. it adjudicates on the constitutionality of laws before promulgation, upon referral by the President of Romania, the President of either of the Chambers, the Government, the High Court of Cassation and Justice, the Advocate of the People, at least 50 Deputies or at least 25 Senators, as well as *ex officio*, on any initiative purporting a revision of the Constitution;
- b. it adjudicates on the constitutionality of treaties or other international agreements, upon referral by the President of either of the Chambers, at least 50 Deputies or at least 25 Senators;
- c. it adjudicates on the constitutionality of the Standing Orders of Parliament upon referral by the President of either of the Chambers, a parliamentary group or at least 50 Deputies or at least 25 Senators;
- d. it rules upon objections as to the unconstitutionality of laws and ordinances which are raised before the courts of law or commercial arbitration; a plea of unconstitutionality may also be brought up directly by the Advocate of the People;
- e. it decides on legal disputes of a constitutional nature between public authorities, at the request of the President of Romania, the President of either of the Chambers, the Prime Minister, or the President of the Superior Council of Magistracy;
- f. it sees to the observance of the procedure for the election of the President of Romania and confirms the ballot returns;
- g. it ascertains any circumstance as may justify the interim in the exercise of office of President of

Romania and it reports its findings to Parliament and to the Government;

- h. it gives advisory opinion on the proposal to suspend the President of Romania from office;
- i. it sees to the observance of the procedure for the organisation and holding of a referendum, and confirms its returns;
- j. it verifies whether conditions are met for the citizens' exercise of their legislative initiative;
- k. it rules upon challenges as to the unconstitutionality of a political party;
- l. it also fulfils other prerogatives as provided by the Court's organic law.

2. The Court's organic law

Based on provisions of Article 146.l of the Constitution, according to which the Constitutional Court "fulfils other prerogatives as provided by the Court's organic law", Law no. 47/1992 provides the following prerogatives:

- the *ex officio* review of the law for the revision of the Constitution (Articles 23-24);
- the constitutional review of resolutions of the Plenum of the Chamber of Deputies, the Plenum of the Senate, or the joint Chambers of Parliament (Article 27).

The Court's competence shall not be objected to, according to the law, by any public authority, as it is the only one entitled to decide on its competence.

The forms of jurisdictional activity can be summarised as follows:

1. The review of constitutionality:

- a. The constitutional review of laws prior to promulgation (a preliminary, abstract review) is exercised only at the request of one of the entities under Article 146.a of the Constitution. In cases related to laws declared unconstitutional before their promulgation, Parliament must reconsider the respective provisions in order to bring them into line with the decision rendered by the Constitutional Court, in conformity with Article 147.2 of the Constitution.
- b. The *ex officio* review on the initiatives for revision of the Constitution is set forth by the second thesis of Article 146.a of the Constitution. The Court will examine the bill or legislative proposal before introduction in Parliament, but also the law passed by both Chambers, prior to submission for a referendum. The twofold review is a result of the amendments brought to the Court's organic law, in 2004.

- c. The constitutional review of treaties or other international agreements (a preliminary, abstract review) is initiated upon request by any of the entities provided in Article 146.b of the Constitution. In conformity with Article 147.3 of the Constitution, a treaty or international agreement found as unconstitutional shall not be ratified. A treaty to which Romania is to become a party which comprises provisions contrary to the Constitution may nonetheless be ratified, but only after the revision of the Constitution.
- d. The constitutional review of parliamentary regulations (a consequent, abstract review) is exercised upon request by any of the entities provided in Article 146.c of the Constitution. Where certain regulations have been declared unconstitutional, the Chamber concerned or, in the case of regulations of the joint sessions, the Chamber convened must re-examine such within forty-five days, to bring them into line with the relevant provisions of the Constitution. For this period of time, provisions held as unconstitutional shall be suspended *de jure*, according to Article 147.1 of the Constitution, and cease legal effect on the expiry thereof.
- e. The adjudication of exceptions of unconstitutionality relative to laws and Government ordinances, within proceedings of the *a posteriori*, concrete review of constitutionality, is, in terms of numbers, the most significant component of the Court's jurisdictional activity.

The settlement of exceptions of unconstitutionality, based on Article 146.d, shall be made upon the request of the courts of law or commercial arbitration. The courts of law or commercial arbitration shall notify the Court upon the request of either party or *ex officio* through a substantiated interlocutory order.

Following the 2003 constitutional revision, also the Advocate of the People has become entitled to raise "exceptions of unconstitutionality" by means of a direct action.

Until 2010, the Court's organic law provided that trial proceedings were to be stayed throughout adjudication of the exception. However, the text was eliminated (through Law no. 177/2010), given last year's practice, when suspension of proceedings automatically followed from the case being referred to the Constitutional Court – a manoeuvre the interested parties had often resorted to for dilatory purposes only, which ultimately affected the length of judicial proceedings.

At the same time, the above-mentioned amending law has also introduced new grounds for revision, in both civil and criminal proceedings, where a

declaration of unconstitutionality has been made in respect of the legal provisions based on which the ordinary court rendered its decision in the case in which the exception of unconstitutionality had been raised.

Subject to Article 147.1 of the Constitution, those provisions of effective laws or ordinances found to be unconstitutional cease their legal effect within 45 days after the publication of the Constitutional Court's decision, if Parliament or, as the case may be, the Government has failed in the meantime to bring them into line with the provisions of the Constitution. For this period of time, the provisions held as unconstitutional are suspended *de jure*.

2. Resolution of legal disputes of a constitutional nature

Pursuant to the 2003 revision of the Constitution, under Article 146.e, the Court has been ascribed the power to decide on legal disputes of a constitutional nature arisen between the public authorities, on request by the President of Romania, the President of either of the Parliament Chambers, the Prime Minister or the President of the Superior Council of Magistracy.

The procedure is regulated by the Court's organic law and involves hearing of the parties, in adversarial proceedings.

In its decision, the Court decides whether there is a legal dispute of constitutional nature, how the dispute must be settled, as well as the conduct to be followed by public authorities involved in the dispute.

The decision whereby the dispute is resolved is final and generally binding as of the day of publication in the Official Gazette, Part I and is communicated to both the petitioner and the conflicting parties.

3. Powers relative to the procedure for election of the President of Romania

The Constitutional Court sees to the observance of the procedure for the election of the President of Romania, based on Article 146.f of the Constitution. In accordance with the law, the Court resolves complaints against the registration or non-registration of candidatures, or concerning hindrances for a political party or candidate to conduct the electoral campaign, as well as the requests for the invalidation of elections for reason of fraud.

After closure of whole operations, the Court confirms the ballot returns, and establishes, as the case may be, the date for the second round and the candidates

qualified to participate. The Constitutional Court validates the election of the President of Romania.

4. Powers relative to the exercise of the mandate as President of Romania

a. Ascertaining circumstances which justify the interim in the exercise of the office of President of Romania

Under the Basic Law, the term of office of the President of Romania is 5 years and shall be exercised from the date the oath was taken.

In certain instances, however, the presidential term of office may also cease before expiry or it may be interrupted; in such an event, it will be for the Court to ascertain the circumstances which justify the interim in the exercise of the office of President of Romania and to communicate its conclusions to Parliament and Government, according to Article 146.g of the Constitution.

Vacancy in the office must be ascertained by the Court at the request of the President of either Chamber of Parliament or at the request of the acting President. If the interim was due to the President's suspension from office, the request is made by the president who chaired over the joint session of both Chambers of Parliament. Finally, if such interim occurs because of a temporary incapacity to exert powers, the request must come from the President of Romania or from the president of either Chamber.

b. Giving an advisory opinion on the proposal to suspend the President of Romania from office

In case the President of Romania has committed serious acts and actions in violation of the Constitution, he or she may be suspended from office by the Chamber of Deputies and the Senate, in a joint session, by a majority vote of Deputies and Senators, and after seeking opinion from the Constitutional Court.

The proposal for suspension may be initiated by at least one third of the Deputies and Senators and is forwarded to the Constitutional Court, together with relevant evidence, by the president who chaired the joint session of both Chambers of Parliament.

The Court issues an advisory opinion that is sent both to the president who chaired the joint session of both Chambers of Parliament and to the President of Romania.

Proceedings are then continued in Parliament, which is solely entitled to decide on the President's suspension from office. If the proposal is approved by a majority vote of Deputies and Senators, a referendum for the President's removal from the office must be held within the following 30 days.

5. Powers related to the procedure of referendum

According to the constitutional provisions, a referendum may be held in order to approve a law for the revision of the Constitution or for consultation of the people by the President of Romania on questions of national interest or to decide on the removal of the head of state following his or her suspension from office.

The Constitutional Court sees to the observances of the procedure for the organisation and holding of a referendum, and confirms its results, based on Article 146.i of the Constitution. Detailed norms are comprised in the Law on the organisation and holding of a referendum.

6. Powers related to the exercise of the legislative initiative by citizens

Subject to Article 146.j of the Constitution, the Court verifies the fulfilment of requirements set for the exercise of the legislative initiative by citizens.

To that end, it adjudicates, *ex officio* or based on a request from the President of the Parliament Chamber in which the citizen's legislative initiative was registered, on the constitutional nature of the legislative proposal, on its compliance with the requirements as to the certification of the lists of supporters, whose number must be no less than the minimum required for the promotion of that initiative according to Article 74.1 or, as the case may be, Article 150.1, as well as on the observance of the territorial distribution of the signatures gathered.

7. Review of the constitutionality of political parties

According to Article 146.k of the Constitution, the Court decides on the challenges as to the constitutionality of a political party. The Court can be referred to under the terms specified in its organic law.

Political parties may be declared unconstitutional in the cases provided under Article 40.2 of the Constitution. If the challenge is accepted, the Court's decision is communicated to the Bucharest County Court in order to have the unconstitutional political party struck off from the Registry of political parties.

V. Nature and effects of decisions

In the exercise of its powers related to the constitutional review of laws and ordinances, international treaties or other agreements, parliamentary regulations, resolutions of the Plenum of the Chamber of Deputies, the Plenum of the Senate, or joint Chambers of Parliament, initiatives for the revision of the Constitution, resolution of legal disputes of a constitutional nature between public authorities, as well as of challenges as to the constitutionality of a political party, the Constitutional Court adjudicates by decisions.

In all other instances, the Court issues rulings, except where it is competent to issue an advisory opinion on the proposal to suspend the President of Romania from office.

The decisions and rulings are rendered in the name of the law, are generally binding as of their publication in the Official Gazette of Romania, Part I, and are effective only for the future.

VI. Conclusion

The activity carried out by the Constitutional Court in more than 20 years of existence, demonstrates its participation and role in achieving all elements of the rule of law, the case-law crystallised over time providing numerous examples in this regard. During this period, the Constitutional Court has had a notable evolution, evolved positively, remaining open to change while being aware of its role, also in terms of effects of its decisions. Such was evinced in the Plenum Decision no. 1/1995, where the Court held that the *res judicata* accompanying jurisdictional acts, therefore also the decisions of the Constitutional Court, relates not only to the operative part of a decision but also to the statement of grounds supporting it. Consequently – the Court held that – Parliament and Government, respectively public authorities and institutions, shall fully respect both the operative part and the statement of grounds of decisions rendered by the Constitutional Court. This specific effect of the acts of the Constitutional Court is a consequence of its role, which could not be fully achieved in lack of an acknowledgement of the binding value of the interpretation given by the Court to the texts and concepts of the Basic Law, to the meaning it identified in the will of the constituent legislator. The meaning of the constitutional concepts and principles established by the Constitutional Court is perceived at the level of society and determines the constitutionality of the society, removing also any potential divergent interpretation by other recipients of constitutional norms, fulfilling in this way also the

constitutional substantiation of the activity of law-making, respectively of law enforcement.



Russia

Constitutional Court

I. Introduction

1. Date and context of establishment

The Constitutional Court of the Russian Federation was first established in 1991 and was based on the Law "on the Constitutional Court of the RSFSR" of 1991.

Interference by the Court, on its own initiative, in the conflict between the President and the Supreme Soviet of Russia in 1993, resulted in the suspension of the Court's activities. The new Constitution of 1993 considerably changed the competence of the Court. In 1994, the new Law on the Constitutional Court was passed, but the Court did not resume its activity until 1995 when all nineteen judges had been appointed, as required by the new Law.

2. Position in the hierarchy of courts

As a part of the judicial system, the Constitutional Court is a specialised judicial body of constitutional review, autonomously and independently exercising judicial authority by means of constitutional judicial proceedings. Its decisions are binding on all other State bodies including courts.

II. Basic texts

- Articles 118-128 of the Constitution adopted on 12 December 1993;
- Federal Constitutional Law "on the Constitutional Court of the Russian Federation" of 21 July 1994 (with amendments).

III. Composition, procedure and organisation

1. Composition

The Constitutional Court is composed of 19 judges appointed by the Federation Council upon nomination made by the President of the Russian Federation.

The term of office is not limited to a fixed term. The age limit for the office of the members of the Court is 70 years old. These legal provisions do not apply to the Chairman of the Court.

The Chairman and the Deputy Chairman of the Constitutional Court are elected by the Federation Council on proposal by the President of the Russian Federation for a term of 6 years, renewable.

A judge of the Constitutional Court must be a citizen of the Russian Federation at least forty years old, who has an irreproachable reputation, higher legal education and experience in the legal profession of at least fifteen years, and possesses recognised high qualifications in the sphere of law.

No judge of the Constitutional Court may be a member of the Federation Council or a deputy of the State Duma or other representative bodies, hold or retain other public or social office, have private practice or engage in entrepreneurial or any other paid activities apart from teaching, academic and other creative activity. Judges may not belong to political parties.

Judges enjoy immunity. They may not be held criminally or administratively responsible or be detained, arrested or searched without the consent of the Constitutional Court, unless detained at the scene of a crime.

The powers of the judge may be suspended in the event that:

1. the Constitutional Court gives its consent to the arrest of the judge or for criminal proceedings to be initiated against him;
2. the judge is temporarily unable to perform his or her duties due to the state of his or her health.

The powers of the judge shall be terminated upon:

1. violation of the procedure for his or her appointment as judge;
2. his reaching the age limit;
3. his personal application for retirement prior to reaching the age limit;
4. loss of citizenship of the Russian Federation;
5. a final decision of conviction passed against the judge;
6. the commission of an act not in keeping with the honour and dignity of a judge;
7. engagement in occupations and actions incompatible with his or her office;
8. his failure to attend the sessions of the Court or to vote more than twice in succession without a valid reason;
9. recognition of the judge's incapacity or the declaration of him or her as a missing or dead person by court decision;
10. the death of the judge.

2. Procedure

The Constitutional Court considers and decides cases in plenary sessions. In cases provided for by Article 47.1, the Court may decide cases without holding sessions.

The Constitutional Court may consider at the plenary session any question within its competence. Exclusively in the plenary sessions the Court:

1. decides cases of conformity with the Constitution of the Russian Federation, of constitutions of republics and charters of component entities of the Russian Federation;
2. interprets the Constitution of the Russian Federation;
3. delivers an advisory opinion on the observance of a prescribed procedure for charging the President of the Russian Federation with high treason or with commission of other grave offences.

Decisions may be passed in plenary sessions provided that two thirds of the total number of judges are present.

Cases are considered in open sessions; decisions are announced publicly.

The hearings are oral. The Court hears the arguments of the parties and testimonies of experts and witnesses and reads available documents.

The session on every case is continuous, excluding time reserved for rest or required to prepare the participants in the proceedings for further hearings.

Petitions are communicated to the Court in writing and a State fee is charged: for an inquiry and application – 15 minimum wages; the complaint of a legal person – 15 minimum wages; the complaint of a citizen – 1 minimum wage. The Court may exempt a citizen from paying the State fee or reduce the fee. Court inquiries, inquiries about the interpretation of the Constitution, applications of the President of the Russian Federation concerning jurisdictional disputes to which he or she is not a party, are not subject to State fee.

The Chairman of the Constitutional Court assigns judges for a preliminary review of the petition to be completed no later than two months after the petition was registered. The results of the preliminary review of the petition are reported in the working plenary session of the Court. The cases are distributed on the basis of their subject matter and supplementary decisions of the working plenary sessions. The

rapporteur judges are designated at the working plenary sessions when the cases are declared admissible.

3. Organisation

The Constitutional Court is independent of any other body in organisational, financial, material and technical terms.

The federal budget, adopted in the form of a federal law, annually allocates in a separate item the funds needed to ensure activity of the Court. The budget may not be reduced as compared with the preceding financial year.

The Court has a staff of about 300 people comprising the Secretariat of the Court and other units. The Secretariat provides organisational, research and analytical support, information and references as well as other support required for the activity of the Court. It also considers the petitions as a preliminary measure and assists the judges in preparation of cases. Other units provide material and technical support.

IV. Jurisdiction

The Constitutional Court:

1. decides cases on the conformity with the Constitution of the Russian Federation of:
 - a. federal laws as well as enactments issued by the President of the Russian Federation, the Federation Council, the State Duma or the Government;
 - b. constitutions and charters of republics as well as laws and other enactments issued by component entities of the Russian Federation on matters pertaining to the jurisdiction of bodies of State power of the Russian Federation and to the joint jurisdiction of bodies of State power of the Russian Federation and bodies of State power of component entities of the Russian Federation;
 - c. agreements between bodies of State power of the Russian Federation and bodies of State power of component entities of the Russian Federation, and agreements between bodies of State power of component entities of the Russian Federation;
 - d. international treaties of the Russian Federation that have not come into force.

2. settles disputes about competence:
 - a. between federal bodies of State power;
 - b. between bodies of State power of the Russian Federation and bodies of State power of component entities of the Russian Federation;
 - c. between supreme bodies of State power of component entities of the Russian Federation.
3. following complaints on the violation of constitutional rights and freedoms of citizens and inquiries of courts, verifies the constitutionality of a law that has been applied or ought to be applied in a specific case;
4. interprets the Constitution of the Russian Federation;
5. delivers an advisory opinion on the observance of a prescribed procedure for charging the President of the Russian Federation with high treason or with the commission of other serious offences;
6. takes legislative initiative on matters within its jurisdiction.

The Court rules exclusively on matters of law. The Court refrains from establishing and investigating of actual facts whenever this falls within the competence of other courts or other bodies.

V. Nature and effects of decisions

1. Types of decision

The final decision on the case is usually a ruling. The rulings are passed in the name of the Russian Federation.

The final decision on the merits of the inquiry on the observance of a prescribed procedure for charging the President of the Russian Federation with high treason or with the commission of other serious offences, is an advisory opinion.

All other decisions of the Court are interlocutory orders.

2. Legal effects of decisions

The decisions of the Constitutional Court are binding on all representative, executive and judicial bodies of State power, bodies of local government, businesses, agencies, organisations, officials, citizens and their associations.

The decisions are final, may not be appealed and come into force immediately upon announcement. The decisions require no action by other bodies and officials. The legal force of the decision of the Court deeming an Act to be unconstitutional may not be overruled by the new adoption of the same Act. The Acts, or individual provisions thereof, found to be unconstitutional are null and void; international treaties of the Russian Federation, which have not come into force and have been found not to be in conformity with the Constitution of the Russian Federation are not brought into force and implemented. Decisions of courts and of other bodies based on the Acts found to be unconstitutional, are not to be executed and are reviewed in cases provided for by federal law.

The decisions and advisory opinions are promulgated immediately in the official publications of the bodies of State power of the Russian Federation and of the component entities of the Russian Federation which the decision may concern. The decisions are also published in the *Vestnik Konstitutsionnogo Suda Rossiyskoy Federatsii* (Bulletin of the Constitutional Court of the Russian Federation) and in other publications, if necessary.



Serbia

Constitutional Court

I. Introduction

The Constitutional Court, an independent state body mandated with protecting constitutionality and legality, was established by the Constitution of the Socialist Republic of Serbia of 9 April 1963. The jurisdiction, proceedings before the Constitutional Court and the legal effects of its decisions are prescribed for in detail by the Law on the Constitutional Court, which was promulgated on 25 December 1963. Founded on those constitutional and legal bases, the Constitutional Court commenced its work on 15 February 1964. Until the adoption of the Constitution of the Republic of Serbia from 1990, the Constitutional Court operated within the scope of the system of unity of powers, with the National Assembly as the highest body.

With the Constitution of 1990, the Constitutional Court was defined as an autonomous and independent state body, which acts within the scope of the system of separation of powers. In Article 9 of the Constitution of 1990, the Constitutional Court was entrusted with the protection of constitutionality and legality.

According to the Constitution of 2006, the Constitutional Court is “an autonomous and independent state body which shall protect the constitutionality and legality, as well as human and minority rights and freedoms”, whose decisions are “final, enforceable and generally binding”.

II. Basic Texts

- The position and structure of the Constitutional Court, election of justices and jurisdiction of the Court are determined by the Constitution of the Republic of Serbia (“Official Gazette no. 98/2006);
- The organisation of the Court, manner of its functioning and decision-making, as well as the types of proceedings before the Court, are further defined by the Law on the Constitutional Court (“Official Gazette of RS”, nos. 109/2007 and 99/2011); and
- The Rules of Procedure of the Constitutional Court (“Official Gazette”, nos. 24/2008, 27/2008 and 76/2011).

III. Composition, procedure and organisation

1. Composition

With the Constitution of 2006, a mixed system was determined for the selection of judges of the Constitutional Court, which included a combination of election and appointment with appropriate participation and influence of all three branches of power – legislative, executive and judicial.

The Constitutional Court, as an autonomous and independent state body, comprises of 15 judges, elected and appointed for the tenure of office of nine years, with the possibility of being re-elected or re-appointed only once.

Five justices are elected by the National Assembly from amongst the ten candidates proposed by the President of the Republic, five justices are appointed by the President of the Republic from amongst the ten candidates proposed by the National Assembly and five justices are appointed by the General Session of the Supreme Court of Cassation from amongst the ten candidates which are proposed at a joint session of the High Judicial Council and the State Prosecutors Council.

Judges are elected and appointed from amongst prominent lawyers who are at least forty years old and have a minimum of fifteen years of experience in the legal profession. Before taking office, the judges of the Constitutional Court are sworn in by the President of the National Assembly

For the purpose of the Court’s proper functioning with autonomous and impartial trials, the judges of the Constitutional Court enjoy immunity equivalent to those of Members of Parliament. Judges of the Constitutional Court cannot be held criminally or otherwise liable for an opinion expressed or for a casting vote in the Constitutional Court, nor “can they be detained or be involved in a criminal or other proceedings in which a prison sentence can be pronounced” without the previous approval of the Constitutional Court, unless caught committing a criminal offence for which a prison sentence of more than five years is foreseen. The Constitutional Court decides on the immunity of judges.

The position of a judge of the Constitutional Court is incompatible with any other public or professional role or action, except for professorship at the Faculty of Law in the Republic of Serbia, in accordance with the law.

The Constitutional Court is represented by the President who administers its activities and is elected from the rank of justices with a majority vote, for term of office of three years with the possibility of re-election.

When absent or otherwise engaged, the President of the Constitutional Court is substituted by the Deputy President, who is elected under the same conditions and procedure as the President of the Court.

2. Procedure

a. Initiation of Procedures

Procedure before the Constitutional Court can be initiated by the way of a proposal, claim, constitutional appeal or other appeal and by other submissions, as well as by the initiative.

They can only be submitted in written form, while a recorded verbal statement is not acceptable with the Constitutional Court. These submissions cannot be sent by electronic mail, fax or telegram.

There are no fees for procedures taking place before the Constitutional Court.

b. Participants in Procedures

Participants in procedures before the Constitutional Court are the following:

1. state authorities, authorities of the autonomous provinces and local self-government entities, Members of Parliament, in procedures for assessing constitutionality and legality;
2. anyone on whose initiative a procedure for assessing constitutionality and legality has been initiated;
3. the enactor of a law, statute of an autonomous province, or local self-government entity, and other general act whose constitutionality and legality are being assessed, as well as parties to a collective agreement;
4. political parties, trade union organisations or civil society organisations whose statute or other general act is being assessed for constitutionality and legality or whose prohibition of activity is being decided upon;
5. religious communities whose prohibition of activity is being decided upon;
6. anyone at whose request a procedure for deciding on an electoral dispute, without legally determined jurisdiction of a court, is being conducted, as well as the competent authority in charge of implementing the election;

7. the state and other authorities, who accept or decline competence, as well as anyone unable to exercise a right, due to the state and other authorities having accepted or refused competence;
8. the Government, Republic Public Prosecutor and authority in charge of registering political parties, trade union organisations, civil society organisations or religious communities, in procedures for the prohibition of the activity of political parties, trade union organisations, civil society organisations or religious communities;
9. proponent of constitutional appeals, as well as state authority or organisation vested with public authority, against whose individual acts or actions the constitutional appeal has been filed;
10. authority designated by the statute of an autonomous province or a local self-government unit, in appellate procedures where the exercise of the authority of an autonomous province, or a local self-government unit, is precluded by an individual act or action of a state authority i.e. local self-government authority, as well as the authority against whose individual act or action the appeal has been filed;
11. the National Assembly and the President of the Republic, when the existence of a violation of the Constitution in the impeachment procedure is being decided upon;
12. judges, public prosecutors and deputy public prosecutors in procedures on appeals against decisions on termination of office, as well as the authority that passed the decision on termination;
13. other persons, in accordance with the law.

In the proceedings before the Constitutional Court the body or organisation is represented by the authorised representatives. Individuals authorised by the party in the proceedings may also take part in it.

c. Deciding bodies

The Constitutional Court decides on issues within its competence in a session of the Constitutional Court, session of the Grand Chamber and session of the Small Chamber.

The session of the Constitutional Court is composed of all judges.

The session of the Grand Chamber is composed of the President and seven judges; the President is the same time the President of the Grand Chamber.

The session of the Small Chamber is composed of three judges, one of whom is the presiding judge.

The Constitutional Court may, in order to clarify things in a case, hold preparatory meetings, consultative meetings and other sessions in accordance with the Rules of Procedure.

d. Acts

The Constitutional Court issues decisions, rulings and conclusions.

3. Organisation

The Professional Services Department at the Constitutional Court deals with the affairs in relation to the efficient processing of constitutional issues from the jurisdiction of the Constitutional Court, as well as legal, financial and general affairs of the Court. The Professional Services Department is administered by the Secretary of the Constitutional Court. It comprises of the Department dealing with affairs from the jurisdiction of the Constitutional Court, the Department of the President of the Constitutional Court and the General and Financial Affairs Department.

IV. Jurisdiction

The jurisdiction of the Constitutional Court, as prescribed for by the Constitution, can be classified into the following groups:

1. Normative control – control of constitutionality and legality of general legal acts, which involves the control of constitutionality and legality of all general legal acts in the legal system of the Republic of Serbia, and pertains to:

- deciding upon the compliance of laws and other general acts with the Constitution;
- generally accepted rules of international laws and ratified international treaties;
- deciding on compliance of ratified international treaties with the Constitution;
- deciding on compliance of other general acts with the law; deciding on compliance of the statutes and general acts of the autonomous provinces and local self-government units with the Constitution and the Law;
- deciding on compliance of general acts of organisations vested with public powers, political parties, trade unions, civic associations and collective agreements with the Constitution and the Law.

The contemporary constitutional system of the Republic of Serbia, as set forth by the Constitution, has provided for a mixed system of control of

constitutionality and legality of regulations, in which there simultaneously exist both prior (preventive) and posterior (repressive) control of the constitutionality of laws.

2. Deciding on disputes on conflicts of jurisdictions, when the Constitutional Court resolves issues: on the conflict of jurisdiction between courts and other state bodies; on the conflict of jurisdiction between the republic and provincial bodies or bodies of the local self-government units; on the conflict of jurisdiction between the bodies of the autonomous provinces or local self-government units.

3. Protection of territorial autonomy and local self-government, which is effectuated by way of the right of the bodies established by the Statute of the Autonomous Province or municipality to an appeal to the Constitutional Court against an individual act or activity of the state bodies or bodies of the local self-government units that prevent the Autonomous Province or the local self-government from exercising their competences; and with the initiation of proceedings for assessing the constitutionality (legality) of laws or other general acts of the bodies of the Republic of Serbia or local self-government units by way of which the right to provincial autonomy or local self-government is violated.

4. Deciding on prohibition of activity of political parties, trade unions and civil society organisations, whose work is aimed at the violent overthrow of the constitutional order, violation of guaranteed human and minority rights or expression of racial, national or religious hatred.

5. Deciding on prohibition of a religious community, whose activity jeopardise the right to life, right to mental and physical health, rights of a child, right to personal and family integrity, public safety and order, or if it incites religious, national or racial intolerance.

6. Deciding on determining a violation of the Constitution by the President of the Republic.

7. Deciding on electoral disputes for which the Law did not prescribe for the jurisdiction of the ordinary courts.

8. Deciding on constitutional appeals; appeals against decisions relating to violation of the term of office of deputies; appeals against decisions on the termination of judges' office; appeals against decisions on the termination of office of the Public Prosecutor or the Deputy Public Prosecutor and appeals against decisions of the High Judicial Council.

V. Nature and effects of decisions

Decisions of the Constitutional Court are final, enforceable and generally binding.



Slovakia

Constitutional Court

I. Introduction

The Constitutional Court of the Slovak Republic was created in accordance with the Constitution of the Slovak Republic, which was adopted on 3 September 1992 and entered into force on 1 October 1992. The first judges of the Constitutional Court of the Slovak Republic were appointed on 21 January 1993. The Law on the Organisation of the Constitutional Court of the Slovak Republic and on the Proceedings before this Court (Law no. 38/1993) entered into force on 15 February 1993. The activity of the Court began on 17 March 1993.

The Constitutional Court is an independent judicial authority vested with the mandate to review the constitutionality of various legal norms and also decisions and proceedings of public authorities, mainly ordinary courts. The Court is not part of the system of the general judiciary, for which the Supreme Court is the highest court.

II. Basic texts

- The basic regulation of the Constitutional Court is provided for in the Constitution of the Slovak Republic, in Articles 124-140 and 152, and in Law no. 38/1993 Coll;
- The Law on Salaries for some Members of Constitutional Bodies (Law no. 120/1993 Coll.), under which salaries are paid to judges, can be considered as a secondary source of law;
- The Civil Procedure Code is intended to apply subsidiarily to Law no. 38/1993.

III. Composition, procedure and organisation

1. Composition

The Court is composed of thirteen judges. The judges of the Constitutional Court are appointed by the President of the Slovak Republic for one twelve-year term from among twenty six nominees approved by the National Council of the Slovak Republic (i.e. the Slovak Parliament).

The Constitutional Court is chaired by the President of the Court, who may be represented by the Vice-President. They are both appointed by the President of the Slovak Republic from among the judges of the Constitutional Court.

A judge of the Constitutional Court must be a citizen of the Slovak Republic, eligible to be elected to the National Council (i.e. a person having the right to vote and being permanent resident in the Slovak Republic), not younger than forty years and a law-school graduate with fifteen years' experience in the legal profession.

A judge is obliged to take the following pledge: "I do solemnly declare that I will faithfully protect the inviolable natural human and civil rights, the rule of law, respect the Constitution and constitutional statutes and decide cases independently and impartially to the best of my abilities and conscience." Upon taking this pledge, the judge assumes the duties of judicial office in the Constitutional Court.

A judge appointed to the Constitutional Court has to resign from membership of any political party or movement prior to his or her solemn vow.

The judges of the Court hold their office in a professional capacity. The exercise of this profession is incompatible with any post or employment in another public office, as well as with any commercial activities and remunerated employments except for those concerning the administration of their own property, research activities, teaching, literary and publishing activities.

The judges of the Court enjoy the same immunity as deputies of the National Council; the judges may be prosecuted and held in pre-trial detention only with the consent of the Constitutional Court.

Any judge of the Court has the right to resign from his or her office.

The President of the Slovak Republic can recall a judge of the Constitutional Court on the basis of a final condemning judgment for a wilful criminal offence or if he or she is lawfully convicted of a criminal offence and the court does not decide in his or her case on probationary suspension of the imprisonment sentence; or on the basis of a disciplinary decision made by the Constitutional Court for conduct which is incompatible with holding the office of a judge of the Constitutional Court; or if the Constitutional Court announces that the judge has not participated in proceedings of the Constitutional Court for over one year; or if he or she is not eligible for membership of the National Council.

2. Procedure

The sessions of the bodies of the Court are permanent. The Court bodies are: the Plenum which consists of all the judges and the Chambers (Senates). There are four Chambers (Senates), each consisting of three judges. The President and the Vice-President of the Court are also members of the Chambers. The Chambers are set up for a one-year term.

The quorum of the Plenum is seven. However, decisions are taken by a majority of all the judges, which means that the majority consists of a minimum of seven persons. If this majority is not reached, the petition is rejected.

Chambers may decide only when all their members are present. A majority of two judges is necessary for deciding on the case.

The proceedings before the Court start with a written petition indicating the name and surname of the petitioner, the right allegedly violated, the demands addressed to the Court, the reasons for bringing the case to the Court and the relevant evidence. The petition must be signed by the petitioner or the petitioner's attorney. In special cases, for example, where the constitutionality of laws is contested, the petition must contain some further data.

In principle, proceedings are public. Exceptions are made in cases of proceedings on the interpretation of constitutional statutes and proceedings on the reviewing of a decision of the National Council and in cases of conflict between the personal interests of a constitutional official or higher state official and public interests. Such proceedings are deliberated in private. Judgments are given publicly in the name of the Slovak Republic.

Natural and legal persons must be represented before the Court by an advocate.

3. Organisation of the Court

Each of the judges has two law advisers. An adviser to a judge must be a law-school graduate with a minimum of five years' experience in the legal profession. The advisers are allowed, upon an explicit instruction from the President of the Court, the Vice-President of the Court, or a judge, to take single procedural decisions in the name of the Court, such as to hear witnesses or experts.

The administrative, technical and other needs of the Court are the responsibility of the Chancellery of the Constitutional Court. This body consists of

approximately sixty persons. The law clerks are members of the Chancellery staff.

IV. Jurisdiction

The Constitutional Court is vested with jurisdiction over constitutional conflicts, as follows:

The Constitutional Court decides on the conformity to the Constitution of:

- a. laws with the Constitution, constitutional laws and international treaties to which the National Council of the Slovak Republic has expressed its assent and which are ratified and promulgated in the manner laid down by law;
 - b. government regulations, generally-binding legal regulations of Ministries and other central state administration bodies with the Constitution, with constitutional laws, with international treaties to which the National Council has expressed its assent and which are ratified and promulgated in the manner laid down by law, and with ordinary laws;
 - c. generally-binding regulations pursuant to Article 68, with the Constitution, with constitutional laws and with international treaties to which the National Council has expressed its assent and which are ratified and promulgated in the manner laid down by law, unless another court is empowered to decide on them;
 - d. generally-binding legal regulations of the local bodies of state administration and generally-binding regulations of the bodies of local government pursuant to Article 71.2, with the Constitution, with constitutional laws, with international treaties promulgated in the manner laid down by law, with laws, with government regulations and with generally-binding legal regulations of Ministries and other central;
 - e. state administration bodies, unless another court is empowered to decide on them;
 - f. negotiated international treaties to which the assent of the National Council is necessary, with the Constitution and constitutional statutes (preliminary review);
 - g. federal (ex-Czechoslovak) constitutional statutes, laws and other generally-binding rules.
- b. to deal with disputes concerning distribution of powers among central government bodies, unless these disputes are to be decided by another governmental authority as provided by law;
 - c. to decide on complaints from natural persons or legal persons if they are pleading infringement of their fundamental rights or freedoms, or human rights and fundamental freedoms resulting from an international treaty which has been ratified by the Slovak Republic and promulgated in the manner laid down by law, unless another court is empowered to decide on their protection of these rights and freedoms (constitutional complaint);
 - d. to decide on complaints from the bodies of local government against unconstitutional or unlawful decisions or against other unconstitutional or unlawful interference in the matters of local government, unless another court is empowered to decide on their protection (*Kommunalbeschwerde*);
 - e. to interpret the constitutional statutes in conflicting cases;
 - f. to decide on a complaint against a decision verifying or rejecting verification of the mandate of a Member of the National Council;
 - g. to decide whether the election of the President of the Slovak Republic, the elections to the National Council and the elections to local government bodies have been held in conformity with the Constitution and the law;
 - h. to decide on complaints against the result of a referendum and complaints against the result of a plebiscite on the recall of the President of the Slovak Republic;
 - i. to decide whether a decision dissolving a political party or movement or suspending the political activities thereof is in conformity with the constitutional laws and other laws;
 - j. to decide on a prosecution by the National Council against the President of the Slovak Republic in matters of wilful infringement of the Constitution or treason;
 - k. to decide on whether a decision on declaring an exceptional state or state of emergency and other decisions connected with this decision have been issued in conformity with the Constitution and constitutional law.

IV. Nature and effects of decisions

Judgments on the merits of cases are called findings (*nalez*) and court rulings (*uznesenie*). The judgment passed in a case of high treason or in matters of wilful infringement of the Constitution committed by the President of the Slovak Republic under Law no. 38/1993 is called "sentence"; the judgment given on the interpretation of constitutional statutes under

The jurisdiction over constitutional conflicts is important, but it is not the only power of the Court. This body is also vested with the power:

- a. to review whether the subject of a referendum to be declared upon a petition of citizens or a resolution of the National Council according to Article 95.1 is in conformity with the Constitution or constitutional statute;

the same law is called “court ruling”; most judgments on the merits are usually called “findings”.

No remedy against a judgment of the Court is provided for by the Constitution.

The judgments of the Court, if they are of a generally binding character, are published in the Collection of Laws of the Slovak Republic, *Zbierka zákonov Slovenskej republiky* (Official Gazette). The judgments should also be published once a year in a special collection of decisions of the Constitutional Court.



Slovenia

Constitutional Court

I. Introduction

1. Historical background

The Constitution of the Socialist Republic of Slovenia (SRS) of 1963 (Official Gazette of the SRS, no. 10/63) provided for a Constitutional Court; the Law on the Constitutional Court (Official Gazette of the SRS, nos. 39/63 and 1/64) established the Court's powers and procedures and stipulated that it would begin operating on 15 February 1964. The first Rules of Procedure of the Constitutional Court were adopted on 23 February 1965 (Official Gazette of the SRS no. 11/65), and on 5 June 1963 the President and the eight judges of the Constitutional Court were elected for the first time by the Assembly of the SRS (decision published in the Official Gazette of the SRS, no. 22/63). The President and judges officially took up their duties in the presence of the President of the Assembly on 15 February 1964.

The 1974 Constitution reorganised the status and powers of the Constitutional Court (Official Gazette of the SRS, no. 6/74); the Law on the Constitutional Court of the Socialist Republic of Slovenia (Official Gazette of the SRS, nos. 39/74 and 28/76) laid down more detailed provisions clarifying the powers and procedures of the Court; new rules of procedure of the Constitutional Court were also adopted (Official Gazette of the SRS, no. 10/74).

The Constitution of the Republic of Slovenia (RS), adopted in 1991, once again changed the status and powers of the Constitutional Court (Official Gazette of the RS, no. 33/91). A new law on the Constitutional Court clarified the powers and procedure of the Constitutional Court (Official Gazette of the RS, no. 15/9).

2. Hierarchical position in the judicial system

The Constitutional Court is the supreme judicial body responsible for supervising the constitutionality and legality of acts, protecting not only such constitutionality and legality but also human rights and the fundamental freedoms.

II. Basics texts

- Constitution of 1991 (Official Gazette of the RS, no. 33/91);
- Law on the Constitutional Court (Official Gazette of the RS, no. 15/9).

III. Composition, procedure and organisation

1. Composition

In pursuance of Article 165.1 of the Constitution, the Court has nine members (including the President).

The membership of the Court was completed on 1 May 1993.

In accordance with Article 163.3 of the Constitution, the President is elected by the judges for a three-year term.

By virtue of Article 163.1 and 163.2, the judges are elected by the National Assembly from among legal experts and appointed by the President of the Republic. Their term of office is nine years and they may not be re-elected.

The following activities are incompatible with the office of Constitutional Court judge (Article 166):

- duties discharged in State bodies;
- duties discharged in local self-government bodies;
- duties discharged in political parties;
- other duties and activities incompatible with the office of Constitutional Court judge, such as those laid down in the Law on the Constitutional Court.

The members of the Constitutional Court enjoy the same immunity as members of the National Assembly in accordance with Article 167 of the Constitution.

Article 164 of the Constitution provides for the (temporary) suspension of members of the Constitutional Court in the following cases:

- if the judge himself so requests;
- if the judge is punished by imprisonment for a criminal offence; or
- if the judge has permanently lost the capacity to perform his or her office.

2. Procedure

Proceedings before the Constitutional Court are free of charge.

Under the terms of Article 162.3 of the Constitution, the Constitutional Court normally takes its decisions by a majority vote from all its judges. The Law on the Constitutional Court does, however, provide for a number of exceptions.

The Court, in principle, deliberates in plenary session, but may sit in restricted chamber when examining constitutional complaints (Article 162.3).

3. Organisation

The Constitutional Court establishes its own internal organisation, thus exercising its power of administrative autonomy.

Technical services: one principal secretary (organisation and documentation); one deputy secretary (financial matters).

Specialist services: legal information centre with a specialised library: 13 specialist staff and 20 administrative staff.

The Court is financed under a separate line in the State budget.

IV. Jurisdiction

The Slovene model is based on the European tradition of concentrating major powers in the field of constitutional review in a single court.

1. Review of acts

a. Preventive review

During the ratification of an international agreement, the Court issues an opinion on its conformity with the Constitution (Article 160.2 of the Constitution); its opinions are binding on the National Assembly.

b. *A posteriori* review

i. Abstract review

The Court decides (Article 160.1 of the Constitution) on:

- the conformity of legislation with the Constitution;
- the conformity of laws and other statutory instruments with the international treaties ratified by Slovenia and with the general principles of international law;
- the conformity of statutory instruments with the Constitution and the law;

- the conformity of the legislation of the self-government bodies with the Constitution and the law;
- the conformity of provisions generally applicable by government departments with the Constitution, the law and regulations currently in force;
- whether it is necessary to annul (*ex tunc*) or revoke (*ex nunc*) regulations or general acts by means of a decision on a constitutional complaint (Article 161.2 of the Constitution).

ii. Concrete review

The Court also conducts concrete reviews of standard-setting texts on request from the ordinary courts (Article 156 of the Constitution).

2. Other powers

Article 160.1 of the Constitution provides that the Court is also responsible for the following matters:

- constitutional complaints of specific acts allegedly breaching human rights and fundamental freedoms;
- disputes as to jurisdiction between the National Assembly, the President of the Republic and the Government;
- unconstitutionality of acts and activities of political parties.

The Court also pronounces on:

- charges brought against the President of the Republic (Article 109 of the Constitution);
- charges brought against the Prime Minister or any of his or her ministers (Article 119 of the Constitution);
- appeals against decisions of the National Assembly relating to examination of deputies' mandates (Article 82.3 of the Constitution).

3. Bringing cases before the Constitutional Court

- complaints submitted by citizens: anyone who is able to prove his or her legal interest in submitting such a complaint (Article 162.3 of the Constitution)
- constitutional complaints (Articles 160, 161 and 162 of the Constitution);
- abstract review: National Assembly (by at least one third of the deputies), State Council, Government, bodies representing the self-government bodies, trade union representatives;
- concrete review: courts, State Counsel, Bank of Slovenia, Auditor General's Department, ombudsman;
- disputes as to jurisdiction: the bodies concerned;
- indictments: National Assembly;

- unconstitutional activities of political parties: citizens and bodies already holding *locus standi* with the Court in matters of abstract review;
- examination of deputies' mandates: the candidates concerned or representatives of lists of candidates;
- preventive review of international agreements: President of the Republic, Government or National Assembly (one third of the deputies).

IV. Nature and effects of decisions

The decisions of the Constitutional Court are binding in nature (Article 1.3 of the Law on the Constitutional Court) and their effects are enforceable *erga omnes*.

Article 161.1 of the Constitution provides for:

- possible suspension of application of the measure pending a final decision;
- abrogation in whole or in part (*ex nunc*) of unconstitutional laws; such abrogation may take effect immediately or within a period of time determined by the Constitutional Court, although such period may not exceed one year;
- annulment (*ex tunc*) or abrogation (*ex nunc*) of other unconstitutional regulations or general acts;
- annulment (*ex tunc*) or abrogation (*ex nunc*) of regulations or general acts pending the outcome of a constitutional complaint (Article 161.2 of the Constitution).

The legal effects of decisions of the Constitutional Court are defined by law (Article 161.3 of the Constitution).

Promulgation of decisions:

- judgments and individual conclusions are published in the Official Gazette of the Republic of Slovenia (in Slovene);
- judgments and conclusions, as well as dissenting/concurring opinions, are published verbatim in the Compendium of Judgments (with summaries in Slovene and English);
- extracts from judgments and conclusions are published in the journal *Pravna praksa* (case-law) (in Slovene);
- judgments and conclusions, as well as dissenting/concurring opinions, are published verbatim in Slovene and English in a computerised database (using STAIRS, ATLASS and TRIP software).



South Africa

Constitutional Court

I. Introduction

The Constitutional Court of South Africa was established in 1994 when South Africa's first democratic constitution, the interim Constitution of 1993, took effect. The final Constitution of 1996 confirmed the position of the Constitutional Court. The Court's first sessions were in February 1995. On 21 March 2004, the Court's new building on Constitution Hill, an historic site in Johannesburg, was inaugurated. The Court consists of eleven judges, headed by a Chief Justice and Deputy Chief Justice. The judges take an oath to uphold the law and the Constitution, which they must apply impartially and without fear, favour or prejudice.

II. Basic texts

The basic texts for the existence and operation of the Court are:

- the Constitution (enacted as the Constitution of the Republic of South Africa Act 108 of 1996, as amended);
- the Judicial Service Commission Act 9 of 1994, the Constitutional Court Complementary Act 13 of 1995;
- the Judges' Remuneration and Conditions of Employment Act 47 of 2001;
- the Rules of the Constitutional Court; and
- the Code of Judicial Conduct, adopted in terms of Section 12 of the Judicial Service Commission Act, dated 18 October 2012.

The Constitution

The Sections that provide a legal basis for the existence and operation of the Constitutional Court are:

- Section 39 relating to the interpretation of the Bill of Rights by courts;
- Section 166 which provides for the existence of the Constitutional Court;
- Section 167 concerning the structure, operation, jurisdiction and supremacy of the Constitutional Court;
- Section 172 which governs the process of declaring law or conduct constitutionally invalid

and the role of the Constitutional Court in relation to this;

- Section 173 which provides for the inherent power of the Constitutional Court to regulate its own process and to develop the common law whilst taking into account the interests of justice;
- Sections 174 and 175 relating to the appointment of judges and acting judges to the Constitutional Court;
- Section 176 which relates to the terms of office and remuneration of Constitutional Court judges.

The Judicial Service Commission Act 9 of 1994

This statute regulates the Judicial Service Commission, which on a vacancy occurring in the Court submits a list of suitably qualified candidates to the President from amongst whom the President makes an appointment. The Commission also has disciplinary powers over all judges, including Justices of the Constitutional Court.

Constitutional Court Complementary Act 13 of 1995

The Constitutional Court Complementary Act regulates matters that are incidental to the establishment of the Constitutional Court.

The Judges' Remuneration and Conditions of Employment Act 47 of 2001

This statute regulates the term of office of Justices of the Constitutional Court, which at present may not exceed fifteen years.

Rules of the Constitutional Court

The Constitutional Court Rules have been adopted in accordance with Section 173 of the Constitution and Section 16 of the Constitutional Court Complementary Act. These Rules provide for the Court's processes. The Rules are divided into the following categories:

- Court terms and Court dates;
 - The Registrar;
 - Parties;
 - *Amici curiae* (friends of the Court);
 - Procedure for applications;
 - Matters within the exclusive jurisdiction of the Court;
 - Procedure relating to direct access and appeals;
 - Fees and costs;
 - Miscellaneous provisions on the Constitutional Court Library and format of documents.
-

Code of Judicial Conduct

The Code provides ethical norms and guidelines for judicial behaviour, in court and outside.

The aforementioned documents are the basic texts of the Constitutional Court of South Africa.

III. Composition, procedure and organisation

The Constitutional Court is the highest court of the Republic and may decide constitutional matters and issues connected with decisions on constitutional matters and any other matter:

- i. if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and
- ii. makes the final decision whether a matter is within its jurisdiction. The Court makes the final decision on the constitutionality of Acts of Parliament, Provincial Acts or the conduct of the President. It must also confirm any order of invalidity made by the Supreme Court of Appeal, a High Court or a court of similar status before that order can have any force.

A constitutional amendment signed into law by the President in February 2013 enlarged the jurisdiction of the Constitutional Court. The Court may now, in addition to purely constitutional matters, also grant leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by the Court. The Court makes the final decision whether a matter is within its jurisdiction. The amendment confirms the Court's position as the apex court in the South African judicial hierarchy.

1. Composition

The Constitutional Court consists of eleven Judges. Decisions must be taken by at least eight judges. The Chief Justice and the Deputy Chief Justice are appointed by the President of the Republic of South Africa after consultation with the Judicial Service Commission and the leaders of parties represented in the National Assembly. A Constitutional Court Judge holds office for a non-renewable term of 12 years or until they attain the age of 70 whichever occurs first. Legislation provides that a judge who has not served in any other court may serve for fifteen years in the Constitutional Court. At present there is no provision for longer service than fifteen years.

Any appropriately qualified woman or man who is a fit and proper person and a South African citizen may be appointed to the Court.

The judicial authority of South Africa is independent and subject only to the Constitution and the law, which must be applied impartially and without fear, favour or prejudice. Judges may be removed from office only if the Judicial Service Commission finds that the judge is incapacitated or grossly incompetent or is guilty of gross misconduct. Only thereafter can the National Assembly resolve to remove a judge by a resolution adopted with a supporting vote of at least two thirds of its members. Upon such a resolution, the President must remove the judge from office.

2. Procedure and Organisation

The Constitutional Court is the Court of first and final instance on all Constitutional matters, and in addition in February 2013 acquired jurisdiction to hear matters involving an arguable point of law of general public importance which ought to be considered by the Court. It deals with applications for leave to appeal from the High Court, the Supreme Court of Appeal or for direct access. Direct access is relatively rarely granted, since the Court is reluctant to operate as a court of first and last instance, particularly where evidentiary findings must be made.

Applications for leave to appeal are filed at the general office and handled by the Registrar and the administrative staff. A Registrar heads the administrative wing of the Court and is assisted by a court manager. Every judge of the Court considers every application – the Court does not divide into panels but always sits *en banc*, subject to the constitutionally required minimum quorum of eight.

IV. Jurisdiction

The Constitutional Court is the highest court in South Africa on constitutional matters, and may also grant leave to appeal where a matter raises an arguable point of law of general public importance which ought to be considered by the Court. The Court may be approached either directly or on appeal from any other court. The Court makes the final decision on whether or not a matter is within its jurisdiction. The Court also makes the final decision on whether provincial or national legislation is constitutional. Any order of invalidity by another court must be confirmed by the Constitutional Court and only comes into force once the Court has done so.

In addition, the Constitutional Court has exclusive jurisdiction over certain matters. These include disputes between organs of state concerning their constitutional

status, powers or functions. The Court has exclusive jurisdiction to decide on the constitutionality of any amendment to the Constitution, to decide that Parliament or the President has failed to fulfil a constitutional obligation and to certify a provincial constitution.

The Court also has jurisdiction to consider Bills before they are enacted at the national and provincial legislative level. Before assenting to and signing a Bill the President or the Premier of a Province may refer the Bill to the Constitutional Court for a decision on its constitutionality. He or she may do so if his or her reservations about the constitutionality of the Bill are not fully accommodated after reconsideration by the legislature.

In addition, the National Assembly may apply to the Constitutional Court for an order declaring that all or part of an Act of Parliament is unconstitutional within 30 days of the date on which the President assented to and signed the Act. Matters may be similarly referred to the Court by members of the provincial legislature if twenty percent of the members of the legislature support the application. Such applications must be brought within 30 days of the date on which the President assented to and signed the Act.

V. Nature and effects of decisions

The Constitutional Court produces a written record of each of its decisions. Decisions dismissing applications are seldom accompanied by reasons. However, when a matter has been set down for oral argument in open court, reasons generally accompany the decision. However, in some instances the Court may issue an order by agreement between the parties, after the oral hearing, and reasons will not necessarily be provided.

The decisions of the Court are taken by a majority. Any judge may write a dissenting or concurring opinion, which is published together with the majority decision.

In terms of Section 165.5 of the Constitution, decisions of the Constitutional Court are binding on all persons to whom, and organs of state to which, they apply. South African law is premised on the doctrine of precedent and the Constitutional Court's judgments bind all other courts in South Africa. The Court's decisions are binding also upon itself, unless it concludes that a previous decision was clearly wrong. The Court's decisions are final and cannot be appealed against.

Any conduct or legislation the Constitutional Court declares inconsistent with the Constitution is invalid. The general principle is that declarations of invalidity apply from the date on which the Constitution came into effect, and not from the date of the Court's order. However, the Court may grant an order limiting the retrospective effect of the declaration of invalidity, or suspending the declaration of invalidity for any period, and on any conditions, to avoid disruption and disorder, and to allow the competent authority to correct the defect.

VI. Publication

All of the Court's judgments are published on the Constitutional Court website (www.constitutionalcourt.org.za/site/judgments/judgments.htm) and on the *Southern African Legal Information Institute* (SAFLII) website (www.saflii.org.za). Privately-owned publishing houses also publish the Constitutional Court's decisions in hard copy law reports, and the Court's decisions are also available on a number of electronic databases.



Spain

Constitutional Court

I. Introduction

The Constitutional Court was set up by the Constitution of 27 December 1978. The relevant legal regulations were formulated in Organic Law no. 2/1979 of 3 October 1979 on the Constitutional Court.

The Law defines the Constitutional Court as the supreme interpreter of the Constitution. As such, it is an independent constitutional body. It is not a part of the judiciary and is bound only by the Constitution and the aforementioned Organic Law.

II. Basic texts

- Part IX (Articles 159-165) of the Constitution of 1978;
- Organic Law no. 2/1979 of 3 October 1979 on the Constitutional Court (amended by Organic Laws Nos. 8/1984 revoking Section 45; 4/1985 revoking Chapter 2 of Part VI; and 6/1988 amending Sections 50 and 86;
- Regulations on Organisation and Staff, approved by Resolution of the full Constitutional Court, dated 15 July 1990.

III. Composition, procedure and organisation

The Constitutional Court is composed of twelve members appointed by the King. Four are proposed by the Chamber of Deputies with a three-fifths majority of its members; four by the Senate, with an identical majority; two by the Government and two by the General Council of the Judiciary (Article 159.1 of the Constitution).

The Judges, elected by constitutional mandate from among lawyers of renowned ability, are independent and cannot be removed. The duration of their term is nine years without the possibility of immediate re-election unless the post has only been held for a term of not more than three years, and current legislation does not foresee any age limit for exercising the position. In order to ensure continuity of the Court's actions, one-third of its members shall be appointed every three years (Article 159.3 of the Constitution).

The Plenary of the Court elects a President from among its members by secret ballot; appointed by the King, the President's mandate is for three years, with the possibility of being re-elected for one further term (Article 160 of the Constitution and Article 9 of the Organic Law on the Constitutional Court). The same procedure is used to elect the Court's Vice-President (Article 9.4 of the Organic Law on the Constitutional Court), also for a three-year term.

The full Bench of the Court can hear any case that comes within the jurisdiction of the Court, taking over *amparo* appeals that belong, in principle, to the Chambers.

The two Chambers of the Court are composed of six judges each. The First is chaired by the President, while the Vice-President chairs the Second. Each of the Chambers is divided into two Sections of three judges each. The Sections basically carry out activities in the early stages of the procedures brought before the Court, deciding on whether or not the *amparo* appeals may be admitted. The resolutions of the full Bench, Chambers and Sections require the presence of two-thirds of their members.

The Court has a Secretariat, whose head is also the Chief Counsel and exercises the position of Head of all the Counsels in the service of the Constitutional Court.

IV. Jurisdiction

The Constitutional Court is the supreme body for interpreting the Constitution. It is not part of the Judiciary and has jurisdiction throughout the territory of Spain to exercise the competencies defined in Article 161 of the Constitution. The Constitutional Court is independent of other constitutional bodies and is subject only to the Constitution and its Organic Law.

The Court's competencies are listed in Article 161 of the Constitution and further developed in Article 2.1 of its Organic Law. The list is open-ended, with an express provision for the Court to hear other matters attributed to it by the Constitution or Organic Laws.

The system of jurisdictional competencies currently attributed to the Constitutional Court is as follows:

- a. Verification of the constitutionality of regulations having the force of Law, whether approved by the State or Regional Legislator. This verification is carried out through an appeal on the grounds of unconstitutionality or questions of unconstitutionality. The former is a direct appeal brought by the Prime Minister, the Ombudsperson, fifty Deputies or

Senators, or by the Governments and Parliaments of the Autonomous Communities. These appeals are heard by the Plenary and by the two Divisions of the Tribunal. The latter can be brought by any trial Court that raises doubts about the constitutionality of a legal provision that must, necessarily, apply.

b. *Amparo* appeal for protection of the fundamental rights and public freedoms referred to in Article 53.2 of the Constitution. The Constitution envisages a specific and final remedy for the protection of fundamental rights, known as *amparo* appeal (*recurso de amparo* in Spanish) before the Constitutional Court. The Constitutional Court is the supreme guarantor of the fundamental rights and public freedoms proclaimed in the Constitution. Ordinarily *amparo* appeals are heard by the Chambers, which may defer them to their Sections. The full Court hears those taken over from or submitted to by the Chambers when they can be overruled.

c. Constitutional conflicts. These may arise between the State and one or more Autonomous Communities or between an Autonomous Community and one or more other Autonomous Communities, and also between the constitutional bodies of the State (Congress, Senate, Government and General Council of the Judiciary). Disputes involving Autonomous Communities may be positive or negative: the former deal with resolutions without the force of law and express a dispute between the National Government and that of the Autonomous Community concerned regarding the territorial distribution of jurisdiction. In the latter, the Court rules which body has jurisdiction to solve a case when both the State and an Autonomous Community have refused jurisdiction and can be brought by individuals or the National Government. Disputes between the aforementioned constitutional bodies require the definition of their respective powers.

The Court also hears all challenges to enactments that are not in force and decisions of the Autonomous Communities brought by the National Government as envisaged in Article 161.2 of the Constitution.

All these proceedings are heard by the full Court, which can defer them, with the exception of conflicts between constitutional bodies, to the Chambers.

d. Conflicts in defence of local self-government: When municipalities and provinces deem that a Law or a regulation that is in force, whether enacted by the State or an Autonomous Community, violates their right to self-government, they can challenge it before the Constitutional Court. The action can be adjudicated in full Bench or deferred to a Chamber.

e. *A priori* verification of the constitutionality of international treaties. This verification can be requested by the National Government, the Congress or the Senate before the ratification of any international instrument deemed contrary to the Constitution.

This mechanism of *a priori* control has been used twice. In the Declaration 1/1992, 1 July 1992, the Court ruled that the amendment of Article 13.2 of the Constitution (political rights of aliens) should precede the ratification of the Treaty on European Union (Maastricht Treaty). The amendment was passed by the National Parliament in August 1992. In the Declaration 1/2004, 13 December 2004, the Court stated that it was not necessary to amend the Constitution to ratify the Treaty establishing a Constitution for Europe.

The jurisdiction belongs to the full Bench.

f. Revocations in defence of the Court's jurisdiction: The Court, in full Bench, can at its sole initiative, annul any decision impairing its jurisdiction.

IV. Nature and effects of decisions

1. Types of decisions

a. Judgments (*Sentencias*): decisions given by the full Court or one of the Chambers on the merits of a case, and rejecting or allowing all or part of an application.

b. Decisions (*Autos*): decisions, giving reasons, by the full Court or one of the Chambers on: the inadmissibility of a case; suspension of the enforceability of a contested legal rule or execution of a contested decision; or the joinder of different sets of constitutional proceedings.

c. Decisions on manifest inadmissibility (*Providencias de inadmisión*): decisions, not giving reasons, dismissing applications which fail to meet the requirements for admissibility (only since 1988).

d. Procedural decisions (*Providencias*): interlocutory decisions relating only to procedural issues.

2. Legal effects of judgments

a. "Unconstitutionality appeals" and "unconstitutionality questions": judgments are final and set aside challenged legal rules when they are deemed unconstitutional, as well as any other closely related rules. The ruling is effective *erga omnes*.

b. *Amparo* appeals. The effects of *amparo* judgments are confined to the parties in the proceedings, but a judgment rejecting an appeal is effective *erga omnes*, insofar as it renders all virtually identical applications inadmissible in future.

c. Constitutional conflicts. In giving judgment on positive conflicts, the Court must determine which body has competence and, if necessary, set aside the measure, resolution or decision which prompted the conflict. In the case of negative conflicts, when the application has been brought by the Government, the judgment determines whether the Autonomous Community had competence and, if it did, sets a time limit for the exercise of that competence. If the application is brought by an individual, the judgment simply determines where competence lies, but sets no time limit.

d. *A priori* review of the constitutionality of international agreements. The Court's ruling is enforceable.

3. Publication

Every decision is immediately notified to the parties and available in typed form. Within one month, judgments are published in the Official Gazette. About nine months later, the Constitutional Court, in conjunction with the Official Gazette, publishes all the judgments and a large proportion of the decisions in the Constitutional Case-law series (a four-monthly periodical). Decisions on manifest inadmissibility and procedural decisions are not usually published.

V. Statistics

In its more than thirty years of existence, the Constitutional Court has received 160,863 appeals of Constitutional Justice of all types; and rendered over 153,251 rulings, of which 6,957 were judgments (data as of 31 December 2011).



Sweden

Supreme Administrative Court

I. Introduction

The Court was established in 1909. As there is no Constitutional Court in Sweden the functions of such a Court are upheld by the Supreme Court and the Supreme Administrative Court.

II. Basic texts

- the Constitution Chapter 1 Article 9, Chapter 2 Articles 1, 5, 9, 11 and 14;
- Administrative Court Procedure Act;
- General Administrative Courts' Act;
- the Ordinance on Instructions for the Supreme Administrative Court.

III. Composition, procedure and organisation

There shall be at least 14 members of the Court.

The members are appointed by the Government after consultation between the Minister of Justice and the Court. At least two-thirds of the members must have a law degree. A member can be dismissed only if, by committing a crime or by gravely or repeatedly neglecting his or her duties as a member of the Court, he or she has conspicuously proved that he or she is not fit to continue in service. The age of retirement is in principle 65. A retired member may in certain circumstances serve as Justice on an *ad hoc* basis.

The Court operates in three divisions. The Court is properly constituted with five justices on the bench or with four, if three of them are unanimous. In certain straightforward cases the Court is constituted by three Justices on the bench. Questions concerning review dispensation may not be tried by more than three Justices and are often decided by only one Justice. If a division of the Court intends to depart from a judicial principle or an interpretation of the law previously laid down by the Court, the matter shall be referred to a plenary session of the Court. The procedure is usually in writing and the cases are presented to the Court by a staff of reporters, who are usually recruited from the Administrative Courts of Appeal.

IV. Jurisdiction

The field of jurisdiction is mainly that of Administrative law, containing cases such as tax assessment, building permits, confinement in social custody, social welfare-allowance and decisions by municipal bodies. The Court is also the Supreme Instance in cases concerning registration of patents and trademarks. Furthermore, the Court may on certain conditions revoke administrative decisions, including those of the Government, if the decision concerns a civil right, is incompatible with a legal provision and cannot otherwise be tried by a Court.

The administrative courts have the power to annul or amend decisions by administrative authorities in individual cases and they have full jurisdiction to assess both facts and law. They are not empowered to award damages but may issue orders or impose penalty payments to enforce the court's decision if that is provided by law.

Decisions by municipal political authorities in individual cases may, however, only be annulled and never amended.

As regards normative acts the following should be noted.

If a court, or any other public organ, considers that a provision is in conflict with a provision of a fundamental law or with a provision of any other superior statute, or that the procedure prescribed has been ignored in any important respect when the provision was inaugurated, then such a provision may not be applied. However, if the provision has been decided upon by Parliament or by the Government, the provision may be set aside only if the inaccuracy is obvious and apparent.

Provisions issued by communities can be annulled by municipal appeals (*Kommunal besvär*).

V. Nature and effects of decisions

The general rule is that the decisions of the administrative courts only have effect *inter partes*. The essential role of the Supreme Administrative Court is, however, to give precedents. Administrative courts and authorities as well as individuals are therefore indirectly affected by those decisions. The Supreme Administrative Court also has the extraordinary remedy of reopening the case, which enables this court to re-examine a closed case.

Usually a judgment is enforceable *ex nunc*, even if an appeal is launched. The court may, however, order a stay in the execution of the judgment. When the legal

force of the judgment is decisive for its enforceability, the person affected by the judgment may cause a stay in the execution merely by appealing.

As mentioned above, the essential role of the Supreme Administrative Court is to give precedents in order to unify the application of law in administrative jurisdictions. The decisions of the Supreme Administrative Court therefore have an influence on other cases of a similar nature and of course also on citizens' future actions. All cases adjudicated during the year are published in the Year Book of the Supreme Administrative Court.



Switzerland

Federal Court

I. Introduction

Date of origin: in its present form, the Federal Court was set up by the Federal Constitution of 29 May 1874 with the aim of creating a permanent court that was independent of parliament and government. The previous Constitution, dating back to 1848, already authorised the then non-permanent Federal Court, to some degree, to hear cases relating to infringements of individual rights.

Position in the court hierarchy: the Federal Court is the supreme judicial authority of the Confederation. Their powers fall within both the Constitutional jurisdiction and the civil, criminal and administrative jurisdictions (Article 188 federal Constitution). Ordinarily, it hears and determines appeals against cantonal legislation and final-instance cantonal decisions, as well as against certain decisions pronounced by the Federal administration.

The Federal Court acts as a constitutional court essentially in that it hears individual constitutional appeals against cantonal decisions. It does not have jurisdiction to review the constitutionality of Federal legislation. Constitutional appeals are dealt with by the two public law – chambers also responsible for administrative law appeals – and, depending on the nature of the complaints, also in some cases by the two civil chambers and by the Court of Cassation.

II. Basic texts

Articles 143 to 145 and 188 to 191 of the new Federal Constitution, which were adopted by referendum on 18 April 1999 and entered into force on 1 January 2000, deal in broad terms with the appointment of judges and the powers of the Federal Court. In particular, according to Article 189.1.a of the Constitution, the Federal Court deals with complaints alleging violations of citizens' constitutional rights.

The organisation of the Federal Court and its rules of procedure, are defined in the Court Act of 17 June 2005. The rules of the Federal Court determine the composition of the various sections, the allocation of cases and the functioning and administration of the Court.

III. Composition, procedure and organisation

1. Composition

- 35 to 45 judges (in 2010, 38 judges) and 20 to 30 substitute judges (in 2010, 19);
- the judges and substitute judges are elected, for 6 years, by the Federal Assembly. Their mandate is renewable;
- the President and Vice-President are elected for 2 years, with the possibility to be re-elected once.

2. Status of judges:

- qualification: in principle, any Swiss citizen aged 18 or over may be elected as a judge or substitute judge; there are no requirements in respect of professional training. However, in practice only law graduates or doctors of law are elected (cantonal judges, professors of law, lawyers and civil servants);
- before taking office for the first time, judges take an oath before the Court or the Federal Assembly;
- Federal judges may not perform any function for the Confederation nor follow another career or exercise a profession. The Court may authorise the exercise of arbitration duties or other related activities;
- criminal proceedings may only be brought against a Federal judge in respect of infringements connected with his or her official activity following the authorisation of parliament;
- there are no measures providing for the suspension or dismissal of Federal judges.

3. Procedure

- The Federal Supreme Court is permanently in session;
 - The Federal Supreme Court comprises seven courts, five of which sit in Lausanne and two (the social-law courts) in Lucerne;
 - The first public-law court deals with appeals relating to federal and cantonal administrative law (in particular spatial planning issues and international mutual assistance in criminal matters), fundamental rights, criminal law (in particular detention on remand and procedure) and political rights;
 - The second public-law court deals with appeals relating to federal and cantonal administrative law (in particular fiscal law, telecommunications, public health and banking law) and fundamental rights;
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- The first civil-law court deals with appeals relating to, in particular, the law of obligations and intellectual property;
- The second civil-law court deals with appeals relating to, in particular, the Civil Code, including deprivation of liberty for purposes of assistance and prosecutions for debt and bankruptcy;
- The criminal-law court deals with appeals relating to, in particular, substantive criminal law and criminal procedure;
- The first and second social-law courts deal essentially with appeals relating to social insurance;
- Generally, cases are heard by a panel of 3 judges. If the case raises a question of principle, the panel consists of 5 judges. In appeals against cantonal legislative decisions or cantonal popular referenda or initiatives, the public law chambers also sit with 5 judges;
- Proceedings are in writing. They begin when an individual files an appeal against a State decision concerning him. In civil and criminal matters, only lawyers authorised to practise and professors of law at Swiss universities may represent clients. Once any necessary provisional measures (with the effect of suspending the contested decision) have been decided upon, the investigation procedure consists in principle of one or more exchanges of correspondence. In exceptional cases, at the request of one of the parties, hearings may be ordered. Deliberations usually take place by "circulation"; in other words, a report is drawn up by the judge assigned to that task and forwarded to each judge in turn. Public deliberations are held in the event of a disagreement or at the request of a judge. Once the decision has been taken, the judgment is drafted by the registry.

4. Organisation

Major administrative decisions (appointments, adoption of rules and so on) are taken by the full Court, with all the ordinary judges sitting. The conference of presidents of chambers performs responsibilities mainly related to the jurisprudence (such as the adoption of directives and uniform rules for the drafting of decisions, coordination of jurisprudence). The administrative committee, headed by the secretary general, is responsible for the administration of the Tribunal. He or she acts as Secretary to the full Court and to the conference of presidents of chambers.

IV. Jurisdiction

1. Types of decisions subject to review of constitutionality

According to Article 190 of the Constitution, the Federal Court is required to apply federal laws and treaties. Therefore these texts are not subject to a review of their constitutionality. However, the Federal Court can find that a Federal Law violates the Constitution, but it cannot sanction this finding by cancelling or refusing to apply the law in question. Finally, the Federal Court may refuse to apply a Federal Law on the ground that it is contrary to an international treaty.

The Federal Supreme Court exercises constitutional jurisdiction in respect of standard-setting instruments (legislation and orders) and decisions made by cantons. Appeals relating to public law issues enable individuals directly to challenge a cantonal rule, the conformity of which with federal law the Federal Supreme Court will verify in abstract terms, or to make a challenge by objecting thereto on the occasion of an implementing decision.

2. Nature of review

Orders of the Federal Council are reviewed only when challenged by way of defence (*par voie d'exception*) (specific review). Cantonal laws may be contested either as soon as they are adopted (abstract review) or at the time of their application. In any event, review is never automatic: an appeal must be lodged with the Court by an individual within 30 days of being notified of the contested decision. The Swiss system does not recognise *actio popularis*, and only in exceptional cases may a matter be referred to the Court by a State body.

3. Other disputes brought before the Court

Constitutional cases: conflicts of jurisdiction between Federal and cantonal authorities or between two or more cantonal authorities; disputes concerning voting rights.

In addition, the Federal Court is not responsible solely for reviewing constitutionality. It functions ordinarily as a supreme court in the various fields of Federal law.

V. Nature and effects of decisions

1. Types and legal effects of decisions

The Court issues its decisions as judgments whereby, should it decide to discuss the matter, it either allows

(possibly partially) or dismisses appeals. The Federal Supreme Court automatically applies the law, but examines only the complaints raised, and for which the reasons have been duly given, by appellants; in principle it issues its rulings on the basis of the facts established by the previous court. When an appeal relates to an individual decision, and that appeal is allowed by the Federal Supreme Court, the Court may annul the act challenged, amend it, find that the rule relied on has been infringed, or refer the case to the previous court for a new decision; if it dismisses the appeal, it finds either that the rule has been correctly applied or that fundamental rights have not been violated.

If an appeal relates to an abstract review of a cantonal rule, the Federal Supreme Court annuls the rule challenged. If the act complained of contravenes the superior law only in certain respects, it in principle annuls only the disputed provisions. In any cases in which the deletion of the unconstitutional parts distorts the cantonal law as a whole, the Federal Supreme Court may annul the whole text of the law.

Judgments of the Federal Supreme Court become *res judicata* as soon as they are delivered.

2. Publication

The principal judgments of the Federal Court are published, in the language of the case, in the "*Official Reports of Judgments of the Federal Court*" (ATF), which have been published since 1875, and also on the Internet site of the Federal Court (www.bger.ch). Since 2002, the Court has made all its recent judgments, limited to the title page and the operative part, available to the public for four weeks.



"The former Yugoslav Republic of Macedonia" Constitutional Court

I. Introduction

The Constitution of the Socialist Republic of Macedonia of 1963 (Official Gazette, no. 14/63) established the Constitutional Court, determined its position in the judicial system and its competence. The Law on the Constitutional Court (Official Gazette, no. 45/63) regulated the procedure and the details of the legal effects of its decisions. The Constitutional Court started its work in 1964.

The Constitution of the Socialist Republic of Macedonia of 1974 (Official Gazette, no. 7/74) and the Law on the Principles of the procedure and effects of its decisions (Official Gazette, no. 42/76) introduced small changes in the competence and in the legal effects of decisions of the Constitutional Court of Macedonia, but its position in respect of legislative and executive powers has remained the same: the Constitutional Court is part of the system of unity of power, and has the task of maintaining the internal harmony of the legal order. Despite a relatively restricted jurisdiction (*inter alia*, the Constitutional Court did not have the opportunity of abolishing or annulling unconstitutional laws, but only of ascertaining their lack of conformity with the Constitution), the Constitutional Court in that period played a significant role in ensuring the harmony of the legal order in the framework of a political system based on the unity of powers.

According to the new Constitution of 1991, the organisation and functioning of the political system is based on the principle of separation of powers. Under Article 8 of the Constitution, the separation of powers is one of the 11 fundamental values on which the constitutional order has been based. In such a constitutional environment, the Constitutional Court has gained a special role of review in respect of the due functioning of the political and legal system. The Court has built upon this role in two principal ways: by expanding its jurisdiction significantly and by strengthening the legal effects of its decisions in respect of evaluation of the unconstitutionality of laws.

Under the new Constitution, the Constitutional Court is an independent body of the Republic charged with protecting the constitutionality and legality of general legal acts, as well as with protecting the fundamental freedoms and rights of the individual and citizen. Although it is not a part of the ordinary judiciary, it exercises the highest level of judicial review.

II. Basic texts

The Fourth Chapter of the Constitution (Official Gazette, no. 52/91), is dedicated to the Constitutional Court. It consists of seven articles (Articles 108 to 113) in which only the principles concerning the position of the Constitutional Court, its composition, its competence and the legal effects of its decisions are determined. In order not to allow the legislator to influence the conditions under which the power of the Constitutional Court is exercised, the Constitution does not provide for a law on the Constitutional Court but only provides that the mode of work and the procedure of the Constitutional Court shall be regulated by an enactment of the Court. Therefore, the only legal bases of the Constitutional Court are the Constitution and its own Rules of Procedure (Official Gazette, no. 70/92).

III. Composition, procedure and organisation

Under Article 109 of the Constitution, the Constitutional Court of Macedonia is composed of nine judges.

The Assembly elects six of the judges to the Constitutional Court by a majority vote of the total number of Representatives. The Assembly elects three of the judges by a majority vote of the total number of Representatives, within which there must be a majority of the votes of the total number of Representatives claiming to belong to the communities not in the majority in the population of Macedonia.

The Constitutional Court elects a President from its own ranks for a term of three years without the right to re-election.

Judges of the Constitutional Court are elected from the ranks of outstanding members of the legal profession.

IV. Jurisdiction

The Constitutional Court follows the traditional European model of concentration of the judicial review of constitutionality in a sole body. The review of constitutionality and legality is abstract, direct and *a posteriori*.

The Constitutional Court:

- decides on the conformity of laws with the Constitution;
- decides on the conformity of collective agreements and other regulations with the Constitution and laws;
- protects the freedoms and rights of the individual and citizen relating to freedoms of communication, conscience, thought and public expression of thought, political association and activity, as well as in respect of the prohibition on discrimination among citizens on the grounds of sex, race, religion or national, social or political affiliation;
- decides on conflicts of competency among holders of legislative, executive and judicial offices;
- decides on conflicts of competency among State bodies and units of local self-government;
- decides on the accountability of the President of the Republic;
- decides on the constitutionality of the programmes and statutes of the political parties and of associations of citizens.

V. Nature and effects of decisions

The judgments of the Constitutional Court are compulsory for each State body, court, legal and natural person. They are final and self-executory. If the Constitutional Court determines that a law does not conform to the Constitution or that other general acts do not conform to the Constitution or to the law, it shall repeal or invalidate that law or other general act. The kind of order depends on the gravity of the breach of constitutionality and legality and on the legal and factual consequences. The decisions of the Constitutional Court are published in the Official Gazette and they become legally effective from the day of publication. The effect of a repealing judgment (*ex nunc* effect) is to prohibit the application of the repealed act. The effect of an invalidating judgment (*ex tunc* effect) besides erasing the law or other regulation from the legal system, implies the right of affected persons to require the elimination of the consequences of any application of unconstitutional norms.



Turkey

Constitutional Court

I. Introduction

The Turkish Constitutional Court was established in 1962, after the adoption of Law no. 44 of 4 April 1962 on the Organisation and Trial Procedures of the Constitutional Court, as a major new concept arising from the 1961 Constitution. The *status quo* was maintained, with certain modifications, in the 1982 Constitution. However, amendments made in 2010 to the 1982 Constitution have resulted in considerable changes to the Court's structure and powers.

II. Basic texts

- The powers, composition and procedure of the Constitutional Court are regulated in detail in Articles 146 to 153 of the Constitution;
- Its organisation and trial procedures are set out in Law no. 6216 dated 30 March 2011 on the Organisation and Trial Procedures of the Constitutional Court;
- The Court's modus operandi and the division of labour among its members are described by the Rules of Procedure made by the Court (dated 2011).

III. Composition, procedure and organisation

Under the 1982 Constitution, the Constitutional Court is composed of 17 members. Three members are appointed by the Turkish Grand National Assembly from candidates nominated by the Court of Accounts and Presidents of the Bars. The President of the Republic appoints three members from the Court of Cassation, two members from the Council of State, and one member each from the Military Court of Cassation and the High Military Administrative Court. In each of these cases, the President chooses from among three candidates nominated for each vacant seat by the plenary session of the court concerned. The President also appoints three members from a list of three candidates nominated for each vacant seat by the Council of Higher Education from among members of the teaching staff of institutions of higher education who are not members of the Council. The President appoints four members directly from among senior civil service officials, judges, Constitutional Court rapporteurs and lawyers (Article 146). The term of office of the judges is 12 years (non-renewable).

There are to be two sections, each of which will be presided over by a Vice-President in the Court, to decide individual constitutional applications. Other functions of the Court are to be carried out by plenum.

The Organic Law on the functions of the Constitutional Court requires that there are sufficient Rapporteurs to assist with the work of the Court. (Article 24). There will also be assistant Rapporteurs. Rapporteurs are drawn from the ranks of university teachers, judges and auditors who have at least five years' experience. They are responsible for the preparation and presentation of reports and drafting of judgments.

The Constitutional Court is granted complete independence from the legislative and executive branches of the state; its members may not take on other official and private functions besides their main functions.

The Constitutional Court elects a President and two Vice-Presidents from among its members for four years. Re-election to these posts is possible.

IV. Jurisdiction

One of the main functions of the Constitutional Court is the judicial review of legislative acts. Article 148 of the 1982 Constitution provides: "The Constitutional Court shall examine the constitutionality in respect of both form and substance of laws, decrees having force of law and the standing orders of the Grand National Assembly of Turkey". The Constitutional Court is also empowered to review whether the procedural rules have been observed in constitutional amendments. It cannot, however, review constitutional amendments on substantive grounds. Decisions to invalidate a constitutional amendment on formal grounds must be made by a two-thirds majority of the Court.

The review of laws on procedural grounds is restricted to consideration of whether the requisite majority was obtained in the last ballot and the review of constitutional amendments is restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and compliance with the prohibition on debates under urgent procedure. The review of laws as to form can only be requested by the President or by one-fifth of the deputies of the Grand National Assembly.

There is a very important restriction on the constitutional review of decrees having force of law issued during a state of emergency, martial law or in time of war. In such situations, no action can be brought before the Constitutional Court alleging

unconstitutionality on substantive and procedural grounds (Article 148). However, the Constitutional Court has established that such decrees can be examined as to whether in fact they meet with the requirements set out in the Constitution. If a particular decree does not meet with these requirements, it may be reviewed.

International agreements cannot be reviewed by the Constitutional Court (Article 90).

The second important function of the Court is to examine individual constitutional complaints. This is a new function introduced by the 2010 amendments and commenced in September 2012.

Article 148 of the Constitution provides that everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights, which are guaranteed by the Constitution, has been violated by the public authorities. An application can only be made once ordinary legal remedies have been exhausted.

The Court's other functions are as follows:

The Constitutional Court, in its capacity as the Supreme Court, tries the President of the Republic, members of the Council of Ministers, Speaker of the Parliament, President and members of the Constitutional Court, of the High Court of Appeals of the Council of State, of the Military High Court of Appeals, of the High Military Administrative Court of Appeals, their Chief Public Prosecutors, Deputy Public Prosecutors of the Republic, the President and members of the Supreme Council of Judges and Public Prosecutors, and of the Audit Court, for offences relating to their functions (Article 148). The Commander of Turkish Armed Forces (Chief of Staff), the Commanders of the Land Forces, Naval Forces and Air Forces and the General Commander of the Gendarmerie are also tried for offences relating to their functions in the Supreme Court.

The Chief Public Prosecutor serves as public prosecutor in the Supreme Court.

The judgments of the Supreme Court are final (Article 148).

The dissolution of political parties is carried out by the Constitutional Court (Article 69).

The auditing of political parties is carried out by the Constitutional Court (Article 69).

Application for annulment of the decisions of Parliament to waive parliamentary immunity of a member or disqualify him or her from membership can be made to the Constitutional Court within one week of the decision for the annulment on the grounds that it is contrary to the Constitution or the rules set out in the Standing Order of the Assembly. The Constitutional Court must decide on the appeal within fifteen days (Article 85).

The Constitutional Court examines cases on the basis of files, except where it acts as the Supreme Court. It may call on those concerned and those having knowledge relevant to the case to present oral explanations, should it deem this necessary.

Under the 1982 Constitution, review of legal acts may be introduced in two ways:

1. Abstract control of norms (Annulment Action)

The action for annulment is abstracted from any particular case. The constitutional validity of an enacted statute, of decrees having the force of law, or Standing Orders of the Assembly may be challenged directly before the Constitutional Court through an annulment action. The standing as plaintiff in such an action is restricted; only those persons and groups enumerated in the Constitution have the right of application.

Regarding the time limit, actions for annulment must be initiated within sixty days after the publication in the Official Gazette of the contested statute, the law amending ordinance and the Standing Order of the Assembly (Article 151).

2. Concrete control of norms (Objection of Unconstitutionality)

By contrast to annulment actions, incidental proceedings can be initiated by any individual and are not subject to any time limitation.

Article 152 of the 1982 Constitution stipulates that if a court which is trying a case finds that the law or the decree having the force of law to be applied is unconstitutional, or if it is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it must adjourn the proceedings and refer the issue to the Constitutional Court. If the Court is not convinced of the seriousness of the claim of unconstitutionality, then such a claim together with the main judgment will be decided upon by the competent authority of appeal.

The Constitutional Court must decide upon the matter within five months. If it does not reach a decision within this period, it must give its judgment on the basis of the existing law.

V. Nature and effects of decisions

Laws, decrees having force of law, or the Standing Orders of the Assembly (or certain of their provisions) cease to have effect from the date of publication in the Official Gazette of the annulment decision. In other words, when a law is invalidated by the Constitutional Court, it becomes ineffective as from the date of publication of the Court's decision. If the Court deems it necessary it may also decide on a later date as the effective date of its decision. That date cannot be more than one year from the date of publication of the decision in the Official Gazette.

Under Article 153 of the Constitution, the annulment decision cannot have retroactive effect.

The decision of the Constitutional Court is final. Annulment decisions cannot be made public before a statement of reasons for the decision has been published (Article 153).

Under Article 11 of the Constitution, the provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, administrative authorities and other agencies and individuals. Laws cannot be in conflict with the Constitution. Only the Constitutional Court in Turkey can authoritatively interpret the Constitution. For this reason, the decisions of the Court bind the legislative, executive, and judicial organs, administrative authorities and persons and corporate bodies (Article 153). In other words, the legislative and the executive branches have no power to modify or delay the execution of the decisions given by the Constitutional Court.



Ukraine

Constitutional Court

I. Introduction

During Soviet time, Ukraine did not have such a special constitutional jurisdiction body. Supervision over observance of the Constitution was performed by Parliament (*Verkhovna Rada*) and its Presidium. A decision to establish the Constitutional Court was made only in 1990. To this end, a special law was approved but the body was not established.

The 1996 Constitution provided for establishment of the Constitutional Court and set forth its constitutional authorities. In October 1996, the Law on the Constitutional Court was adopted and judges were sworn in on 18 October 1996 at the session of the *Verkhovna Rada*. On 13 May 1997 the Constitutional Court adopted its first decision.

The status and basis of activities of the Constitutional Court are specified in a separate Chapter of the Constitution (XII) that emphasises its special place in the system of bodies of state power as the sole body of constitutional jurisdiction (Article 147.1) that does not belong to the system of courts of general jurisdiction. At the same time, the Constitutional Court is a judicial body: according to Chapter VIII "Justice" of the Constitution judicial proceedings in Ukraine are performed by the Constitutional Court and courts of general jurisdiction (Article 124.3).

The task of the Constitutional Court is to guarantee the supremacy of the Constitution as the fundamental law of the State throughout the territory. In order to perform this task the Constitutional Court shall resolve the issues of conformity of laws and other legal acts with the Constitution and provide the official interpretation of the Constitution and laws (Article 147.2 Constitution, Article 2 of the Law on the Constitutional Court).

The activities of the Constitutional Court shall be based on the principles of the rule of law, independence, collegiality, equality of judges' rights, openness, complete and comprehensive consideration of cases, and legal soundness of decisions it adopts (Article 4 of the Law on the Constitutional Court).

The Constitutional Court shall seat in the City of Kyiv (Article 12 of the Law on the Constitutional Court).

II. Fundamental Texts

- Constitution (Chapter XII (Articles 147-153), Articles 85.1.26, 85.1.28, 106.1.22, 124.3, 159, Chapter XV "Transitional Provisions");
- Law on the Constitutional Court (adopted 16 October 1996; amended by Law 73-V dated 3 August 2006, Law 79-V dated 4 August 2006, Law 2453-VI dated 7 July 2010, Law 2592-VI dated 7 October 2010, Law 4711-VI dated 17 May 2012);
- Rules of Procedure of the Constitutional Court (approved by the Decision of the Constitutional Court dated 5 March 1997; in the new wording pursuant to the Decision of the Constitutional Court 34-p/2008, dated 14 October 2008; amended by the Decision of the Constitutional Court 17-p/2009, dated 24 December 2009).

III. Composition, procedure and organisation

1. Composition

The Constitutional Court is composed of eighteen judges (Article 148.1 of the Constitution).

The President, the *Verkhovna Rada* and the Congress of Judges each appoint six judges to the Constitutional Court (Article 148.2 of the Constitution).

A judge of the Constitutional Court shall assume office from the day of taking the oath. A judge of the Constitutional Court shall take the oath at a session of the *Verkhovna Rada* with the participation of the President, as well as the Prime Minister and the Chairperson of the Supreme Court or persons who perform their duties (Article 17 of the Law on the Constitutional Court).

A judge of the Constitutional Court may be a citizen who has attained the age of forty on the day of appointment, has a higher legal education and professional experience of no less than ten years, has resided in Ukraine for the past twenty years and has command of the Ukrainian language (Article 148.3 of the Constitution).

A judge of the Constitutional Court shall be appointed for the term of nine years with no right to reappointment (Article 148.4 of the Constitution). Judge of the Constitutional Court is obligated to retire at the age of 65.

2. Procedure

The forms of application to the Constitutional Court shall be a constitutional petition and a constitutional appeal (Article 38 of the Law on the Constitutional Court).

The constitutional petition shall be a written application to the Constitutional Court on recognition of a legal act (separate provisions thereof) as unconstitutional, on determination of the constitutionality of an international treaty or on the necessity of the official interpretation of the Constitution and laws. The constitutional petition shall be also an application of the *Verkhovna Rada* on providing an opinion concerning observance of the constitutional procedure for investigation and consideration of the case on removal of the President from office through impeachment (Article 39 of the Law on the Constitutional Court).

The constitutional appeal shall be a written application to the Constitutional Court on the necessity of official interpretation of the Constitution and laws in order to ensure implementation or protection of the constitutional human and citizen's rights and freedoms, as well as the rights of a legal entity (Article 42 of the Law on the Constitutional Court).

The grounds for refusal to initiate the proceedings in a case in the Constitutional Court shall be as follows: the Constitution and this Law do not provide for the right to file a constitutional petition or a constitutional appeal; a constitutional petition or a constitutional appeal do not meet requirements prescribed by the Constitution and this Law; the Constitutional Court has no jurisdiction over issues that constitute a subject matter of the constitutional petition or the constitutional appeal (Article 45 of the Law on the Constitutional Court).

The Constitutional Court considers cases free of charge.

Initiation of the proceedings, in a case at the Constitutional Court upon constitutional petition or constitutional appeal, shall be approved by the Collegium of Judges of the Constitutional Court or by the Constitutional Court at its session (Article 46.1 of the Law on the Constitutional Court).

According to the content of Articles 48, 49 of the Law on the Constitutional Court the Collegium of Judges of the Constitutional Court in cases upon constitutional petitions/constitutional appeals shall adopt a procedural ruling on initiation of the proceedings in a case at the Constitutional Court or

on refusal to initiate the proceedings by a majority of the judges' votes. If a procedural ruling on initiation of the proceedings in a case in the Constitutional Court is adopted, the Chairperson of the Constitutional Court shall submit this case for consideration at a plenary session of the Constitutional Court. If a procedural ruling on refusal to initiate the proceedings in a case is adopted, the secretary of the Collegium of Judges shall forward the materials to the Chairperson of the Constitutional Court for consideration of the case at a session of the Constitutional Court.

At its plenary sessions the Constitutional Court: considers cases, adopts decisions and provides opinions in cases upon constitutional petitions and constitutional appeals; approves regulation on standing commissions; makes decisions on formation of temporary commissions, approves their personal composition and appoints chairmen of these commissions. The plenary session of the Constitutional Court shall be competent, provided no less than twelve judges of the Constitutional Court are present. Decisions of the Constitutional Court shall be deemed adopted and opinions of the Constitutional Court shall be deemed provided at plenary sessions, if they receive the votes of no less than ten Judges of the Constitutional Court (Article 51 of the Law on the Constitutional Court, § 6 of the Rules of Procedure of the Constitutional Court).

Consideration of cases at a plenary session of the Court is done both orally and in a written form. The form of hearing shall be determined by a procedural ruling of the Constitutional Court, which may also resolve other issues concerning organisation of a plenary session of the Constitutional Court on a case. Oral hearing are obligatory if for comprehensive examination of the circumstances of a case and adoption of a legally sound decision it is necessary that participants in the constitutional proceedings are heard at a plenary session of the Constitutional Court. They may also be conducted upon the motions of subjects of the right to constitutional petition/constitutional appeal as well as bodies and officials whose acts are disputed concerning their constitutionality or need official interpretation. Oral hearings may be conducted only on separate issues of a case determined by a ruling adopted at a plenary session of the Constitutional Court.

All issues to be decided on by the Constitutional Court, except for the issues to be decided on at its plenary session in accordance with this Law, shall be considered at the sessions of the Constitutional Court. Sessions of the Constitutional Court shall be competent, provided that no less than eleven Judges of the Constitutional Court are present. A decision of the Constitutional Court shall be deemed adopted at

its session if it receives more than a half of votes of the Judges of the Constitutional Court who took part in the session (Article 50 of the Law on the Constitutional Court, § 7 of the Rules of Procedure of the Constitutional Court).

3. Organisation

The Chairperson of the Constitutional Court heads the Constitutional Court and organises its activities (Article 21.1 of the Law on the Constitutional Court). He or she has two Deputy Chairpersons of the Constitutional Court, who perform his or her separate authorities under his or her instruction (Articles 22.1, 22.2 of the Law on the Constitutional Court). All of them shall be elected at a special plenary session of the Constitutional Court from among the judges of the Constitutional Court for a single three-year term by secret vote from among the judges of the Constitutional Court (Articles 20, 22.4 of the Law on the Constitutional Court).

The Constitutional Court at its sessions shall establish standing commissions of the Constitutional Court from among the judges of the Constitutional Court. Such commissions are auxiliary working bodies on issues of organisation of the Court's internal work. Chairpersons of standing commissions shall be appointed by the Chairperson of the Constitutional Court for the term of their office (Article 33 of the Law on the Constitutional Court). These commissions are as follows: the regulations and ethics commission, the budget and personnel commission, the scientific and information support commission, and the international relations commission.

The Constitutional Court at its plenary sessions may establish temporary commissions for additional examination of issues related to constitutional proceedings in a case with the participation of experts in relevant branches of law (Article 34 of the Law on the Constitutional Court).

In the Constitutional Court, collegia of judges are established, which consider issues concerning initiation of proceedings in cases arising from constitutional petitions and constitutional appeals. Decisions on establishment of the collegia of judges of the Constitutional Court, approval of the composition and appointment of the secretaries of the collegia of judges shall be adopted at a session of the Constitutional Court during the first month of each calendar year (Article 47 of the Law on the Constitutional Court). As a rule, the Constitutional Court creates three collegia (each consisting of six judges).

A judge of the Constitutional Court shall have a research consultant and an assistant, which are civil servants and fulfil instructions of a judge of the Constitutional Court on the issues concerning constitutional proceedings (Article 25 of the Law on the Constitutional Court).

The organisational, research and expert, informational and reference as well as other kinds of support for activities of the Constitutional Court, are provided by the Secretariat of the Constitutional Court headed by the Head of Secretariat of the Constitutional Court. He or she shall be appointed by the Constitutional Court upon nomination by the Chairperson of the Constitutional Court from among the citizens entitled to hold the office of a professional judge. The Head and other officials of the Secretariat of the Constitutional Court are civil servants (Article 32 of the Law on the Constitutional Court).

Financing of the Constitutional Court shall be provided for in a separate item of the State Budget (Article 31 of the Law on the Constitutional Court).

IV. Jurisdictions

The authorities of the Constitutional Court are set forth in Articles 150, 151 of the Constitution and Article 13 of the Law on the Constitutional Court. In accordance with these articles, the Constitutional Court adopts decisions and provides opinions in cases concerning:

1. constitutionality of laws and the other legal acts of the *Verkhovna Rada*, acts of the President, acts of the Cabinet of Ministers, legal acts of the *Verkhovna Rada* of the Autonomous Republic of Crimea;
2. conformity of international treaties that are in force, or those international treaties which are submitted to the *Verkhovna Rada* for granting consent to their binding nature with the Constitution;
3. adherence to the constitutional procedure for investigation and consideration of cases concerning removal of the President from office through impeachment, within the limits provided for in Articles 111 and 151 of the Constitution;
4. official interpretation of the Constitution and laws.

The Constitution also specifically provides that:

- a draft law on introducing amendments to the Constitution shall be considered by the *Verkhovna Rada* upon the availability of an opinion of the Constitutional Court on the conformity of such draft law with the

requirements of Articles 157 and 158 of this Constitution (Article 159);

- the *Verkhovna Rada* shall have the power to terminate early the powers of the *Verkhovna Rada* of the Autonomous Republic of Crimea on the basis of an opinion of the Constitutional Court concerning the violation of the Constitution or laws by the *Verkhovna Rada* of the Autonomous Republic of Crimea (Article 85.1.28).

The authorities of the Constitutional Court shall not include issues concerning the legality of acts of bodies of state power, bodies of the Autonomous Republic of Crimea and bodies of local self-government as well as other issues pertaining to the authorities of courts of general jurisdiction (Article 14 of the Law on the Constitutional Court).

According to the content of Articles 150 and 152 of the Constitution the object of constitutional control by the Constitutional Court shall be laws and other legal acts which are in force only. Draft laws shall not be object of the constitutional control by the Constitutional Court except draft laws on introducing amendments to the Constitution.

The Constitutional Court does not have a right to initiate proceedings independently. At the same time, pursuant to the Law on the Constitutional Court, it has a possibility to consider the constitutionality of a law beyond the limits of constitutional petition or after its withdrawal. With regard to this the Law provides the following:

- if in the course of consideration of a case upon a constitutional petition or a constitutional appeal there has been revealed non-conformity with the Constitution of legal acts (separate provisions thereof) other than those in which constitutional proceedings are initiated and which have an impact on adopting a decision or providing an opinion on the case, the Constitutional Court shall recognise such legal acts (separate provisions thereof) as unconstitutional (Article 61.3);
- if during interpretation of a law (separate provisions thereof) non-conformity of this law (separate provisions thereof) with the Constitution is established, the Constitutional Court shall decide on the issue concerning the unconstitutionality of such a law in the same proceedings (Article 95.2).

V. Nature and effects of decisions

The Constitutional Court shall adopt decisions mandatory for execution throughout the territory and such decisions shall be final and shall not be appealed (Article 150.2 of the Constitution). Decisions and opinions of the Constitutional Court, shall be equally binding (Article 69 of the Law on the Constitutional Court).

Decisions and opinions of the Constitutional Court are signed no later than seven days after their adoption and are officially promulgated on the next working day following the day on which they are signed (Article 67 of the Law on the Constitutional Court).

The grounds for adoption of decision concerning unconstitutionality of legal acts, in whole or in part, by the Constitutional Court shall be as follows: non-conformity with the Constitution; violation of the procedure for their consideration, adoption or entry into force established by the Constitution; excess of constitutional authorities during their adoption (Article 152.1 of the Constitution, Article 15 of the Law on the Constitutional Court).

Laws and other legal acts or their particular provisions deemed unconstitutional, shall lose their legal force from the day of adoption of the decision on their unconstitutionality by the Constitutional Court (Article 152.2 of the Constitution).

Material or moral damages caused to physical or juridical persons by the acts or actions deemed to be unconstitutional, shall be compensated for by the State in compliance with a procedure established by law (Article 152.3 of the Constitution).

Article 70 of the Law on the Constitutional Court is devoted to the procedure of execution of decisions and opinions of the Constitutional Court:

- copies of decisions and opinions of the Constitutional Court shall be sent next working day after their official promulgation to the subject of the right to constitutional petition or constitutional appeal upon whose initiative the case was considered, to the Ministry of Justice as well as to the state body that adopted the legal act which was considered by the Constitutional Court;
- 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;

- 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 Constitutional Court;
- failure to execute decisions or adhere to opinions of the Constitutional Court shall entail liability under the law.

Decisions and opinions of the Constitutional Court, together with the dissenting opinions of judges of the Constitutional Court, shall be published in the "Bulletin of the Constitutional Court" and other official publications (Article 67.3 of the Law on the Constitutional Court).

VI. Conclusion

Since its establishment sixteen years ago, the Constitutional Court:

- has reviewed over 60,000 documents, including about 1,000 constitutional petitions from the public authorities and more than 3,500 constitutional appeals from individuals and legal entities;
- adopted 280 decisions, including 157 on constitutionality of legal acts and 123 on official interpretation of the Constitution and laws;
- provided 2 opinions, including one opinion in the case on the international treaty's conformity with the Constitution (the Rome Statute of the International Criminal Court) and 22 opinions regarding conformity of a draft law on introducing amendments to the Constitution with the requirements of Articles 157 and 158 of the Constitution.



United Kingdom

Supreme Court

I. Introduction

The UK Supreme Court was created as a consequence of the Constitutional Reform Act 2005. Prior to its creation, the UK's supreme judicial authority was the judicial committee of the House of Lords, which was constituted of members of the House of Lords who had either been appointed under the Appellate Jurisdiction Act 1876 or had held high judicial office, commonly referred to as the Law Lords. The Supreme Court is therefore the successor to the judicial committee.

II. Basic texts

- Constitutional Reform Act 2005 (see Sections 23 – 60)

III. Composition, procedure and organisation

1. Composition

The Supreme Court is constituted of its President, Deputy President and 10 Supreme Court Justices. *Ad hoc*, acting justices, can also sit as necessary at the request of the President of the Supreme Court. Acting justices have to hold high judicial office e.g., of Session in Scotland, or the Court of Appeal of Northern Ireland. It is independent of, and separate from, the other branches of government.

Members of the Court hold office during good behaviour and can only be removed following an address to both Houses of Parliament. Retirement age is currently 70 (75 for those member who were appointed to their first judicial position before 1995). Members of the Court can also be removed on medical grounds if they become permanently incapacitated.

Members of the Court are appointed by the Queen, following a recommendation by the Prime Minister. The selection process is however carried out by the independent Judicial Appointments Commission.

To be eligible for appointment an individual must either have held high judicial office for at least 2 years or been a qualifying practitioner for at least 15 years. A qualifying practitioner is either a lawyer (solicitor, barrister, advocate in Scotland) who has qualified to act in the Senior Courts of England and Wales, the Court of Session and the High Court of Justiciary in Scotland or is a member of the Northern Irish bar or a solicitor of the Court of Judicature of Northern Ireland.

2. Procedure

The Supreme Court's procedure is set out in *The Supreme Court Rules 2009* (www.supremecourt.gov.uk/docs/uksc_rules_2009.pdf).

The Court generally sits in panels of five justices. It can, and does in cases of particular importance, sit in panels of seven or nine. In theory it could sit *en banc*.

Judgments are not delivered *ex tempore*. The Court can deliver single judgments of the court, multiple judgments (i.e., each Justice can deliver his or her own judgment) or it can deliver majority or minority judgments.

Appeals are argued orally before the Court. Oral submissions are supported written submissions. Parties are generally legally represented, but may if they wish act in-person.

3. Organisation

The Court is run by a Chief Executive, who is supported by a management team. Members of staff are civil servants.

The Registrar of the Supreme Court exercises judicial and administrative powers as provided under the Supreme Court Rules 2009 and its Practice Directions.

Eight judicial assistants assist the members of the Court with research related to appeals. They do not prepare draft judgments.

IV. Jurisdiction

The Supreme Court has all the powers and jurisdiction of its predecessor, judicial committee of the House of Lords.

It is the Court of Final Appeal in all civil matters from the three UK legal jurisdictions (England and Wales, Scotland and Northern Ireland). It is the Court of Final Appeal in criminal matters from England and Wales and Northern Ireland.

It only hears appeals which raise arguable points of law which are of general public and constitutional importance. It can hear appeals from the following courts:

England and Wales

- i. The Court of Appeal of England and Wales, both Civil and Criminal Division
- ii. The High Court of Justice (in a limited number of circumstances)

Scotland

- iii. The Court of Session

Northern Ireland

- iv. The Court of Appeal in Northern Ireland
- v. The High Court (in a limited number of circumstances)

The Supreme Court also has jurisdiction over devolution matters arising under the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 2006. These matters are referred to the Court from a court in the relevant jurisdiction.

IV. Nature and effects of decisions

The Supreme Court has all the powers of the court from which an appeal originated. It may therefore:

- a. affirm, set aside or vary any order or judgment made or given by that court;
- b. remit any issue for determination by that court;
- c. order a new trial or hearing;
- d. make orders for the payment of interest;
- e. make a costs order.

Any order of the Supreme Court may be enforced in the same manner as an order of the court below, or an appropriate superior court (e.g., where the appeal originated from a court in England and Wales, the High Court; where the appeal originated from a court in Scotland, in civil proceedings, the Court of Session, in criminal proceedings, the High Court of Justiciary; where the appeal originated from Northern Ireland,

the High Court in Northern Ireland). Similar provisions apply in respect of references to the Court on devolution matters.

Court orders must be sealed by the Registrar of the Court.



United States of America

Supreme Court

I. Introduction

The Supreme Court of the United States was established by the United States Constitution, which was ratified by the states in 1789. The Judiciary Act of 1789, adopted on 24 September 1789, provided for two terms of the Court, the first commencing on the first Monday of February, and the second the first Monday of August. The Court convened for the first time on 1 February 1790.

The Supreme Court is the highest court in the United States, having appellate jurisdiction over both the lower federal courts and the various state courts throughout the United States.

II. Basic texts

- Article III of the United States Constitution provides that “the judicial Power of the United States, shall be vested in one supreme Court”;
- Title 28, Section 1 of the United States Code provides that there shall be eight associate Justices and one Chief Justice of the Supreme Court;
- Sections 2-6 of Title 28 set forth other basic provisions concerning the Supreme Court;
- Sections 1251-1259 of Title 28 define the Court’s jurisdiction;
- The Rules of the Supreme Court, adopted by the Court on 12 January 2010 pursuant to Title 28, Section 2071 of the United States Code, prescribe the Court’s procedures. These Rules may be found at: www.supremecourt.gov/ctrules/2010RulesoftheCourt.pdf.

III. Composition, procedure and organisation

1. Composition

The Court has eight associate Justices and one Chief Justice. All appointments to the Court are made by the President, with the advice and consent of the Senate. No specific qualifications are spelled out in the Constitution nor by statute. Justices serve for life during good behaviour and can only be removed through the impeachment process.

Upon appointment and confirmation, each Justice takes two oaths: the first, required by Article VI of the Constitution, states that the Justice swears to uphold the Constitution; the second, required by the Judiciary Act of 1789, states that the Justice will impartially discharge his or her judicial duties.

Justices of the Court are precluded by Article I.6 of the Constitution from serving as members of the Congress.

2. Procedure

Six Justices constitute a quorum. The Court acts as a unitary, collegiate body and renders decisions by majority vote. The Court hears oral arguments in the Courtroom from 10:00 am to 12:00 noon, and from 1:00 pm to 3:00 pm, Monday through Wednesday, from the first Monday in October until the end of April. Cases normally are allotted one hour apiece, meaning the Court usually hears four arguments on each of these days. During this same period, and on through June, the Court holds private conferences to discuss cases and conduct business on every Friday.

3. Organisation

Associate Justices have staffs consisting of two secretaries, four law clerks, and one messenger. The present Chief Justice has three secretaries, three law clerks (he is entitled to five), and one messenger. The Chief Justice also has an Administrative Assistant, whose office includes a secretary, a special assistant, a judicial fellow, and two college interns.

The Supreme Court’s budget is set by the Congress, with one caveat: Justice’s salaries are guaranteed them by the constitution and cannot be diminished during their terms in office.

IV. Jurisdiction

The Supreme Court is of limited jurisdiction and is only empowered to address cases and controversies of a federal nature. Federal cases are those that involve issues surrounding Congressional legislation, actions of the Executive branch, treaties and the Constitution. The Court cannot render advisory opinion, and thus must be presented with an actual controversy.

The Court’s jurisdiction is largely discretionary, so that it may choose the cases it wishes to hear from the thousands annually presented to it. It commonly selects one-hundred or more cases each year for argument and resolution.

The Court has jurisdiction to hear cases from both the lower federal courts and the state courts, as well as cases originating in the military courts.

V. Nature and effects of decisions

Judgments of the Supreme Court are binding on the parties and on all public officers, state and federal, throughout the United States. Article VI of the Constitution states that the “Constitution, and the laws of the United States ... shall be the supreme law of the Land”, and the Court has interpreted this to include its decisions.

Publication of Supreme Court opinions is performed by the Reporter of Decisions, a statutorily created officer of the Supreme Court. The Reporter makes decisions available to the public the moment they are announced in both print and electronic form. Decisions are thereafter collected and bound in the United States Reports, which are distributed throughout the United States and are accessible in virtually all law libraries. Several privately owned printing houses also publish the Supreme Court's decisions, and its decisions are available on a number of electronic databases, including the Internet.



European Court of Human Rights

I. Introduction

The European Court of Human Rights (the “Court”) is a permanent international court that was set up in 1959. It rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights and Protocols thereto (the “Convention”).

The Court is based in Strasbourg (France) and monitors respect for the human rights of 800 million Europeans in the 47 Council of Europe member States that have ratified the Convention.

II. Basic texts

- European Convention on Human Rights;
- Rules of Court.

III. Composition, procedure and organisation

1. Composition

The Court is composed of a number of judges equal to that of the member States of the Council of Europe who have ratified the Convention. There are currently a total of 47 judges sitting at the Court. The judges are elected by the Parliamentary Assembly of the Council of Europe, for a non-renewable period of 9 years, subject to a retirement age that is currently set at 70.

To be eligible for office, the judges must be of high moral character and either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence. They sit on the Court in their individual capacity and do not represent any State.

The Court has a President and one or two Vice-Presidents elected by the Plenary Court.

2. Procedure

The vast majority of cases before the Court are introduced by individual application. Cases may, however, also be brought by a member State, other than the State alleged to have breached the Convention (inter-State cases). Special rules apply to such cases.

Individual applications may be considered by a single judge (who must not be the judge elected in respect of the respondent State), a Committee of three judges, a Chamber of seven judges or a Grand Chamber of seventeen judges.

Any complaint in an individual application that does not satisfy the admissibility criteria (for example, because domestic remedies have not been exhausted, the complaint is out of time or is manifestly ill-founded) may be declared inadmissible at any stage of the proceedings by any of the above judicial formations. Inadmissibility decisions are final.

Complaints that are declared admissible may be the subject of a judgment on the merits by:

- a Committee (if the vote is unanimous and the underlying question in the case is already the subject of well-established case-law of the Court);
- a Chamber; or
- the Grand Chamber (following relinquishment by or referral from a Chamber).

In cases before a Chamber or the Grand Chamber, judgments are delivered on a majority vote. Any judge who has taken part in the consideration of the case may issue a concurring or dissenting opinion or a bare statement of dissent.

The proceedings before the Court are mainly written, but oral hearings may be held (generally in Grand Chamber cases and important Chamber cases).

The Court may, if satisfied that respect for human rights does not require it to pursue the examination of the case, strike an application out of the list without deciding the merits, if the parties reach a friendly settlement or if the respondent State files a unilateral declaration clearly acknowledging a violation of the Convention and offering adequate redress and remedial measures in respect thereof.

3. Organisation

The Registry of the Court provides legal and administrative support to the Court in the exercise of its judicial functions. Registry staff are staff members of the Council of Europe, the Court's parent organisation, and are subject to the Council of Europe's Staff Regulations. All members of the Registry are required to adhere to strict conditions as to their independence and impartiality.

The head of the Registry (under the authority of the President of the Court) is the Registrar, who is elected by the Plenary Court. He or she is assisted by one or more Deputy Registrars, likewise elected by the Plenary Court. Each of the Court's five judicial Sections is assisted by a Section Registrar and a Deputy Section Registrar.

The principal function of the Registry is to process and prepare for adjudication applications lodged by individuals with the Court. The Registry's lawyers prepare files and analytical notes for the judges. They also correspond with the parties on procedural matters. They do not themselves decide cases. Cases are assigned to the different divisions on the basis of knowledge of the language and legal system concerned. The documents prepared by the Registry for the Court are all drafted in one of its two official languages (English and French).

In addition to its case-processing divisions, the Registry has divisions dealing with the following sectors of activity: case-law information and publications; research; just satisfaction; press and public relations; information technology and internal administration. It also has a central office, which handles mail, files and archives, a language department and a library.

IV. Jurisdiction

The jurisdiction of the Court extends to all matters concerning the interpretation and application of the Convention that are referred to it.

It includes jurisdiction in respect of allegations of a violation of the Convention made by:

- a member State against another member State (inter-State cases);
- any person, non-governmental organisation or group of individuals who claim to be victims of a violation by a member State (individual applications).

The Court also has jurisdiction to deal with questions referred to it by the Committee of Ministers of the

Council of Europe arising out of the execution of final judgments it has delivered.

Lastly, the Court has limited jurisdiction to issue advisory opinions at the request of the Committee of Ministers on certain legal questions concerning the Convention (for example, voting procedures for the appointment of judges to the Court) that do not touch upon the content or scope of the Convention rights or freedoms.

V. Nature and effects of decisions

Irrespective of the originating body, inadmissibility decisions are final.

Judgments by a Committee are final. Judgments by a Chamber become final three months after delivery if no request is made for their referral to the Grand Chamber or when the panel of the Grand Chamber rejects such a request. Grand Chamber judgments are final.

If the Court finds a violation of the Convention, and if the internal law of the member State concerned allows only partial reparation, the Court shall, if necessary, afford just satisfaction to the injured party. Just satisfaction takes the form of financial compensation in respect of pecuniary and/or non-pecuniary damage and/or costs and expenses.

In addition, while the Court has no power to overturn domestic legislation or decisions, it may indicate the individual and/or general measures it considers should be taken by the respondent State to secure, under the supervision of the Committee of Ministers, the applicant's rights which the Court has found to be violated.

In cases where the facts of an application reveal the existence of a structural or systemic problem or other similar dysfunction in the member State concerned the Court may adopt a pilot judgment identifying both the nature of the problem and the type of remedial measures which the member State concerned is required to take at the domestic level. It may impose a time-limit for the implementation of the remedial measures and adjourn the examination of similar pending applications in the meantime.

The Committee of Ministers is responsible for monitoring execution of the Court's judgments.



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