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The expanded constitutional jurisdiction is beyond any doubt one of the most striking features of the democratisation process in the countries of Central and Eastern Europe which have recently emerged from many decades of totalitarian rule. Courts are called upon to play a vital role in the stabilisation and continuing reform of new political and legal infrastructures designed to guarantee respect for the rule of law.

Despite national differences, constitutional courts and courts of equivalent jurisdiction face similar problems relating inter alia to respect for fundamental rights and freedoms, the separation of powers and the independence of the judiciary. Many of these issues have been object of extensive case-law developed by existing courts of competent jurisdiction in Western Europe and North America. It therefore appears to be of utmost importance to further the exchange of information and ideas among old and new democracies in the field of judge-made law. Such an exchange and such cooperation, it is hoped, will not only be of benefit to the newly established constitutional jurisdictions of Central and Eastern Europe, but will also enrich the case-law of the existing courts in other countries. The main purpose of the Bulletin on Constitutional Case-Law is to foster such an exchange and to assist national judges in solving critical questions of law which often arise simultaneously in different countries and which may have already been examined by other courts.

The present bulletin is a special issue of the Constitutional Case-Law Bulletin published by the European Commission for Democracy through Law. It contains brief descriptions of the various Constitutional and Supreme Courts which regularly participate in the preparation of the bulletin. The case-law which is reported in the bulletin may be placed in perspective only by a comprehensive knowledge of the different powers and procedures of these institutions. The national contributions have been provided by liaison officers from the respective Courts.

In order to ensure a certain homogeneity and to facilitate the comparison between the different jurisdictions, the descriptions are usually divided into the following rubrics:

Introduction

I. Basic texts

II. Composition and organisation

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The regular bulletin is published three times a year, each issue reporting the case-law of the different courts during one trimester. Publication of the next issue, covering the first trimester of 1994, is planned for July 1994.

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The Venice Commission

The European Commission for Democracy through Law, also known as the Venice Commission, was established in 1990 pursuant to a Partial Agreement of the Council of Europe. It is a consultative body which co-operates with member states of the Council of Europe and with non-member states. It is composed of independent experts in the fields of law and political science whose main tasks are the following:

- to help new Central and Eastern Europe democracies to set up new political and legal infrastructures;
- to reinforce existing democratic structures;
- to promote and strengthen principles and institutions which represent the bases of true democracy.

The activities of the Venice Commission comprise, inter alia, research, seminars and legal opinions on issues of constitutional reform, on draft constitutional charters, electoral laws and the protection of minorities, as well as the collection and dissemination of case-law in matters of constitutional law from Constitutional Courts and other courts throughout Europe.

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Albania

Constitutional Court

Introduction

1. Date and circumstances of establishment

Albania set up a Constitutional Court for the first time in its history as a State under Constitutional Law No. 7561, of 29 April 1992. Articles 17 to 28 of this law cover the Court's legal position, structure, membership, operation and powers, as well as laying down the main parameters within which it must work when deciding constitutional issues.

2. Position in the court hierarchy

The Constitutional Court of the Republic of Albania is not part of the ordinary court system: it is a separate court, responsible for monitoring the compatibility with the Constitution of laws and other standard-setting instruments. It began operations on 1 June 1992, when its members swore the oath set out in Article 19 of the Constitutional Law, in the presence of the President of the Republic.

I. Basic texts

Constitutional Law No. 7561, of 29 April 1992.

II. Composition and organisation

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 17 of the Constitutional Law). It has nine members, five elected by Parliament and four appointed by the President of the Republic (Article 18 of the Constitutional Law). The members of the Court hold a secret ballot to elect their President, who serves a three-year term of office and may be re-elected. Three members of the Constitutional Court, their names drawn by lot, have a three-year term of office, while the term of office of another three will come to an end three years later. The other members will serve a twelve-year term; they may not be re-elected.

Appointment to the Constitutional Court is restricted to prominent and highly capable lawyers, who have been active in the legal sphere or as university law lecturers for more than ten years and have high moral standing (Article 20 of the Constitutional Law).

Constitutional Court judges may not be members of parliament, members of the Council of Ministers, judges, prosecutors or members of a party or of any other political or trade union organisation; nor may they engage in other public or private activities which might be detrimental to their independence or impartiality (Article 21 of the Constitutional Law). They enjoy immunity in respect of decisions taken and opinions expressed in the course of their duties. They may be neither prosecuted nor arrested without the prior permission of the Constitutional Court. Their period in office terminates if:

a they have, without justification, failed to carry out their duties for longer than six months;

b. they resign;

c. they are appointed to a position incompatible with their duties;

d. their term of office reaches its end.

If judges cease their duties before the end of their term of office, Parliament or the President of the Republic, as appropriate, elects or appoints new judges to complete their term.

Each application made to the Court is examined at a meeting of the members and, if it is a matter for which the Court is competent, the President appoints one member to prepare a report. If it is not a matter for the Constitutional Court, the President, or another member appointed to do so, issues a reply of an administrative nature to the applicant.

The Constitutional Court sits as a plenary body, convened by its President, who appoints the reporting judge and decides the agenda. When a reporting judge has made his or her report to the Court, the latter sits in camera. The proceedings are usually public, and both parties participate. The parties may be legally represented. There is no charge for the proceedings.

III. Powers

In pursuance of Article 24 of the Constitutional Law,

a. the Constitutional Court interprets the Constitution and the Constitutional Laws;

b. it decides whether legislation and instruments having the force of law are compatible with the Constitution; it has power to rule whether a law is compatible with the Constitution when a question is referred to it by an ordinary court, ie any other court; such references are made when an ordinary court doubts the constitutionality of the statutory provision which it is obliged to apply; the decision to make a reference leads to suspension of the main trial before the ordinary court, until such time as the Constitutional Court has taken its decison;

c. the Court decides whether instruments and regulations are incompatible with the Constitution and with the law;

d. it decides on the compatibility with the Constitution of international Conventions, prior to ratification, and on the compatibility of legislation with the standards of generally accepted international law and with the Conventions to which the Republic of Albania is a party; the Court has taken the view that it may exercise this power only when a specific case is referred to it by the persons mentioned in Article 25 of the Constitutional Law, and not through prior review;

e. it resolves conflicts of competence among branches of the central administration and between local authorities and central government;

f. it decides on the constitutionality of parties and other organisations in the political and social spheres, and may prohibit their activities;

g. it rules on the lawfulness of elections to the office of President of the Republic and to parliament and on that of referendums, publishing the final results;

h. the Constitutional Court examines any criminal accusations made against the President of the Republic;

i. it takes final decisions on complaints by individuals, made through the channel of a constitutional appeal, relating to violations of fundamental rights through illegal acts by the authorities;

j. the Constitutional Court suspends legislation considered by it not to be in conformity with the Constitution and suspends or repeals instruments or provisions which it finds not to be in accordance with the law; the Constitutional Court also takes the steps it considers necessary in respect of the case before it: if it considers that a provision of the Constitution has been violated, it says so in its judgment and, if necessary, also decides to remedy the effects of the said violation by granting compensation for the damage suffered where appropriate. It may also decide that any agency of the State, social organisation or legal entity must cancel or alter the individual measures which infringed an individual's constitutional right.

The Constitutional Court acts either on the basis of applications or of its own volition.

The following may apply to the Constitutional Court: the President of the Republic, the Council of Ministers, a parliamentary group, one fifth of the members of parliament, the courts, local authorities and anyone alleging a violation of his or her rights and freedoms as defined in the Constitution (Article 25 of the Constitutional Law).

IV. Nature and effects of judgments

The Constitutional Court's decisions require a majority. Its judgments have to be in writing, state their reasons and be signed by all the members who took part in the sitting. Any member who has a dissenting opinion may attach it to the judgment.

The Constitutional Court's judgments are final. Should there be any doubt as to the precise content of a judgment, interpretation is by the Court itself, on application by the interested party, made within thirty days of the date on which the judgment was notified, or of the Court's own volition.

Any law, standard-setting instrument or provision declared to be incompatible with the Constitutional Law, with the standards of generally accepted international law or with the Conventions to which the Republic of Albania is a party become null and void on the day after publication of the judgment in the "Official Gazette". In any other cases, the Court's judgment comes into force on the date specified in the judgment itself (Article 26 of the Constitutional Law).

Where the repeal, revocation or amendment of a law or of another instrument creates a situation requiring specific provisions, the Constitutional Court's judgment is notified to Parliament or to any other competent State bodies for them to take the steps laid down in the Constitution.

The Constitutional Court's judgments determine the constitutionality and legality of the provisions examined (Article 27 of the Constitutional Law).

The law also provides for there to be legislation to determine the internal organisation and operation of the Constitutional Court, as well as its procedure and other issues which might arise in respect of its competence (Article 28 of the Constitutional Law).

Conclusion

In conclusion, Albania's Constitutional Court may be said, in the first two years of its existence, to have publicised its role and importance through its judgments. It has benefited from the assistance of other European States' Constitutional Courts – including those of Germany and Italy – and, above all, from the assistance of the Council of Europe and its specialised bodies.

Austria

Constitutional Court

Introduction

1. Date and circumstances of establishment

1 October 1920: entry into force of the Federal Constitutional Law.

2. Position in the court hierarchy

There are three supreme legal authorities of the same rank:

Supreme Court: reviews the decisions of civil and criminal courts.

Administrative Court: reviews the lawfulness of administrative decisions (determines appeals against administrative decisions and determines infringements of rights guaranteed by law).

Constitutional Court: reviews the conformity of laws with the Constitution and the conformity of legal regulations with the law. May also be asked by the Supreme and Administrative Courts to rule on questions raised by proceedings pending before them (inter alia).

I. Basic texts

- Articles 137-148 of the Federal Constitutional Law (Bundesverfassungsgesetz = B-VG); Constitutional Court Act (Verfassungsgerichtshofgesetz = VfGG)
- Rules of Court of the Constitutional Court (Geschäftsordnung des Verfassungsgerichtshofes).

II. Composition and organisation

1. Composition

1.1 Number of judges: 14 ordinary judges, 6 substitute judges.

1.2 Appointment of judges and President:

All members of the Court must be qualified lawyers and have practised a legal profession for at least 10 years. Power of appointment lies with the President of the Federation, who acts on proposals made by the Federal Government in appointing the President, Vice-President, six ordinary judges and three substitute judges (who must be chosen among judges, public officials and university professors of law), on proposals by the National Council (lower house of Parliament) in appointing three ordinary and two substitute judges, and on proposals by the Federal Council (upper house of Parliament) in appointing three ordinary judges and one substitute judge. Three ordinary judges and two substitute judges must be resident outside Vienna.

1.3 Term of office

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

1.4 Status of judges

Members of the Federal or Land (regional) Governments, of the National or Federal Councils or of any other general, representative body may not serve on the Court. Membership of the Court is not compatible with the holding of party political office, paid or unpaid. Members of the Court are independent in the performance of their duties. Judges may only be dismissed by two-thirds majority decision of the Court itself, for example, 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 incapacitated. Once dismissal proceedings have begun, the Court may order provisional suspension.

2. Procedure

2.1 The President convenes the Court Sessions usually take place in March, June, October and December and last three weeks. The permanent rapporteurs who prepare the Court's judgments are elected for three years. Nine members of the Court are currently serving as rapporteurs. The President assigns applications to the Court to the various rapporteurs.

The Constitutional Court gives decisions on applications only. It may, however, review the constitutional validity of a law or the lawfulness of a regulation on its own motion, if this becomes an issue in court proceedings.

Generally, decisions are taken by majority vote. The President has only a casting vote.

In principle, decisions are given by the full Court (President, Vice-President and 12 judges). There are no separate Chambers within the Court, but certain decisions are taken by four judges, the President and the Vice-President (in view of the number of decisions, this is by far the commonest procedure).

Judicial proceedings before the Court must always be recorded in writing. The Court may also give a decision after a public hearing (this has now become rare, relative to the number of cases). In certain proceedings, application must be made to the Court through a barrister (particularly applications under Article 144 of the Constitution, which make up 80% of cases heard by the Court).

Some applications are subject to time-limits: 6 weeks for appeals and 4 weeks for electoral disputes. All

decisions are given in writing and sent to the parties by post. Judgments may also be given after a public hearing.

3. Organisation

Apart from the judges, the Court has 66 staff. These include 18 jurists assisting the permanent rapporteurs, two jurists in charge of the research and documentation unit, and one jurist attached to the President's office. Internal administration is the responsibility of the Registrar. The Court has its own budget. Under the Constitutional Court Act, matters relating to staff and technical administration are the responsibility of a government body, the Federal Chancellery.

III. Powers

Is defined as follows in the Federal Constitutional Law:

Article 126 a:

Disputes between state authorities and the Court of Accounts concerning its competence (ref: KR).

Article 137:

Financial claims against the Federation, Länder and local authorities which cannot be settled by the ordinary judicial process or by decision of an administrative authority (ref: A).

Article 138.1:

Conflicts of competence 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 (ref.: K I).

Article 138.2:

On application from the Federal or a Land government, the Court decides whether a legislative or administrative decision is a matter for the Federation or the Land (ref.: K II).

Article 138 a:

It verifies compliance with agreements concluded between two or more Länder or between the Länder and the Federation.

Article 139:

It reviews the lawfulness of orders made by the federal or Land authorities (ref: V).

Article 139 a:

When a new legal regulation is published (in the Federal Law Gazette), it decides whether the issuing authority has exceeded its powers in passing it (ref: V).

Article 140:

It decides on the conformity of laws with the Constitution (ref: G).

Article 140 a:

It decides on the lawfulness of treaties or international agreements concluded by Austria (ref: G or V).

Laws and regulations may also be reviewed at the request of individuals ("individual petitions") on certain, fairly limited conditions. There is not only a general review but also a specific review of legal rules. A court which has doubts concerning a legal rule is bound to refer the matter to the Constitutional Court.

Article 141:

It decides on disputes concerning the main political and administrative as well as professional elections (elections to representative professional bodies entitled to determine their own statutes) (ref: WI).

It decides, at the request of a representative body, on the forfeiture of political or professional mandates (ref: WII).

It reviews the lawfulness of referenda and popular initiatives (ref.: WIII).

Article 142:

It decides 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 (President of the Federation, members of the Federal or Land governments, etc.).

Article 143:

Jurisdiction where the persons named in Article 142 are charged with criminal offences connected with their official duties.

Article 144:

It decides on appeals against the decisions of administrative authorities (ref: B).

In some circumstances, these appeals may be dismissed under an abridged procedure.

Article 145:

It decides on violations of international law (ref: C). Compliance with this Article is not yet subject to review by the Court since the specific Federal Act provided for in Article 145 has not yet been promulgated.

Article 148 f:

It decides on disputes between the "Volksanwalt" (ombudsman) and State authorities concerning the interpretation of statutory provisions governing the powers of the "Volksanwalt" (ref: KV).

IV. Nature and effects of judgments

1. Types of decision

Decisions on procedure: "Beschlüsse"
For example:

- dismissal of appeals which have no basis in law
- dismissal of applications made out of time
- decision not to examine the merits (in cases where the applicant is given satisfaction when the administrative decision complained of is rescinded by the administrative authority itself).

Decisions on the merits: "Erkenntnisse"
For example:

- ruling that a case falls within the jurisdiction either of a court or of an administrative authority – setting aside of the decision which conflicts with the Constitutional Court's judgment
- decision as to whether a bill is a matter for the Federation or for a Land
- revocation of a legal rule
- setting aside of an administrative decision

2. The Court's decisions are final and binding. The legal effects vary widely, since the Court's jurisdiction is itself very broad.

For example:

- decisions determining competence must be published in the Federal Law Gazette; they are binding and rank as constitutional Acts;
- legal rules set aside by the Court cease to have effect on the date of publication of the Court's decision in the Federal Law Gazette; the Court may, by specifying a time, postpone the effects of such decisions
- when formal administrative decisions are set aside, the administrative authority is required to take a fresh decision, which must comply with the legal opinion of the Court.

3. Publication – Access to case-law

The decisions are published by the court itself:

- in full (compendium of decisions and judgments = Amtliche Sammlung der Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes);
- as extracts (Case-law of the Constitutional Court: Die Judikatur des Verfassungsgerichtshofes); 1919-1986, 1987-1989 in preparation; from 1990 available individually.

Since 1985, case-law has been stored on a computerised data base: RIS legal information system (installed in the Federal Chancellery). Hardware: IBM. Software: IBM, IMS, stairs/mike.

Language: German.

Bibliography

Eisenmann:
La Justice constitutionnelle et la Haute Cour constitutionnelle d'Autriche, 1928, new edition Economica-P.U.A.M. (Paris 1986).

Favoreu:
Les Cours constitutionnelles, Que sais-je, P.U.F. (Paris 1986).

"Autriche": in Annuaire International de Justice constitutionnelle, Economica, since 1985.

Heller:
Outline of Austrian Constitutional Law, Kluwer, Law and Taxation Publishers, (Deventer-Boston 1989).

Peyrou-Pistouley:
La Cour constitutionnelle et le contrôle de la constitutionnalité des lois en Autriche, Economica (Paris 1993).

Belgium

The Court of Arbitration

Introduction

The Belgian constitutional system – Constitutional review in Belgium

Belgium is a constitutional monarchy with a representative regime. The fundamental rules governing the structures of the State and the operation of its institutions, chiefly the legislature, the executive and the judiciary, were established by the Belgian Constitution dating from 7 February 1831. The territory is divided into provinces and communes whose elected bodies hold a considerable degree of autonomy.

The constitutional amendment procedure is complex; over the first 150 years following the adoption of the Constitution only three revisions occurred (1892-93, 1919-21 and 1965-68). Since 1970, however, several constitutional reforms have resulted from the demand for self-government raised by Belgium's two main cultural and linguistic elements, the Dutch-speaking and French-speaking communities. Belgium today 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) holding considerable autonomy and the power to enact statutes and regulations with force of law or equivalent value.

The citizens' fundamental rights and freedoms are protected by the letter of the Constitution, but individuals and corporations may also appeal to the courts and invoke directly applicable rules of international law such as those embodied in the European Convention on Human Rights which override domestic law, particularly enacted law.

In Belgium it was traditionally acknowledged that it was not for judges to determine the compliance of the laws with the Constitution. Since 1946, however, there has been a form of preventive review by the legislative section of the Conseil d'Etat which may deliver opinions, without binding effect, on the constitutionality of the preliminary drafts of laws or equivalent statutes. The section of this judicial body dealing with administrative issues may, on appeal by interested parties, order the retroactive annulment of measures taken by the government and local authorities (provinces and communes) in breach of the supreme reference standards, namely the Constitution, the laws and directly applicable rules of international law.

In their concrete review of legality, the courts are empowered by Article 107 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.

The Belgian courts as a general rule have nevertheless consistently refrained from verifying the constitutionality of the laws, except for interpretations in accordance with the Constitution.

I. Basic texts

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

- Article 142 of the Constitution (as amended on 17 February 1994):

  "There shall be, for all of Belgium, a Court of Arbitration whose composition, jurisdiction and functioning shall be determined by law.

  This Court shall rule on:

  1° The conflicts referred to in Article 141 [1]

  2° The violation by a law, decree or rule referred to in Article 134, of Articles 10, 11 and 24

  3° The violation by a law, decree or rule referred to in Article 134, of articles of the Constitution determined by law.

  Any authority designated by law, any person who has an interest or, by interlocutory appeal, any tribunal, may submit matters to the Court.

  The laws referred to in paragraph 1, paragraph 2, No.3 and paragraph 3 shall be adopted by the majority indicated in the last paragraph of Article 4."

- Special law of 6 January 1989 on the Court of Arbitration (*Moniteur belge*, 7 January 1989) superseding the law of 28 June 1983 concerning the organisation, jurisdiction and operation of the Court of Arbitration.

- Law of 6 January 1989 concerning the emoluments and pensions of judges, advisers and clerks of the Arbitration Court (*Moniteur belge*, 7 January 1989, erratum, *Moniteur belge*, 1 February 1989).

II. Composition and organisation

1. Composition and operation of the Court

The Court of Arbitration consists of twelve judges appointed for life by the Crown from a dual list of

1. *Conflict between laws, decrees and rules referred to in Article 134, as well as between the decrees and between the rules referred to in Article 134 themselves.*

nominations submitted alternately by the Chamber of Representatives and the Senate after adoption by a two-thirds majority of members present. Six judges belong to the French linguistic group and six to the Dutch linguistic group. The judges in each group elect a president, who presides over the Court for one year in rotation with the other president. Each linguistic group has three judges with prior parliamentary experience as senators or representatives, and three are required to have held posts in Belgium for at least five years as senior judge of the Court of Cassation or the Conseil d'Etat, adviser to the Court of Arbitration or law professor at a Belgian university. One must have an adequate knowledge of German. Forty is the minimum age of appointment. Judges are eligible for retirement at the age of seventy. Incompatibility of office with other functions, duties or occupations is strictly regulated.

Cases are normally heard by a single panel 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 before the full Court (ten or twelve members) where the presidents consider it necessary or two permanent judges so request. Manifestly inadmissible cases or cases in which the Court clearly lacks jurisdiction are dealt with by the presiding judge and the two reporting judges.

The presiding judges and members of the Court are assisted by advisers who are legal specialists appointed by competitive examination. The Court is also assisted by two clerks and some thirty staff members (library, translation, secretarial services, accounting, etc).

The Court's operating budget is settled annually by the national legislative body under a special budgetary law. The Court has complete freedom in the management of its appropriation.

2. Procedure before the Court

Procedure before the Court, governed by the actual terms of the institutional law of 6 January 1989, 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 – obviously enough – as regards referral and the effects of the Court's decision.

In order to avoid any overload, all cases are "screened" under a summary procedure to identify those which are manifestly inadmissible, clearly outside the Court's jurisdiction or manifestly without foundation or purpose (these two clauses concern cases on which the Court has previously ruled).

Unless screening is applied, the *Moniteur Belge* announces that the Court has a case before it. The various legislative assemblies and the federal and regional executive bodies receive separate notification, as do the parties in lower court proceedings which give rise to interlocutory appeals. Written submissions may then be made to the Court within forty-five days and supporting documents lodged as appropriate. Third parties may also state their interest in the case in writing within thirty days of publication of the above-mentioned notice in the *Moniteur Belge*. Thereafter, all parties having made written submissions have a further thirty days to lodge a written reply.

The parties have access, in the registry, to the case file containing all documents and procedural records. The Court is furthermore empowered to initiate extensive investigatory measures for the purpose of obtaining additional particulars, and to examine the parties or other individuals and agencies.

At a public hearing, a reporting judge comments on the substantive implications of the case and the points of law to be settled. A second reporting judge from the other linguistic group may make a supplementary report. All parties having lodged written submissions may also make oral pleadings (in French or Dutch with simultaneous interpretation) both personally and with a lawyer's assistance. A panel of seven judges is convened or, for important cases, the full court of ten or twelve judges. The Court rules by outright majority. Where the full court is convened and the votes are tied, the presiding judge has the casting vote. Deliberations are secret. No provision is made for delivery of concurring or dissenting opinions.

The Court's judgments are drafted and delivered in French, Dutch and often German, and published in all three languages in the *Moniteur Belge* as well as in a separate publication.

The average time taken to process cases (requests for suspension and selective screening procedures excluded) is currently one year. The number of cases is nevertheless increasing rapidly (7 cases in 1985, the first year of operation; 42 cases in 1991; 81 cases in 1992). In 1992, some 70% of cases involved applications for annulment, and 30% applications for preliminary rulings. It was found in approximately one-fifth of cases that the provision in question conflicted with the Court's reference standards.

III. Powers

1. Creation and functions of the Court of Arbitration

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 statutes and regulations ranking as law against the Constitution.

The allocation of separate powers to these political entities prompted the Constituent Assembly in 1980 to set up the Court of Arbitration as a new judicial authority for the settlement of current and potential conflicts

arising from the exercise of legislative power respectively by the State (through legislation), the Communities and Regions (through decrees or, where the Brussels-Capital Region is concerned, through ordinances).

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

The Court, which owes its creation to the primary function of federal mediator described above, was vested by the then Article 107 ter 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) which are enacted in accordance with the Constitution. Provisions which rank as law include both substantive and formal measures adopted by the legislative bodies of the nation, the Communities (decrees) and the Regions (decrees and ordinances).

The jurisdiction of the Court was extended in 1988 to include review of compliance with the then *Articles 6, 6 bis and 17 of the Constitution* (now Articles 10, 11 and 24). This constitutional amendment was effected under the special majority law of 6 January 1989 on the Court of Arbitration, settling virtually all matters of 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 judges, advisers and clerks of the Court.

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

The same 1988 constitutional amendment empowered the special legislator to give the Court of Arbitration wider jurisdiction, which has yet to be conferred. The Court's practice since 1990 has nonetheless been to rely indirectly on other provisions of the Constitution and of international law in performing its function, above all when determining compliance with the principles of equality and non-discrimination.

2. Methods of referral

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 (Governments of the Communities and 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, provided that they justify their interest.

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 occasion 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, at the applicant's request and in special circumstances, can order its suspension. Such suspension, however, is valid for not more than three months.

b. *Interlocutory procedure*

Any court faced with a problem as to whether laws, decrees and ordinances conform to the rules governing allocation of powers between the State, the Communities and the Regions and comply with Articles 10, 11 and 24 of the Constitution is normally required to consult the Court of Arbitration before making its own ruling. If the Court of Arbitration 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.

Breach of constitutional rules by enactments which do not have force of law and originate from any lower authority is sanctioned by the courts themselves, which have also retained oversight of the law with reference to directly applicable international treaty provisions.

IV. Nature and effects of judgments

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

Decisions annulling provisions challenged have absolute binding force upon their publication in the *Moniteur belge*. The provision challenged is deemed never to have existed, but the Court can decide that certain effects thereof may continue to apply. The Court cannot compel the legislator to legislate in any particular way following an annulment. For practical purposes, however, it may enable the legislator to avert a legal vacuum by maintaining the effects of an annulled provision for a certain time after the judgment. Instruments, regulations and court decisions founded on such provisions still stand. In addition to the ordinary remedies which may remain available to the parties concerned, the law provides a six-month deadline within which court decisions or administrative measures founded on a provision subsequently annulled may be rendered unenforceable. Special means of appeal are available to the prosecuting authorities and the interested parties for this purpose.

In cases which raise preliminary points of law, courts delivering judgment in proceedings with the same litigants (ie appeal courts included) must comply with

the opinion given by the Court of Arbitration on the preliminary point of law. Moreover, where the Court finds a violation, a further six-month period commences within which the Council of Ministers or the executive bodies may lodge an application for annulment of the provision in question.

Bibliography

Apart from the large number of articles and records of decisions, the main references dealing principally with the Court of Arbitration which have been published to date are as follows. They are confined to works published after the 1988-89 reform of the Court's functions and the methods of referral.

R. Andersen et al:
La Cour d'arbitrage – Actualité et perspective, 1988, 441 p.;

R. Andersen et al:
Le recours des particuliers devant le juge constitutionnel, Paris, 1991.

F. Delpérée and A. Rasson:
Recueil d'études sur la Cour d'arbitrage (1980 – 1990), Brussels, 1990;

J. Sarot, P. Vandernoot and E. Peremans:
La jurisprudence de la Cour d'arbitrage, Brussels, 1990, 507 p. and second edition, Brussels, 1993, 377 p.;

J. Velaers:
Van Arbitagehof tot Grondwettelijk Hof, Antwerpen – Apeldoorn, 1990, 578 p.;

Bulgaria

Constitutional Court

Introduction

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

I. 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.

II. Composition and organisation

1. Composition

The Constitutional Court of the Republic of Bulgaria is composed of twelve judges. One third of them are elected by the 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 the Members of Parliament.

According to the Constitution, being a Constitutional Court judge is incompatible with being a MP, 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 October 3, 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 – not 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 the 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 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 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.

III. Powers

The powers of the Constitutional Court as defined by the Constitution of the Republic of Bulgaria 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. A large part of the decisions adopted by the Constitutional Court to date are interpretations concerning inter alia the relationship between the church and the state, the question of whether the Speaker of Parliament can be replaced before the end of his term and whether the status of MP is incompatible with holding another office or performing other activities.

The Constitutional Court rules on motions for establishing the unconstitutionality of laws and other legislative acts passed by the 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. Several 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 the 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 as between the Parliament, the President and the Council of Ministers, as well as between organs of local government and the 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 MPs 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 MPs or the incompatibility between the functions of an MP 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 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.

IV. Nature and effects of judgments

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.

Conclusion

The two-year practical experience of the Constitutional Court of the Republic of Bulgaria, albeit relatively short, has confirmed the need for having such an institution, as well as its role for the establishment of stable constitutional order in the country.

Canada

Supreme Court

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 two territories.

The Court hears cases from the ten provincial Courts of Appeal and from the Appeal Division of the Federal Court of Canada. 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 recognized. The Court assures uniformity, consistency and correctness in articulation, development and interpretation of legal principles throughout the Canadian judicial system.

I. Basic texts

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

II. Composition 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 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 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 leave, or permission, will be given by the Court when a case involves a question of public interest, or if it raises an important issue of law or of mixed law and fact, or if the matter is, for any other reason, of such a nature or significance as to warrant 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 approximately 500 applications for leave each year. An oral hearing will be held only when so ordered by the Court. Applications for leave are dealt with by three Justices; and when an oral hearing has been ordered, there is a time limit of 15 minutes for each side, with five minutes for reply.

When leave has been granted, the appellant prepares documents to be submitted to the Court, including the Case on Appeal and a factum stating the issues as well as the arguments to be presented. The respondent and the interveners are also required to file factums. 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 approximately 120 appeals. The first session begins on the fourth Tuesday in January and ends just before Easter; the second begins the fourth Tuesday in April and continues to the end of June, and the third begins the first Tuesday in October and ends just before Christmas. The statutory opening dates may be varied if the prescribed notice is given.

The Court sits only in Ottawa and its sessions are always open to the public. When in session, the Court sits Monday to Friday from 10:15 a.m. to 12:30 p.m. and from 2:00 p.m. to 4:00 p.m. A quorum consists of five members for appeals, but most are heard by a panel of seven or nine Justices.

Except by special leave of the Court, the only persons who may argue a case before the Court, apart from litigants themselves, are lawyers from any Canadian province or territory. As a general rule, the Court allows two hours for the hearing of an appeal. Each party is given one hour to present its arguments. The interveners, if any, are also given the opportunity to be heard. Any party not satisfied with the allotted time may make a special application to the Registrar to obtain more time. During the argument of the appeal, any Justice may question the lawyers.

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. This responsibility includes the appointment and supervision of Court staff, the management of the Library and the Registry, 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 approximately 150 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 private secretary and a court attendant for each Justice ensure the efficient management of his or her office. An Executive Legal Officer is attached to the office of the Chief Justice.

The judicial support functions are provided by three branches: the Legal Affairs Branch, for the Registry and the preparation of hearings, the Library Branch, for research and documentation, and the Reports Branch, for the distribution and publication of Court judgments.

The Finance, Personnel, Administration and Informatics Branches give to the Justices and Court Staff the administrative and operational support necessary to carry out their responsibilities.

III. Powers

The Supreme Court of Canada hears appeals from the provincial or territorial Courts of Appeal and the Federal Court of Appeal.

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 decisions on such matters 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.

IV. Nature and effects of judgments

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.

Bibliography

Balcome, Randall P.H.:
Supreme Court of Canada Decision-Making: The Benchmarks of Rand, Kerwin and Martland, Toronto: Carswell, 1990.

Beatty, David M.:
Talking Heads and the Supremes The Canadian Production of Constitutional Review. Toronto: Carswell. 295 p.

Bernier, Ivan and Lajoie, Andrée:
La Cour suprême du Canada comme agent de changement politique, Ottawa: Commission royale sur l'union économique et les perspectives de développement du Canada, 1986. 225 p. (also published in English).

Bernier, Ivan and Lajoie, Andrée:
The Supreme Court of Canada as an instrument of Social Change, Toronto: University of Toronto Press, 1986, 211 p. (aussi disponible en français).

Beaudoin, Gérald-A.:
The Supreme Court of Canada / La Cour suprême du Canada: Proceedings of the October 1985 Conference / Actes de la Conférence d'octobre 1985, Cowansville, P.Q.: Editions Yvon Blais, 1968, 436 p.

Bushnell, Ian:
The Captive Court: A Study of the Supreme Court of Canada, Montréal: McGill-Queen's University Press, 1992, 604 p.

Crane, Brian, A. and Henry, S. Brown:
Supreme Court of Canada Practice 1994. Scarborough, Ont.: Carswell, 1993, 290 p.

Decary, Robert:
Cour suprême, 1e éd. Montréal: Wilson & Lafleur, 1988, 97 p.

Mohahan, Patrick:
Politics and the Constitution: The Charter, Federalism, and the Supreme Court of Canada, Toronto: Carswell, 1987, 260 p.

Snell, James G. and Vaughan, Frederick:
The Supreme Court of Canada: History of the Institution, Toronto: University of Toronto Press, 1985, 319 p.

"The Supreme Court of Canada" in Peter H. Russel:
The Judiciary in Canada: The Third Branch of Government, Toronto: McGraw-Hill Ryerson, 1987, pp. 333-377.

The Supreme Court Law Review, v.1, 1980 – v.11, 1989; 2d ser. v.1, 1990 – Toronto: Butterworths, 1980.

Swinton, Katherine:
The Supreme Court and Canadian Federalism: The Laskin-Diskson Years, Toronto: Carswell, 1990. 360 p.

Weiler, Paul C.:
In the Last Resort: A Critical Study of the Supreme Court of Canada, Toronto: Carswell Methuen, 1974, 246 p.

Croatia

Constitutional Court

Introduction

1. The Constitutional Court of the Republic of Croatia was established in 1963, by the republic Constitution of that year. The same happened on a federal level and also in six other republics of former Yugoslavia, a federation with a federal constitution and a federal constitutional court and with a constitution and a constitutional court in each of its republics.

The federal constitutional court was to review the conformity of federal laws with the federal constitution, and the constitutional court of the republics were to review the conformity of republican laws with republican constitutions, but the practice concerning this competence was very restricted. The constitutional courts both on federal and republic levels mainly reviewed the constitutionality and legality of vast numbers of regulations which resulted from self-management decision-making, in various types of organisations and local and territorial communities.

The Constitution of 1974 maintained roughly the same position and role of the constitutional court.

2. The Constitutional Court of the Republic of Croatia has been established as a body independent of other courts and their hierarchy. This has remained so in the Constitution of 1990, although today's Constitution has introduced a link between law suits before the courts and the protection of constitutional rights before the Constitutional Court. No case in the protection of constitutional rights begins before the Constitutional Court. The constitutional action may be submitted after legal remedies before other courts have been exhausted. The Constitutional Court's decision by which such a constitutional action is accepted repeals the disputed judgment of the other court, which violates a constitutional right, and enables renewal of procedure.

I. Basic texts

- The Constitution of the Republic of Croatia (published in "Narodne novine", the Republic's official gazette, No. 56/1990)
  Art. 122 – 127, and Art. 105 (impeachment of the president of the Republic);
- The Constitutional Act on the Constitutional Court of the Republic of Croatia (published in "Narodne novine", No. 13/1991);
- The Constitutional Law on Human Rights and Freedoms and the Rights of National and Ethnic Communities or Minorities in the Republic of Croatia (published in "Narodne novine", No. 27/1992, amended text in No. 34/1992)
  Art. 35 and 36;
- Rules of Procedure of the Constitutional Court of Croatia
  (published in "Narodne novine", No. 29/1983; new rules of procedure are in preparation).

II. Composition and organisation

1. Composition

The Court consists of 11 judges (including the president).

The candidates are proposed by one chamber of republic parliament, the chamber of counties, and elected by the other chamber of parliament, the chamber of representatives.

The President is elected by the Court itself (secret majority vote of all judges).

Judges are elected for a term of eight years, the President for a term of four years.

Judges are elected from among persons with a law degree and at least 15 years of practice in the legal profession, "who have achieved outstanding scientific or professional results or excelled in their public activities". There are no age requirements, neither at the time of election, nor concerning retirement.

Before assuming their duty judges take the oath before the President of the Republic.

Judges may not perform any other public or professional duties or be members of any political party.

The immunities of judges are the same as the immunities of representatives in the republic parliament: a judge shall not be called to account for an expressed opinion or vote cast in the Court, nor shall he be detained or called to account criminally without approval thereof by the Court; without this approval the detention is possible only if a judge were caught in the act of committing a criminal offence which carries a penalty of imprisonment of more than five years.

The Court may decide that a judge against whom criminal proceedings are instituted may not perform his duties during proceedings against him; the same applies in procedures certifying the permanent incapacity of a judge to perform his office.

2. Procedure

The Court sits permanently, except in August. The regular sessions are held once a week; extraordinary sessions, public hearings and consultations are held according to needs.

There is no division into chambers.

A case is studied by a judge and an adviser and a written report is presented to the session of the Court, not necessarily with a draft decision. The session may accept the conclusion of the written report and its reasons, may ask for further investigation or ask another judge to state his opposite opinion. The finalised investigation results with the draft decision or ruling are presented to Court's session for voting.

The Court takes decisions and makes other rulings by a majority vote of all judges, unless the Constitution or the Constitutional Act specify otherwise.

The impeachability of the President of the Republic is decided upon by a two-thirds majority vote of all judges.

Claims, proposals and constitutional actions are submitted in written form. The Rules of Procedure specify requirements for each of them. The Rules are more rigid in the case of a claim, which sets the Court's proceeding into motion without the Court's decision to do so. The Constitutional Act lists subjects which may submit a claim. On the other hand everyone has the right to propose that the Court may set into motion its proceedings. There are no restrictive rules concerning the duration of oral expositions at public hearings. Parties do not have to be represented by advocates.

3. Organisation

Apart from the president and judges the Court has a secretary general, legal advisers (8), a documentation service (2 lawyers + secretary), registration (2), secretaries (7), and financial and other services (10).

The Court is financed through the State budget (separate element of budget).

III. Powers

Deciding on the conformity of laws with the Constitution and on the conformity of other regulations with the Constitution and the laws, the Court performs judicial review abstract in character, and never preventive. In exercising constitutional control, the Court is not bound by either claim or proposal to review, since the Court itself may start, upon its own initiative, proceedings in which it will review constitutionality and legality. In other competences, it does not go further than required by the claim or action.

As regards the nature of texts reviewed, since the Constitution was enacted only three years ago there are many questions to be solved in the years to come. Laws are subject to review, but there is no firm standpoint about constitutional laws and other acts of the legislator. Decrees issued by the President of the Republic, and decrees issued by the government are subject to review. What "other regulations" are, the constitutionality and legality of which the Court reviews, is quaestio facti of each case. Generally, regulations are judged by their content. They are regulations if they are general acts, binding an indefinite number of people, enacted by state organs or bodies vested with authority to regulate the matter.

Treaties are not subject to review, neither is the constitution, nor its amendments. Acts which are the result of self-management decision-making are no longer considered to be subject of the Court's review. The same applies to laws and regulations that have ceased to be valid.

The other competences of the Court are: to protect constitutional freedoms and rights, to decide jurisdictional disputes among the legislative, executive and judicial branches of government, to decide on the impeachability of the President of the Republic, to supervise the constitutionality of the programmes and activities of political parties, to supervise the constitutionality and legality of elections and republican referenda and to decide electoral disputes which do not fall within the jurisdiction of other courts.

IV. Nature and effects of judgments

The decision of the Court may repeal an unconstitutional law or refuse the claim to do so. A repealed law or its provisions shall cease to be valid on the day the Court's decision is published, if the Court does not determine another day. The enforcement of individual judgments which were based on repealed laws, or regulations either repealed or annulled, cannot be ordered or carried out, and if enforcement has already begun it shall be terminated.

Regulations other than laws are annulled in cases where the violation of the Constitution or laws is particulary serious and in the interest of legal certainty. The difference is in the period in which the change of individual acts, based on the repealed law or regulation, or the annulled regulation, may be claimed.

As far as the protection of constitutional rights and other competences of the Court is concerned, the claim is accepted, refused or rejected as inadmissible.

Decisions (by which the Court decides on the merits) and more important rulings are published in "Narodne novine", the official gazette of the Republic. Decisions concerning regulations other than laws are also published. The Court publishes its own Bulletin.

Conclusion

To clarify the position and role of the Court many questions are under discussion, even if these questions have not yet arisen in individual cases. One line of studies investigates the nature of acts which may be subject to constitutional control, the other deals

with the constitutional provisions which are to be applied in the control and the content which has been given to such provisions in different times and places, aiming to find lines of activities which will make these sheets of paper, called the Constitution, which were agreed to be the supreme law, not only sheets of paper, but slices of life.

Cyprus

Supreme Court

Introduction

1. Date and context of establishment: 16th August 1960.

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

I. Basic texts

- Article 133 of the Constitution
- The Courts of Justice (Miscellaneous Provisions) Law 1964 (No. 33/64)

II. Composition and organisation

1. Composition
   - number of judges: 13
   - procedures for appointment of judges and president. Appointed by the President of the Republic.
   - terms of office: Retiring age: 68.

Judges are appointed from amongst lawyers of high professional and moral standard. In accordance with the Constitution 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;

   - Division into chambers, structures for conducting investigations and/or giving judgments:

There is no division into chambers but any constitutional matter is tried by 7 judges. Judgment is given in open Court. The judges are not conducting any investigation but they bear argument for parties.

   - 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 orally. They limit their address on the skeleton which they have submitted earlier. There is no time limit.

3. Organisation

The organisation of the Court and recruitment of staff are difficult to describe because they are interwoven

with the Appellate Court, as well as other divisions of the Court like the Admiralty Division, Reporting Section, etc.

III. Powers

- 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.

IV. Nature and effects of judgments

1. Types of decision: Declaratory.

2. Legal effects of decisions: Final and conclusive.

3. Publication – arrangements for access to complete tests: All judgments are published in volumes and complete texts are available.

4. The judgments of the Court (*The Cyprus Law Reports*) are now published in Greek.

Conclusion

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

Denmark

Supreme Court (Højesteret)

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.

I. Basic texts

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

II. Composition 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, the Minister of Justice 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 the Minister of Justice.

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.

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 14 other judges. Like the judges of the lower instances, Supreme Court judges are appointed by the Queen on the recommendation of the Minister of Justice, who is advised by the presidents of the Supreme Court and the two High Courts. The appointments are unlimited in time, 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 divisions composed of five and seven judges respectively. 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.

Normally the Supreme Court requires that a party shall by represented by a lawyer before the 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". This periodical also contains a review section with, for example, comments by Supreme Court judges on recent Supreme Court decisions.

III. Powers

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 (the Danish Parliament) any possibility of having opinions from the courts on the constitutionality of a Bill. Such questions are usually settled by the Folketing 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.

IV. Nature and effects of judgments

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 valve, because as a precedent it means that the application of the Act will be paralysed in all similar future cases.

Estonia

Constitutional Review Court

Introduction

The system of constitutional review was introduced in Estonia by the Constitution adopted by the people of Estonia at the referendum held on 28 June 1992. The establishment and composition of the Constitutional Review Court were already foreseen by the Law on Courts 1991. The Law on Constitutional Review Court Procedure governing the powers and procedure of the Constitutional Review Court was adopted on 5 May 1993. The first constitutional review case was heard on 22 June 1993.

According to the Constitution the courts of Estonia are organized on three levels. County and city courts, as well as administrative courts are the courts of first instance. District courts are the courts of second instance exercising intermediate appellate jurisdiction. The National Court is the final court of appeal exercising also constitutional review.

I. Basic texts

The articles of the Constitution concerning the National Court, its composition and powers, are Articles 4, 83, 107 and 146-153.

The Law on Courts was adopted on the 23 rd of October in 1991 and amendments thereto date from 16 December 1992 and from 4 May 1993. Since the National Court is the final court of appeal, all statutes governing final appellate jurisdiction are relevant in respect of its powers, namely the Law on Civil Procedure of 15 September 1993 with amendment of 16 December 1993, the Code of Criminal Procedure of 6 January 1961 with several amendments, the Law on Appellate Criminal Procedure of 15 September 1993, the Law on Administrative Crimes of 8 July 1992 with amendments, and the Law on Administrative Court Procedure of 15 September 1993.

II. Composition and organisation

1. Composition

Under the Law on Courts the National Court is divided into panels. Constitutional issues are settled by the constitutional review panel or, in special instances, by the general assembly of the National Court consisting of all the National Court judges. The constitutional review panel of the National Court consists of five judges. The head of the panel is the Chairman of the National Court who also presides over the panel. The

members of the panel are elected by the general assembly of the National Court for a term of five years (re-eligible for another term) on proposal by the Chairman of the National Court from members of the civil, criminal and administrative panel (the other panels of the National Court) – at least one from each panel. The Chairman of the National Court is appointed by the National Assembly (Parliament of Estonia) on proposal by the President of the Republic. The other sixteen judges of the National Court are appointed by the National Assembly on proposal by the Chairman of the National Court.

According to the Law on Status of Judges 1991 the National Court judges must be legally qualified and at least 30 years of age. At present the members of the constitutional review panel are between 38-43 years; one of them is a professor of constitutional law at the University of Tartu and two of them have an academic degree of Candidate of Law. As established by the Law judges are prohibited from being employed outside the judiciary, with the exception of pedagogy and scientific research. Judges are also prohibited from being a member of the National Assembly or of a local government representative body, from belonging to the leadership of a political party, political movement or group and from participating in any other activity which would violate his or her oath of office, as well as from being an entrepreneur or director of a company for profit. If by the date of swearing in a judge has not met these requirements his or her appointment will be considered void.

Judges are independent and subject only to the law. The National Court judges may be charged with a criminal offence or be placed under arrest only on proposal by the Legal Chancellor and with the consent of the majority of the members of the National Assembly. The consent to bring criminal charges against a judge suspends his or her authority. Judges may be recalled from office only by a court decision.

2. Procedure

The rules governing Constitutional Review Court procedure are established by the Law on Constitutional Review Court Procedure and by the Rules of the National Court adopted by the general assembly of the National Court under powers conferred by the Law. The procedure is oral and, as a rule, cases are heard in public. In the constitutional review panel the minimum number of judges to hear a case is three and a majority decision is sufficient. When at least one judge on the panel has a dissenting opinion a case may be referred to the general assembly. In the general assembly eleven judges constitute a quorum and a majority decision is sufficient.

The National Court tries the case and makes its decision within two months following the date a petition has been duly filed with the National Court. This term may be extended by the general assembly of the National Court. In case the constitutional issue is settled upon petition by the President of the Republic the decision must be made within a month and this term may not be extended.

Parties to the case are a petitioner or his or her representative and a representative of the government agency whose statute or other legal act is under dispute. Parties will be informed of the date and place of hearing but their absence is not a reason for the postponement of the trial. If a party whose appearance before the Court has been considered obligatory fails to appear the Court may, however, postpone the trial.

III. Powers

According to the Law on Constitutional Review Court Procedure, the National Court rules on the constitutionality (1) of statutes adopted by the National Assembly and which have entered into force, (2) of statutes adopted by the National Assembly and which have not been promulgated by the President of the Republic and thus have not entered into force, (3) of decrees issued by the President of the Republic and which have entered into force, and (4) of international treaties concluded by the Republic of Estonia but which have not entered into force; the National Court decides also (5) whether resolutions passed by the National Assembly and which have entered into force, and (6) whether legislative acts adopted by the national executive or by the local governments and which have entered into force are in accordance with the Constitution and ordinary laws.

Constitutional questions reach the National Court by way of a petition from the President of the Republic or from the Legal Chancellor, or through references by the courts engaged in deciding cases. The President of the Republic is authorized to exercise his right of petition in respect of statutes adopted by the National Assembly before they are promulgated (in case the President has exercised his suspensive veto over a statute by refusing its promulgation and turning it back to the National Assembly, and the National Assembly re-adopts the statute without amendments). The Legal Chancellor is authorized to petition in respect of statutes adopted by the National Assembly and which have entered into force, of legislative acts adopted by the national executive or by the local governments, and of international treaties. If an ordinary court in trying a case concludes that the applicable statute or some other legal act conflicts with the provisions of the Constitution, it will declare such statute or other legal act to be unconstitutional and refuses to apply it in deciding a case. When the court has declared a statute or other legal act to be unconstitutional and has refused to apply it in deciding a case it must refer to the National Court and to the Legal Chancellor by which constitutional review proceedings in the National Court commence. The National Court rules on constitutionality only to the extent requested by petition or reference.

IV. Nature and effects of judgments

The National Court has the power (1) to reject the petition or reference, or (2) to admit the petition or reference and (2.1) to invalidate a statute or other legal act which has entered into force, in whole or in part, or (2.2) to declare a statute or an international treaty not entered into force to be unconstitutional. The National Court pronouncements 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 National Court pronouncements on constitutionality are published in the *Riigi Teataja* (official journal of Estonia).

Conclusion

The system of constitutional review is a new institution in the legal system of Estonia. Although only six constitutional review cases have been tried up to now, the National Court has obtained a respectful position as the guardian of the Constitution.

Finland

Supreme Court

Introduction

Finland was a part of the Kingdom of Sweden until 1809 when Finland was conquered by Russia and became an autonomous country (Grand Duchy) under the Russian Empire. In Sweden a Supreme Court had been established in 1789. The court was thus also the Supreme Court in Finland. Many distinguished lawyers born and educated in Finland served as members of the court.

After the separation from Sweden the Czar of Russia, Alexander I, promised at the meeting of the Diet in Porvoo (Borgå) in 1809 to uphold the laws of Sweden in Finland as they were at the time of the separation. The tasks of the supreme governmental authority were conferred on a new body, the State Council, later called the Senate, consisting of two departments, the administrative and the judicial.

The Judicial Department was entrusted, inter alia, with the tasks of a supreme adjudicating body, and thus functioned as the Supreme Court of Finland.

The members of the Judicial Department, called senators, were appointed for a fixed period of time, but their position as judges and their independence was at least partly safeguarded by their right to return to their former office or – from 1858 on – to receive a pension if not re-appointed. In most cases they were re-appointed; only during the time of oppression at the beginning of this century were senators replaced and appointed on political grounds. Nevertheless, the members of the Judicial Department could not be regarded as independent judges in the proper sense. So, in the years to come, there were many proposals to the effect that a separate and independent Supreme Court should be created. However, all such proposals failed due to the veto of the Russian rulers.

Finland gained independence in 1917. Shortly thereafter the Supreme Court was established by an Act of Parliament on July 22, 1918. The Supreme Administrative Court was established at the same time.

I. Basic texts

- The Constitution 17.7.1919 (Nr 94) § 2 subparagraph 4; § 53-54, § 58
- The Supreme Court Act 22.7.1918 (Nr 74).

II. Composition and organisation

1. Composition

The Supreme Court consists of a President (Chief Justice) and no fewer than 15 members, called oikeusneuvos/ justitieråd (counsellors of law, justices). At present (1993) the number is 20. The president and the justices are, as mentioned before, appointed by the President of the Republic, from among persons "just and righteous, skilled and experienced in the administration of justice" and having a degree in law.

The justices are appointed for life, but there is a mandatory age of retirement, set at 67.

The justices are appointed from a variety of positions. Among them there are judges from the lower courts, professors of law, advocates, "referendars" of merit from within the Court, and persons who have held positions in the law-drafting department in the Ministry of Justice. The age of the justices at the time of their appointment has been around fifty, varying from forty to fifty-five.

Even if the justices may be highly specialised at the time of their appointment, on the bench they do not specialise. There are no special chambers for certain types of cases (e.g. criminal, civil, etc.). Each member of the Court deals with a variety of cases.

Finally it should be mentioned that when court-martial cases are tried on their merits, two high-ranking officers appointed for a period of two years take part as members of the Court. These cases are very rare in the Supreme Court.

2. Procedure

In cases brought from the Courts of Appeal (civil and criminal cases) the right to have the case adjudicated on its merits by the Supreme Court is dependent on a leave to appeal. Applications for leave to appeal are decided upon by a panel of three justices. Leave can be granted only "if it is important with regard to the application of the law in other similar cases (precedents) or because of a grave error in the lower courts or if there is any other important reason for granting leave to appeal." – In 1992 the Supreme Court decided upon 2 654 applications for leave to appeal. Of those, 869 were applications in criminal matters and 1 785 in civil matters respectively. Leave to appeal was granted in 9.2 % of the civil cases, and in 7.9 % of the criminal cases.

When leave to appeal is granted the case is allotted to a chamber of five justices, in certain important cases to a chamber of eleven justices or, when the decision of a chamber runs counter to a former decision by the Supreme Court, to the plenary Court.

The case, either when an application for leave to appeal is being considered or when the case is adjudicated on its merits, is prepared before presentation to the deciding chamber by a legal assessor of the court, called a referendar, holding the same status as a judge.

At the sessions of the Court the cases are discussed and decided upon on the basis of the documents submitted by the parties and the briefs prepared by the reporting referendar. Thus, the proceedings in the Supreme Court are mainly in writing.

According to law the Supreme Court decides on both questions of law and questions of fact. In other words the Supreme Court is not bound by the findings of fact in the lower court(s) but is free to judge the facts of the case de novo. In practice, however, the Court shows great restraint when reconsidering the evidence. This holds true especially in cases where the findings of fact depend on an evaluation of oral testimony, and the lower courts have unanimously concurred in the findings of fact.

The Court may at its discretion hear the parties and witnesses in person, but this procedure is resorted to rather seldom. In 1992, for example, the parties were heard orally in only three cases. Due to a reform of the procedure in the lower courts and to precedents of the European Court of Human Rights, oral hearings will be much more frequent in the years to come.

III. Powers

The primary task of the Supreme Court is to review on appeal decisions of the six Courts of Appeal in ordinary civil and criminal matters. In 1992, 2 654 cases on appeal from the Courts of Appeal were taken to the Supreme Court.

The Supreme Court is also the court of last resort in certain cases decided upon by the Land Courts (cases concerning roads and parcelling of land, 346 cases in 1992), the Insurance Court (cases concerning social insurance, 605 cases in 1992) and the Water Rights Appeal Court (17 cases in 1992).

The Court has no competence in purely administrative matters, e.g. cases concerning taxes and complaints against decisions taken by the municipal councils. In those cases the Supreme Administrative Court is the court of last resort. The Supreme Court is not vested with the power to review the constitutionality of laws enacted by Parliament.

The Supreme Court examines applications for the reopening of proceedings in cases finally decided by the Supreme Court itself or by the lower courts.

The Supreme Court gives an opinion to the President of the Republic concerning petitions for pardon.

The Supreme Court also gives an opinion to the Government as to the lawfulness of a request for extradition for crime. If the Court finds that extradition

would be contrary to the law regulating extradition, the Government is bound to refuse the request for extradition.

Outside the field of its judicial functions proper the Supreme Court is vested with certain tasks in the legislative and the administrative field, a heritage from the time under Sweden and Russia and an exception to the principle of the separation of state powers. Without going into detail, a few of those tasks may be mentioned.

The Supreme Court plays a part in the appointment of judges. The appointment of justices to the Supreme Court takes place on the recommendation of the Court itself. The recommendation is not binding on the President of the Republic, but in most cases he has followed the recommendation.

The Supreme Court is also involved in the appointment of judges to the Courts of Appeal and the inferior courts. Previously, the Supreme Court itself appointed most of the judges in the inferior courts and made a recommendation as to the appointment of justices in the Courts of Appeal to the President of the Republic. On 1 December 1993, the power to appoint judges in the inferior courts was conferred on the President of the Republic and now takes place on recommendation by the Supreme Court.

When matters of an administrative nature, such as the appointment of judges in the lower courts, are under consideration in the Supreme Court, the Minister of Justice is present and takes part in the session en banc of the Supreme Court as a voting member, and the matter is presented by a high-ranking official from the Ministry of Justice. This practice is – as already noted – a clear and perhaps doubtful exception to the principle of the separation of state powers. But in practice the system has worked well and has not been subject to any criticism.

According to the Constitution the Government may ask for an opinion of the Supreme Court concerning proposed new legislation before a Bill is submitted to Parliament. The President of the Republic may likewise obtain the opinion of the Court concerning laws enacted by Parliament before he gives his assent to the law. On very few occasions only has the opinion of the Supreme Court been asked for in these matters.

The Aaland Islands (Ahvenanmaa/Åland) have had a rather extensive form of self-government since the beginning of the 1920s. Aaland has, inter alia, the right to enact its own legislation in certain specified fields. Its legislative competence has been increased as of 1 January 1993. The laws enacted by the local legislative Assembly of Aaland (Lagtinget) are to be confirmed by the President of the Republic. If he finds such a law to be in conflict with the Law of Self-Government for Aaland, he can withhold his assent and revoke the law, but only after having obtained an opinion of the Supreme Court.

IV. Nature and effects of judgments

1. Types of decision

The Supreme Court is, as already mentioned, an Appellate Court, not a Court of Cassation. When adjudicating a case on its merits the Supreme Court may:

a. accept and confirm the decision of the Court of Appeal;

b. reverse the decision of the Court of Appeal and

i. make its own decision both on questions of law and questions of fact (rarely),

ii. refer the case back to the Court of Appeal (or the court of first instance) for consideration de novo, mostly for procedural reasons;

c. change (amend) the decision of the Court of Appeal, for instance as to the reasons given, the amounts awarded etc.

2. Legal effects of decisions

a. The "immediate" effects of the decisions of the Supreme Court do not differ from those of the decisions of courts in general (enforcement and recognition); the only difference is, self-evidently, that the decisions are final.

b. The decisions of the Supreme Court serve as precedents for the lower courts (and other authorities), and to a certain extent for the Supreme Court itself. The precedents are not binding in a legal sense, but rather "strongly guiding". When the Supreme Court declares a decree or any other regulation promulgated by the administration (the Government) to be in conflict with the Constitution or a law enacted by Parliament, the decision means the non-applicability of the decree or regulation in question.

3. Publication – arrangements for access to complete texts

All decisions are, of course, public and available to everybody. Those regarded as having the value of precedent are disseminated and available in a number of ways. They are published in the Finnish-language data base FKKO and in the Swedish-language data base FHDR of the Finlex information system maintained by the Ministry of Justice. The Supreme Court itself publishes an annual report of its precedents.

Conclusion

The present system works well. The workload is heavy, but there is no backlog. The average time for disposing of the cases adjudicated on their merits is about 6 months.

There is a proposal according to which applications for leave to appeal could be decided upon by a single judge instead of three justices. The proposal, if realised, would give much more time to the court to concentrate on cases adjudicated on their merits.

France

Constitutional Council

Introduction

The Constitutional Council was created by the Constitution of the Fifth Republic on 4 October 1958. It is a recent institution, without any institutional precedent.

The Constitutional Council is not situated at the summit of a hierarchy of judicial or administrative courts. In that sense it is not a Supreme Court.

I. Basic texts

Constitution: Title VII, Articles 56 to 63

- Ordinance no. 58-1067 of 7 November 1958 incorporating an institutional act on the Constitutional Council, amended by *Ordinance no. 59-223* of 4 February 1959 and by Institutional Act no. 74-1101 of 26 December 1974 (Official Journal of 9 November 1958, 7 February 1959 and 27 December 1974);
- Decree no. 59-1292 of 13 November 1959 on the obligations of members of the Constitutional Council (Official Journal, 15 November 1959);
- Decree no. 59-1293 of 13 November 1959 on the organisation of the General Secretariat of the Constitutional Council;
- Referendum Act no. 62-1292 of 6 November 1962 on the election of the President of the Republic by direct universal suffrage, amended by Institutional Acts no. 76-528 of 18 June 1976, no. 83-1096 of 20 December 1983, nos. 88-35 and 88-36 of 13 January 1988, no. 88-226 of 11 March 1988 and no. 90-393 of 10 May 1990 (Official Journal, 7 November 1962, 19 June 1976, 21 December 1983, 15 January 1988, 12 March 1988 and 11 May 1990);
- The Electoral Code: Articles L.O. 136, L.O. 136-1, L.O. 151, L.O. 152, L.O. 296 and L.O. 297;
- Regulations governing the procedure to be followed before the Constitutional Council in disputes concerning the election of deputies and senators (Official Journal, 31 May 1959), amended by the decisions of the Constitutional Council of 5 March 1986 (Official Journal, 6 March 1986), 24 November 1987 (Official Journal, 26 November 1987) and 9 July 1991 (Official Journal of 12 July 1991);
- Regulation governing the procedure to be followed before the Constitutional Court in

complaints concerning the conduct of referendums (Constitutional Council decision of 5 October 1988; Official Journal, 6 October 1988).

II. Composition and organisation

1. Composition

The Constitutional Council is composed of nine members, one-third of whom are replaced every three years. 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). Former Presidents of the Republic are de jure life members of the Constitutional Council, provided they do not occupy a post incompatible with the mandate of Council member.

The President of the Constitutional Council is appointed by the President of the Republic from among the members he nominates.

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 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 replacement has not occupied the post for more than three years.

The members take an oath before the President of the Republic.

There are no age or professional qualifications for membership of the Constitutional Council. The office is incompatible with that of member of the government, the parliament, the European Parliament, or the Economic and Social Council. 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 permanent court whose sessions are organised as and when applications are referred to it. It only sits and passes judgment in plenary session. Its deliberations are subject to a quorum rule which requires the actual presence of seven judges.

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 exclusively written inquisitorial and, except where referral is mandatory, both parties are represented. There is no provision for dissenting opinions. Neither the session or plenary sitting discussions nor the votes are published.

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 and computer service assists in legal search operations. The secretariat also comprises a financial service and a recently created registry. The remainder of the staff are responsible for reception, secretarial, catering and transport services.

The Constitutional Council is financialy autonomous. The President of the Council establishes its budget, the amount of which is included in the Finance Bill under the heading of common expenditure.

III. Powers

The powers of the Constitutional Council, which reflect its specific area of jurisdiction, can be divided into two categories:

1. Judicial authority, covering two types of disputes:
   a. Normative and abstract proceedings which are optional in the case of ordinary laws or international agreements and mandatory for institutional acts and the rules of procedure of the parliamentary assemblies. This supervision is exercised after Parliament has voted but before promulgation of the law, ratification or approval of an international agreement or entry into force of the rules of procedure of the assemblies. Optional referral can take place on the initiative either of a political authority (President of the Republic, Prime Minister, President of the National Assembly or of the Senate) or of 60 deputies or 60 senators.
   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 candidates for parliamentary and presidential elections, the Council adjudicates. As of 31 December 1993 the Council had delivered 1,633 decisions on electoral questions as against 516 decisions on legislation.

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.

Moreover, the Government consults the Council on texts concerning the organisation of voting in presidential elections and referendums.

IV. Nature and effects of judgments

All decisions are reached by the same formal procedure, comprising approval of the applicable texts and procedural stages, 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. Finally, the 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 serial number and precede the date.

A distinction is made between:

- decisions on electoral disputes concerning parliamentary elections, which bear the initials of the chambers AN (National Assembly) or S (Senate) and a reference indicating the constituency or département;
- decisions on the apportionment of powers between the legislative and regulatory authorities bear the letters L (legislative review) or FNR (fin de non recevoir – objection to admissibility; ie examination in the course of drawing up the act);
- finally, decisions concerning the constitutionality of rules are classed DC (control of conformity).

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.

Decisions on conformity lead to the total or partial censure of the law but not its annulment, since they are handed down before the legal act which is required for implementation (promulgation, ratification).

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 decisions of the Constitutional Council are notified to the parties and published, sometimes with the text of the referral from Parliament, in the *Official Journal*.

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), an analytical table and, since 1990, an English translation.

Conclusion

1. Results

In the three months from January to March 1994, the Constitutional Council delivered as many decisions on the constitutional verification of rules as in the 25 years from 1958 to 1974!

This enormous increase is chiefly due to the combination of two factors:

- first of all, case law: in 1971, when giving judgment on the law governing associations, the Council incorporated in the rules of reference the text of the preamble to the Constitution and, incidentally, that of the 1946 Constitution and the 1789 Declaration of the Rights of Man and the Citizen. This development in case law establishes the role of the Council as the guarantor of rights and freedoms.
- secondly, constitutional factors: the 1974 revision extended the right of referral, hitherto reserved exclusively to the Presidents of the Assemblies, to a minority of parliamentarians.

2. Projects

Several proposals for reform have been put forward from time to time. These concern:

- the introduction of in concreto review of laws at the instigation of members of the public;
- the use of oral procedure in full jurisdiction procedures;
- the procedures for appointing members.

Bibliography

Avril, P./Gicquel, J:
Le Conseil constitutionnel Paris, Montchrestien, 1993.

Beardsley, J.E:
Constitutional review in France – The supreme Court review 1975.

Favoreu, L./Philip, L:
Les Grandes décisions du Conseil constitutionnel, SIREY, 1993.

Genevois, B:
La jurisprudence du Conseil constitutionnel, S.T.H. 1988.

Morton, F.L:
Juridical review in France: a comparative analysis American Journal of Comparative Law n° 136 – 1988.

Rousseau, D:
Droit du contentieux constitutionnel, Paris, Montchrestien, 1992.

Roussillon, H:
Le Conseil constitutionnel, Paris, Dalloz, 1993.

Germany

Federal Constitutional Court

Introduction

1. Date and context of establishment

The Federal Constitutional Court (Bundesverfassungsgericht) is the first organ of this kind in German constitutional history. The erosion of the constitution during the Third Reich proved the necessity for a special organ to protect human rights and the federal structure as laid down in the Constitution. Based on the fundamental law of 1949 and the statute on the Federal Constitutional Court of 1951, the Federal Constitutional Court was established in 1951.

2. Position in the hierarchy of courts

The claim before the Federal Constitutional Court does not form part of the so-called ordinary remedies. The court is not conceived as a judiciary organ for "super-appeals". It does not review the application of ordinary law, but it has only to ensure that due respect is paid to the Constitution. The decisions of the Federal Constitutional Court, however, bind all State organs and among them the other courts (§ 31).[1]

I. Basic texts

Arts. 93, 94, 100, 18, 21, 41, 61, 98, 99, 126 and 115 g of the fundamental law; Statute on the Federal Constitutional Court of 1951, last revision in 1993; Standing orders of 1986, last revision in 1989.

II. Composition and organisation

1. Composition

The Federal Constitutional Court is composed of 16 judges, § 16.

Half of the judges are elected by the Bundestag (federal parliament) and half by the Bundesrat (second legislative organ, composed of representatives of the federal States), § 5. The President and the Vice-President are elected alternately by the Bundestag and the Bundesrat, § 9.

The term of office is 12 years.

A judge of the Federal Constitutional Court must have completed the 40th year of his life. He must have a legal

1. *"§" refers to the statute on the Federal Constitutional Court, "Art." to the fundamental law.*

formation which qualifies him to exercise the functions of a judge according to the general statute on German judges. Each chamber must be composed of three judges who have served in one of the highest federal courts of justice, § 2.

A judge has to take an oath on the fundamental law, § 11. The mandate of a judge of the Federal Constitutional Court is incompatible with all other professional activities but those of a lecturer of law at a German university, § 3. Judges do not enjoy immunities.

A judge cannot be suspended; he is dismissed on his demand, § 12, or on demand of the Federal Constitutional Court in the case of a permanent incapability to fulfil his duties or if he has committed a dishonest act, if he has grossly violated his duties or if he has been sentenced to imprisonment for more than six months, § 106.

2. Procedure

The Federal Constitutional Court is a permanent court. There are no special sessions. In general, each chamber (Senat) meets twice a month for two to three days in order to deliberate the judgments.

The Federal Constitutional Court is divided into two chambers (Senate), each composed of eight judges, § 2; each chamber has a chairman, one is the President of the Constitutional Court, the other the Vice-President. The chambers are independent of each other. A plenary decision will only be taken if one chamber wants to deviate from a decision of the other chamber, § 16.

Each chamber has three sections (Kammern). These sections are competent to deny an individual constitutional claim (Verfassungsbeschwerde) if it has no fundamental constitutional importance and does not require a decision in order to protect fundamental rights, §§ 93 a and b. A section may also grant such a claim if there are clear grounds for doing so and the Federal Constitutional Court has already taken a decision on the constitutional question at stake, § 93 c. The decisions of a section must be unanimous.

The decisions of a chamber are generally taken by a simple majority. If the chamber is divided by four to four votes, the case is rejected.

In general, the procedure is written, § 23. The statute on the Federal Constitutional Court, however, provides for oral pleadings in all proceedings, unless the parties expressly waive them, § 25. The complainant of an individual constitutional complaint cannot require an oral pleading, § 94.

An individual constitutional complaint must be brought within one month after the impugned decision of a public authority or a court has been taken, § 93: if the complaint is directed against a statute, the same limit is one year. In case of a conflict between federal organs or between the Bund and the Länder a party has to initiate proceedings within six months, §§ 64, 69. In other cases no time-limit is established. An individual may bring an individual claim only after exhausting all other remedies, § 90.

The Statue on the Federal Constitutional Court does not require the representation of a party by a lawyer, unless oral pleadings are held. A party, however, can be represented by a lawyer or by a university professor of law.

The proceeding is free of charge. Only in case of an abuse of the constitutional jurisdiction may a party be charged with a fee up to 5000,- DM, § 34.

3. Organisation

In addition to the judges, the Federal Constitutional Court has a staff of almost 200 people.

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

The President represents the court and is responsible for the administration; he has no special powers as regards the other judges.

In practice, the President entrusts the Secretary General (Direktor beim Bundesverfassungsgericht) with the administration, §§ 14, 15 of the standing orders.

There is a department (Allgemeines Register) which is in charge of informing a party if there are formal deficits in a claim, §§ 60 ss. of the standing orders.

Each judge has three law clerks – in general judges from the ordinary – civil, criminal, administrative, social, financial labour – jurisdiction, whom he is free to choose. Normally they work at the Constitutional Court for three years.

The cases are distributed on the basis of their subject matter between the two chambers in accordance with the statute on the Federal Constitutional Court and supplementary decisions by the plenary chamber. These decisions are not taken for each case but only in respect of categories and with effect for the following year. The distribution of cases within a chamber and the determination of the reporter is done on the basis of a schedule adopted before the beginning of each year.

III. Powers

The Federal Constitutional Court disposes of the powers enumerated in art. 93 of the Fundamental Law § 13 of the Statute on the Federal Constitutional Court. It cannot act on its own, but only on the request of a State organ or an individual. § 13 of the Statute on the Federal Constitutional Court is worded as follows:

"The Federal Constitutional Court shall decide in the cases determined by the Basic Law, to wit:

- on the forfeiture of basic rights (Article 18 of the Basic Law)
- on the unconstitutionality of parties (Article 21 (2) of the Basic Law)
- on complaints against decisions of the Bundestag relating to the validity of an election or to the acquisition or loss of a deputy's seat in the Bundestag (Article 41 (2) of the Basic Law),
- on the impeachment of the Federal President by the Bundestag or the Bundesrat (Article 61 of the Basic Law)
- on the interpretation of the Basic Law in the event of disputes concerning the extent of the rights and duties of a highest federal organ or of other parties concerned who have been vested with rights of their own by the Basic Law of by rules of procedure of a highest federal organ (Article 93 (1) (1) of the Basic Law)
- in case of differences of opinion or doubts on the formal and material compatibility of federal law or Land law with the Basic Law, or on the compatibility of Land law with other federal law, at the request of the Federal Government, of a Land government, or of one third of the Bundestag members (Article 93 (1) (2) of the Basic Law)
- in case of differences of opinion on the rights and duties of the Federation and the Länder particularly in the execution of federal law by the Länder and in the exercise of federal supervision (Article 93 (1) (3) and Article 84 (4), second sentence, of the Basic Law)
- on other disputes involving public law, between the Federation and the Länder, between different Länder or within a Land, unless recourse to another court exists (Article 93 (1) (4) of the Basic Law)
- on complaints of unconstitutionality (Article 93 (1) (4a) and (4b) of the Basic Law)
- on the impeachment of federal and Land judges (Article 98 (2) and (5) of the Basic Law)
- on constitutional disputes within a land if such decision is assigned to the Federal Constitutional Court by Land legislation (Article 99 of the Basic Law)
- on the compatibility of a federal or Land law with the Basic Law or the compatibility of a Land law or other Land right with a federal law, when such decision is requested by a court (Article 100 (1) of the Basic Law)
- in case of doubt whether a rule of public international law is an integral part of federal law and whether such rule creates rights and duties for the individual, when such decision is requested by a court (Article 100 (2) of the Basic Law)
- if the constitutional court of a Land, in interpreting the Basic Law, intends to deviate from a decision of the Federal Constitutional Court ore of the constitutional court of another Land, when such decision is requested by that constitutional court (Article 100 (3) of the Basic Law)
- in case of differences of opinion on the continuance of law as federal law (Article 126 of the Basic Law)
- in such other cases as are assigned to it by federal legislation (Article 93 (2) of the Basic Law)"

The Federal Constitutional Court may control State acts of whatever nature (treaties, constitutional laws, institutional acts, regulatory texts, court decisions).

IV. Nature and effects of judgments

1. Types of decision

a. The Federal Constitutional Court may declare a norm null and void with retroactive effect. It may also declare it incompatible with the Constitution. In this case, the norm can be still applied until its abrogation by the legislator. The Constitutional Court may set a time-limit for the revision of the norm, §§ 31, 79.

b. The Federal Constitutional Court may reverse a decision of a court and send it back to an ordinary court, 95. In general, the Constitutional Court must not take a decision in the place of the ordinary court.

c. If it is urgently needed to avert serious detriment,to ward off imminent force or for any other important reason, the Constitutional Court may take a temporary injunction, § 32.

2. Legal effects of decisions

The decisions of the Federal Constitutional Court shall be binding upon federal and Land constitutional organs as well as all courts and authorities. If a norm is declared unconstitutional, the decision of the Court has legal force. The norm is null and void ex tunc, § 31. Administrative acts or ordinary judgments taken on the basis of a norm later declared unconstitutional remain in force with the exception of the act which was the object of a case before the Constitutional Court. New proceedings may be instituted in accordance with the provisions of the Code of Criminal Procedure against a final conviction based on a rule

which has been declared incompatible with the Basic Law, or declared null and void, § 79.

The important decisions of the Federal Constitutional Court including all of the chambers are published in the digest: "Entscheidungen des Bundesverfassungsgerichts". These decisions and the most important of the sections are released to the press and are published in law reviews, f.e. in the Europäische Grundrechtezeitschrift. Interested organs – like foreign constitutional courts – may obtain these decisions on demand or regularly. These judgments are also put into the data bank JURIS.

Conclusion

The constitutional jurisdiction is broadly accepted in Germany – by political organs as well as by individuals. A reform of this jurisdiction is not envisaged.

Bibliography

Michel Fromont /Alfred Rieg:
Introduction au droit allemand, vol. 1: Fondements, Paris, 1977.

Jean-Claude Béguin:
Le contrôle de la constitutionnalité des lois en République Fédérale d'Allemagne, 1982.

Donald Paul Kommers:
The Constitutional Jurisprudence of the Federal Republic of Germany, Durham 1981.

Wolfgang Zeidler:
The Federal Constitutional Court of the Federal Republic of Germany: decisions on the constitutionality of legal norms, Notre Dame Law Review, vol. 62, 1982, p. 501.

Wolfgang Zeidler:
The complaint of unconstitutionality under German law as a remedy available to individual persons, in: Protection of human rights in Europe 1982.

Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany vol. 1 – International Law and the Law of the European Communities 1952-1989, published by the members of Court, Karlsruhe 1992.

Hungary

Constitutional Court

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 No. 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 1st of January, 1990. Five additional members were elected by the Parliament in mid-1990.

2. The Constitutional Court is an independent Court that is not part of the hierarchy of the ordinary courts.

I. Basic texts

- Chapter Four, Article 32/A of the Constitution
- Act No. XXXII of 1989 on the Constitutional Court.

II. Composition and organisation

1. Composition

The number of judges – as determined by the Constitution – is fifteen. Currently, the Court consists of nine judges (the tenth former member resigned in November 1993 because he was elected to the World Court in The Hague). Five additional members will be elected during the fifth year subsequent to the commencement of the Constitutional Court's function on January 1, 1990.

All members of the Constitutional Court are elected by Parliament. An *ad hoc* nominations committee composed of one representative of each parliamentary party nominates candidates for election. The candidates are heard by the Legal Committee of the Parliament. The members of the Constitutional Court are elected by the votes of two thirds of all Members of Parliament. The President of the Court is elected by the plenary session of the Court itself.

The constitutional judges are elected for nine years tenure, and can be re-elected once.

The judges must be lawyers, having graduated from a School of Law. The minimum age limit is 46, while the maximum age limit is 71.

The members of the Court take an oath before the Parliament pledging the absolute observance of the

Constitution and conscientious exercise of their duties. The members of the Constitutional Court shall not be members of any party and shall not carry out any political activities beside those arising from the sphere of authority of the Constitutional Court.

No person who, in the course of four years preceding the election, has been a member of the Government, or an employee of a party, or who has held a leading office in public administration, shall be eligible to become a member of the Constitutional Court. A member of the Constitutional Court shall neither be a Member of Parliament, Member of local government, nor hold office in any state organ. Except for a scientific, educational, literary or artistic activity, a member of the Constitutional Court shall pursue no occupation for which he receives remuneration.

A member of the Constitutional Court shall enjoy an immunity identical to that of the Members of Parliament. Without the consent of the plenary Constitutional Court, a member of the Constitutional Court cannot be arrested or prosecuted. 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 his/her opinion given in the course of exercising his/her duties.

A member of the Constitutional Court shall, if there emerges any cause of incompatibility, put an end thereto. Failure to do so within ten days shall result in his 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 attributable to him/her, becomes unable to meet his duties.

The mandate may be discontinued by exclusion if the member of the Constitutional Court, for a reason attributable to him/her, does not meet his/her duties, or if he/she commits a criminal offence, or becomes unworthy of the office in another way, and therefore, is excluded by the Plenary Court.

2. Procedure

The Constitutional Court proceeds by plenary session or by chambers composed of three members. The chambers proceed in cases of repressive norm control and in the examination of conformity of legal rules with international treaties – except if an Act of Parliament is to be adjudicated, or if it is a case of constitutional complaint, unconstitutional omission of legislation, or conflict of competences that come under the plenary session's jurisdiction.

Oral hearings are not made obligatory by law; it depends on the decision of the Court. The ten-member Court has a quorum if eight members are present. In the panels for the quorum the presence of all the three members is required.

3. Organisation

Detailed rules on the organisation and proceedings of the Constitutional Court should be defined by its Rules that are to be enacted by the Parliament on the proposal of the Court. This law has not been passed yet, so the Court proceeds by its provisional Rules.

At present all judges have a staff of their own consisting of two advisers and a law clerk. The administrative and preparatory functions are carried out by the office of the General Secretary of the Court (the General Secretary is not a member of the Court, but holds an administrative position).

The budget of the Court is defined by the Parliament on the proposal of the Court.

There is no time limit for decision by the Constitutional Court.

III. Powers

The jurisdiction of the Hungarian Constitutional Court includes:

1. Preventive norm control of
   - bills
   - enacted but yet not promulgated statutes
   - Standing Orders of the Parliament
   - international treaties.

2. Constitutional review of enacted norms (repressive norm control).

Review of legislative acts and sub-legislative legal norms, such as decrees of ministers.

- Abstract norm control (no case or controversy) or
- Concrete norm control (initiated either by the judge or by a public administrative agency).

3. Review of unconstitutional omission of legislation.

If the legislature has omitted to comply with its legislative duty, deriving from a legal rule, and has thus given rise to unconstitutionality, then the Court shall appoint a term within which the organ that has committed the omission must meet its duty.

4. Examination of the conformity of legislative acts with international treaties.

5. Interpretation of the Constitution (advisory opinion).

6. Conflict of competences

7. Constitutional complaint (claims arising as a consequence of a violation of fundamental rights by administrative acts can be vindicated before the court).

8. Constitutional complaints of municipalities.

9. Constitutional complaints related to the control of popular referendums.

10. Impeachment of the President of the Republic.

The Constitutional Court has impeachment jurisdiction over the President of the Republic for breach of the Constitution or other statute.

IV. Nature and effects of judgments

1. If the Constitutional Court finds a legal provision unconstitutional, then the Court declares it wholly or partly null and void. The decision of the Constitutional Court is final and without appeal. As a rule, the legal norm shall be abrogated on the day of publication of the decision, but exceptions are possible.

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. The judgment declaring unconstitutional an omission of a legislative organ of the State has mandatory effect.

3. The most important decisions of the Court are published in the Official Gazette (Magyar Közlöny). 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.

Conclusion

The Hungarian Constitutional Court, making use of its wide-ranging (even by international standards) powers, has in a few years become one of the most important factors in safeguarding Hungary's transition to democracy and constitutionalism. In four years the Court has delivered more than 1400 decisions, and has declared sixty laws or statutory provisions unconstitutional

One of the difficulties that the Court has to face is that the procedure of repressive norm control can be initiated by anybody. This unlimited possibility of *actio popularis* (no special personal interest is required) is discussed frequently in the literature and the Court itself is divided on the question of its scope. The overwhelming majority of the cases before the Court are abstract norm control initiated for the most part by private individuals.

Therefore, the amendment of some provisions of the Act on the Constitutional Court is necessary. In February, 1994 the Government submitted a proposal for constitutional amendment to the Parliament that would reduce the number of the judges to nine.

Bibliography

Ádám, Antal:
Le contrôle de la constitutionnalité des actes administratifs et gouvernementaux en Hongrie, Studia Iuridica Auctoritate Universitatis Pécs Publicata, No 121, Pécs, 1992.

Brunner, Georg:
Development of a Constitutional Judiciary in Eastern Europe, 18 Review of Central and East European Law 1992, No 6., 535-553.

Halmai, Gábor:
Chroniques – Hongrie, Annuaire International de Justice Constitutionnelle vol. VI, 1990, Economica – Presses Universitaires d'Aix-Marseille, 745-752.

Klingsberg, Ethan:
Judicial Review and Hungary's Transition from Communism to Democracy, 1992 Brigham Young University Law Review 41.

Paczolay, Péter:
Judicial Review of the Compensation Law in Hungary, Michigan Journal of International Law, vol. 13, No 4, Summer 1992, 806-831.

Paczolay, Péter:
Chroniques – Hongrie, Annuaire International de Justice Constitutionnelle vol. VII, 1991, Economica – Presses Universitaires d'Aix-Marseille, 601-612.

Sólyom, László:
The First Year of the Constitutional Court, 33 Acta Iuridica Hungarica 1991, No 1-2, 5-22.

Sólyom, László:
The Role of the Hungarian Constitutional Court in the Change of the Social System, 76 Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft, 1993, No 1., 34-45.

Iceland

Supreme Court

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.

I. 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.

II. Composition and organisation

1. Composition

The judges of the Supreme Court are eight in number, and are commissioned 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 commissioned 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.

d. 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, 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, e.g. by reason 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 alternate are elected by the judges of the Court for a term of two years. These offices are now held by Mr. Hrafn Bragason, President, and alternate President Mr. Haraldur Henrysson. Their term extends to 31 December 1995.

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 from 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 each 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.

III. Powers

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.

The conditions for appeal to the Supreme Court are enumerated in the Supreme Court Act. The Court may furthermore grant leave of appeal even if those conditions are not fulfilled. Leave of appeal is granted by three judges.

IV. Nature and effects of judgments

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.

Conclusion

A bill amending the Supreme Court Act has been submitted to the legislative assembly, the *Althing*. The bill proposes, i.a., 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

Introduction

The Constitution of Ireland provides at Article 34.1 thereof that "justice shall be administered in Courts established by law by Judges appointed in the manner provided by this Constitution..." and at Article 34.4.1 thereof 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 pursuant to Article 58 thereof 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 in addition to cases without any specific constitutional issue.

I. Basic texts

- Bunreacht na hEireann (the Constitution)

The jurisprudence of the Supreme Court is governed by the provisions of the Constitution generally. Articles of specific relevance are Article 6, Article 12.3.1, Article 26, Articles 34, 35, 36, Article 40.4.3.

- Courts (Establishment and Constitution) Act 1961
- Courts (Supplemental Provisions) Act 1961
- Law reform Act 1975
- The Rules of the Superior Courts 1986

II. Composition and organisation

1. Composition

The Supreme Court is constituted of its President (the Chief Justice) and such number (at present four) of ordinary Judges as may be fixed by the Oireachtas. 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 72 years.

A person who is a Judge of the High Court or a practising barrister 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 Dail Eireann and Seanad Eireann calling for his/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. 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 legislative provision 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/her own Judgment.

Cases are heard on oral advocacy in open Court. Written submissions are sometimes furnished in advance by leave of the Court. Parties may appear in person or may be represented by a lawyer.

3. Organisation

a. Registrar – (acts as Registrar to the Court, attends at hearings, prepares Orders of the Court).

b. Assistant Registrar – (may perform Registrar's duties if necessary, acts as Registrar to the Court of Criminal Appeal).

c. Court Clerks (2) – (duties include staffing of public office, monitoring of documentation and Court lists, processing of Judgments, personal applications, inquiries, records).

d. Junior clerk.

e. Clerical Assistant.

Staff numbers are determined by the Minister for Justice and recruitment is carried out by the Civil Service Commission. One staff pool caters for both the High Court and the Supreme Court.

III. Powers

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.

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, administrative acts.

IV. Nature and effects of judgments

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 repugnant to 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 at Luxembourg.

The written Judgments of the Supreme Court are reported officially by the Incorporated Council of Law Reporting for Ireland which usually publishes two volumes of law reports each year.

Italy

Constitutional Court

I. Basic texts

In Italy, as indeed in Austria (1920), Germany (1949), France (1958), Spain (1978), and Portugal (1982), the 1947 Constitution granted jurisdiction in the sphere of constitutional law to a specific body, the Constitutional Court.

Granting this body jurisdiction to decide on constitutional legitimacy was not unanimously approved by the Constituent Assembly and there was still some reluctance even once the articles concerning the Court (articles 134-137 of the Constitution) and the *ad hoc* Constitutional Act No. 1/48 had been approved. This is attested to by the fact that it took five years to complete all the provisions relating to the Court (Constitutional Act No. 1/53 and Ordinary Act No. 87 of the same year). 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. What is more, ten years later, Parliament amended by a Constitutional Act of 1967 some of the norms relating to the members of the Court in a decidedly unfavourable way, expressly prohibiting the renewal of a term of office, even if not immediate, and reducing its 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 a judgment, are taken following legal proceedings with, in the more important cases, the participation of the parties) it has no place in the hierarchy of courts, because it is a constitutional body like the President of the Republic, the Chamber of Deputies, the Senate or the Government.

II. Composition and organisation

The Constitutional Court comprises fifteen judges and is not subdivided into chambers.

- five members are elected by Parliament (Chamber of Deputies and the Senate of the Republic) in extraordinary session by a qualified majority;
- five members are appointed by the President of the Republic;
- the remaining five are elected by the supreme courts, three by the Court of Cassation, one by the *Conseil d'Etat* and one by the Court of Accounts.

The Court elects its President from among its members. The President, whose term of office is three years (as long as his judge's mandate has not expired) and renewable (to date, however, no judge has completed two full terms of office as President) appoints the Vice-President.

The judges of the Constitutional Court, who enjoy the prerogatives of members of Parliament, may be chosen from among three groups: university professors, barristers with at least 20 years' experience and judges from supreme courts (Court of Cassation, *Conseil d'Etat*, Court of Accounts). There is neither a minimum nor maximum age limit, but the youngest judges are obviously former university professors, who are not required to have been full professors for a minimum length of time. Even so, the youngest person ever elected to the Court was only just forty (minimum age required for election to the Senate).

Judges normally choose candidates from among their own ranks; the President of the Republic tends to nominate university professors; as for Parliament, its nominees are mainly academics or barristers. Whatever their background, candidates generally have political connections.

III. Powers

The main components of the Court's jurisdiction 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 governments and from the autonomous provinces (in the case of the Trentino-Alto Adige Region) and equivalent prescriptive acts (acts "having the force of law").

The Court may receive requests for advisory rulings on laws and acts having "the force of law" submitted by judges who, when required to enforce a particular norm, have doubts as to its legitimacy with regard to one or more constitutional principles.

The Court may be called upon to decide on the constitutionality of laws, on appeal by the State against legislative decisions by the Regions (and the two autonomous provinces); or on appeal by the Regions against laws emanating from central government, immediately after they have entered into force, if these laws are found to have encroached on spheres of regional jurisdiction as guaranteed under the Constitution.

Article 134 (cited above) also provides that the Court decides on controversies arising over the constitutional assignment of powers both within the State and between the State and the Regions.

It 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 addition to the fifteen ordinary members, sixteen extraordinary members, who are drawn by lot from among 45 citizens eligible for the Senate, also sit on the body acting as High Court of Justice.

On the other hand, the Court has now been deprived of its original jurisdiction to rule on charges relating to offences or crimes allegedly committed by ministers in the exercise of their duties.

Lastly, and to date at least this is a feature peculiar to Italian constitutional jurisdiction, the Constitutional Court is empowered to decide on the admissibility of abrogative referendums, on the basis of the provisions of article 75 of the Basic Charter and of the criteria established by the case-law of the Court, particularly its fundamental ruling No. 16 of 1978.

IV. Nature and effects of judgments

Decisions as to constitutional illegitimacy have effect "erga omnes" and "ex tunc", but 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 issue of constitutional legitimacy have effect only between the parties to the proceedings a quo.

Conclusion

To conclude these necessarily brief remarks, it may be said that after 37 years of activity and at a crucial moment in the country's political and institutional life – the most obvious causes of which are well known even abroad – the Italian Constitutional Court has won a degree of prestige and respect from other institutions and more importantly in the "paese reale" (country at large), in other words among the ordinary citizens, that is unmatched by any other institutional body in view of the unusual circumstances alluded to above, particularly affecting the constitutional organs.

Japan

Constitutional Court

Introduction

In prewar days, there was no procedure for determining the constitutionality of normative acts under the Imperial Japanese Constitution (promulgated in 1889) since it had no provisions concerning judicial review. It was acknowledged that the Constitution should be observed and maintained by the legislative branch.

The Constitution of Japan, which was promulgated in 1947, entered into force on 3 May 1948, and introduced as an amendment to the Imperial Japanese Constitution, has the following provision concerning the judicial power to determine the constitutionality of the statute: "Article 81. The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."

I. Basic texts

- The Constitution of Japan

  Articles 76 Judicial power
  77 Rule-making power
  79 Composition of the Supreme Court
  81 Power to determine the constitutionality of any law, rules etc.

- Court Organisation Law

  Articles 3 Powers of courts
  4 Binding power of superior courts' decision
  5 Judges
  7 Jurisdiction of the Supreme Court
  8 Other powers of the Supreme Court
  9 Composition of the Supreme Court
  10 The Grand Bench-cases and the Petty Benches-cases

II. Composition and organisation

The explanation of "the constitutional court system in Japan" will be the same as the explanation of the Japanese judicial system, since judicial review of constitutionality is always accompanied by concrete legal disputes to be resolved by the Court. The following is a brief description of the organisation of the courts in Japan.

1. The judicial power

The whole judicial power is vested in the Supreme Court and in such inferior courts as established by law. No extraordinary tribunal shall be established (Article 76 of the Japanese Constitution). This provision prohibits the establishment of extraordinary tribunals, administrative courts, etc. outside the hierarchy of the judicial court system. The inferior courts established by law are as follows: High Court, District Court, Family Court and Summary Court.

2. The Supreme Court

The Supreme Court exercises appellate jurisdiction of *jōkoku* appeal against the judgments of the High Courts, etc. It is composed of the Chief Justice and fourteen Justices. In civil and administrative cases, a *jōkoku* appeal may be lodged only on the grounds of violation of the constitution, or any violation of a law or ordinance which is obviously material to a judgment. In criminal cases, there are limited grounds for a *jōkoku* appeal which comprise inter alia violations of the constitution and conflicts with the precedents of the Supreme Court. Hearings and adjudications in the Supreme Court are made either by the Grand Bench made up of all the fifteen Justices sitting together or by one of the three Petty Benches, each composed of five Justices. Every case on appeal is first assigned to one of the three Petty Benches. If a case proves to involve a question of constitutionality, it is transferred to the Grand Bench for its inquiry and adjudication.

Appellate proceedings in the Supreme Court commence with the filing of a notice of appeal written by a party dissatisfied with the judgment delivered by one of the lower Courts, normally one of the High Courts. The Supreme Court renders decisions, as a rule, after examining merely documentary evidence (appellate briefs and records of the courts below). Where the appeal is ill-founded, the Court may dismiss the appeal without holding oral proceedings. However, if the Court finds that there are grounds for appeal, a judgment will be rendered after the oral argument is heard.

3. High Courts

The High Courts are located in eight major cities in Japan, and each one has its own territorial jurisdiction over one of the eight parts of Japan. Some courts have branch offices. There are six branch offices throughout Japan. Each High Court consists of the President and other High Court judges. A High Court has jurisdiction inter alia over appeals filed against judgments rendered by the District Courts. Cases in a High Court are commonly heard by a three-judge panel.

4. District Courts

There are 50 District Courts, which are located in the capital of each prefecture and three other cities in Hokkaido. The District Courts have branch offices.

The District Courts are primarily first instance courts of general jurisdiction, and they handle all cases in the first instance except those coming under the exclusive jurisdiction of other types of courts. They also have appellate jurisdiction over appeals lodged against judgments of the Summary Courts in civil cases.

In a District Court, cases are heard either by a single judge or a panel of three judges.

5. Family Courts

The Family Courts and their branch offices are located in the same places as the District Courts and their branch offices.

Family Courts have jurisdiction over family cases, which are related to matrimonial or parent-child relationships with legal significance, and over juvenile delinquency cases, which are caused by juveniles under 20 years of age who have committed a crime or are prone to commit offenses. All the cases brought to the Family Courts are heard by a single judge.

6. Summary Courts

There are 448 Summary Courts in Japan. They have original jurisdiction over civil cases involving claims not exceeding 900,000 yen and criminal cases relating to offenses punishable by fines or lighter punishments.

All the cases brought to the Summary Courts are heard by a single judge.

III. Powers

It is generally acknowledged that the Court has the power to determine the constitutionality of normative acts in the course of resolving legal disputes brought to the courts. All the courts, the Supreme Court at the top, may determine the constitutionality of laws, orders, regulations or official acts only when the determination of the constitutionality is required in the course of making a ruling on concrete cases. They do not have the power to determine the constitutionality of laws, orders, regulations or official acts which are not related to concrete cases. No extraordinary organs other than the Court have been set up to examine the constitutionality of the statute itself.

The Court gives a ruling on the constitutionality of a certain statute only to the extent necessary to resolve the case under consideration. The Japanese system is very different from that of France, under which the "Conseil Constitutionnel" has the power to review the constitutionality of the statute itself.

IV. Nature and effects of judgments

It is accepted that a given statute declared unconstitutional by the Court does not become null and void, and that the Court's ruling is effective only between the parties. As to the temporal effects of the Court's

rulings, it is accepted that they may give retrospective effect only with regard to the parties. Furthermore, as a rule, the Court cannot give a ruling which orders that a certain statute should become null and void after a certain period in the future when declaring the statute unconstitutional.

However, there are some rulings of the Supreme Court, concerning election disputes, in which the provisions relating to the allocation of seats in Public Offices Election Law have been declared unconstitutional while the past election, which took place in accordance with the unconstitutional provisions, remains valid. These rulings cite the idea of the provision in Administrative Case Litigation Law, which provides that the Court may declare a certain provision illegal while dismissing the claim when the Court considers the annulment of the illegal disposition incompatible with the public welfare.

It is acknowledged that the judicial power to review the constitutionality of statutes does not extend to highly political questions even though there exists the possibility of a judicial ruling.

Self-executing treaties come into force in Japan without taking legislative measures. Treaties with domestic validity are interpreted to be placed higher than the law in the Japanese judicial hierarchy. However, there is no simple answer as to whether treaties take precedence over the Japanese constitution or not. According to some of the rulings by the Supreme Court, while the constitutionality of treaties may be determined by judicial review, treaties which are highly political in nature do not fall within the scope of judicial review unless "the unconstitutionality of the treaty is deemed clear and evident".

There are some periodicals of court reports, including "Saiko Saibansho Hanreishu" (Report of the Supreme Court's Decisions), which publish the major decisions of the Supreme Court. However, those periodicals are published only in Japanese, and there are no official court reports published in English or French.

Conclusion

Judicial review in Japan functions sufficiently well, and there is no plan for reform.

Lithuania

Constitutional Court

Introduction

It was the Constitution of 1992 which, for the first time in the history of Lithuania, foresaw the establishment of the Constitutional Court, while 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. But 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.

I. Basic texts

Chapter 8 (consisting of 7 Articles) of the Constitution of the Republic of Lithuania 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 February 3, 1993.

II. Composition and organisation

1. Composition

The Constitutional Court of the Republic of Lithuania consists of 9 judges appointed for an unrenewable 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. The Seimas (Parliament) appoints an equal number of judges to the Constitutional Court from the candidates nominated by the President of the Republic of Lithuania,

the Chairperson of the Seimas, and the Chairperson of the Supreme Court; the procedure shall also be used for the renewal of the composition of the Court. The Seimas appoints the Chairperson of the Constitutional Court from among the judges thereof who are nominated by the President of the Republic of Lithuania.

To become Constitutional Court judges 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 the Seimas.

Before entering office, persons appointed to become Constitutional Court judges swear, in the Seimas, 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 of the Republic of Lithuania. 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 the Seimas to initiate impeachment proceedings in the Seimas 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 the Seimas according to the impeachment proceedings.

2. Procedure

All the procedures of the Constitutional Court may be grouped in the following way: preparatary procedures and procedures of judicial trial.

Preparatary procedures, i.e. preliminary investigations of the issues presented to 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 or to refuse to examine a petition or inquiry, are considered.

Constitutional Court sittings are public. 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. 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.

While investigating a case, 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.

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.

III. Powers

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 the questions foreseen in the Constitution.

While performing the function of judicial review, the Constitutional Court considers and adopts decisions concerning the conformity of laws of the Republic of Lithuania and legal acts adopted by the Seimas (Parliament) with the Constitution of the Republic of Lithuania.

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 Seimas members, and the courts for cases concerning a law or other act adopted by the Seimas
- groups consisting of at least 1/5 of all Seimas members and the courts for cases concerning an act of the President of the Republic; and
- groups consisting of a least 1/5 of all Seimas members, the court, and the President of the Republic for cases concerning Governmental acts.

According to the Constitution of the Republic of Lithuania the Constitutional Court presents conclusions concerning:

- the violation of election laws during presidential elections or elections to the Seimas
- whether the President of the Republic of Lithuania's health is not limiting his or her capacity to continue in office
- the conformity of international agreements of the Republic of Lithuania with the Constitution; and
- the compliance with the Constitution of concrete actions of Seimas members or other State officers against whom impeachment proceedings have been instituted.

The Seimas may request conclusions from the Constitutional Court on the questions mentioned above, and in cases concerning Seimas elections and international agreements, the President of the Republic of Lithuania may also request a conclusion. Here it should be noted that the conclusion concerning an international agreement may be requested prior to the ratification thereof by the Seimas.

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.

IV. Nature and effects of judgments

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.

Laws of the Republic of Lithuania (or a part thereof) or other Seimas 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 of the Republic of Lithuania, 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, the Seimas 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 Official Gazette "Valstybės žinios", and newspapers. Rulings of the Constitutional Court become effective on the day that they are published.

Norway

Supreme Court

Introduction

The Norwegian Constitution of 17th 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.

I. 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 13th August 1915 no. 5. The rules of procedure are stated in the Civil Procedure Act of 13th August 1915 no. 6 and the Criminal Procedure Act of 22nd May 1981 no. 25.

II. Composition and organisation

The Supreme court consists of the Chief Justice of the Supreme Court (the President) and 17 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 the age of 70 years. 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 reaching 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 2 of the Act of Plenary of 25th June 1926 no. 2, the Court shall sit in plenary session when at least two of the members of the Court want to base their decision on a legal provision being "in contravention of the Constitution". The passing of this act actually confirmed the presumption of the Supreme Court's competence to exercise judicial review.

III. Powers

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, the 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 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. Recently draft legislation stating that international treaties on human rights shall be incorporated into the Norwegian Constitution has been taken up for consideration by the Norwegian Parliament.

IV. Nature and effects of judgments

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.

Bibliography

Ryssdal, Rolv:
The relation between the judiciary and the legislative and executive branches of the government in Norway, North Dakota Law Review 57 (1981), pp. 527-539

Smith, Eivind:
Judicial review of legislation in Norway – characteristics and recent trends, in: The Norwegian Academy of Science and Letters (ed.): The Role of the Constitution in a Changing Society (Oslo 1992), pp. 179-215.

Smith, Eivind:
Pays scandinaves, in: Favoreu et Jolowitz (ed.): Le contrôle juridictionnel de la législation. Légitimité, effectivité et développements récents (Paris/Aix-en-Provence 1986), pp. 223-282.

Smith, Eivind:
Les droits de l'homme dans le droit national en France et en Norvège (Paris/Aix-en-Provence 1990).

Smith, Eivind:
Les techniques juridictionnelles du contrôle de constitutionnalité des lois dans les pays scandinaves: le contrôle diffus "à la scandinave", in: Annuaire International de Justice Constitutionnelle, Vol. I, (1985) (Paris/Aix-en-Provence 1987), pp. 105-11.

Chronique de justice constitutionnelle: La Cour Suprême de Norvège, in: Annuaire International de Justice Constitutionnelle, Vol. I, (1985) (Paris/Aix-en-Provence 1987), pp. 601-606.

Norvège: Eléments de jurisprudence 1984-86, in: Annuaire International de Justice Constitutionnelle, Vol. II, (1986) (Paris/Aix-en-Provence 1988), pp. 581-586.

Eléments de jurisprudence 1987, in: Annuaire International de Justice Constitutionnelle, Vol. III, (1987) (Paris/Aix-en-Provence 1989), pp. 701-705.

Les juges constitutionnels dans les pays scandinaves, in: Annuaire International de Justice Constitutionnelle, Vol. IV (1988) (Paris/Aix-en-Provence 1990), pp. 191-197.

Administration et fonctionnement de la justice en Norvège, in: Annuaire Européen d'Administration Publique, Vol. XIV – 1992 (Paris 1992), pp. 69-90.

Chronique de justice constitutionnelle norvégienne 1988-90, in: Annuaire International de Justice Constitutionnelle, Vol. VI (1990) (Paris/Aix-en-Provence 1992), pp. 815-825.

Chronique de justice constitutionnelle norvégienne 1991, in: Annuaire International de Justice Constitutionnelle, Vol. VII (1991) (Paris/Aix-en-Provence 1993), pp. 663-670.

Poland

Constitutional Court

Introduction

1. Date and circumstances of its establishment

The Constitutional Court was set up by the Act of 26 March 1982 revising the Constitution (Legislative Gazette, No.11, text 83).

The Court's jurisdiction, organisation and procedure are defined, pursuant to Article 33a, para.6, of the Constitution, by the Constitutional Court Act of 29 April 1985 (single text L.G. of 1991, No.109, text 470).

In accordance with that Act, the Court began functioning on 1 January 1986.

2. Position in the hierarchy of State authorities

In accordance with the Constitution and the above-cited Act, the Court is a State authority, separate from and independent of the legislative, judicial and administrative authorities. In particular, its decisions may not be set aside by the Supreme Court.

I. Basic texts

The basic regulations on the powers of the Constitutional Court are set out in Article 33a, para.1, of the Constitution and Sections 1, 2, 5, 6 and 11 of the Constitutional Court Act.

The basic regulations on the composition of the Constitutional Court are set out in Article 33a, para.4, of the Constitution and Sections 15, 16, 17 and 18 of the Constitutional Court Act.

The main provisions relating to proceedings before the Constitutional Court appear in Article 33a, paras. 2 and 6, of the Constitution; in Sections 3, 4, 7 (1), 8, 9 (2), 10 (2) and (3), 12, 13, 22 and 23-30 of the Constitutional Court Act; and in the Diet's resolution of 31 July 1985 on proceedings before the Constitutional Court (L.G. 1985, No. 39, text 184).

II. Composition and organisation

1. Composition

The Court has 12 judges, including a president and a vice-president.

Constitutional Court judges are elected and dismissed by the Diet.

Constitutional Court judges are elected for eight years, with half of the members being replaced every four years. Re-election is not permitted.

Persons who possess an outstanding knowledge of the law and are qualified to serve as judges in the Supreme Court or Administrative High Court may be elected to the Constitutional Court.

Constitutional Court judges are independent and bound only by the Constitution.

Constitutional Court judges may not be more than 70 years old.

On taking office, Constitutional Court judges take the following oath before the President of the Diet: "I solemnly swear, in performing the duties assigned to me, to serve the Polish people faithfully, to uphold the Constitution and the laws and to discharge my duties with the utmost diligence".

The office of Constitutional Court judge is incompatible with membership of the Diet or Senate, with State service and with other posts which would interfere with a Constitutional Court judge's performance of his duties, damage his dignity or cast doubt on his impartiality.

Constitutional Court judges may not be arraigned on criminal charges before ordinary or administrative courts, and may not be arrested without the Court's consent, unless caught *in flagrante delicto*. Applications to prosecute are examined by the full Court, without the judge concerned.

Matters which are not regulated by the Constitutional Court Act, and particularly the rights, obligations and disciplinary measures (including suspension) which apply to Constitutional Court judges, are governed by the corresponding provisions of the Supreme Court Act, in so far as these do not conflict with the Constitutional Court Act. This means that Constitutional Court judges are subject to the disciplinary jurisdiction of the Constitutional Court itself.

The Diet dismisses Constitutional Court judges who: 1) resign; 2) are prevented by illness, infirmity or disability from performing their duties; 3) are convicted in criminal proceedings; 4) break their oath; 5) are dismissed by a disciplinary decision that has become final.

2. Procedure

The Court gives its decisions, after a hearing, in writing and with a statement of reasons.

At the hearing and in chambers, the Court gives interim decisions which are formal in character.

Applications and legal questions concerning the constitutionality of legislation are considered by five judges, and applications and legal questions concerning other legal regulations are considered by three judges. In particularly complex cases, the President of the Court may order that the application be examined by the full Court, consisting of seven or more judges.

The universally binding interpretation of laws is determined by resolution of the full Court.

All decisions and resolutions are taken by a majority vote. Judges are entitled to enter a separate vote.

Proceedings in the Constitutional Court are initiated by a written application or legal question, or on the Court's own motion. Hearings are public and oral, and the parties present their cases and produce supporting evidence. The Court applies the provisions of civil procedure.

Parties in proceedings act for themselves or through a representative.

The Court is not divided into chambers or other units.

3. Organisation

Practical and administrative organisation of the Court's work is the responsibility of its president and the Bureau, which is subordinate to him.

The regulations on civil servants apply to staff of the Bureau. The Bureau is independent of the state administration. The Court and Bureau are financed directly from the state budget in accordance with the Finance Act.

III. Powers

The Court reviews the constitutionality of legal decisions, on application from bodies empowered to apply to it or on its own motion (general review), or in response to legal questions addressed to it in connection with judicial or administrative proceedings pending (specific review).

The Court decides whether laws and by-laws are compatible with the Constitution, and whether by-laws are compatible with the law. It also decides whether the aims of political parties are incompatible with the Constitution.

It does not consider the compatibility of laws with international treaties ratified by Poland, nor does it review judicial decisions.

IV. Nature and effects of judgments

The Court delivers judgments and decisions and determines the universally binding interpretation of laws.

Any authority passing a by-law which is incompatible with the Constitution or the law is required to amend it within 3 months of notification of the Court's decision.

A decision that a law is incompatible with the Constitution must be examined by the Diet within 6 months

of its being submitted to the Diet by the President of the Constitutional Court.

If the authority passing a by-law fails to amend it, or if the Diet fails to examine the Court's decision, the President of the Court declares that the provisions covered by the Court's decision are no longer binding. The Court's decisions are final.

Constitutional Court resolutions fixing the universally binding interpretation of laws, and declarations by the President of the Court nullifying the binding force of regulations/by-laws judged unconstitutional by the Court, are published in the Legislative Gazette or the Official Journal, the "Monitor Polski".

Every six months – previously every year – the Constitutional Court publishes a compendium of all its decisions.

Conclusion

The Polish Constitutional Court is similar to the judicial institutions set up in western European countries to safeguard the Constitution and laws, although it has certain features of its own.

The preparatory work at present being done on a new Constitution and on revision of the Constitutional Court Act sets out to abolish ratification by the Diet of Constitutional Court decisions on laws, to give the Constitutional Court authority to examine the conformity of laws with international law, and to give individuals the right to bring constitutional complaints before the Constitutional Court.

Bibliography

Garlicki, L.:

La Jurisprudence du Tribunal constitutionnel polonais / 1986-1990 /, Warsaw 1993; The Polish Constitutional Court in: Upheaval against the Plan – Eastern Europe on the Eve of the Storm: New York 1991;

Zakrzewska, J:

L'Etat de Droit et le Tribunal constitutionnel en Pologne. Jahrbuch des öffentlichen Rechts der Gegenwart 1993, vol. 41; Constitutional Court in Poland in a period of state system transformation, Varsovie 1993.

Portugal

Constitutional Tribunal

Introduction

The Republican Constitution of 1911 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, but such checks were carried out exclusively on a random basis. Courts were required to evaluate the constitutional legitimacy of laws and regulations in cases submitted for trial whenever the question of constitutionality was raised by one of the parties.

The next Constitution, that of 1933, maintained and even broadened this monitoring system, since courts were entitled *ex officio* to raise the question of constitutionality. In practice, however, the system did not work. Court decisions on constitutional questions between 1911 and 1976 were extremely rare.

An effective system for the monitoring of constitutionality, combining random and specific checks, was not established until the 1976 Constitution was introduced, following the revolution of 25 April 1974. During an initial period, specific supervision was exercised by the Council of the Revolution and the Constitutional Commission. The Constitutional Tribunal was set up as a result of the 1982 revision of the Constitution.

The Constitutional Tribunal does not form part of any court hierarchy, but its decisions are binding on all courts, and those made in the course of abstract appeals are binding on all public authorities.

I. Basic texts

The composition of the Tribunal and its powers are defined in the Constitution (Articles 223-236 and 277-283), but its powers may be broadened by law and have been on several occasions, notably with regard to electoral disputes and political parties.

The organisation, functioning and procedure of the Tribunal are governed by Act No. 28/82 of 15 November 1982, as amended by Acts Nos. 143/85 of 26 November 1985 and 85/89 of 7 September 1989.

II. Composition and organisation

1. Composition

The Tribunal's membership comprises 13 judges: 10 are elected by the parliament (Assembly of the Republic)

on the basis of a two-thirds majority of the deputies; the other three are co-opted by the first 10. At least six of the 13 judges must be career members of the state legal service. The others are selected from among practicing jurists. The judges take an oath before the President of the Republic. Their six-year term of office may be renewed once or more. They select a Chairman and a Vice-Chairman from their own ranks for a renewable two-year term of office. Their tenure can only be terminated by death, permanent physical incapacity, resignation, acceptance of responsibilities incompatible with their functions or on disciplinary grounds decided by the court.

The judges are independent and irremovable. They resemble the judges of other courts in terms of their responsibility for the decisions they take. Their status, in respect of rights, honours and so forth, is identical to that of the judges on the Supreme Court of Justice.

They may not carry out other public or private functions, apart from unpaid teaching or legal scientific research. They are not entitled to work in political parties or associations or to take part in public party-political activities.

2. Procedure

Several sorts of procedure are applied according to the category of proceedings. In all cases a judge is appointed rapporteur by the drawing of lots, and it is he who presents a draft decision. Either the decision or the findings must be approved by the majority of judges. In the event of a tie, the President has the casting vote. If the rapporteur's proposal is defeated, the file is transferred to another rapporteur.

The Tribunal sits as a plenary body for the exercise of abstract supervision and as a chamber (two chambers composed of six judges each, plus the President) for the exercise of concrete supervision. However, the President may decide that certain cases involving concrete supervision should be dealt with in plenary sitting in order to avoid disparities in case-law between the two chambers. If there are divergencies between the two chambers, the case may be submitted to the plenary Tribunal.

No public sittings are held. All evidentiary material in the proceedings must be in written form. Provision is made for adversarial hearings in all proceedings. The parties are represented by counsel.

3. Organisation

Each judge is assisted by an aide whom he selects (in practice, from among assistants to law faculties, judges or senior officials) and by a secretary. The office of the President comprises an executive officer, three assistants and two secretaries.

The Tribunal has a documentation centre with a library.

Its secretarial services are directed by the Secretary of the Tribunal.

The prosecuting authorities are represented on the Tribunal by two members of the Public Prosecutor's Department.

The Tribunal currently has 61 persons working for it, this number being additional to judges and members of the Public Prosecutor's Department.

III. Powers

1. Monitoring of constitutionality

1.1 Preventive monitoring

The President of the Republic may ask the Constitutional Tribunal to review the constitutionality of laws passed by the Assembly of the Republic, of governmental legislative decrees and of international treaties before they are promulgated. If the Tribunal considers a single provision of such instruments to be unconstitutional, the President may not promulgate them, but the Assembly or the Government may delete or amend the provisions deemed unconstitutional. However, in the case of laws passed by the Assembly, the latter may confirm them by a two-thirds majority vote, and the President may then promulgate such laws notwithstanding the judgment of the Tribunal, although he is not obliged to do so. The Prime Minister or one-fifth of the members of parliament may call for a preventive review of institutional acts (laws relating to elections, to referenda, to the Constitutional Tribunal, or to defence and martial law, which laws must be approved by an absolute majority of deputies).

Ministers of the Republic (representatives of central government to the regions of Madeira and the Azores) may demand preventive monitoring of the rules contained in regional legislative instruments.

1.2 *Ex post facto* abstract supervision

Such supervision relates to all legal rules, in the form of either laws or regulations. The Tribunal may have such cases referred to it by the President of the Republic, the President of the Assembly of the Republic, the Prime Minister, the Ombudsman, the Public Prosecutor, one-tenth of the deputies in the Assembly of the Republic and, where violation of the rights of the autonomous regions is alleged, by Ministers of the Republic, by regional assemblies or one-tenth of their deputies and by the presidents of regional governments.

If a legal rule is three times deemed unconstitutional in specific review proceedings, the representative of the Public Prosecutor's Department to the court may initiate an objective review of that rule.

Declarations of unconstitutionality adopted in abstract review proceedings have general binding effect and cause the rule in question to be set aside. The Tribunal may determine the temporal effects of its decisions.

1.3 Specific supervision

The exercise of specific supervision presupposes that the constitutionality issue is first raised in an ordinary court in the context of a pre-existing dispute. Indeed, all courts are authorised to evaluate the constitutionality of legal rules.

If the ordinary court decides that a rule is unconstitutional or if the question of constitutionality raised by the parties is not deemed relevant by the court, the parties may bring the matter before the Tribunal. Indirect supervision is then supplemented by direct supervision.

The effects of the Tribunal's decisions in specific review proceedings are limited to the case brought before the court.

1.4 Monitoring of omissions

The Tribunal may decide that the Constitution has been violated by a failure to adopt legislative measures. The authorities empowered to refer such cases to the Tribunal are the President of the Republic, the Ombudsman and, if the rights of an autonomous region are involved, the Presidents of regional assemblies.

If the Tribunal finds that the Constitution has been violated by failure to adopt certain measures, it makes known this finding to the body which is empowered to produce the necessary measures.

1.5 Monitoring of lawfulness

The Tribunal may sanction three types of unlawfulness: incompatibility of rules adopted by central government with the statutes of autonomous regions; incompatibility of regional rules with either regional statutes or national laws; incompatibility of any rule whatsoever with amplified laws; and in some cases, incompatibility of national rules and international conventions.

The procedures for monitoring lawfulness are similar to those for the review of constitutionality, but there are neither preventive checks nor checks on failure to take measures.

2. Other powers

2.1 The President of the Republic

It is for the Constitutional Tribunal to confirm the death or declare the permanent physical disability of the President of the Republic, to check on temporary impediments to the exercise of his duties, to verify discontinuation of his duties as a result of absence from the national territory not authorised by the parliament and to decide on his removal from office if the Supreme Court of Justice finds him guilty of a crime committed in the exercise of his duties.

These powers are exercised in plenary sitting.

2.2 Electoral disputes

The Constitutional Tribunal enjoys ultimate decision-making authority with regard to the lawfulness and validity of electoral procedures.

With regard to the election of the President of the Republic and members of the European Parliament, its authority is direct. In parliamentary elections, local elections, and elections to the legislative assemblies of the autonomous regions, the Tribunal rules on appeals against decisions taken by courts or by electoral administrative organs.

Decisions are usually taken in plenary sitting and the procedure is characterised by its rapidity.

2.3 Political parties

The Tribunal has the task of registering political parties, coalitions and federations of parties and also, following the recent adoption of Law No 72/93 of 30 November 1993, of carrying out an annual check on parties' accounts.

2.4 Organisations professing fascist ideology

The Tribunal is empowered to decide on the dissolution of organisations professing fascist ideology.

2.5 National or local referenda

The Tribunal may decide to order preventive measures concerning the constitutionality or lawfulness of national or local referenda.

2.6 Declarations of assets and income by political office-holders

Persons exercising political or equivalent responsibilities are required to present a declaration of their assets and income to the Tribunal at the beginning and the end of their term of office. The Tribunal shall decide on cases where such declarations may be consulted or published in the press.

IV. Nature and effects of judgments

On the types of decisions and their effects, see the above heading concerning powers.

A selection of the Tribunal's decisions is published in the Official Gazette (Diário da República), in a publication by the Ministry of Justice (Boletim do Ministério da Justiça) and in the official compendium published by the Tribunal (Acórdaos do Tribunal constitucional). Several legal journals publish and comment on certain decisions by the Tribunal.

There is a computerised data bank of all the Tribunal's decisions. However, this bank includes a summary rather that the unabridged text.

Bibliography

La Justice constitutionnelle au Portugal, (Constitutional justice in Portugal), Paris, Economica, 1989.

Marques Guedes:
La justice constitutionnelle au Portugal, (constitutional justice in Portugal), Saarbrücken, Europa-Institut.

Mário Torres:
"Le 'constitutionnalisme'", (Constitutionalism), in 13th International Congress of Comparative Law, Portuguese reports, Separata do Boletim do Ministério da Justiça, Lisboa, 1990.

The International Yearbook of Constitutional Justice publishes regular reports on the case law of the Portuguese Constitutional Tribunal.

Romania

Constitutional Court

I. Basic texts

The Constitution, endorsed through the referendum of December 8, 1991, instituted the Constitutional Court under Articles 140-145, Title V.

In compliance with those provisions, the Law No. 47/1992 established the rules of organisation and operation of the Constitutional Court, the details of which were settled under the Rule of the Court, endorsed by the judges' *plenum* in July 1992.

II. Composition and organisation

1. Composition

The Constitutional Court consists of nine judges, appointed for a nine-year term of office, that cannot be prolonged or renewed.

The Constitutional Court's judges must have completed their higher education in law, must have high professional competence, and at least 18 years experience in legal activity or in teaching in higher law schools.

Among the nine judges, three shall be appointed by the Chamber of Deputies, three by the Senate, and three by Romania's President. Thus, all the judges are appointed by the public authorities elected by universal vote.

The members of the Court shall be renewed by thirds every three years, and each of the public authorities entitled to appoint judges shall appoint a judge. In order to secure the application of the renewal system, the first judges were appointed for terms of three, six and nine years, by the authorities that appointed one judge for each of these terms.

The judges shall be independent and irremovable during their term of office.

After appointment, they shall individually take the loyalty oath before the President of Romania and the Presidents of the two Chambers of Parliament, and their term becomes effective on that date. The present Constitutional Court took this oath on June 6, 1992.

The office of judge is incompatible with the exercise of any other public or private office, except for teaching functions in higher law schools. Likewise, the judges shall not be members of political parties.

The judges are duty bound to discharge their office impartially and in observance of the Constitution and to abstain from any activity or manifestation contrary to the independence and dignity of their function.

The judges shall enjoy immunity. They shall not be held responsible for their opinions and votes expressed on endorsing solutions, nor shall they be put under arrest or sued in a court of law or fined, except with the approval of the Standing Bureau of the Chamber that appointed them or of Romania's President, as the case may be. The Supreme Court of Justice is competent to try such offences.

The President of the Constitutional Court shall be equal in function to the President of the Supreme Court of Justice, and the other judges to the vice-president of the Supreme Court of Justice, the office of judge being therefore equal to that of a minister.

2. Procedure and organisation

The Constitutional Court sits in *plenum*, or, in the case of settling claims of unconstitutionality, in jurisdiction panels.

Apart from jurisdiction prerogatives, the *plenum* of the Constitutional Court also has the role of running the general activity of the Court, being competent to endorse the Court's Rule, budget, roll of offices, schedule of external relations, etc.

The *quorum* of work in *plenum* is of two thirds of the number of judges, and the acts it issues shall be adopted by the vote of the majority of the judges.

The President of the Constitutional Court shall be elected by judges by secret vote for a three-year term. The President's prerogatives are stipulated in the organic law of the Court and in its Rule of organisation and operation.

The functional staff of the Court consists of assistant-magistrates and of the Secretariat of the Court. The services making up the Secretariat are headed by a Chief Secretary.

III. Powers

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 Article 144 of the Constitution:

a. it makes pronouncements on the constitutionality of laws, prior to their promulgation, at the notification of Romania's President, of one of the Presidents of the two Chambers, of the Government, of the Supreme Court of Justice, of a least 50 Deputies or of at least 25 Senators, as well as, *ex officio*, on the initiatives to revise the Constitution

b. it makes pronouncements on the constitutionality of the Rules of Parliament, at the notification of one of the Presidents of the two Chambers, of a parliamentary group or of at least 50 Deputies or of at least 25 Senators

c. it decides on the claims brought to the courts of law as to the unconstitutionality of laws and ordinances

d. it watches over the observance of the procedure for the election of the President of Romania and confirms the returns

e. it confirms the circumstances justifying the *ad interim* exercise of the Presidency of Romania and reports its findings to Parliament and Government

f. it makes consultative pronouncement on the proposal for suspension of the President of Romania

g. it watches over the observance of the procedure of organisation and carrying out of a referendum and confirms its results

h. it checks on compliance with the conditions for the exercise of legislative initiative by citizens

i. it decides on legal actions regarding the constitutionality of a political party.

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 main ways of jurisdiction activities may be resumed as follows :

a. Review of the constitutionality of laws

The constitutionality of laws shall be reviewed prior to their promulgation and through the settlement of the claims of unconstitutionality.

Review before promulgation shall be exercised only upon the notification of the subjects stipulated under Article 144, subparagraph (a) of the Constitution, based on the opinions requested by the President of the Court from the two Chambers of Parliament and from the Government. If the President deems it necessary, he may also appoint a judge as rapporteur. Likewise, the Court is entitled by the law to request any necessary information and documentation.

The settlement of claims of unconstitutionality, by virtue of Article 144, subparagraph (c), shall be made upon the request of the courts of law. The courts of law shall notify the Court upon the request of either party or *ex officio*, through a substantiated interlocutory decision.

To settle claims of unconstitutionality, the President of the Court shall organise lower panels made up of three judges to try the case, and review panels, consisting of five judges, other than those who settled the case in the first instance. The presidents of these panels shall be appointed concomitant with the appointment of the panels.

The president of the lower panel shall appoint one of the judges as rapporteur. On review, the appointment of a judge as rapporteur is not compulsory.

The rapporteur judge shall forward the claim to the two Chambers of Parliament and to the Government, so that they may express their standpoints, and may ask

also for further necessary information or documentation. If the rapporteur judge of the lower panel considers the claim as being obviously without foundation, he may propose its rejection. Rejection of the claim on that ground shall be adopted only with the judges' unanimous vote. But, if this conclusion is not reached, the rapporteur judge shall draw up a report comprising the analysis of the materials presented and the major issues arising in connection with the settlement of the claim.

Based on the report, the panel's president shall establish the day of trial in public session, serving the parties and the Public Ministry with *subpoenas*. The parties and the Public Ministry may appeal against the decision within 10 days of its communication ; The case shall always be settled in public session, with the participation of the Public Ministry.

The decision, both by the lower panel and by the review one, shall be made with the majority of the panel members' vote.

With a view to securing the unitary character of the jurisdiction practice, the plenum may issue interpretative decisions.

b. Review of the constitutionality of Parliament's Rules

As far as the Chambers' Rules are concerned, their constitutionality shall be reviewed by the plenum of the Court, upon the notification of the subjects stipulated by Article 144, subparagraph (b) of the Constitution, and in this specific case only the point of view of the Standing Bureau of the Chamber whose Rule is subject to control shall be required.

c. Legal actions against the constitutionality of a political party

The legal action presented by public authorities stipulated by Article 144, subparagraph (d) of the Constitution shall be tried in the plenum of the Court. Subpoenas shall be served on the challenger, the political party whose constitutionality is under scrutiny, and the Public Ministry, based on the report presented by the rapporteur judge designated to this end and on the evidence produced, and the decision shall be pronounced with the vote of the judges' majority.

d. Review of the Presidential electoral procedure

In its capacity as electoral judge of Presidential elections, the Constitutional Court shall settle the legal actions against electoral operations, consistent with the election law, shall confirm the returns of the poll, and, if necessary, shall establish the date for the second poll, and shall validate the election of the President of Romania, who shall take the oath in front of Parliament.

IV. Nature and effects of judgments

On exercising its prerogatives regarding the review of the constitutionality of laws and Rules of Parliament, as well as the settlement of the legal actions regarding the constitutionality of a political party, the Constitutional Court shall issue decisions.

The decisions issued on review of the consitutionality of a law prior to its promulgation shall be communicated to Parliament, which, with the vote of two thirds of the members of each Chamber, may reject them, and in that case the law shall be promulgated in the initially passed form.

The decisions shall be published in "Monitorul Oficial" (Official Gazette of Romania), and shall only take effect in the future. A law or a legal provision declared unconstitutional shall no longer be enforced.

On exercising the prerogatives of an electoral judge or its other prerogatives, the Court shall issue resolutions, except for the assessment of the proposal of suspension of Romania's President from office, which shall be made through a consultative pronouncement.

The decisions and resolutions shall be pronounced in the name of the law.

Slovakia

Constitutional Court

Introduction

The Constitutional Court of the Slovak Republic was created by the Constitution of the Slovak Republic which was adopted on 3 September 1992 and entered into force on 1 October 1992. The 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 of the Slovak Republic is an independent judicial authority vested with the mandate to ensure the observance of constitutional principles. The Court stands aside from the system of the general judiciary, for which the Supreme Court of the Slovak Republic is the highest court.

I. Basic texts

The principal 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. The Law on Salaries for some Members of Constitutional Bodies (Law No. 120/1993), under which salaries are paid to judges, can be considered as a secondary source of law. The Civil Procedure Code is supposed to apply subsidiarily to Law No. 38/1993.

II. Composition and organisation

1. Composition

The Court is composed of ten judges. The judges of the Constitutional Court are appointed by the President of the Slovak Republic for a seven-year term from among twenty 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 substituted 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 of the Slovak Republic (i.e. a person having the right to vote and being permanently resident in the Slovak Republic), not younger than forty years, and a law-school graduate with fifteen years of 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 shall assume the duties of judicial office in the Constitutional Court.

A judge appointed to the Constitutional Court has to resign from membership of a political party or movement prior to his/her solemn vow.

The judges of the Court hold their offices 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, scientific activities, teaching, literary and publishing activities.

The judges of the Court enjoy the same immunity as members of the National Council of the Slovak Republic; 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/her office.

The President of the Slovak Republic can remove a judge of the Constitutional Court upon a conviction by a court of law for an intentional criminal offence or upon a disciplinary decision taken by the Constitutional Court for misconduct, or for conduct incompatible with the exercise of the office of a judge of the Constitutional Court.

The President of the Slovak Republic shall remove a judge of the Court from his/her office if it is established that the said judge has not participated in the work of the Court for more than twelve months, or if the judge has been incapacitated by a court decision.

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. There are two Chambers, each consisting of three judges. The President and the Vice-President of the Court are not permanent 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 six persons. If this majority is not reached, the petition is dismissed.

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. An exception is made in the case of proceedings arising from conflicting cases on the interpretation of constitutional statutes, which take place "behind closed doors" and are decided by a Chamber. Judgments are given publicly in the name of the Slovak Republic.

Natural and legal persons must be represented before the Court by practising lawyers or attorneys. There is no fixed time limit for deciding on a case.

3. Organisation of the Court

Each of the judges has one counsel. A counsel to a judge must be a law-school graduate with a minimum of ten years experience in the legal profession. The counsels are allowed, upon an explicit commission 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 counsels are members of the staff of the Chancellery.

III. Powers

The Constitutional Court of the Slovak Republic is vested with jurisdiction over constitutional conflicts between:

a. laws and the Constitution or constitutional statutes

b. regulations passed by the Government of the Slovak Republic or generally binding rules passed by the Ministries or other authorities of the central government and the Constitution, constitutional statutes, or other laws

c. generally binding rules passed by local self-governing bodies and the Constitution, or other laws

d. generally binding rules passed by local government authorities and the Constitution, other laws or other generally binding rules

e. generally binding rules and international instruments promulgated as fixed by law

f. federal (ex-Czechoslovak) constitutional statutes, laws and other generally binding rules and the Constitution.

The jurisdiction over constitutional conflicts is the principal, but not the only power of the Court. This body is also vested with the power:

a. 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

b. to review final decisions made by central government bodies, local government bodies and local self-governing bodies where it is alleged that these decisions violate fundamental rights and freedoms of people, unless the protection of such rights falls under the jurisdiction of another court

c. to interpret the constitutional statutes in conflicting cases

d. to examine applications against decisions which confirm or reject the election of a member of the National Council of the Slovak Republic

e. to decide whether the elections to the National Council of the Slovak Republic and to local self-governing bodies have been held in conformity with the Constitution and the law

f. to deal with petitions challenging the results of a public referendum

g. to decide whether a decision dissolving a political party/movement or suspending political activities thereof is consistent with the constitutional statutes and other laws

h. to decide cases of treason allegedly committed by the President of the Slovak Republic.

IV. Nature and effects of judgments

Judgments on the merits of cases are called findings (*"nalez"*), sentences (*"rozsudok"*), and court rulings (*"uznesenie"*). The judgment passed in a case of treason 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 same law is called "court ruling"; most judgments on the merits are usually called "findings".

No appeal against a judgment of the Court is provided for by the Constitution. The Constitutional Court, however, is vested with the power to amend its judgment. This power is granted to the Plenum for a judgment on the interpretation of constitutional statutes. If the interpretation to be made by one Chamber differs from the interpretation of an identical part of the Constitution by another Chamber, the conflict of interpretation has to be brought to the Plenum for its final determination. This is the only possibility for self-correction within the Court as provided for by Law No. 38/1993.

Neither the Constitution, nor Law No. 38/1993 nor any other law includes an *expressis verbis* rule on the binding force of the judgments of the Constitutional Court. This is one of the most serious *lacunae* within the Slovak law on constitutional jurisdiction presently in force.

The judgments of the Court, if they are of a generally binding character, shall be published in the Collection of Laws of the Slovak Republic (*"Zbierka zákonov Slovenskej republiky"*). The judgments should also be published once a year in a special collection of decisions of the constitutional Court. Every person has the right to consult the judgments at the seat of the Court.

The principal literature on the Slovak Constitutional Court is a monograph of 236 pages ČIČ, M. – MAZÁK, J. – OGUR – ČÁK, Š.: *Konanie pred Ústavným súdom Slovenskej republiky* (Proceedings of the Constitutional Court of the Slovak Republic). Košice, Cassoviapress 1993.

Conclusion

The constitutional provisions on the Constitutional Court of the Slovak Republic must be further specified as regards its structure, the proceedings before it and the status of its judges. This specification is done – imperfectly – by Law No. 38/1993. For example, no explicit rules exist as to the procedure to be followed in cases where a petition is presented by natural or legal persons claiming that their rights have been violated. These proceedings are governed by rules which apply only by analogy. This and some other shortcomings of Law No. 38/1993 are the reasons why an amendment of this law is envisaged.

Slovenia

Constitutional Court

Introduction

1. Date and context of establishment

The Constitution of the Republic of Slovenia of 1963 (Official Gazette SRS, no. 10/63) envisaged a Constitutional Court; the law on the Constitutional Court (Official Gazette SRS, no. 39/63 and 1/64) determined the competence and procedures of the Constitutional Court and determined that it start work on 15.2.1964. The first rules of procedure of the Constitutional Court were adopted on 23.2.1965 (Official Gazette SRS, no. 11/65). The Assembly of SRS elected the first President and eight judges of the Constitutional Court on 5.6.1963 (the decision on their election was published in the Official Gazette SRS, no. 22/63). The president and judges were sworn before the President of the Assembly on 15.2.1964.

The Constitution of 1974 reorganised the position and competences of the Constitutional Court (Official Gazette SRS no. 6/74); more detailed provisions on competences and procedures were defined in the law on the Constitutional Court of the Socialist Republic of Slovenia (Official Gazette SRS, no. 39/74 and 28/76); new rules of procedure of the Constitutional Court were also adopted (Official Gazette SRS, no. 10/74).

The Constitution of the Republic of Slovenia of 1991 again brought changes in the position and competences of the Constitutional Court (Official Gazette RS, no. 33/91). A new law on the Constitutional Court is currently in the process of adoption by parliament.

2. Position in the hierarchy of courts

The Constitutional Court is the highest body entrusted with the judicial review of constitutionality and legality and for protecting such constitutionality and legality as well as human rights and basic freedoms.

I. Basic texts

Constitution 1991 (Official Gazette RS, No. 33/91)

New laws on the Constitutional Court and rules of procedure for the Constitutional Court are in preparation.

Currently, the old law on procedures before the Constitutional Court SRS (Official Gazette SRS, No. 39/74 and 28/76) and the rules of procedure of the Constitutional Court SRS (Official Gazette SRS, No. 10/74, with amendments and supplements 7.7.1977 and 16.1.1992) are used on the basis of Article 7 of the Constitutional Law for Implementing the Constitution of RS (Official Gazette RS, No. 33/91).

II. Composition and organisation

1. Composition

Under Article 165(1) of the Constitution, the Court is comprised of 9 members (inc. the President).

The Court has been fully constituted with 9 members since 1 May 1993.

Under Article 163(3) of the Constitution, the president is elected by the judges themselves for a period of three years.

Under Article 163(1) and (2), all judges are elected from among experts in law by the National Assembly on the nomination of the President of the Republic. Their mandate is for nine years, and it is not renewable.

The following activities are incompatible with their judicial function (Article 166):

- functions in state bodies
- local government functions
- functions in political parties
- other functions and activities which are incompatible with the functions of judge of the Constitutional Court as provided for under the law on the Constitutional Court.

As regards immunities, members of the Constitutional Court enjoy the same immunities as members of the National Assembly, by virtue of Article 167 of the Constitution.

Article 164 of the Constitution provides for the (temporary) relief of a member of the Constitutional Court where:

- he requests this himself
- he is found guilty of a criminal offence for which the penalty is imprisonment
- he becomes permanently incapable of performing his duties

2. Procedure

Proceedings before the Constitutional Court are free

Under Article 162(3) of the Constitution, the normal rule for decision-making in the Constitutional Court is by majority vote of all judges. Exceptions are nonetheless possible and these are provided for in the law on the Constitutional Court.

As regards its composition in decision making, as a rule the court deliberates in plenum but it sits in senate in cases of constitutional complaints (Article 162(3)).

3. Organisation

The Constitutional Court regulates its own internal organisation in the exercise of its administrative autonomy.

Technical services: 1 principal secretary (matters of organisation and legal knowledge); 1 assistant secretary (financial organisational matters).

Special services: legal information centre with professional library, 13 professional employees and 20 administration staff.

The financing of the court is provided for under a separate element of the State budget.

III. Powers

The Slovenian model follows those European jurisdictions which have opted for extensive powers of constitutional review concentrated in a single Court.

1. Control of standards

a. *Preventive control*

In the process of ratification of international agreements, it expresses opinions on their conformity to the Constitution (para 2 of article 160 of the Constitution); the National Assembly is bound by any such opinion.

b. *A posteriori control*

i. abstract control

It decides (para 1 of article 160 of the Constitution):

- whether laws conform with the Constitution
- whether laws and other regulations conform with ratified international agreements and general principles of international law
- whether regulations conform with the Constitution and the law
- whether local government bye-laws conform with the Constitution and the law
- whether general acts issued for the implementation by public authorities conform with the Constitution and the law and with legally enforced regulations
- whether to set aside (*ex tunc*) or abrogate (*ex nunc*) regulations or general acts while deciding on a constitutional complaint (para. 2 of article 161 of the Constitution)

ii. concrete control

It provides concrete controls of norms at the request of regular courts (article 156 of the Constitution).

2. Other competences

Article 160, para. 1 of the Constitution provides further for the Court's jurisdiction in respect of:

- constitutional complaints in relation to violations of human rights and basic freedoms by specific acts
- disputes in relation to competences among and between the National Assembly, the President of the Republic and the Government
- the unconstitutionality of acts and activities of political parties.

It also decides:

- on charges against the President of the Republic (article 109 of the Constitution)
- on charges against the Prime Minister or against any Minister of State (Article 119 of the Constitution)
- on appeals against decisions of the National Assembly on confirming the mandate of deputies (paragraph 3 of article 82 of the Constitution).

3. Standing before the Constitutional Court:
   - anyone who can show a proper legal interest (para. 3 of article 162 of the Constitution)
   - constitutional complaint (articles 160, 161, 162 of the Constitution)
   - abstract control: National Assembly, at least one third of deputies to the National Assembly, the Council of State, the Government, representative bodies of local government, representatives of trade unions
   - concrete control: the courts, state prosecutor, Bank of Slovenia, accountancy courts, Ombudsman
   - disputes on competence: affected bodies
   - impeachment: National Assembly
   - anti-constitutional acts and activities of political parties: anyone who can show a proper legal interest and applicants for abstract controls
   - confirming deputies mandates: affected candidates or representatives of candidate lists
   - preventive control of international agreements: president of the Republic, the Government or one third of deputies to the National Assembly.

IV. Nature and effects of judgments

Decisions of the Constitutional Court are binding (article 1 of the bill of the new law on the Constitutional Court) and produce effects *erga omnes*.

Article 161, para. 1 of the Constitution provides for:

- the possible stay of implementation of the measure pending final decision
- the abrogation in whole or in part (*ex nunc*) of unconstitutional laws; abrogation is effective immediately or in a time limit determined by the Constitutional Court – maximum time limit is one year
- the setting aside (*ex tunc*) or abrogation (*ex nunc*) of other unconstitutional regulations or general acts
- setting aside (*ex tunc*) or abrogation (*ex nunc*) of regulations or general acts while deciding on a constitutional complaint (para. 2 of article 161 of the Constitution).

The legal effects of decisions of the Constitutional Court are regulated by law (para. 3 of article 161 of the Constitution).

Promulgation of decisions:

- Decisions and individual findings in the Official Gazette RS (in Slovene)
- Decisions and findings together with dissenting/concurring opinions – full text in the Collection of Decisions (with abstracts in Slovene and English)
- abstracts of Decisions and findings in the journal, *Pravna praksa* (Legal Practice) (in Slovene)
- Decisions and findings together with dissenting/concurring opinions – full text in Slovene and English in a computer supported database (STAIRS, ATLASS, TRIP programme packets).

Bibliography

The bibliography of the Constitutional Court of Slovenia and the bibliography on constitutional justice as a whole from the territory of former Yugoslavia is included in copies of databases of the Constitutional Court of Slovenia, which are communicated to the Secretariat of the European Commission for Democracy through Law.

Spain

Constitutional Court

Introduction

The Constitutional Court was set up by the Constitution of 27 December 1978. The relevant legal regulations were formulated in Institutional Act No. 2/1979 of 3 October 1979 on the Constitutional Court.

The Act defines the Constitutional Court as the supreme interpreter of the Constitution. As such, it is a constitutional body independent of all others. It is not a part of the judiciary and is bound only by the Constitution and the said Institutional Act.

I. Basic texts

- Part IX (Articles 159-165) of the Spanish Constitution of 1978.
- Institutional Act No 2/1979 of 3 October on the Constitutional Court (amended by Institutional Acts 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.

II. Composition and organisation

1. Composition

a. *Appointment of judges (Magistrados)*

The Constitutional Court has twelve members, appointed by the King; four are nominated by the Chamber of Deputies, four by the Senate, two by the Government and two by the General Council of the Judiciary.

b. *Eligibility and incompatibilities*

The following may sit on the Court: lawyers of recognised ability, who are or have been judges, advocates-general, university professors, civil servants or barristers, and who have practised their profession for more than 15 years. Incompatibilities are strictly regulated, and no other functions may be exercised.

c. *Independence and irremovability*

The independence of the judges is guaranteed. They must also be impartial and may not be prosecuted for opinions expressed in the performance of their duties. Lastly, they may not be dismissed.

d. *Term of office and renewal of the Court*

Judges in the Constitutional Court serve for nine years. There is no statutory age limit. A third of the Court's membership is replaced every three years. No judge's term of office may be renewed immediately.

2. Structure and organisation

a. *The President*

The President is appointed by the King on the proposal of the full Court, which elects him from among its members by secret ballot for three years; he may be re-elected once only.

The law provides for a Vice-President, elected by the full Court from among its members in the same way as the President, also for three years. The Vice-President replaces the President if the latter is absent, the office is temporarily vacant or for any other lawful reason, and presides over the Second Chamber of the Court (*Sala Segunda*).

b. *The full Court*

The full Constitutional Court comprises all the judges and is presided by the President or, if necessary, the Vice-President. The Court's decisions are adopted on a majority, and are considered valid if at least two-thirds of its members are present.

The full Court gives decisions on appeals and questions relating to allegations of non-constitutionality, on constitutional conflicts of jurisdiction, on conflicts between the State's constitutional authorities, on the constitutional validity of international agreements, and on regulations and resolutions adopted by the Autonomous Communities and contested by the Government.

In addition to the regulatory power conferred on it by law, the full Court exercises a wide range of other powers of regulation.

c. *The Chambers (Salas)*

The Court is divided into two Chambers, each consisting of six judges appointed by the full Court. The President also presides over the First Chamber, while the Vice-President presides over the Second Chamber. Like those of the full Court, the decisions of a Chamber are valid only if at least two-thirds of its judges are present.

The Chambers' jurisdiction is exclusively judicial. They decide applications claiming the protection of the Constitution (*recurso de amparo*). Cases are allocated to the Chambers by the full Court, which may itself examine any case on its own motion.

To expedite ordinary cases and decide on the admissibility of applications, the full Court and the Chambers set up Sections (*Secciones*), consisting of their respective Presidents, or substitutes, and two judges.

d. *The Registry*

is headed by the Chief Registrar, who is elected by the full Court and appointed by the President from among the legal advisers (*Letrados*). He acts as Principal Legal Adviser (*Letrado Mayor*) and has other administrative and financial duties; he is also responsible for organising and supervising the Court's legal, administrative and subsidiary services.

e. *Constitutional Court staff*

The Court has a team of legal advisers (*Letrados*), who perform the research and advisory tasks assigned to them.

Like the full Court, each Chamber has a registry headed by a registrar appointed in due form.

Lastly, the Court has officials from the state legal and civil service, who discharge the administrative and executive tasks which it assigns to them.

3. Procedure

Proceedings before the Constitutional Court are conducted in writing. The Court may decide to substitute a hearing for written submissions only in cases where the protection of the Constitution is being claimed. Parties in constitutional proceedings before the Court must be represented by an attorney (*procurador*), and act on the instructions of a barrister.

III. Powers

1. Review of the constitutional validity of legal regulations having force of law

This essentially concerns laws, regulations or decisions having force of law, adopted by the State or the Autonomous Communities, whose conformity with the Constitution has been questioned. Two types of procedure may be followed in examining and deciding cases of this kind:

a. *"Unconstitutionality actions"*

These are direct actions giving rise to a "general review of legal rules".

The following may bring actions of this kind: the President of the Government (Prime Minister), the Ombudsman (*Defensor del Pueblo*), 50 deputies, 50 senators, and the collegiate executive bodies and assemblies of the Autonomous Communities (but only if the action concerns State regulations that may interfere with their autonomy). Individuals may not bring direct actions.

b. *"Unconstitutionality questions"*

These are indirect actions since the question concerning the constitutional validity of a legal regulation is put by a judge or a court as a preliminary question which must be settled before it can be applied to a specific case which that judge or court is considering.

2. Action for constitutional protection (*Recurso de amparo*)

a. *Nature*

This action is brought to secure special, reinforced protection of fundamental rights. It normally takes the form of an appeal, in other words, a further remedy in cases where a decision by a public authority has resulted in violation of a right, and this has not been rectified by the lower courts.

b. *Scope*

This action covers the fundamental rights and public freedoms defined in Part I, Chapter 2, Section 1 (Articles 15-28) of the Constitution, and the rights to equality and conscientious objection (Articles 14 and 30 of the Constitution).

c. *Decisions open to appeal and time-limit for appeal*

Actions for constitutional protection may be brought against: a) final decisions not having force of law taken by the legislatures of the State or Autonomous Communities; b) measures, legal decisions or other injurious conduct (*vias de hechos*) by the State, the Autonomous Communities or other regional, corporate or institutional public authorities, or by their officials or staff, once the relevant legal remedies have been exhausted; c) decisions or failures to decide by any court (civil, criminal, administrative, industrial or military).

d. *Capacity to act*

Any legal or natural person showing proof of legitimate interest, the Ombudsman (*Defensor de Pueblo*) and the Public Prosecutor have the right to bring such an action.

Persons benefiting from the decision, measure or act that prompted the "amparo" action, or anyone showing proof of legitimate interest, may oppose the action as a party or intervening party.

e. *Admissibility*

The decision on the admissibility of an "amparo" action is taken by the Sections (*Secciones*) of the Court. Applications are inadmissible if they clearly have no constitutional content, if the Court has already ruled on the merits of an identical case, if the application concerns rights not protected by the Constitution, or if there is a procedural error that cannot be rectified. If its members are unanimous, the Section declares the application inadmissible without giving reasons (*providencia* decision); otherwise, it gives reasons (*auto* decision), after hearing the applicant and the Advocate-General.

f. *Suspension of execution of the decision prompting the "amparo" action*

On its own motion or at the request of a party, the Chamber examining an "amparo" action may suspend execution of the official decision which prompted

the action, provided that execution would cause harm rendering constitutional protection meaningless, and that suspension would not seriously interfere with the general interests, fundamental rights or public freedoms of any other person.

g. *Conversion of the action for constitutional protection into an "unconstitutionality question"*

If the violation of a right which prompted the "*amparo*" action was due not to misapplication of the law, but to the law itself, the Chamber will, when the application is first examined, submit a question on this point to the full Court, which may declare the law unconstitutional in a fresh judgment. When this happens, the procedure followed is that applying to "unconstitutionality questions", and the effects of the judgment are those applying in that procedure.

h. *Electoral appeal*

Sections 49.3 and 114.2 of the Institutional Act on the general electoral system, provide for appeals against the proclamation of candidates and elected representatives.

3. Constitutional conflicts

This is the third major area in which the Constitutional Court has jurisdiction. The aim is to ensure that the rules governing the division of powers laid down in the Constitution, and in the statutes which develop and apply the Constitution, are respected in relations between the various constitutional bodies and between the various territorial authorities.

a. *Conflicts of competence between the State and one or more Autonomous Communities or between two or more Autonomous Communities*

In settling these conflicts, the Court takes account not only of the rules set out in the Constitution itself, but also of the legal rules which form part of the body of constitutional law.

The national Government and the collegiate executive bodies of the Autonomous Communities have the right to initiate such proceedings. If the Government brings the action, it may request suspension of the decision or measure at issue, and the Court must agree. If the collegiate executive bodies bring the action, the Court decides on the merits of the request for suspension. Two kinds of conflict must be distinguished:

- Positive conflicts. These arise when the State or an Autonomous Community adopts measures, resolutions or decisions which, in the applicant party's view, infringe the rules of competence defined by the Constitution, the Statutes of Autonomy or the corresponding legislation. If the executive body of an Autonomous Community brings proceedings, it must first formally apply to the other Autonomous Community or the State, as the case may be, to repeal or set aside the resolution or decision complained of; if the Government brings proceedings, it may either refer the conflict of competence directly to the Constitutional Court, within two months, or follow the prior application procedure. Notwithstanding the above, the State may, under Article 161.2 of the Spanish Constitution, suspend the measure, resolution or decision at issue, for an initial period of five months, after which the Constitutional Court must either ratify it or set it aside.
- Negative conflicts. These arise when none of the bodies concerned considers itself competent to take the decision whose very non-existence has given rise to the conflict; proceedings may be brought by the individuals concerned or by the Government, but not by the collegiate executive bodies of the Autonomous Communities. Proceedings may only be started when the authorities involved have been asked to exercise their competence and have refused to do so.

b. *Conflicts between State constitutional bodies*

There are four constitutional bodies between which constitutional conflicts can arise: the Government, the Chamber of Deputies, the Senate and the General Council of the Judiciary. Before taking action, the applicant body must notify the body alleged to have exceeded its powers and ask it to revoke the decisions at issue.

c. *Objection by the Government to legal rules not having force of law and resolutions passed by agencies of the Autonomous Communities*

Article 161.2 of the Spanish Constitution allows the Government to contest, before the Constitutional Court, any legal rule not having force of law or any resolution passed by an Autonomous Community body. This forms an exception to the general rule, which makes the administrative court responsible for such review.

4. A priori review of constitutionality

In addition to *a posteriori* review of legal rules having force of law, the Constitutional Court also has power to exercise *a priori*, or preventive, review, whose purpose is to guard against unconstitutional rules becoming law.

Thus the Court may rule on the constitutionality of international agreements, while the Government or the Chamber of Deputies and Senate may ask it to rule on the constitutionality of an international agreement which has been signed but not ratified.

IV. Nature and effects of judgments

1. Types of decision

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 inadmision*"): decisions, not giving reasons, dismissing applications which fail to meet the requirements for admissibility (since 1988 only).

d. Procedural decisions ("*providencias*"): interlocutory decisions relating only to procedure.

2. Legal effects of judgments

a. "Unconstitutionality actions" and "unconstitutionality questions": judgments are final and set aside contested legal rules when they are deemed unconstitutional, as well any other closely related rules. The ruling is effective *erga omnes*

b. Action for constitutional protection (*amparo*). The effects of "*amparo*" judgments are confined to the parties in the proceedings, but a judgment rejecting an action is effective *erga omnes*, in so far 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 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.

Conclusion

Between 1980, when the Court was established, and 31 December 1993, 25,558 cases were registered. In the same period, the Court gave 2,517 judgments (*Sentencias*) and 19,846 final decisions (*Autos and Providencias de inadmision*).

Sweden

Supreme Administrative Court

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.

I. Basic texts

- the Constitution Chapter 1 Article 9, Chapter 2 Articles 1, 5, 9, 11 and 14
- the Act on Judicial Procedure in Administrative Court
- the Act on ordinary Administrative Courts.
- the Ordinance on Instructions for the Supreme Administrative Court.

II. Composition and organisation

There shall be at least 18 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 duties as a member of the Court, he has conspicuously proved that he 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 normally in writing and the cases are presented to the Court by a staff of reporters, who are normally recruited from the Administrative Courts of Appeal.

III. Powers

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 the 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.

IV. Nature and effects of judgments

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.

Normally 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 be 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

Introduction

Date of origin: in its present form, the Federal Court was set up by the Federal Constitution of 29 May 1974 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. 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.

I. Basic texts

Articles 106 to 114 bis of the Constitution deal in broad outline with the appointment of judges and the jurisdiction of the Federal Court. In particular, according to Article 113.2.3, the Federal Court may hear complaints against infringements of citizens' constitutional rights.

The organisation of the Federal Court and its rules of procedure are defined in the Federal Judicial Organisation Act of 16 December 1943. 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.

II. Composition and organisation

1. Composition
   - 30 judges and 30 substitute judges.
   - the judges, substitute judges, President and Vice-President are elected by the Federal Assembly.
   - the term of office is 6 years; the President and Vice-President are elected for 2 years.

- 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 official activity following the authorisation of parliament;
  - there are no measures providing for the suspension or dismissal of Federal judges.

2. Procedure
   - the Federal Court sits permanently.
   - The five chambers of the Federal Court and their principal areas of jurisdiction are as follows:
     - the first and second public law chambers (7 and 6 judges respectively) hear appeals against infringements of constitutional rights and appeals concerning administrative law infringements;
     - the first and second civil chambers (6 judges) hear appeals in all fields of civil law, including certain constitutional appeals arising in such fields;
     - the Criminal Court of Cassation hears appeals and pleas involving infringements of Federal criminal law and certain related constitutional appeals.
   - 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 sit with 7 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.

3. 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 other responsibilities (such as the adoption of directives). Under the supervision of an administrative committee, the registrar is in charge of officials and staff at the Court. He heads the specialist and technical services, namely the administrative section of the registry ("chancellerie"), the documentation service, the library, publications and data processing. He acts as Secretary to the full Court and to the conference of presidents of chambers.

III. Powers

1. Types of decisions subject to review of constitutionality

Agreements and treaties concluded by Switzerland are not susceptible to verification or review of their constitutionality, nor are constitutional and quasi-constitutional provisions. Under Article 113.3, Federal laws are not subject to verification or review of constitutionality nor is any Federal or cantonal decision which simply reiterates the terms of such laws. The only Federal legislative decisions subject to constitutional jurisdiction (albeit solely in a preliminary ruling of the Constitution, relating to their application) are *orders by the Federal executive* (Federal Council). The Federal Court thus exercises its constitutional jurisdiction chiefly in respect of *legislative acts (laws and orders) and decisions issued by the Cantons*.

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.

IV. Nature and effects of judgments

1. Types of decision and their legal effects

The Court pronounces judgments in which, if it has examined the merits of the case, it either allows (possibly partially) or rejects the appeal. The main legal remedy by which a citizen may appeal against an infringement of his constitutional rights – a public law appeal – normally results only in annulment: the Federal Court can do no more than set aside the contested decision (in exceptional circumstances, if constitutional order cannot be restored by annulment alone, the Court may order positive measures such as the release of a prisoner). When a legislative decision is contested by way of defence, a successful argument will result in the setting aside only of the particular decision. Judgments of the Federal Court become final as soon as they are pronounced.

2. Publication

The main judgments of the Federal Court are published, in the language in the which the proceedings took place, in the "official compendium of Federal Court judgments" (ATF), first published in 1875. Unpublished judgments may be consulted by anyone with a plausible interest therein.

Bibliography

Aubert, Jean-François:
Traité de droit constitutionnel suisse, Neuchâtel 1967 and 1982.

Auer, Andreas:
La juridiction constitutionnelle en Suisse, Bâle 1983.

Grisel, André:
Le Tribunal fédéral suisse, Revue de droit suisse 1971 p. 385.

Rouiller, Claude:
Le contrôle de la constitutionnalité des lois par le Tribunal fédéral suisse, Pouvoirs 54, 1990, p. 147.

Turkey

Constitutional Court

Introduction

For the first time in Turkish history, the Constitution of 1961 established a Constitutional Court for the country. This important body met for the first time on August 28, 1962 after the adoption of the Law of the Organisation and Trial Procedures of the Constitutional Court (No. 44, dated April 4, 1962). To most students of the Turkish system of government, the introduction of the judicial review of legislation and the setting up of a special Constitutional Court to perform this review was the most radical feature of the 1961 Constitution. The system was maintained, with certain modifications, in the 1982 Constitution.

The 1961 Constitution brought a new concept of sovereignty which differed from the principle of "national sovereignty" of the 1924 Constitution. This different concept of sovereignty is also adopted by the 1982 Constitution. According to Article 4 of the 1961 and Article 6 of the 1982 Constitutions, "Sovereignty is vested in the nation without reservation or condition". This first sentence of the Article is a word for word repetition of Article 3 of the 1924 Constitution. However, the following sentence of the same Articles of the 1961 and 1982 Constitutions defining how sovereignty is to be exercised by the nation depicts quite a different approach: "The Turkish nation shall exercise its sovereignty through the authorised organs as prescribed by the principles laid down in the Constitution". In the context of Turkish constitutional history, the clear intention of this provision was to put an end to the principle of the supremacy of Parliament. Supremacy of parliament was the main characteristic of the 1924 Constitution. With the adoption of this new principle the Turkish Grand National Assembly ceased to be the sole organ which can exercise the sovereignty on behalf of the nation. Under the 1961 and the 1982 Constitution the judiciary was given considerable powers in the exercise of sovereignty. In particular the Constitutional Court has the power to test the constitutional validity of statutes passed by the parliament. The Constitutional Court was expected to counterbalance political institutions, especially the Parliament, which could abuse their powers.

I. Basic texts

The powers, composition and procedure of the Constitutional Court have been regulated in a detailed way in Articles 146 to 153 of the Constitution. The organisation and trial procedures of the Court have been determined by the Law of the Organisation and Trial Procedures of the Constitutional Court (No. 2949,

dated December 3, 1983) and the method of work and the division of labour among its members have been described by the Rules of Procedure made by the Court (dated December 3, 1986, published in the Official Gazette, No. 19300).

II. Composition and organisation

According to the 1982 Constitution, the Constitutional Court is composed of eleven regular and four substitute members. The President of the Republic appoints two regular and two substitute members from the Court of Cassation, two regular and one substitute member from the Council of State, and one member each from the Military Court of Cassation, the High Military Administrative Court and the Court of Accounts. 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 one member from a list of three candidates nominated 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, and three members and one substitute member from among senior civil service officials and lawyers (Art. 146). Although it is not mentioned in the Constitution, according to the organic law concerning the functions of the Constitutional Court, there must be enough reporters for assisting in the works of the Court (Art. 16). The organisation of General Secretary is attached to the Presidency (Art. 17).

The Constitutional Court is granted complete independence from the legislative and executive branches of the state. All judges of the Court hold office until they retire at the age of sixty-five. Apart from age, their office may be terminated only upon conviction for an offence requiring dismissal from the judicial profession. One more reason for the termination of their office is for reasons of health; but in this case, the Constitutional Court itself decides by a decision of an absolute majority of the total members of the Court on the termination of membership (Art. 147). In addition to these provisions, the members of the Constitutional Court cannot take other official and private functions besides their main functions (Art. 146).

III. Powers

The main function of the Constitutional Court is the judicial review of legislative acts. According to Article 148 of the 1982 Constitution, "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" (Art. 146). The Constitutional Court is also empowered to review whether the procedural rules are observed in constitutional amendments. In other words the Constitutional Court cannot 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 (Art. 148, 149).

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 in the ballot, and whether the prohibition on debates under urgent procedure was complied with. 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 of constitutional review of decrees having force of law issued during a state of emergency, martial law or in time of war. In these situations no action can be brought before the Constitutional Court alleging unconstitutionality on substantive and procedural grounds (Art. 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 given decree does not meet with these requirements, then it may be reviewed.

Although international agreements duly implemented carry the force of law, no appeal can be made with regard to these agreements on the grounds that they are unconstitutional (Art. 90).

The Constitutional Court also performs, in addition to its main function of the judicial review of legislative acts, other functions given to it by the Constitution. These 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, 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, and the President and members of the Supreme Council of Judges and Public Prosecutors, and of the Audit Court for offences relating to their functions (Art. 148). The Chief Public Prosecutor serves as public prosecutor in the Supreme Court. The judgments of the Supreme Court are final.

The dissolution of political parties is carried out by the Constitutional Court (Art. 69).

The auditing of political parties is carried out by the Constitutional Court (Art. 69).

Application for annulment of the decisions of the Parliament to waive the parliamentary immunity of a member or disqualify him from membership can be appealed to the Constitutional Court within a week of the decision for the annulment on the grounds that it is contrary to the Constitution or to the rules laid

down in the Standing Order of the Assembly. The Constitutional Court must decide on the appeal within fifteen days (Art. 85).

The Constitutional Court examines cases on the basis of files, except where it acts as the Supreme Court. But when the Court deems it necessary, it may call on those concerned and those having knowledge relevant to the case to present oral explanations.

Under the 1982 Constitution access to the Constitutional Court can be secured in two ways:

1. Abstract control of norms

The action for annulment is abstracted from any particular case ; for that reason in Turkish law the scholars called this abstract control of norms. The constitutional validity of an enacted statute, of decrees having 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 an action for annulment is restricted. Only those persons and groups enumerated in the Constitution have the right of application.

As for 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 (Art. 151).

2. Concrete control of norms

In 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 law amending ordinance 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 judgement will be decided upon by the competent authority of appeal.

The Constitutional Court must decide upon the matter within five months. If no decision is reached by the Constitutional Court within this period, the court has to give its judgement on the basis of the existing law.

IV. Nature and effects of judgments

Laws, decrees having force of law, or the Standing Orders of the Assembly or some provisions of them 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 some 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.

According to Article 153 of the Constitution, the annulment decision cannot have a retroactive effect. This means that a law which is invalidated by the Constitutional Court is valid and effective up to the moment when the decision of the Constitutional Court is published. This is completely different from the American system where the judge, in the exercise of this power of review, does not annul but merely declares the pre-existing nullity of unconstitutional law.

In the event of the postponement of the date on which an annulment decision is to come into effect, the Turkish Grand National Assembly must debate and decide with priority on the draft bill or a law proposal, designed to fill the legal *lacuna* arising from the invalidation.

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 (Art. 153).

According to 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, the executive, and the judicial organs, the administrative authorities and persons and corporate bodies (Art. 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.

Although it is very difficult to interpret, according to Article 153 of the Constitution, the Constitutional Court cannot act as a law-maker and pass judgment leading to a new implementation (in the course of annulling the laws).

Conclusion

After the sad experiences of the first half of this century, first in European countries, then in other countries in the world, the need to put a check upon the legislature itself arose. It had become evident that even legislation could be the source of great abuses, which were sanctioned by statute. For that reason, first Europeans, then non-Europeans started to walk the path taken by the Americans. Almost all contemporary democratic countries decided to express fundamental rights in constitutions that were difficult to amend, and the judiciary, or a part of it, was to be the instrument for ensuring conformity to the constitution[1].

1. *Mauro Cappelletti, Judicial Review in the Contemporary World (Indianapolis: The Bobbs-Merill Company, Inc. 1971), p. 97.*

In modern Turkey we understand that no "constitutional jury" other than the Constitutional Court which is a part of the judiciary will be sufficiently neutral and detached to exercise effectively the functions of guardian of the constitution. One of the greatest constitutional scholars in the world, Carl J. Friedrich, more than 40 years ago said: "We must conclude, therefore, that in the absence of a constitution deeply rooted in tradition, such as exists in England, Switzerland, or Sweden, a judiciary capable of exercising judicial review will be required if a constitution in the political sense of a set of techniques for restraining the actions of government is to be established" [1].

We must also emphasize that the concept of human rights has gained contemporary and universal dimension in the world and became an important subject within the constitutions of 1961 and 1982. For example, in the Preamble of the 1982 Constitution it has been stressed that the Turkish Nation "as a full and honourable member of the world family of nations" must safeguard the everlasting existence, prosperity and material and spiritual wellbeing of the Turkish Republic. Also according to Article 2 of the 1982 Constitution, one of the main characteristics of the Turkish Republic is to respect human rights. In this Article the fundamental qualities of the Turkish Republic are a respect for human rights and are enumerated thus: "the Republic of Turkey is a democratic, secular and social state governed by the rule of law". In this regard, the most important event is the foundation of the Constitutional Court on 25 April 1962 [2] which provides a judicial and juridical security mechanism for fundamental rights and other very important qualities of the Republic. The Constitutional Court, as a national guarantee institution, using universal principles of law and depending on human rights in its decisions, is gradually strengthening and going to be accepted.

1. *Carl J. Friedrich, Constitutional Government and Democracy (Boston: Ginn and Company, 1950), p. 236.*

2. *The Constitutional Court was convened for the first time on 28 August 1962.*

United States of America

Supreme Court

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 September 24, 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 February 1, 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.

I. 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, paragraph 1 of the United States Code, provides that there shall be eight associate Justices and one Chief Justice of the Supreme Court, and paragraphs 1251-1259 define the Court's jurisdiction. The Rules of the Supreme Court, adopted by the Court pursuant to title 28, paragraph 2071 of the United States Code, prescribe the Court's procedures.

II. Composition 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 judicial duties.

Justices of the Court are precluded by Article I, paragraph 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. Total employees of the Supreme Court in 1993 numbered 353, while its budget for FY 1993 was $ 25.6 million.

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.

III. Powers

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 can not 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.

IV. Nature and effects of judgments

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.

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