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Replies to the questionnaire on the execution of constitutional review decisions

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Réponses au questionnaire sur l'exécution des arrêts des juridictions constitutionnelles

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ALBANIA / ALBANIE

Réponse au questionnaire sur
"L'exécution des juridictions constitutionnelles"

I. Questions générales sur le contrôle de constitutionnalité

A. Le type e l'objet du contrôle de la constitutionnalité:

1. Le contrôle de constitutionnalité des actes normatifs

a. Le contrôle préventif.

Le contrôle préventif de la Cour Constitutionnelle en Albanie est exercé seulement pour vérifier la compatibilité des traités internationaux avec la Constitution de la République d'Albanie. Selon l'article 131 point *b* de la Constitution ce contrôle est exercé avant la ratification des traités par l'Assemblée. La ratification d'un traité comporte son inclusion comme partie intégrante du système juridique du pays, après la publication dans le Journal Officiel.

Mais il faut souligner que la loi "Sur l'organisation et le fonctionnement de la Cour Constitutionnelle de la République d'Albanie", approuvée le 10 février 2000, prévoit que les traités internationaux, ratifiés avant l'entrée en vigueur de la Constitution et qui sont incompatibles avec elle, peuvent être présentés à la Cour Constitutionnelle par le Conseil des Ministres. Si la Cour Constitutionnelle constate que le traité international ratifié par une loi contient des dispositions contraires à la Constitution, elle décide l'abrogation de l'acte de ratification.

Le contrôle préventif est exercé aussi pour les référendums.

b- Le contrôle abstrait ou principal (grief direct d'inconstitutionnalité).

En Albanie aussi, le contrôle principal de la Cour Constitutionnelle est le contrôle abstrait, exercé pour vérifier la compatibilité de la loi avec la Constitution ou avec les traités internationaux ainsi que la compatibilité des actes normatifs des organes centraux et locaux avec la Constitution et les traités internationaux.

c -Le contrôle concret ou incident des normes.

Selon la Constitution et la loi mentionnée, si un tribunal ou un juge, au cours d'un procès judiciaire, ex-officio ou à la suite d'une objection soulevée par les parties engagées dans ce procès, estime qu'une loi est anticonstitutionnelle, lorsqu'il y a une liaison directe entre cette loi et la solution concrète du procès, il n'applique pas la loi, décidant l'interruption du procès et l'envoi du dossier à la Cour Constitutionnelle, pour que celle-ci puisse s'exprimer sur la constitutionnalité de la loi.

Dans leur arrêt le tribunal ou le juge doit préciser les dispositions de la loi considérées incompatibles avec les normes concrètes ou les principes de la Constitution, et aussi les motifs pour lesquels il demande leur abrogation.

Après la conclusion du jugement par la Cour constitutionnelle, le dossier, avec l'arrêt de la Cour, doit être renvoyé au tribunal intéressé. La décision de la Cour Constitutionnelle est obligatoire pour tous les tribunaux.

En outre, lorsque la Cour Constitutionnelle, pendant un procès pour conflits de compétences, estime que la solution de ce conflit est liée à une loi ou à des autres actes normatifs elle examine aussi la constitutionnalité de la loi ainsi que la légalité des actes normatifs.

d - Les actes normatifs échappant au contrôle de constitutionnalité

Il n'y a pas de tels actes en Albanie.

2. L'examen des omissions inconstitutionnelles en matière législative (inaction du législateur lorsque la Constitution l'oblige à agir).

La Constitution et la législation albanaise ne prévoient pas de cas pareils

3. *Les décisions concernant la protection des droits constitutionnels.*

La Cour Constitutionnelle juge, comme dernier ressort, les recours des individus pour la violation des leurs droits constitutionnels à un procès régulier légal, lorsque ont été utilisés tous les moyens juridiques pour la protection de ces droits. En conséquence la Cour Constitutionnelle peut annuler aussi les décisions des tribunaux, en principe inappelables, si ces décisions violent les droits constitutionnels des individus.

4. *Les autres compétences des juridictions constitutionnelles*

La Cour Constitutionnelle décide:
- sur la constitutionnalité des partis politiques et des autres organisations politiques.

Dans ce cas la Cour agit sur demande du Président de la République, du Premier Ministre et pas moins d'un cinquième des députés. La demande peut être présentée à chaque moment à la Cour Constitutionnelle.

La Cour décide si le parti ou l'organisation politique a été formée en conformité avec les dispositions constitutionnelles et si son activité est conforme à la Constitution.

Lorsque la Cour Constitutionnelle arrive à la conclusion que la création d'un parti ou d'une organisation politique est contraire à la Constitution, elle annule l'acte de sa création. Lorsque la Cour Constate que l'activité d'un parti ou d'une organisation politique est contraire à la Constitution, elle décide l'interdiction de son activité ou ordonne l'annulation de son enregistrement.

- pour les conflits de compétence entre les pouvoirs de l'Etat ainsi que entre les organes centraux et locaux.

Le recours devant la Cour Constitutionnelle peut être présenté par les sujets qui sont parties dans le conflits ou par les sujets endommagés directement à cause du conflit.

- pour les referendums.

La Cour Constitutionnelle examine d'une façon préventive la constitutionnalité des questions posées dans le referendum ainsi que le respect ou non des normes constitutionnelles pour la proposition et l'autorisation du referendum.

B. Les effets des arrêts des juridictions constitutionnelles

1. En ce qui concerne les actes normatifs:

a – Les arrêts des juridictions constitutionnelles ont-ils uniquement un effet déclaratoire?

Ces arrêts généralement ont un effet déclaratoire, mais pas dans tous les cas. Par exemple, dans le cas d'un conflit de compétence, exposé dans le point 4a, la Cour Constitutionnelle statue qui est l'organe compétent pour le problème concret. En outre, lorsque la Cour décide l'abrogation d'une loi ou d'un acte normatif et les rapports créés exigent une réglementation juridique, l'arrêt de la Cour Constitutionnelle est notifié aux organes respectifs pour qu'ils prennent les mesures prévues dans cet arrêt.

b. La norme déclarée contraire a la Constitution est-elle déclarée nulle ou annulée avec effet immédiat? Est-ce que la juridiction constitutionnelle peut modifier la norme?

L'arrêt de la Cour Constitutionnelle, qui a abrogé une loi ou un acte normatif pour incompatibilité avec la Constitution ou avec un traité international, a un effet à partir de l'entrée en vigueur.

Exceptionnellement, l'arrêt a un effet rétroactif seulement:

- envers une sentence pénale dans la période de son exécution, lorsque cette sentence a une liaison directe avec l'application de la loi ou de l'acte normatif abrogé;
- envers les cas examinés par les tribunaux, jusqu'au moment où leurs décisions sont devenues inappelables;
- envers les conséquences encore présentes de la loi ou de l'acte normatif.

L'arrêt interprétatif de la Cour Constitutionnelle a aussi un effet rétroactif.

L'arrêt de la Cour Constitutionnelle ne peut modifier la norme dans aucun cas.

c. Est-ce que l'arrêt doit être mis en oeuvre (par l'abrogation de la norme) par un autre organe?

La Cour Constitutionnelle a le droit d'abroger directement la norme.

d. Est-ce que les effets de l'annulation peuvent être reportes?

Les arrêts de la Cour Constitutionnelle entrent en vigueur dès leur publication dans le Journal Officiel. Mais la Cour peut statuer que la loi ou l'acte normatif soit abrogées dans un autre délai.

e. La portée de l'arrêt va-t-elle au-delà du cas particulier, en cas de contrôle par voie incidente?

La portée de l'arrêt peut aller au-delà du cas particulier.

f. La juridiction constitutionnelle peut – elle ordonner à une autre autorité d'agir? Peut – elle fixer un délai pour agir?

La Cour Constitutionnelle n'ordonne pas d'agir à une autre autorité, sauf dans le cas d'un arrêt qui statue qui est l'organe compétent pour un cas particulier.

2. Concernant la protection des droits individuels
Si la juridiction constitutionnelle annule une décision d'une autre autorité pour inconstitutionnalité:

a – L'affaire est-elle renvoyée à l'autorité inférieure pour une nouvelle décision?

L'affaire est renvoyée à l'autorité inférieure pour une nouvelle décision.

b – Est-ce que la juridiction constitutionnelle statue elle-même, me sur la question?

En Albanie la Cour Constitutionnelle ne statue pas sur la question.

3. En outre, est-ce que les arrêts des juridictions constitutionnelles:
a. lient celles-ci?
b. ont un effet de res judicata (entre les parties; erga omnes)?

Ces arrêts ont un effet de res judicata pas seulement entre les parties, mais aussi *erga omnes.*

c – ont force de loi?

Les arrêts de la Cour Constitutionnelle ont force de loi.

d- sont publiées dans un journal officiel?

Tous les arrêts de la Cour Constitutionnelle sont publiés dans le Journal Officiel.

e– Qu'en est-il en particulier lorsqu'un arrêt déclare qu'une norme deviendra inconstitutionnelle si elle n'est pas modifiée dans un certain délai?

La loi ne prévoit pas des mesures concrètes, peut être parce que l'arrêt de la Cour Constitutionnelle doit être exécuté obligatoirement.

II. Quels sont les moyens d'assurer des arrêts des juridictions constitutionnelles?

En particulier:

1. *La législation prévoit-elle l'autorité chargée d'exécuter les arrêts de la juridiction constitutionnelle?*

Selon la loi "Sur l'organisation et le fonctionnement de la Cour Constitutionnelle…", les arrêts de cette Cour sont obligatoires et doivent être exécutés. L'exécution est assurée par le Conseil des Ministres, par le moyen des organes compétents de l'administration de l'Etat.

2. *Sinon, existe-t-elle une norme prévoyant que la juridiction constitutionnelle ou une autre autorité détermine l'organe compétent pour exécuter les décisions de la Cour Constitutionnelle?*

Outre la réponse donnée dans le point précédent, il faut ajouter que la loi prévoit que la Cour Constitutionnelle peut designer elle-même un autre organe chargé de l'exécution de son arrêt et, si cela est nécessaire, aussi la façon de l'exécution de cet arrêt.
Dans la pratique de la Cour Constitutionnelle il s'est présenté un seul cas pareil, lorsque la Cour a chargé le Parquet pour l'exécution d'un arrêt. L'arrêt en question a été exécuté.

III. Quelles sont les conséquences de l'inexécution ou de l'absence d'exécution dans un délai raisonnable – des arrêts des juridictions constitutionnelles?

Selon la loi, les personnes qui n'exécutent pas les arrêts de la Cour Constitutionnelle ou empêchent leur exécution, si cette action ne constitue pas un délit prévu par la loi pénale, sont condamnées à une amende de 100.ooo leks (l'équivalent d'environ 930 dollars US) par le président de la Cour Constitutionnelle, avec une décision inappellable et qui constitue un titre exécutif.

IV. Cas d'inexécution

A. *Pouvez-vous citer des cas récents d'un arrêt de la juridiction constitutionnelle de votre pays?*

Il n'y a pas de tels cas

V. Cas d'exécution insatisfaisante

Dans certains cas, même si un arrêt de la juridiction constitutionnelle a été exécuté, la situation reste insatisfaisante, car une norme inconstitutionnelle continue d'être appliquée.

A. *Une telle situation s'est-elle présentée récemment dans votre pays?*

La réponse est non.

En ce qui concerne les points IV et V, des problèmes particuliers se sont-ils présentés lorsque des arrêts des juridictions ordinaires supérieures ont été déclarés contraires à la Constitution?

De tels problèmes ne se sont pas présentés.

LUAN OMARI

ANDORRA / ANDORRE

QUESTIONNAIRE SUR L'EXECUTION DES ARRÊTS DES JURIDICTIONS CONSTITUTIONNELLES

Question préliminaire: S'agit-il de l'exécution de l'arrêt tout entier ou seulement du dispositif en excluant les motifs?

Le Tribunal constitutionnel de l'Andorre a jugé que l'autorité de la chose jugée s'attachait au dispositif ainsi qu'aux motifs qui en sont son support nécessaire et son fondement même.

I. Questions générales sur le contrôle de constitutionnalité

A. Le type et l'objet du contrôle de constitutionnalité:

a. Le contrôle de constitutionnalité des actes normatifs.

1. Le contrôle préventif

   Le contrôle du Tribunal est préventif; la norme déclarée contraire à la Constitution ne peut donc entrer en application. La décision du Tribunal est donc nécessairement exécutée.

2. Le contrôle abstrait ou principal (grief direct d'inconstitutionnalité).

   Il n'y a pas de recours direct contre une norme régulièrement publiée. Il n'y a donc pas de décision à exécuter.

3. Le contrôle concret ou incident des normes.

   Ce contrôle est exercé sur renvoi d'une juridiction.

4. Les actes normatifs échappant au contrôle de constitutionnalité.

   La compétence du Tribunal constitutionnel se limite aux lois et aux décrets législatifs pris sur délégation du législateur.

b. L'examen des omissions inconstitutionnelles en matière législative (inactions du législateur lorsque la Constitution l'oblige à agir).

Pas de compétences spéciales du Tribunal constitutionnel.

c. Les décisions concernant la protection des droits constitutionnels.

Le Tribunal constitutionnel de l'Andorre connaît des recours des particuliers en cas d'atteinte à leurs droits constitutionnels. Ce recours doit être précédé d'une instance judiciaire.

d. Les autres compétences des juridictions constitutionnelles.

Le Tribunal a aussi compétence pour régler les conflits entre les organes de l'Etat; les paroisses (ou communes sont considérées comme des organes de l'Etat).

B. Les effets des arrêts des juridictions constitutionnelles:

1. En ce qui concerne les actes normatifs:

1. Les arrêts des juridictions constitutionnelles ont-ils uniquement un effet déclaratoire?

   Non.

2. La norme déclarée contraire à la Constitution est-elle déclarée nulle ou annulée avec effet immédiat? Est-ce que la juridiction constitutionnelle peut modifier la norme?

   La norme est annulée avec effet immédiat.
   Le Tribunal constitutionnel ne peut pas modifier la norme.

3. Est-ce que l'arrêt doit être mis en œuvre (par l'abrogation de la norme) par un autre organe.

   Non, la décision du Tribunal constitutionnel suffit.

4. Est-ce que les effets de l'annulation peuvent être reportés?

   Non.

5. La portée de l'arrêt va t-elle au-delà du cas particulier, en cas de contrôle par voie incidente? Qu'en est-il notamment des situation analogues au cas d'espèce, mais qui ont déjà fait l'objet d'une décision définitive ?

   Les arrêts déclarant l'inconstitutionnalité partielle ou totale des normes contestées ont effet à partir de la date de leur publication au journal officiel de la Principauté. Sauf dans les cas d'une application rétroactive favorable, les effets en cours produits par ces normes avant leur annulation subsistent tant que de nouvelles normes ne sont pas adoptées pour régir les situations juridiques préexistantes.

D'autre part, les précédents établis par le Tribunal Constitutionnel constituent des critères d'interprétation au Tribunal, mais ils peuvent toujours être modifiés par une décision motivée prise à la majorité absolue de ses membres.

6. La juridiction constitutionnelle peut-elle ordonner à une autre autorité d'agir? peut-elle fixer un délai pour agir?

Non.

2. Concernant la protection des droits constitutionnels:

Si la juridiction constitutionnelle annule une décision d'une autre autorité (administration, tribunal, etc.) pour inconstitutionnalité:

L'affaire est renvoyée à l'autorité inférieure pour nouvelle décision.

3. En outre, est-ce que les arrêts des juridictions constitutionnelles:

a) lient celles-ci?
Oui.

b) ont un effet de *res iudicata* (entre les parties; *erga omnes*).
Ils ont un effet *erga omnes*.

c) ont force de loi?
Leur force est supérieure à la loi.

d) sont publiés dans un journal officiel?
Oui.

e) qu'en est-il en particulier lorsqu'un arrêt déclare qu'une norme deviendra inconstitutionnelle si elle n'est pas modifiée dans un certain délai?
Le cas n'est pas prévu.

II. Quels sont les moyens d'assurer l'exécution des arrêts des juridictions constitutionnelles?

La décision s'impose à toutes les autorités de la Principauté.

III. Quelles sont les conséquences de l'inexécution- ou de l'absence d'exécution dans un délai raisonnable – des arrêts des juridictions constitutionnelles?

Ils ont toujours été exécutés.

IV. Cas d'inexécution

Aucun cas d'inexécution.

V. Cas d'exécution insatisfaisante

Aucun cas.

Professeur F. LUCHAIRE
Membre de la Commission de
Venise pour Andorre

Mme. M. TOMAS BALDRICH
Agent de liaison

Andorra la Vella, septembre 2000

ARMENIA / ARMENIE

REPLIES TO THE QUESTIONNAIRE ON THE EXECUTION OF THE CONSTITUTIONAL REVIEW DECISIONS

BY THE CONSTITUTIONAL COURT OF ARMENIA

I. General questions on constitutional review

A. The type of constitutional review and its subject:
1. constitutional review of normative acts
a. preliminary review
Only International Treaties of the Republic of Armenia are subject to the preliminary review.

b. abstract or principal review (direct claim of unconstitutionality)
All the normative acts of the Constitutional Court of the Republic of Armenia prescribed in Paragraph 1, Article 100 of the Constitution are subject to the abstract review. The Constitutional Court "decides the conformity of laws, the National Assembly decisions, decrees, orders of the President of Republic and Government decisions with the Constitution". At the same time, these acts are subject to the principal review.

c. concrete or incidental review of norms
The Constitutional Court of the Republic of Armenia does not exercise concrete or incidental review, because of absence of the Institute of individual applications of the citizens.

d. normative acts that are not subject to constitutional review
Currently, the normative acts of the Prime Minister, ministries and other departments, Governors, Local self-government bodies are not subject to the constitutional review.

2. Review of unconstitutional omission of legislation (failure of the legislator to act when it is obliged to do so by the Constitution)

Such review is not exercised.

3. Decisions concerning the protection of constitutional rights (Verfassungsbeschwerde, amparo, appeal to a judicial body of ultimate appeal)

There is a possibility to apply to courts of general jurisdiction for protection of constitutional rights, even to the supreme judicial body, that is Court of Appeals.

4. Other areas of constitutional review (examples: unconstitutionality of political parties, referenda, conflicts between infra-state entities, conflicts between state bodies)

The Constitutional Court solves the conflicts on the results of referenda, makes a decision on suspension or prohibition of activity of the party in case stipulated by law. However, the conflicts between infra-state entities, as well as the conflicts between state bodies are not subject to the constitutional review.

B. The effects of constitutional review decisions:

1. Concerning normative acts:

a. Are constitutional review decisions merely declaratory?
The Constitutional Court decisions are not declaratory.

b. Is the norm, which is declared contrary to the Constitution null and void, or annulled immediately? Can the body exercising constitutional review modify the norm?
The norm, which contradicts the Constitution, is annulled upon publication of the decision of the Constitutional Court. The body exercising constitutional review can not modify the norm.

c. Must the decisions be implemented (i.e. by repealing the norm) by another organ?
According to the Paragraph 3, Article 64 of the Law "On Constitutional Court", "The decisions of the Constitutional Court are obligatory for execution within the territory of the Republic of Armenia, and according to Article 70, "Non-execution, improper execution or impeding the execution of the decisions of the Constitutional Court result in responsibility prescribed by law".

d. Can the effects of annulment be postponed?
The effects of annulment can not be postponed, because the norm (de facto) declares null and void upon publication of the decision of the Constitutional Court.

e. Do the effects of the decisions go beyond the individual case, where incidental concrete review of norms is concerned? What is the position regarding similar cases which have already been the subject of a final decision?
The Constitutional Court of the Republic of Armenia does not exercise concrete or incidental review.

f. Can the body exercising constitutional review order another authority to act? Within a fixed period of time?
No, the body exercising constitutional review can not order another authority to act.

2. Concerning the protection of constitutional rights:
If the body exercising constitutional review quashes a decision by a public authority (administration, court, etc.) on the grounds that it is unconstitutional:

a. Is it sent back to the original authority for a new ruling? or
b. Does the body exercising constitutional review decide on the matter?

The Constitutional Court decides on the matter.

3. Furthermore, do constitutional review decisions have:
a. binding force (binding the body exercising constitutional review itself)?
b. *res iudicata* force (*inter partes; erga omnes*)?
c. force of law (see for instance § 31.2 of the German law on the constitutional court)?
d. are they published in an official journal?

e. What happens if a decision declares that a norm will become unconstitutional if it is not modified within a certain period?

Do the answers to the previous questions depend on the type of constitutional review (for example: concrete/abstract control)? Do special rules apply in the cases mentioned in point **I**. A. 4 above?
The reply to questions II and III will make a distinction, if necessary, according to the type/subject of constitutional review as well as to the effects of decisions (see question I).

3. The decision of the Constitutional Court has *res iudicata force*, binding force, force of law and it is published in an official journal. The Constitutional Court declares the norm unconstitutional, if the norm is contrary to the Constitution at the present. The answers of the previous questions can not depend on the type of the constitutional review, because the Constitutional Court of the Republic of Armenia is exercising only abstract review. For all cases mentioned in I A 4 point only one case allows the special rule for applying to the Constitutional Court. The application to the Constitutional Court concerning the conflicts arising from the results of the referenda can be exercised during 7 days after the official publication of the results.

II. What means are available to ensure the execution of constitutional review decisions?

The response to this question should take account of the legislation concerning the execution of constitutional review decisions, either by other courts or by executive bodies. In particular:
1. Is there a norm indicating which authority has to execute the constitutional review decisions?
No, there is not such a norm.

2. If not, is there a norm providing that the body exercising constitutional review or any other authority has the power to designate the body which will execute the decisions of the court?
How does the system work in practice?
No, according to the Paragraph 3, Article 64 of the Law "On Constitutional Court", "The decisions of the Constitutional Court are obligatory for execution within the territory of the Republic of Armenia, and according to Article 70, "Non-execution, improper execution or impeding the execution of the decisions of the Constitutional Court result in responsibility prescribed by law".

III. What are the consequences if constitutional review decisions are not executed or are not executed within a reasonable time?

The decisions of the Constitutional Court are enacted immediately upon publication. The body to who concerns this decision can exercise specific activity. For example, on October 16, 1999 the Constitutional Court of the Republic of Armenia made a decision on conformity of Paragraph 2, Article 3 of the Law "On Local self-government" adopted by the National Assembly on June 30, 1999, Point 1, Article 2 and Points 1 and 2, Article 122 of the Electoral Code of the Republic of Armenia adopted on February 5, 1999, Paragraph 8, Article 18 of Law of the Republic of Armenia "On refugees" adopted on March 3, 1999 with the Constitution of the Republic of Armenia (this concerns the provisions excluding the electoral rights of the refugees, who have taken permanent residence over 10 years in Armenia. They could not form the local self-government bodies.

The Constitutional Court has declared the provisions of above mentioned laws unconstitutional, as far as they exclude the rights of the refugees, who have legally taken

residence in Armenia, to take part in the election of Local self-government bodies. Taking into account this decision, the National Assembly of the Republic of Armenia ammended the provisions of above-mentioned laws, that were declared unconstitutional.

IV. Cases where decisions are not executed?

A. Have there been any recent cases where a constitutional review decision has not been executed in your country?
B. If so, is it possible to identify the reasons why the decision was not executed (e.g. political or financial reasons, lack of clarity in the decision, inadequate rules on the execution of decisions)?

No, however, there were cases, when the officials tried to express their disagreement on Constitutional Court decision in public. This in our opinion is also impermissible. The decisions of the Constitutional Court are final, can not be subject to review, can not be cancelled. It is preferable that legislation contains a provision, that the decision of the Constitutional Court can not be interpreted by any institutions or officials too.

V. Cases of unsatisfactory execution

In certain cases, even where a constitutional review decision has been executed, the situation remains unsatisfactory because an unconstitutional norm continues to be applied.

A. Has such a situation arisen recently in your country?
B. What are the causes of such a situation? Do they stem from the effects of the constitutional review decision (absence of *erga omnes* effect, declaratory nature of the decision), or from other causes, such as those mentioned in IV. B above?

Concerning points IV and V, did specific problems arise when decisions of ordinary higher courts were declared contrary to the Constitution?

In the Republic of Armenia there were no cases, when unconstitutional norm continued to be implemented.

Concerning points IV and V, specific problems could not arise, because the decisions of the courts of ordinary jurisdiction are not subject to the constitutional review.

AUSTRIA / AUTRICHE

Austrian reply
Ingrid Siess-Scherz
Federal Chancellery, Constitutional Service
Vienna

Execution of Constitutional Court Decisions

First, it needs to be noted that the competences of the Austrian Constitutional Court are laid down in Articles 126a, 137 to 144 and 148f of the Austrian Federal Constitution. These provisions read as follows:

"Art. 126a. Should divergences of opinion arise between the Public Audit Office and a legal entity (Art. 121 para. 1) on interpretation of the legal provisions which prescribe the competence of the Public Audit Office, the Constitutional Court decides the issue upon application by the Federal Government or a Land Government or the Public Audit Office. All legal entities must in accordance with the legal opinion of the Constitutional Court render possible a scrutiny by the Public Audit Office. The enforcement of this obligation will be implemented by the ordinary courts. The procedure will be prescribed by Federal law.

D. The Constitutional Court

Art. 137. The Constitutional Court pronounces on pecuniary claims on the Federation, the Laender, the Bezirke, the municipalities and municipal associations which cannot be settled by ordinary legal process nor be liquidated by the ruling of an administrative authority.

Art. 138. (1) The Constitutional Court furthermore pronounces on conflicts of competence

a) between courts and administrative authorities;

b) between the Administrative Court and all other courts, in particular too between the Administrative Court and the Constitutional Court itself, as well as between the ordinary courts and other courts;

c) between the Laender amongst themselves as well as between a Land and the Federation.

(2) The Constitutional Court furthermore determines at the application of the Federal Government or a Land Government whether an act of legislation or execution falls into the competence of the Federation or the Laender.

Art. 138a. (1) The Constitutional Court establishes on application by the Federal Government or a Land Government concerned whether an agreement within the meaning of Art. 15a para. 1 exists and whether the obligations arising from such an agreement, save in so far as it is a matter of pecuniary claims, have been fulfilled.

(2) If it is stipulated in an agreement within the meaning of Art. 15a para. 2, the Court also establishes on application by a Land Government concerned whether such an agreement exists and whether the obligations arising from such an agreement, save in so far as it is a matter of pecuniary claims, have been fulfilled.

Art. 139. (1) The Constitutional Court pronounces on application by a court or an independent administrative tribunal whether ordinances issued by a Federal of Land authority are contrary to law, but *ex officio* in so far as the Court would have to apply such an ordinance in a pending suit. It also pronounces on application by the Federal Government whether ordinances issued by a Land authority are contrary to law and likewise on application by the municipality concerned whether ordinances issued by a municipal affairs supervisory authority in accordance with Art. 119a para. 6 are contrary to law. It pronounces furthermore whether ordinances are contrary to law when an application alleges direct infringement of personal rights through such illegality in so far as the ordinance has become operative for the applicant without the delivery of a judicial decision or the issue of a ruling; Art. 89 para. 3 applies analogously to such applications.

(2) If the litigant in a suit lodged with the Constitutional Court, entailing application of an ordinance by the Constitutional Court, receives satisfaction, the proceedings initiated to examine the ordinance's legality shall nevertheless continue.

(3) The Constitutional Court may rescind an ordinance as contrary to law only to the extent that its rescission was expressly submitted or the Court would have had to apply it in the pending suit. If the Court reaches the conclusion that the whole ordinance

a) has no foundation in law,

b) was issued by an authority without competence in the matter, or

c) was published in a manner contrary to law, it shall rescind the whole ordinance as illegal. This does not hold good if rescission of the whole ordinance manifestly runs contrary to the legitimate interests of the litigant who has filed an application pursuant to the last sentence in para. 1 above or whose suit has been the occasion for the initiation of *ex officio* examination proceedings into the ordinance.

(4) If the ordinance has at the time of the Constitutional Court's delivery of its judgment already been repealed and the proceedings were initiated *ex officio* or the application was filed by a court or an applicant alleging direct infringement of his personal rights through the

ordinance's illegality the Court must pronounce whether the ordinance contravened the law. Para. 3 above applies analogously.

(5) The judgment by the Constitutional Court which rescinds an ordinance as contrary to law imposes on the highest competent Federal or Land authority the obligation to publish the rescission without delay. This applies analogously in the case of a pronouncement pursuant to para. 4 above. The rescission enters into force on the day of publication if the Court does not set a deadline, which may not exceed six months or if legal dispositions are necessary 18 months, for the rescission.

(6) If an ordinance has been rescinded on the score of illegality or if the Constitutional Court has pursuant to para. 4 above pronounced an ordinance to be contrary to law, all courts and administrative authorities are bound by the Court's decision, the ordinance shall however continue to apply to the circumstances effected before the rescission, the case in point excepted, unless the Court in its rescissory judgment decides otherwise. If the Court has in its rescissory judgment set a deadline pursuant to para. 5 above, the ordinance shall apply to all the circumstances effected, the case in point excepted, till the expiry of this deadline.

Art. 139a. The Constitutional Court pronounces on application by a court whether in the republication of a legal norm the limits of the authority conferred were transcended; *ex officio*, in so far as the republication of the legal norm constitutes the prerequisite to a judgment by the Court itself; also on application by a Land Government in the case of legal norms republished by the Federation, likewise on application by the Federal Government in the case of legal norms republished by a Land. It pronounces furthermore whether in the republication of a legal norm the limits of the authority conferred were transcended when an application alleges direct infringement of personal rights in so far as the republished legal norm has become operative against the applicant without the delivery of a judicial decision or the issue of a ruling. Art. 59 paras. 2, 3 and 5 as well as Art. 139 paras. 2 to 6 shall apply analogously.

Art. 140. (1) The Constitutional Court pronounces on application by the Administrative Court, the Supreme Court, a competent appellate court or an independent administrative tribunal whether a Federal or Land law is unconstitutional, but *ex officio* in so far as the Court would have to apply such a law in a pending suit. It pronounces also on application by the Federal Government whether Land laws are unconstitutional and likewise on application by a Land Government, by one third of the National Council's members, or by one third of the Federal Council's members whether Federal laws are unconstitutional. A Land constitutional law can provide that such a right of application as regards the unconstitutionality of Land laws lies with one third of the Diet's members. The Court pronounces furthermore whether laws are unconstitutional when an application alleges direct infringement of personal rights through such unconstitutionality in so far as the law has become operative for the applicant without the delivery of a judicial decision or the issue of a ruling; Art. 89 para. 3 applies analogously to such applications.

(2) If the litigant in a suit lodged with the Constitutional Court, entailing application of a law by the Court, receives satisfaction, the proceedings initiated to examine the law's constitutionality shall nevertheless continue.

(3) The Constitutional Court may rescind a law as unconstitutional only to the extent that its

rescission was expressly submitted or the Court would have to apply the law in the suit pending with it. If however the Court concludes that the whole law was enacted by a legislative authority unqualified in accordance with the allocation of competence or published in an unconstitutional manner, it shall rescind the whole law as unconstitutional. This does not hold good if rescission of the whole law manifestly runs contrary to the legitimate interests of the litigant who has filed an application pursuant to the last sentence in para. 1 above or whose suit has been the occasion for the initiation of *ex officio* examination proceedings into the law.

(4) If the law has at the time of the Constitutional Court's delivery of its judgment already been repealed and the proceedings were initiated *ex officio* or the application filed by a court or an applicant alleging direct infringement of personal rights through the law's unconstitutionality, the Court must pronounce whether the law was unconstitutional. Para. 3 above applies analogously.

(5) The judgment by the Constitutional Court which rescinds a law as unconstitutional imposes on the Federal Chancellor or the competent Governor the obligation to publish the rescission without delay. This applies analogously in the case of a pronouncement pursuant to para. 4 above. The rescission enters into force on the day of publication if the Court does not set a deadline for the rescission. This deadline may not exceed eighteen months.

(6) If a law is rescinded as unconstitutional by a judgment of the Constitutional Court, the legal provisions rescinded by the law which the Court has pronounced unconstitutional become effective again unless the judgment pronounces otherwise, on the day of entry into force of the rescission. The publication on the rescission of the law shall also announce whether and which legal provisions again enter into force.

(7) If a law has been rescinded on the score of unconstitutionality or if the Constitutional Court has pursuant to para. 4 above pronounced a law to be unconstitutional, all courts and administrative authorities are bound by the Court's decision. The law shall however continue to apply to the circumstances effected before the rescission the case in point excepted, unless the Court in its rescissory judgment decides otherwise. If the Court has in its rescissory judgment set a deadline pursuant to para. 5 above, the law shall apply to all the circumstances effected, the case in point excepted till the expiry of this deadline.

Art. 140a. (1) The Constitutional Court pronounces whether treaties are contrary to law. Art. 140 shall apply to treaties concluded with the sanction of the National Council pursuant to Art. 50 and to law-modifying of law-amending treaties pursuant to Art. 16 para. 1, Art. 139 to all other treaties with the proviso that the authorities competent for their execution shall from the day of the judgment's publication not apply those which the Court establishes as being contrary to law or unconstitutional unless it determines a deadline prior to which such a treaty shall continue to be applied. The deadline may not in the case of treaties specified in Art. 50 and of law-modifying or law-amending treaties pursuant to Art. 16 para. 1 exceed two years, in the case of all others one year.

(2) If the Constitutional Court establishes that a treaty whose fulfilment requires the issue of laws or ordinances is contrary to law or unconstitutional, the effect of the sanction or the directive for implementation of the treaty by ordinance expires.

Art. 141. (1) The Constitutional Court pronounces upon

a) challenges to the election of the Federal President and elections to the popular representative bodies or the constituent authorities (representative bodies) of statutory professional associations;

b) challenges to elections to a Land Government and to municipal authorities entrusted with executive power;

c) application by a popular representative body for a loss of seat by one of its members; application by at least eleven member of the European Parliament from the Republic of Austria for a loss of seat by a member from the Republic of Austria;

d) application by a constituent authority (representative body) of a statutory professional association for a loss of seat by one of the members of such an authority;

e) the challenge to rulings whereby the loss of a seat in a popular representative body, in a municipal authority entrusted with executive power or in a constituent authority (representative body) of a statutory professional association has been enunciated, in so far as laws of the Federation or Laender governing elections provide for declaration of a loss of seat by the ruling of an administrative authority, and after all stages of legal remedy have been exhausted.

The challenge (application) can be based on the alleged illegality of the electoral procedure or on a reason provided by law for the loss of membership in a popular representative body, in the European Parliament, in a municipal authority entrusted with executive power, or in a constituent authority (representative body) of a statutory professional association. The Court shall allow an electoral challenge if the alleged illegality has been proved and was of influence on the election result. In the proceedings before the administrative authorities the popular representative body or statutory professional association has litigant status.

(2) If a challenge pursuant to para. 1 sub-para. a above is allowed and it thereby becomes necessary to hold the election to a popular representative body, to the European Parliament or to a constituent authority of a statutory professional association in whole or in part again, the representative body's members concerned lose their seat at the time when it is assumed by those elected at the ballot which has to be held within a hundred days after delivery of the Constitutional Court's decision.

(3) The premises for a decision by the Constitutional Court in challenges to the result of initiatives, consultations of the people, or referenda will be prescribed by Federal law. How long, in view of the possibility of such a challenge, it is necessary to retard publication of the law about which a referendum has taken place, can also be laid down by Federal law.

Art. 142. (1) The Constitutional Court pronounces on suits which predicate the constitutional responsibility of the highest Federal and Land authorities for legal contraventions culpably ensuing from their official activity.

(2) Suit can be brought:

a) against the Federal President, for contravention of the Federal Constitution: by a vote of the Federal Assembly;

b) against members of the Federal Government and the authorities placed with regard to responsibility on an equal footing with them, for contravention of the law: by a vote of the National Council;

c) against an Austrian representative in the Council for contravention of law in matters where legislation would pertain to the Federation: by a vote of the National Council for contravention of law in matters where legislation would pertain to the Laender: by identically worded votes of all the Diets;

d) against members of a Land Government and the authorities placed by the present Law or the Land constitution regard to responsibility on an equal footing with them, for contravention of the law: by a vote of the competent Diet;

e) against a Governor, his deputy (Art. 105 para. 1) or a member of the Land Government (Art. 103 paras. 2 and 3) for contravention of the law as well as for non-compliance with ordinances or other directives (instructions) of the Federation in matters pertaining to the indirect Federal administration, in the case of a member of the Land Government also with regard to instructions from the Governor in these matters: by a vote of the Federal Government;

f) against the authorities of the Federal capital Vienna, in so far as within its autonomous sphere of competence they perform functions from the domain of the Federal executive power, for contravention of the law: by a vote of the Federal Government;

g) against a Governor for non-compliance with an instruction pursuant to Art. 14 para. 8: by a vote of the Federal Government;

h) against a president or executive president of a Land school board, for contravention of the law as well as for non-compliance with ordinances or other directives (instructions) of the Federation: by a vote of the Federal Government;

i) against members of a Land Government for contravention of the law as well as for non-compliance with ordinances of the Federation in matters relating to Art. 11 para. 1 sub-para. 7 as well as for obstruction of the powers pursuant to Art. 11 para. 9: by a vote of the National Council or the Federal Government.

(3) If pursuant to para. 2 sub-para. e above the Federal Government brings a suit only against a Governor or his deputy and it is shown that another member of the Land Government in accordance with Art. 103 para. 2 concerned with matters pertaining to the indirect Federal administration is guilty of an offence within the meaning of para. 2 sub-para. e above, the Federal Government can at any time pending the passing of judgment widen its suit to include

this member of the Land Government.

(4) The condemnation by the Constitutional Court shall pronounce a forfeiture of office and, in particularly aggravating circumstances, also a temporary forfeiture of political rights. In the case of minor legal contraventions in the instances mentioned in para. 2 sub-paras. c, e, g and h above the Court can confine itself to the statement that the law has been contravened. From forfeiture of the office of president of the Land school board ensues forfeiture of the office with which pursuant to Art. 81a para. 3 sub-para. b it is linked.

(5) The Federal President can avail himself of the right vested in him in accordance with Art. 65 para. 2 subpara. c only on the request of the representative body or the representative bodies which voted for the filing of the suit, but if the Federal Government has voted for the filing of the suit only at its request, and in all cases only with the approval of the defendant.

Art. 143. A suit can be brought against the persons mentioned in Art. 142 also on the score of actions involving penal proceedings connected with the activity in office of the individual to be arraigned. In this case competence lies exclusively with the Constitutional Court; any investigation already pending in the ordinary criminal courts devolves upon it. The Court can in such cases, in addition to Art. 142 para. 4, apply the provisions of the criminal law.

Art. 144. (1) The Constitutional Court pronounces on rulings by administrative authorities including the independent administrative tribunals in so far as the appellant alleges an infringement by the ruling of a constitutionally guaranteed right or the infringement of personal rights on the score of an illegal ordinance, an unconstitutional law, or an unlawful treaty. The complaint can only be filed after all other stages of legal remedy have been exhausted.

(2) The Constitutional Court can before the proceedings decide to reject a hearing of a complaint if it has no reasonable prospect of success or if the decision cannot be expected to clarify a constitutional problem. The rejection of the hearing is inadmissible if the case at hand according to Art. 133 is barred from the competence of the Administrative Court.

(3) If the Constitutional Court finds that a right within the meaning of para. 1 above has not been infringed by the challenged ruling and if the case at hand is not in accordance with Art. 133 barred from the competence of the Administrative Court, the Court shall on the request of the applicant transfer the complaint to the Administrative Court for decision whether the applicant sustained by the ruling the infringement of any other right. This applies analogously in the case of decisions in accordance with para. 2 above.

Art. 148f. If differences of opinion arise between the ombudsman board and the Federal Government or a Federal Minister on the interpretation of legal provisions. The Constitutional Court on application by the Federal Government or the ombudsman board decides the matter in closed proceedings."

The regulations governing individual procedures are set forth in the Constitutional Court Act of 1953, Federal Law Gazette No. 85/1953, as amended.

Against the background of the mentioned provisions, the pertinent questions may be answered as follows:

Question 1:

A.1.a A preliminary review of normative acts by the Constitutional Court is (only) possible within the framework of Article 138 para. 2 of the Federal Constitution. Under this provision, a draft law may be submitted to the Constitutional Court for review whether it falls into the competence of the Federation or of the Laender (but not whether it corresponds to other constitutional laws). However, this procedure is only available as long as the draft has not been adopted by Parliament. It needs to be noted that in practice there are only few cases where this option is chosen. Over the past ten years, for instance, the Constitutional Court had to determine not more than 3 cases of conflicting competences.

A.1.b. The admissibility of a socalled abstract review of normative acts depends, as far as their constitutionality is concerned, on Article 140 of the Federal Constitution. Under this provision, federal laws may freely be challenged by Land governments, by at least one third of the members of the National Council or by at least one third of the members of the Federal Council, according to their free political judgment. The same applies to Land laws where the Federal Government and – if individual Land constitutions so provide – at least one third of the members of a Land parliament (Diet) claim that such Land laws are unconstitutional.

A.1.c. Again, the admissibility of a concrete review of norms is determined by Article 140 of the Federal Constitution. The right to challenge a law lies with the Administrative Court, the Independent Administrative Tribunals as well as the courts of second or higher instance, provided that it is imaginable that the challenged norm constitutes a precondition for deciding the case pending before the applicant court. In proceedings where the Constitutional Court doubts the constitutionality of a norm to be applied, it may ex officio institute proceedings to examine that norm as to its constitutionality. In addition, there is the possibility of filing a socalled “private application”, where an individual alleges direct infringement of his personal rights through the unconstitutionality of a norm in so far as it has become operative for such individual without the delivery of a judicial decision or the issue of a decree.

A.1.d. Under the legal protection system of the Federal Constitution, it is impossible that acts of legislation or not subject to review by the Constitutional Court.

A.2. Its consistent case law enables the Constitutional Court to respond to a so-called “partial omission” on the part of the legislator by repealing the unconstitutionally incomplete norm. The Constitutional Court, however, cannot respond to a complete failure of the legislator to act (cf. ConstCourt rulings no. 14.453/1996).

A.3. In this connection, reference needs to be made to Article 144 of the Federal Constitution. According to this constitutional provision, everyone is free to file a complaint with the Constitutional Court – after exhaustion of administrative remedies – alleging a violation of their

constitutionally guaranteed rights (or a violation of rights as a result of the application of an unlawful general norm). According to the case-law of the Constitutional Court, this legal safeguard must not be precluded by the fact that in simple laws the legislator has failed to make provision for the issue of a decree.

A.4. In this connection, reference needs to be made to the possibility of the Federal Government to challenge Land laws on grounds of alleged unconstitutionality and the possibility of Land governments to challenge federal laws on grounds of alleged unconstitutionality before the Constitutional Court. Moreover, the possibility needs to be recalled of a preliminary review of norms under Article 138 para. 2 of the Federal Constitution. It must be pointed out that the Austrian Constitutional Court is not empowered to declare political parties unconstitutional.

B.1.a. The decisions pronounced by the Constitutional Court within the framework of Article 140 of the Federal Constitution are always constitutive.

B.1.b. If the Constitutional Court revokes a norm for being unconstitutional, the revocation always becomes effective on the day following its publication in the Federal Law Gazette. The Constitutional Court is allowed, however, to set a time limit of up to 18 months for the norm found unconstitutional to become inoperative in order to give the legislator an opportunity to adopt a new norm which is in conformity with the Constitution so that there is no legal vacuum in the meantime. Similarly, the Constitutional Court's case law provides that the Court may also repeal norms retroactively. As far as the modification of a norm found to be unconstitutional is concerned, however, the Constitutional Court is allowed to do so only in specific circumstances by repealing only part of the norm thus giving the remaining part a different normative content.

B.1.c. Rulings of the Constitutional Court which repeal a norm for being unconstitutional become legally effective through their publication in the Federal Law Gazette which must be effected by the Federal Government.

B.1.d. As already said, the Constitutional Court may set a time limit of up to 18 months for a norm found unconstitutional to become inoperative in order to give the legislator time to adopt a new norm which is in conformity with the Federal Constitution.

B.1.e. A decision of the Constitutional Court repealing a norm for being unconstitutional basically has no influence on cases that have already been decided with final effect. Cases that were already pending before the Constitutional Court when deliberations about the eventually repealed norm started are, however, put on an equal footing with the case leading to the repeal of the norm. Cases that were not yet pending before the Constitutional Court at the time when the Constitutional Court found a norm to be unconstitutional basically continue to be subject to the repealed norm unless the Constitutional Court states otherwise in its repealing decision.

B.1.f. The Constitutional Court may only set a time limit for the norm found unconstitutional to become inoperative, within which the legislator is free to adopt a new norm corresponding to the Constitution. The Constitutional Court is not empowered, however, to order the legislator to act.

B.2. The decisions taken by the Constitutional Court on rulings by administrative authorities in compliance with Article 144 of the Federal Constitution merely have the effect that the

administrative ruling concerned is set aside. This means that the challenged ruling is quashed for being unconstitutional if it violated the constitutional rights of the applicant. The administrative authortity that issued the ruling then has to issue a new ruling which is in conformity with the Constitution and corresponds to the legal view of the Constitutional Court.

B.3.a. When the Constitutional Court pronounces its judgment, this only decides the case before it. That is why the Constitutional Court is basically free to arrive at different decisions in similar cases in future. In practice, however, it is very rare that the Court deviates from its previous case law.

B.3.b. The decisions taken by the Constitutional Court in review proceedings have erga omnes effect, decisions on rulings by administrative authorities only inter partes effect.

B.3.c. According to the case law of the Constitutional Court and prevailing legal doctrine, the legal rules defined by the Constitutional Court in cases of conflicts of competence (Article 138 para. 2 of the Federal Constitution) have the standing of the norm to be interpreted (i.e. federal constitutional law, as a rule). While other decisions of the Constitutional Court de jure have not the force of law, the constitutions in practice have by nature the significance which the Constitutional Court attributes to them (in this connection, cf. the classic saying of US Supreme Court Chief Justice *Hughes*: “The Constitution is what the judges say it is”.).

B.3.d. Annulments of laws pronounced by the Contitutional Court must be published in the Federal Law Gazette. Major decisions and resolutions of the Constitutional Court are published in an official collection of rulings.

B.3.e. The Constitutional Court has no competence to take such decisions, so that this question does not arise in the first place.

Question 2:
The execution of Constitutional Court decisions is governed by Article 146 of the Federal Constitution. This provision reads as follows:

„Art. 146. (1) The enforcement of judgments pronounced by the Constitutional Court on claims made in accordance with Art. 137 is implemented by the ordinary courts.

(2) The enforcement of other judgments by the Constitutional Court is incumbent on the Federal President. Implementation shall in accordance with his instructions lie with the Federal or Laender authorities, including the Federal Army, appointed at his discretion for the purpose. The request to the Federal President for the enforcement of such judgments shall be made by the Constitutional Court. The afore-mentioned instructions by the Federal President require, if it is a matter of enforcements against the Federation or against Federal authorities, no countersignature in accordance with Art. 67.”

This means that the execution of Constitutional Court judgments on claims under Article 137 of the Federal Constitution lies with the ordinary courts, while the execution of all other Constitutional Court judgments rests with the Federal President who may call in federal or Land authorities in this context by way of instruction. In interpreting this provision, the Constitutional Court has taken the view that the term “judgments” also includes “decisions” (such as, for instance, decisions on costs or decisions granting a complaint within the meaning of Article 144 of the Federal Constitution suspensive effect).

As regards the question disputed in specific cases which judgments and decisions of the Constitutional Court are actually subject to execution from the viewpoint of legal theory, prevailing doctrine may be outlined as follows:

a) With regard to the solution of conflicts of competence (Article 138 para. 1 of the Federal Constitution), execution of a judgment is not possible because the decision resolves the competence issue. If an authority continues to act outside its sphere of competence, this would have to be challenged by means of the remedies available in the specific case (e.g. complaint against a ruling by an administrative authority under Article 144 of the Federal Constitution).

b) When determining a competence in accordance with Article 148f of the Federal Constitution, only one legally binding decision is pronounced on the competence, which, however, is not subject to execution.

c) Under Article 138 para.2 of the Federal Constitution, only a competence is determined so that execution is not possible.

d) The annulment of a norm is not executable as the annulment (rather the effect of determining that a norm was unlawful) takes place *eo ipso* with its publication. As in such cases publication is mandatory, the question arises whether the judgment is executable in so far as such publication is concerned. Prevailing doctrine says yes.

e) Within the framework of challenging election results (Article 141 of the Federal Constitution), there is no room for execution either as all acts to be taken have a directly constitutive legal effect.

f) In so far as a judgment pronounced in accordance with Article 142f of the Federal Constitution results in the forfeiture of office and concerns the deprivation of political rights, execution is not possible. It is possible, however, if a penalty is imposed or the duty to pay damages is pronounced.

g) A judgment pronounced within the framework of the Constitutional Court's competence as a special administrative court (Article 144 of the Federal Constitution) quashes the challenged administrative ruling or ascertains its unconstitutionality; there is no room for execution in this respect. What needs to be noted, however, is that administrative authorities are obligated to create in the specific case the legal situation that corresponds to the Constitutional Court's legal view without delay by using all legal means available to them (Section 87 para. 2 of the Constitutional Court Act of 1953).

Question 3:
As already said, the Constitutional Court may request the Federal President under Article 146 para. 2 of the Federal Constitution to execute its judgments (as far as execution is possible). If the Federal President did not comply with such a request, he would violate the Federal Constitution, and suit could be brought against him in this matter by decision of the Federal Assembly under Article 142 para.2(a) of the Federal Constitution before the Constitutional Court.

Question 4:
There has been no such case so far.

Question 5:

A situation that can truly be considered legally unsatisfactory always arises when the Constitutional Court annuls a norm setting a deadline for its becoming inoperative, as in such cases all authorities must continue to apply the norm found to be unconstitutional until the annulment takes effect. In this respect, citizens whose constitutionally guaranteed rights have so been violated have no possibility to successfully challenge the ascertained unconstitutionality before the Constitutional Court as the norm already found to be unconstitutional is considered unchallengeable under constitutional law until the annulment becomes effective. This situation is certainly a result of Austrian constitutional law which enables the Constitutional Court to annul norms by setting a deadline. It lies, of course, in the discretion of the Constitutional Court if and when it applies the possibility of setting such a deadline.

It may be pointed out that the Austrian Constitutional Court has no power to review the constitutionality of judicial judgments, which is why no specific problems can arise under this aspect.

AZERBAIJAN / AZERBAÏDJAN

RESPONSES TO QUESTIONNAIRE ON THE EXECUTION OF CONSTITUTIONAL COURT DECISIONS

(Azerbaijan Republic)

I. General questions on constitutional review

A. The type of constitutional review and its subject

1. *constitutional review of normative acts*

a) *preliminary review*

The interstate agreements of Azerbaijan Republic, which have not yet come into force, are subject to verification on conformity to the Constitution via procedure of the preliminary control.

b) *abstract or principal review (direct claim of unconstitutionality)*

The European model of the constitutional justice, which combines the abstract and concrete constitutional control, is applied in Azerbaijan. In the framework of abstract control reflected in Article 130 of the Constitution of Azerbaijan Republic, the Constitutional Court on basis of a petition lodged by the President of Azerbaijan Republic, Milli Majlis of Azerbaijan Republic, Cabinet of Ministers of Azerbaijan Republic, Supreme Court of Azerbaijan Republic, Procurator's Office of Azerbaijan Republic, Ali Majlis of Nakhichevan Autonomous Republic adopts decisions on conformity of laws of Azerbaijan Republic, decrees and orders of the President of Azerbaijan Republic, decrees of Milli Majlis of Azerbaijan Republic, decrees and orders of Cabinet of Ministers of Azerbaijan Republic, normative-legal acts of central bodies of Executive power with Constitution of Azerbaijan Republic. As a whole, other legal acts, constitutionality of which the Constitutional Court verifies on petitions of the mentioned subjects are also listed in Article 130 of the Constitution.

c) *concrete or incidental review of norms*

Concrete normative control is carried out through the estimation of constitutionality of the norm, which has been applied or is a subject to application in concrete case, commenced by the complaint regarding infringement of the constitutional rights and freedoms of the citizens, lodged with the Supreme Court of Azerbaijan Republic by means of general courts.

All cases in the Constitutional Court are considered via the procedure of abstract control.

2. *Review of unconstitutional omission of legislation (failure of the legislator to act when it is obliged to do so by the Constitution)*

Absent

3. *Decisions concerning the protection of constitutional rights*

According to Article 4 of the Law of Azerbaijan Republic «On the Constitutional Court», the Constitutional Court should protect human rights and freedoms of citizens. In case of infringement of human rights and freedoms by the acting normative acts the person by means of relevant courts can apply to the Supreme Court of Azerbaijan Republic with the request to refer the petition to Constitutional Court. This procedure is determined by the Law of Azerbaijan Republic «On Courts and Judges», Civil Procedure Code and Criminal Procedure Code of Azerbaijan Republic.

The Constitutional Court having examined the issue of conformity of complete confiscation of property as kind of criminal punishment with the Constitution, in the decision «On conformity of Article 32 of the Criminal Code of Azerbaijan Republic with Article 29, para IV of the Constitution of Azerbaijan Republic» rendered on January 12, 1999 has recognized provisions of the Criminal Law not corresponding to the Constitution and recognized it void. At the same time, by way of interpretation the Court has explained that the confiscation, as punishment, can be applied only to the instruments and means of crime, and also to the property obtained by criminal way. The analysis of the given decision of Court shows, that the Court gave interpretation of the law in light of norms of the Constitution protecting the property and fixing the principle of innocence.

The Constitutional Court protecting the rights of citizens on dwelling, in its decision «concerning Article 60 of the Housing Code of Azerbaijan Republic» rendered on March 12, 1999 has specified, that the absence of the individual for the term more than six months can not serve as a ground for deprivation of his right on dwelling.

The decisions of the Constitutional Court are of a great importance for functioning of all branches of power, because they are aimed at protection of rights and freedom of the citizens.

4. *Other areas of constitutional review (examples: unconstitutionality of political parties, referenda, conflicts between infra-state entities, conflicts between state bodies)*

According to Article 130, para III, item 7 and para III, item 9 of the same Article of the Constitution the Constitutional Court decides on liquidation of political parties and other public associations and resolves disputes, connected with distribution of powers between legislative, executive and judicial branches. So the Constitutional Court of Azerbaijan Republic in its decision rendered on March 02, 2000 has recognized void the order of the Head of Executive of Baku city N 961 on October 05, 1999 «On regulation of tariffs for public utilities» as not corresponding to Article 7, para III of the Constitution of Azerbaijan Republic providing a principle of division of authorities.

B The effects of constitutional review decisions:

1. Concerning normative acts:

a) *Are constitutional review decisions merely declaratory?*

The decisions of the Constitutional Court are not declaratory.

b) *Is the norm which is declared contrary to the Constitution null and void, or annulled immediately? Can the body exercising constitutional review modify the norm?*

Having recognized norm as not conforming to Constitution, the Constitutional Court announces it void. According to Article 81 of the Law of Azerbaijan Republic «On the Constitutional Court», decisions of the Constitutional Court come into force in following terms:

1) decision on cases, stipulated in Article 130, para III, items 1-6 and 8 of the Constitution of Azerbaijan Republic, - in terms, specified in the decision itself;

2) decisions on liquidation of political parties and other public associations, on distribution of powers between legislative, executive and judicial branches - on the date of publication of the decision;

3) decision on other questions referred to the competence of the Constitutional Court, - from the date of their declaration.

According to Article 82 of the same Law and Article 130, para VII of the Constitution of Azerbaijan Republic the laws and other acts or their separate provisions, the intergovernmental agreements of Azerbaijan Republic lose force, and the interstate agreements of Azerbaijan Republic come into force in time, envisaged by the decision of the Constitutional Court.

c) *Must the decision be implemented by another organ?*

According to Article 130, para VI of the Constitution of Azerbaijan Republic, the Constitutional Court renders decisions on issues referred to its competence. The decisions of the Constitutional Court have mandatory force in all the territory of Azerbaijan Republic.

d) *Can the effects of annulment be postponed?*

No.

e) *Do the effects of the decision go beyond the individual case, where incidental concrete review of norm is concerned? What is the position regarding similar cases which have already been the subject of a final decision?*

Effect of the decision connected with concrete constitutional review is distributed outside the frameworks of a single case. So, the Constitutional Court under the complaints to violation of the constitutional rights and freedoms of the citizens verifies constitutionality of the law, which has been applied or is a subject to application in concrete case. The study of public practice allows to reveal a problem of constitutionalization as factor of overcoming of the legal contradictions. These contradictions reduce efficiency of the rules of law, serve the reason of deviation, directly or indirectly from the Constitution, result in unauthorized interpretation of the Constitution and laws. Granting the citizens with the right to apply directly to the Constitutional Court essentially expands the circle of the subjects of the right on petition in Court and will allow it more effectively to react to violations of the constitutional rights and freedom of the citizens.

f) *Can the body exercising constitutional review order another authority to act? Within a fixed period of time?*

According to Article 80 of the Law of Azerbaijan Republic «On the Constitutional Court», the decisions of the Constitutional Court after their adoption are subjects to mandatory execution. The persons, who do not execute the decision of the Constitutional Court, carry the criminal responsibility in the procedure stipulated by the legislation of Azerbaijan Republic.

2. *Concerning the protection of constitutional rights:*
If the body exercising constitutional review quashes a decision by a public authority on the grounds that it is unconstitutional:

a) *Is it sent back to the original authority for a new ruling?*

If the Constitutional Court cancels the decision of a body of legislative or executive branch, Court can recommend to the appropriate body to remove discrepancy in the normative and legal acts concerned.

b) *Does the body exercising constitutional review decide on the matter?*

Article 6 of the Law of Azerbaijan Republic «On the Constitutional Court» states: «The Constitutional Court shall be an independent State body and shall not depend in its organizational, financial or any other forms of activities on any legislative, executive and other judicial bodies, local self-government bodies, political parties, public associations, trade unions, and their officials and as well as legal entities or individuals».

3. *Do constitutional review decisions have:*

a) *binding force (binding the body exercising constitutional review itself)?*

According to Article 80 of the Law of Azerbaijan Republic «On the Constitutional Court», the decisions of the Constitutional Court after their adoption are subjects to mandatory execution. The persons, who do not execute the decision of the Constitutional Court, carry the criminal responsibility in the procedure stipulated by the legislation of Azerbaijan Republic.

b) *res iudicata (inter partes; erga omnes)?*

No.

c) *force of law*

No.

d) *are they published in an official journal*

According to Article 85 of the Law of Azerbaijan Republic «On the Constitutional Court», decisions and rulings are subjects to publication in the official state newspaper of Azerbaijan Republic.

All decisions and rulings of the Constitutional Court, shorthand records of open sessions of the Constitutional Court and other materials related to activity of the Constitutional Court, are published in «the Bulletin of the Constitutional Court of Azerbaijan Republic».

II. What means are available to ensure the execution of constitutional court decisions ?

1) *If there is a norm indicating which authority has to execute the constitutional review decisions?*

No. According to Article 130 para VI of the Constitution of Azerbaijan Republic the decisions of the Constitutional Court are mandatory all over the territory of Azerbaijan Republic.

2) *If not, is there a norm providing that the body exercising constitutional review or any other authority has the power to designate the body which will execute the decisions of the court? How does this system work in practice?*

According to Article 31 of the Internal Statute of the Constitutional Court of Azerbaijan Republic the Constitutional Court regularly analyzes the condition of execution of its decisions.

The appropriate division of the Constitutional Court provides Judges of the Constitutional Court with semi-annual and annual informational - analytical reports on execution of the decisions of the Constitutional Court. In case of necessity the Chairman of the Constitutional Court gives task to prepare the information on execution of one or number of the concrete decisions of the Constitutional Court, informs the heads of other branches of power about execution of decisions of the Constitutional Court.

III. What are the consequences if constitutional court decisions are not executed or are not executed within a reasonable time ?

According to Article 31, para III of the Internal Charter of the Constitutional Court of Azerbaijan Republic, as soon as the fact of non-execution or inadequate execution of the decisions of the Constitutional Court is discovered the Chairman of the Constitutional Court submits for consideration of session of the Constitutional Court the proposal concerning measures, which could promote execution of the decision of the Constitutional Court.

As stated in Article 80 of the Law of Azerbaijan Republic «On the Constitutional Court», persons, who do not execute the decision of the Constitutional Court, carry the criminal responsibility in the procedure stipulated by the legislation of Azerbaijan Republic.

IV. Cases where decisions are not executed

Have there been any recent case where a constitutional review decision has not been executed in your country?

No.

V. Cases of unsatisfactory execution

No.

BOSNIA AND HERZEGOVINA / BOSNIE ET HERZEGOVINE

I.A.1.a.
The Constitutional Court of Bosnia and Herzegovina does not dispose of competences in this field.

I.A.1.b.
This sort of competence is provided by Article VI.3 (a) of the Constitution of Bosnia and Herzegovina. This provision, in its relevant part, provides: "The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina […] Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity."

I.A.1.c.
The Constitutional Court of Bosnia and Herzegovina does have responsibilities in this field. This competence is laid down in Article VI.3 (c) of the Constitution, which provides: "The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision."

A positive or negative outcome for the party in a specific case does not represent an obstacle for the Court.

I.A.1.d.
All normative acts of lower rank with respect to the Constitution are subject to constitutional review by the Constitutional Court. The human rights protection mechanisms provided by Annex I of the Constitution are not subject to constitutional review, being an integral part of the Constitution.

I.A.2.
BH is a State in a specific situation due to the presence of the High Representative, who was vested with legislative powers by the International Community in case the State Parliament fails to adopt a necessary law. However, as the High Representative is in this way intervening in the domestic legal system of a sovereign and independent State, the Constitutional Court is competent to review all normative acts enacted by the High Representative. It is in this indirect way that the Constitutional Court can act in cases of omissions in the legislative field.

However, the Constitutional Court is also competent to recommend or order the adoption of certain laws in order to fill legal voids.

I.A.3.

The Constitutional Court has appellate jurisdiction over issues under the Constitution arising out of a judgment of any other court in Bosnia and Herzegovina. In this way, the Constitutional Court appears as a court of final instance in cases of violation of constitutional rights. The conditions for these applications before the Court are provided by the Court's Rules of Procedure - The Court may examine an appeal only if all legal remedies which are available under the laws of the Entities against the judgment challenged by the appeal have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the final decision.

This responsibility of the Court is a new one: the Constitutional Court of the former Republic of BH did not dispose of this competence.

The appellate jurisdiction is the most widely used competence of the Court – most of the applications filed at the Court fall within this competence.

I.A.4.

According to the Constitution, "The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina." Other mentioned competences fall within the general review of constitutionality.

I.B.1.a.

The decisions of the Constitutional Court do not have only declaratory character. According to the Constitution of Bosnia and Herzegovina, they are final and binding (Article VI.4 of the Constitution)

I.B.1.b.

All decisions of the Court enter into force upon publication in the official gazette. As a rule, the Court decides on the nature of the decision. In its decisions until present day, the Court declared acts as unconstitutional giving the adopter of the act a time limit for the restoration of constitutionality (e.g. decision No. 1/99). The Rules of Procedure allow also a second possibility, which is annulling the act as of the entering into force of the decision (Article 59 para. 2 of the Court's Rules of Procedure).

I.B.1.c.

As regards abstract review of constitutionality, the decisions of the Court do not need to be implemented by another organ.

I.B.1.d.

The Court's Rules of Procedure provide for two possibilities here. According to Article 59 para. 1 of the Rules, the Court decides on the legal effect of the decision (ex tunc or ex nunc).

I.B.1.e.

According to Article 26 of the Rules of Procedure, the Court examines only alleged violations stated in the request.

The situation depends whether the act in question is challenged on the same grounds or not. Although there is a tendency to follow the established constitutional jurisprudence, a request will not be rejected if the circumstances point in that direction, even though it is about the same case.

I.B.1.f.
The answer to this question is also given by the aforementioned Article 59 of the Rules of Procedure.

I.B.2.
The Constitutional Court disposes of both possibilities of referring the case back and deciding on the merits of a case. It depends on the situation of the specific case. Until present day, the Court mostly decided on the merits of cases.

I.B.3.
The decisions of the Court generally do not bind the Court. However, the Court is making efforts to establish a firm line in the constitutional jurisprudence which would represent grounds for decision. This is in the interest of each citizen.

I.B.3.b.
Article 12 para. 3 item 5 regulates that any appeal on which the Court has already decided shall be rejected.

I.B.3.c.
Such an option is not provided by any normative act.

I.B.3.d.
The decisions of the Court are published in the Official Gazette of Bosnia and Herzegovina, as well as in the official gazettes of the Entities.

I.B.3.e.
In this case, the Court establishes in a decision that the unconstitutional norms shall cease to be valid.

The Court acts in the same way in cases of concrete review and abstract review.

II.1.
There is no law that would provide for an organ responsible for the execution of the decisions of the Court.

II.2.
The Rules of Procedure (in Article 72 para. 4) provide that a ruling of the Court establishing that a decision has not been executed shall be forwarded to the Council of Ministers of Bosnia and Herzegovina, i.e. the governments of the Entities.

III, IV, V.
Being a very young institution, the Court has not yet faced any situations of non-execution or of lack of execution within a reasonable time of its decisions.

BULGARIA / BULGARIE

REPONSE AU QUESTIONNAIRE SUR L'EXECUTION DES ARRETS DES JURDIDICTIONS CONSTITUTIONNELLES

I. Questions générales sur le contrôle de constitutionnalité

A. Le type et l'objet du contrôle de constitutionnalité

Conformément à l'article 149 (1) de la Constitution de la République de Bulgarie la Cour constitutionnelle :

«1. donne des interprétations impératives de la Constitution;
2. se prononce, lorsqu'elle est saisie, sur demande visant l'établissement de l'inconstitutionnalité des lois et des autres actes de l'Assemblée nationale, ainsi que des actes du Président;
3. règle les litiges concernant la compétence entre l'Assemblée nationale, le Président et le Conseil des ministres, comme entre les organes d'autogestion locale et les organes exécutifs centraux;
4. statue sur la conformité des accords internationaux conclus par la République de Bulgarie avec la Constitution avant leur ratification, ainsi que sur la conformité des lois avec les normes universelles reconnues du droit international et les accords internationaux dont la Bulgarie est partie;
5. se prononce sur des litiges relatifs au caractère constitutionnel des partis et associations politiques;
6. se prononce sur des litiges concernant la légalité de l'élection du Président et du vice-président;
7. se prononce sur des litiges concernant la légalité de l'élection des députés;
8. se prononce sur des accusations formulées par l'Assemblée nationale à l'encontre du Président et du vice-président».

La citation de cet article de la Constitution apporte la réponse aux questions de ce point.

2. Il n'est pas dans les compétences de la Cour constitutionnelle d'inciter à des décisions législatives qui s'imposent de la Constitution lorsque le législateur est inactif.

3. La Cour suprême a le droit de saisir la Cour constitutionnelle en général, ainsi que pour d'une affaire concrète au sujet de la constitutionnalité d'une loi.

B. Les effets des arrêts des juridictions constitutionnelles

a-e. La norme déclarée inconstitutionnelle n'est plus appliquée à compter de la date de l'entrée en vigueur de la décision de la Cour constitutionnelle.

La Cour constitutionnelle ne peut pas modifier la norme.

Les réponses ci-dessus se rapportent au p.1 «a-e».

f. La Cour constitutionnelle ne peut pas ordonner à une autre autorité d'agir.

2. Les compétences de la Cour constitutionnelle sont indiquées dans l'article 149 (1) de la Constitution, cité plus haut.

Les décisions de la Cour constitutionnelle ont l'effet de *res iudicata* seulement dans les cas lorsque la Cour s'est prononcée sur l'irrecevabilité de la demande. Elles sont obligatoires *erga omnes*.

Les décisions sont publiées dans le Journal officiel et prennent effet trois jour après leur publication.

Si après l'abrogation d'un acte de l'Assemblée nationale celle-ci ne procède pas à l'adoption d'un autre acte et si avant cette abrogation il existait un acte normatif qui régissait la même matière, c'est cet acte qui est en vigueur conformément à une décision de la Cour constitutionnelle. Si avant l'abrogation de l'acte normatif, il n'existait pas une autre norme régissant la même matière, celle-ci n'est régie d'aucune norme.

II. Ni la Constitution de la République de Bulgarie ni la Loi sur la Cour constitutionnelle ne traite la question des moyens pour l'exécution des décisions de la Cour constitutionnelle. La pratique n'a pas eu de difficultés de ce genre jusqu'à présent, toutes les institutions ayant respecté les décisions de la Cour constitutionnelle.

III. Vu ce qui précède le problème des conséquences d'inexécution des décisions de la Cour constitutionnelle n'a pas été connu jusqu'a présent.

Compte tenu du paragraphe ci-dessus des réponses ne peuvent être données aux chapitres **IV et V**.

CANADA

QUESTIONNAIRE SUR L'EXÉCUTION DES ARRÊTS DES JURIDICTIONS CONSTITUTIONNELLES

(CDL (2000) 45 rév.)

Gérald-A. Beaudoin, sénateur,
Professeur émérite à l'Université d'Ottawa
Canada

I. Questions générales sur le contrôle de constitutionnalité

A. Le type et l'objet du contrôle de constitutionnalité :

1. Le contrôle de constitutionnalité des actes normatifs (a, b, c, d)

Il existe plus d'un moyen de soulever l'inconstitutionnalité d'une loi au Canada. Nous en relevons trois principaux: l'exception d'inconstitutionnalité, l'action déclaratoire en inconstitutionnalité, la demande d'opinion consultative. Les deux premiers sont *a posteriori* et le troisième peut être *a priori*, c'est-à-dire avant qu'une loi soit adoptée, et aussi *a posteriori.*

Le premier moyen est ouvert au citoyen. Ainsi, par exemple, un individu poursuivi en vertu d'une disposition du *Code criminel* peut en défense soulever l'inconstitutionnalité de cette disposition. Il lui faudra démontrer que la mesure ne relève pas de la compétence de la législature qui l'a édictée ou qu'elle enfreint la *Charte canadienne des droits et libertés.*

L'action déclaratoire en inconstitutionnalité permet à un citoyen, à certaines conditions, de soulever directement (et non seulement en défense) l'inconstitutionnalité d'une loi. Il est à noter qu'une compagnie peut aussi soulever l'inconstitutionnalité d'une loi. Même lorsque la qualité pour agir de l'une des parties est mise en cause, la cour conserve le pouvoir de trancher le débat.

Les règles des tribunaux et des règles législatives obligent la partie qui soulève l'inconstitutionnalité à en donner avis aux procureurs généraux concernés. La Cour suprême permet de plus, à sa discrétion, l'intervention d'autres parties intéressées au débat.

Le troisième moyen est le renvoi ou la demande d'opinion consultative. Un gouvernement provincial peut référer à sa Cour d'appel pour avis consultatif une question de droit constitutionnel. Le gouvernement fédéral peut s'adresser directement à la Cour suprême du Canada pour obtenir pareil avis.

L'article 55 de la *Loi sur la Cour suprême* du Canada prévoit que le gouverneur général en conseil peut soumettre à la Cour suprême une question importante de droit ou de fait qui intéresse la Constitution, pour audition et examen. Il est du devoir de la Cour de l'entendre, de

l'étudier et d'y répondre. La Cour transmet au gouverneur général son opinion certifiée avec raisons à l'appui. Cette question peut aussi porter sur une loi ou un projet de loi.

La Cour suprême ou deux de ses juges, déclare l'article 56 de la *Loi sur la Cour suprême*, examinent tout projet de loi privé fourni, pour opinion à la Cour, par le Sénat ou la Chambre des communes.

Il n'y a pas d'acte normatif (loi, règlement, règle de common law) soustrait au contrôle de la constitutionnalité des lois. Ce principe est tempéré par l'article 33 de la Charte de 1982 qui permet au Parlement du Canada et à une assemblée législative provinciale de déroger, pour une période de cinq ans (renouvelable), à certains droits et libertés (libertés fondamentales, garanties juridiques, droits à l'égalité). Cette disposition est très rarement utilisée.

Au Canada, c'est la Cour suprême, en dernier ressort, qui se prononce sur la constitutionnalité des lois.

2. L'examen des omissions inconstitutionnelles en matière législative (inactions du législateur lorsque la Constitution l'oblige à agir).

Il arrive que, dans certains cas, le législateur soit tenu d'agir comme le démontre l'arrêt *Vriend* de 1998 et l'arrêt *Eldridge* de 1997.

Ainsi, l'omission d'inclure l'orientation sexuelle comme motif de discrimination illicite dans la *Individual Rights Protection Act (IRPA)* de l'Alberta constitue une violation du paragraphe 15(1) de la *Charte* qui n'est pas justifiée dans une société libre et démocratique, déclare à l'unanimité la Cour suprême dans l'arrêt *Vriend.*

Dans l'arrêt *Eldridge*, la Cour suprême déclare que la province de la Colombie-Britannique doit fournir, dans les hôpitaux de la province, des services d'interprétation gestuelle aux personnes atteintes de surdité afin de respecter les droits garantis par le paragraphe 15(1) de la *Charte*.

3. Les décisions concernant la protection des droits constitutionnels (*Verfassungsbeschwerde, amparo*, recours devant les tribunaux de dernière instance)

La Cour suprême du Canada a déjà rendu plus de 450 arrêts sur la Charte canadienne des droits et libertés de 1982. Ces arrêts traitent des domaines suivants : les libertés fondamentales (religion, conscience, presse, expression, association), les droits démocratiques (vote, candidat), la liberté de circulation et d'établissement, les garanties juridiques (droit à la vie, à la liberté et à la sécurité de sa personne; protection contre les saisies ou les perquisitions abusives; protection contre la détention et l'emprisonnement arbitraires; droit à l'assistance d'un avocat; droit à un procès public et équitable dans un délai raisonnable devant un juge indépendant et impartial; protection contre tous traitements ou peines cruels et inusités; protection contre l'auto-incrimination; droit à l'assistance d'un interprète), les droits à l'égalité, les droits linguistiques, le droit à l'instruction dans la langue de la minorité de langue officielle (français ou anglais).

4. Les autres compétences des juridictions constitutionnelles (exemples : inconstitutionnalité des partis politiques, référendums, conflits entre entités infra-étatiques, conflits entre organes de l'État)

Chez nous, nous n'avons pas véritablement de conflits en ces matières.

B. <u>Les effets des arrêts des juridictions constitutionnelles :</u>

1. En ce qui concerne les actes normatifs (a, b):

L'article 52 de la *Loi constitutionnelle de 1982* est un article capital de notre Constitution. Il assujettit toutes les lois à la Constitution. Ainsi, les lois doivent respecter la Constitution sous peine d'invalidité. Le paragraphe 52(1) dispose que:

> « 52(1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit ».

C'est dans l'arrêt *Schachter* que la Cour suprême révèle la portée de l'article 52 de la *Loi constitutionnelle de 1982*. Elle estime d'abord que l'article 52 confère une certaine latitude aux tribunaux en ce qui concerne les mesures correctives qu'ils peuvent apporter à une disposition incompatible avec la *Charte*.

Lorsqu'une disposition est jugée inconstitutionnelle parce qu'elle viole la *Charte*, le tribunal doit alors déterminer *l'étendue* de l'incompatibilité (totale ou partielle). C'est la première étape. Cette étendue peut être déterminée de trois façons: large, étroite ou avec souplesse.

Il y a une présomption à l'effet que la loi sera invalide dans sa totalité si l'objectif même qui la sous-tend est inconstitutionnel.

Dans l'étude du critère du lien rationnel, la partie à invalider sera celle qui ne respecte pas ce critère et non pas toute la loi ou toute la disposition donnée, selon le cas.

Le tribunal possède cependant plus de latitude si la disposition contestée ne respecte pas le critère de l'atteinte minimale. Il pourra l'annuler, la dissocier ou l'interpréter de façon large, selon le cas.

À la deuxième étape, il s'agit de savoir quelle solution doit être préférée: la dissociation, l'interprétation large ou l'annulation. À cet égard, les facteurs suivants seront pris en considération: la mesure corrective, l'ingérence dans l'objectif législatif, le changement de sens du reste du texte et le sens de la portion restante.

Enfin, à la troisième étape, le tribunal devra se demander s'il est approprié de suspendre temporairement l'effet de la déclaration d'invalidité. Trois hypothèses sont possibles: (1) l'annulation de la disposition litigieuse présenterait un danger pour le public; (2) elle porterait atteinte à la primauté du droit; et (3) la disposition serait trop limitative plutôt que trop large.

c. Est-ce que l'arrêt doit être mis en œuvre (par l'abrogation de la norme) par un autre organe?

L'arrêt n'a pas à être mis en œuvre. Il est exécutoire. Et le Parlement fédéral et les législatures provinciales s'y conforment.

d. Est-ce que les effets de l'annulation peuvent être reportés?

Les effets de l'annulation peuvent être reportés temporairement pour laisser le temps au législateur de modifier les dispositions inconstitutionnelles. La Cour suprême fixe habituellement un délai précis. Elle peut, sur demande, étendre le délai.

e. La portée de l'arrêt va-t-elle au-delà du cas particulier, en cas de contrôle par voie incidente? Qu'en est-il notamment des situations analogues au cas d'espèce, mais qui ont déjà fait l'objet d'une décision définitive?

L'arrêt s'applique à tous. L'arrêt n'a pas de portée rétroactive : les autres cas qui ont fait l'objet d'une décision définitive ne peuvent pas être entendus de nouveau. La cour peut réentendre une cause. Elle l'a fait dans des cas très rares.

2. Concernant la protection des droits constitutionnels :
Si la juridiction constitutionnelle annule une décision d'une autre autorité (administration, tribunal, etc.) pour inconstitutionnalité …

Cela dépend de la nature de l'affaire. La Cour suprême peut ordonner un nouveau procès (affaire criminelle); elle peut infirmer la décision de la Cour d'appel (ce faisant, elle peut aussi confirmer la décision de première instance). La Cour peut statuer elle-même sur la question ou elle peut renvoyer l'affaire au juge de première instance afin qu'il applique les principes énoncés par elle aux faits de l'espèce.

3. En outre, est-ce que les arrêts des juridictions constitutionnelles :

Les arrêts de la Cour suprême lient les parties et lient les instances inférieures. La théorie du *stare decisis* s'applique. Ils ont force de loi et sont publiés dans les Recueils de la Cour suprême du Canada et sur support informatique à l'adresse suivante : www.lexum-umontreal.ca/csc-scc/

Une disposition ou une loi est déclarée inconstitutionnelle, mais l'effet de cette déclaration peut être suspendu pendant quelques mois. Après ce délai, si la disposition ou la loi n'est pas modifiée la déclaration d'inconstitutionnalité prend effet.

II. Quels sont les moyens d'assurer l'exécution des arrêts des juridictions constitutionnelles?

Les décisions de la Cour suprême sont exécutoires. Dans certains cas, la cour peut suspendre *temporairement* l'effet de sa décision (6 mois, 12 mois) afin de donner le temps au législateur de modifier les dispositions jugées inconstitutionnelles.

La Cour suprême rend aussi des avis consultatifs qui, en principe, ne sont que des *opinions*; elles n'ont pas de caractère exécutoire. *En pratique*, par contre, ces décisions sont suivies et respectées.

III. Quelles sont les conséquences de l'inexécution – ou de l'absence d'exécution dans un délai raisonnable – des arrêts des juridictions constitutionnelles?

Sans objet.

IV. Cas d'inexécution

Sans objet.

V. Cas d’exécution insatisfaisante

Sans objet.

CZECH REPUBLIC / REPUBLIQUE TCHEQUE

I. General questions on constitutional review

A. The type of constitutional review and its subject:

1.	**Constitutional review of normative acts** The possibility of the constitutional review of normative acts by the constitutional judiciary of the Czech Republic are provided for in Article 87 Par. 1 a), b) of the Constitution of the Czech Republic (the "Constitution").
a.	**Preliminary review** There are no provisions in the constitutional law of the Czech Republic for preliminary review of normative acts.
b.	Abstract or principal review (direct claim of unconstitutionality) The constitutional law of the Czech Republic provides for an abstract control of normative acts in Articles 64 – 71 ("Statute Annulment Proceedings") of the Act Constitutional Court No. 182/1993 and its later amendments (the "Constitutional Court Act") that gives the Constitutional Court the power to decide about the constitutionality of a particular legal regulation or its individual provisions. The proceeding can be initiated on a request of an authorized person or a group of persons (e.g. the president of the republic or a group of at least 25 members of the Assembly of Deputies or 10 Senators).
c.	**Concrete or incidental review of norms** Concrete (or incidental) control is possible in connection with constitutional complaints pursuant to Article 74 of the Constitutional Court Act. In these cases, constitutional complainants may be submitted together with a proposal for an annulment of the statute or some other regulation or their individual provision , the application of which resulted in the situation that is the subject of the constitutional complaint. In such a case, a senat (panel) of Constitutional Court judges is entitled (Article 64 Par. 1 of the Constitutional Court Act) to submit a proposal for an annulment of a statute or an individual provision thereof.
d.	**Statutes that are not subject to constitutional review** A review of statutes can be required in a constitutional complaint pursuant to Article 74 of the Constitutional Court Act (see 1.c above).
2.	Review of unconstitutional omission of legislation (failure of the legislator to act when it is obliged to do so by Constitution) The Czech constitutional legislation does not contain any provisions dealing with a review of unconstitutional omissions of legislation .
3.	Decisions concerning the protection of constitutional rights (Verfassungbeschwerde, amparo, appeal to a judicial body of ultimate appeal) Yes, the Constitutional Court Act regulates the processing of constitutional complaints. Constitutional complaints proceedings are regarded as a special type of a proceeding (Article 72-84 of the Constitutional Court Act). A constitutional

	complaint may be submitted by a natural or legal person if he/she alleges an infringement of his/her fundamental rights and basic freedoms guaranteed by a constitutional act or Article 10 of the Czech Constitution (on international treaties concerning human rights and fundamental freedoms which have been ratified and promulgated, and by which the Czech Republic is bound).
4.	Other areas of constitutional review (examples: unconstitutionality of political parties, referenda, conflicts between infra-states entities, conflicts between state bodies) Article 87 Par. 1 of the Constitution of the Czech Republic lists the following areas of constitutional review (besides the review of normative acts and the constitutional complaints in item 3 of this questionnaire) : - constitutional complaint lodged by local or regional authorities against an unlawful action on the part of state authorities (Article 87 c); - verification of parliamentary election results, and in cases of doubts about the qualifications to be elected as Member of the Chamber of Deputies or Senator, or of a ban for Members of the Chamber of Deputies or Senators to hold certain other offices at the same time (Article 87 e, f); - a constitutional charge brought by the Senate against the President of the Republic pursuant to Article 65 Par. 2 (g); - a petition by the President of the Republic seeking the revocation of a joint resolution of the Assembly of Deputies and the Senate pursuant to Article 65 Par. 2 (h); - the measures necessary to implement a decision of an international court that is binding on the Czech Republic in the event that it cannot be otherwise implemented (Article 65 Par. 2 (i); - a decision to dissolve a political party or other decisions relating to political parties (Article 65 Par. 2 (j); - jurisdictional disputes between state bodies and local and regional authorities (Article 65 Par. 2 (k).

B. The effects of constitutional review decisions:

1.	*Concerning normative acts:*
a.	**Are constitutional review decisions merely declaratory?** Constitutional review decisions are not merely declaratory. If the Constitutional Court, after a due process of law, arrives at a conclusion that a certain statute or any of its provisions are not in conformity with a constitutional act or with an international treaty in accordance with Article 10 , it shall declare in its judgment that such a statute or any of its provisions shall be annulled (Article 70 of the Constitutional Court Act).
b.	Is the norm which is declared contrary to the Constitution null and void, or annulled immediately? Can the body exercising constitutional review modify the norm? If the Constitutional Court comes to the conclusion that a statute, or individual provisions thereof, is not in conformity with a Constitution, it shall annul them on the day specified in the judgment (Art. 70 of the Act on the Constitutional Court). The body deciding about constitutionality, i.e. the Constitutional Court, is not entitled to modify statutes that are not in conformity with the Constitution.
c.	**Must the decisions be implemented (i.e. by repealing the norm) by**

	another organ? The decisions of the Constitutional Court of unconstitutionality of normative acts are not implemented by any other organ.
d.	**Can the effects of annulment be postponed?** Yes, the Constitutional Court annul a statute, or individual provisions thereof, on the day specified in the judgment (Art. 70 of the Act on the Constitutional Court). This means that in fact the Constitutional Court can postpone the effect of its annulment decision .
e.	Do the effects of the decisions go beyond the individual case, where incidental concrete review of norms is concerned? What is the position regarding similar cases which have already been the subject of a final decision? Yes, Art. 78 par. 2 of the Act on the Constitutional Court enables to annul a statute, or individual provisions thereof, on the basis of a proposal submitted by the Court's plenary session or its senate in connection with deciding a constitutional complaint. It follows from similar cases that have already been finally decided that enforceable decisions of the Constitutional Court are binding on all authorities and persons (Art. 89 par. 2 of the Constitution). In a broader sense we can say that the effects of the decisions go beyond the scope of individual cases in that legal opinions of the Constitutional Court expressed in the comments to judgments have a moral as well as instructive value that influence subsequent decisions of other courts.
f.	Can the body exercising constitutional review order another authority to act? Within a fixed period of time? No, the Constitutional Court can not order another authority to act, its decisions has only cassational effects, i.e. the Court can only state whether or not that constitutionally guaranteed fundamental rights and basic freedoms have been infringed by a certain measure taken by a public authority. In some cases, however, a longer period of time is set for the annulment of the offending statute to give the Parliament time to amend the statute in a legal way that conforms with the Constitution, and that is explicitly mentioned in the reasons for the decision. Such a procedure is used if an annulment of a legal regulation or any of its provisions could be damaging for the society, or if an annulment of a provision would render the statute in question ineffective.
2.	*Concerning the protection of constitutional rights*: *If the body exercising constitutional review quashes a decision by a public authority (administration, court, etc.) on the grounds that it is unconstitutional:*
a.	*It is sent back to the original authority for a new ruling? or*
b.	**Does the body exercising constitutional review decide on the matter?** If, on the basis of a complaint submitted to it, the Constitutional Court find a decision of a public authority unconstitutional, it may exercise its cassational discretion and annul the offending decision. In case of some other action by a public authority, it enjoin the authority from continuing to infringe this right or freedom (Art. 82 par. 3 of Act on the Constitutional Court). The Constitutional Court does not have any other authority. It is the matter of the first-instance courts which decided the case in the original proceeding and whose decision has been annulled, to make a new decision in the case. In doing so, it is bound by the decision of the Constitutional Court (Art. 89 par. 2 of the Constitution).
3.	**Furthermore, do constitutional review decisions have**
a.	*Binding force (binding the body exercising constitutional review itself)?* Generally speaking, decisions of the Constitutional Court are binding on all

	authorities and persons (Art. 89 par. 2 of the Constitution). For the purpose of a more detailed examination, however, it is necessary to differentiate between judgments about the matter itself and resolutions deciding other, mainly procedural matters. While enforceable judgments on facts are binding on all authorities and persons, it follows from the character of the resolutions on procedural issues that they are not generally binding. Enforceable judgments of the Constitutional Court are binding also for the Constitutional Court and any subsequent proceeding conducted before this court (see, e.g., decision III. US 425/97).
b.	*Res iudicata force (inter partes; erga omnes?* The decision of the Constitutional Court has the "rei iudicate" effects if the Court passed a judgment in the case (pursuant the Art. 35 of the Act on the Constitutional Court, a petition instituting a proceeding is inadmissible if it relates to a matter upon which the Court has already passed judgment). No such effects exist in the case of resolutions; they are not decisions on facts. Pursuant to Art. 89 par. 2 of the Constitution, decision of the Constitutional Court have the "erga omnes" effect. ; Opinions in this respect, however, vary, and while some people maintain that decisions of the Constitutional Court are generally binding , others differentiate between decisions in the cases of abstract review *(erga omnes)* and cases of concrete review *(inter partes).*
c.	**Force of law?** Decisions of the Constitutional Court, in fact judicial decisions generally, do not have the force of law in the Czech Republic.
d.	**Are they published in an official journal?** It is necessary to differentiate between judgments and resolutions. Judgments are published in the Collection of Laws and in the Collection of Constitutional Court Judgments ; resolutions may also be published in the Collection of Decisions if the Plenum makes a corresponding decision (Art. 59 of the Act on the Constitutional Court).
e.	What happens if a decision declares that a norm will become unconstitutional if it is not modified within a certain period? If the Constitutional Court finds a norm unconstitutional, it annuls it on the day specified in the judgment.

Do the answers to the previous questions depend on the type of constitutional review (e.g. concrete/ abstract control)? Do special rules apply in the cases mentioned in I. A 4 above?

Answers to the previous questions may be partly different in case of abstract and concrete reviews as these two types are defined by law as different types of proceedings; that is why there are differences in the proceedings as well as in the effects of such proceedings (if, however, the senate (panel) or a plenum submits a proposal for an annulment of a statute or individual provision thereof, it is the provisions on abstract review are used). On the other hand, both types of proceeding are to a large extent regulated by the same general provisions of the Act on the Constitutional Court.

For the proceeding listed in I.A 4 above (i.e. special types of proceeding), provisions of the Act on the Constitutional Court that regulate those special types of proceeding will be used.

II. What means are available to ensure the execution of constitutional review decisions?

1.	There are no special statutes saying which body is authorized to execute the decisions on constitutional review. There is only a general provision in Art. 89 of the Constitution on the enforceability of the decisions of the Constitutional Court and it stipulates that enforceable decisions of the Constitutional Court are binding on all authorities and persons.
2.	There is no special body authorized to execute decisions of the Constitutional Court (see the previous explanation above concerning binding force of decisions of the Constitutional Court and the cassational character of the Constitutional Court's decisions.

III.What are the consequences if constitutional review decisions are not executed or are executed within a reasonable time?

Article 89 par. 2 of the Constitution stipulates explicitly when a decision is enforceable (a decision of the Constitutional Court is enforceable as soon as it was announced in the manner provided for by the statute, unless the Constitutional Court decides otherwise concerning enforcement).

IV.Cases where decisions are not executed

A.	There have been cases when the Constitutional Court passed a decision in a concrete case but the lower court subsequently adjudicated the same matter differently. This was, e.g., the case people refusing to do military service (or its civilian service counterpart): while lower courts repeatedly decided that a continuous refusal to do national service is a reason for repeated punishments, , the Constitutional Court repeatedly adjudicated that such rulings violated the constitutional rule *ne bis in idem*. The lower courts eventually accepted the opinion of the Constitutional Court.
B.	This happened in the first years of the Constitutional Court's existence when it was still in the process of establishing its authority, trying to make sure that its decisions are respected by lower courts, and clarifying the question to of the binding force of its decisions.

V. Cases of unsatisfactory execution

A.	Such a situation has not occurred recently.
B.	See A.

ESTONIA / ESTONIE

ANSWER TO THE QUESTIONNAIRE ON THE EXECUTION OF CONSTITUTIONAL REVIEW DECISIONS

ESTONIA

In Estonia there is no separate constitutional court. According to Article 149.3 of the Constitution the Supreme Court is also the court of constitutional review. Besides constitutional provisions, Constitutional Review Court Procedure Act provides for the powers and procedure of the Supreme Court with regard to constitutional review.

I. General questions on constitutional review

A. The type of constitutional review and its subject:

1. Constitutional review of normative acts

The Supreme Court rules on the constitutionality (1) of laws adopted by the Parliament which have entered into force, (2) of laws adopted by the Parliament which have not been promulgated by the President and thus have not entered into force, (3) of decrees issued by the President which have entered into force, (4) of international treaties concluded by the Republic of Estonia which have not entered into force; the Supreme Court decides also (5) whether legislative acts adopted by the executive or by the local governments which have entered into force are in accordance with the Constitution and laws.

Preliminary review is carried out (1) with regard to statutes adopted by the Parliament that have not been promulgated by the President – upon a proposal by the President, and (2) with regard to international treaties concluded by the Republic of Estonia – upon a proposal of the Legal Chancellor.

Abstract review is exercised, of course, in the cases of preliminary review. In addition, the Legal Chancellor is authorized to petition in respect of statutes adopted by the Parliament, and in respect of legislative acts adopted by the executive powers or by the local governments that have entered into force.

Concrete review is exercised upon request of courts. If a court in trying a case concludes that the applicable law or some other legal act conflicts with the provisions of the Constitution, it will declare such a statute or other legal act to be unconstitutional and refuses to apply it in deciding the case. When the court has declared the law or other legal act to be unconstitutional and has refused to apply it in deciding the case it must refer to the Supreme Court by which constitutional review proceedings in the Supreme Court commence.

All normative acts are subject to constitutional review.

2. Review of unconstitutional omission of legislation (failure of the legislator to act when it is obliged to do so by the Constitution)

Legislation does not provide for such a proceeding.

3. Decisions concerning the protection of constitutional rights (*Verfassungsbeschwerde*, *amparo,* appeal to a judicial body of ultimate appeal)

Legislation does not provide for such a proceeding.

4. Other areas of constitutional review (examples: unconstitutionality of political parties, referenda, conflicts between infra-state entities, conflicts between state bodies)

A parliamentary resolution to submit a bill conflicting the Constitution to a referendum can be declared invalid by the Supreme Court upon the request by the Legal Chancellor. Parliamentary resolution to submit a bill to amend the Constitution to a referendum is not subjected to constitutional review.

B. The effects of constitutional review decisions:

1. Concerning normative acts:

The effects of the constitutional review decisions depend on the type of proceedings.

In cases of preliminary review the Supreme Court shall declare a law or an international treaty unconstitutional. This decision does not need any implementation by other organs. Legal acts declared unconstitutional shall not be enacted.

In cases of *ex post* review the Supreme Court shall declare a law or other legislation null and void in whole or in part. This means that the act shall be not implemented any more – it shall be invalid. The court declares the act null and void itself; this decision does not need any implementation by other organs.

According to Section 20.1 of the Constitutional Review Court Procedure Act the decision enters into force as of the date on which the decision is promulgated. The law does not specify if the Court may decide that the annulment of the legal act takes place at a later date. In one instance the Court has decided so, allowing the Government a time gap of more than two months in order to enact a new regulation.

The Supreme Court decisions 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 (Section 23 of the Constitutional Review Court Procedure Act).

If some court has applied an act, declared later null and void by the Supreme Court, the decision of the ordinary court remains in force. At the time of the ordinary court decision, it is considered, the act was applicable and effective. An exception is criminal law. A sentencing decision based on a norm declared null and void shall be revised by the Criminal Law Chamber of the Supreme Court.

2. Concerning the protection of constitutional rights:

Legislation does not provide for a proceeding of protection of constitutional rights.

3. Furthermore, do constitutional review decisions have binding force:

As stated above, the law provides that the Supreme Court decisions 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 law does not stipulate that the decisions would have the force of law, but since they are binding for everybody, they factually do have force of law.

The decisions are published in the State Gazette (the official journal).

III. What means are available to ensure the execution of constitutional review decisions?

There is no specific legislation concerning the execution of constitutional review decisions. Actually there is no good reply to question III, since the decisions have been executed so far, and - on the other hand - the legislation does not provide for any remedies for the case of non-execution. In this sense it cannot be spoken of any consequences - at least so far. If there is to be an answer, it could probably be put this way: The legislation does not provide for remedies in this regard.

IV. Cases where decisions are not executed

There is no information of decisions having been maliciously not executed.

Since there is no individual constitutional complaint in Estonia, the constitutional review functions much like negative legislation.

However, a problem caused by unsatisfactory legislation, exists. The ordinary court that finds that some piece of legislation is in conflict with the Constitution shall declare it unconstitutional and refer the question to the Supreme Court. The ordinary court must do that by a final court decision – the proceedings are not suspended for the time the Supreme Court decides upon constitutionality of the legislation. If the viewpoints of the referring court and the Supreme Court differ, a contradiction in the decisions arises. It was mentioned above that a solution has been foreseen in criminal proceedings, but in civil and administrative law proceedings the court decision of the ordinary court, differing from the Supreme Court decision may remain in force.

V. Cases of unsatisfactory execution

There is no information of long-term application of a norm declared null and void. The only problem in this regard which has risen so far was caused by the fact that officials applying an act declared null and void by the Supreme Court were not aware of the court decision – the decision (and annulment of the act) became effective as of promulgation, not as of publication of the decision. Such a regulation is obviously problematic. However, in the case mentioned, the annulled act was applied for only half a day.

FINLAND / FINLANDE

Kaarlo Tuori 11.9.2000

The Finnish reply to the Questionnaire on the Execution of Constitutional Review Decisions (CDL (2000) 45rev.)

I. General questions on constitutional review

A. The type of constitutional review and its subject

1. constitutional review of normative acts

The emphasis on the constitutional review of parliamentary statutes lies on a beforehand control exercised by the Constitutional Committee of the Parliament. If doubts arise about the constitutionality of a bill, the issue is subjected to a scrutiny in this committee. In most cases, already in the governmental bill the need to acquire the opinion of the Constitutional Committee is expressed. In the Parliament, the decision on sending the bill to the Constitutional Committee is made by the plenary session or by the parliamentary committee responsible for the preliminary reading of the bill.

The Constitutional Committee is comparable to other parliamentary committees in the sense that it is composed exclusively of members of the Parliament. However, the Constitutional Committee bases its work on the opinions given by constitutional experts, mainly university professors. The committee also follows these opinions, especially when there is a large unanimosity among them. The reports of the committee also differ from those of other parliamentary committees in employing legally tuned argumentation. The opinions of the committee on the constitutionality of the bills are binding in the future decision-making of the Parliament. - All in all, the committee can be characterised as a quasi-judicial body.

The control of the committee is of abstract nature. If the committee consider a bill unconstitutional, it usually also indicates how the bill should be changed in order to bring it into harmony with the Constitution. The Parliament, however, has the power to accept a bill, which the Constitutional Committee has considered unconstitutional, but this requires the same qualified procedure as amending the Constitution. Most often the bills are changed along the lines indicated by the Constitutional Committee.

According to the previous Constitution of 1919, the courts - as well as other public authorities - were obliged to apply a provision of a parliamentary statute even if they considered it contradictory to the constitution. The new Constitution, which entered into force March the 1st 2000, changed the situation. Now the courts have the right and the obligation not to apply a provision of a parliamentary statute, if its application would, in the case at hand, lead to an obvious contradiction with the Constitution (Art. 106). It is a question of concrete review, which in principle can be exercised by every court and which does not have any legal effects outside the concrete case. No court can declare a statute generally void, nor is there any other procedure for abstract constitutional review concerning statutes already passed by the Parliament.

The courts, as well as other public authorities, too, are also obliged not to apply governmental decrees and other by-laws, if the application would lead to results contradictory to the Constitution (or to a parliamentary statute). Also here it is a question only of concrete norm control. The requirement of an *obvious* contradiction concerns merely the non-application of a parliamentary statute.

2. review of unconstitutional omission of legislation

There is no procedure in which such omissions could be affirmed and/or the legislature obliged to fulfil its constitutional responsibilities.

3. decisions concerning the protection of constitutional rights

There is no specific procedure corresponding to that of Verfassungsbeschwerde. The protection of constitutional rights takes place through the procedures of abstract and concrete constitutional review described above. In addition, the Ombudsman of the Parliament and the Chancellor of Justice play an important role in the protection of constitutional rights. This task also is explicitly mentioned in the constitutional provisions on their obligations (Art. 108-109). Their decisions do not have immediate legal effects, but they can, for example, initiate judicial procedures.

4. other areas of constitutional review

The Self-government Act of the Åland Islands (Art. 59) provides for a procedure for solving controversies between state authorities and the authorities of the autonomous province of the Åland Islands. The controversies are solved by the Supreme Court.

B. The effects of constitutional review decisions

1. concerning normative acts

The decision of the Constitutional Committee, taken during the deliberation of a bill, is legally binding in the decision-making of the Parliament. As to the courts, the decisions of the committee are not binding in the sense that in cases where the committee has found no contradiction between a bill and the Constitution, the courts would not be allowed to exercise their power of concrete norm control. As noted above, the contradiction with the Constitution must be obvious, before a court can leave a statutory provision non-applied. If the Constitutional Committee has recently given an opinion and considered a provision constitutionally unproblematic, the contradiction at the phase of application can hardly be regarded as "obvious".

The decisions by the courts not to apply a statutory provision they consider unconstitutional are binding, but do not have any effects beyond the individual case. The courts, including the Supreme Court and the Supreme, cannot order the legislature or the government to take steps aiming at repealing or changing a certain provision.

2. concerning the protection of human rights

Decisions by the Constitutional Committee or the courts, which are based on the constitutional provisions on fundamental rights, do not, in their legal effects, differ from other decisions concerning the constitutionality of bills or parliamentary statutes. As stated above, the decisions of the Ombudsman or the Chancellor of Justice do not have immediate legal effects.

3.

The Constitutional Committee of the Parliament is not legally bound by its previous opinions. However, the Committee tries to maintain a consequent line in its praxis and uses previous opinions as precedents. The opinions are published in the proceedings of the Parliament.

There are no special provisions on the legal effects of court decisions involving an aspect of constitutional review. The same holds for the publication of these decisions.

II-IV The execution of constitutional review decisions

The positions the courts take when exercising constitutional review are not independent decisions but part of the decisions closing a concrete case. As these positions do not have any legal effects beyond the case, there is no need for specific provisions on their execution.

As regards the opinions of the Constitutional Committee given in the abstract control of bills under deliberation in the Parliament, it is the task of the Speaker to control that appropriate procedures are followed (Art. 42 of the Constitution). There have been no cases, where a bill deemed by the Constitutional Committee to contradict the Constitution would have been passed by the plenary session with a single majority. What is problematic is that there is no systematic procedure for checking that the changes made to a bill correspond to what the Constitutional Committee has required for securing its harmony with the Constitution. Sometimes other committees send their drafts to the Constitutional Committee in order to get a new opinion. However, this is not regular procedure required by an explicit constitutional provision.

FRANCE

Réponses françaises au questionnaire sur « l'exécution des arrêts des juridictions constitutionnelles »

I. Questions générales sur le contrôle de constitutionnalité

A. Le type et l'objet du contrôle de constitutionnalité :

a. Le contrôle qu'exerce le Conseil constitutionnel français sur les actes normatifs est essentiellement un contrôle *a priori* et abstrait.

La loi lui est déférée avant sa promulgation et son entrée en vigueur est subordonnée à la décision qu'il prendra.

L'initiative de la saisine directe du Conseil est réservée au Président de la République, au Premier Ministre, aux Présidents de l'Assemblée et du Sénat et à 60 députés ou sénateurs.

Le contrôle est dit « abstrait » parce qu'il n'a pas à trancher un différend entre des parties mais simplement à dire si la loi en cause est ou non contraire à la Constitution.

Toutes les lois peuvent lui être déférées, sauf les lois constitutionnelles et les lois adoptées par la procédure référendaire. Le Conseil constitutionnel n'est pas compétent pour connaître des actes normatifs relevant du pouvoir réglementaire (qui, eux, relèvent du contrôle du Conseil d'Etat).

S'agissant du contentieux électoral, les choses sont un peu différentes car, chargé de la vérification de la régularité de toutes les élections nationales, le Conseil constitutionnel peut être amené, non point à statuer – abstraitement – sur la régularité d'une norme mais sur les conditions matérielles dans lesquelles s'est déroulée une élection. Saisi, en général, d'une plainte émanant d'un candidat battu contre les conditions de l'élection du candidat élu, il tranchera alors un litige entre deux parties.

Mais, juge de l'élection dans son ensemble, il s'affirme compétent – si les circonstances l'exigent – pour connaître, avant même les résultats de l'élection, de la légalité de certains décrets d'organisation. Il l'a fait tout récemment à propos du referendum sur le quinquennat en se prononçant sur des requêtes dirigées contre les décrets organisant le referendum et la campagne (Décisions du Conseil constitutionnel des 25 juillet et 23 août 2000).

Le Conseil constitutionnel n'est pas une Cour suprême. Il ne statue pas en dernier ressort sur des décisions juridictionnelles préalablement rendues.

En ce qui concerne les traités, le Conseil constitutionnel a refusé, dans le cadre du contrôle de constitutionnalité, d'examiner la conformité d'une loi nationale à un traité international (auquel il ne reconnaît pas valeur constitutionnelle). Mais la Constitution française dispose, dans son article 54, que le Conseil constitutionnel peut être saisi de la constitutionnalité d'un traité. Si, au vu de ce traité, il déclare qu'une de ses dispositions est contraire à la Constitution, l'autorisation de ratifier ou d'approuver l'engagement international en cause ne peut intervenir qu'après la révision de la Constitution. C'est ce qui s'est passé plusieurs fois : en 1992 pour la ratification du Traité de Maastricht ; en 1999, deux fois, pour la ratification du Traité d'Amsterdam et pour la reconnaissance de la Cour pénale internationale.

b. Comme on l'a déjà vu, le Conseil constitutionnel possède, outre son pouvoir de contrôle de la constitutionnalité des lois (auxquelles il faut ajouter les règlements des Assemblées parlementaires) – celui de veiller à la régularité de l'élection du Président de la République, de statuer en cas de contestation sur la régularité de l'élection des députés et des sénateurs, de contrôler le déroulement des opérations de referendum et d'en proclamer les résultats.

Il est également contacté pour avis en diverses circonstances par le Président de la République (notamment lorsque ce dernier envisage de mettre en application l'article 16 de la Constitution en cas de danger grave et imminent pour le fonctionnement des institutions).

En outre, il est chargé de régler les problèmes constitutionnels qui pourraient naître de la vacance de la Présidence de la République ou de l'empêchement – constaté par lui – dans lequel le Président se trouverait d'exercer ses fonctions.

La Constitution lui confie également la mission de prendre les mesures de report de l'élection présidentielle qui devraient s'imposer si l'un des candidats venait à disparaître pendant le déroulement de la campagne.

Mais, en aucun cas, le Conseil constitutionnel français n'est investi d'un pouvoir de médiation dans le cas de conflits entre organes de l'Etat.

B. Les effets des arrêts des juridictions constitutionnelles :

a. Le Conseil constitutionnel peut déclarer – en tout ou en partie – la norme législative qui lui a été déférée non-conforme à la Constitution.

Si la totalité de la loi est déclarée contraire à la Constitution, le Président de la République ne peut pas la promulguer en la signant. Elle est donc censée n'avoir jamais existé puisqu'elle ne peut être appliquée.

Si une partie seulement de ses dispositions sont déclarées non-conformes à la Constitution, il appartiendra au gouvernement d'apprécier si, amputée de ces dispositions, la loi présente encore un intérêt. Dans l'affirmative, il présentera au Président de la République pour promulgation la loi amputée des dispositions non-conformes.

Si les dispositions non-conformes étaient essentielles pour la compréhension de la loi et se trouvent donc inséparables du reste, la loi ne sera pas présentée au Président de la République et donc point appliquée.

b. Le contrôle du Conseil constitutionnel étant *a priori*, l'effet de sa décision est immédiat. Il se traduit, en cas de déclaration de conformité, par la signature de la loi par le chef de l'Etat, sa promulgation et sa publication au Journal Officiel de la République française. En cas de déclaration de non-conformité, ne sont signées, promulguées et publiées, le cas échéant, que les dispositions de la loi qui – elles – auront été déclarées non-contraires à la Constitution (voir plus haut).

II. Quels sont les moyens d'assurer l'exécution des arrêts des juridictions constitutionnelles ?

Ce problème ne se pose pas en France car la Constitution dispose, dans son article 62 que « les décisions du Conseil constitutionnel ne sont susceptibles d'aucun recours » et qu'elles « s'imposent aux pouvoirs publics et à toutes les autorités administratives et juridictionnelles ».

Cela signifie que, sous peine de forfaiture, le Président de la République ne peut pas signer et promulguer une loi qui aurait été déclarée inconstitutionnelle par le Conseil et que le gouvernement et toutes les autorités administratives et juridictionnelles du pays sont tenues d'appliquer strictement non seulement le « dispositif » de la décision mais les « motifs » qui l'appliquent.

Lorsque, par exemple, le Conseil assortit une décision de conformité d'un certain nombre de « réserves », ces dernières devront être scrupuleusement prises en compte par le gouvernement quand il édictera les règlements d'application de la loi jugée « conforme sous réserves ». Il en résulte que saisi, éventuellement, d'un recours pour excès de pouvoir contre ces règlements, le Conseil d'Etat sera obligé d'examiner si ces règlements, dans leur contenu, ont bien tenu compte des « réserves » émises par le Conseil constitutionnel dans sa décision sur la loi.

S'agissant du contentieux électoral, les décisions du Conseil constitutionnel s'imposent avec la même force. Si une élection est annulée, le gouvernement sera tenu d'en organiser une autre. Si un député, élu est déclaré inéligible ou invalidé, il appartiendra à l'Assemblée concernée d'en tirer immédiatement toutes les conséquences.

III – V Sur l'inexécution des arrêts des juridictions constitutionnelles

Je ne connais aucun cas d'inexécution – totale ou partielle – d'une décision rendue par le Conseil constitutionnel.

Jacques ROBERT

29 septembre 2000

GERMANY / ALLEMAGNE

QUESTIONNAIRE ON THE EXECUTION OF CONSTITUTIONAL REVIEW DECISIONS

Georg NOLTE
Professor of Public Law
Institute of International Law
University of Goettingen

I. General questions on constitutional review

A. The type of constitutional review and its subject :

The competences of the German Constitutional Court are enumerated in the Basic Law and in the Law on the Constitutional Court (**BVerfGG,** § 13) (so-called enumeration principle).

1. constitutional review of normative acts
a. preliminary review

In German law there is no procedure of preliminary review. The Constitutional Court has, however, accepted to review the constitutionality of Parliamentary laws which authorize the ratification of international treaties before such laws are promulgated and have entered into force. This exception prevents that the treaty can become binding on the Federal Republic before the Constitutional Court has finally determined its compatibility with the Basic Law (indirectly by reviewing the authorizing legislation).

b. abstract or principal review (direct claim of unconstitutionality)

Abstract review by the Constitutional Court is provided for in the Basic Law in cases of disagreement or doubt over the procedural or substantive compatibility of Federal legislation or Land legislation with the Basic Law, or on the compatibility of Land legislation with other Federal legislation, at the request of the Federal Government, of a Land government, or of one third members of the Bundestag (Article 93 (1) (2) of the Basic Law). The "necessity" of certain Federal legislation can also be challenged by the Parliaments of the different Laender (Articles 93 (1) 2a) and 72 (2) of the Basic Law).
(A "direct claim of unconstitutionality" of a norm can be put forward by any individual within the constitutional complaint procedure (Article 93 (4a) Basic Law). This procedure is, however, not abstract since the individual must be directly, personally and presently affected by the norm in question.)

c. concrete or incidental review of norms

The Constitutional Court is competent to decide on the compatibility of a Parliamentary Federal or Land statute with the Basic Law or on the compatibility of a Land statute or other Land legislation with a Federal statute, when such a decision is requested by a court (Article 100 (1) of the Basic Law). The request is only admissible if the requesting court expresses its reasoned opinion that the statute in question is unconstitutional and if the decision of the court depends on the validity of the Statute in question. This procedure ensures the monopoly of the Constitutional Court to declare parliamentary statutes null and void.

d. normative acts that are not subject to constitutional review

There are no normative acts which are not subject to constitutional review. In German law there is no "political question-doctrine" and there are no "actes du gouvernement" which are because of their very nature exemt from constitutional review.

2. Review of unconstitutional omission of legislation (failure of the legislator to act when it is obliged to do so by the Constitution)

Unconstitutional omission of legislation can be claimed directly by any (affected) individual by way of the constitutional complaint procedure (Article 93 (4a of the *Basic Law*). The Constitutional Court can also determine an unconstitutional omission of legislation in disputes between state organs about the extent of their respective competences (Article 93 (1) and (3) of the *Basic Law*). Finally, failures of the legislator to act can also be (indirectly) identified by way abstract and concrete constitutional review procedures if the omission renders a more comprehensive legislative scheme unconstitutional.

3. Decisions concerning the protection of constitutional rights (Verfassungsbeschwerde, amparo, appeal to a judicial body of ultimate appeal)

The Court is competent to decide on constitutional complaints by individuals who invoke a violation of their basic rights by a public authority (Article 93 (1) (4 a) of the Basic Law).

Other areas of constitutional review (examples: unconstitutionality of political parties, referenda, conflicts between infra-state entities, conflicts between state bodies)

The Court is furthermore competent to decide in the following procedures:

- on the forfeiture of basic rights by individuals (Article 18 of the Basic Law),

- on the prohibition of political 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 supreme Federal organ or of other parties concerned who have been vested

with rights of their own by the Basic Law or by rules of procedure of a supreme Federal organ (Article 93 (1) (1) of the Basic Law),

- in case of disagreements on the rights and duties of the Federation and the Laender, particularly with respect to the implementation of Federal law by the Laender and in the exercise of Federal supervision (Article 93 (1) (3) and Article 84 (4), sentence 2 of the Basic Law),

- on other disputes involving public law, between the Federation and the Laender, between different Laender or within a Land, unless recourse to another court exists (Article 93 (1) (4) of the Basic Law),

- on municipalities claiming a violation of their right to self-administration (Article 93 (1) (4 b) 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),

- in case of doubt whether a rule of public international law is an integral part of Federal law and whether such rule directly 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 or 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 disagreement on the continuance of law as Federal law (Article 126 of the Basic Law) (relates to pre 1949 legislation),

- in such other cases as are assigned to it by Federal legislation (Article 93 (2) of the Basic Law).

B. The effects of constitutional review decisions :

1. Concerning normative acts :

a. Are constitutional review decisions merely declaratory ?

Constitutional review decisions normally declare a law either to be null and void (ab initio) or to be (merely) unconstitutional. Decisions by which the Court exceptionally orders an interim solution until the legislator has enacted a new law (see B. 1. d. below) are constitutive.

b. Is the norm which is declared contrary to the Constitution null and void, or annulled immediately ?

As a general rule, the norm is declared null and void (see §§ 31 and 78 BVerfGG). The norm is considered to be invalid *ex tunc* and not annulled *ex nunc*.
In some cases the Court merely declares that a norm is “contrary to the constitution”. This enables the Court to provisionally preserve the legal validity of the rule. The Court has developed this practice especially in cases of a violation of the principle of equal treatment. In such cases the Court avoids to declare the whole law null and void because this would deprive everybody of its benefits and not only the excluded group. A mere declaration of

unconstitutionality gives the legislator time to choose another legislative scheme for a variety of legally permissible modifications.

Can the body exercising constitutional review modify the norm ?

In principle, the Constitutional Court cannot modify the norm. The legislator has discretion how an unconstitutional norm should be amended (*gesetzgeberische Gestaltungsfreiheit*). When the Constitutional Court does not declare a norm null and void but merely unconstitutional, it can also, instead of provisonally preserving the legal validity of the unconstitutional norm, prescribe specific rules for the transitory phase until the legislator has reenacted a constitutional law. This practice amounts to a (provional) modification of the norm.
The Constitutional Court can also modify a norm by way of a restrictive interpretation. Sometimes the Constitutional Court describes conditions under which a revised norm would be constitutional.

c. Must the decisions be implemented (i.e. by repealing the norm) by another organ ?

If the Court declares a norm to be null and void no further implementation is necessary. If the Court merely declares a norm to be contrary to the constitution (see B 1 b above), it adds to its findings that the legislator must change the unconstitutional situation.

d. Can the effects of annulment be postponed ?

Yes, see B. 1. b. and B. 1. c.: If the Court declares a norm not null and void but merely to be "unconstitutional" it can order whether and to what extent this norm can continue to be provisionally applied. The Court can prescribe a certain time limit for such a provisional application of the norm. The Court has, in practice, also ordered other interims solutions: In the decisions concerning the abortion legislation, for instance, the Court has formulated its own provisional rules which penalized abortion. In such cases the Court acts on the basis of its competence to execute its decisions according to § 35 BVerfGG (see B II below). If the norm is declared null and void, it is not possible to postpone the effects of this finding.

e. Do the effects of the decisions go beyond the individual case, where incidental concrete review of norms is concerned ?

Yes, § 31 para. 1 and 2 BVerfGG apply (see B. 3. b. and B. 3. c. below).

What is the position regarding similar cases which have already been the subject of a final decision ?

According to § 79 BVerfGG a reopening of criminal proceedings may be instituted according to the provisions of the Code of Criminal Procedure against a final conviction which was based on a rule which has been declared null and void or incompatible with the Basic Law. Non-criminal final decisions which were based on a law that has been declared null and void remain unaffected. If and insofar such decisions have not yet been implemented, however, their execution is not permissible anymore.

f. Can the body exercising constitutional review order another authority to act ? Within a fixed period of time ?

If the Constitutional Court has determined that a law is not null and void but merely unconstitutional it can issue an order that the legislator must pass a constitutional law within a certain time.

2. Concerning the protection of constitutional rights :
If the body exercising constitutional review quashes a decision by a public authority (administration, court, etc.) on the grounds that it is unconstitutional :
a. Is it sent back to the original authority for a new ruling ? or
b. Does the body exercising constitutional review decide on the matter ?

Constitutional Court protection against decisions by the administration is rare because the constitutional complaint procedure is only admissible after all remedies have been exhausted. This means that the vast majority of constitutional complaints are directed against (final) court decisions. If it finds that the court decision violated the constitutional rights of the complainant the Constitutional Court quashes the decision and sends the case back to the competent court for a new ruling (Article 95 (2) BVerfGG). In some cases, however, in which the issue is ripe for decision the Constitutional Court has assumed the power to render the final decision itself.
Sometimes the Constitutional Court decides that the decision under review is unconstitutional but it does not quash it because it considers that there is no decision suitable for quashing.

3. Furthermore, do constitutional review decisions have :
a. binding force (binding the body exercising constitutional review itself) ?

The Court's finding has binding force for itself only insofar as the decision is *res judicata*. Thus, there is, as a general rule, no possibility for the Constitutional Court to reopen the case *proprio motu*. A decision by the Constitutional Court is also binding insofar as the specific norm under review has been declared null and void. There is no principle of stare decisis, however. The Court can change its jurisprudence in a later case. It can hold that a new law with the same content is now constitutional. The Constitutional Court has even held that the legislator may "try again", that is to enact an identical law hoping that this time it will be held constitutional.

b. *res iudicata* force (*inter partes*; *erga omnes*) ?

According to § 31 para. 1 BVerfGG all decisions of the Constitutional Court are not only binding *inter partes* but also upon Federal and Land constitutional organs as well as on all courts and public authorities (but not on private individuals). This binding force encompasses the reasoning insofar as the decision rests on it (similar to the *ratio decidendi* rule in common law systems).

c. force of law (see for instance § 31 (2) of the German law on the constitutional court)?

If the Constitutional Court has pronounced itself on the constitutionality of a norm such a decision has the force of law (§ 31 (2) (1) BVerfGG). It is doubtful, however, whether this rule is really necessary.

d. are they published in an official journal ?

According to § 31 (2) (3) BVerfGG the decision of the Constitutional Court shall be published in the Federal Law Gazette by the Federal Ministry of Justice if a law is declared to be compatible or incompatible with the Basic Law or other Federal law or to be null and void.

e. What happens if a decision declares that a norm will become unconstitutional if it is not modified within a certain period ?

In its so-called ”Appellentscheidungen”, i.e. in decisions calling for new legislation, the Constitutional Court can find that the law in question remains constitutional for a certain period but calls for legislative action in order to prevent that the law will become unconstitutional. If the norm is not modified within the time period prescribed, the norm does not automatically become null and void. It continues to be applicable, except if the Constitutional Court has declared otherwise.

f. Do the answers to the previous questions depend on the type of constitutional review (for example : concrete/abstract control) ?

No. But see B. 3. c.

g. Do special rules apply in the cases mentioned in point I. A. 4 above ?

In procedures concerning the *prohibition of political parties* the Constitutional Court’s decision is constitutive. The decision is accompanied by an order dissolving the party and the prohibition of the establishment of a substitute organization. Moreover, the Constitutional Court may direct that the property of the party be confiscated for the public benefit. The Court can order the (Federal and Land) Ministers of the Interior to execute the decision.
According to § 67 para. 1 BVerfGG in cases of *constitutional disputes between the highest Federal organs* the Constitutional Court only declares whether the act complained of violates the Basic Law. In such a procedure the Constitutional Court does not issue any final orders.

The reply to questions II and III will make a distinction, if necessary, according to the type/subject of constitutional review as well as to the effects of decisions (see question I).

II. What means are available to ensure the execution of constitutional review decisions ?

The response to this question should take account of the legislation concerning the execution of constitutional review decisions, either by other courts or by executive bodies. In particular :

1. **Is there a norm indicating which authority has to execute the constitutional review decisions ?**
2. **If not, is there a norm providing that the body exercising constitutional review or any other authority has the power to designate the body which will execute the decisions of the court ? How does the system work in practice ?**

According to § 35 BVerfGG the Constitutional Court may determine “who” (“wer”) must execute its decisions. It may also specify the method of execution. Taking into account its broad competences under § 35 BVerfGG the Constitutional Court exercises self-restraint and does not often use this specific power. Due to the Court’s authority in German constitutional life it is mostly not necessary for the Court to ensure execution through the means of § 35 BVerfGG.

III. What are the consequences if constitutional review decisions are not executed or are not executed within a reasonable time ?

According to § 35 BVerfGG the Constitutional Court is ”Herr der Vollstreckung”, i.e. the process of execution is at the discretion of the Court. The question how the Court should react if constitutional review decisions are not executed is a question of appreciation. The following two cases may serve as an illustration:

1) In 1956 the Constitutional Court declared the Communist Party of Germany (KPD) unconstitutional. One of the legal consequences of this decision is the prohibition of the establishment of a substitute organization. When the German Communist Party (DKP) was founded in 1967 the Court could have executed its 1956 decision by ordering the Minister of the Interior act against this party as well. However, probably due to changed political circumstances, the Court did not act.
2) In 1971 the Court prohibited the publication of the book ”Mephisto” by Klaus Mann because it considered that it infringed the post-mortem right of privacy of a well-known actor. In 1981 the book was republished by another publisher. Although the Court could have executed its old decision against the new publication it chose to remain inactive, perhaps due to a reconsideration of the necessary extent of privacy protection.

The question of non-execution of constitutional norms is of particular importance with regard to the Court’s declarations that a norm is not null and void but merely contrary to the constitution. In most cases, the question of eventual execution is solved politically. There are some cases, however, in which the decisions were not executed within the time limit prescribed, especially in cases of discriminatory tax legislation. The Court’s jurisdiction with regard to certain tax reductions, for instance, has not been implemented within a reasonable time. If the legislature does not change the unconstitutional law it risks further proceedings and defeats before the Constitutional Court.

IV. Cases where decisions are not executed

A. Have there been any recent cases where a constitutional *review* decision has not been executed in your country ?

During the last ten years several decisions concerning tax law, such as cases concerning taxes on the income of retired persons, tax reductions for families with children, or questions of the income taxes have not been implemented, at least not within a reasonable time (see III. above).

B. If so, is it possible to identify the reasons why the decision was not executed (e.g. political or financial reasons, lack of clarity in the decision, inadequate rules on the execution of decisions) ?

If decisions are not executed it is mainly for specific political, administrative or financial reasons. Sometimes the legislature tries to delay painful consequences for the budget. In other cases, the Constitutional Court has acknowledged that the German reunification had led to an unforeseen need to pass new legislation so that the period of time for modifying unconstitutional laws had to be extended.

V. Cases of unsatisfactory execution

In certain cases, even where a constitutional review decision has been executed, the situation remains unsatisfactory because an unconstitutional norm continues to be applied.

A. Has such a situation arisen recently in your country ?

B. What are the causes of such a situation ? Do they stem from the effects of the constitutional review decision (absence of *erga omnes* effect, declaratory nature of the decision), or from other causes, such as those mentioned in IV.B above ?

Concerning points IV and V, did specific problems arise when decisions of ordinary higher courts were declared contrary to the Constitution ?

GREECE / GRECE

Réponse de la Grèce au questionnaire sur l'exécution des arrêts des juridictions constitutionnelles

Olga Papadopoulou
Maître de requêtes au Conseil d'Etat
ATHENES

I. REMARQUES GENERALES SUR LE CONTROLE JURIDICTIONNEL DE LA CONSTITUTIONNALITE DES LOIS EN GRECE

En vertu de la Constitution de 1975/1986, « les tribunaux sont tenus de ne pas appliquer les lois dont le contenu est contraire à la Constitution » (art. 93 par.4) ; « dans l'exercice de leurs fonctions, les magistrats sont soumis uniquement à la Constitution et aux lois ; dans aucun cas ils ne sont obligés de se conformer à des dispositions édictées en violation de la Constitution » (art. 87 par. 2). Expression directe du caractère rigide de la Constitution hellénique, le contrôle juridictionnel de la constitutionnalité des lois remonte au XIXe siècle. Inspiré du modèle américain, ce contrôle diffus est exercé a posteriori, à l'occasion de l'application – dans un litige déterminé – de la disposition législative dont la constitutionnalité est mise en cause (a).

Le système du contrôle diffus présente toutefois des inconvénients, surtout en cas d'édiction de décisions contradictoires. Divers mécanismes atténuent considérablement ce risque dans chaque ordre des juridictions (b). Par ailleurs, la Cour Spéciale Suprême prévue par l'article 100 de la Constitution se prononce sur la constitutionnalité ou le sens d'une loi lorsque les Hautes Juridictions ont émis à ce sujet des décisions contradictoires (c).

(a) Les magistrats de toutes les juridictions (administrative, civile, pénale) et de tous les degrés (tribunaux de première instance, cour d'appel, Hautes juridictions – Conseil d'Etat, Cour de Cassation, cour des Comptes) sont habilités à contrôler la constitutionnalité des lois. Le contrôle se limite toutefois au contenu matériel des dispositions législatives ; il ne s'étend pas aux vices de procédure qui, en vertu d'une jurisprudence constante, sont considérés comme des interna corporis et échappent à la sanction juridictionnelle. Le contrôle de la constitutionnalité est exercé par voie d'exception et non pas par voie d'action : ainsi par exemple, lors d'un recours pour excès de pouvoir qui tend à l'annulation d'un acte administratif – réglementaire ou individuel – le requérant peut invoquer l'inconstitutionnalité d'une disposition législative qui régit soit le fond de l'affaire litigieuse, soit la recevabilité de la requête.

Le grief d'inconstitutionnalité, invoqué à l'occasion d'un litige, met en cause une disposition définie, dont l'application est nécessaire au jugement du litige en question : le contrôle est donc exercé in concreto et non pas in abstracto. Le juge peut et doit soulever d'office

l'inconstitutionnalité d'une loi pour définir la majeure de son syllogisme. Lorsqu'une disposition législative est jugée inconstitutionnelle, elle est écartée de la solution du litige ; le jugement porté sur la constitutionnalité de la loi n'est pas revêtu de l'autorité de la chose jugée. Théoriquement, ce jugement ne lie ni le tribunal qui l'a émis, ni les autres tribunaux. Toutefois, en pratique la position des Hautes Juridictions qui se prononcent en principe en Assemblée plénière (voir infra) s 'impose aux tribunaux du même ordre ; ainsi, à travers les voies de recours et les mécanismes de renvoi au sein des Hautes Juridictions, le contrôle diffus devient un contrôle centralisé.

(b) Lorsque, par les voies des recours [recours en appel ou en cassation], le litige est porté devant les Hautes juridictions, les risques inhérents au contrôle diffus sont atténués. Le renvoi du litige devant la Chambre plénière – facultatif ou obligatoire – exclut l'édiction d'arrêts divergents au sein de chacune des Hautes Juridictions et contribue à l'unification de la jurisprudence des instances inférieures. A cet égard, la position du Conseil d'Etat est significative. Le statut constitutionnel de cette juridiction et ses compétences l'érigent en interprète privilégié des normes constitutionnelles et lui confient une place prépondérante dans le contentieux de la constitutionnalité. Lorsqu'une formation du CE est appelée – à l'occasion d'un litige – à examiner la constitutionnalité d'une disposition législative, elle peut ou elle doit [si un jugement sur la constitutionnalité ou sur le sens de cette disposition a déjà été porté par la Cour de Cassation ou la Cour des Comptes] saisir l'Assemblée plénière du tribunal.

(c) Pour éviter les interprétations divergentes et les jugements contradictoires – le constituant établit une Cour Spéciale Suprême à laquelle incombe entre autres le jugement des contestations portant sur l'inconstitutionnalité de fond ou le sens des dispositions d'une loi, lorsque la Cour de Cassation, le Conseil d'Etat ou la Cour des Comptes ont émis sur ces dispositions des arrêts contradictoires. Les décisions de cette instance ont validité erga omnes ; elles sont irrévocables et lorsqu'elles prononcent l'inconstitutionnalité d'une disposition, celle-ci devient caduque soit à partir de la publication de l'arrêt de la Cour Suprême soit rétroactivement.

A. Le type et l'objet du contrôle de constitutionnalité

1. Le contrôle juridictionnel de la constitutionnalité des lois formelles votées par le Parlement est un contrôle a posteriori, incident et concret. Il faut toutefois signaler que le Service Scientifique du Parlement examine la constitutionnalité des projets et propositions de lois qui lui sont soumis et émet un avis à ce sujet.

Le contrôle juridictionnel de la constitutionnalité des actes réglementaires [qui sont édictés par le Président de la République, le Conseil des Ministres, les Ministres et les autres organes de l'administration en vertu d'une habilitation législative] est aussi un contrôle a posteriori ; toutefois, les projets des décrets réglementaires sont examinés par le Conseil d'Etat qui donne son avis sur la légalité des décrets et examine à ce propos la constitutionnalité de la loi d'habilitation. Mais, contrairement aux lois formelles les actes réglementaires peuvent faire l'objet d'un recours direct – d'un recours pour excès de pouvoir devant le Conseil d'Etat.

Il n'y a pas d'acte normatif échappant au contrôle de constitutionnalité.

2. La seule sanction prévue contre les omissions inconstitutionnelles en matière législative est l'action en dommages portée devant les tribunaux. Comme l'ordre juridique hellénique ne reconnaît pas d'action directe contre la loi, l'omission du législateur n'est pas, a fortiori, sujette à des recours directs [il faut par ailleurs signaler que même si l'omission de l'administration d'édicter un acte réglementaire peut faire l'objet d'un recours pour excès de pouvoir, le juge

admet que l'édiction des actes réglementaires relève du pouvoir discrétionnaire de l'administration et n'accepte pratiquement jamais ces recours].

Cependant, si la disposition constitutionnelle prescrivant l'édiction d'une loi a un contenu suffisamment clair, le juge l'applique directement. Ainsi par exemple la Constitution [art. 24 par.6] prévoit l'édiction d'une loi fixant les modalités et la nature de l'indemnisation des propriétaires victimes des mesures restrictives imposées pour la protection des sites et monuments historiques ; l'omission du législateur de procéder à l'adoption d'une telle loi n'a pas empêché le juge administratif d'appliquer directement la règle constitutionnelle et d'ordonner l'indemnisation du propriétaire lésé.

3. Il n'y a pas de procédure spéciale concernant la protection des droits constitutionnels. La protection de ces droits est assurée par les recours juridictionnels ordinaires.

4. La Cour Spéciale Suprême, instituée par l'art. 100 de la Constitution est aussi compétente pour statuer sur le contentieux des élections législatives ; pour contrôler la validité et les résultats des référendums ; pour porter un jugement sur les incompatibilités ou la déchéance des députés ; pour le règlement des conflits d'attributions entre les juridictions et les autorités administratives, ou entre les juridictions administratives et les juridictions civiles et pénales, ou entre la Cour des Comptes et les autres juridictions ; pour se prononcer sur le caractère des règles de droit international.

Le Conseil d'Etat est aussi compétent pour prononcer un avis sur la légalité des décrets réglementaires.

De la compétence de la Cour des Comptes relèvent aussi :

le contrôle des dépenses de l'Etat, ainsi que des collectivités territoriales ou des autres personnes morales de droit public qui sont soumises au contrôle de la Cour des Comptes par des lois spéciales ; (b) le rapport présenté au parlement sur le bilan de l'Etat ; (c) la formulation des avis sur les lois relatives aux pensions ; (d) le contrôle des comptables publics.

B. Les effets des arrêts des juridictions constitutionnelles

Les arrêts des Hautes Juridictions [Conseil d'Etat, Cour de Cassation, Cour des Comptes] qui exercent un contrôle de constitutionnalité par voie d'exception ont un effet inter partes. Dans ces cas, la norme jugée inconstitutionnelle n'est pas appliquée au litige en question, mais formellement, et souvent aussi dans la pratique, elle conserve sa validité. Les tribunaux inférieurs se conforment au jugement rendu par la Haute Juridiction, sinon leurs décisions sont annulées par les instances juridictionnelles supérieures. L'attitude de l'administration dépend de plusieurs facteurs. Parfois, elle prend l'initiative d'annuler les actes qui sont fondés sur la disposition jugée inconstitutionnelle ; mais souvent, soit pour des raisons politiques, soit pour des raisons budgétaires, soit par inertie et sans autre raison particulière elle continue à appliquer la norme qui a été jugée inconstitutionnelle. Dans ce cas l'administré ne peut que saisir le juge compétent.

Par contre, les arrêts de la Cour Spéciale Suprême, qui est saisi à la suite de jugements contradictoires prononcés par les Hautes Juridictions pour examiner la constitutionnalité d'une loi, ont effet erga omnes, dès leur prononcé en séance publique. Ces arrêts sont irrévocables et sont publiés dans le Journal Officiel ; ils n'ont pas cependant force de loi. La norme jugée inconstitutionnelle est déclarée caduque à partir du prononcé de l'arrêt. Dans certains cas, la

Cour Suprême peut, par un considérant spécialement motivé, donner effet rétroactif à son arrêt déclarant caduque la disposition inconstitutionnelle.

Ni la Cour Suprême, ni a fortiori les Hautes Juridictions ne sont compétentes pour modifier les normes législatives.

II-V : MOYENS D'ASSURER L'EXECUTION DES ARRETS DES JURIDICTIONS CONSTITUTIONNELLES

A . Il n'y a pas de procédure formelle pour la mise en œuvre des décisions juridictionnelles qui se prononcent sur l'inconstitutionnalité d'une loi.

Les arrêts des Hautes Juridictions [Conseil d'Etat, Cour de Cassation, Cour des Comptes] qui, à l'occasion d'un litige déterminé, se prononcent sur l'inconstitutionnalité d'une disposition législative n'ont pas d'effet erga omnes. Il n'y a aucun moyen formel pour assurer l'abrogation de la disposition dont l'application a été jugée inconstitutionnelle. Parfois le gouvernement prend l'initiative de soumettre au Parlement un projet de loi, pour abroger ou pour modifier la disposition en cause. Le Conseil d'Etat avait statué que l'urbanisme et l'aménagement du territoire relevaient, en vertu de l'art. 24 de la Constitution, de la compétence exclusive de l'Etat – des administrations centrales ou des organes des services décentralisés de l'Etat – et que le législateur ne pouvait transférer ces attributions aux collectivités locales. Or, plusieurs compétences en cette matière avaient été transmises aux communes et aux préfectures qui sont des collectivités locales. Pour faire face à cette situation une loi récente a procédé à une redistribution des compétences en conformité avec la jurisprudence. Mais souvent aucune initiative législative n'est entreprise pour abroger la disposition jugée inconstitutionnelle. Les raisons varient : motifs politiques, raisons budgétaires, inertie, perspective de revirement jurisprudentiel etc.

B. La loi sur l'organisation de la Cour Suprême prévoir toutefois certaines mesures pour assurer l'application effective des jugements prononcés par cette instance. Les décisions juridictionnelles et les actes administratifs qui sont édictés après le prononcé de l'arrêt de la Cour Suprême en séance publique et qui sont contraires à l'arrêt rendu par la Cour peuvent faire l'objet d'un recours devant les instances juridictionnelles [bien entendu les actes administratifs peuvent aussi faire l'objet de recours non juridictionnels]. Si la décision a été prononcée par le Conseil d'Etat, la Cour de Cassation ou la Cour des Comptes, à savoir par des juridictions de dernière instance, un recours spécial est prévu par la loi qui peut être intenté dans un délai de 90 jours à partir du prononcé de la décision de ces hautes instances.

Ces règles sont également applicables contre les décisions rendues avant la publication de l'arrêt de la Cour Suprême, si un litige était déjà pendant devant la Cour Suprême au moment du prononcé des décisions ; en effet, dès qu'un litige mettant en cause la constitutionnalité [ou le sens] d'une loi devient pendant devant la Cour Suprême, toute juridiction doit surseoir à statuer jusqu'au prononcé définitif de l'arrêt de la Cour Suprême.

En outre, si la Cour Suprême déclare la norme caduque avec effet rétroactif, toute décision irrévocable rendue par une instance juridictionnelle au cours de la période visée par la rétroactivité de l'arrêt de la Cour Suprême peut faire l'objet d'un recours spécial, dans un délai de six mois à partir de la publication de l'arrêt de la Cour Suprême. Les décisions administratives édictées en vertu de la norme jugée inconstitutionnelle sont impérativement annulées par l'administration dans un délai de six mois à partir de la publication de l'arrêt de la Cour Suprême.

HUNGARY / HONGRIE

Hungarian Answers to the Questionnaire on the Execution of Constitutional Review Decisions
By László Sólyom

I. General Questions

A Type of review

1. Constitutional review of normative acts. (Reference is made to the §§ of the Constitutional Court Act of 1989; decisions of the CC are indicated by the No and the year.)

a. Preliminary review: only on the motion of the President of the Republic. If the President considers any provision of a statute to be unconstitutional, ha may, prior to signing it, refer it to the Constitutional Court within 15 days following its receipt from the Parliament. Should the CC determine the statute to be unconstitutional, the President of the Republic shall return the statute to the Parliament; otherwise he is required to sign the statute and promulgate it within 5 days. (Art 26 of the Constitution, §§ 33-36 CC Act)

b. Abstract or principal review: everybody is entitled to challenge the constitutionality of any kind of legal norms that have already taken effect. There is no deadline to be observed, nor is the applicant required to show any violation of his/her rights or a legally protected interest. (95% of the cases of the CC are based on such an *actio popularis*. §§ 37-43.)

c. Concrete review: The judge, who finds that a legal norm to be applied is unconstitutional, must stay the proceeding and obtain a decision ob the matter from the CC (§ 38).

d. Normative acts that are not subject of review: The Constitution itself is not subject of review. There is no hierarchy between the provisions of the Constitution. (There are no "eternity rules"/Ewigkeitsklausel, that must not be amended and no other constitutional rules may conflict with them.)
The CC held that laws amending the Constitution were subject to constitutional review only as to the formal requirements of the legislative process. A "hidden" amendment of the Constitution (e.g. by the practical effects of a referendum) was unconstitutional. (2/1993; 23/1994; 1260/B/1997.)
It is to be noted that the CC has a wide discretion in determining whether a legal act is "normative" (and subject to review) or has no normative content (*Massnahmengesetz*). Acts of the Parliament are usually reviewed irrespective of their normative character. The CC may refuse the review of Government regulations on the grounds that they are not normative but refer to a single, concrete situation (e.g. building a dam, license a new public television channel).

2. Unconstitutional omission of legislation can be initiated by everybody (*actio popularis*) and - exceptionally – ex officio. (§ 49. The CC never commenced an ex officio proceeding in order to establish legislative omission. On the other hand, the Court frequently extended proceedings on abstract norm control to reviewing the omission of the legislature.)

3. Protection of individual constitutional rights: in Hungary there is no *Verfassungsbeschwerde* or *amparo* in the German or Spanish sense. The "constitutional complaint" regulated in the CC Act is a kind of concrete norm control initiated by one of the parties following a final (ordinary) court decision. (§ 48.) The CC decides on whether the legal norm applied by the ordinary court is unconstitutional. "Claims arising from a violation of fundamental rights … shall be enforceable in a court" (that is in an ordinary court) according Art. 70/K of the Constitution.

On the other hand, special laws give the CC the competence to review legal acts (normative and non-normative) concerning the autonomy of the universities and the local governments.

4. The CC has a special competence to review the decisions of the National Commission on Elections on the admissibility of proposed questions for a referendum and the results of a referendum, as well.

B Effects of the decisions

1. As to normative acts:

a. The decision of the CC on the constitutionality of a norm is constitutive.

b. If the CC finds a norm to be unconstitutional it annuls the norm - as a rule – with the day of the publication of the decision in the Official Gazette (§ 42, 43 (1)). If it is required by the security of the law ("legal certainty") or the by overwhelming interests of the parties involved (if there are "parties", that is in a decision on the initiative of a judge or in a "constitutional complaint" case), the CC may declare the norm null and void *ex tunc*. The norm may also be annulled in a future date determined in the decision of the CC (§ 43 (4)).

Strictly speaking the CC cannot modify a norm. For practical reasons, if only some words of a sentence have been annulled, the original meaning of that sentence will be modified.

c. Decisions annulling a norm are self-executing. No further implementation is necessary. If a law (statute, that is Act of Parliament) is annulled, implementing norms of lower rank cannot be applied any more even if they were not ordered expressly to be ineffective.

An implementation of the CC decision is necessary in the case of the legislative omission. This does not belong to the "constitutional review of normative acts" we are speaking of under this heading. In the practice of the Hungarian CC, however, the abstract review and the legislative omission became intermingled. It occurs frequently, that some parts of a norm are declared unconstitutional and are annulled. At the same time the Court establishes the omission of the legislature in the same subject matter and obliges it to pass a statute before a deadline. The CC prescribes the content of this law to be passed. The new legislation that has to replace the annulled norm and the new legislation that completes the regulation of the same subject can hardly be separated in the practice. Indeed, the CC prefers to couple the constitutional review with the omission in order to be able to oblige the legislator to act.

d. Yes. The CC may determine a future date of ineffectiveness of a norm. By doing so, the CC gives the legislature time to eliminate the unconstitutionality of a norm and a legal vacuum can be avoided.

e. The decision in a concrete norm control case (or in a "constitutional complaint" case) declares the norm to be unconstitutional and provides for its (usually *ex nunc*) annulment *erga omnes*.

Besides this, the CC orders that the norm cannot be applied in the individual case. (That is, the annulment has also an *individual ex tunc* effect.) In case of a concrete norm control, the judge continues the proceeding without applying the annulled norm. The party, who filed the constitutional complaint, has a right to reopen his case. In the new proceeding the annulled law cannot be applied.)

The decision of the CC that a norm cannot be applied in an individual case has no automatic effect for similar cases, which have already been finally closed. Parties in a similar situation may file a constitutional complaint on the normal conditions.

f. See Point c. above. In the case of a preliminary review the President of the Republic has certain duties depending on whether the CC held the law constitutional or unconstitutional. (See 1.a. above.) These duties are prescribed in the Constitution and the CC makes no reference to them in the decision.

2. In the case of a "constitutional complaint" the CC does not quash the court decision that was based on an unconstitutional norm. It is the party of the given case, who can reopen his case in the ordinary court. The CC Act provides only for one exception: if a norm of the criminal law was found to be unconstitutional and was annulled, the CC orders the revision of all criminal proceedings which have been completed with a final judgement and which imposed a punishment under the annulled legal norm, provided that any negative consequence of having been sentenced still prevails in the given case.

In some special competences (autonomy of universities or local governments) the CC can decide on the unconstitutionality of concrete acts of ministries or of the government. The laws that provided for these competences did not give any procedural rules nor rules on the consequences of the unconstitutionality. Until now, the CC had only such cases before him where the autonomy of those entities was violated by a normative act. These acts could be annulled in the same way as in the abstract norm control proceedings.

The decision of the CC on the admissibility of a question for popular referendum concerns the previous decision of the National Election Committee. If the refusal or the admission of the proposed question violates the Constitution, the CC refers back the case to the Committee that has to make a new decision.

3. Constitutional review decisions

a. have binding force for everybody.
Although the CC Act is silent in this respect, if the CC changes its practice it does so expressly, mentioning the earlier cases and pointing out in which respect and on what reasons the Court modifies its judicature.

b. The CC decisions have *res judicata* force *erga omnes*.

c. The Constitution has no comparable provision with the German CC law. However, the Hungarian CC Act provides that the decisions of the CC are binding for everybody (§ 27 (2)). For practical reasons it is the same as the force of law.

d. Decisions establishing the unconstitutionality of a norm and its annulment must be published in the Official Gazette; the norm becomes ineffective – as a rule - with the day of the publication. Decisions establishing an omission of the legislature are published in the Official Gazette as well.

The CC publishes his own monthly official journal that contents all decisions taken (including refusals of motions etc.)

e. If the CC establishes the unconstitutionality of a norm, but annuls it *pro futuro*, the norm looses effect at the future date determined in the judgement of the CC. (Naturally, if the legislature passes a new norm before this deadline, the old norm will be replaced by the new one even earlier.)

II. Means of Execution

1. As to the abstract review of the constitutionality of a norm, there is no provision on the execution of the CC decision, because the annulment by the decision of the norm is self-executory. In case of legislative omission the CC Act do not specify the organ that is responsible for passing the desired legal norm. According to the language of the Act this is "the organ, which is in omission" (§ 49 (1)). Accordingly, the CC usually repeats the wording of the Act. Sometimes the CC decision obliges expressly the Parliament to pass a statute. In this case, it is usually the Government, which introduces a bill into the House.

The CC can review whether a legal norm is contrary to a treaty or international agreement. The sanction of such a controversy depends on the hierarchical level of the norm that promulgated the international treaty and the rank of the contradictory domestic norm. If the promulgating norm is of higher rank, the conflicting norm will be annulled. If the international agreement has been promulgated in a norm of lower hierarchical level than the conflicting law (e.g. an agreement was incorporated into Hungarian law and promulgated by a regulation of a minister, that is quite natural in case of agreements of technical nature – but the CC establishes that the agreement is in contradiction with an Act of Parliament), the CC has two possibility. Either the CC orders the "organ that has concluded the treaty" "to eliminate the contradiction" within a time limit, or the CC orders the maker of the higher level domestic norm to amend that law in order to reach harmony with the international agreement. The CC is free to this delicate political choose, it obviously considers the interests on keeping the international relations possibly undisturbed (§ 46).

III. Consequences of non-execution

Under the competencies of the Hungarian CC a delay or non-execution of a decision can only occur in cases where the CC determines a deadline for the execution of its decision. This applies in cases of omission to pass a law and the "elimination" of contradiction between a treaty and the domestic law. Practice shows that the relevant lawmaker usually tries to obey the CC's order. If and Act of the Parliament has to be passed delays may occur for practical reasons. The CC has no means and has no direct influence on having the time limits kept. It is considered to be a matter of constitutional culture.

It occurred that the CC suspended its proceeding on unconstitutional omission because the Minister of Justice told the CC the bill on national minorities will be soon completed and

introduced into the Parliament. After a year the CC continued the proceeding and established the omission with the obligation to pass the law by the end of that year (35/1992).

In certain cases the CC may construct its decision in a way that a pressure on the legislature is incorporated to pass the new law within time. If the CC annuls a law *pro futuro* in order to enable the Parliament to replace the unconstitutional law by a new constitutional one, the undesired consequences of a gap in the regulation may move the Parliament to timely legislation. For instance the CC declared the then valid abortion regulation to be unconstitutional in December 1991 and annulled it by 31. December 1992. If the Parliament had not had passed the new Abortion Act by the end of 1992, from the 1. January 1993 on – in the lack of any regulation that makes certain cases of the abortion legal – all cases of the abortion would have counted as crimes under the Criminal Code. (64/1991.)

In the case of the replacement of the old regulation on the public law radio and television by a new, constitutional one the CC saw the political difficulties of reaching the consensus between government and opposition that would have been necessary to pass the Media Act by the constitutionally mandated two third majority of the votes. Some political actors were interested in loosing effect of the old regulation but they did not want to make any compromise concerning the new legal regime of the public media. The CC considered in 1992 the lack of regulation - and first of all the lack of a comprehensive legal regime of the public media - as more dangerous for the free speech than maintaining the very partial old rules. The CC determined the time of loosing effect of the old, unconstitutional regulation at the moment of taking effect of a new law on the media. The law has been passed in 1995 as in the newly elected Parliament the government disposed over more that two third majority of the votes (37/1992).

IV. Non-execution cases

A. As pointed out above, a non-execution has a sense only in cases of omission or in cases where establishing an omission completes the constitutional review. Such cases were the Act on national minorities, on the media, recently on the minimal number of MP-s of a parliamentary faction. (35/1992, 37/1992, 27/1998.)

B. In each case there have been purely political reasons of the delay. In the national minority case all parliamentary parties were keen to pass the law as early as possible. While making the bill, the associations of minorities were consulted and it was mainly the controversies between those associations that hindered the progress of the work. In the media and factions cases a qualified majority would be necessary to pass the respective laws but could not be reached in the given political circumstances.

V. Non-satisfactory execution

If the CC annulled a law no authority continued to apply it.

There were problems only with the *retroactive* non-application of a norm in individual cases, if a constitutional complaint has had success. If the CC declared the norm to be unconstitutional and annulled it *ex nunc* with an *erga omnes* effect, and at the same time ordered that the unconstitutional norm could not be applied in the individual case, until 1999 there were no specific procedural rules how the applicant can reopen his case before the ordinary court. So the execution of the order of the CC remained uncertain. In some cases the ordinary judge applied

the rules of resuming of proceedings *per analogiam*, in other cases he refused a new trial. In 1998 the CC established the omission of the Parliament to regulate this procedural issue. In 1999 the Code of Civil Procedure has been amended and the right to reopen the case of the party whose constitutional complaint was successful, was guaranteed and regulated in depth.

Budapest, 12 November 2000.

IRELAND / IRLANDE

9 October, 2000

Mr. Gianni Buquicchio,
Secretary of the Commission,
F-67075 Strasbourg Cedex,
France.

Dear Mr. Buquicchio,

I refer to your questionnaire on the execution of constitutional review decisions received on 29 August 2000. The following is the position in Ireland:-

I.

A .The type of constitutional review and its subject

1. There is no specialized constitutional court in Ireland. The Courts of First Instance include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal (Constitution of Ireland, Article 34.3.1°). The High Court has the exclusive jurisdiction to deal, at first instance, with the question of the validity of any law having regard to the provisions of the Constitution (Article 34.3.2°). A right of appeal lies to the Supreme Court.

   Almost all normative acts are open to review by the High Court as are all actions or decisions of Government or its agencies which infringe on constitutionally protected rights. The plaintiff must show standing to bring the application, and in principle the courts of Ireland do not recognize an *actio popularis*. However, the rules of standing are generously interpreted to favour the rights of plaintiffs. A plaintiff can sue if, as a citizen, his or her rights or interests are affected but he or she may not be entitled to complain of damage to the interests of third parties. Where an infringement affects the whole constitutional and political structure any citizen may sue (e.g. *Crotty -v- An Taoiseach* [1987] I.R. 713.

a. Preliminary review. In addition to the High Court's power to review existing law, a procedure exists whereby under Article 26 of the Constitution of Ireland the constitutionality of a proposed law (a Bill), or any provision of it can be tested in advance of its enactment. Following its passage by both Houses of the Oireachtas (Parliament) the President, after consultation with

the Council of State, can refer any Bill or specified provision of a Bill to the Supreme Court for a decision whether the Bill or provision is repugnant to the Constitution. The Supreme Court must give its decision within 60 days. If any provision of the Bill is found repugnant the President may not sign it and it does not become law. On the other hand, if the Bill is not found repugnant, then after it becomes law it may not subsequently be challenged as invalid (Article 34.3.3°). The Article 26 procedure does not apply to money Bills or Bills to amend the Constitution, or emergency legislation certified as such by the Government, with the approval of Dáil Éireann (the House of Representatives) and the concurrence of the President (Article 24).

b. Abstract or principal review (direct claim of unconstitutionality). Plenary proceedings may be brought in the High Court seeking a declaration that a law is invalid.

c. Concrete or incidental review of norms. The High Court has full jurisdiction to decide on the invalidity of a law in any case where such an issue arises and it is not necessary that a separate claim be made by way of plenary proceedings. For example, the High Court has been prepared to consider the constitutionality of statutes in the course of judicial review proceedings seeking to quash a Ministerial Order (see for example *The State (Lynch) -v- Cooney* [1982] I.R. 337) or in the course of ordinary litigation between private individuals.

d. In principle there are no normative acts that are not subject to constitutional review other than amendments to the Constitution which themselves must be passed by both Houses of Parliament and approved in a referendum of the people and emergency legislation under the Article 28.3.3° procedure. This procedure excludes from review emergency laws expressed to be for the purpose of securing the public safety in time of war or armed rebellion. "Time of war" includes a time when there is taking place an armed conflict in which the State is not a participant but in respect of which each of the Houses of the Oireachtas has resolved that arising out of that conflict a national emergency exists affecting the vital interests of the State. The resolution making such a declaration may be constitutionally reviewed: *In re Article 26 and the Emergency Powers Bill, 1976* [1977] I.R. 159.

Acts previously examined under the Article 26 procedure are not open to further review.

2. Review of unconstitutional omission of legislation

The Irish Courts, arising from respect for the principle of the separation of powers, are reluctant to fill a gap in legislation. To do so is solely a matter for the legislator. This has led to a reluctance to strike down on grounds of inequality legislation which benefits persons other than the plaintiff, but excludes the plaintiff, where to do so would not help the plaintiff but would injure those benefiting under the legislation. An example is *Somjee -v- Minister for Justice* [1981] ILRM 324 where an alien man married to an Irish citizen failed in a challenge to an Irish citizenship law which provided more favourable rights to alien women married to male Irish citizens on the grounds that striking down the scheme would not provide him with a remedy.

While the courts will not fill the legislative gap themselves, they may grant a declaration that a plaintiff's rights have not been vindicated.

3. Decisions concerning the protection of constitutional rights

While an action to establish that a law is in breach of the Constitution must be instituted in the High Court, actions based on breach of constitutional right may be brought in any court of competent jurisdiction, and may arise in a variety of contexts. For example, an argument that there has been a breach of the constitutional rights of an accused person can be made in any court exercising criminal jurisdiction and if upheld the court will have power to exclude the evidence obtained in breach of constitutional right. An executive action which is alleged to be a breach of constitutional rights can be challenged before any court which is entitled to determine the validity of the action concerned. In addition breach of constitutional rights can give rise to an action for damages (for example, *Kennedy -v- Ireland* [1987] I.R. 587 where damages were awarded for unlawful telephone tapping in breach of the constitutionally-protected right to privacy).

4. Other areas of constitutional review

There are a number of areas which call for particular comment:

(1) A challenge to an election or referendum must be brought by election or referendum petition instituted within 7 days of the result.

(2) The text of a proposal to change the Constitution cannot itself be challenged as not in conformity with the Constitution (*Finn -v- Attorney General* [1983] I.R. 154; *Slattery -v- An Taoiseach* [1993] 1 I.R. 286).

(3) Ireland as a unitary state has no subordinate legislatures although the Constitution envisages and permits their creation by law (Article 15.2.2°).

(4) The President is not answerable to any court for the exercise and performance of the powers and functions of that office other than in the course of impeachment (Article 13.8).

(5) A dispute between the two Houses of the Oireachtas as to whether a Bill is or is not a Money Bill is resolved by a Committee of Privileges consisting of an equal number of members of each House and chaired by a Judge of the Supreme Court (Article 22.2.3°).

B. The effects of constitutional review decisions

1. Concerning normative acts

a. Constitutional review decisions may hold normative acts to be invalid for unconstitutionality.

b. The norm which is declared invalid is a nullity; that is, the law is regarded as never having been valid (see *Murphy -v- Attorney General* [1982] I.R. 241). If the part of an Act which is not impugned is capable of standing alone and apart from the invalid provision the Court will sever the offending part and allow the remainder to continue to be effective but the court will not rewrite the law or fill a gap.

c. No further act is required by any other organ of state to give effect to a ruling that a normative act is invalid. If the impugned legislative provision is not repealed, however, it may in principle be possible that a court could subsequently in effect “revive” the

impugned provision by reversing its earlier decision. The Supreme Court is not bound by the rule of *stare decesis* (See *Moynihan -v- Greensmyth* [1977] I.R. 55 at p71 where the Supreme Court expressly reserved the question whether a previous decision to the effect that a statutory provision was invalid had correctly been decided. It appears to have been implicit in the judgment that if the court subsequently reversed itself the statutory provision would be effective without any further act on the part of the legislature since it had not been repealed).

d. The effects of annulment cannot in principle be postponed. However, the Courts have prevented persons who had not themselves taken proceedings from claiming the benefit retrospectively of successful litigation brought by others: see *Murphy -v- Attorney General* [1982] I.R. 241. In that case a successful challenge to a portion of the income tax code was held to entitle the plaintiffs to restitution only from the date they had instituted proceedings, and others who had not sued only to benefit prospectively, notwithstanding that the legislation was held to be invalid *ab initio*, on the grounds that the State had been entitled to expend the revenue which it had acquired from the tax in question on the *bona fide* assumption, contributed to by the absence of objections on the part of any taxpayer, that the tax had been validly imposed. Henchy J. justified the decision as "the subjugation of abstract principle and the symmetry of logic to the compulsion of economic or practical demands of society" (at p322); or, as his colleague, Griffin J. put it "the egg cannot be unscrambled" (at p311).

e. Where the legislative norm is held invalid it is invalid *ab initio* for all purposes. In relation to cases already decided, see the comments at point d. above.

f. The High Court can make any order necessary to give effect to its decisions including ordering another body to act since it is invested with full original jurisdiction and power to determine all matters and questions. Plaintiffs will generally bring their action not only against the State but against any interested party who may be required to take action on foot of a finding.

2. Where a court quashes a decision by a public authority on the ground that it is unconstitutional in some cases the authority concerned will be able to take a fresh decision applying constitutional procedures whereas in other cases the unconstitutionality cannot be cured. There is no one answer in all cases; the answer will depend on the nature of the unconstitutionality found and on the nature of the proceedings and the relief sought by the plaintiff. To take two examples; if a defendant in a criminal case obtains a judicial review of the decision to prosecute on the grounds of excessive delay, no new decision can be made that will be free of the original infirmity. On the other hand, if a decision of a licensing authority is set aside for failure to adopt fair procedures the authority will probably be entitled to take a fresh decision provided the procedural defect can be cured.

3.

a. Constitutional review decisions have binding force.

b. They are *res judicata*. Findings of invalidity of a statute operate *erga omnes*. The Attorney General, on behalf of the State, must be put on notice in any case involving alleged invalidity of a law and the court may direct that he be put on notice of other

questions of constitutional interpretation. He is entitled to become a party as respects the constitutional question.

d. The texts of decisions are available from the Court. Most decisions which have constitutional implications are published in one of the published series of law reports.

e. Prospective rulings of unconstitutionality have not to date arisen.

II The High Court can make any order which is necessary to ensure that its decision has full effect.

III Failure to obey a court ruling is punishable as a contempt of court. Furthermore, since breach of constitutional right is actionable failure to execute could give rise to liability in damages.

IV In general, there has not been any failure to execute any direct orders made in the course of constitutional review decisions. In some cases, however, consequential steps necessitated on foot of constitutional review decisions may have been neglected. In the recent case of *Sinnott -v- Minister for Education* (High Court, unreported, 4 October 2000) the Court expressed trenchant criticism of the failure of the Department of Finance to make the funds available to give effect generally to an earlier finding in the case of *O'Donoghue -v- Minister for Health* [1996] 2 I.R. 20 that mentally handicapped persons had a constitutional right to free, basic, elementary education. The State had taken steps to implement the decision in respect of the individual plaintiff but not of others similarly circumstanced. The judge stated that the Department had "persistently dragged its feet in recognising and implementing the obligations of the State" (at p27), had persisted in an appeal "without any hope of success… but with the intention of delaying the implementation of the *O'Donoghue* judgment for as long as possible" (at p.45) and had engaged in a "conscious, deliberate failure" to honour the State's constitutional obligations (at p.69).

V The situation described has not arisen in Ireland.

The above is necessarily a very simple description of a complex system. I can expand on or clarify any of the above if required.

Yours sincerely,

_____

James Hamilton

ISRAEL

Response to the Questionnaire on Constitutional Review on Israel by Amnon Rubinstein

Introduction

Israel does not have a complete written constitution; this is due to political controversy, mainly because of religious opposition to judicial review of Knesset laws by the Supreme Court. Nevertheless, a series of Basic Laws, which are regarded as parts of the incomplete constitution have enabled the Supreme Court to rescind offending sections in the Knesset laws.

By way of general introduction, I would like to quote from the 1998 Israeli report to the UN Human Rights Committee on the implementation of the International Covenant on Civil and Political Rights.

"Israel as yet has no formal constitution. Instead, it has chosen to enact Basic Laws dealing with different components of its constitutional regime; these Basic Laws, taken together, comprise a "constitution-in-the-making".

The Basic Laws are adopted by the Knesset in the same manner as other legislation. Their constitutional import derives from their content and, in some cases, from the inclusion of "entrenchment clauses" which require a special Knesset majority for amendment of the Law.
The following are the Basic Laws of the State of Israel:

* Knesset (1958)
* State Lands (1960)
* President (1964)
* State Economy (1975)
* Israel Defense Forces (1976)
* Jerusalem (1980)
* Administration of Justice (1984)
* State Comptroller (1988)
* Human Dignity and Liberty (1992)
* Freedom of Occupation (1992)
* The Government (1992)

There are currently three additional draft Basic Laws being circulated prior to their submission to the Ministerial Committee on Legislation: Draft Basic Law: Due Process Rights, Draft Basic Law: Social Rights, and Draft Basic Law: Freedom of Expression and Association.

The Judiciary

The absolute independence of the judiciary is guaranteed by law. Judges are appointed by the President, on the recommendation of a special nominations committee comprised of the two Ministers, Supreme Court Judges, representatives of the bar, and Knesset Members. Judges are appointed for permanent tenure, until mandatory retirement at age 70.

Magistrates and District Courts exercise jurisdiction in civil and criminal cases, while juvenile, traffic, military, labor and municipal courts each deal with matters under their statutory jurisdiction. There is no trial by jury in Israel.

In matters of personal status such as marriage, divorce, and, to a certain extent, maintenance, guardship and the adoption of minors, jurisdiction is vested in the judicial institutions of the respective religious communities: the Rabbinical courts, the Moslem religious courts (*Sharia* courts), the religious courts of the Druze and the juridical institutions of the ten recognized Christian communities in Israel.

The Supreme Court, seated in Jerusalem, has nationwide jurisdiction. It is the highest court of appeal on rulings of lower tribunals and has original jurisdiction in specific matters such as Knesset elections, rulings of the Civil Service Commission, and disciplinary rulings of the Israel Bar Association.

In its capacity as High Court of Justice, the Supreme Court also hears petitions against the actions of any government authority or persons or bodies that exercise public functions, including the Knesset, the military, and the lower courts. In such cases, the Supreme Court is a court of first and last instance, and may grant any relief it deems fit in the interest of justice. It is in this capacity that the Supreme Court has played a crucial role both in developing human rights norms, and in ensuring that official actions comply with the rule of law. In many cases, including those bearing fundamental constitutional or political import, or involving the highest echelons of government, the petitions are heard very quickly, sometimes within hours.

Although legislation is wholly within the competence of the Knesset, the Supreme Court can and does call attention to the desirability of legislative changes. It also has the authority to determine whether a law properly conforms with the Basic Laws of the State and to declare void laws which do not so conform."

As to the specifics of the questionnaire:

Chapter I General questions on Constitutional Review.

Part A: All these types of review exist in Israeli Law and Practice.

Part B

1. (concerning nomination):
(a) Constitution review decisions are of a constituent nature.
(b) The norm is null and void immediately.
(c) Yes, the decisions must be implemented.

(d) No, the effects of annulment cannot be postponed, unless the Supreme Court decides that the annulment should be postponed (as was decided in one case).
(e) The principle of res judicata applies and similar cases are thus affected by the court's decision.
(f) The Supreme Court can issue any order to any authority it sees fit.

2. (concerning the protection of constitutional rights)
(a) It is not sent back to the original authority for a new ruling.
(b) Yes.

3. (concerning constitutional review decisions)
The answers to (a), (b) and (d) are yes.
The answer to (c) is no.
As for (e), there has not been a case in which such a decision has not been respected fully and immediately.

These answers do not depend on the type of control, as the only control is exercised by the courts.

Chapter II

(1) There is no specific provision granting the courts constitutional review powers. Israeli courts, following English and American Law principles, exercise such a jurisdiction without a specific authorization.

Chapter III

There has never been such a case of non-execution of judicial decisions.

Chapter IV

(a) Never happened.

Chapter V

(a) No, not recently.
(b) In the fifties there were a couple of cases in which a decision of the Supreme Court was circumvented. The reasons were generally relating to issues of security. In the last forty years, there has not been such a case.

The main problem is that the intervention of the Supreme Court is highly controversial and is attacked by the religious parties and the extreme right wing parties. Recently, Prime Minister Barak has announced his intention to complete the constitution and enshrine in it civil liberties and human rights.

ITALY / ITALIE

THE EXECUTION OF CONSTITUTIONAL REVIEW DECISIONS - ITALY
By Prof. Sergio Bartole, University of Trieste

I
A 1
The Italian system of law provides for three types of constitutional review.

a) The ordinary or general type is the incidental or concrete review of norms. According to art. 1 of the constitutional law February 1948, n. 1 (implementing articles 134 and 137 of the Constitution), in the course of a judgement a judge is allowed to raise on his own initiative or by the initiative of one of the parties the question of the conformity to the Constitution of a law of the State or of the Regions, or of a normative act of the State's Government which has the legal force of a law. The question is based on a doubt about the constitutionality of the concerned act and can be raised only if the act is relevant in the judgement, that is it has to be applied to settle the case. The question has to be submitted to the Constitutional Court by an act (ordinanza) of the judge providing for the suspension of the judgement pending before him: in this act the legal provisions whose constitutionality is doubted and the constitutional provisions which are supposed to be violated, are to be clearly stated. The question may regard not all the normative act concerned but only some provisions of it, or - better - the norms which the judge draws from the concerned provisions in view of the decision of the case.

b) Art. 127 of the Constitution provides for a preliminary review of normative acts. It regards only the laws of the Regions (and of the provinces of Trento and Bolzano). After their approval by the Regional (or Provincial) Council these laws have to be submitted to the check of the national Government which is allowed to ask the local legislative assembly to examine a law again when its conformity to the Constitution is doubtful in the opinion of the Government. If the assembly does not amend the law in compliance with the remarks made by the Government, the Government is allowed to submit the case to the Constitutional Court clearly stating the provisions of the law which are supposed to violate the Constitution, and the constitutional provisions which are deemed violating the Constitution. In this case the review is abstract, therefore it deals with the question of constitutionality of the normative act without any immediate connection with its application in a specific case.

c) On the basis of art. 2 of the constitutional law 9 february 1948, n. 1, a Region (or one of the provinces of Trento and Bolzano) is allowed to submit a complaint to the Constitutional Court asking the constitutional review (abstract or principal review) of a law of the State or of another Region (or of one of the two mentioned Provinces) which is supposed interfering with its own competences or usurping them. Also this judgement of the Court shall deal with the question of constitutionality without any immediate connection with its interpretation in view of its application in a specific case.

Moreover, according to the special Statute of the Trentino - Alto Adige Region the majority of the councillors of a linguistic group present in the regional Council or in the provincial Council of Bolzano is allowed to submit a complaint against a regional or provincial law after its publication if it was adopted without taking into account the linguistic, ethnic or cultural rights of the linguistic group concerned.
d) Normative acts (regolamenti) of the national Government and of the Regions, of the two Pronvinces of Trento and Bolzano and of the local government authorities which don't have the legal force of a law, are not subject to constitutional review of legislation. With the exception of the acts of the local government they can be submitted to a judgement of the Court in case of a conflict between the constitutional bodies of the State or between the State and the Regions or Provinces (or between these territorial entities).

A 2
The Italian system of law does not directly provide for a specific review of unconstitutional omission of legislation. Notwithstanding this legislative choice made by the Parliament the Constitutional Court has dealt with unconstitutional omissions of legislation, specially in the course of judgements aimed at concrete or incidental review of norms. For instance, dealing with a case of legislative discrimination, the Court has reviewed the conformity to the constitutional principle of equality of a law which excluded a person or a group of persons from the enjoiment of rights reserved without any justification by the law itself to persons who are in the same position of the persons excluded. Sometimes the Court dealt also with cases concerning an incomplete implementation of constitutional provisions.

A 3
Decisions concerning the protection of constitutional rights in individual cases are dealt with by the ordinary judicial bodies and don't fall in the scope of the constitutional review.

A 4
Other areas of constitutional review:

a) the Constitutional Court shal examine the conformity to the Constitution of the proposal of an abrogative referendum before its calling by the President of the Republic;

b) the " powers " of the State (that is, the State's bodies which are directly entrusted with functions by the provisions of the Constitution) are allowed to submit to the Constitutional Court a complaint against an act or a behaviour of another " power " of the State which is supposed interfering with the constitutional (that are provided for by the Constitution) functions of the " power " complaining.

c) the State and the Regions (and the Provinces of Trento and Bolzano) are allowed to submit to the Constitutional Court a complaint against an act of a Region (or of a Province) or of the State which is supposed interfering with the constitutional (that are, provided for by the Constitution) functions of the entity concerned. The conflict can deal only with administrative (included regolamenti) or judicial acts.

B 1
a) If the constitutional review decision deals with a case of preliminary review, the act which is declared unconstitutional cannot be promulgated.

b) When concrete or incidental review of norms, on one side, and abstact or principal review, on the other side, are at stake, the constitutional review decision declares the unconstitutionality of

the concerned act or norm which loses its legal force the day after the publication of the decision (art. 136 of the Constitution). The decision has erga omnes effects and implies that all individual cases which are still open (cases which have not been settled by a judicial decision which cannot be appealed any more, or cases which cannot be any more be submitted to a court) cannot be decided on the basis of the norm or of the law declared unconstitutional.

The decision of the Constitutional Court has to be published in the " Gazzetta Ufficiale della Repubblica Italiana ". It is notified to the parties of the constitutional judgement and to the judge who submitted the question of constitutionality in view of an incidental or concrete review of norms. The parties of an abstract or principal judgement are bound to comply with the decision, that is that they are not allowed any more to apply the law or the norm declared unconstitutional. The judge who initiated an incidental or concrete review has to settle the individual case pending before him taking in account the constitutional review decision.

The Constitutional Court is not explicitly allowed to modify the norms which are submitted to the constitutional review, but sometimes the Court states its decision in such a way of actually adding some new elements to the norms in cases dealing with omissions of the legislator: it means that the Court extends the scope of the norms drawn from the provisions of a legislative act to the persons discriminated against without any justification, or adds norms directly drawn from the Constitution to norms declared unconstitutional because of the incomplete implementation of the Constitution. Therefore the Court directly amends the norms which are declared unconstitutional, and keeps the amended rule in force.

There is not any provision entrusting the Constitutional Court with the power of ordering another authority to act in view of the implementation of its decision. The Court is not explicitly allowed to postpone the effects of its decision, but in facto it sometimes modified the dies a quo of the effects of its decision elaborating the relevant norms of the judgement, for instance in cases of inconstitutionality of a norm which intervened at a later time after the adoption of the norm itself.

_____ * _____

If the Constitutional Court declares that the complaint or the question about the supposed unconstitutionality of a law or of a norm is unfounded, its decision does not have erga omnes effects and does not imply a final declaration of the constitutionality of the act or of the norm concerned. The complaint or the question can be submitted again to the Court (but not in the course of the same judgement by the judge who initiated a concrete or incidental review): the Court shall declare the unconstitutionality of the act or of the norm if new elements are offered supporting such a decision and the Courts finds these new elements convincing and adequate.

Sometimes the Court admonished the legislator to amend a law in view of a better implementation of the Constitution and to avoid a later unconstitutionality of the law itself. If the legislator does not comply with the admonishment, the Court is allowed to declare the intervened unconstitutionality only in presence of a complaint or a judicial question of constitutionality reopening the case.

c) When settling conflicts between the State and infra - State entities, the Court, if it finds the complaint founded, annulles the administrative or judicial act which was submitted to its judgement. A similar decision is adopted when a conflict between State ' bodies is at stake.

Both the decisions have erga omnes effects and don't require an act of another organ aimed at their implementation.
When the complaint is judged unfounded, it cannot be submitted again in the case of the conflicts between the State and the infra - State entities, or between the infra - State entities because there is a very strict deadline for the submission of the required complaint. This is not the case when conflict between State's bodies (where no deadline is provided for) are at stake: if the bodies concerned are not satisfied with the decision of the Court, they could submit a new complaint founded on new and different motives, specially if the previous decision of the Court was asopted on procedural or formal rationes.

d) decisions concerning the conformity to the Constitution of a proposal of referendum imply that the President of the Republic is allowed to call the referendum when the Court found the proposal in conformity with the Constitution. If the decision is negative, the Chief of the State is not allowed to call the referendum.

II - V

In the Italian system of law there are'nt norms which explicitly entrust an authority with the task of executing the constitutional review decisions or allow the Constitutional Court to designate the body which will execute the decisions of the Court itself.

Art. 30 of the law 11 march 1953, n. 87, charges the Minister of justice, on one side, and the President of the Region, on the other side, with the task of providing in ten days for the publication in the " Gazzetta Ufficiale della Repubblica Italiana " of the Court's decisions which declared the unconstitutionality of a normative act of the State or of a Region; the same rule has to be complied with when are at stake decisions which settle conflicts between State's bodies, State and infra - State entities, infra -State entities and annulle an administrative or judicial act.

The Public Prosecutor shall provide for the liberation of a person who is serving in prison a sentence adopted on the basis of a criminal law declared unconstitutional. I don't have knowledge of omissions of implementation of this rule. There are examples of delayed execution of constitutional review decisions which extended financial benefits to people discriminated against without any justification: the Parliament was late in adopting the necessary financial appropriations. Recent rules of the budgetarian legislation provide for easing the implementation of such decisions.

Rules of the internal Standing Orders (regolamenti) of the Senato della Repubblica and of the Camera dei Deputati are dealing with the parliamentary follow - up of the constitutional review decisions (art. 139 and art. 108).

Internal rules of the Constitutional Court (art. 20 Norme integrative per i giudizi davanti alla Corte costituzionale) entrust the Chairman of the Court with the task of providing for the publication in the " Gazzetta Ufficiale della Repubblica Italiana " of the decisions of the Court which reject a question or a complaint of constituionality. These rules are specially relevant in those cases in which the Court rejects the question (or the complaint) adopting an interpretation of the rules supposed to be unconstitutional different from the interpretation supporting the question or the complaint. The publication allows the concerned authorities to get acquainted with the interpretation adopted by the Court which is explained in the motivation of the decision which is published.

A conflict arose in the past between the Constitutional Court and the Corte di Cassazione which denied to be bound by the interpretation adopted by a constitutional review decision. Rejecting a question or a complaint. As a matter of fact, the decision of the Constitutional Court which rejects a question or a complaint don't have erga omnes effects. Moreover, while the Constitutional Court claimed to have the exclusive power of guaranteeing the conformity of the legal order to the Constitution, the Corte di Cassazione objected that the Constitutional Court has the exclusive power of interpreting the Constitution only, the interpretation of the remaining laws and normative acts being reserved to the cassazione itaself.

The conflict was settled de facto when the Constitutional Court started substituting a different interpretation for the interpretation supporting the question or the complaint only when it had the possibility of making reference to the s.c. living law, that is that there was an interpretation of the concerned law generally adopted by the judicial authorities. In this way the Court unilaterally adopts its own interpretation and reacts against interpretations supporting questions or complaints of constitutionality only when they are extravagant and are not shared by the practice of the judicial authorities. But therefore the Court has been giving up the idea of advancing its own interpretation of the law different from the Constitution.

The decisions which settle conflicts, don't raise problems of implementation because they directly annulle the acts which are unconstitutional.

_____ * _____

I don't have knowledege of cases where an unconstitutional norm or act continued to be applied. If the Parliament adopts again a law which was declared unconstitutional, the Court can intervene only if a question or a complaint is submitted to it about the new act.

University of Trieste, November 17th, 2000

JAPAN / JAPON

ANSWER TO THE QUESTIONNAIRE ON
THE EXECUTION OF CONSTITUTIONAL REVIEW DECISIONS
JAPAN

I. A.

1. The Constitution of Japan adopts incidental review system with regard to the constitutional review of normative acts, and Japanese courts do not review normative acts abstractly nor preliminarily. Art. 98.1 of the Constitution of Japan provides that "This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity," and therefore, all types of normative acts are subject to constitutional review.

2. Legislative omission of the Diet may be the point at issue on its illegality in some cases seeking damages from the government, and such failure of the legislative organ to act may be subject to judicial review.

3. The Constitution of Japan does not have any special provisions to file complaints in order to protect constitutional rights. Although Art. 81 of the Constitution provides that the Supreme Court of Japan is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act, it is acknowledged in the procedure laws that litigants can file appeals to the Supreme Court in any type of litigation (civil, criminal, and administrative) on the ground of violation of the Constitution.

4. Art. 6 of the Administrative Case Litigation Law provides for the institutional litigation, in which disputes between organs of the state or public bodies with regard to the existence and exercise of their authorities are at issue. When the point at issue in such an institutional litigation is whether a particular organ's exercise of its authority is constitutional or not, constitutionality is under review in the proceedings of the litigation.

B.

1. a. Constitutional review decisions are not merely declaratory.

b. Even if a particular statute is declared unconstitutional in a case, the statute does not become null and void as a matter of course.

c. The decisions must be implemented (i.e. by repealing the statute) by another organ.

e. As a rule, the decision declaring unconstitutional is effective only between the parties in a particular case in the same way as in other ordinary cases. Since decisions do not have retrospective effect, the decision declaring unconstitutional is not effective on similar cases which have already come to final decisions.

f. The body exercising constitutional review cannot order another authority to act.

2. a. b.
When a court revokes a disposition by an administrative agency on the ground of violation of the Constitution, the administrative agency may take a new measure after the decision if necessary.

3.
a. The Supreme Court may render a decision based on an opinion concerning the interpretation and application of the Constitution or of any other laws or ordinances that is contrary to that of a decision previously rendered. However, such a change of decision must be rendered by the Grand Bench. (Court Organization Law Art. 10.3)

b. Constitutional review decisions have *res judicata* force between parties in the same way as the decisions of ordinary cases.

c. The extent of the effect, *res judicata* force, of constitutional review decisions is not different from that of ordinary decisions, and in principle it is only applied to the parties of the cases involved. Constitutional review decisions do not have such an effect as Art. 31.2 of the German law on the constitutional court describes.

d. In case that the Supreme Court renders a decision that declares unconstitutionality of laws, orders, regulations, or official acts, its summary is published in an official gazette, and the certified copy of the decision is sent to the Cabinet. If the decision is declaring unconstitutionality of laws, the certified copy of the decision is also sent to the Diet. (Supreme Court Rules of Managing Litigation Matters Art.14)

e. Courts do not render such a decision at all.

II.
1. There is not any norm indicating which authority has to execute the constitutional review decision.

2. There is not such a norm. As the Diet revises or repeals the law which is declared unconstitutional, and administrative organs restrain themselves from applying the law until the Diet revises or repeals it, the measure is taken according to the aim of the decision of unconstitutionality.

III.
As the Diet revises or repeals the law which is declared unconstitutional, and administrative organs restrain themselves from applying the law until the Diet revises or repeals it, the measure is taken according to the aim of the decision of unconstitutionality. Therefore, the situation mentioned in the questionnaire is not assumed in the Constitution.

IV.
A. There have not been any recent cases where a constitutional review decision has not been executed in our country.

V.
A. Such a situation has not arisen in our country:
Since ordinary courts have the authority to review constitutionality in Japan, there are not any special constitutional courts separated from ordinary courts. Consequently, there has not been any case where decisions of ordinary higher court are declared unconstitutional.

KOREA (Republic) / COREE (République)

Replies to the Questionaire on the Execution of Constitutional Review Decisions

November 16, 2000

Constitutional Court of Korea
Republic of Korea

I. General questions on constitutional review

A. The type of constitutional review and its subject :

1. constitutional review of normative acts
a. preliminary review
b. abstract or principal review
c. concrete or incidental review of norms
d. normative acts that are not subject to constitutional review
- The answer is "c". The Constitutional Court of Korea (hereinafter "Constitutional Court") do not exercise preliminary review and abstract or principal review. And there are no such normative acts that are not subject to constitutional review.

2. Review of unconstitutional omission of legislation (failure of the legislator to act when it is obliged to do so by the Constitution)
- Constitutional Court can review the constitutionality of omission of legislation. However, the omission of legislation may be declared unconstitutional only when the legislator is clearly obliged to enact specific statutes by the Constitution.

3. Decisions concerning the protection of constitutional rights (*Verfassungsbeschwerde*, *amparo*, appeal to a judicial body of ultimate appeal)
- Decisions on constitutional complaint which may be filed by any person whose basic right guaranteed by the Constitution is claimed to have been violated by an exercise or non-exercise of governmental power. However, the judgments of the ordinary courts in general are not subject to constitutional complaint.

4. Other areas of constitutional review (examples : unconstitutionality of political parties, referenda, conflicts between infra-state entities, conflicts between state bodies)
- Adjudication on impeachment, adjudication on dissolution of a political party, adjudication on competence dispute (controversy on the existence or the scope of competence between state agencies, between a state agency and a local government, or local governments, a state agency or a local government).

B. The effects of constitutional review decisions :

1. Concerning normative acts :
a. Are constitutional review decisions merely declaratory ? : The answer is "No".
b. Is the norm which is declared contrary to the Constitution null and void, or annulled immediately ?
- The answer is "Yes". Any statute or provision decided as unconstitutional loses its effect from the day on which the decision is made.
Can the body exercising constitutional review modify the norm ?
- The answer is "No". Constitutional Court cannot modify it.
c. Must the decisions be implemented (i.e. by repealing the norm) by another organ ?
- The answer is "No".
d. Can the effects of annulment be postponed ?
- When Constitutional Court decides certain statute or provision is unconformable to the Constitution, it may allow the interim application of that statute or provision, and it may postpone the effects of annulment for a while.
e. Do the effects of the decisions go beyond the individual case, where incidental concrete review of norms is concerned ?
- The answer is "Yes".
What is the position regarding similar cases which have already been the subject of final decision ?
- The effects of the decisions do not reach the cases on which the final decisions have already been made.
f. Can the body exercising constitutional review order another authority to act ?
- The answer is "Yes". When certain statute or provision is declared unconformable to the constitution, Constitutional Court may order the legislator to amend the norm.
Within a fixed period of time ?
- The answer is "Yes". Constitutional Court can fix the period of time to amend such statute or provision.

2. Concerning the protection of constitutional rights :
If the body exercising constitutional review quashes a decision by a public authority (administration, court, etc.) on the grounds that it is unconstitutional :
a. Is it sent back to the original authority for a new ruling ? or
b. Does the body exercising constitutional review decide on the matter ?
- The answer is neither "a", nor "b". In the constitutional complaint cases, Constitutional Court may revoke the exercise of governmental power which infringes basic rights or conform that the non-exercise therof is un constitutional. When a decision to uphold a constitutional complaint is made, it binds all the state agencies and the local governments. Therefore, the original authority should take a new action in accordance with such decision, even if there is no procedure to send back the case.

3. Futhermore, do constitutional review decisions have :
a. binding force (binding the body exercising constitutional review itself) ?
- The answer is "Yes". Decisions that statutes are unconstitutional bind the ordinary courts, other state agencies and local governments. And decisions that uphold constitutional complaints bind all the state agencies and the local governments. Furthermore, Constitutional Court itself cannot adjudicate again the same case on which a prior adjudication has already been made.
b. *res judicata* force (*inter parties; erga omnes*) ?
- The answer is "Yes".
c. force of law (see for instance §31.2 of the German law on the constitutional court) ?
- The answer is "No".
d. Are they published in an official journal ?
- All the decisions are not published in an official journal, but the important decisions are mostly published therein.
e. What happens if a decision declares that a norm will become unconstitutional if it is not modified within a certain period ?
- Constitutional Court does not made such decisions in Korea.

Do the answers to the previous question depend on the type of constitutional review (for example : concrete/abstract control) ?
- The answer is "No".
Do special rules apply in the cases mentioned in point I.A.4 above ?
- The annswer is "No".

The reply to the question II and III will make a distinction, if necessary, according to the type/subject of constitutional review as well as to the effects of decisions (see question I).

II. What means are available to ensure the execution of constitutional review decisions ?

The response to this question should take account of the legislation concerning the execution constitutional review decisions, either by other courts or by executive bodies. In particular :
1. Is there a norm indicating which authority has to execute the constitutional review decisions ?
- The answer is "No".
2. If not, is there a norm providing that the body exercising constitutional review or any other authority has the power to designate the body which will execute the decisions of the court ?
- The answer is "No".
How does the system work in practice ?
- In fact, the state agencies or local governments in general spontaneously take actions to get rid of unconstitutional conditions in accordance with the decisions.

III. What are the consequences if constitutional review decisions are not executed or are not executed within a reasonable time ?
- As a matter of fact, there is no appropriate legal devices to execute the decisions for such occasion.

IV. Cases where decisions are not executed

A. Have there been any recent cases where a constitutional *review* decisions has not been executed in your country ?
- The answer is "Yes". Firstly, Constitutional Court made a decision declaring unconstitutional the failure of legislator to enact statutes providing compensation for certain kind of expropriation in 1994. However, the legislator has not enacted such statutes yet. Secondly,

even though Constitutional Court had already declared some provisions of Income Tax Act unconformable to the Constitution, the Supreme Court knowingly applied those provisions as constitutional on the whole.

B. If so, is it possible to identify the reasons why the decisions was not executed (eg. political or financial reasons, lack of clarity in the decision, inadequate rules on the execution of decisions) ?

- In the first case mentioned above, the main reasons may be the political or financial reasons. In the second case, it may be the conflicts of view between the two Courts in regard to the effects of unconformity decisions and the competence to interpret the statutes.

V. Cases of unsatisfactory execution

In certain cases, even where a constitutional review decision has been executed, the situation remains unsatisfactory because an unconstitutional norm continues to be applied.

A. Has such a situation arisen recently in your country ?

- The answer is "No".

B. What are the causes of such a situation ? Do they stem from the effects of the constitutional review decisions (absence of *erga omnes* effect, declaratory nature of the decisions), or from other causes, such as those mentioned in IV.B above ?

- No answer.

Concerning points IV and V, did specific problems arise when decisions of ordinary higher courts were declared contrary to the Constitution ?

- In the second case of IV.A, Constitutional Court exercised a very exceptional constitutional review on the Supreme Court decision and annulled it on the grounds that if an ordinary court refuses to follow a decision of Constitutional Court, the court's decision can be challenged in a constitutional complaint.

LATVIA / LETTONIE

QUESTIONNAIRE
ON THE EXECUTION
OF CONSTITUTIONAL REVIEW DECISIONS

I. General questions on constitutional review

A. <u>The type of constitutional rewiev and its subject:</u>

1. constitutional review of normative acts

a preliminary review

The Constitution of Latvia ant the Constitutional Court Law does not envisage preliminary review.

b abstract or principal review (direct claim of unconstitutionality)

Abstract or principal review is within the competence of the Constitutional Court of Latvia. The greatest number of cases reviewed at the Constitutional Court can be considered as belonging to the above category of constitutional proceedings.

c concrete or incidental review of norms

The effective law does not envisage concrete or incidental review.
However, the draft law of the "Amendments to the Constitutional Court Law", which has been adopted in its second reading, provides for concrete and incidental review. Namely, a court, which- when reviewing an administrative, civil or criminal case in the first instance, under the procedure of cassation or appeal- holds that the norm to be applied to the case does not comply with the legal norm of higher force; or a judge of the Land Registry, when registering the real estate and confirming the right to the property in the Land book, is of the opinion that the norm to be applied does not comply with the legal norm (act) of higher force, shall have the right to submit an application to the Constitutional Court.

d normative acts that are not subject to constitutional review

All normative acts, passed in Latvia by the state institutions are *subject to constitutional rewiev.*

2. Rewiev of unconstitutional omission of legislation (failure of the legiskator to act when it is obliged to do so by the Constitution)

Rewiev of unconstitutional omission of legislation is not within the authority of the Constitutional Court of the Republic of Latvia.

3. Decisions concerning the protection of constitutional rights (Verfassungsbeschwerde, amporo, appeal to a judicial body of ultimate appeal).

The Law in effect does not envisage the possibility of an individual, whose constitutional rights have been violated, to submit an application to the Constitutional Court.

However, the draft law "Amendments to the Constitutional Court Law", which has been adopted in the second reading, states that any person, who holds that his/her fundamental constitutional rights have been violated by applying a normative act, which is not in compliance with the legal norm of higher force, may submit a claim (application) to the Constitutional Court. A constitutional claim shall be submitted only after exhausting all the possibilities of protecting the above rights with other legal means (a claim to a higher institution or official, a claim or application to a general court etc.) or if there are no other legal means.

4. Other areas of constitutional review (examples: unconsttitutionality of political parties, referenda, conflicts between infra-state entities, conflicts between state bodies)

None of the categories, mentioned above or alike these, are within the competence of the Constitutional Court of Latvia. But within its competence is to review cases on compliance of acts passed by the President of State, the Chairperson of the Saeima (Parliament), the Cabinet of Ministers and the Prime Minister with the Constitution and other laws. These cases may be on competence conflicts, on conformity of normative acts with the Constitution and laws, and cases on compliance of administrative acts with the Constitutiona and the laws.

B. The effects of constitutional review decisions:

1. Concerning normative acts:

a. Are constitutional review decisions merely declaratory?

No, decisions of the Constitutional Court are not declarative.

b. Is the norm which is declared contrary to the Constitution null and void, or annulled immediately? Can the body exercising constitutional review modify the norm?

In accordance with the law, the legal norm (act), which the Constitutional Court has declared as incompatible with the legal norm of higher legal force, shall be considered as null and void as of the date of announcing the decision of the Constitutional Court, unless the Constitutional Court has ruled otherwise.

c. Must the decisions be implemented (i. e. by repealing the norm) by another organ?

No.

d. Can. the effects of annulment be postponed?

See the answer to B.1.d. The Constitutional Court itself may ”rule otherwise” and decide that the legal norm (act), which the Constitutional Court has declared as unconformable with the legal norm of higher force shall be considered as invalid from a concrete date or event after the decision. There has been the case when the disputable norm had been declared as null and void as of the date of adoption of the law on the state budget.

No other institution may resolve that the norm (act), which the Constitutional Court has declared as incompatible with the norm of higher legal force, does not lose its validity on the date announced by the Constitutional Court.

e. Do the effects of the decisions go beyond the individual case, where incidental concrete review of norms is concerned? What is the position regarding similar cases which have already been the subject of a final decision?

No. See the answer to 1.a.

f. Can the body exercising constitutional review order another authority to act? Within a fixed period of time?

When reviewing the case on its essence- no.

Only when preparing a case for review the Constitutional Court may ask any state or municipal institution, office or official to submit the necessary documents and information within a fixed period of time.

2. Concerning the protection of constitutional rights:

If the body exercising constitutional review quashes a decision by a public authority (administration, court, etc.) on the grounds that it is unconstitutional:

See the answer to A.1. No, cases on constitutional rights of an individual are not within the competence of the Constitutional Court at the present moment.

a. Is it sent back to the original authority for a new ruling? or
-

b. Does the body exercising constitutional review decide on the matter?
-

3. Furthermore, do constitutional review decisions have:

a. binding force (binding the body exercising constitutional review itself)?

In compliance with the law ”The Judgement of the Constitutional Court is binding to all the state and municipal institutions, offices and officials, including the courts, physical and juridical persons.

b. res iudicata force (inter partes; erga omnes)?

c. force of law (see for instance § 31.2 of the German law on the constitutional court)?

No.

d. are they published in an official journal?

Yes, all the judgements of the Constitutional Court are published in the newspaper ”Latvijas Vestnesis””not later than within five days of being announced. The deciding part of the judgement shall also be published in the gazette ”Latvijas Republikas Saeimas un Ministru Kabineta Zinotajs”.

e. What happens if a decision declares that a norm will become unconstitutional if it is not modified within a certain period?

See the answer to B.1: the unconstitutional norm is not valid.

Do the answers to the previous questions depend on the type of constitutional review (for example: concrete/abstract control)? Do special rules apply in the cases mentioned in point I.A.4 above?
No.

The reply to questions II and III will make a distinction, if necessary, according to the type/subject of constitutional review as well as to the effects of decisions (see question I).

II. What means are available to ensure the execution of constitutional review decisions?

The response to this question should take account of the legislation concerning the execution of constitutional review decisions, either by other courts or by executive bodies. In particular:

1. Is there a norm indicating which authority has to execute the constitutional review decisions?

No.

2. If not, is there a norm providing that the body exercising constitutional review or any other authority has the power to designate the body which will execute the decisions of the court? How does the system work in practice?

No.

III. What are the consequences if constitutional review decisions are not executed or are not executed within a reasonable time?

In the Law there are no norms, envisaging consequences if constitutional review decisions are not execited. In practice there have been no situations like the one mentioned above.

IV. Cases where decisions are not executed

A. Have there been any recent cases where a constitutional review decision has not been executed in your country?

No, there have been no such cases.

B. If so, is it possible to identify the reasons why decision was not executed (eg. political or financial reasons, lack of clarity in the decision, inadequqte rules on the execution of decisions)?

-

V. Cases of unsatisfactory execution

In certain cases, even where a constitution review decision has been executed, the situation remains unsatisfactory because an unconstitutional norm continues to be applied.

A. Has such a situation arisen recently in your country?

No, such a situation has never arisen.

B. What are the cases of such a situation? Do they stem from the effects of the constitutional review decision (absence of erga omnes effect, declaratory nature of decision), or from other causes, such as those mentioned in IV.B. above?

-

Concerning points IV and V, did specific problems arise when decisions of ordinaru higher courts were declared contrary to the Constitution?

LITHUANIA / LITUANIE

LITHUANIA'S REPLY TO THE QUESTIONNAIRE ON THE EXECUTION OF CONSTITUTIONAL REVIEW DECISIONS

I. General questions on constitutional review

A. <u>The type of constitutional review and its subject:</u>

1. constitutional review of normative acts
a. preliminary review
b. abstract or principal review (direct claim of unconstitutionality)
c. concrete or incidental review of norms
d. normative acts that are not subject to constitutional review

a. Preliminary constitutional review is possible only in one case – regarding international agreements, which are submitted to the parliament (Seimas) for ratification.

b. In Lithuania, constitutional review is executed by the Constitutional Court. It applies abstract (principal) constitutional review of normative acts.

c. In Lithuania, constitutional review is performed with regard to the following legal acts: laws and other legal acts passed by the Seimas (parliament); acts issued by the President of the Republic of Lithuania; and Government acts. The review of lawfulness of other administrative acts (including acts issued by municipal authorities) is performed by administrative courts.

1. Review of unconstitutional omission of legislation (failure of the legislator to act when it is obligated to do so by the Constitution)

The Constitutional Court of Lithuania does not deal with loopholes in laws. Constitutional Court rulings only state such facts indicating that the elimination of law loopholes is the prerogative of the parliament.

2. Decisions concerning the protection of constitutional rights (Verfassungsbeschwerde, amparo, appeal to a judicial body of ultimate appeal)

The institute of a constitutional complaint addressed to the Constitutional Court, as the institute of the enforcement of individual constitutional rights, does not have direct existence in Lithuania. However, the Constitution of Lithuania stipulates that: "In cases when there are no grounds to believe that the law or other legal act applicable in a certain case contradicts the

Constitution, the judge shall suspend the investigation and shall appeal to the Constitutional Court to decide whether the law or other legal act in question complies with the Constitution." (Part 2 of Article 110 of the Constitution). After the Constitutional Court issues a respective ruling, the court resumes the particular suspended case and tries it in essence.

3. Other areas of constitutional review (examples: unconstitutionality of political parties, referenda, conflicts between infra-state entities, conflicts between state bodies)

The Constitutional Court of Lithuania delivers conclusions regarding:

1) violation of election laws during presidential elections or elections to the Seimas;
2) whether the health of the President of the Republic of Lithuania is not limiting his or her capacity to continue his work;
3) conformity of international agreements of the Republic of Lithuania to the Seimas; and
4) compliance of concrete actions of Seimas members or other state officers undergoing impeachment proceedings to the Constitution.

B. <u>The effects of constitutional review decisions:</u>

1. Concerning normative acts:

a. Are constitutional review decisions merely declaratory?
b. Is the norm which is declared contrary to the Constitution null and void, or annulled immediately? Can the body exercising constitutional review modify the norm?
c. Must the decisions be implemented (i. e. by repealing the norm) by another organ?
d. Can the effects of annulment be postponed?
e. Do the effects of the decisions go beyond the individual case, where incidental concrete review of norms is concerned? What is the position regarding similar cases which have already been the subject of a final decision?
f. Can the body exercising constitutional review order another authority to act? Within a fixed period of time?

a. b. Upon examining a case pertaining to the conformity of a legal act with the Constitution, the Constitutional Court shall adopt one of the following rulings: 1) to recognize that a legal act is in conformity with the Constitution and laws; and 2) to recognize 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) shall not be applicable from the day that a Constitutional Court Ruling that the appropriate act (or a part thereof) contradicts the Constitution of the Republic of Lithuania is publicized. The same consequences shall 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 adopted by the Constitutional Court shall have the power of law and shall be binding to all governmental institutions, companies, firms, and organizations as well as to officials and citizens.

c. All governmental institutions as well as their officials must revoke executive acts or provisions thereof which they have adopted and which are based on the act which has been recognized unconstitutional.
Decisions based on legal acts which have been recognized as being contradictory to the Constitution or laws must not be executed if they have not been executed prior to the appropriate Constitutional Court ruling became effective.

d. The Constitution establishes that Constitutional Court decisions shall be final and not subject to appeal. Therefore, a ruling of the Constitutional Court can be neither annulled nor reviewed, nor its implementation can be postponed.

The power of the Constitutional Court to recognize a legal act or part thereof as unconstitutional may not be overruled by a repeated adoption of alike legal act or part thereof.

e. See response to question I.A.3.

f. Neither the Constitution, nor the law provides for that.

2. Concerning the protection of constitutional rights:
If the body exercising constitutional review quashes a decision by a public authority (administration, court, etc.) on the grounds that it is unconstitutional:

a. Is it sent back to the original authority for a new ruling? or
b. Does the body exercising constitutional review decide on the matter?

See response to question I.A.3.

3. Furthermore, do constitutional review decisions have:

a. binding force (binding the body exercising constitutional review itself)?
b. res iudicata force (inter partes; erga omnes)?
c. force of law (see for instance §31.2 of the German law on the constitutional court)?
d. are they published in an official journal?
e. what happens if a decision declares that a norm will become unconstitutional if it is not modified within a certain period?

a. b. c. Rulings adopted by the Constitutional Court shall have the power of law and shall be binding to all governmental institutions, companies, firms, and organizations as well as to officials and citizens.

d. Constitutional Court decisions are officially promulgated in the Official Gazette, as well as other publications if necessary. Constitutional Court rulings come into effect on the day of their official promulgation.

e. The law does not provide for such decisions.

4. Do the answers to the previous questions depend on the type of constitutional review (for example: concrete/abstract control)? Do special rules apply in the cases mentioned in point I.A. 4 above?

In cases specified in question I.A.4, the Constitutional Court delivers conclusions to the Seimas or the President of the Republic. The Seimas makes a final decision on particular questions following Constitutional Court conclusions.

II. What means are available to ensure the execution of constitutional review decisions?

The response to this question should take account of the legislation concerning the execution of constitutional review decisions, either by other courts or by executive bodies. In particular:

1. Is there a norm indicating which authority has to execute the constitutional review decisions?
2. If not, is there a norm providing that the body exercising constitutional review or any other authority has the power to designate the body which will execute the decisions of the court? How does the system work in practice?

1. The laws do not indicate specific institution which would be designated to execute Constitutional Court decisions. There are general norms stipulating that rulings adopted by the Constitutional Court shall have the power of law and shall be binding to all governmental institutions, companies, firms, and organizations as well as to officials and citizens. All governmental institutions as well as their officials must revoke executive acts or provisions thereof which they have adopted and which are based on an act which has been recognized as unconstitutional. Decisions based on legal acts which have been recognized as being contradictory to the Constitution or laws must not be executed if they have not been executed prior to the appropriate Constitutional Court ruling became effective.

2. Such a norm is non-existent.

III. What are the consequences if constitutional review decisions are not executed or are not executed within a reasonable time?

The laws do not cover these issues.

IV. Cases where decisions are not executed

A. Have there been any recent cases where a constitutional review decision has not been executed in your country?
B. If so, is it possible to identify the reasons why the decision was not executed (e.g. political or financial reasons, lack of clarity in the decision, inadequate rules on the execution of decision)?

There have not been such cases in the practice of the Constitutional Court.

V. Cases of unsatisfactory execution

In certain cases, even where a constitutional review decision has been executed, the situation remains unsatisfactory because an unconstitutional norm continues to be applied.

A. Has such a situation arisen recently in your country?
B. What are the causes of such a situation? Do they stem from the effects of the constitutional review decision (absence of erga omnes effect, declaratory nature of the decision), or from other causes, such as those mentioned in IV.B. above?

There have not been such problems in the practice of the Constitutional Court.

LUXEMBOURG

Réponses au questionnaire sur « L'exécution des arrêts des juridictions constitutionnelles »

Introduction

La Cour Constitutionnelle luxembourgeoise est une jeune institution. En effet, un contrôle juridictionnel de la constitutionnalité des lois n'a été introduit que récemment au Grand-Duché de Luxembourg, notamment par les lois du 12 juillet 1996, portant révision de la Constitution et du 27 juillet 1997 portant organisation de la Cour Constitutionnelle.

Suite à l'arrêt « *PROCOLA* » du 28 septembre 1995 de la Cour Européenne des Droits de l'Homme qui a retenu que le Conseil d'Etat luxembourgeois ne pouvaient pas remplir une double fonction consultative et juridictionnelle, le législateur luxembourgeois a réagi pour réformer ce dernier. Le législateur a procédé à une révision constitutionnelle par la loi du 12 juillet 1996 laquelle a introduit un nouvel ordre juridictionnel administratif et parallèlement une Cour Constitutionnelle.

La loi du 27 juillet 1997 portant organisation de la Cour Constitutionnelle est entrée en vigueur le 1er octobre 1997.

Même si la Cour Constitutionnelle recrute ses membres parmi les magistrats des juridictions ordinaires et administratives, elle est toutefois une institution indépendante, particulière par sa composition et son objet. Elle est désormais la plus haute juridiction du pays.

Enfin, signalons que la Cour Constitutionnelle luxembourgeoise a rendu neuf arrêts jusqu'à ce jour.

Réponses aux questions

I. A. 1. a. :

Un véritable contrôle *préventif* ou *a priori*, exercée par la Cour Constitutionnelle, n'existe pas au Luxembourg. La Cour constitutionnelle n'exerce qu'un contrôle *a posteriori*.

Il importe néanmoins de remarquer qu'on peut parler d'un contrôle *a priori* qui est opéré par le Conseil d'Etat. En effet, l'avis de ce dernier est toujours requis préalablement au vote par la Chambre des Députés de tout texte de loi. Dans ce contrôle a priori des projets et propositions de loi, le Conseil d'Etat examine aussi et surtout la conformité des textes de loi par rapport à la Constitution.

S'il existe un problème de constitutionnalité, le Conseil d'Etat formule une opposition formelle ce qui signifie qu'il ne renoncera pas au second vote constitutionnel pour lequel un délai de trois mois au moins doit s'écouler depuis le premier vote.

Généralement la Chambre des Députés prend en compte les considérations d'ordre constitutionnel ceci d'autant plus depuis qu'une Cour Constitutionnelle existe. Ce n'est qu'exceptionnellement qu'un texte de loi d'initiative gouvernementale (projet) ou d'initiative parlementaire (proposition) peut être discuté en séance publique sans que le Conseil d'Etat n'ait donné son avis. Cette exception n'existe que depuis la réforme du Conseil d'Etat et n'a pas encore été appliquée en pratique.

I. A. 1. b. :

Le Luxembourg ne connaît pas de contrôle abstrait ou principal.

I. A. 1. c. :

Le Luxembourg a opté pour un système de contrôle concret des normes, exercé par la Cour Constitutionnelle, pouvant être saisie par le juge du fond par le biais d'une question préjudicielle.

I. A. 1. d. :

La Cour Constitutionnelle luxembourgeoise a pour seule mission de contrôler la constitutionnalité des lois.

Les traités ainsi que les lois en portant approbation , sont expressément exclus par l'article 95ter de la Constitution ainsi que par l'article 2 de la loi du 27 juillet 1997 portant organisation de la Cour Constitutionnelle.

I. A. 2. :

Juridiquement, ni la Constitution, ni la loi du 27 juillet 1997, n'obligent le législateur à agir, suite à un arrêt déclarant une norme non conforme à la Constitution. Néanmoins sur le plan politique, il appartiendra au pouvoir législatif d'analyser l'arrêt de la Cour pour soit modifier la loi, afin de la rendre conforme à la Constitution, soit modifier la Constitution si les conditions requises à cet effet se trouvent réunies.

I. A. 3. :

Le système de contrôle de constitutionnalité luxembourgeois ne connaît pas une procédure telle que la « Verfassungsbeschwerde » que connaît la République Fédérale Allemande. Bien entendu il se peut qu'au cours d'un litige les parties demandent aux juges de dernière instance de poser une question préjudicielle sur la conformité d'une norme à la Constitution.

I. A. 4. :

La Cour Constitutionnelle luxembourgeoise n'a pas d'autre compétences que le seul contrôle de constitutionnalité des lois. (cf. réponse à la question I. A. 1. d.)

I. B. 1. a. :

Les arrêts de la Cour Constitutionnelle luxembourgeoise ont uniquement un effet déclaratoire en ce que la norme constitutionnelle est déclarée conforme ou non à la Constitution. Les arrêts n'ont qu'un effet relatif, limité au litige concret qui a donné lieu à la question préjudicielle.

I. B. 1. b. :

La norme déclarée contraire n'est pas déclarée nulle ou annulée avec effet immédiat. La Cour Constitutionnelle luxembourgeoise n'a pas le pouvoir non plus de la modifier.

I. B. 1. c. :

Juridiquement il n'existe pas d'obligation pour le pouvoir politique, c'est-à-dire le législateur, d'intervenir suite à un arrêt déclarant une norme constitutionnelle contraire à la Constitution.

Néanmoins, il y a lieu de remarquer que l'on peut lire dans les travaux parlementaires préparatoires de la loi du 27 juillet 1997 portant organisation de la Cour Constitutionnelle que *« Il appartiendra toujours aux représentants élus du peuple de lever l'obstacle que la loi rencontre dans la Constitution et que la Cour Constitutionnelle lui oppose, en révisant la Constitution. »*.

I. B. 1. d. :

Non.

I. B. 1. e. :

Les arrêts on un effet relatif au litige concret qui a opposé les parties.

En cas de situation analogue à un cas d'espèce, les juges du fond sont dispensés de poser une question préjudicielle relative à une disposition législative contestée quant à la constitutionnalité quand la question préjudicielle a déjà été tranchée par la Cour Constitutionnelle.

I. B. 1. f. :

La Cour Constitutionnelle luxembourgeoise n'a pas le pouvoir d'ordonner à une autre autorité d'agir.

I. B. 2. a. + b. :

Non, puisque le contrôle de constitutionnalité luxembourgeois ne connaît pas ce système.

I. B. 3. a. + b. :

Non.

I. B. 3. c. :

Les arrêts de la Cour Constitutionnelle luxembourgeoise n'ont pas force de loi.

I. B. 3. d. :

Les arrêts sont publiés au Mémorial, Recueil de législation, dans les trente jours de leur prononcé. La Cour Constitutionnelle peut décider de faire abstraction, lors de cette publication, des données à caractère personnel des parties en cause.

I. B. 3. e. :

Comme il n'existe pas juridiquement une obligation pour le législateur de modifier une norme déclarée inconstitutionnelle et encore moins dans un certain délai, il se pourrait que le juge du fond de renvoi se trouve devant un vide juridique, crée par le fait de l'inconstitutionnalité de la loi, et qu'il aurait des difficultés pour trancher le litige porté devant lui. Dans la plupart des cas, l'arrêt de la Cour devrait toutefois permettre au juge de renvoi de trancher, en appliquant le principe constitutionnel sur lequel la Cour Constitutionnelle s'est basée dans son arrêt.

II. + III. + IV. + V. :

Le Luxembourg n'ayant pas de dispositions législatives relatives à l'exécution des arrêts de la Cour Constitutionnelle, il est impossible de répondre aux questions II., III., IV., et V. .

25.09.2000.

Lydie ERR
Membre suppléant luxembourgeois de la Commission de Venise

MALTA

Replies to the questionnaire on the Execution of Constitutional Court Decisions (First version of the questionnaire)

I. What means are available to ensure the execution of constitutional court decisions ?

1. ***Is there a norm indicating which authority has to execute the judgments of the constitutional courts ?***

Under Maltese law the superior courts are the Civil Court, the Court of Appeal and the Constitutional Court (Article 3 of the Code of Organization and Civil Procedure – Chapter 12 of the Laws of Malta).

Judgements delivered by local courts are considered to constitute an executive title (Art. 253 of the Code of Organization and Civil Procedure – Chapter 12 of the Laws of Malta). According to law executive titles may be enforced by any of the executive acts stipulated by law (Article 273 of Chapter 12 of the Laws of Malta):

(a) warrant of seizure of movable property;
(b) judicial sale by auction of movable or of immovable property or of rights annexed to immovable property;
(c) executive garnishee order;
(d) warrant of ejection or eviction from immovable property;
(e) warrant *in factum*

In terms of Article 95 of the Constitution, the Constitutional Court has an:

(a) **<u>Original jurisdiction</u>**: hears and determines issues referred to it on whether a person has been validly elected as a member of the House of Representatives; whether a person, who, as a member of the House of Representatives, has vacated his seat therein, or was required to cease to perform his duties as a member because of any one of the reasons established by the Constitution; whether a person has been validly elected Speaker of the House of Representatives from among persons who are not members of the House or having been so elected as Speaker he has vacated his office. The Constitutional Court has also an original jurisdiction to determine any reference made in cases where voting at elections of members of the House of Representatives is alleged to be tainted with illegal or corrupt practices or foreign interference. If such practices were proved, the Court is empowered to annul the election in all, or in one or more, of the electoral districts, to provide the proper remedy and in particular to ensure that fresh elections be held at the earliest possible opportunity. It also has jurisidiction relating to other matters regarding the conduct of elections and is also called on to hear and determine any reference made to it in accordance with any law relating to the election of members of the House of Representatives. In these matters

the Constitutional Court has an exclusive jurisdiction to the exclusion of any other Court. It has a determining role and there is no appeal from its decisions.

(b) **Appellate Jurisdiction**: Determines matters, which, by the Constitution are entrusted to its exclusive jurisdiction. These matters are mainly concerned with violations of fundamental human rights protected by the Constitution and matters relating to the validity of laws. The Constitution provides that these matters should first be examined and decided by the First Hall of the Civil Court, being the Superior Court of First Instance. The Constitutional Court therefore hears and determines appeals from decisions of the Civil Court First Hall regarding cases concerning the protection of fundamental human rights and freedoms of the individual, enshrined in Article 33 to 45 of the Constitution. These fundamental rights have been further safeguarded by the introduction of Act Number XIV of 1987 by which the European Convention for the Protection of Human Rights and Fundamental Freedoms was made enforceable as part of the domestic law of Malta. It has also jurisdiction to hear all appeals from any Court of original jurisdiction as to the validity of laws.

Like other judgements, in terms of Maltese law it is the Court itself which orders and has the appropriate mechanism to ensure the execution of its judgements. Where for example, the Court orders the payment of an amount of money as a remedy for a breach of an individual's fundamental human rights, it is the court official who executes such an order following the issue of the relative executive acts enlisted above. The Court is empowered to give such orders as are necessary to ensure the effective enforcement of the judgement. In fact, the Constitution itself empowers the Constitutional Court to issue such orders and such directions which it deems appropriate in order to secure *"the enforcement of, any of the provisions of the said sections 33 to 45 (inclusive) to the protection of which the person concerned is entitled"* (Article 46(2)) of the Constitution). It is pertinent to note that Articles 33 to 45 of the Constitution deal with the fundamental rights and freedoms of the Individual. In a recent decision (*Mario Pollacco v. The Commissioner of Police et* – 6th October 1999), the Constitutional Court itself ordered the release on bail of the applicant and confirmed the conditions of bail imposed by the First Hall of the Civil Court. This after the Criminal Court had failed to release the applicant from arrest pending trial, notwithstanding the judgement delivered by First Hall of the Civil Court which declared a breach of the applicant's fundamental rights and freedoms as protected by Article 5 and 6 of the European Convention.

Under Maltese law there exists no legislation which specifically deals with the enforcement of judgements delivered by the Constitutional Court. The enforcement of judgements is regulated in Articles 252 – 283A inclusive (Chapter 12 of the Laws of Malta), whether the judgement is delivered by an inferior or superior court. It must also be emphasised that in practice the utilization of any one of the executive acts enlisted above is not appropriate in each and every case decided by the Constitutional Court (e.g. where the Constitutional Court declares a law to be unconstitutional, the method of enforcement does not lie in any one of the above-mentioned executive acts). It all depends on the remedy afforded by the Constitutional Court to the aggrieved party, which remedy would be stated in the court's judgement. Thus, the warrant *in factum* is an executive act whereby the court shall deliver an order to convey to prison the party against whom the warrant is issued to be therein kept at his own expense, until the performance of the act ordered by the judgment (Article 385 of Chapter 12 of the Laws of Malta). This could be an effective remedy where an official of a public authority may refuse to implement the court's decision. As will be seen further on, there are other repercussions which serve as a deterrent to anybody tempted to oppose the Court's decision.

It is also interesting to note that in terms of Article 267 of the Code of Organization and Civil Procedure (Chapter 12 of the Laws of Malta), any judgment *"providing redress against infringement for the individual's right to life or providing remedies against illegal arrest or forced labour"*, shall **in all cases** be provisionally enforceable notwithstanding that an appeal is filed by any party to the proceedings.

Under Maltese law the principle of precedent finds no application. The legal system only recognises authoritative weight but not binding force to the judgements of the Court of Appeal. Therefore, there is no doctrine of *'stare decisis'*. Similarly, there is no provision in the Constitution providing for the statutory binding effect of the decisions of the Constitutional Court beyond the merits of the application considered and decided by it. This means that in theory the doctrine of *stare decisis* is not applicable to these judgements, just as it is not applicable to the judgements of the so called 'ordinary' courts. While it is clear that the judgements of the Constitutional Court would be binding on the other courts in so far as concerns the case specifically referred to that Court for decision, it is not at all clear that the judgement delivered by the Constitutional Court would constitute a binding precedent on other courts if a similar issue were to arise before them.

On the other hand, one can consider that certain Constitutional Court judgements, such as those regarding the validity or constitutionality of laws, are deemed to have a binding effect on its own subsequent decisions and on those of other Courts including the Court of Appeal. It would perhaps be more appropriate to consider these judgements as being the final determination by the competent constitutional tribunal of the state of the law in dispute within the country rather than as a matter of judicial precedent.

However, it is a moot point whether a judgement delivered by the Constitutional Court declaring a piece of legislation as being unconstitutional, is enforceable by the introduction of an amendment to the relevant legislation. In terms of Article 242 of the Code of Organization and Civil Procedure (Chapter 12 of the Laws of Malta) when a court, by a judgment which has become definitive (*res judicata*), declares and provision of any law to run counter to any provision of the Constitution of Malta or to any human right or fundamental freedom set out in the First Schedule to the European Convention Act, or to be *ultra vires*, the registrar shall send a copy of the said judgment to the Speaker of the House of Representatives, who shall during the first sitting of the House following the receipt of such judgment inform the House of such receipt and lay a copy of the judgment on the table of the House. In a recent constitutional case (***Maria Rosa Tabone v. Attorney General et al***) decided by the First Hall of the Civil Court on the 30th May, 2000, the Court held that where the Constitutional Court declares legislation to be unconstitutional because it is in breach of an individual's fundamental rights and freedoms, such law will no longer be applicable once the judgement is definitive (*res judicata*) and the ordinary Courts would be bound not to apply the impugned law. In this judgement, the Court was evidently implying that no legislation is required to enforce the Constitutional Court's decision. A similar judgement had been delivered by the Constitutional Court in the case ***Frank Cachia vs. The Hon. Prime Minister***, where the court emphasised that any provision of law declared to be unconstitutional would immediately lose its effect, without the need of an authority, to amend or revoke the law, according to the circumstances of the case. Notwithstanding, there are still those who contend that it rests with the House of Representatives to take whatever action it deems necessary to fall in line with the judgement delivered by the Constitutional Court.

Where the decision concerns the protection of fundamental human rights, the Constitutional Court is empowered to provide such remedies as will ensure and guarantee an appropriate redress for the breach of any fundamental human right as protected by the Constitution and/or

Act No. XIV of 1987. Thus, for example the Constitutional Court may, when quashing a decision of a public authority, order that the matter is transmitted back to the authority for a new ruling under the terms and conditions laid down by the Constitutional Court. Where the public authority fails to conform itself with the ruling delivered by the Constitutional Court, then its actions would be *ultra vires* and contrary to law.

Probably, the enforcement of judgements delivered by the Constitutional Court is an area under Maltese law which requires specific legislation to remove all doubts as to the manner of execution.

2. ***If not, is there a norm providing that the constitutional court or any other authority has the power to designate the body which will execute the decisions of the court ? How does the system work in practice?***

There is no such norm.

II. What are the consequences if constitutional court decisions are not executed or are not executed within a reasonable time?

Since the establishment of the Maltese Constitutional Court in 1964, judgements delivered by this Court have been concerned with the investigation of alleged breaches of individuals fundamental human rights and the issue concerning the validity of certain provisions of law. Where the Court declares a breach, it is in the interest of the wrongdoing party to ensure that it adheres to the decision delivered by the Constitutional Court. Normally, the party concerned is a public authority. Failure by the public authority to give effect to the court's judgement would evidently lead to further repercussions, such as the possibility of proceedings for contempt of Court or other judicial proceedings for the liquidation and payment of damages for failure to give effect to the judgement. The authority could further expose itself to other judicial proceedings where the non – enforcement of the judgement could give rise to a further breach of an individual's fundamental rights and freedoms (e.g. in matters dealing with freedom from illegal arrest and detention).

With reference to judgements which declare a law to be unconstitutional or in breach of an individual's rights and freedoms as protected by the Constitution and/or Act XIV of 1987, if one were to adopt the view that legislation is to be enacted in order to give effect to the court's judgement, the law does not establish any time period within which the House of Representatives is to enact the relative legislation. However, if a similar case arises, the ordinary courts would consider themselves to be bound by such judgement and would not apply any provision of the law which had previously been declared to be unconstitutional by the Constitutional Court.

III Cases where decisions are not executed

A. ***Have there been any recent cases where a constitutional court decision has not been executed in your country ?***

There have been instances where provisions of law have been declared unconstitutional, and notwithstanding the House of Representatives has failed to introduce the appropriate amendments in the law. Examples:

- Time period of six months granted to a person who is registered as the natural father of a child, to contest the paternity of such child;

- Difference in treatment between legitimate and illegitimate children in succession law.

Notwithstanding, as stated previously, any Court dealing with a similar issue would feel constrained to adhere to the judgement delivered by the Constitutional Court and refuse to apply a provision of the law which has been declared to be unconstitutional.

A. ***If so, is it possible to identify the reasons why the decision was not executed (eg. Political or financial reasons, lack of clarity in the decision, inadequate rules on the execution of decisions) ?***

Not applicable.

IV. Cases of unsatisfactory execution.

In certain cases, even where a decision of a constitutional court has been executed, the situation remains unsatisfactory because an unconstitutional norm continues to be applied.

A. ***Has such a situation arisen recently in your country ?***

A. Not applicable.

B. ***What are the causes of such a situation ? Do they stem from the effects of the constitutional court decision (absence of erga omnes effect, declaratory nature of the decision), or from other causes, such as those mentioned in III.B above ?***

Not applicable.

No problems arise when decisions of ordinary higher courts were declared contrary to the Constitution because such decision would be null and void, and would have no effect once the Constitutional Court delivers a judgment declaring such decision to be in breach of the Constitution.

Mr. Justice J. Said Pullicino B.A. LL.D.

August, 2000.

MOLDOVA

Réponses au questionnaire
sur "L'exécution des arrêts des juridictions constitutionnelles"

La juridiction constitutionnelle est exercée en base de la Constitution, de la Loi sur la Cour Constitutionnelle et du Code de la juridiction constitutionnelle.
La Cour Constitutionnelle (CC) est l'unique autorité de juridiction constitutionnelle en République de Moldova. La CC est indépendante et elle est subordonnée seul a la Constitution.

I. Questions générales sur le contrôle de constitutionnalité

A. Le type et l'objet du contrôle de constitutionnalité :

Les attributions de la CC (art.135 de la Constitution RM) :

A/ exerce sur saisie le contrôle de la constitutionnalité des lois, des arrêts du Parlement, des décrets du Président de la RM des arrêts et des ordonnances du Gouvernement, ainsi que des traités internationaux dont la RM est partie;
B/ interprète la Constitution;
C/ se prononce sur les initiatives de révision de la Constitution;
D/ confirme les résultats des référendums républicains;
E/ confirme les résultats des élections du Parlement et du Président de la RM;
F/ constate les circonstances qui justifient la dissolution du Parlement, la démission du Président de la RM ou l'intérim de la fonction de Président, ainsi que l'impossibilité du Président de la RM d'exercer ses attributions plus de 60 jours;
G/ résolue les cas exceptionnels de inconstitutionnalité des actes juridiques sur saisie de la Cour Suprême de Justice;
H/ décide sur les questions qui ont pour objet la constitutionnalité d'un parti.

La compétence de la CC est prévue par la Constitution et ne peut être contestée par aucune autorité publique. Peuvent être soumis au contrôle de la constitutionnalité seul les actes normatifs adoptés après l'entrée en vigueur de la Constitution adoptée le 29 juillet 1994. La CC examine en exclusivité les problèmes de droit (art.31 de la Loi sur la CC).

La CC établie elle-même les limites de sa compétence (art.6 (2) du Code de la juridiction constitutionnelle).

La CC prononce des arrêts et de décisions et émet des avis. Les arrêts sont prononcés et les avis sont émis dans le cas de la solution au fond de la saisie. Dans le cas de la non-solution au fond de la saisie, la CC prononce une décision qui est consignée dans le procès verbal ou en tant que acte séparé.

B. Les effets des arrêts des juridictions constitutionnelles:

1. En ce qui concerne les actes normatifs:

Tout acte normatif ainsi que tout traité international dont la RM est partie est considéré constitutionnel jusqu'à ce que sa inconstitutionnalité soit prouvée lors du processus de juridiction constitutionnelle.

Les lois et les autres actes juridiques ou certaines de leurs stipulations qui sont déclarées inconstitutionnelles deviennent nulles avec effet immédiat.

La norme ou l'acte doit être modifié par l'organe qui l'a adopté.
Les arrêts de la CC sont définitifs, ils ne peuvent pas être attaqués, et ils entrent en vigueur la date de leur adoption. Certains arrêts de la CC, sur décision de la Cour, entrent en vigueur la date de leur publication ou la date indiquée dans l'arrêt.

2. Concernant la protection des droits constitutionnels:

Si, lors du processus d'examen, des questions qui sont dans la compétence des autres organes apparaissent, la Cour leur remet les matériaux ou communique les faits aux parties et aux organes intéressés, en donnant les explications de rigueur. En contrôlant la constitutionnalité de l'acte contesté, la CC peut prononcer un arrêt aussi sur les autres actes normatifs dont la constitutionnalité dépend intégralement ou en partie de la constitutionnalité de l'acte conteste (art.6 du Code de la juridiction constitutionnelle).

3. Les arrêts des juridictions constitutionnelles ont un effet *erga omnes*. Ils ont force de loi constitutionnelle. Les arrêts de la CC sont publiés dans le *Monitorul Oficial al Republicii Moldova*.

II. Quels sont les moyens d'assurer l'exécution des arrêts des juridictions constitutionnelle ?

Chapitre 10 du Code de la juridiction constitutionnelle :

Les arrêts de la CC sont expédiés aux parties, aux autorités publiques dont les actes avaient été examines par la CC, au Président de la RM, au Parlement, au Gouvernement, a la Cour Suprême de Justice, a la Cour de Justice Economique, au Procureur Général, au Ministère de Justice.

Les arrêts et les avis de la CC sont exécutés dans les délais indiques par la CC. L'exécution de l'arrêt ou de l'avis est porté à la connaissance de la CC dans les termes indiqués par celle-ci. Le contrôle sur l'exécution des arrêts et des avis de la CC est exercé par le Secrétariat de la CC, sous la direction du juge - rapporteur, en conformité avec le Règlement du Secrétariat de la CC.

III. Les facteurs de décision qui n'exécutent pas, dans les termes établis, l'arrêt ou l'avis portent une responsabilité conformément a l'art.82 du Code de juridiction constitutionnelle.

L'article 82 du Code de juridiction constitutionnelle: "En vue d'assurer l'exercice de la juridiction constitutionnelle, une responsabilité administrative est prévue sous forme d'amende jusqu'aux 25 salaires minimums pour:

a) des déclaration inconstitutionnelles;
b) immixtion dans la procédure du juge de la CC, essai d'exercer une influence sur le juge par des méthodes hors procédure;
c) inexécution sans motifs, dans le mode et le délai établis, des demandes du juge de la Cour, l'inexécution des arrêts et des avis de la Cour;
d) violation du serment judiciaire;
e) manifestation du manque de respect face a la CC par la violation des dispositions du président de séance, de l'ordre pendant la séance, ainsi que par des faits qui prouvent une non-considération devant la Cour et la procédure de juridiction constitutionnelle;

L'amende doit être versée dans un délai de 15 jours après la date ou la personne concernée a été prévenue sur l'application de l'amende. Si la personne refuse de payer l'amende ou si elle ne la paye pas dans le délai établi, la décision de la CC est exécutée dans les conditions de la loi, en base de l'extrait du procès-verbal de la séance ou de la décision du président de la séance.

IV. Il n'y a pas de cas récents d'inexécution d'un arrêt de la juridiction constitutionnelle.

V. Les causes possibles d'exécution insatisfaisante d'un arrêt de la juridiction constitutionnelles sont d'ordre financier (exemple: l'arrêt de la CC nr.39 du 15.12.98 sur le contrôle de la constitutionnalité de l'arrêt du Gouvernement nr.744 du 6.06.98 "Sur l'approbation du projet de loi pour la modification de la Loi sur les investissement étrangers" et sur le contrôle de la constitutionnalité de la Loi nr.114-XIY du 29 juillet 1998 "Pour la modification de la Loi sur les investissement étrangers").

THE NETHERLANDS / PAYS-BAS

THE EXECUTION OF CONSTITUTIONAL REVIEW DECISIONS

Reply to the questionnaire for the Netherlands

I. General questions

ad A.1. Constitutional review of Acts of Parliament is prohibited by Article 120 of the Netherlands Constitution. Dutch courts may only review the constitutionality of legislative acts of a lower rank, such as Royal Decrees, ministerial regulations, municipal regulations *etcetera*. The competence to do so is part of the jurisdiction of all courts in the civil, criminal or administrative case before them. They do not have to, and cannot, refer the constitutional issue to another court.
Preliminary review is performed by the Council of State, whose advisory opinion has to be obtained on all Bills and on draft general regulations and draft Royal Decrees. In its opinion the Council of State will also address the constitutionality of the Bill or draft. However, its opinion is not of a binding character.

ad A.2. No review is possible. That is different if the legislator has failed to (correctly) implement European law or treaty obligations.

ad A.3. There is no special procedure. Acts of Parliament can also not be reviewed for their conformity with constitutional rights. They can, however, be reviewed for their conformity with **international** human-rights treaties (Arts 93-94 of the Constitution). Lower legislation can be reviewed for its conformity with constitutional rights by all courts in the proceedings before them.

ad A.4. In those cases the administrative courts have jurisdiction. If the case concerns a conflict between public bodies which the administrative courts have no jurisdiction to judge on, it may be referred to the Crown. In all these cases constitutional review is possible, except for the applicability of Acts of Parliament.

Ad B.1. Since constitutional review is performed by the courts in the proceedings before them, the outcome is binding for the parties, but only in relation to that particular case. The regulation which is found to be unconstitutional will be left out of application in that particular case (and will presumably be left out of application in similar future cases), but may not be annulled by the court. Its decision also has no retroactive effect. It is up to the authority, which enacted the regulation to withdraw or amend it.

Ad B.2. A decision of a public authority may be quashed by the administrative court on the ground that it is unconstitutional. Normally the public authority has to take a new decision. Only in the exceptional case that there is no discretion on its part as to how to decide may the court replace the quashed decision by its own decision.

Ad B.3. As said before, court decisions concerning review are binding, but only for the case concerned. The decisions are public but there is no official journal for court decisions. A selection is published in professional periodicals. It is very rare, indeed, that a Dutch court sets a time limit for the legislator.

II. Execution

There are no special procedures or powers to execute court decisions in which constitutional review has taken place.

III. Delay in execution

Again, the parties to the case in which a court has performed constitutional review, have the normal remedies against delays in execution of the decision. No special procedures and powers exist.

IV. Cases of non-execution

Normally, all court decisions are executed. To our knowledge, there is no recent case of non-execution.

V. Unsatisfactory execution

Since the courts do not have the power to annul the regulation which they find to be unconstitutional, but only the power to leave it out of application in the case concerned, it is quite possible that the same regulation will be applied by the authorities at a later instance. Although, in general, the authorities take good notice of developments in the case law, they may be of the opinion that the situation differs from that decided by the court or they may deem it desirable that the court be invited to reconsider its case law. In most cases, however, the legislator will act after a regulation has been declared unconstitutional.

POLAND / POLOGNE

Hanna Suchocka – Poland
Questionnaire on the execution of Constitutional Review Decisions.

I. General questions on constitutional review

A. The type of constitutional review and its subject:

1. Constitutional review of normative acts

The scope of constitutional review performed by the Constitutional Tribunal is prescribed by the Constitution of the Republic of Poland dated 2 April 1997 and in the Constitutional Tribunal Act dated 1 August 1997, on whose basis the previous Constitutional Tribunal Act of 1985 was repealed. As a result of the new Constitution coming into force, the position and the tasks of the Constitutional Tribunal have been altered. In making these changes the importance and the role previously played by the Constitutional Tribunal were taken into consideration, especially the role of the Constitutional Court in the process of the most recent transformations in Poland in the area of strengthening the rule of law and the protection of constitutional rights. In light of the new Constitution, the Tribunal's decisions are final and universally binding. This means that the Tribunal's decisions are *res iudicata* in nature.

Pursuant to the previously binding Constitution, the Constitutional Tribunal's decisions in the matter of a statute's unconstitutionality were subject to review by the Sejm. The Sejm could throw out the Tribunal's decision by the same majority required to enact a statute. The Constitution of 1997 did, however, envisage a two-year transitory period during which decisions asserting the unconstitutionality of the provisions of law incorporated in a statute could be thrown out by the Sejm. This transitory period elapsed on 17 October 1999. This date also marked the end of the process of transforming the Constitutional Tribunal's position in the system of government.

Article 188 of the Constitution enumerates the normative acts which are subject to the Constitutional Tribunal's review. The Constitutional Tribunal is competent to decide on the **constitutionality** of the following:

1) **statutes** - the Constitutional Tribunal's review encompasses all statutes, i.e. both those that have been signed by the President and those that are awaiting the President's signature after enactment by the parliament. For according to article 122 of the Constitution, the President, prior to signing a statute, may approach the Constitutional Tribunal in the matter of a statute's constitutionality. This is preventive review since a statute enacted by the parliament before the President's signature is affixed does not come into effect. The President, however, cannot refuse to sign a statute, which the Constitutional Tribunal has acknowledged to be constitutional;

2) **international treaties -** the Constitutional Tribunal's review applies to treaties that are both subject and not subject to ratification. International treaties subject to ratification may be the subject matter of review both prior to ratification (article 133 section 2 of the Constitution) and after ratification. In the Polish system of law there are two types of treaties, which require

ratification, i.e. treaties, which require consent for ratification by way of a statute, as well as ratification for which statutory consent is not required. All types of these treaties are subject to the Constitutional Tribunal's review;

3) **all normative acts issued by central national government bodies** – i.e. regulations with the power of a statute issued by the President during martial law when the Sejm cannot assemble at a meeting (article 234 of the Constitution), as well as regulations and other normative acts of internal law issued by central national government bodies (e.g. the Council of Ministers, individual ministers) and the rules of procedure of the Sejm and the Senate.

The Constitutional Tribunal is also empowered to review the **conformance** of "sub-statutory" normative acts, i.e. the regulations issued by the central bodies of national government administration (article 92 of the Constitution), all normative acts of internal law (article 93 of the Constitution) and the bylaws of the Sejm and the Senate **with statutes and international treaties**. The Constitutional Tribunal's scope of review is very broad. It encompasses all normative acts. The Polish legal system does not include any acts that are not subject to statutory constitutionality review.

2. Review of unconstitutional omission of legislation.

The Constitutional Tribunal does not have the power to investigate cases of the legislator's failure to act. The Constitutional Tribunal may not, therefore, undertake any actions if the legislator has failed to act when it is obliged to do so by the Constitution. The Constitutional Tribunal does have, however, an important instrument, viz. the institution of **signaling**. By the institution of signaling the Constitutional Tribunal may draw the legislative branch's attention to the need of undertaking a legislative initiative, especially if, as a result of a decision handed down by the Constitutional Tribunal, a legal provision, hitherto existing in the legal system, is repealed, whereby a loophole arises. Analysis of the legal provisions concerning signaling and the practice of applying this institution have shown that signaling is applied solely to cases related to the subject matter of the Constitutional Tribunal's decision-making. Signaling is therefore not applied as a self-existent institution but in conjunction with reviewing a case, or on the basis of a motion to assert unconstitutionality, or on the basis of a legal question or constitutional complaint when the Constitutional Tribunal asserts abrogations and loopholes in the law. The recipients of this signaling are the bodies that make the law. It is therefore applied only when, according to the Constitutional Tribunal, the loophole may be eradicated only as a result of law-making intervention.

3. Decisions concerning the protection of constitutional rights

The review of normative acts exercised by the Constitutional Tribunal is abstract in nature. The Constitutional Tribunal's review, however, is of a specific nature in the following cases:

a) Adjudicating on the legal questions submitted by courts in conjunction with a specific case being heard.

Every court may submit legal questions to the Constitutional Tribunal on the constitutionality of a normative act, or its conformance to ratified international treaties or a statute if the adjudication of the case before the court is dependent on the response to the legal question. The subject matter of the question is a doubt, which has arisen during the course of specific proceedings. A legal question may not concern any legal topic whatsoever but only the issue of constitutionality, or the legality of a legal act, on the basis of which the

court is supposed to adjudicate the case. [1]The legal question as a basis for judicial adjudication in a specific case constitutes a very effective means of protecting basic rights. An unconstitutional normative act may not be omitted by a court when adjudicating a specific case, while its removal from the legal order (derogation) may take place only on the power of a judgment handed down by the Constitutional Tribunal as the result of proceedings initiated by posing a legal question. The Constitutional Tribunal's decisions in these cases are in a certain sense carried out directly in the court proceedings conducted before the court which posed the question.

b) taking up cases as a result of a constitutional complaint.

The constitutional complaint was introduced to the Polish legal system on the basis of the new Constitution of 1997 (article 79 section 1). The constitutional complaint is an institution to protect constitutional rights. The Constitution very broadly specifies the entities which may lodge a constitutional complaint. Everyone whose constitutional freedoms or rights have been violated, i.e. a Polish national, an alien or a legal person may lodge a constitutional complaint. Cases in the course of a constitutional complaint are heard only in conjunction with a specific, unit decision issued by a public administration body or a court. These proceedings have a specific nature[2] in contrast to cases entailing a motion to assert the constitutionality of a normative act, which have an abstract nature. The subject matter of a constitutional complaint is not the administrative decision or the court's decision itself, but a normative act, on the basis of which the relevant body has founded its decision. The court's decision or ruling must concern a given person's freedoms, rights or duties as prescribed in the Constitution. One should therefore cite in the complaint the specific provision of the Constitution which guarantees a given freedom, as well as the provision of the statute, which breaches the Constitution.. It is possible to submit a complaint to the Constitutional Tribunal only after exhausting the instances, i.e. it may be lodged against a final decision, against which there is no longer a normal appellate course.

The Constitutional Tribunal may issue a temporary decision to suspend or to enjoin the performance of a decision in the matter to which the complaint applies if the performance of the judgment, decision or some other adjudication could cause irreversible effects entailing a great loss to the complainant or if an important public interest, or if some other important interest of the complainant speaks in favor of the same. The temporary decision shall be delivered without delay to the complainant and the judicial body with competent jurisdiction or the enforcement body.

4. *Other areas of constitutional review*

According to Poland's Constitution of 1997, the Constitutional Tribunal adjudicates on:

a) the constitutionality of the goals or activities of political parties (article 188 section 5) The Constitutional Tribunal acts as a court of law, while it acts as a court of facts in matters relating to the evaluation of the activities of political parties.

b) competence disputes between central constitutional bodies of the state (article 189). The Constitutional Tribunal adjudicates competence disputes if two or more central constitutional bodies of state deem it to be proper for them to rule on the same matter or if they issue a decision

[1] In 1999 the Constitutional Tribunal adjudicated 10 cases under the course of a legal question. These questions were posed by various courts: district courts, voivodship courts and the Supreme Administrative Court (NSA).

[2] Last year the most frequent subject matter of constitutional complaints were those normative acts, which referred to retirement and disability pensions, fiscal obligations and ownership transformations. A large percentage of cases are complaints referring to the violation of the right to court.

(a positive competence dispute) or if they deem it to be improper to adjudicate on a given matter (a negative competence dispute). The commencement of proceedings before the Constitutional Tribunal causes the suspension of the proceedings before the bodies which are conducting a competence dispute.

The Constitutional Tribunal's adjudication entails an indication of which body has the jurisdiction to make the decision, but not to make the decision for the entitled body.

c) In response to the motion of the Speaker of the Sejm, the Constitutional Tribunal adjudicates in the matter of asserting an obstacle for the President of the Republic of Poland to fulfill his/her office if the President is unable to notify the Speaker of the Sejm about the inability to fulfill this office. If it is acknowledged that the President is temporarily incapable of fulfilling his/her office, then the Constitutional Tribunal shall entrust the temporary performance of the duties of the President of the Republic of Poland to the Speaker of the Sejm..
None of these procedures has been applied up till now.

B. The effects of constitutional review decisions:

The Constitutional Tribunal's decisions are not declaratory in nature. In light of the new Constitution (article 190), the Constitutional Tribunal's decisions are universally binding and final. When asserting an act's unconstitutionality the Constitutional Tribunal adjudicates on the loss of a given act's binding force (in full or in part). The Constitutional Tribunal's decision comes into force on the date of its promulgation; however, the Constitutional Tribunal may specify some other timeline for the normative act to lose binding force. This timeline may not exceed 18 months for statutes and 12 months for other normative acts. As a rule, the Constitutional Tribunal specifies some other timeline (a longer one) for the decision to come into force to give the legislator the appropriate time to prepare a new normative act and not to cause loopholes in the law.[3] The Constitutional Tribunal's decisions are subject to announcement, without delay, in the official body in which the normative act was promulgated. If the act was not promulgated then the decision shall be promulgated in the Official Journal of the Republic of Poland entitled "Monitor Polski".

A decision of the Constitutional Tribunal of the unconstitutionality or the contravention of an international treaty or a statue by a normative act, on the basis of which a legally-binding court decision, a final administrative decision or an adjudication in other matters has been issued, constitutes the basis for reinstating proceedings, repealing a decision or some other adjudication according to the principles and in the matter prescribed by the appropriate provisions for a given proceedings. Thus final decisions which were made before the decisions of the Constitutional Tribunal came into force do not become null and void thereby.

Constitutional Tribunal decisions made as a result of lodging a constitutional complaint have the same features as decisions issued in the matter of asserting an act's unconstitutionality. They are therefore final and have universally-binding force; they are subject to promulgation in the official journal in which the challenged normative act was promulgated. The Constitutional Tribunal's decisions, as noted above, concern the legal grounds on which a specific decision or adjudication has been issued. The Constitutional Tribunal does not, therefore change this decision or adjudication. On the basis of a decision of the Constitutional Tribunal, one may pursue their amendment in the proper course for a case of a given type.

[3] Yes. For instance, when adjudicating on 12 January 2000 on the unconstitutionality of several articles in the Act on the Letting of Apartments and Housing Allowances, the Constitutional Tribunal resolved that its decision shall take force on 11 July 2001. This is time to prepare the new solutions.

The Constitutional Tribunal's decisions are binding not only in the unit cases which led to the lodging of the constitutional complaint, and not only for the entities which participated in these cases, but have an *erga omnes* effect.

II . In the Polish legal system the Constitutional Tribunal's decision explicitly indicates to what body and to what legal act the said decision applies. There is no need, therefore to designate a special body to carry out the Constitutional Tribunal's decisions. The Constitutional Tribunal specifies the timeline upon which the challenged legal act loses binding force. And this forms an obligation for the body which issued the act to take actions to prepare a new act, or to refrain from regulating the matter if the repealed provision does not elicit a loophole, and if according to the evaluation of the authors of this provision, it is not indispensable. The decision itself, therefore, of the Constitutional Tribunal specifies the body which is obliged to make the changes. This is the body which issued the challenged act. In turn, if the Constitutional Tribunal's decision applies to a statute, then the decision itself constitutes a signal to the bodies holding the legislative initiative, primarily for the government to launch such an initiative.

The signaling institution which I have already discussed plays an extraordinarily important role in this area. One should assume that the importance of signaling shall grow in a situation in which the Constitutional Tribunal's decisions are final in nature. Under the framework of the previous Constitution, when every decision on a statute's unconstitutionality was subject to verification by the Sejm, the debate alone on the decision and the voting in the Sejm were a signal to the government and the parliament about the need to prepare a new statute or to amend it. At present, these tasks rest upon the Constitutional Tribunal. It is precisely the Constitutional Tribunal which should signal the need for rapid legislative intervention.

The duty of obtaining the opinion of the Council of Ministers on decisions entailing financial outlays not envisaged by the budgetary act, which follows from article 44 section 1 of the Constitutional Tribunal Act is a very important institution exerting an influence on the effectiveness of the Constitutional Tribunal's decisions. Only after obtaining the government's opinion the Constitutional Tribunal specifies the timeline for the normative act's loss of binding force. This makes it possible to so specify the timeline for the loss of binding force that the government may include additional obligations in the budgetary act, and therefore not issue decisions which cannot be executed. This does not mean that the Constitutional Tribunal should give priority to economic considerations but it creates an additional element of the procedure which is supposed to allow the Constitutional Tribunal to provide a complete explanation of the context of the decision being taken. The Constitutional Tribunal, after all, has shown many times that the drive towards budgetary balance should be treated as a constitutional value.

In 1999 the President of the Constitutional Tribunal obtained the opinion of the Council of Ministers three times. In two instances the Constitutional Tribunal acknowledged the provision's constitutionality and in one case it acknowledged its unconstitutionality.
The entire procedure presented hereunder supports the idea that it would be difficult to enumerate instances in which the Constitutional Tribunal's decisions were not carried out.

PORTUGAL

Answer to the questionnaire
on the execution of constitutional review decisions (Portugal)

I. General questions on constitutional review

A. The type of constitutional review and its subject

1. constitutional review of normative acts:

a. preliminary review

Yes (Const., Art. 278º-279º)

b. abstract or principal review (direct claim of unconstitutionality)

Yes (Const., Art. 281º-282º)

c. concrete or incidental review of norms

Yes (Const., Art. 280º)

d. normative acts that are not subject to constitutional review

Every normative act, whatever its nature or the public entity it comes from, is subject to constitutional review by any ordinary court (concrete, incidental review) and specifically by the Constitutional Court (both through appeals against the decisions of the ordinary courts in concrete review procedure and through the abstract, erga omes review, which is an exclusive competence of the Constitutional Court).

The only restriction to this broadest scope of constitutional review regards the preliminary review, which can be required by the President of the Republic (or by the representatives of the State in the autonomous regions of Azores and Madeira) only against the approval of international conventions, the laws of parliament, the decree-laws of the Government and the legislative acts of the autonomous regions.

The other types of constitutional review apply to any kind of norms.

2. Review of unconstitutional omission of legislation (failure of the legislator to act when it is obliged to do so by the Constitution)

Yes (Const., Art. 283º). But this kind of review has only a declaratory nature and does not command the mandatory compliance of the lawmaking organs. The Constitutional Court can strike down actual legislation, but cannot impose the approval of missing legislation even though it proves to be necessary to implement the Constitution or a fundamental right established by the Constitution.

3. Decisions concerning the protection or constitutional rights (Verfassungsbeschwerde, amparo, appeal to a judicial body of ultimate appeal).

In the Portuguese constitutional system there is no special judicial action aimed specifically at the protection of fundamental rights.

4. Other areas of constitutional review (examples: unconstitutionality of political parties, referenda, conflicts between infra-state entities, conflicts between state bodies)

Yes. Besides the constitutional review of legislation, the Constitutional Court has competence to review the constitutionality (and legality) of referenda, prior to their call by the President of the Republic, as well as of political parties, and elections (Const. Art. 223.2.c., e., f., h). Indirectly, by the way of the constitutional review of legislation, the Constitutional Court may also decide the conflicts between state legislation and the legislation of the autonomous regions (the archipelagos of Azores and Madeira). It has no competence regarding conflicts between state bodies, unless these conflicts regard the competence to produce legislative acts or other normative instruments, because these can be appreciated by the Constitutional Court through the common procedure of constitutional review of legislation.

<u>B. The effects of constitutional review decisions:</u>

1. Concerning normative acts:

a. Are constitutional review decisions merely declaratory?

No, they have direct effect upon the legal rule that is deemed to be unconstitutional. In the case of abstract review the norm ceases automatically to produce any effect, and the other courts and the Administration should act in conformity. In the case of concrete review, the court “a quo” must comply with the Constitutional Court decision.

b. Is the norm that is declared contrary to the Constitution null and void, or annulled immediately? Can the body exercising constitutional review modify the norm?

The norm that is declared unconstitutional in an abstract review is considered to be null and void, since the beginning, “ ex tunc” (as a rule). The Constitutional Court cannot modify the norm. The Court is only a “negative legislator”; it does not participate in the active lawmaking decision.

c. Must the decisions be implemented (i.e. by repealing the norm) by another organ?

No, the decision of the Constitutional Court produces its effect directly and automatically (nullification effect). The only requirement is the publication of the decision in the official journal. There is no need of additional intervention by the lawmaking body or by any other body.

d. Can the effects of annulment be postponed?

According to the prevailing opinion on the interpretation of art. 193 of the Constitution, which establishes the effects of the unconstitutionality decisions of the Constitutional Court, the answer is no. These decisions have "ex tunc" or retroactive effects (with the exception of the cases protected by the "res judicata" principle). Nevertheless, in certain situations, the Court can safeguard the effects that were produced by the norm until the decision of the Court ("ex nunc" effects), but not any effects produced after the declaration of unconstitutionality.

e. Do the effects of the decisions go beyond the individual case, where incidental concrete review of norms is concerned? What is the position regarding similar cases which have already been the subject of a final decision?

As a rule, the decisions taken in the incidental, concrete review have effects only upon the case where the constitutionality issue was raised. Similar cases, which have already been the subject of a final decision, are protected by the res judicata principle. And if afterwards similar cases arise before the Constitutional Court, this is not bound to take the same decision, though it usually does so.

Still, when the same norm has been considered to be unconstitutional in three different concrete cases, the Constitutional Court can refer that norm to an abstract review procedure and declare ii unconstitutional with erga omnes effects.

f. Can the body exercising constitutional review order another authority to act? Within a fixed period of time?

No, the Constitutional Court has only "negative" powers (the power to annul legislation, not to give orders to the lawmaker or to the Administration). Of course both the public powers and private persons must comply with the decisions of the Constitutional Court, but it is not competent to give orders to anyone.

2. Concerning the protection of constitutional rights:
If the body exercising constitutional review quashes a decision by a public authority (administration, court, etc.) on the grounds that it is unconstitutional:
a. Is it sent back to the original authority for a new ruling? or
b. Does the body exercising constitutional review decide on the matter?

In the Portuguese constitutional system constitutional review is only about norms, not administrative decisions or court decision in themselves. These can only be reviewed in as much as they apply a norm deemed to be unconstitutional or refuse to apply a norm on grounds that it is unconstitutional.

In the case of concrete, incidental, review, when the Constitutional Court is called to review a decision by another court (criminal, labour case, or whatever), the Constitutional Court is only competent to address the constitutional issue that may be involved in the case, not the

case in itself. Therefore, when the Constitutional Court decides the constitutional issue differently from the "a quo" court, the former cannot decide on merit of the matter of the case. The case is sent back to the original court for a new ruling, taking into consideration the decision of the Constitutional Court on the constitutional issue that had been brought before it.

3. Furthermore, do constitutional review decisions have?

a. Binding force (binding the body exercising constitutional review itself)?

Yes, in the abstract review procedure the unconstitutionality decisions of the Constitutional Court do have binding force to all authorities and courts. And the Constitutional Court itself cannot address the issue again. It is also bound by its own unconstitutionality decision.

b. res iudicata force (interpartes; erga omnes) ?

They have res iudicata erga omnes effects in the case of decisions taken in abstract review, not in the case of incidental, concrete, review, where the effects are only interpartes and limited to that particular case.

c. force of law (see for instance § 31.2 of the German law on the constitutional court)?

Yes, to the extent that they annul directly the law rules considered being unconstitutional, without need of legislative action to repeal that norm, they have "negative" force of law.

d. are they published in an official journal?

Yes.

e. What happens if a decision declares that a norm will become unconstitutional if it is not modified within a certain period?

There is no constitutional provision for decisions like that in Portugal. The Constitutional Court must decide whether a certain norm is, or is not, unconstitutional at the time it is being reviewed. But sometimes the publication of the Constitutional Court decision is delayed in order to give time for a previous modification of the related legislation.

Do the answers to the previous questions depend on the type of constitutional review (for example: concrete/abstract control)? Do special rules apply in the cases mentioned in point I.A.4 above?

Yes, as stated above, the effects of the unconstitutionality decisions are very different when it comes to concrete, incidental, review.

The cases mentioned in point I.A.4 do have special procedural and substantial rules, the main being the fact that the Constitutional Court is required to check not only the

constitutionality of norms, but also the constitutionality and legality of individual acts (call of referenda, creation and acts of political parties, etc.).

The reply to questions II and III will make a distinction, if necessary, according to the type/subject of constitutional review as well as to the effects of decisions (see question I).

II. What means are available to ensure the execution of constitutional review decisions?

The response to this question should take account of the legislation concerning the execution of constitutional review decisions, either by other courts or by executive bodies. In particular:

1. Is there a norm indicating which authority has to execute the constitutional review decisions?

No. In the case of preliminary review the addressee of the decision is the lawmaking organ, which is bound to change the draft legislation, or to give it up, according to the unconstitutionality decision of the Constitutional Court. In the case of abstract, erga omnes, review, unconstitutionality decisions apply automatically to everyone who may be concerned (authorities, courts, private persons). In the case of incidental, concrete, review the decisions are mandatory for the court "a quo" and for the parties in the case (case bound effects).

2. If not, is there a norm providing that the body exercising constitutional review or any other authority has the power to designate the body which will execute the decisions of the court?

How does the system work in practice?

Not applicable. See answer to the previous question.

III. What are the consequences if constitutional review decisions are not executed or are not executed within a reasonable time?

In the case of preliminary review, if parliament does not comply with the Constitutional Court decision, the President of the Republic should refuse to promulgate the law. However, if he does, and the law comes into force, it can be submitted again to constitutional review, either under abstract procedure or under concrete, incidental procedure.

According to the Portuguese constitutional review system the main addressees of the unconstitutionality decisions of the Constitutional Court are the other courts. They are asked to comply directly with those decisions, when they are taken within the framework of the concrete review of legislation, and are required to strike down any action that is based upon a rule that was declared to be unconstitutional within the framework of an abstract review procedure.
If the lawmaking organs of the State insist in approving new legislation that goes against a previous decision by the Constitutional Court (for example reintroducing legislation with the same content of legislation that was considered to be unconstitutional), it is up to the interested parties to bring the new legislation again to constitutional review. The same occurs when any other public authorities take decision based upon legislation that was considered unconstitutional.

In any case the interested parties may be entitled to compensation for damages that might have been caused by the non-execution of (or by the delay to execute) a Constitutional Court decision.

IV. Cases where decisions are not execute

A. Have there been any recent cases where a constitutional review decision has not been executed in your country?

Yes, there are on the record a few, very rare, cases of constitutional review decisions where the Administration or the courts did not comply, at least entirely, with the decision of the Constitutional Court.

Nevertheless, in these cases the interested parties appealed again to the Constitutional Court, which confirmed the previous decision.

We can mention two cases brought to the Constitutional Court: (i) Decision nº 257/1989 (application by a court of a norm previously declared to be unconstitutional erga omnes by the Constitutional Court), and (ii) Decision 184/96 (where the Supreme Court considered itself not to be bound by a decision of the Constitutional Court).

B. If so, is it possible to identify the reasons why the decision was not executed (eg. political or financial reasons, lack of clarity in the decision, inadequate rules on the execution of the decisions)?

The main reasons for the non-compliance may be of different kinds: (i) ignorance of the decision of the Constitutional Court; (ii) lack of clarity of the unconstitutionality decision, which leaves reasonable doubts as to its scope; (iii) unwillingness of the ordinary courts to acknowledge the authority of the Constitutional Court to review their decisions.

V. Cases of unsatisfactory execution

In certain cases, even where a constitutional review decision has been executed, the situation remains unsatisfactory because an unconstitutional norm continues to be applied.

A. Has such a situation arisen recently in your country?

No.

B. What are the causes of such a situation? Do they stem from the effects of the constitutional review decision (absence of erga omnes effect, declaratory nature of the decision), or from other causes, such as those mentioned in IV.B above?

Not applicable.

Concerning points **IV and V**, did specific problems arise when decisions of ordinary higher courts were declared contrary to the Constitution?

In the Portuguese system of constitutional review there is no ground for the direct review of judicial decisions in themselves. The Constitutional Court, within the framework of the concrete review procedure, can review the decisions of other courts only when and to the extent that they applied some unconstitutional norm or refused to apply any norm on grounds of unconstitutionality.

When the Constitutional Court, on appeal by the concerned parties, decides contrary to the decisions of the case court, this one is required to decide again the case, according to the ruling of the Constitutional Court on the constitutional issue. As it was stated above, only in a few cases did the courts “a quo” refuse to implement the Constitutional Court decisions or tried to dodge them.

SLOVAKIA / SLOVAQUIE

Questionnaire on the Execution of Constitutional Review Decisions
(Slovak Republic)

I. General questions on constitutional review

A. The type of constitutional review and its subject:

1. According to Article 125 of the Constitution of the Slovak Republic (hereinafter as Constitution) the Constitutional Court of Slovak Republic (hereinafter as Constitutional Court) is entitled to review the constitutionality of a number of normative acts-statutes, regulations passsed by the Government, Ministries or other central administration bodies, generally binding legal regulations passed by local self-governing bodies and local government authorities (letters a) – d) of Article 125). All kinds of normative acts are in principle subjected to the control of their constitutionality before Constitutional Court on the basis of applications lodged by a duly qualified legitime petitioners. The jurisdiction of the Constitutional Court includes both abstract and concrete (incidental) repressive review of the constitutionality of enacted normative acts.

2. There is no specific competence of Constitutional Court to review the unconstitutionality of omission caused by slovak legislator. The effects of such omission may be however taken into consideration (evaluated) within one of the proceeding concerning the individual protection of fundamental rights and freedoms before Constitutional Court (Petition of natural or legal person lodged in accordance with Article 130 para. 3 of the Constitution).

3. There are two kinds of proceedings (and consequently two different kinds of decisions) dealing with the alleged violations of fundamental rights or freedoms by the individual natural and/or legal persons before Constitutional Court. One of them is „traditional“ constitutional complaint. In such a case complainant objects alleged violation of his/her fundamental right or freedom by the final decision of central government body, local government body or self-governing body (unless the protection of these rights falls under the jurisdiction of ordinary court - Article 127 of the Constitution). Second one is proceeding on the petition of individual petitioner (natural or legal person) whose fundamental rights or freedoms are claimed to have been violated by whatever measure taken by any public authority (different from its final decision - Article 130 para. 3 of the Constitution).

4. According to Constitution the Constitutional Court is entitled to decide in a number of other proceedings namely to review challenges against decisions confirming or abrogating the seat of a deputy of the National Council of the Slovak Republic (Article 129 para. 1 of the Constitution), to resolve the conflicts of competences among central government bodies (unless they are to be decided by another governmental authority - Article 126 of the Constitution), to review the legality and constitutionality of the presidential election, parliamentary election as well as election to local self governing bodies (Article 129 para. 2 of the Constitution), to decide on the complaints against the results of popular referendum (Article 129 para. 3 of the Constitution), to review the legality and constitutionality of the decision dissolving a political

party and/or movement or suspending political activities thereof (Article 129 para. 4 of the Constitution), to decide on a treason allegedly committed by the President of the Slovak Republic on the basis of accusation of National Council of Slovak Republic (Article 129 para. 5 of the Constitution).

B. The effects of constitutional review decisions:

1. Concerning normative acts:

Provided that Constitutional Court has found that challenged normative act (its part or provision) is not in conformity with the Constitution its finding shall be promulgated in Collection of Laws (Journal Official) of the Slovak Republic by the manner „defined by law" (Article 132 para. 2 of the Constitution) with *erga omnes effect.* Such effects have all these findings of Constitutional Court regardless of the fact that have been taken in proceedings of abstract and/or concrete (incidental) review of their constitutionality. According to Article 132 of the Constitution since the day of the finding´s publication in Collection of Law unconstitutional normative act, its part or provision becomes ineffective (inapplicable) *ex constitutione*. The legislators enacting such legislation are obliged to bring it in conformity with the Constitution not later than six months following their promulgation in Collection of Laws. Otherwise these normative acts shall loose their legal validity (shall be qualified as null and void). The nullity of unconstitutional acts cannot however negate that they were in force for a certain time and that legal affairs have been regulated on their basis. Such express constitutional regulation at the same time prevents any specific action either „affected" legislator or Constitutional Court in order to modify or even postpone these legal effects of the findings of Constitutional Court. Article 132 of the Constitution confirms general obligation of all legislative bodies of the Slovak Republic to take relevant legislative measures in order to comply with requirements of the finding of Constitutional Court declaring the unconstitutionality of „their" normative act, its part or provision in the fixed six months time limit. Failure to do so for a while raises the question of constitutional responsibility of legislative body for breaching this constitutional obligation. Provided that such legislative body fails to take appropriate measure of such kind Constitutional Court may neither replace its „positive" legislative activity nor to order to act it in such a sense. There is the traditional approach according which constitutional review has no positive power in relation to the legislator and the Constitutional Court may to be only a negative legislator. The Constitutional Court therefore cannot compel legislator to legislate in any other particular way to meet the requirements of its finding.

2. Concerning the protection of constitutional rights:

As has already been noted above (**I**.3) two separate proceedings dealing with the protection of fundamental rights and freedoms can by initiated by the natural and/or legal persons before Constitutional Court. Legal effects of the finding (judgment) taken within the constitutional complaint proceeding are regulated by Article 57 of the Act on the organization of the Constitutional Court of the Slovak Republic, on the proceedings before the Constitutional Court and on the status of its judges (hereinafter as Act on Constitutional Court - No. 38/1993 Collection on Laws). Provided that Constitutional Court found violation of fundamental right or freedom of complainant (by the final decision of state or self-governing body) Constitutional Court *shall repeal* this challenged decision (para 1. Article 57) and relevant state or self-governing body is subsequently obliged to re-examine the case of complainant and to take a new decision. In this renewed proceeding the „defendant" shall be bound by a legal opinion of the Constitutional Court (para. 2 of Article 57). Binding effect of this finding of Constitutional Court is naturally *inter partes.* The failure to comply with this legal provision may by qualified as an

unlawful activity of the concerned organs whereas these did not respect concrete legal obligation issuing for them from the Act on Constitutional Court.Similarily as with respect of above mentioned findings of Constitutional Court (declaring unconstitutionality of normative acts) Constitutional Court itself has no competence to execute its finding taken within the proceeding on the constitutional complaint as well. The finding taken by Constitutional Court in the proceeding of the petition of natural and/or legal person has however only declaratory nature declaring that by the concrete act or omission of defendant (public authority) one of the fundamental right or freedom of the petitioner has been violated. Any concrete obligation cannot be derived from the Act on the Constitutional Court for the defendant with respect of such finding of Constitutional Court.

3. Furthermore, do constitutional review decisions have:

Generally speaking findings of the Constitutional Court declaring the unconstitutionality of various normative acts, their parts or provisions (Article 125 of the Constitution) have *erga omnes* and *ex nunc* effect connected with the date of their official promulgation in the Collection of Laws. Express constitutional obligation for concerned legislative bodies may be identified to comply with the requirement of such findings in fixed six month time limit (Article 132 of the Constitution). Findings of Constitutional Court taken within the proceedings of individual protection of fundamental rights and freedoms (constitutional complaint, petition) have only *inter partes* effect. With respect of these findings only statutory obligations (issuing from the Act on the Constitutional Court) may be identified for concerned public authorities to comply with the requirements of such findings. There is however no statutory time limit to comply with these findings of Constitutional Court. Provided that both legislative or other body failed to comply with requirements of above mentioned findings relevant legal regulation (constitutional or statutory) does not however provide specific sanctions for their breaching.

II. What means are available to ensure the execution of constitutional review decisions?

1. In general one may say that the execution of the constitutional courts decisions is everywhere very complex issue depending from the particular kind of decision, from the kind of effects which the constitution (or statute) provides for that decision and from the authority bound to execute it. The need for prompt and correct execution of judicial decisions is particularly strong in the case of the constitutional courts because of their decisive role in the constitutional order of each country. In Slovak Republic cannot be identified norm indicating concrete organ (s) generally obliged to execute the decisions (findings) of the Constitutional Court. In principle each public authority („defendant") bound by the finding (judgment) is legally obliged carry out it according to its either constitutional or statutory obligation. Provided that such public authority fails to respect and to carry out decision of the Constitutional Court the need of its execution (enforcement) raises very urgently.

Unlikely of the system of ordinary courts (courts of general jurisdiction) having its own law enforcement procedures Constitutional Court has not such own procedure for the enforcement of its findings and the law enforcement procedure for the judgments of the ordinary courts may not be used for the need of constitutional justice. For the completeness it should be however pointed out that an exemption from this general rule can be registered. Within the proceeding on the treason of the president (Article 74 of the Act on Constitutional Court) Constitutional Court shall apply the rules of Penal Procedure Act (Act No. 141/1961 Collection of Law in the wording of later amendments) including law enforcement procedure.

In such a case the judgment of the Constitutional Court shall by executed by the same organs which are competent to enforce the judgment of the ordinary courts in penal matters and by the same manner.

As has already been noted above (and with respect of any other decision of the Constitutional Court) no special procedure is available for their enforcement in Slovakia. Provided that the obligations (more or less general) of the affected organs to respect and carry out the decision of the Constitutional Court are regulated by the statute (Act on the Constitutional Court) the failure to do so may be qualified as their *unlawful activity*. In general there is a system of procuracy (public prosecutors) vested with power to guarantee the legality of the conduct of state and other bodies. Provided that legal conditions of the practical application of the Act No. 314/1996 Coll. on the procuracy have been met public prosecutors may use its own legal means towards the concerned organs in order to fulfil their statutory obligation with respect of the decision (finding) of the Constitutional Court.

The procuracy (as an guardien of legality) has however no real competence to control the observance of the constitutional obligation of the organs with respect to the findings of Constitutional Court declaring the unconstitutionality of normative acts, their parts or provisions.

2. Constitutional Court is not empowered to designate the body which should execute its own decisions.

III. What are the consequences if constitutional review decisions are not executed or are not executed within a reasonable time?

Depending on the kind of decision one can differentiate between the „ex constitutione" legal effects of the findings declaring the unconstitutionality of normative acts and the „positive" obligations of concerned organs to observe and carry out the decision of constitutional court. Provided that relevant organs fail to comply with such constitutional and/or statutory obligation **the responsibility** for its unlawful (unconstitutional) omission shall appear. The role of procuracy in this respect has been noted above (**II.**1).

IV. Cases where decisions are not executed

A. – B.

From time to time it is possible to register the cases of con compliance with the findings of the Constitutional Court declaring the unconstitutionality of various normative acts in the prescribed six months time limit (Article 132 of the Constitution). Generaly speking it is not easy to identify the reasons which led the legislators not to carry out concrete finding of the Constitutional Court in time. The Constitutional Court itself has no capacity to collect and analyze the reasons of such omissions. So far the Constitutional Court has not received any complaint objecting the lack of clarity of one of its decisions. These general remarks may be used with respect of the other decisions of the Constitutional Court as well. It should be however pointed out that the "starting point" of the period of no-compliance with last mentioned decisions of the Constitutional Court is more difficult whereas the statutory obligations to carry out such decision are not followed by the exact time limit for doing so.

V. Cases of unsatisfactory execution

A. – B.

So far has not been registered situation of the continuing application of the norm declared by constitutional court as unconstitutional.

Košice November 15, 2000

Ján Klučka
member of the Venice Commission

SLOVENIA / SLOVENIE

QUESTIONNAIRE ON THE EXECUTION OF CONSTITUTIONAL REVIEW DECISIONS IN SLOVENIA

Ljubljana, 25 September 2000

I. General Questions on Constitutional Review

A The Type of Constitutional Review and its Subject:

1. Constitutional Review of Normative Acts

a. Preliminary (Preventative) Review

In the process of ratifying a treaty, the Constitutional Court issues an opinion on the conformity of such treaty with the Constitution (Para. 2 of Article 160 of the Constitution, Para. 2 of Article 21 and Article 70 of the Constitutional Court Act); the National Assembly is bound by such opinion.

b. Abstract or Principal Review (Direct Claim of Unconstitutionality) (Para. 1 of Article 160 of the Constitution,
Articles 22 through 49 of the Constitutional Court Act).

The Constitutional Court decides:

- whether statutes conform with the Constitution;
- whether statutes and other regulations conform with ratified treaties and with the universal principles of international law;
- whether regulations conform with the Constitution and with statute;
- whether local government regulations conform with the Constitution and statute;
- whether general acts issued for the exercising of public authority conform with the Constitution and statute as well as with regulations.

In these matters the Constitutional Court also decides on the constitutionality and legality of the proceedings that represent the basis of these acts (Para. 3 of Article 21 of the Constitutional Court Act).

In deciding on the constitutionality and legality of a regulation or a general act issued for the exercise of public authority, the Constitutional Court is entitled to assess the constitutionality or legality of other provisions of the respective (or other) regulations or general acts issued for the exercise of public authority whose constitutionality or legality have not been submitted for assessment, if such proposals are mutually related, or if this is absolutely necessary to resolve the case (Article 30 of the Constitutional Court Act). If the Constitutional Court, while deciding on a constitutional complaint, establishes that a given abolished act was founded on an unconstitutional regulation or general act issued for the exercise of public authority, such act may be set aside (ex tunc) or abrogated (ex nunc) (Para. 2 of Article 161 of the Constitution, Para. 2 of Article 59 of the Constitutional Court Act). The Constitutional Court shall issue a decision stating which authority is competent and may also abrogate, retroactively or prospectively, the general act, or the general act for the exercise of public powers whose unconstitutionality or illegality has been established (Para. 4 of Article 61 of the Constitutional Court Act).

c. Concrete or Incidental Review of Norms

The Court provides concrete review of provisions when requested by the ordinary Courts, the Public Prosecutor, the Bank of Slovenia and the Auditor General, if a question relating to constitutionality or legality arises during the proceedings they are conducting or if such is submitted by the Ombudsman and refers to individual cases discussed (Para. 1 of Article 156 of the Constitution, subsections 5 and 6 Para. 1 of Article 23 of the Constitutional Court Act).

d. Normative Acts that are not Subject to Constitutional Review

The Constitutional Court may only review regulations. Thus, the Constitutional Court has no jurisdiction to review an order issued by the executive council of a municipal assembly on, for example,adopting a study of locations, which is in terms of its contents or legal character not a regulation, or which is not a regulation or general act due to its contents or formal status: it does not contain abstract legal rules, is not considered a legal source, and has not been published. Possible objections concerning the conformity of such a study adopted by this order with a municipal ordinance on land use planning conditions may only be brought within appropriate administrative or judicial proceedings. Furthermore, the Constitutional Court has no jurisdiction to review an act which does not have the character of a general legal norm, neither does it have jurisdiction to review an individual act. Additionally, the Constitutional Court has no jurisdiction to review a business act and no jurisdiction to review employers' acts. The Constitutional Court is not empowered to review the mutual conformity of two statutes (or the mutual conformity of executive regulations). The Constitutional Court lacks jurisdiction to review the mutual conformity of provisions of the same statute, or to review the internal consistency of individual statutory provisions. The Constitutional Court is also not vested with the authority to adjudicate on regulations which are not part of the legal system of the Republic of Slovenia. The Constitutional Court has no jurisdiction to review the Constitution or regulations with constitutional character or statutory provisions which only concertize norms with constitutional character. Moreover, the Constitutional Court has no jurisdiction to review collective bargaining agreements or acts having the character of a contract.

2. Review of the Unconstitutional Omission of Legislation

If the Constitutional Court determines that a statute, regulation or general act issued by statutory authorities is unconstitutional or illegal because a certain matter which it should have regulated was not regulated or is regulated in a manner which makes it impossible to be abrogated either retroactively or prospectively, a declaratory decision shall be adopted on this matter (Para. 1 of Article 48 of the Constitutional Court Act). The legislature or body which issued such unconstitutional or illegal general act (or general act issued by statutory authorities) must abolish the ascertained unconstitutionality or illegality within the period determined by the Constitutional Court (Para. 2 of the Constitutional Court Act).

3. Decisions Concerning the Protection of Constitutional Rights

The Constitutional Court is empowered to decide upon matters relating to constitutional complaints of breaches of the Constitution involving individual acts infringing human rights and fundamental freedoms (subsection 6 of Para. 1 of Article 160 of the Constitution, Articles 50 through 60 of the Constitutional Court Act).

4. Other Areas of Constitutional Review

Para. 1 of Article 160 of the Constitution and Para. 1 of Article 21 of the Constitutional Court Act further provide for the Court's jurisdiction with respect to:

- Disputes in relation to powers between the National Assembly, the President of the Republic and the Government, the State and local community bodies and among such local government bodies, and between the courts and other State bodies (subsections 7 trough 9 of Para. 1 of Article 160 of the Constitution, Articles 61 and 62 of the Constitutional Court Act);

- The unconstitutionality of the acts and activities of political parties (subsection 10 of Para. 1 of Article 160 of the Constitution, Article 68 of the Constitutional Court Act);

- Charges against the President of the Republic (Article 109 of the Constitution, Articles 63 through 67 of the Constitutional Court Act);

- Charges against the Prime Minister or against any Government Minister (Article 119 of the Constitution, Articles 63 through 67 of the Constitutional Court Act);

- Appeals against decisions of the National Assembly on confirming the term of office of the deputies (Para. 3 of Article 82 of the Constitution, Article 69 of the Constitutional Court Act; Para. 1 of Article 8 of the Deputies Act, Official Gazette RS, No. 48/92);

- Appeals against decisions of the National Council on confirming the term of office of the members of the National Council (Para. 3 of Article 50 of the National Council Act, Official Gazette RS, No. 44/92);

- Under Article 16 of the Referendum and Peoples Initiative Act (Official Gazette RS, Nos. 15/94 and 13/95) the Court's jurisdiction includes adjudication with respect to a request by the National Assembly concerning the calling of a referendum;

- Under Article 91 of the Local Self-Government Act (Official Gazette RS, Nos. 72/93, 6/94,

45/94, 57/94, 14/95, 20/95, 63/05, 73/95, 4/96) the Constitutional Court shall decide on complaints by local self-government authorities;

- Other matters with which it is charged by the Constitution or a statute (subsection 11 of Para. 1 of Article 160 of the Constitution, Para. 1 of Article 21 of the Constitutional Court Act).

B. The effects of constitutional review decisions :

1. Concerning normative acts:

a. Are Constitutional Review Decisions Merely Declaratory?

No. The list of possible Court decisions, with the general type of decision, is as follows:

- dismissal of proceedings due to the withdrawal of a petition during preliminary proceedings, resolution (Article 6 of the Constitutional Court Act);

- interpretative decision (Article 21 of the Constitutional Court Act);

- determination that a disputed regulation or general act or their provisions are not in conformity with the Constitution (or statute), decision (Article 21 of the Constitutional Court Act);

- rejection of a request, due to a non-entitled proponent, resolution (Para. 2 of Article 23 of the Constitutional Court Act);

- rejection of a petition, due to a lack of jurisdiction to review an act which is not a regulation/general act, resolution (Article 25 of the Constitutional Court Act);

- rejection of a petition, due to a lack of legal interest, resolution (Article 25 of the Constitutional Court Act);

- rejection of a request and/or petition, due to a lack of fulfilled procedural prerequisite, resolution (Article 25 of the Constitutional Court Act);

- refusal of a petition as unfounded, resolution (Para. 2 of Article 26 of the Constitutional Court Act);

- refusal of a petition for a repeated review of the same case, due to a to lack of new reasons for a repeated review, resolution (Para. 2 of Article 26 of the Constitutional Court Act);

- dismissal of proceedings due to an incomplete application, resolution (Para. 3 of Article 28 of the Constitutional Court Act);

- refusal of a request for the exclusion of a constitutional judge, resolution (Article 33 of the Constitutional Court Act);

- temporary order (a stay of the implementation of a regulation and/or general act), resolution (Article 39 of the Constitutional Court Act);

- prohibition of the application of an unpublished regulation and/or general act, decision (Article 40 of the Constitutional Court Act);

- determination of the mode of execution of a Constitutional Court decision, decision (Para. 2 of Article 40 of the Constitutional Court Act);

- abrogation of a statute as a whole, with immediate effect, decision (Articles 43 and 44 of the Constitutional Court Act);

- abrogation of a statute as a whole, with a suspensive time-limit, decision (Articles 43 and 44 of the Constitutional Court Act);

- partial abrogation of a statute, with immediate effect, decision (Articles 43 and 44 of the Constitutional Court Act);

- partial abrogation of a statute, with a suspensive time-limit, decision (Articles 43 and 44 of the Constitutional Court Act);

- annulment of other regulations or general acts, decision (Article 45 of the Constitutional Court Act); - abrogation of other regulations or general acts, decision (Article 45 of the Constitutional Court Act);

- declaratory decision, due to the cessation of the validity of a disputed norm during proceedings (Article 47 of the Constitutional Court Act);

- rejection of petition due to the cessation of the validity of a disputed regulation or general act during the proceedings (Article 47 in connection with Article 6 of the Constitutional Court Act);

- declaratory decision, concerning the time-limit determined for the legislature for a reconciliation (Article 48 of the Constitutional Court Act);

- rejection of a constitutional complaint, due to the disputed act not being an individual act, resolution (Article 50 of the Constitutional Court Act);

- rejection of a constitutional complaint, due the complaint not having been lodged by an entitled person, resolution (Article 50 of the Constitutional Court Act);

- rejection of a constitutional complaint, due to the previous non-exhaustion of all legal remedies, resolution (Para. 1 of Article 51 of the Constitutional Court Act);

- exceptional deciding on a constitutional complaint before the exhaustion of extraordinary legal remedies, resolution (Para. 2 of Article 51 of the Constitutional Court Act);

- rejection due to exceeding the time limit for lodging a constitutional complaint,, resolution (Para. 1 of Article 52 of the Constitutional Court Act);

- exceptional deciding on a constitutional complaint lodged after the expiry of a statutorial time-limit, resolution (Para. 3 of Article 52 of the Constitutional Court Act);

- rejection of a constitutional complaint due an incomplete application, resolution (Para. 2 of

Article 54 of the Constitutional Court Act);

- non-acceptance of a constitutional complaint, resolution (Para. 2 of Article 55 of the Constitutional Court Act);

- temporary order (the staying of the implementation of an individual act), constitutional complaint, resolution (Article 58 of the Constitutional Court Act);

- refusal of a constitutional complaint as unfounded, decision (Para. 1 of Article 59 of the Constitutional Court Act);

- constitutional complaint, annulment of an individual act and the return of the act to the empowered body, decision (Para. 1 of Article 59 of the Constitutional Court Act);

- constitutional complaint, abrogation of an individual act and the return of the act to the empowered body, decision (Para. 1 of Article 59 of the Constitutional Court Act);

- constitutional complaint, annulment of a regulation or general act, decision; abrogation of a regulation or general act, decision; declaratory decision (Para. 2 of Article 161 of the Constitution; Para. 2 of Article 59 of the Constitutional Court Act);

- constitutional complaint, final decision on a contested human right or freedom, decision (Para. 1 of Article 60 of the Constitutional Court Act);

- execution of a Constitutional Court decision on a contested human right or freedom, decision (Para. 2 of Article 60 of the Constitutional Court Act);

- determination of the empowered body concerning a given matter, decision (Para. 4 of Article 61 of the Constitutional Court Act);

- temporary prohibition of the President from performing the office of president, decision (Para. 3 of Article 64 of the Constitutional Court Act);

- finding a proposal for impeachment to be unfounded, acquittal, decision (Para. 1 of Article 65 of the Constitutional Court Act);

- decision on the grounds for impeachment /decision on the cessation of office, decision (Para 2. of the Article 65 of the Constitutional Court Act);

- refusal of a petition and/or request, resolution (Article 68 of the Constitutional Court Act);

- annulment of an unconstitutional political party act, decision (Para. 3 of Article 68 of the Constitutional Court Act);

- prohibition of a political party activity, decision (Para. 3 of Article 68 of the Constitutional Court Act);

- ordering the deletion of a political party from the register of parties, decision (Para. 4 of Article 68 of the Constitutional Court Act);

- annulment of a decision by the National Assembly and deciding on a deputy's election,

decision (Para 3. Of Article 69 of the Constitutional Court Act; Para. 1 of Article 8 of the Deputies Act, Official Gazette RS, No. 48/92);

- annulment of a decision by the National Council and deciding on a National Council member's election, decision (Para 3. of Article 50 of the National Council Act, Official Gazette RS, No. 44/92);

- obligatory opinion on the conformity of an international treaty with the Constitution, opinion (Para. 2 of Article 160 of the Constitution; Article 70 of the Constitutional Court Act).

- declaration of the (un)constitutionality of a request concerning the calling of a referendum, decision (Article 16 of the Referendum and Peoples Initiative Act, Official Gazette RS, Nos. 15/94 and 13/95).

In this period of transition the Legislature is not always able to follow all legal developments nor to impose standards for all shades of the legal system and its institutions. This results in the so-called interpretative decisions taken by the Court or the appellative decisions or certain declaratory decisions that include specific instructions by the Constitutional Court to the Legislature on how to settle a certain question, or a specific issue (Article 48 of the Constitutional Court Act). However, in compliance with the Principle of Judicial Self-Restraint, a clear limit has been imposed on the Slovenian Constitutional Court due to the fact that the Court has actively been creating the legal rule both negatively (e.g. by abrogation) and positively (e.g. by appelative, interpretative and the declarative decisions), a function theoretically reserved for the Legislature. On the other hand there arises the question whether the Constitutional Court, in deciding on the existence or non-existence of a specific provision, actually creates the law, because it carries out a review of legislative activity. In any case, the Legislature cannot avoid the existence of constitutional case-law in its activity.

b. Is the norm which is declared contrary to the Constitution null and void, or annulled immediately? Can the body exercising constitutional review modify the norm?

The Constitutional Court may completely or partly abrogate a statute which does not conform with the Constitution. Such decision shall come into effect one day after the publication of the decision or on the expiry of the period determined by the Constitutional Court (Article 43 of the Constitutional Court Act).

Unconstitutional or illegal regulations or general acts issued by statutory authorities shall be abrogated by the Constitutional Court ab initio or prospectively (Para. 1 of Article 45 of the Constitutional Court Act). An unconstitutional or illegal regulation or general act issued by statutory authorities shall be abrogated ab initio by the Constitutional Court if it determines that harmful consequences arising from this unconstitutionality or illegality have to be eliminated. Such abrogation shall be retroactive (Para. 2 of Article 45 of the Constitutional Court Act). In other cases, unconstitutional or illegal regulations or general acts issued by statutory authorities shall be abrogated by the Constitutional Court prospectively. Such abrogation shall take effect on the day after the publication of the decision of the Constitutional Court on the abrogation, or after the lapse of the time-limit determined by the Constitutional Court (Para. 3 of Article 45 of the Constitutional Court Act).

If, during the proceedings, a statute, regulation or general act issued by statutory authorities

was altered to conform with the Constitution and statute or it ceased to be in force, but the consequences of unconstitutionality or illegality were not eliminated, the Constitutional Court may declare that such act was not in conformity with the Constitution and statute. In the case of regulations or general acts issued by statutory authorities, the Constitutional Court shall decide whether its ruling shall have retroactive of prospective effect (Article 47 of the Constitutional Court Act).

If the Constitutional Court determines that a statute, regulation or general act issued by statutory authorities was unconstitutional or illegal because a certain matter which it should have regulated was not regulated or is regulated in a manner which makes it impossible to be abrogated either retroactively or prospectively, a declaratory decision shall be adopted on this (Para. 1 of Article 48 of the Constitutional Court Act). The legislature or body which issued such unconstitutional or illegal general act (or general act issued by statutory authorities) must abolish the ascertained unconstitutionality or illegality within the period set by the Constitutional Court (Para. 2 of Article 48 of the Constitutional Court Act).

c. Must the decisions be implemented (i.e. by repealing the norm) by another organ?

Decisions of the Constitutional Court are legally binding (Para. 3 of Article 1 of the Constitutional Court Act).

The Constitutional Court shall, if necessary, determine which body must implement the decision and in what manner. The decision must be reasoned (Para. 2 of Article 2 of the Constitutional Court Act).

If the Constitutional Court abrogates an individual act with retroactive effect, it may also decide on a disputed right or freedom if such proceedings are necessary in order to eliminate the consequences that have already occurred on the basis of the retroactively abrogated individual act, or if such is the nature of the constitutional right or freedom, and if a decision can be reached on the basis of information in the record (Para. 1 of Article 60 of the Constitutional Court Act). The decision mentioned in the preceding Paragraph shall be implemented by the body competent for the implementation of the individual act which was retroactively abrogated by the Constitutional Court and replaced by a decision of the same. If there is no such competent body according to the current regulations, the Constitutional Court shall appoint one (Para. 2 of Article 60 of the Constitutional Court Act).

d. Can the effects of annulment be postponed?

Yes. The Constitutional Court may completely or partly abrogate a statute which does not conform with the Constitution. Such decision shall come into effect one day after the publication of the decision or on the expiry of the period determined by the Constitutional Court (Article 43 of the Constitutional Court Act).

Unconstitutional or illegal regulations or general acts issued by statutory authorities shall be abrogated by the Constitutional Court ab initio or prospectively (Para. 1 of Article 45 of the Constitutional Court Act). An unconstitutional or illegal regulation or general act issued by statutory authorities shall be abrogated ab initio by the Constitutional Court if it determines that harmful consequences arising from this unconstitutionality or illegality have to be eliminated. Such abrogation shall be retroactive (Para. 2 of Article 45 of the Constitutional Court Act). In other cases, unconstitutional or illegal regulations or general acts issued by statutory authorities shall be abrogated by the Constitutional Court prospectively. Such

abrogation shall take effect on the day after the publication of the decision of the Constitutional Court on the abrogation, or after the lapse of the time-limit determined by the Constitutional Court (Para. 3 of Article 45 of the Constitutional Court Act).

e. Do the effects of the decisions go beyond the individual case, where incidental concrete review of norms is concerned? What is the position regarding similar cases which have already been the subject of a final decision?

Under the most commonly accepted principle of constitutional review systems, the decisions of the Constitutional Court concerning abstract review are binding and produce effects erga omnes. Exceptions to this rule are constitutional complaints and jurisdictional disputes where decisions have effect only inter partes, but even here effects are felt erga omnes, when the Constitutional Court acts concerning abstract review or ex officio.

Any person who suffers detrimental consequences due to the existence of a regulation or a general act issued by statutory authoritie which was abrogated with retroactive effect, shall be entitled to request the elimination of such consequences. If such consequences were incurred as a result of an individual act adopted on the basis of a retroactively abrogated regulation or general act issued by statutory authorities, the injured party shall have the right to submit a request to the competent authority which issued the decision at the first instance to change or retroactively abrogate such individual act (Para. 1 of Article 46 of the Constitutional Court Act).

A change to or retroactive abrogation of an individual act under the preceding Paragraph may be requested by an injured party within three months from the day of the publication of the Constitutional Court decision, provided that no more than one year has passed from the service of the individual act to the submitting of the popular complaint or request (Para. 2 of Article 46 of the Constitutional Court Act).

If the consequences arose directly as a result of a general act or a general act issued by statutory authorities that was retroactively abrogated by the Constitutional Court, the elimination of consequences shall be required from the authority which issued such general act or such general act issued by statutory authorities. The claim must be submitted by the entitled person within the periods mentioned in the foregoing paragraph of this Article (Para. of Article 46 of the Constitutional Court Act).

If the consequences referred to in the preceding Paragraphs of this Article cannot be eliminated, the injured party may claim damages in a court (Para. 4 of Article 46 of the Constitutional Court Act).

f. Can the body exercising constitutional review order another authority to act? Within a fixed period of time?

Yes.

The Constitutional Court shall, if necessary, determine which body must implement the decision and in what manner. The decision must be reasoned (Para. 2 of Article 2 of the Constitutional Court Act).

If the Constitutional Court abrogates an individual act with retroactive effect, it may also decide on a disputed right or freedom if such proceedings are necessary in order to eliminate

the consequences that have already occurred on the basis of the retroactively abrogated individual act, or if such is the nature of the constitutional right or freedom, and if a decision can be reached on the basis of information in the record (Para. 1 of Article 60 of the Constitutional Court Act). The decision mentioned in the preceding paragraph shall be implemented by the body competent for the implementation of the individual act which was retroactively abrogated by the Constitutional Court and replaced by a decision of the same. If there is no such competent body according to the current regulations, the Constitutional Court shall appoint one (Para. 2 of Article 60 of the Constitutional Court Act).

2. Concerning the protection of constitutional rights:

If the body exercising constitutional review overturns a decision by a public authority (administration, court, etc.) on the grounds that it is unconstitutional:

a. Is it sent back to the original authority for a new ruling?

In principle, yes. Deciding on a founded constitutional complaint the Constitutional Court shall abrogate, retroactively or prospectively, the disputed act, and return the case to the competent body Para. 1 of Article 59 of the Constitutional Court Act).

or

b. Does the body exercising constitutional review decide on the matter?

Yes, exceptionally. If the Constitutional Court abrogates an individual act with retroactive effect, it may also decide on a disputed right or freedom if such proceedings are necessary in order to eliminate the consequences that have already occurred on the basis of the retroactively abrogated individual act, or if such is the nature of the constitutional right or freedom, and if a decision can be reached on the basis of information in the record (Para. 1 of Article 60 of the Constitutional Court Act).

3. Furthermore, do constitutional review decisions have:

a. binding force (binding the body exercising constitutional review itself)?

Decisions of the Constitutional Court are binding (Para. 3 of the Article 1 of the Constitutional Court Act).

b. res iudicata force (inter partes; erga omnes)?

Decisions of the Constitutional Court produce erga omnes effects. As exception to this rule are constitutional complaints with decisions having only inter partes effect, but even here effects are felt erga omnes, when the Constitutional Court acts ex officio (Para. 2 of Article 59 of the Constitutional Court Act).

c. force of law ?

In this transitional period the Constitutional Court has played a more important role based on its new extended powers. In the sense of contemporary trends, the Slovenian Constitutional Court has additionally assumed the role of a negative legislature. In this period of transition the Legislature has not always been able to follow the development or impose standards for

all shades of the legal system and its institutions. This results in the so called interpretative decisions taken by the Court or the appellative decisions or certain declaratory decisions that include specific instructions by the Constitutional Court to the Legislature on how to settle a certain question, or a specific issue (Article 48 of the Constitutional Court Act). However, in compliance with the Principle of Judicial self-restraint, a clear limit has been imposed on the Slovenian Constitutional Court due to the fact that the Court has actively been creating the legal rule both negatively (e.g. the abrogation) and positively (e.g. the appellative, interpretative, the declarative decisions), a function theoretically reserved for the Legislature. However, there arises the question whether the Constitutional Court, in deciding on the existence or nonexistence of a specific provision, actually creates the law because it carries out a review of legislative activity.
In any case, the legislature cannot avoid the existence of constitutional case-law in its activity.

d. are they published in an official journal?

Decisions are published in the Official Gazette of the Republic of Slovenia, whereas the rulings of the Constitutional Court are not generally published in an official bulletin, but are handed over to the participants in the proceedings.

However, all decisions and rulings are published and made available to users:

- in an official annual collection (Slovenian full text versions, including dissenting/concurring opinions, and English abstracts);

- in the Pravna Praksa (Legal Practice Journal) (Slovenian abstracts, with the full-text version of the dissenting/concurring opinions);

- since 1 January 1987 via the on-line STAIRS database (Slovenian and English full text versions);

- since September 2000 via the Ius-Info database (complete Slovenian full text versions from 1963 through 1990 (the historical database) as well as from 1991 through 2000 (the current database), combined with appropriate links to the texts of the Slovenian legislation);

- since June 1999 on CD-ROM (complete Slovenian full text versions from 1990 through 1998, combined with appropriate links to the text of the Slovenian Constitution, Slovenian Constitutional Court Act, Rules of Procedure of the Constitutional Court and the European Convention for the Protection of Human Rights and Fundamental Freedoms - Slovenian translation);

- since September 1998 in the database and/or Bulletin of the Association of Constitutional Courts using the French language (A.C.C.P.U.F.);

- since August 1995 on the Internet (http://www.sigov.si/us/eus-ds.html");

- in the CODICES database of the Venice Commission.

e. What happens if a decision declares that a norm will become unconstitutional if it is not modified within a
certain period?

The significance of constitutional decisions is not only limited to the direct participants in a constitutional dispute and to the individuals and legal entities whose rights were encroached by way of the application of an unconstitutional or illegal general act. By publishing its decisions, the Constitutional Court also calls attention to the established unconstitutionalities and illegalities of other bodies which have adopted an equal or similar general act regulating the questions on which the Constitutional Court had already taken its view in a constitutional dispute.

As regards this statutory provision, the question of sanctioning is raised if the legislature does not respond to a Constitutional Court decision. Probably, such sanction can only have moral importance. In the case of certain decisions to which the legislature does not respond, or in case its response is delayed, the Constitutional Court calls the legislature to implement its statutory duty ("intensification of sanctions").

Do the answers to the previous questions depend on the type of constitutional review (for example: concrete/abstract control)? Do special rules apply in the cases mentioned in point I.A.4 above?

Following Article 49 of the Constitutional Court Act, the provisions of Chapter IV of the Constitutional Court Act (concerning the review of the constitutionality and legality of general acts, including those issued by statutory authorities) shall be applied mutatis mutandis for proceedings and decisions on other matters from the jurisdiction of the Constitutional Court, unless otherwise provided for by the Constitutional Court Act (which does not have any other special rules to be applied in the cases mentioned in point I.A.4 above).

II. What means are available to ensure the execution of constitutional review decisions?

The response to this question should take into account the legislation concerning the execution of constitutional review decisions, either by other courts or by executive bodies. In particular:

1. Is there a norm indicating which authority has to execute the constitutional review decisions?

No, generally speaking. Decisions of the Constitutional Court are legally binding (Para. 3 of Article 1 of the Constitutional Court Act). Although concerning Art. 432 of the 1974 Constitution, the possibility of Government measures was envisaged in case a Constitutional Court decision was not implemented, nevertheless in the framework of the then case-law, such a case did not occur. In accordance with effective legislation, depending on needs, the Constitutional Court itself decides which body is to implement a decision and in what manner (Art. 40, Paragraph 2). On the other hand, the Courts Act (Official Gazette RS, No. 19/94) provides that the court implement the decisions of other State bodies or holders of public authority if statute determines so (Article 3, Paragraph 37). In addition, the same Act determines that the relevant court, in conformity with a Constitutional Court decision, implement a final judgement or other court decision altered by the decision of the Constitutional Court of the Republic of Slovenia (Art. 112).

2. If not, is there a norm providing that the body exercising constitutional review or any other authority has the power to designate the body which will execute the decisions of the court?

The Constitutional Court shall, if necessary, determine which body must implement the decision and in what manner. The decision must be reasoned (Para. 2 of Article 2 of the Constitutional Court Act).

If the Constitutional Court abrogates an individual act with retroactive effect, it may also decide on a disputed right or freedom if such proceedings are necessary in order to eliminate the consequences that have already occurred on the basis of the retroactively abrogated individual act, or if such is the nature of the constitutional right or freedom, and if a decision can be reached on the basis of information in the record (Para. 1 of Article 60 of the Constitutional Court Act). The decision mentioned in the preceding Paragraph shall be implemented by the body competent for the implementation of the individual act which was retroactively abrogated by the Constitutional Court and replaced by a decision of the same. If there is no such competent body according to the current regulations, the Constitutional Court shall appoint one (Para. 2 of Article 60 of the Constitutional Court Act).

How does the system work in practice?

The Constitutional Court has been exercising such a practice continuously, e.g. to designate the body which has to execute the decision of the Court: e.g. decision no. U-I-112/98 of 17/6-1998, publ. Official Gazette RS no. 50/98, OdlUS VII, 133; decision no. U-I-195/95 of 24/6-1998, publ. Official Gazette RS no. 51/98, OdlUS VII, 141; decision no. U-I-183/96 of 16/7-1996, publ. Official Gazette RS no. 56/98, OdlUS VII, 146; decision no. U-I-57/97 of 16/7-1998, publ. Official Gazette RS no. 62/98, OdlUS VII, 148; decision no. U-I-285/98 of 17/9-1998, publ. Official Gazette RS no. 67/98, OdlUS VII, 160; decision no. U-I-301/98 of 17/9-1998, publ. Official Gazette RS no. 67/98, OdlUS VII, 157; decision no. U-I-341/98 of 14/10-1998, publ. Official Gazette RS no. 72/98, OdlUS VI, 186; decision no. U-I- 354/98 of 14/10-1998, publ. Official Gazette RS no. 72/98, OdlUS VII, 188; decision no. U-I-294/98 of 12/10-1998, publ. Official Gazette RS no. 72/98, OdlUS VII, 185; decision no. U-I-302/98 of 14/10-1998, publ. Official Gazette RS no. 67/98, 72/98, OdlUS VII, 187; decision no. U-I-326/98 of 14/10-1998, publ. Official Gazette RS no. 67/98, 76/98, OdlUS VII, 190; decision no. U-I-12/97 of 8/10-1998, publ. Official Gazette RS no. 82/98, OdlUS VII, 180, and resolution no. U-I-12/97 of 4/3-1999, publ. Official Gazette RS no. 17/99; decision no. U-I-14/97 of 19/11-1998, publ. Official Gazette RS no. 83/98, OdlUS VII, 204; decision no. U-I-173/97 of 21/1-1999, publ. Official Gazette RS no. 9/99, OdlUS VIII, 14; decision no. U-I- 284/94 of 4/2-1999, publ. Official Gazette RS no. 14/99, OdlUS VIII, 22; decision no. U-I-76/97 of 17/6-1999, publ. Official Gazette RS no. 54/99, OdlUS VIII, 154; decision no. U-I-306/97 of 17/6-1999, publ. Official Gazette RS no. 59/99, OdlUS VIII, 157; decision no. U-I-4/99 of10/6-1999, publ. Official Gazette RS no. 59/99, OdlUS VIII, 145; decision no. U-I-365/96 of 4/11-1999, publ. Official Gazette RS no. 99/99, odlUS VIII, 241 etc.

III. What are the consequences of constitutional review decisions that are not executed or are not executed within a reasonable time?

The significance of constitutional decisions is not only limited to the direct participants in a constitutional dispute and to the individuals and legal entities whose rights were encroached by way of the application of an unconstitutional or illegal general act. By publishing its decisions, the Constitutional Court also calls attention to the established unconstitutionalities and illegalities of other bodies which have adopted an equal or similar general act regulating the questions on which the Constitutional Court had already taken its view in a constitutional dispute.

As regards this statutory provision, the question of sanctioning is raised if the legislature does not respond to a Constitutional Court decision. Probably, such sanctions can only have moral importance. In the case of certain decisions to which the legislature does not respond, or in case its response is delayed, the Constitutional Court call the legislature to implement its statutory duty ("intensification of sanctions").

IV. Cases where decisions are not executed

A. Have there been any recent cases where a constitutional review decision has not been executed in your country?
B. If so, is it possible to identify the reasons why the decision was not executed?
(eg. political or financial reasons, lack of clarity in the decision, inadequate rules on the execution of decisions)?

From time to time there are some delays concerning the modification of an unconstitutional norm by the legislature, which more or less depend on the how curent its legislative activity is.

V. Cases of unsatisfactory execution

In certain cases, even where a constitutional review decision has not been executed, the situation remains unsatisfactory because an unconstitutional norm continues to be applied.

A. Has such a situation arisen recently in your country?

No.

B. What are the causes of such a situation? Do they stem from the effects of a constitutional review decision (absence of erga omnes effect, the declaratory nature of the decision), or from other causes, such as those mentioned in IV.B above?

Concerning points IV and V, did specific problems arise when the decisions of ordinary higher courts were declared contrary to the Constitution?

No. The Constitutional Court is limited to deciding on constitutional matters, on the concerningthe violation of constitutional rights. However, if a violation is found, a decision may have a cassatory effect which is as a rule inter partes (and erga omnes in a case in which the subject-matter of the decision is a legislative act). The Constitutional Court here retains the position of the highest judicial authority. These Courts can be referred to as the "high ranking courts of cassation", because Constitutional Courts reviewing the decisions of

ordinary courts act in fact as the third and the fourth instance. Although the Constitutional Court is not a court of full jurisdiction, in specific cases it is the only competent court to judge whether a ordinary court has violated the constitutional rights of the plaintiff. It involves the review of micro- constitutionality, perhaps the review of the implementation of a law, which, however, is a deviation from the original function of the Constitutional Court. Constitutional complaint cases raise sensitive questions on defining constitutional limits. In any case, the Constitutional Court in its activities is limited strictly to questions of constitutional law. The Slovenian system is specific in that the Constitutional Court may, under specified conditions, make a final decision on constitutional rights or fundamental freedoms themselves (Para. 1 of Article 60 of the Slovenian Constitutional Court Act, Official Gazette RS, No. 15/94).

SPAIN / ESPAGNE

ANSWERS TO THE QUESTIONNAIRE ON THE "EXECUTION OF CONSTITUTIONAL REVIEW DECISIONS"

I. General questions on constitutional review

A. The type of constitutional review and its subject :

1. Constitutional review of normative acts

a. preliminary review

The Spanish Constitution provides for preventive control of the constitutionality of international treaties (Art. 95.2). Before ratification, the Government, the Congress of Deputies or the Senate may ask the Constitutional Court for an opinion as to the compatibility of a given treaty with the Constitution. If the Constitutional Court deems that a contradiction exists between the Constitution and the treaty, the latter cannot be ratified without a prior reform of the Constitution.
(There has already been a precedent in that regard, Declaration of the Constitutional Court of July, 1st. 1992)

b. abstract or principal review (direct claim of unconstitutionality)

Direct appeals for review of constitutionality are possible with respect to laws of the State and the Autonomous Communities, as well as acts of the Government having the force of law (decree-laws), international treaties and the rules of order of the national and autonomous legislative assemblies (Art. 27 of the Organic Law on the Constitutional Court)

c. concrete or incidental review of norms
There is a "question of unconstitutionality"(incidental question) referring to norms having the rank of a law, which may be raised by a judge or Court during legal proceedings, if the norm is of decisive importance for the final decision.

d. normative acts that are not subject to constitutional review

Rules or norms without legal rank (such as administrative regulations) cannot be brought before the Constitutional Court by means of the proceedings of abstract or incidental control of constitutionality. However, the Court may issue decisions with respect to that type of norms during proceedings concerning the protection of individual rights (recurso de amparo), as well as in conflicts among territorial entities (conflicts of competence).

2. Review of unconstitutional omission of legislation (failure of the legislator to act when it is obliged to do so by the Constitution)

There are not constitutional or legal provisions concerning any type of control by the Constitutional Court of legislative omissions.

3. Decisions concerning the protection of constitutional rights (Verfassungsbeschwerde, *amparo,* appeal to a judicial body of ultimate appeal)

There is a specific procedure before the Constitutional Court for the protection of constitutional (fundamental) rights against any violation on the part of the public powers (Arts. 41-58 Organic Law on the Constitutional Court).

4. Other areas of constitutional review

In addition to these preventive, abstract and concrete controls of the constitutionality of norms, and proceedings concerning the protection of fundamental rights, the Spanish Constitutional Court has jurisdiction in:

-Conflicts between State and Autonomous Communities.
-Conflicts among Autonomous Communities
-Conflicts affecting the autonomy of local entities
-Conflicts opposing the constitutional organs of the State

B. <u>The effects of constitutional review decisions :</u>

1. Concerning normative acts :

a. Are constitutional review decisions merely declaratory ?

According to Article 38 of the Organic Law on the Constitutional Court, the Court decisions rendered in proceedings reviewing the constitutionality of legal norms shall have "binding effects on all public powers". In the cases of declarations of the Court in proceedings of preventive control of constitutionality of international treaties, the Organic Law (Art. 78.2) also establishes their "binding force", which must be interpreted within its context; i.e., the treaty cannot be ratified without a previous reform of the Constitution.

b. Is the norm which is declared contrary to the Constitution null and void, or annulled immediately ? Can the body exercising constitutional review modify the norm ?

According to Art. 39.1 of the Organic Law on the Constitutional Court, the declaration of unconstitutionality of a norm having the force of law implies the nullity of the affected norm. However, the interpretation given to that article by the Constitutional Court has been very flexible. In some cases, the Court has delayed the annulling effects of its judgments (for instance, Judgment 195/1998). In others, the Court has stated the exclusion of any practical consequences of the declared unconstitutionality of a norm (except as establishing doctrine for the future), due to the fact that the provisions of the law declared unconstitutional had been already irrevocably executed (Judgment 13/1992).

c. Must the decisions be implemented (i.e. by repealing the norm) by another organ ?

No intermediary executing authority is needed for the execution of the decisions of the Court concerning the unconstitutionality of legal norms. The decisions of the Court on such matters shall have "general effects" from the date of their publication in the Official Journal (*Boletin Oficial del Estado*) according to Art. 38.2 of the Organic Law on the Constitutional Court.

d. Can the effects of annulment be postponed ?

At least in one case, the Court decided to delay the annulatory effects of a ruling of unconstitutionality in order to avoid a legal vacuum (Judgment 195/1998). However, that decision was not founded on any legal provision in this sense.

e. Do the effects of the decisions go beyond the individual case, where incidental concrete review of norms is concerned ? What is the position regarding similar cases which have already been the subject of a final decision ?

Decisions in constitutionality proceedings have general effects, both in the cases of abstract and concrete control of the unconstitutionality of norms. In concrete (incidental) proceedings of constitutional review of laws, the decision declaring the unconstitutionality of a legal rule shall have effects on the case **a quo** from the moment the Court raising the question becomes aware of the Constitutional Court's ruling. The decision shall have general effects when it is published in the Official Journal.

The ruling shall not have effects on cases already decided, and having the force of **res iudicata.** According to Art. 40 of the Organic Law on the Constitutional Court, the only exception (giving retroactive effects to the Court's rulings) would be those administrative or criminal penalties or sanctions imposed in cases already closed, in application of a law declared unconstitutional in a subsequent proceeding. In those cases, the previous judgment must be revised, according to the terms of the (subsequent) declaration of unconstitutionality by the Constitutional Court.

f. Can the body exercising constitutional review order another authority to act ? Within a fixed period of time ?

No provision in this sense is included in the Constitution or the Organic Law on the Constitutional Court, concerning proceedings on the constitutionality of legal norms. With respect to other procedures, see the answer below.

3. Concerning the protection of constitutional rights :

c. Is it sent back to the original authority for a new ruling ? or
d. Does the body exercising constitutional review decide on the matter ?

Both ways are possible, according to the practice of the Spanish Constitutional Court, and they are currently employed. In most cases, the Court, after declaring the violation of a fundamental right on the part of the administration or a court of justice, sends the case back to the ordinary court which rendered the last decision on the matter, ordering it to issue a new ruling, according to the pronouncements contained in the decision of the Constitutional Court. But it is not uncommon for the Constitutional Court itself to decide all aspects of the case, without referring it back to an ordinary court. This occurs mainly in criminal cases in which the Court's awareness of a violation of procedural constitutional rights leads to the closing of the proceedings, and the

exoneration of the accused (and appellant before the Court) of any criminal responsibility. (See, for instance, Judgment 85/1994).

3. Furthermore, do constitutional review decisions have :

f. binding force (binding the body exercising constitutional review itself) ?
g. *res iudicata* force (*inter partes*; *erga omnes*) ?

The decisions of the Court concerning the control of constitutionality of legal norms, conflicts of competence, and conflicts among organs of the State have general effects (Art. 164.1 Spanish Constitution). The decisions concerning the protection of individual rights have effects *inter partes*. However, it must be taken into account that the interpretation of the Constitution by the Constitutional Court in any type of proceedings is binding for the organs of the judicial powers (Organic Law on Judicial Powers, Art. 5.1)

As for the Court itself, it is bound to an extent by its own jurisprudence (principle of *stare decisis*) as only the Plenary Session of the Court may alter the criteria set in previous decisions. The two Chambers of the Court, composed of six Justices each, must refer a case to the Plenary, if they consider that the doctrine of the Court must be modified or reversed. (Art. 13, Organic Law on the Constitutional Court).

h. force of law (see for instance § 31.2 of the German law on the constitutional court) ?

See point I.B.1.a

i. are they published in an official journal ?

The decisions of the Constitutional Court must be published in the *Boletin Oficial del Estado* (Official Journal), pursuant to Art. 164.1 of the Spanish Constitution. Dissenting and concurrent opinions must be also published.

j. What happens if a decision declares that a norm will become unconstitutional if it is not modified within a certain period ?

The question is not relevant in the Spanish legal order. The Constitutional Court cannot decide that a law must be modified.

II. What means are available to ensure the execution of constitutional review decisions ?

The basic norm covering this point is Art. 92 of the Organic Law of the Constitutional Court: "*In its decision or in subsequent rulings,, the Court may establish who must execute the decision and shall resolve the incidents arising during execution*". Thus, the Court itself is the last and only instance for resolving problems or difficulties in the implementation of its own resolutions. Several possibilities must be distinguished:

In proceedings concerning the abstract or concrete control of legal norms, no execution is needed, since the declaration of unconstitutionality results *ipso iure* in the nullity of the affected legal norm (if there is no special provision to the contrary it in the decision itself).

In proceedings involving inter-territorial conflicts (*conflictos de competencia*) among authorities of the State and authorities of the Autonomous Communities, the execution of the Constitutional Court decisions must be performed by the administrative powers who are parties in the proceedings. Usually, this means that, as a consequence of the decision, one of the administrations in conflict (State or autonomous) must abstain from any interference in the matter declared by the Court to be under the jurisdiction of the other party. Similar considerations may apply to the conflicts among constitutional organs of the State.

Concerning proceedings involving fundamental rights (*amparo*), the Constitutional Court usually sends the case back to an ordinary Court for a new ruling. The Constitutional Court may also settle the case itself (see answer I.B.2.b). If so, the execution of the decision may fall to an administrative authority. Any incidents during execution must be resolved by the Court.

Incidents during the execution of decisions of the Court are very unusual, in all types of proceedings. Normally, a warning by the Court is enough to suppress any resistance or delay in the execution of its rulings. As an example, Ruling (*Auto*) 854/1986 in a conflict of competence may be cited. In that case a communication of the Court to the Basque Government sufficed to expedite the execution of a previous decision concerning the Basque coat-of arms. An example concerning the protection of constitutional rights may be found in Ruling (*Auto*) 86/1983, stating that a subsequent judicial decision had executed the pronouncement of the Constitutional Court remedying a violation of a fundamental rights in family proceedings.

III. What are the consequences if constitutional review decisions are not executed or are not executed within a reasonable time ?

IV. Cases where decisions are not executed

V. Cases of unsatisfactory execution

To date there has been no instance of non-execution of the decisions of the Constitutional Court on the part of legislative, administrative or judicial authorities; or at least, no evidence of non-execution has ever formally been brought before the Court. (See answer to Section II.)

SWEDEN / SUEDE

Execution of Constitutional Review Decisions in Sweden

I. General questions on constitutional review

A. Types of constitutional review and its subjects

1. Constitutional review of normative acts is possible as
– review of *legislative proposals* by the Council on Legislation according to Chapter 8 Section 18 of the Instrument of Government or as
– incidental review of *normative acts in force* by any law court according to Chapter 11 Section 14 of the Instrument of Government which provides

> If a court or any other public body considers that a provision conflicts with a provision of a fundamental law or with a provision of any other superior statute, or that the procedure prescribed was set aside in any improper respect when the provision was introduced, the provision may not be applied. However, if the provision has been approved by the Riksdag or by the Government, it may be set aside only if the error is manifest.[4]

There is no procedure of referral to any supreme or specialized court for a preliminary review; the deciding court or public body cannot for guidance refer the question of constitutionality to any other instance. Under the Swedish Constitution there is no possibility of concrete review other than incidental review and no possibility at all of abstract review of enacted norms.

2. There is no remedy under Swedish law against failure of the legislator to act. However, under EC-law failure of the national legislator to correctly implement or to implement at all a directive may lead to liability of the Member State to compensate individuals affected by the failure for any infringement of their rights.[5] In a number of such cases, most of which had originated under the transition period around the beginning of Swedens membership in the EU, the Swedish State accepted such liability and most of the compensation claims were settled out of court.[6]

3. Any claim of unconstitutionality of a normative act has to be raised within the framework of *general* proceedings in civil, penal or administrative matters. Under Swedish law there is no *special* remedy similar to the German Verfassungsbeschwerde.

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[4] Translation according to Constitutional documents of Sweden. Published by The Swedish Riksdag. Stockholm 1996, ISBN 91-88398-18-8.

[5] Cf. EC-Court, 19.11.1991, C-6 and 9/90, Francovich and Bonifaci v. Italy, and 16.12.1993, C-334/92, Miret v. Fondo de garantia salarial.

[6] Cf. JK-beslut 1995 C.12 p. 168-170 and EC-court 15.6.1999, C-321/97, Andersson v. Svenska staten.

4. The same applies to constitutional review in other cases.[7]

B. The effects of constitutional review decisions

1. If a normative act is found to be unconstitutional, the court will say so in the reasons of its judgment. According to Chapter 11 Article 14 of the Instrument of Government, the consequence will be that the normative act "may not be applied". If that is the case, the court has to reach its conclusions without application of the normative act; the court, however, will not make any formal declaration on the unconstitutionality of the normative act as part of these formal conclusions.

2. If the court has to quash a decision by a public authority on the grounds that the decision was not in accordance with the law, the court may find it appropriate to send the matter back to the original authority or to decide on the matter itself. In which way the court will choose to act, will depend both on the matter and on the procedural situation.

3. Any reasons of a judgment "will be of importance for guidance in application of the law"[8] for other courts and for administrative agencies but they do not constitute binding precedent – neither for the court itself nor for any other court or public body – and they cannot have the force of law. Decisions of the supreme courts of Sweden are reported in full or in abbreviated form in official reports, and some decisions of appeal courts will be reported in such reports, too, but the reported decisions are never published in any of the official gazettes, which are used for formal publication of normative acts. Judgments usually may achieve *res iudicata*-force *inter partes* only. There are a few exceptions to this rule, but none of these exceptions applies to constitutional review.

II – III Execution of constitutional review decisions

Therefore, decisions of Swedish courts on constitutional matters can provide only guidance in application of the Swedish constitution and are so interpreted. Cases of constitutional review are not very frequent,[9] but – at least until now – all the known cases have been discussed extensively and analyzed thoroughly both by the legal profession and within the political system. If found appropriate, normative acts have been changed, and even in cases, in which the courts did not find any manifest constitutional error, court arguments have been recognized as important contributions to the ongoing development of constitutional law and its interpretation. But when questions of changing normative acts arise, according to the letter and the spirit of the Swedish constitution the final arbiter of constitutionality is not a court – any court – but the *Riksdag*, the Swedish parliament. If the *Riksdag* does not take guidance there is no recourse against it within the Swedish legal system.

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[7] Cf. Regeringsrättens årsbok 2000 ref. 19. In this case a local community claiming infringement of its constitutionally guaranteed right to self-government had to use the extraordinary, but generally available remedy of *resning* to get a review by the Supreme Administrative Court of decisions of a regional tax authority and the Swedish government.

[8] Cf. Chapter 54, Section 10 of the Swedish Code of Judicial Procedure of 1942 and Section 36 of the Administrative Court Procedure Act of 1971.

[9] Cf. the list given in Håkan Strömberg: Sveriges författning, 16 ed., Lund 1999, ISBN 91-44-00898-8, p. 145–147.

IV–V Cases of non-execution or unsatisfactory execution of constitutional review decisions in Sweden

It is quite common that a review judgment leads to a discussion about how to interpret the opinion of the court and what to do next in order to solve the constitutional problem. Sooner or later either a consensus or, at least, a majority view will develop, and the appropriate body will take some kind of action. Whether the action taken is sufficient or not may then become a new matter of debate. But there are no known cases in Sweden of more or less outright non-compliance with what a court has said in a review case.

H.-H. Vogel
(14.11.2000)

SWITZERLAND / SUISSE

Questionnaire sur l'exécution des arrêts des juridictions constitutionnelles

La Suisse

I. Questions générales

A) Le type et l'objet du contrôle de constitutionnalité

1. La structure fédéraliste de la Suisse implique que le droit de procédure est aussi varié que le droit de fond: ainsi, non seulement la Confédération suisse, mais aussi chacun des vingt-six cantons qui la composent peuvent-ils prévoir leurs propres procédures[10]. Les lignes qui suivent se limiteront à une brève présentation du système fédéral.

La juridiction constitutionnelle suisse consacre de façon générale le *système diffus* de contrôle des normes. Toute autorité chargée de l'application de normes doit examiner si celles-ci sont conformes au droit supérieur[11]. Cette obligation est appelée "contrôle préjudiciel général" (allgemeines akzessorisches Prüfungsrecht), parce que la question de la conformité d'une norme au droit supérieur doit être résolue *avant* le problème principal et que le contrôle porte sur *toutes* les normes (lois fédérales, arrêtés du Parlement fédéral, ordonnances du Gouvernement fédéral, constitutions cantonales, actes législatifs cantonaux,…).

La juridiction constitutionnelle suisse permet, en principe et sous réserve des exceptions qui seront présentées ultérieurement, le contrôle des normes et des décisions. Elle connaît ainsi tant le contrôle *concret* que le contrôle *abstrait*[12]. La constitutionnalité des actes cantonaux peut être examinée de manière abstraite ou concrète, celle des actes fédéraux, uniquement à l'occasion d'un acte d'application (contrôle concret), en raison de l'absence d'un moyen de droit. Rappelons brièvement que dans le cas du contrôle abstrait des normes, l'autorité vérifie la *conformité matérielle de la norme à la Constitution*, en dehors de tout cas d'application[13]. En revanche, le contrôle concret est le contrôle exercé à l'occasion de l'application de la norme dans un cas précis (décision, avec cas échéant, examen préalable de la constitutionnalité de la norme sur laquelle elle se base)[14]; ce contrôle est en principe répressif (effectué par une autorité judiciaire ou remplissant une fonction juridictionnelle pour examiner la constitutionnalité d'une décision).

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[10] ZIMMERLI Ulrich / KÄLIN Walter / KIENER Regina, *Grundlagen des öffentlichen Verfahrensrechts*, Berne 1997, p. 12.

[11] AUER Andreas / MALINVERNI Giorgio / HOTTELIER Michel, *Droit constitutionnel suisse, Volume I: L'Etat*, Berne 2000, p. 639s et 661ss; ZIMMERLI, p. 14.

[12] AUER / MALINVERNI / HOTTELIER, p. 637; ZIMMERLI / KÄLIN / KIENER, p. 14.

[13] AUER / MALINVERNI / HOTTELIER, p. 636; KÄLIN Walter, *Das Verfahren der staatsrechtlichen Beschwerde*, 2ème édition, Berne 1994, p. 132; ZIMMERLI, p. 14, 192ss.; ZIMMERMANN Robert, *Le contrôle préjudiciel en droit fédéral et dans les cantons suisses*, Lausanne 1987, p. 25ss.

[14] ZIMERMANN p. 35ss; AUER, p. 637; KÄLIN, p. 133; ZIMMERLI / KÄLIN / KIENER, p. 14, 193.

Lois fédérales

Le contrôle des lois fédérales a conduit à de nombreuses discussions dans la doctrine. En effet, l'article 191 Cst.[15] prévoit que "le Tribunal Fédéral et les autres autorités sont tenus d'appliquer les lois fédérales et le droit international". Les art. 113 al. 3 et 114bis al. 3 aCst.[16], prédécesseurs de l'art 191 Cst., ont pendant longtemps été interprétés comme devant conduire à l'application obligatoire des lois fédérales par les autorités (donc aussi par les tribunaux) et à l'absence de contrôle de constitutionnalité de ces lois[17].

En 1993, le Tribunal fédéral a jugé que l'art. 113 al. 3 aCst., tout en l'obligeant à appliquer les lois fédérales (Anwendungsgebot), ne lui interdisait pas d'en examiner la conformité à la constitution (pas de Prüfungsverbot)[18]. Le juge pouvait donc constater une éventuelle inconstitutionnalité, mais pas la sanctionner.

En 1995 ensuite, le Tribunal fédéral est allé plus loin dans son raisonnement en refusant d'appliquer les dispositions d'une loi fédérale contraires à un traité international et ne pouvant être interprétées de manière conforme à celui-ci[19]. Depuis lors, les lois fédérales peuvent donc être soumises à un "contrôle de conventionnalité"[20] et le Tribunal fédéral ne peut plus appliquer une loi fédérale qui viole un droit fondamental garanti par une convention internationale.

Dans le cadre de la réforme de la justice de 1999, le Gouvernement fédéral avait proposé d'étendre la juridiction constitutionnelle du Tribunal fédéral aux lois fédérales. Cette extension a fait l'objet d'une grande controverse au Parlement fédéral, a trouvé une majorité dans un premier temps, mais a été refusée en fin de compte.

Ordonnances fédérales

La Constitution fédérale ne s'oppose pas à ce que les ordonnances du Gouvernement fédéral puissent faire l'objet d'un contrôle abstrait. Cependant, il n'existe *pas de voie de recours* par laquelle un particulier peut les attaquer directement[21]. En effet, le recours de droit public n'est ouvert qu'à l'égard des actes cantonaux (art. 84 al. 1 loi fédérale d'organisation judiciaire[22], voir ci-dessous). Le contrôle des ordonnances fédérales *ne peut donc avoir lieu qu'à titre préjudiciel* à l'occasion d'un recours dirigé contre un acte d'application individuel et concret se basant sur une ordonnance (contrôle concret de la constitutionnalité d'une décision).

Néanmoins, l'obligation d'appliquer les lois fédérales s'étend à toutes les normes, fédérales ou cantonales, qui se fondent directement sur une loi fédérale (*effet indirect de la règle*)[23]. Pour être

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[15] Constitution fédérale de la Confédération suisse du 18 avril 1999 (RS 101).
[16] Constitution fédérale de la Confédération suisse du 29 mai 1874.
[17] AUER / MALINVERNI / HOTTELIER, p. 642.
[18] ATF 117 Ib 367; AUER / MALINVERNI / HOTTELIER, p. 649.
[19] ATF 119 V 171; AUER / MALINVERNI / HOTTELIER, p. 652; KÄLIN p. 18.
[20] AUER / MALINVERNI / HOTTELIER, p. 652; MALINVERNI Giorgio, *L'article 113 al. 3 de la Constitution fédérale et le contrôle de conformité des lois fédérales à la Convention européenne des droits de l'homme*, in Francis CAGIANUT et al. (éd.), *Aktuelle Probleme des Staats- und Verwaltungsrechts – Festschrift für Otto K. Kaufmann*, Berne 1989, p. 381-397.
[21] AUER, p. 664.
[22] Loi fédérale d'organisation judiciaire du 16 décembre 1943 (OJ; RS 173.110).
[23] AUER p. 657ss; KÄLIN p. 25ss.

indirectement protégées par l'art. 191 Cst (et encore avec la réserve de conventionnalité indiquée ci-dessus), les normes doivent remplir 2 conditions: avoir leur fondement juridique direct dans une loi fédérale et reproduire formellement une inconstitutionnalité figurant dans cette loi.

En résumé, le contrôle des ordonnances du Gouvernement fédéral suivantes est possible:
- toutes les ordonnances indépendantes, c'est-à-dire celles qui se basent directement sur la Constitution (art. 182 al. 1 Cst.);
- les ordonnances dépendantes (qui se basent sur une loi) contenant des normes primaires[24] ou des inconstitutionnalités nouvelles (ne figurant pas dans la loi);
- toutes les ordonnances administratives[25].
A l'inverse, les ordonnances ne faisant que reproduire une inconstitutionnalité figurant dans une loi fédérale et qui ne sont pas soumises à un contrôle de conventionnalité (par exemple: modification, sans base constitutionnelle, de la répartition des compétences entre la Confédération et les cantons) ne peuvent être contrôlées.

Actes cantonaux

En Suisse, chaque Canton est doté d'une *constitution* qui doit avoir été acceptée par le peuple et doit pouvoir être révisée si le peuple le demande (art. 51 al. 1 Cst.). Les constitutions cantonales, y compris toutes les dispositions révisées, doivent être garanties par l'Assemblée fédérale (art. 51 al. 2 et 172 al. 2 Cst.), qui ne les accepte qu'après avoir examiné la conformité de celles-ci au droit supérieur (fédéral et international). Ultérieurement, le Tribunal fédéral est compétent lorsqu'il est saisi d'un recours dans lequel est alléguée la violation d'une norme de droit supérieur qui n'était pas encore en vigueur au moment de l'octroi de la garantie par l'Assemblée fédérale[26].

La constitutionnalité des *lois et ordonnances cantonales* est examinée, sans problèmes particuliers, par toutes les autorités.

Le recours de droit public

Le recours de droit public est la voie de droit la plus importante permettant la mise en oeuvre de la juridiction constitutionnelle en Suisse. Subsidiaire aux autres recours, il est principalement ouvert à l'égard des *violations des droits constitutionnels des citoyens* (art. 84 al. 1 let. a OJ). Il permet aux citoyens d'attaquer les *actes cantonaux*, à l'exclusion des actes fédéraux. Les actes cantonaux attaqués peuvent être tant des décisions que des actes normatifs. Enfin le recours de droit public conduit en principe, lorsqu'il est recevable et bien-fondé, à l'annulation de l'acte cantonal attaqué[27]. Plus rarement, le jugement du Tribunal fédéral peut aussi consister en une injonction, une constatation ou en un jugement formateur[28].

* * *

[24] "Dispositions qui étendent le champ d'application de la loi en restreignant les droits des administrés ou en imposant à ceux-ci des obligations nouvelles" (ATF 124 I 127, 132).
[25] AUER, p. 672.
[26] AUER / MALINVERNI / HOTTELIER, p. 663; HÄFELIN Ulrich / HALLER Walter, *Schweizerisches Bundesstaatsrecht*, 4ème édition, Zurich 1998, p. 85ss.
[27] AUER / MALINVERNI / HOTTELIER, p. 675ss; HÄFELIN / HALLER, p. 550; ZIMMERLI / KÄLIN / KIENER, p. 159ss.
[28] AUER / MALINVERNI / HOTTELIER, p. 745-750; pour une étude approfondie, voir: GERBER Philippe, *La nature cassatoire du recours de droit public: mythe et réalité*, Bâle 1997.

2. Les *inactions* du législateur ne sont pas sanctionnées. Ainsi, par exemple, l'attribution d'une clause de compétence à la Confédération n'oblige pas l'Assemblée fédérale à légiférer. Elle en a simplement le droit.

* * *

3. La protection des droits constitutionnels est essentiellement assurée par le recours de droit public au Tribunal fédéral, ouvert aux citoyens à l'égard d'un acte cantonal pour violation d'un droit constitutionnel (art. 84 al. 1 OJ, voir ci-dessus).

* * *

4. Le Tribunal fédéral est *l'autorité judiciaire suprême* de la Confédération (art. 188 al. 1 Cst.); sa juridiction s'étend à tout le territoire national[29]. Il exerce la juridiction supérieure en matière civile, pénale et administrative (art. 190 Cst.), en plus de ses fonctions de juge constitutionnel (art. 189 Cst.). Le Tribunal fédéral, composé de 30 juges et de 15 suppléants (art. 1 OJ), comprend 2 Cours de droit public, 2 Cours civiles et 1 Cour de cassation pénale (art. 12 OJ).

En matière constitutionnelle, le Tribunal fédéral statue sur des réclamations pour violations des droits constitutionnels, de l'autonomie des communes, de traités internationaux ou de conventions intercantonales et des différends de droit public entre la Confédération et les cantons ou encore entre les cantons (art. 189 al. 1 Cst.)[30].

* * * * *

B) Les effets des arrêts

1. Dans la plupart des cas, lorsque le Tribunal fédéral déclare bien fondé un recours de droit public, *la décision ou l'acte normatif attaqué est annulé*. Les arrêts ont en principe *un effet cassatoire*. Le Tribunal fédéral ne peut en principe ni modifier ni remplacer une décision ou un acte normatif attaqué. Il peut cependant, à certaines occasions, enjoindre l'autorité cantonale à adopter un acte déterminé, constater l'étendue d'un droit ou d'une obligation ou, très rarement, modifier une situation juridique en conférant des droits aux particuliers ou en leur imposant une obligation (jugement formateur)[31].

Le Tribunal fédéral ne peut annuler que l'acte que le recourant a attaqué *directement* (lors d'un recours contre une décision basée sur un acte normatif, ce dernier ne peut plus être annulé… mais le Tribunal refusera de l'appliquer, s'il est contraire au droit supérieur).

La norme déclarée contraire à la Constitution ou au droit supérieur est annulée avec effet immédiat (effet ex nunc). Le Tribunal fédéral ne peut pas modifier la norme. L'arrêt ne doit en principe pas être mis en œuvre. Toutefois, si le Tribunal fédéral annule un acte normatif cantonal, ce dernier perd sa validité et le Parlement cantonal devra formellement l'abroger ou le modifier (parallélisme des formes[32]); si le Parlement ne fait rien, cela n'a aucune conséquence, car l'acte a perdu sa validité et chaque tribunal pourra le constater.

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[29] AUER / MALINVERNI / HOTTELIER, p. 54.
[30] AUER / MALINVERNI / HOTTELIER, p. 56.
[31] AUER / MALINVERNI / HOTTELIER, p. 746-750; GERBER, p. 1ss.
[32] AUER / MALINVERNI / HOTTELIER, p. 609.

Un arrêt ne va en principe pas au-delà du cas particulier. S'il est annulé, un acte normatif perd sa validité; les autres actes normatifs ne sont pas touchés. La situation fédéraliste de la Suisse peut cependant faire qu'un acte normatif d'un canton soit annulé et que des actes normatif au contenu semblable existent dans d'autres cantons; ces autres actes restent alors valables, mais risquent à tout moment d'être annulés par une décision judiciaire, dans la mesure où ils sont attaqués.

Dans de rares cas, le Tribunal fédéral peut ordonner à une autre autorité d'agir, par exemple pour ordonner la libération d'un détenu[33].

* * *

2. Lorsqu'elle annule une décision d'une autre autorité, la juridiction constitutionnelle prononce un *jugement cassatoire*. La décision ou l'acte normatif attaqué n'est plus valable. La juridiction ne statue pas elle-même sur la question.

* * *

3. Les arrêts du Tribunal fédéral lient celui-ci ainsi que tous les tribunaux inférieurs. Même si les tribunaux suisses ne sont pas liés par les précédents comme dans les systèmes anglo-saxons, le Tribunal fédéral n'en est donc pas moins obligé de respecter une certaine cohérence dans sa pratique juridictionnelle. Dès lors, un *revirement de jurisprudence* n'est possible que s'il se justifie par des motifs sérieux[34]. De plus, lorsqu'une section du Tribunal fédéral entend déroger à la jurisprudence suivie par une autre section, l'art. 16 OJ prévoit que cette dernière ou le Tribunal doit approuver ce changement de pratique.

Les arrêts ont assurément un effet de *res iudicata* entre les parties. Ils ont un effet *erga omnes* relatif. En effet, les autres décisions ou actes normatifs de contenu similaire ne sont pas annulés; en revanche, en cas de recours contre ceux-ci, les tribunaux et autorités de recours devront tenir compte de la jurisprudence du Tribunal fédéral.

Les arrêts n'ont pas force de loi. Ils ne sont pas publiés dans un journal officiel, mais une faible partie d'entre eux (10% environ) sont publiés dans un recueil officiel et sur Internet. Les autres arrêts sont des "arrêts non publiés", comme le Tribunal fédéral les désigne; ils sont néanmoins accessibles au public et publiables dans des revues de jurisprudence (privées), si la demande en est faite.

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Les règles en matière de publication et d'effet des arrêts sont les mêmes pour toutes les compétences du Tribunal fédéral. En revanche, le pouvoir de décision est différent dans les litiges civils ou pénaux. Ainsi, par exemple, si un recours en réforme (recours ordinaire suprême en matière civile) est admis, le Tribunal fédéral peut lui-même rendre une nouvelle décision[35].

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[33] AUER / MALINVERNI / HOTTELIER, p. 747, GERBER, p. 223.
[34] ATF 122 I 57, 108 Ia 122.
[35] CORBOZ Bernard, *Le recours en réforme au Tribunal fédéral*, in La Semaine Judiciaire (Genève) 2000, partie II, p. 1-75.

II. Exécution des arrêts

Les arrêts du Tribunal fédéral entrent en force dès qu'ils sont prononcés (art. 38 OJ). L'exécution des arrêts est prévue par l'art. 39 OJ[36]: ce sont les cantons qui exécutent les arrêts du Tribunal fédéral, de la même manière que les jugements passés en force de leurs tribunaux.

Le principe exigeant que les jugements doivent être exécutés est un principe de rang constitutionnel[37]. En cas d'inexécution d'un jugement par un canton, la Confédération doit intervenir. En fait, en cas de non-exécution ou d'exécution incomplète ou imparfaite, un recours au Gouvernement fédéral est ouvert (art. 39 al. 2 OJ)[38]. Le recours au Gouvernement fédéral n'est soumis à aucun délai[39]. L'art. 39 al. 2 OJ est une concrétisation du devoir de surveillance du Gouvernement fédéral, tel que défini à l'art. 186 al. 4 Cst. (102 ch. 2 aCst.).

Cependant, selon la doctrine et la jurisprudence, seuls les jugements condamnant à une prestation et dont le dispositif peut être libellé en fonction d'une obligation de faire, d'une abstention ou de l'obligation de tolérer quelque chose sont susceptibles d'exécution forcée. De plus, seul le dispositif du jugement peut être mis à exécution[40].

Ces vingt dernières années, seules trois décisions prises par le Gouvernement fédéral sur la base de l'art. 39 al. 2 OJ ont été publiées:

> Jurisprudence administrative des autorités de la Confédération (JAAC) 50/1986 no 62
>
> En 1978, le Gouvernement cantonal du canton X a approuvé le plan de zones de la commune Y et a en même temps écarté plusieurs oppositions visant ce plan. Un opposant à fait recours au Parlement cantonal, ce que permet la loi cantonale. Le Parlement cantonal ne s'est cependant jamais préoccupé de ce recours. L'opposant s'est alors adressé au Tribunal fédéral, qui a en 1982 admis le recours (pour déni de justice et refus de statuer) et invité le Parlement cantonal à se prononcer sans délai sur les oppositions au plan de zones. Le Parlement cantonal n'ayant encore rien fait en 1984, l'opposant s'est alors adressé au Gouvernement fédéral, en lui demandant de traiter son opposition à la place du Parlement cantonal.
>
> Le Gouvernement fédéral n'a pas eu à intervenir, le Parlement cantonal ayant finalement pris la décision attendue en novembre 1994. La position de l'Office fédéral de la justice, qui prépare les décisions du Gouvernement fédéral, a cependant été publiée. L'office considère que l'exécution de l'arrêt du Tribunal fédéral n'a pas eu lieu et que le Gouvernement fédéral aurait même pu prendre une décision à la place de l'autorité cantonale, au vu des circonstances du cas d'espèce.
>
> Jurisprudence administrative des autorités de la Confédération (JAAC) 53/1989 no 4

[36] Voir aussi POUDRET Jean-François, *Commentaire de la loi fédérale d'organisation judiciaire du 16 décembre 1943, Volume I, Articles 1-40*, Berne 1990, p.324ss; KNAPP Blaise, *Commentaire de la Constitution fédérale du 29 mai 1874*, Berne 1986, ad art. 5, note 48.
[37] Jurisprudence administrative des autorités de la Confédération (JAAC) 50 / 1986 no 62.
[38] POUDRET, p. 335ss.
[39] JAAC 56 / 1992 no 19.
[40] JAAC 56 / 1992 no 19, JAAC 53 / 1989 no 4, JAAC 50 / 1986 no 62.

L'autorisation accordée à l'entreprise X d'installer un portique roulant mécanique et d'étendre ses dépôts de matériaux a été annulée par le Gouvernement cantonal. Le Tribunal administratif cantonal a confirmé cette décision. Le Tribunal fédéral a rejeté un recours de droit public déposé contre l'arrêt cantonal et confirmé la décision. Malgré ces décisions, l'entreprise X n'a pas évacué ses matériaux dans le délai fixé par la commune.

F, propriétaire d'une parcelle voisine de celle de l'entreprise X, demande au Gouvernement fédéral d'inviter le canton à faire exécuter le jugement du Tribunal fédéral. Le Gouvernement fédéral déclare les conclusions du recourant irrecevables. En effet, ni le dispositif, ni les considérants de l'arrêt du Tribunal fédéral ne s'expriment sur la question de l'évacuation des déchets. Il ne peut donc être pris de mesures d'exécution à ce sujet sur la base de l'arrêt.

Jurisprudence administrative des autorités de la Confédération (JAAC) 56/1992 no 19

Dans un arrêt du 25 novembre 1987, le Tribunal fédéral a considéré que la transformation d'une exploitation d'élevage et d'engraissement de porcs en un entrepôt sis en zone agricole ne pouvait être admise en vertu de la législation sur l'aménagement du territoire. A la suite de cet arrêt, la commune concernée a ordonné au propriétaire de vider l'entrepôt et de le remettre dans son état d'origine.

A la suite de la plainte de l'un des locataires de l'entrepôt, le Gouvernement fédéral a considéré que la commune avait réagi dès que possible et que le recours était dès lors mal fondé.

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III. Conséquences de l'inexécution
IV. Cas d'inexécution
V. Cas d'exécution insatisfaisante

Le faible nombre de recours au Gouvernement fédéral démontre que l'exécution des jugements du Tribunal fédéral ne pose pas de véritables problèmes en Suisse. D'ailleurs, la doctrine sur ce sujet est pratiquement inexistante, ce qui démontre que l'intérêt pour le sujet a jusqu'à présent été relativement limité.

A notre connaissance, il n'existe pas de cas récents d'inexécution d'arrêts de la juridiction constitutionnelle. Les cas d'exécution insatisfaisante d'arrêts ne sont pas non plus connus.

Il ne nous semble pas non plus y avoir eu de problèmes particuliers lors de la déclaration d'inconstitutionnalité d'arrêts de juridictions ordinaires par le Tribunal fédéral.

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TURKEY / TURQUIE

Turkey: Execution of Constitutional Review Decisions

I.
A.
1.
a. no.
b.Yes
c. Yes
d. Reform laws of the Republic enumerated in Article 174 of the Constitution, and the laws and other normative acts passed during the National Security Council regime (1980-83).

2. No.
3. No.
4 Unconstitutionality of political parties.

B.
1.
a. Constitutional review decisions are directly enforceable.
b. Annulled immediately. The Constitutional Court cannot modify the norm.
c. No need for implementation by another organ.
d. The effects of annulment may be postponed for a maximum period of one year, only if the Constitutional Court so decides.
e. No automatic effect regarding similar cases which have already been the subject of a final decision.
f. No.

2. No procedure for constitutional complaint.
3.
a.Yes.
b. Erga omnes.
c. No.
d.Yes
e. No such possibility.

Same rules apply to concrete and abstract review. Special rules apply in cases regarding the prohibition of political parties.

II. The annulment decision takes effect immediately; in other words, the normative act becomes null and void. Therefore there is no question of another organ charged with implementing the Constitutional Court decisions.

III. No such possibility.
IV. No such cases.
V. No such cases.

Prof. Ergun Özbudun

UKRAINE

EXECUTION OF CONSTITUTIONAL REVIEW DECISIONS

I. General questions on the constitutional review

A. The type of constitutional review and its subject:

1. Constitutional review of normative acts

a) preliminary review in the form of opinions is effected over international treaties submitted to the Verkhovna Rada of Ukraine for granting agreement on their binding nature (article 88 of the Law of Ukraine "On the Constitutional Court of Ukraine") and draft laws introducing amendments to the Constitution of Ukraine (Article 159 of the Constitution of Ukraine).

b) abstract constitutional review is exercised on the basis of direct filing applications with the Constitutional Court of Ukraine by subjects of the right to a constitutional petition: President of Ukraine; not fewer than forty five National Deputies of Ukraine; the Supreme Court of Ukraine; Human Rights Commissioner of the Verkhovna Rada of Ukraine; Verkhovna Rada of the Autonomous Republic of Crimea (part 1 of Article 150 of the Constitution of Ukraine).

They may apply to the Constitutional Court of Ukraine requesting to decide on issues of conformity with the Constitution of Ukraine (constitutionality) solely with regard to the exhaustive list of normative legal acts laid down in part one of Article 150 of the Constitution of Ukraine:

- laws and other legal acts of the Verkhovna Rada of Ukraine;
- acts of the President of Ukraine;
- acts of the Cabinet of Ministers of Ukraine;
- legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea.

In addition, the same subjects may apply in an abstract way requesting for the provision of an official interpretation of the Constitution and laws of Ukraine (paragraph two of part one of Article 150 of the Constitution of Ukraine). Although part one of Article 93 of the Law of Ukraine on the Constitutional Court of Ukraine designates that "the ground for a constitutional petition with regard to an official interpretation of the Constitution of Ukraine and laws of Ukraine is the practical need of ascertainment, clarification, or official interpretation of provisions of the Constitution of Ukraine and laws of Ukraine", and practice relates "practical need" exactly to abstract issues of law making and law application.

c) concrete review is exercised by the Constitutional Court of Ukraine in the case regulated by article 83 of the Law on the Constitutional Court of Ukraine:

"In the event if in the course of general judicial proceedings a dispute arises with regard to the constitutionality of the norms of law that is applied by the court, the proceedings in the case shall be terminated [41].

In such circumstances, constitutional proceedings shall be initiated in the case, and the case shall be considered by the Constitutional Court of Ukraine without delay". There was not a single record of the consideration of cases pursuant to the procedure envisaged by article 83.

Quasi-concrete (indirect) constitutional review may include: provision of the official interpretation of the Constitution and laws of Ukraine requested by subjects of the right to a constitutional petition: citizens of Ukraine, aliens, stateless persons and legal entities, if "there is ambiguous application of provisions of the Constitution of Ukraine or laws of Ukraine by the courts of Ukraine and other bodies of state power provided the subject of the right to a constitutional petition believes that this may result or has resulted in a violation of his/her constitutional rights and freedoms" (article 94 of the Law of Ukraine on the Constitutional Court of Ukraine).

Pursuant to part two of article 95 of the Law of Ukraine on the Constitutional Court of Ukraine "in the event if during the interpretation of a Law of Ukraine (its individual provisions) the availability of the indicia of its non-conformity with the Constitution of Ukraine was established, the Constitutional Court of Ukraine in the same proceedings shall decide on the issue in respect of the unconstitutionality of this Law" and part three of article 61 of the Law on the Constitutional Court of Ukraine "if the course of the consideration of the case according to a constitutional petition or a constitutional appeal revealed the non-conformity Ukraine of other legal acts (their individual provisions) with the Constitution of Ukraine, in addition to those with regard to which the proceedings in the case were initiated, and which affect the adoption of the decision or the provision of an opinion in the case, the Constitutional Court of Ukraine shall adjudge such legal acts (their individual provisions) unconstitutional". In the course of effecting official interpretation on the basis of a constitutional petition the Constitutional Court may adjudge unconstitutional other legal acts: laws and other legal acts of the Verkhovna Rada of Ukraine; acts of the President of Ukraine; acts of the Cabinet of Ministers of Ukraine; legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea.

d)

- acts of ministries and other central bodies of the executive power
- acts of the National Bank of Ukraine
- acts of bodies of regional and local self-government
- acts of regional and local state administrations (executive)

2. The Constitutional Court of Ukraine exercises incidental review by adjudging omissions of law unconstitutional (not laid down in the legislation, but exists in practice). Thus, in the case on

[1] Although there were cases when courts of general jurisdiction in violation of article 83 of the Law of Ukraine on Constitutional Court of Ukraine in their decisions adjudged certain norms of the law to be unconstitutional , e.g. judgment of Pechersk district court of the city of Kyiv of 21 December 1999 in the case based on V.V. Hryhoriev's complaint (certain provisions of the ***Law of Ukraine "On All-Ukrainian and Local Referenda***" were deemed unconstitutional)

the elections of National Deputies of 26 February 1998, in deciding on the issue of conformity of the Law of Ukraine "On Elections of National Deputies of Ukraine" with the Constitution of Ukraine, the Constitutional Court of Ukraine revealed omissions in provisions of parts one, three and five of article 15 of this Law, which did not provide for citizens' rights to appeal to the court actions or omissions of officials and officers of district, constituency and Central electoral committees. The Constitutional Court of Ukraine passed a decision on the non-conformity of these provisions with the Constitution in view of the designated omission.

3. The right to a constitutional complaint is not available in the Constitution of Ukraine. In order to defend their constitutional right individuals may apply either through subjects of the right to a constitutional petition (abstract constitutional review) or pursuant to the procedure of article 83 of the Law on the Constitutional Court of Ukraine: in the event where in the course of general proceedings there arises a dispute with regard to the constitutionality of norms of the law that is applied by the court, proceedings in the case shall be terminated and the case shall be considered by the Constitutional Court of Ukraine without delay; and pursuant to article 94 of the Law on the Constitutional Court of Ukraine through a constitutional petition with regard to official interpretation of the Constitution and laws of Ukraine.

4. Unconstitutionality of political parties and referenda, conflicts among domestic subjects, conflicts between state bodies are not regulated by the Ukrainian Law.

Among other spheres of constitutional review the following may be listed:

- pursuant to article 79 of the Law of Ukraine on the Constitutional Court of Ukraine provision of opinions with regard to the observance of the constitutional procedure of investigation and consideration of the case on the removal of the President of Ukraine from office in accordance with the procedure of impeachment established by Articles 111 and 151 of the Constitution of Ukraine;

- pursuant to Article 159 of the Constitution of Ukraine an opinion in respect of conformity of the draft law on introducing amendments to the Constitution of Ukraine with the requirements of Article 157: "The Constitution of Ukraine shall not be amended, if the amendments foresee the abolition or restriction of human and citizens' rights and freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine. The Constitution of Ukraine shall not be amended in conditions of martial law or a state of emergency"; and Article 158 of the Constitution of Ukraine: "The draft law on introducing amendments to the Constitution of Ukraine, considered by the Verkhovna Rada of Ukraine and not adopted, may be submitted to the Verkhovna Rada of Ukraine no sooner than one year from the day of the adoption of the decision on this draft law. Within the term of its authority, the Verkhovna Rada of Ukraine shall not amend twice the same provisions of the Constitution of Ukraine".

B. The effects of constitutional review decisions:

1. Concerning normative acts

a) in accordance with article 69 of the Law of Ukraine "On the Constitutional Court of Ukraine" decisions and opinions of the Constitutional Court of Ukraine shall be equally mandatory for the execution.

b) in conformity with part one of Article 152 of the Constitution of Ukraine "Laws and other legal acts, by the decision of the Constitutional Court of Ukraine, are deemed to be

unconstitutional, in whole or in part, in the event that they do not conform to the Constitution of Ukraine, or if there was a violation of the procedure established by the Constitution of Ukraine for their review, adoption or their entry into force. Laws and other legal acts, or their separate provisions, that are deemed to be unconstitutional, lose legal force from the day the Constitutional Court of Ukraine adopts the decision on their unconstitutionality". The Constitutional Court of Ukraine is not entitled to modify legal norms.

c) the matter has not been regulated in the legislation, decisions on voiding legal norms do not require special execution.

d) no, it is impossible.

e) the Constitutional Court of Ukraine invokes its motivation procedure in the previous cases that are of similar nature, which is called "a legal stand" of the court on a certain issue – *sui generis* equivalent of *ratio decidendi* which the Constitutional Court of Ukraine deduced from its practice (not laid down by law);

f) yes, it may. In accordance with part two of article 70 of the Law: "In the event of necessity, the Constitutional Court of Ukraine may determine in its decision or opinion the procedure and the terms for their execution and make the respective state bodies responsible for the enforcement of a decision or observance of an opinion. The Constitutional Court of Ukraine is entitled to demand from the bodies of state power designated in this article a written confirmation of the execution of decisions or observance of an opinion of the Constitutional Court of Ukraine". The fixed time for it is not specified.

2. Concerning the protection of constitutional rights

There is no right to a constitutional complaint in the Constitution of Ukraine.

3. Furthermore , do constitutional review decisions have:

a) binding force?

-decisions are binding in view of the *ratio decidendi* principle and the "similar cases shall be decided similarly" principle, which ensues from the practice of the Constitutional Court of Ukraine. However, the sphere of the operation of this doctrine has not been elaborated in the legislation of Ukraine.

b) *res jucdicata* force?

-the courts of Ukraine do not recognise the *res judicata* principle; actually all decisions of the Constitutional Court of Ukraine on the issues of constitutionality and official interpretation have the *erga omnes* effect;

c) force of law?

-this is recognised only in the doctrine ("negative legislator");

d) decisions of the Constitutional Court of Ukraine are subject to be published in the *"Visnyk Konstytutiinoho Sudu Ukrainy"* (Herald of the Constitutional Court of Ukraine) and the *"Ofitsiinyi Visnyk Ukrainy"* (Official Gazette of Ukraine);

e) this matter has not been regulated in the national legislation of Ukraine.

II. What means are available to ensure the execution of constitutional review decisions?

1. The national legislation of Ukraine lacks legal norms which would specify a special body charged with the duty of the execution of decisions.

2. According to article 70 of the Law of Ukraine on the Constitutional Court of Ukraine:

"Article 70. The procedure for the execution of decisions and opinions of the Constitutional Court of Ukraine.

Copies of decisions and opinions of the Constitutional Court of Ukraine, on the next working day after they are made officially public, shall be sent to the subject of the right to a constitutional petition or a constitutional appeal on whose initiative the case was considered, to the Ministry of Justice, and also to the body of power that adopted the legal act which was the subject-matter for the consideration in the Constitutional Court of Ukraine.

In the event of necessity, the Constitutional Court of Ukraine may determine in its decision the procedure and terms for its execution and also make the respective state bodies responsible for the enforcement of the decision or observance of the opinion.

The Constitutional Court of Ukraine has the right to demand from the bodies designated in this article a written confirmation of the execution of the decision or observance of the opinion of the Constitutional Court of Ukraine.

A failure to execute decisions and adhere to the opinions of the Constitutional Court of Ukraine entails liability pursuant to law".

III. What are the consequences if constitutional review decisions are not executed or were not executed within a reasonable time?

It is difficult to answer due to lack of regulations on this matter in Ukrainian Law. The practice proves no consequences in this case.

IV. Cases where decisions are not executed

A. Yes. For instance, in the decision of the Constitutional Court of Ukraine in the case based on the constitutional submission with regard to the official interpretation of the provisions of articles 3 and 5 of the *Law of Ukraine "On the Status of Deputies of Local Radas of National Deputies"* of 13 May 1998 No. 6-рп/98 the Constitutional Court of Ukraine held:

"1. To deem to be such that do not conform to the Constitution of Ukraine (are unconstitutional) provisions of part one of article 5 of *the Law of Ukraine "On the Status of Deputies of Local Radas of National Deputies"* to the effect that a *rada* deputy may not be head of a local state administration or its head, head of its structural subdivision, a procurator.

To rule that a deputy of a village, settlement, city, city district, district, oblast *rada* who holds an office of head of a local body of executive power or any other office to which the effect of the Constitution and laws of Ukraine in respect of restrictions on compatibility extends, may not combine his official activity in this office with the office of a village, settlement, city head, secretary of a village, settlement, city *rada,* head and deputy head of a city district, district, oblast *rada* as well as with other work on a permanent basis in *radas*, their executive bodies and staff.

2. Provisions of part one of article 3 of the *Law of Ukraine "On the Status of Deputies of Local Radas of National Deputies"* shall be understood in such a way that the authority of a deputy of a village, settlement, city *rada*, head and deputy head of a city district, district, oblast *rada* shall be terminated ahead of time in the event of availability of the grounds listed therein, certified by official documents, without the adoption of a decision of the respective *rada.*

3. The Verkhovna Rada of Ukraine, President of Ukraine, the Cabinet of Ministers of Ukraine, local state administrations, in accordance with their authority, shall ensure the execution of this Decision.

4. The Decision of the Constitutional Court of Ukraine shall be binding for the execution on the territory of Ukraine, final and unappealable."

However, it is the fact that in a number if regions of Ukraine the heads of the regional state administrations (executive) hold at the same time positions of the heads of regional (local) bodies of self-government (*radas*), including the city of Kyiv where the major of Kyiv is the chairman of Kyiv`s *rada* and the head of the Kyiv`s state administration (executive).

B. Political reasons

V. Cases of unsatisfactory execution

A. Yes. For instance, in the decision of the Constitutional Court of Ukraine in the case based on the constitutional petition with regard to death penalty of 29 December 1999 No.1-33/99 the Constitutional Court of Ukraine ruled:

"1. Provisions of article 24 of the General Part and provisions of the sanctions of articles of the Special Part of the Criminal Code of Ukraine that provide for death penalty as a type of punishment shall be deemed to be such that do not conform to the Constitution of Ukraine (unconstitutional).

2. The provisions of the Criminal Code of Ukraine found to be unconstitutional shall become void from the day of the adoption of this Decision by the Constitutional Court.

3. The Verkhovna Rada of Ukraine shall bring the Criminal Code of Ukraine in line with this Decision of the Constitutional Court of Ukraine.

4. The Decision of the Constitutional Court of Ukraine shall be binding for execution on the territory of Ukraine, final and shall be not subject to appeal."

Thus the Constitutional Court of Ukraine found death penalty to be **absolutely unconstitutional in Ukraine both in peace and war time.**

B. However, **on political motives,** in contravention of the said Decision of the Constitutional Court of Ukraine, on 22 February 2000 the Verkhovna Rada of Ukraine adopted the Law of Ukraine No. 1484-III on the ratification of the 1983 Protocol No.6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning abolition of death penalty. According to this Law **death penalty will be applicable** in Ukraine **during war time**.

UNITED STATES / ETATS-UNIS

"QUESTIONNAIRE ON THE EXECUTION OF CONSTITUTIONAL REVIEW DECISIONS"

RESPONSE FOR THE UNITED STATES OF AMERICA

Jed Rubenfeld
Robert E. Slaughter Professor of Law
Yale Law School
Yale University
203-432-7631
jed.rubenfeld@yale.edu
United States Observer,
European Commission for Democracy Through Law

I. General Questions

A. *Type of constitutional review and its subjects*

1. In the United States, the federal Constitution is binding on all judges, state and federal, and hence every judge in every court of general jurisdiction – whether state or federal, whether inferior or superior – can and must engage in constitutional review of "normative acts."

It would be unconstitutional, for example, in United States practice for an inferior state judge to *refuse* to engage in constitutional review of a local law, provided that the judge was prepared to enforce the local law and provided that a constitutional question had been properly raised. A local judge who enforced a local piece of legislation, while refusing to engage in constitutional review thereof, would be regarded as violating the Constitution's requirement that "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, § 2.

Constitutional review can be exercised, however, only in a concrete "case or controversy." There is no "preliminary" or "advisory" constitutional review in the United States, where those terms refer to the ability of a governmental actor or body to procure an opinion from a United States court on the constitutionality of some proposed law or course of action before that law has been enacted or before that course of action has been taken.

Standing to bring constitutional claims is limited to parties specifically aggrieved or injured by the challenged law or action. There is no legislator's standing; members of Congress have no special standing to bring constitutional claims against federal statutes.

A small class of constitutional provisions are considered "non-justiciable." Hence it is possible for some legislative or executive actions to be immune to judicial review. Most scholars, for example, consider the impeachment process to be non-justiciable and hence not subject to judicial constitutional review.

2. In general there is no review of unconstitutional omissions to legislate in the United States. Exceptions could include rare situations in which specific, affirmative constitutional duties had been laid upon the Congress or the state legislatures but had been wholly ignored (as if, for example, Congress refused to enact legislation for the taking of the decennial census, which is specifically required in the Constitution).

3. The protection of constitutional rights is the chief subject of constitutional review in the United States. Again, an individual's claim that his constitutional rights have been violated can be heard in a variety of courts, state and federal, inferior and superior.

4. Numerous matters are subject to constitutional review in the United States in addition to the protection of individual rights. Prominent example include: (a) the separation of powers among the three federal branches of government; and (b) the allocation of powers between the federal and state governments. No special rules apply in such cases.

B. *Effects of Constitutional Review*

1. The courts' constitutional decisions, when final, are not merely declaratory in the United States. They are immediately effective and fully binding on all parties, including governmental parties, to whom they are directed. A law declared unconstitutional is null and void.

American courts have no express authority to modify a norm or law. They can, however, strike down portions of a law as unconstitutional while sustaining the rest of the enactment – a result that, in effect, can be said to "modify" the original law.

An order entered by a lower court declaring a law unconstitutional can be stayed pending appeal to a higher court. A final decision declaring a law unconstitutional is, however, immediately effective within the area of the court's jurisdiction. Its effect cannot generally be "postponed." No American is obliged to comply with a law declared unconstitutional by a final judgment of a court of competent jurisdiction.

In appropriate cases, however, a court may postpone the effectuation of any affirmative remedies it has ordered. Thus in the well-known case of *Brown v. Board of Education*, 347 U.S. 483 (1954), the United States Supreme Court ruled that racially segregated public schooling violated the equal protection guarantees of the Constitution, but permitted states a reasonable period of time to devise remedies to cure this unconstitutionality.

The United States judiciary has plenary authority to order other governmental organs and officers to take specific actions, within specific periods of time, to remedy a constitutional violation. The courts can set deadlines for such action and can in appropriate cases impose severe penalties for refusal to comply with such orders. As an example, although an exceptional one, the federal courts have in some cases become overseers of state prisons found to have engaged in repeated, systematic, and intentional violations of the constitutional rights of prisoners.

Decisions by United States courts on constitutional matters do not apply only to the parties in the particular case before the courts. For example, a final decision by the United States Court of Appeals for the Ninth Circuit declaring a law unconstitutional is fully binding on all courts in all cases in California, Oregon, Washington, and elsewhere within the area of the Ninth Circuit's jurisdiction.

On the other hand, such a decision would be merely *persuasive authority* for courts outside the Ninth Circuit. For example, the United States Court of Appeals for the Second Circuit (which includes New York) is free to disagree with the Ninth Circuit's judgment as to the constitutionality of a given law. Governmental actors in the Ninth Circuit must follow the Ninth Circuit's decisions, while actors in the Second Circuit must follow the Second Circuit's decisions. In such circumstances, the conflict will ultimately be resolved by the United States Supreme Court. A final decision by the Supreme Court is binding on all courts and all other actors in all cases presenting the same issue of law.

2. A judicial decision "quashing" the action of an administrative or executive agency on constitutional grounds is decisive. It is not "sent back" to that organ for a new ruling, unless the court so orders.

3. Constitutional decisions by American courts have binding precedential force. They are *controlling* authority for inferior courts. When a court confronts an issue that it has itself decided on a previous occasion, the earlier decision typically has the qualified force of *stare decisis* familiar to the common law system. There are, however, instances in which an American court can be without power to overrule its own prior decisions.

The federal appellate courts (the "circuit" courts) generally decide cases in three-judge panels. When such a panel renders a decision, an aggrieved party can petition the entire court for rehearing. Such a petition is granted only in very exceptional cases. Ordinarily, then, a three-judge panel will decide cases on behalf of the entire court. In such cases, a future three-judge panel of the same circuit will in principle lack authority to overrule a decision by a prior three-judge panel. Thus a prior decision by the United States Court of Appeals for the Ninth Circuit will not only be binding on district courts within the jurisdiction of the Ninth Circuit, but also on future three-judge panels of that circuit. But the Ninth Circuit sitting *en banc* (as a whole) would have authority to overrule any prior Ninth Circuit decision.

Constitutional decisions by American courts have full *res judicata* effect. They are published in an official reporter as well as in other reporters and on the internet.

II. **Means Available to Ensure Execution**

The authority charged with executing constitutional judgments in the United States will depend on the nature of the case and the parties before the court. Because constitutional review in the United States is concrete – it occurs only in actual cases and controversies – courts that strike down a law or other governmental action as unconstitutional will characteristically order the losing party in the case at hand to take the appropriate measures to execute the court's order.

III. **Consequences when Decision is Not Executed**

In the event that state actors do not comply with a judicial constitutional decision, the full force of the United States Government is in principle available to ensure execution. To take once again the well-known example of *Brown v. Board of Education*, in which the Supreme Court ordered southern states to permit black students to attend "white" public schools, the President of the United States ultimately called out the National Guard to enforce the Court's orders in Georgia and to protect the safety of black students.

IV. **Cases Where Decision was Not Executed**

There are no recent cases of non-execution. There has been no case of absolute refusal to execute for about two hundred years.

V. **Cases of Unsatisfactory Execution**

There are many cases of unsatisfactory execution, varying greatly in nature. A typical problem of this sort for the United States might, for example, concern a judicial order finding that a given prison is unconstitutionally overcrowded. Genuine steps may be taken to relieve the overcrowding, but these steps may be insufficient or the problem may recur later. Another example might be police forces that continue to engage in constitutionally prohibited conduct even after judicial decisions ordering that such practices cease and desist. The problem here involves in part the difficulties of monitoring and in part the difficulties of translating legal decisions understandable to trained lawyers into effective on-the-street rules understandable and acceptable to police officers.

URUGUAY

Ref : 16.80/00-829
MAS/nd

Paris, le 31 octobre 2000

Monsieur G. BUQUICCHIO
Secrétaire de la Commission de Venise
67075 STRASBOURG Cedex

Monsieur le Secrétaire,

Je suis désolé de n'avoir pas répondu plus tôt à votre questionnaire sur « L'exécution des arrêts des juridictions constitutionnelles », mais j'ai été absent pendant plus d'un mois et viens seulement d'en prendre connaissance.

Permettez-moi de vous adresser ci-jointe la copie - en espagnol - des dispositions qui régissent la déclaration d'inconstitutionnalité des lois en Uruguay et l'annulation des actes administratifs, généraux ou particuliers. Vous trouverez, à la lecture de ce document, une bonne partie des réponses aux questions qui figurent dans le questionnaire, sans perdre de vue ce que stipule l'art. 259 (les sentences de la Cour Suprême de Justice s'appliquent exclusivement à un cas concret).

I. / A.

Seuls les lois (actes juridiques approuvés par le Pouvoir législatif et promulgués par le Pouvoir exécutif), ainsi que les décrets des gouvernements départementaux (actes-règles approuvés par le Conseil départemental et promulgués par le Maire) peuvent être déclarés inconstitutionnels. Les actes normatifs (par exemple décrets du Pouvoir exécutif), qui ne sont ni des lois ni des décrets départementaux, ne peuvent être annulés par le Tribunal du Contentieux Administratif que s'ils sont contraires à une règle de droit ou ont été dictés par détournement de pouvoir. Le contrôle préventif n'existe pas. C'est toujours « a posteriori ». La juridiction constitutionnelle ne peut modifier la loi, ni ses décisions faire force de loi.

B.

La sentence de la Cour Suprême de Justice ne s'applique qu'au cas particulier : la loi ne s'applique pas aux parties en procès ni aux intéressés, mais elle n'est pas déclarée nulle, ni dérogée par la sentence. Elle reste en vigueur jusqu'à ce qu'une autre loi la modifie ou la déroge. Il n'y a pas d'effet « erga omnes ».

Seul dans le cas de « acción de amparo », le Juge en exercice peut ordonner à l'Administration d'agir, mais cette possibilité n'est pas utilisée dans mon pays pour remettre en question la constitutionnalité des lois.

V.

Notre système - qui date de 1934 - a fait ses preuves mais a choisi un chemin intermédiaire : la loi déclarée inconstitutionnelle (par le Pouvoir Judiciaire) reste en vigueur tant que le Pouvoir Législatif n'en a pas décidé autrement. Ce système respecte le principe de séparation des pouvoirs mais oblige les particuliers à alléguer des actions ou des exceptions d'inconstitutionnalité (art. 258) chaque fois qu'ils se considèrent lésés dans leurs intérêts, même s'il existe déjà une jurisprudence sur l'inconstitutionnalité qui les affecte.

Il est évidemment que ma réponse n'aborde qu'une infime partie du questionnaire, mais j'estime que de nombreuses questions trouvent leur réponse dans la simple lecture de la Constitution qui, au moins pour nous - est suffisamment explicite.

Veuillez agréer, Monsieur le Secrétaire, l'expression de ma considération distinguée.

Miguel Angel SEMINO
Ambassadeur

Ref: 16.80/00-856
MAS/nd

Paris, le 15 novembre 2000

Monsieur G. BUQUICCHIO
Secrétaire de la Commission de Venise
67075 STRASBOURG Cedex

Monsieur le Secrétaire,

Ma réponse au questionnaire sur « L'exécution des arrêts des juridictions constitutionnelles », que j'ai précédemment envoyée est la définitive, car loin de mon pays, de ma bibliothèque et occupé à ma tâche diplomatique, il m'est difficile de rédiger un rapport plus complet, comme j'aurais aimé le faire.

Je joins une traduction (libre) en français des dispositions qui régissent en Uruguay, en matière d'inconstitutionnalité (Constitution de 1967).

Je précise que le problème de l'exécution des sentences de la Cour Suprême de Justice ne se pose pas, chez nous, car la décision est prise au cours d'un procès et pour un cas particulier (effet « inter parties ») exclusivement : la loi déclarée inconstitutionnelle sera inapplicable à celui qui a agi (demandeur) ou qui a opposé l'exception.

Par exemple : l'Etat prétend percevoir d'un particulier une somme d'argent au nom d'un impôt. En réponse, le particulier, soutient que la loi qui établit cet impôt est contraire à la Constitution pour tel ou tel motif. Le procès est aussitôt porté devant la Cour Suprême de Justice qui tranchera de façon définitive. Si elle déclare la loi inconstitutionnelle, l'Etat ne pourra pas recouvrer l'impôt en question et si elle la déclare conforme à la Constitution, le procès est renvoyé auprès du Tribunal d'origine qui conclura par une sentence ordonnant au particulier de payer ce qui est dû.

Veuillez agréer, Monsieur le Secrétaire, l'expression de ma considération distinguée.

Miguel Angel SEMINO
Ambassadeur

TRADUCTION LIBRE

Art. 256 - Les lois pourront être déclarées inconstitutionnelles pour raison de forme ou de contenu, selon ce qui est établi par ce qui suit.

Art. 257 - La connaissance et la résolution originale et exclusive en la matière est de la compétence de la Cour Suprême de Justice : elle devra se prononcer sur les formalités requises des sentences définitives.

Art. 258 - Toute personne qui se considère lésée dans son intérêt direct, personnel et légitime, pourra réclamer l'inconstitutionnalité d'une loi et l'inapplicabilité des dispositions qui en émanent :

1) Par la voie d'une action qu'elle entreprendra auprès de la Cour Suprême de Justice.

2) Par la voie d'exception, dans n'importe quelle procédure judiciaire.

Le Juge ou le Tribunal saisi d'une procédure judiciaire, ou le Tribunal du Contentieux Administratif, selon les cas, pourront également demander d'office la déclaration d'inconstitutionnalité d'une loi et son inapplicabilité, avant de dicter une résolution.

Dans ce cas, de même que dans celui prévu au n° 2, la procédure sera suspendue et l'affaire portée devant la Cour Suprême de Justice.

Art. 259 - L'arrêt de la Cour Suprême de Justice s'appliquera exclusivement au cas concret et n'aura d'effet que sur l'affaire en question.

Art. 260 - Les décrets des Gouvernements Départementaux qui font force de loi dans leur juridiction, pourront également être déclarés inconstitutionnels, en application des dispositions établies dans les articles antérieurs.

Art. 261 - La loi réglementera les procédures pertinentes.