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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH THE LAW
(VENICE COMMISSION)

Judgments of constitutional courts and the execution thereof

REPORT BY THE SECRETARIAT

Introduction

At the dawn of the twenty-first century, constitutional courts have become one of the pillars of the primacy of law and, more generally, of constitutional law. Even though their role and jurisdiction differ from State to State, since they were instituted in very different historical and political circumstances, it is essential that their decisions should be carried out effectively. Accordingly, the main aim of this study is to consider the effects of judgments of constitutional courts and their execution, an exercise which will be carried out in Parts 2 and 3. These questions, however, cannot be divorced from an examination of the type and purpose of the review of constitutionality, which will be considered in Part 1.

Consequently, this study is not confined to issues relating to the execution of constitutional decisions, but sets out to provide a general description of the functioning of constitutional courts of States taking part in the proceedings of the Venice Commission. The study is based on the questionnaire on judgments of constitutional courts and their execution which was adopted by the Venice Commission following its 43rd meeting (June 2000)¹. Thirty-nine States² sent replies to the questionnaire to the Secretariat.

For the purposes of this study, constitutional courts may be defined as being judicial bodies of last instance which review constitutionality.

What may be involved is:

- a constitutional court which carries out concentrated supervision, be it *a posteriori* (examples: *Austria, Italy*) or *a priori* (*France*) or both (*Hungary*);
- a supreme court which determines constitutional disputes at last instance in the context of a diffuse degree of supervision (*Canada, Ireland, Japan, United States*);
- an intermediate situation: for example, in *Estonia*, the Supreme Court carries out concentrated supervision; in *Israel* the constitutional court participates in a system which combines both diffuse and concentrated supervision; in *Portugal* and to an even greater degree in *Malta*, the constitutional court is involved in a diffuse system of supervision.

I. The type and purpose of the review of constitutionality

The review of constitutionality takes different forms depending on the State concerned. Furthermore, the various types of constitutional review have differing consequences with regard to the carrying out of judgments, which explains why it is appropriate to consider them here.

1. Preventive review

Preventive review is carried out with regard to a legal text before it enters into force. Such review is generally carried out by constitutional courts (*France*) or supreme courts (*Estonia*), which carry out a concentrated review. In some States, preventive review is carried out only

¹ CDL (2000) 45.

² Albania, Andorra, Armenia, Austria, Azerbaijan, Bosnia-Herzegovina, Bulgaria, Canada, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Republic of Korea, Latvia, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United States, Uruguay. See document CDL (2000) 89.

with regard to international treaties, thereby enabling any conflict between constitutional law and international law to be avoided (*Armenia, Azerbaijan, Bulgaria, Lithuania, Slovenia, Spain*); the *German* Constitutional Court has even introduced preventive review of treaties with a view to avoiding such conflicts. In *Austria*, preventive review is confined to the allocation of competences between the Central State and the *Länder*³. Preventive review is not precluded in systems which, in principle, practise diffuse review, such as *Canada*, where it exists in the form of a request for a consultative opinion, or *Ireland* (where it falls exclusively to the Supreme Court).

As we shall see later, preventive review raises very few problems as far as execution is concerned. This is because the contested act quite simply does not enter into force and is not liable to be implemented.

2. Review in the abstract

Apart from preventive (*a priori*) review in the abstract (or principal review) of constitutionality relates to provisions that are already in force, and hence is carried out *ex post facto*. Such review exists in most States with a system of concentrated review, with the exception of the *Republic of Korea* and *Luxembourg*. Moreover, it is not ruled out in States applying diffuse review (*Canada, Ireland and Switzerland* - in the case of legislative measures of the cantons).

Review in the abstract – whether it be solely preventive (first case), solely repressive (second case) or a combination of the two (third case) – is carried out generally at the request of an authority.

Examples:

- *France* (first case): a case may be referred only by the President of the Republic, the Prime Minister, the President of the Assembly, the President of the Senate, or sixty members of the National Assembly or Senators,
- *Czech Republic* (second case): an application for the annulment of legislative provisions, for example, may be made by the President of the Republic or at least forty-one Members of Parliament or 17 Senators or also following the lodging of a constitutional complaint⁴;
- *Moldova* (second case): the Constitutional Court may be seised by the President of the Republic, the government, the Minister of Justice, the State Prosecutor, Members of Parliament and parliamentary groups;
- *Bulgaria* (third case: preventive control relates solely to international treaties): the Constitutional Court meets at the request of at least one-fifth of Members of Parliament, the President, the Council of Ministers or the State Prosecutor⁵;
- *Portugal* (third case): preventive review is requested by the President of the Republic (Ministers in the case of lower-ranking provisions), *ex post facto* review by the President of the Republic, the President of the Assembly of the Republic, the Prime Minister, the *Provedor*

³ Article 138(2) of the Constitution (Cst).

⁴ Article 64 of the Law on the Constitutional Court.

⁵ Article 150(1) Cst.

da Justiça, the Prosecutor of the Republic, one-tenth of the Members of the Assembly of the Republic, the Ministers of the Republic, the regional legislative assemblies, etc.⁶

3. Preliminary review

The constitutionality of provisions may also be reviewed when considering a specific case (preliminary – also termed specific or incidental – review).

Specific review exists in the first place in systems of diffuse review (examples: *Canada, Japan, Malta, Portugal, United States*).

In contrast, in States where there is concentrated review of constitutionality, review takes the form of a reference for a preliminary ruling by the ordinary courts to the Constitutional Court. This system is applied, for example, by *Estonia, Lithuania, Luxembourg* and *Turkey*.

Preliminary references may be combined with the possibility of bringing proceedings in a specific case before the Constitutional Court for violation of constitutional rights, which may in turn result in a preliminary review of legislative measures (examples: *Albania*⁷, *Andorra, Austria* in administrative matters⁸, *Hungary, Slovakia*⁹, *Spain*¹⁰).

4. Direct action before the Constitutional Court

In many States, individuals may bring a direct action against decisions liable to detract from their constitutional rights, in particular where the breach of the constitution is the result of the decision itself and not of a legislative measure.

This is the case in the first place in States in which diffuse review of constitutionality exists (examples: *Canada, Finland, Greece, Malta, Switzerland, United States*).

However, this is also possible in a number of States which practise concentrated review of constitutionality (examples: *Bosnia-Herzegovina, Czech Republic*¹¹, *Spain*¹²). Accordingly, in the *Czech Republic* any natural or legal person may bring a complaint before the Constitutional Court alleging violation of fundamental rights guaranteed by the Constitution or an international treaty in the sphere of human rights. In this context, such a person may seek the annulment of provisions of legislation or regulations whose application gave rise to the situation to which the constitutional complaint relates (preliminary review); such a request for preliminary review may be made in addition to the constitutional complaint but is not a condition for lodging such a complaint. The constitutional complaint must be made after exhausting all remedies available before other authorities¹³.

⁶ Articles 279 and 281 Cst.

⁷ Article 131(f) Cst.

⁸ Articles 140 and 144 Cst.

⁹ Articles 127 and 130(3) Cst.; Article 18(1)(d) of the Law on the Constitutional Court with regard to references by courts to the Constitutional Court.

¹⁰ Articles 161(1)(b), 162(1)(b), 163 Cst.

¹¹ Article 87(1)(d) Cst.

¹² Article 161(1)(b) Cst.

¹³ Articles 72-74 of the Law on the Constitutional Court.

In some States, however, a direct action may be brought before the Constitutional Court only where it is alleged that a legislative measure is not in conformity with the Constitution (*Austria*¹⁴, *Poland*¹⁵).

It is also possible in a State in which concentrated review of constitutionality exists to provide that the ordinary courts have jurisdiction to rule on allegations relating to the unconstitutionality of decisions (*Italy*).

5. Limits on the review of constitutionality

a. Acts rendered immune

Whilst some form of review of constitutionality exists in all the States which answered the questionnaire, the extent of that review varies, not only with regard to the type of review and who may apply for such review (whether or not an individual may bring an application, for example) but also because some legislative measures are not amenable to a review of their constitutionality in all States.

The jurisdiction of the Constitutional Court varies from case to case. In *the Netherlands*, all laws are exempt from the review of constitutionality. In *Switzerland*, the same applies to federal laws and all federal or cantonal provisions based directly on a federal law and likewise international treaties¹⁶. In *Luxembourg*, only international treaties are exempt. In *France*, only laws approved by referendum do not fall within the scope of constitutional review.

In *Moldova*, acts prior to the Constitution cannot be subject to review of constitutionality. The same is true in *Turkey* of a number of reform laws enacted between 1924 and 1934 and of legislative measures going back to the regime of the Council of National Safety¹⁷.

The Constitution itself and amendments thereto are in principle excluded from any review of constitutionality. However, some States make provision for a formal review of the constitutionality of amendments (*Hungary*, *Turkey*¹⁸).

It must also be noted that, in States which only have preventive review of constitutionality, acts not submitted to the Constitutional Court in time are *de facto* immune from review (*France*).

The systems for reviewing constitutionality in *Finland* and *Sweden* constitute a particular case. Their review is limited to manifestly unconstitutional acts (without prejudice to acts adopted by bodies of lower rank than the government in *Sweden*).

b. Unconstitutional omissions

For the most part, Constitutional Courts review the constitutionality of legislative acts that have already been adopted or are to be adopted (in the case of preventive review). However, unconstitutionality may result, not from the existence of a legislative act, but from its non-existence where the Constitution requires such an act to be adopted. Few States provide that the Constitutional Court may rule on such omissions. This type of review is most developed

¹⁴ Article 144 Cst.

¹⁵ Article 79(1) Cst.

¹⁶ Article 191 Cst.

¹⁷ Articles 148(1) and 174 Cst.

¹⁸ Article 148(1) Cst.

in *Germany*. Such review may be carried out both in constitutional proceedings brought by individuals alleging unconstitutionality and in proceedings concerning conflicts of jurisdiction as between institutions of the State¹⁹; furthermore, unconstitutional omissions may be identified when carrying out a review of provisions *in abstracto* or *in concreto*. In *Bosnia-Herzegovina*, the Constitutional Court may recommend or order laws to be adopted so as to remedy *lacunae*. Constitutional Courts may also make findings that such omissions exist in the *Republic of Korea* (if the Constitution provides for a specific obligation on the part of the legislature), in *Italy* and in *Ukraine* (according to case-law), in *Hungary* and in *Portugal*²⁰. Furthermore, in some cases, in the absence of implementing legislation provided for by a provision of the Constitution, the Constitutional Court will apply that provision directly (*Greece*, in the case, for example, of compensation for owners who are the victim of restrictive measures imposed with a view to the protection of historical sites and monuments²¹). In addition, where a Constitutional Court makes a finding that an inequality exists, this often leads to a further finding that there is a legislative omission, where, in order to remedy the inequality, the legislature has to extend the scope of the provision to cover other addressees.

Unconstitutional legislative omissions may also found actions for damages against the State (*Greece, Iceland, Japan*).

c. Questions of jurisdiction

For the sake of completeness, it should be pointed out that reviewing lower-ranking acts for conformity with higher-ranking law does not fall within the remit of the Constitutional Court in all the States that have set up such a court. In such case, such acts are not rendered immune but fall within the jurisdiction of the ordinary courts. Thus, in *Italy*, delegated legislation is brought before the Constitutional Court only in the event of a conflict of jurisdiction; in *Armenia*, acts adopted by the Government may be brought before the Constitutional Court, but not acts emanating from institutions of lower rank; on a more general level, in those two State actions for violation of constitutional rights in a specific case fall within the jurisdiction of the ordinary courts. In *France*, regulatory measures come within the jurisdiction of the Council of State. In *Uruguay*, acts other than laws and decrees come within the purview of the Administrative Court.

A specific case arises in *Switzerland* as regards the cantonal Constitutions, which are guaranteed by the Federal Assembly (Parliament)²². The courts, and in particular the Federal Court, are entitled only to review whether they are in conformity with provisions which were not in force at the time when that guarantee was conferred.

6. The other powers of the constitutional courts

In general, constitutional courts exercise a number of powers above and beyond the review of the constitutionality of legislative measures and decisions.

¹⁹ See Article 93(1),(3) and (4)(a) Cst.

²⁰ Article 283 Cst.

²¹ Article 24(6) Cst.

²² Articles 51(2) and 172(2) Cst.

Obviously, Supreme Courts with general jurisdiction carry out their activities outside the constitutional sphere. This falls outside the scope of this study. In contrast, it is appropriate to examine the powers of the constitutional courts in the constitutional field.

a. Conflicts between organs of the State

Constitutional courts often have jurisdiction to determine conflicts (of jurisdiction and other conflicts) between organs of the State, including those involving different levels of State competence. This role is particularly important in federal or regional States. In *Austria*, the Constitutional Court determines conflicts of jurisdiction as between the courts and the administrative authorities or as between the courts, on the one hand, and as between the Federation and the Länder or as between Länder, on the other²³. In *Germany*, the Constitutional Court rules in particular on the interpretation of the Basic Law when disputes arise about the extent of the rights and obligations of a supreme federal institution or when there are differences of opinion as to the rights and obligations of the Federation and the Länder; it also entertains some actions from local authorities brought for breaches of their right of self-administration²⁴. In the *United States*, the Supreme Court rules both on questions concerning the separation of powers at the federal level and on the allocation of competences as between the Union and the States. Where the Constitutional Court has an autonomous status, this may result in such jurisdiction being conferred upon it (in *Finland*, the Supreme Court has jurisdiction to determine conflicts between the Central State and the Åland Islands). In other States, conflicts between the Central State and local and regional authorities also fall within the jurisdiction of the Constitutional Court (*Albania*²⁵, *Andorra* in the case of parishes, *Czech Republic*, *Hungary*); the Constitution of *Azerbaijan* provides that “the Constitutional Court ... shall determine questions ... relating to the settlement of disputes in connection with the delimitation of powers as between the legislature, the executive and the judiciary”, including local bodies²⁶. In *Slovakia*, in contrast, the Court’s jurisdiction is restricted to conflicts between institutions of the Central State.

Moreover, even in States which do not provide for specific remedies, conflicts of jurisdiction may be determined indirectly in the context of the review of constitutionality (example: *Portugal*, in the case of conflicts between State legislation and legislation of the autonomous regions of Madeira and the Azores) or in the context of ordinary actions (*Iceland*).

b. *Jurisdiction with regard to elections and votes*

Constitutional Courts and their equivalents often have jurisdiction in the electoral field (elections and referendums). This is true both of Constitutional Courts properly so called and of Supreme Courts having jurisdiction in constitutional matters, of courts carrying out preventive review of constitutionality and of those carrying out repressive review.

Accordingly,

- In *France*, although it carries out essentially preventive review, the Constitutional Council has the power to supervise the legality of the election of the President of the Republic, to rule

²³ Article 138 Cst.

²⁴ Article 91(1)(1)(4) and (4)(b) Cst; see also Articles 28 and 84(4)(2).

²⁵ Article 131(c) Cst.

²⁶ Article 130(III)(9) Cst.

- in the event of a dispute – on the legality of the election of Members of Parliament and senators and to supervise the conduct of referendums and to announce their results.

- The *Austrian* Constitutional Court, which, in contrast, invariably carries out repressive review, except with regard to the allocation of powers, has jurisdiction with regard to electoral disputes²⁷; the same situation obtains in *Albania* (the Constitutional Court rules on the election of the President of the Republic and Members of Parliament and on the constitutionality of referendums and the verification of their results²⁸);

- In *Lithuania*, direct recourse to the Constitutional Court is no more possible in the electoral field than it is in others; the Constitutional Court gives an opinion as to whether there has been any infringement of electoral laws during the election of the President of the Republic and of the members of the *Seimas*²⁹;

- In *Greece*, one of the main powers of the Special Supreme Court relates to disputes concerning elections and referendums³⁰.

In other States, the Constitutional Court rules on recourse to referendums (*Italy, Portugal*) or on the results of referendums (*Armenia*). In *Hungary*, the Constitutional Court rules on appeals against decisions of the National Electoral Commission concerning the permissibility of questions put in referendums and their results.

Electoral disputes also come within the jurisdiction of Supreme Courts exercising diffuse supervision, as in *Ireland, Iceland* and *Switzerland*³¹.

c. Powers with regard to the constitutionality and the dissolution of political parties

A good number of Constitutional Courts have jurisdiction to rule on the constitutionality of political parties and, as a result, on their dissolution and their prohibition (examples: *Czech Republic, Germany*³², *Republic of Korea, Poland, Portugal, Slovenia, Turkey*). In *Albania*³³ and *Bulgaria*³⁴, this jurisdiction extends to other political organisations and, in *Azerbaijan*, to other associations³⁵.

d. Other matters

Sometimes, Constitutional Courts and equivalent bodies have other competences in constitutional matters or in allied fields. By way of example,

- in *Austria*, election disputes and disputes relating to the dismissal of statutory professional bodies, proceedings against the Federal or Länder authorities, determination of differences in the interpretation of the law as between the Federal Government and a Minister and the Ombudsman's office³⁶;

²⁷ Article 140 Cst.

²⁸ Article 131(e) – (ë) Cst.

²⁹ Article 105(3)(1) Cst.

³⁰ Articles 58 and 100(1)(a) – (b) Cst.

³¹ Article 189(1)(f) Cst.

³² Article 21(2) Cst.

³³ Article 131(d) Cst.

³⁴ Article 149(5) Cst.

³⁵ Article 130(III)(7) Cst.

³⁶ Articles 141(1), 142, 148 *et seq.* Cst.

- in *France*, the Constitutional Council's opinion is sought in a variety of circumstances by the President of the Republic, in particular where the latter contemplates implementing Article 16 of the Constitution in the event of grave and immanent danger to the functioning of the institutions;
- in *Germany*, the Constitutional Court has jurisdiction, in particular, to entertain public-law disputes between the Federation and the Länder, between different Länder or within a Land where they are not amenable to any other means of judicial review³⁷; in impeachment proceedings brought against the Federal President or judges³⁸; in cases involving deprivation of fundamental rights³⁹; and cases involving doubt whether a rule of international law forms an integral part of federal law and whether it directly creates rights and obligations for individuals⁴⁰;
- in the *Czech Republic*, the Constitutional Court rules *inter alia* on constitutional actions brought by the Senate against the President of the Republic, at the proposal of the President of the Republic in proceedings seeking the annulment of a decision of the Assembly of Deputies and the Senate in the event of the President's being prevented from acting and with regard to measures necessary to carry out a decision of an international court, which is binding on the Czech Republic if such decision cannot be carried out in any other way⁴¹;
- in *Moldova*, the Constitutional Court rules on initiatives for the revision of the Constitution and on circumstances justifying the dissolution of Parliament, the suspension of the President of the Republic from his office or the acting President⁴²;
- in *Ukraine*, the Constitutional Court rules on the permissibility of a revision of the Constitution and on its conformity with intangible norms on human and citizens' rights, independence and territorial integrity, and likewise with the prohibition on carrying out revisions within certain specified periods⁴³.

II. The effects of judgments

1. Principle and temporal effects

It is important to dwell on the question of the effects of judgments, since the way in which they are carried out largely depends on their effects.

Where *preventive review* is carried out, this, by definition, prevents the provision from entering into effect. No measure is annulled or declared void; rather it is the legislative procedure that does not reach its conclusion: the effect of the judgment is non-promulgation (*France, Italy*). If only part of the contested text is declared unconstitutional, the rest enters into force – except, of course, in the case of international treaties, which may not be ratified only in part. Thus, in *France*, it is for the government to assess whether the law, severed of

³⁷ Article 93(4) Cst.

³⁸ Articles 61 and 98(2) and (5) Cst.

³⁹ Article 18 Cst.

⁴⁰ Article 100(2) Cst.

⁴¹ Art 87(1)(g)-(i) Cst.

⁴² Article 135(c) *et seq.* Cst.

⁴³ Articles 157-159 Cst.

its unconstitutional provisions, still has any interest; if so, it will present the text so amended to the President of the Republic for promulgation.

In the case of *repressive review*, the unconstitutional provision is declared void or annulled (invalidated) where the judgment has effect *erga omnes*⁴⁴. The difference in terminology has no real significance, rather it is the question of the date on which the judgment takes effect that is determinative. Most often, the invalidation takes effect on the date on which the judgment is given or published (*ex nunc* effect). States in which invalidation systematically takes effect retroactively (*ex tunc*) are the exception: in such case, invalidation of a legislative measure does not apply only to the pending proceedings and to proceedings under way at the date of the judgment, but also to certain proceedings which have already been closed. This is the case:

- in *Ireland*, where the courts may however limit the retroactive effect to persons who had brought court proceedings at the date of the judgment;

- in *Portugal*: the principle of *res judicata* is maintained; the Constitutional Court may order an exception to this principle, in particular in criminal matters⁴⁵.

In other States, the Constitutional Court may stipulate that its judgment has *retroactive effect* (examples: *Andorra*, *Greece*). In *Germany*, judgments in criminal matters which are based on an unconstitutional provision may be revised; other decisions are no longer capable of being carried out⁴⁶. Decisions of the *Spanish* Constitutional Court have retroactive effect where the non-application of the unconstitutional provision would have resulted in a less severe criminal or administrative sanction or no sanction at all⁴⁷. In *Slovenia*, the Constitutional Court may determine that a judgment is to have retroactive effect where measures of delegated legislation adopted for the exercise of public powers are annulled; a party adversely affected by a decision adopted on the basis of such a measure is entitled to seek the amendment or annulment of such measure, provided that it was adopted less than one year before⁴⁸. In *Hungary*, an *ex tunc* –or conversely a postponement of the effect of the judgment – is possible where required on grounds of legal certainty; the Constitutional Court will order the reopening of criminal proceedings which resulted in a sanction based on an unconstitutional provision where its adverse effects subsist⁴⁹.

In numerous States, *the date on which the judgment takes effect may be deferred*, in order to give the authorities time to adapt the legislation to suit the Court's decision. This occurs particularly where the contested provision embodies an inequality which may be rectified by one of two opposing solutions (extending the scope of the provision or simply abrogating it) or more generally, where several solutions consistent with the Constitution are possible; the effects of judgments are deferred in particular where the judgment has major budgetary implications (for example in the field of tax or social security benefits) or where it requires administrative reorganisations (see below for an example from the *United States*). In *Poland*, the Constitution provides that "judgments of the Constitutional Court shall enter into force on the date of their publication; however, the Court may determine another date for the extinction of the binding force of the legislative measure. This time may not exceed 18

⁴⁴ See point II.2, *infra*.

⁴⁵ Article 282 Cst.

⁴⁶ Article 79 of the Law on the Constitutional Court.

⁴⁷ Article 40 of the Organic Law on the Constitutional Court.

⁴⁸ Articles 45-46 of the Law on the Constitutional Court.

⁴⁹ Articles 43(3)-(4) of the Law on the Constitutional Court.

months in the case of a law and 12 months in the case of other legislative measures. In the case of judgments giving rise to financial burdens not provided for in the budgetary law, the Constitutional Court shall determine the date on which the measure loses its binding force after having cognisance of the opinion of the Council of Ministers”⁵⁰. In *Slovenia*, judgments of the Constitutional Court are declaratory where they make a finding that there has been a legislative omission or that the unconstitutionality cannot be remedied by annulling or abrogating the contested measure; in such case, the Court sets a period for the competent authority to rectify the unconstitutionality⁵¹. In the *Czech Republic*, the Constitutional Court is even at liberty to determine the date on which its judgments take effect⁵². In other States, the ability to alter the date on which judgments take effect is enshrined by practice (*Italy*, by way of exception), in the *United States*, the Supreme Court may, in certain cases, allow a reasonable time for carrying out its decisions, as in the case of the well-known judgment in *Brown* prohibiting racial segregation in schools.

Whilst judgments of Constitutional Courts never formally amend the contested measure, it is possible in practice for the court’s decision to add new aspects to the provision. Accordingly, in *Italy*, the Constitutional Court sometimes gives judgments which result in the scope of a provision being extended to cover persons who have suffered unjustified discrimination or add provisions directly derived from the Constitution to provisions declared unconstitutional on the ground that they fail to implement the Constitution fully.

2. Scope of judgments

Most often, judgments have effect *erga omnes*. This is always the case following a declaration of nullity or the annulment of a legislative act, where there has been preventive review or abstract review. The *erga omnes* effect extends in certain States to all judgments relating to the unconstitutionality of a legislative measure, in particular in the context of a reference for a preliminary ruling or of a direct action before the Constitutional Court (*Hungary, Poland*) or the Supreme Court (*Ireland*). The provision is then invalidated. In a number of States, it is even provided that judgments of the Constitutional Court have the force of law (*Armenia, Canada, Lithuania*) or even force superior to law (*Andorra*). In *Austria*, judgments relating to the allocation of competences are in principle equated to constitutional law. Constitutional Courts may be bound by their previous decisions (*Portugal, Czech Republic*), but this is not the rule, even in common law countries (*Ireland, United States*).

In contrast, review of the constitutionality of decisions, including cases involving a preliminary review of the validity of provisions, often results in judgments whose scope is merely *inter partes*, leaving the way open for a reversal of the case-law and hence to contrary decisions of inferior courts, both in States in which there is a diffuse review of constitutionality (examples: *Finland, Japan, Netherlands, Sweden*) and in those which essentially practise concentrated review (examples: *Austria, Slovakia, Slovenia*). In *Luxembourg*, where only references for preliminary rulings are possible, judgments of the Constitutional Court always have an *inter partes* effect. In *Portugal*, a judgment given following a review *in concreto* only has effect on an *inter partes* basis, but, once the Constitutional Court has declared a provision unconstitutional in three specific cases, it may decide to carry out an *in concreto* review with *erga omnes* effect. In *Spain*, decisions relating to the protection of constitutional rights in principle have effect *inter partes*, but the

⁵⁰ Article 190(2) Cst.

⁵¹ Article 48 of the Law on the Constitutional Court.

⁵² Article 70 of the Law on the Constitutional Court.

interpretation given by the Constitutional Court is binding on the other courts and the agreement of the full court is needed in order to change the case-law. In *Switzerland*, a reversal of the case-law has to be justified on serious grounds and one division of the Federal Court cannot deviate from the case-law of another without the latter's agreement. In *Iceland*, since *stare decisis* has the force of a constitutional custom, judgments of the Supreme Court have *de facto* effect *erga omnes*.

In most States, judgments of the Constitutional Court or the equivalent court are published in an official gazette (examples: *Bosnia-Herzegovina* – publication in the Official Gazettes of Bosnia-Herzegovina and its constituent entities -, *Bulgaria, Estonia, France, Hungary, Italy*). In *Poland*, judgments are published in the organ in which the contested measure was promulgated and, in the absence of such an organ, in the official gazette. However, some States merely provide for publication in an official series of court reports (*Canada*), whereas others publish only a selection of judgments (*Greece*, in the case of the superior courts – Court of Cassation, Council of State, Court of Auditors -, as opposed to the special Supreme Court; *Ireland; Republic of Korea*).

3. Effects on other authorities

In a number of States, the judgments of the Constitutional Court do not have to be carried out by other institutions and the Constitutional Court has no power to order another authority to act. This is the case in particular where there is only preventive review, since the effect of the judgment in such a case is non-promulgation (*France*). The situation is similar in some States which apply abstract review and references for preliminary rulings (*Bulgaria, Estonia, Turkey*), and even direct actions before the Constitutional Court (*Canada, Czech Republic, Finland*). In *Albania* in principle judgments of the Constitutional Court have no effect on other authorities except where they determine the competent authority in a particular case.

Among the affirmative answers to the question as to the effect of judgments of the Constitutional Court on other authorities, some mention solely the obligation for the government to publish judgments declaring measures unconstitutional (*Austria*⁵³), others the obligation for the competent institutions to adopt measures (in particular laws) conforming to the Constitution (*Japan, Lithuania, Moldova, Netherlands*), in some cases within a time limit laid down by the Constitutional Court (*Bosnia-Herzegovina*). In *Slovakia*, the legislature has to bring the legislation into line with the Constitution within a period of six months of the decision of the Constitutional Court⁵⁴. In contrast, in other States, the Constitutional Court may request another authority to act, for example:

- by ordering a detainee to be freed (*Switzerland*);
- by ordering the legislature to amend a provision (*Republic of Korea, Hungary*), if necessary within a specified time (*Germany*), or by giving notice to this effect (*Italy*);
- by ordering the reopening of criminal proceedings which gave rise to a sanction with continuing adverse effects: *Hungary*⁵⁵;

⁵³ Article 140(5) Cst.

⁵⁴ Article 132 Cst.

⁵⁵ Article 43(3) of the Law on the Constitutional Court.

- in *Slovenia*, “where necessary, the Constitutional Court shall specify the institution responsible for the implementation and the conditions for applying the decision⁵⁶; in *Ukraine*, it “may specify in its decision or its opinion the procedures to be followed in order to give effect to them and compel the competent institutions of the State to carry out the decision to comply with the opinion”⁵⁷;

- in some States, the Constitutional Court has extensive powers and may give all orders necessary to have its judgments carried out, including giving instructions to other authorities: *Ireland, Malta*⁵⁸, *United States*; in the *United States*, the courts may, if necessary, impose severe sanctions in the event of a refusal to carry out their orders.

4. The effects of judgments given in direct actions before the Constitutional Court

Where a constitutional court (be it a Constitutional Court or a Supreme Court ruling under a system of diffuse review) rules in the context of a direct action brought by an individual for violation of constitutional rights, it may rule in one of two ways: either by giving judgment on the substance or by referring the case to an inferior authority for a fresh decision.

Reference to an inferior authority is the most frequent case, especially in States with a specialised Constitutional Court (examples: *Austria, Czech Republic, Portugal, Slovakia*). Alternatively, it is incumbent upon the competent authority to act in accordance with the judgment of the Constitutional Court, which amounts to the same thing (*Republic of Korea*).

In some States, referral to an inferior authority is the rule, although the Constitutional Court may itself rule on the substance: *Ireland, Netherlands, and Slovenia*.

In other States, the Constitutional or Supreme Court decides whether to rule itself or to refer the case to an inferior authority: *Canada, Japan, Spain*.

Of the States which answered the questionnaire, only *Israel* indicated that the Supreme Court itself rules on the substance in all cases.

Hungary is a particular case since, except in criminal cases, it is for the parties to reopen the proceedings before the ordinary courts. In the *United States*, referral to an inferior authority is the exception, although this does not preclude a resumption of the proceedings before such an authority. In *Poland*, a decision of the Constitutional Court ruling that a measure is unconstitutional constitutes the basis for reopening the proceedings before the inferior authorities.

III. Execution of judgments

1. Means for securing execution

The question of executing judgments is dealt with in a fairly varied way depending on the State. Several States have not adopted any provision in this connection (examples: *Bulgaria, Estonia, Latvia, Luxembourg, Netherlands*). In *Turkey*, once a contested provision has been declared null and void, the question of the execution of the judgment is regarded as being to

⁵⁶ Article 40(2) of the Law on the Constitutional Court.

⁵⁷ Article 70 of the Law on the Constitutional Court.

⁵⁸ Article 46(2) Cst.

no purpose. In the case of preventive review, the fact that the contested provision does not enter into force suffices in order to execute the judgment.

Some answers relating to States where judgments take effect solely on an *inter partes* basis indicate that the question of the execution of judgments does not really arise there (*Finland, Uruguay*).

Other answers indicate that judgments are enforceable (*Canada*), or binding on all authorities (*France*) or both (*Czech Republic*⁵⁹). In *Azerbaijan*, judgments are binding⁶⁰; the court follows up their execution on the basis of annual or six-monthly reports and informs the other institutions of the State where necessary. The execution of the judgment or opinion is notified to the *Moldavian* Constitutional Court on such terms as it indicates; the Court's secretariat monitors enforcement. In *Poland*, the judgment of the Constitutional Court indicates the authority competent to amend the unconstitutional measure.

In numerous States, it falls to the *executive* (government and administration) to execute the judgments. Accordingly,

- in *Albania*, execution is carried out by the Council of Ministers through the competent bodies of the State administration; the Constitutional Court may designate another institution as being responsible for executing its judgment and, where necessary, specify how the judgment is to be executed; in one case the Public Prosecutor's office executed a judgment;

- in *Austria*, judgments are executed by the Federal President or under his authority, with the exception of judgments relating to pecuniary claims against the Federation, the Länder, or the local authorities, which are executed by the ordinary courts⁶¹;

- in *Switzerland*, an appeal may be made to the Federal Government in the event of non-execution⁶².

In *Slovakia*, whereas there is no provision on the execution of judgments, the prosecutors may ensure that judgments are in fact executed pursuant to their ordinary powers.

In contrast, in *Greece*, only court action is available to secure the execution of judgments of constitutional courts and such action is not available in respect of decisions relating to the unconstitutionality of a law. An action may be brought in the courts against court decisions and administrative measures taken after delivery of a judgment of the Supreme Court and contrary thereto; a special action is also provided for in order to secure the execution of judgments of the superior courts (Council of State, Court of Cassation and Court of Auditors) or to challenge decisions which have entered into force on the basis of a law which has been declared unconstitutional with retroactive effect.

Lastly, as mentioned above⁶³, in some States, the Constitutional Courts may give all the orders necessary in order to have their judgments carried out, including giving instructions to other authorities (*Ireland, Malta, Ukraine, United States*) or may at least specify the body

⁵⁹ Article 89 Cst.

⁶⁰ Article 130(VI) Cst.

⁶¹ Articles 146 (and 137) Cst.

⁶² Article 39(2) of the Federal Law on the Organisation of the Judiciary.

⁶³ See point II.3 *supra*.

responsible for carrying them out and for the conditions for implementing them (*Germany*⁶⁴, *Slovenia*).

In *Spain*, the Constitutional Court may determine who has to execute the judgment and where applicable, rule on objections to execution⁶⁵. Accordingly, it may put an authority on notice to terminate difficulties in execution.

2. Problems relating to the execution of judgments

Most of the replies to the questionnaire do not mention recent cases of non-execution or inadequate execution of judgments of constitutional courts. However, some problems were noted.

- Some related to the *absence of clear legal provisions on the effect of judgments*; hence, in *Hungary*, until 1999 there were no provisions on how to reopen ordinary proceedings where an unconstitutional provision had been applied.

- It is also possible that *ordinary courts* are not inclined to comply with judgments of the Constitutional Court. In *Estonia*, the law provides that the ordinary proceedings continue in the event of a reference to the Supreme Court for a preliminary ruling, which may lead to contradictory decisions; it can occur that a judgment of a lower court which is contrary to one of the Supreme Court enters into force, at least in civil and administrative matters (in criminal cases, this would constitute a ground for appeal). In *Italy*, the Court of Cassation has not always followed the interpretation given by the Constitutional Court which considered, in a judgment with no *erga omnes* effect, that the law did comply with the Constitution; indeed, the court of Cassation considered that it alone was competent to interpret the law. Now, in principle, the Constitutional Court, no longer diverges from the way in which the ordinary courts interpret laws. There have also been cases where an ordinary court has failed to follow the case-law of the Constitutional Court in the *Czech Republic*, but these have been resolved. Similar problems have arisen in *Portugal*.

- Other difficulties arise from the *concrete nature of the review*, especially in countries which do not have diffuse review of constitutionality: since the unconstitutional provision is not abrogated, it is possible for it to be applied by lower courts or administrative bodies (examples: *Greece, Ireland, Malta, Netherlands*). Similar problems have arisen in *Germany* where the Constitutional Court held that certain fiscal legislation was unconstitutional rather than null and void (given the financial implications involved).

- The administration's reluctance to apply across the board the principles identified by a given judgment may be ascribed in particular to *financial or practical reasons* – for example, with regard to the right of handicapped children to primary education in *Ireland* or the finding that prison overcrowding in the *United States* is unconstitutional.

- *Political reasons* may be involved where it is necessary to *adopt laws in conformity with the Constitution*, in particular in the case of an unconstitutional omission: in *Hungary*, this was the case with statutes on minorities, the media and the minimum number of Members of Parliament per parliamentary political group, which were ultimately enacted. *Financial grounds* may also make execution difficult (*Moldova*, as regards legislation on foreign

⁶⁴ Article 35 of the Law on the Constitutional Court.

⁶⁵ Article 92 of the Organic Law on the Constitutional Court.

investment). Delays in the adoption of statutes in conformity with the Constitution have also been observed in *Italy*, *Slovakia* and *Slovenia*. In *Ukraine*, the death penalty has been maintained in peacetime, likewise the holding of dual legislative and executive offices, contrary to the case-law of the Constitutional Court.

- Difficulties in executing judgments of constitutional courts may also be due to *lack of knowledge of them* or their *lack of clarity* (*Portugal*).

Without there being any question of non-execution, properly so-called,

- public disagreement of certain authorities with a judgment of the Constitutional Court could make its application more difficult (*Armenia*);

- postponing the effects of a judgment of the Constitutional Court (by the Court itself) may give rise to an unsatisfactory situation (*Austria*) – claims arising out of a declaration of unconstitutionality may be time-barred (*Iceland*).

3. Consequences of the non-execution of judgments

Most of the answers to the questionnaire indicate that the consequences of non-execution are not catered for by the legislation. Often, this is due to the fact that there have been few real cases of non-execution, owing in particular to the means conferred on the Constitutional Court in order to impose its decisions on other authorities.

In the absence of specific provisions, ordinary judicial proceedings (*Iceland*, *Netherlands*) or fresh proceedings before the Constitutional Court (*Portugal*) may be brought by the parties.

A number of States provide for legal sanctions in the event of non-execution. These may be *criminal sanctions*, as in *Azerbaijan*⁶⁶ or in *Ireland* (contempt of court); in *Albania*, the President of the Constitutional Court may impose a fine. An administrative fine is provided for in *Moldova*.

In addition, in *Azerbaijan*, the President of the Court refers the matter to the full court in the event of non-execution with a view to its taking the necessary measures.

Civil sanctions (damages) may also be imposed on persons who do not carry out a judgment of the Constitutional Court (*Ireland*, *Portugal*).

Lastly, in extreme cases, judgments may be executed by *force*, as was the case in the *United States* in order to suppress racial segregation in education.

Conclusion

As might have been expected, the diversity of forms of constitutional court results in diversity in the effects of their decisions and the manner of executing them.

For example, preventive or even abstract review will give rise to fewer difficulties of execution than review carried out in individual cases where such review nevertheless results in judgments of general scope. The sanction whereby the law does not enter into force or is

⁶⁶ Article 80 of the Law on the Constitutional Court.

invalidated is easier to execute than a sanction requiring an institution to revise the measures which it has adopted or, worse, requiring the administration to alter a long-established practice. Political or financial considerations may also constitute major impediments to the execution of judgments.

Obviously, this does not signify that only judgments which are easy to execute should be given, such that reasoning could have the perverse effect of reducing the compass of the review of constitutionality. Neither does this mean that courts should not take subtle decisions, leaving a degree of leeway to the legislator, rather than unrealistically imposing substantial expenditure or creating a legislative vacuum. On the other hand, procedural rules must be framed sufficiently precisely so as to avoid leaving the way open to non-execution or to doubts as to the effects of a judgment; legislation must provide for institutions empowered to execute judgments and, where necessary, to act in the event of non-execution. It is fortunate in this regard that, despite their imperfections, the systems currently applied give rise to only a limited number of cases of non-execution.