**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

# Models of Constitutional Jurisdiction

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## A. INTRODUCTION

This report is based on the First and Second Progress Reports on Models of Constitutional Jurisdiction by the rapporteur, the discussions at the Commission's meeting with Presidents of European Constitutional Courts and Supreme Courts in Padova in 1990, and on comments on the questionnaire submitted by the rapporteur to that meeting. This report may accordingly refer to the general statements and the fundamental principles and presuppositions of a system of constitutional jurisdiction contained in these reports.

Nevertheless the following points shall be called into the mind:

1. As a mere working definition the rapporteur by constitutional jurisdiction means judicial institutions and procedures directly instituted for the purpose to guarantee the observation of the constitutional order of a state.

2. By judicial institutions the rapporteur means institutions established by law which are accorded competences to decide cases or controversies according to law and legal criteria, proceeding on the basis of legally provided rules of procedure, rendering final decisions which are binding within their scope of territorial, personal and temporal jurisdiction, to the extent of the subject-matter decided upon, on all domestic public powers and other parties involved; composed of members whose functional and personal independence from public and private powers is guaranteed by law.

3. In conclusion of what the Draft Report discussed under the sub-heading "Principal Types of Constitutional Jurisdiction - Possible Advantages of a Special Constitutional Court", it is recommended to have constitutional jurisdiction exercised by a permanent special constitutional court.

Especially if a state wishes to introduce constitutional jurisdiction to its legal system, for the first time, possibly in connection with a new constitution, it appears preferable to entrust the decision of constitutional issues to a special institution, raised (to that extent) above the ordinary courts. For in this situation the judges of the ordinary courts may be neither trained nor used to dealing with constitutional matters.

Such a system, it should be emphasized, does not imply that all other courts be excluded from passing upon issues of constitutional law although there must be some rules as to what extent the courts of ordinary jurisdiction shall be competent to scrutinize a case on its constitutional implications and to rule on issues of constitutional law.

If a constitution is to be immediately applicable law, it must be respected by all institutions exercising public power including the courts. The very character of some provisions of constitutional law leads to the conclusion that the courts have the duty to apply and respect these

provisions, regarding, e.g., the constitutional rights of habeas corpus pertaining to criminal proceedings or to forensic matters in general, such as fundamental procedural rights, the violation of which must be sanctioned, best immediately by the higher appellate courts reviewing the case. But even more, as the constitution is binding on the administration, too, the courts of ordinary jurisdiction must be able to examine whether administrative acts violate constitutional rights and freedoms in order to enforce these rights.

One of the most effective instruments of constitutional jurisdiction is the procedure of concrete (or collateral) norm control. It by necessity presupposes that a court of ordinary jurisdiction has the power to interpret the constitution, to affirm the question of the compatibility of a norm with the constitution, or to deny it; under this instrument it is only the power to declare an act of legislation violating the Constitution that is monopolized with the Constitutional Court.

On the other hand, certain matters should be reserved to the jurisdiction of the Constitutional Court simultaneously withdrawing them from the ordinary courts' scope of jurisdiction. Among these can be counted:

- jurisdiction on controversies between the supreme organs of the state concerning their respective powers;

- jurisdiction on controversies between the federal power and the constituent states of a federation or between the central state and autonomous regions or provinces over their respective competences, rights or duties;

- constitutional control of acts of legislation.

- constitutional control of admissibility of referendum;

- control of the constitutionality of the formation of supreme organs of the state by control of elections;

- the protection of the constitution by impeachment of the bearers of high offices, decisions on the unconstitutionality of political parties and on the forfeiture of individual rights.

## B. POSSIBLE SCOPES OF JURISDICTION OF SPECIALIZED CONSTITUTIONAL COURTS

The scope of jurisdiction of constitutional courts may be drawn wider or narrower. As a rule, the possible various matters subject to review by a constitutional court in order to be adjudicated appropriately, require different procedures, for example with regard to the capability of initiating proceedings, to time limits, to admissibility of an application, to required exhaustion of other legal remedies, to questions of standing, of intervening, burdens of proof, admissibility of temporary injunctions, contents and effects of decisions rendered by the court, enforcement, costs, etc.

It is advisable to distinguish whether the constitutional issues are the subject-matter of a principal action (i.e. suit or application) or whether they arise as a preliminary question

incidental to some other subject-matter pending before the relevant court. Upon this distinction may depend the capability to initiate proceedings, the standing of an applicant, the applicable rules of procedure, the effects of the decision rendered, etc.

In the following, this report enlists a number of matters which might be provided as subject-matters of principal actions before a constitutional court. (References to various constitutions all over the draft report are meant as selective examples, not exhaustive).

## I. Review of the constitutionality of laws

1. There are two principal types of judicial review of laws by special Constitutional Courts:

A. Preventive control, i.e. prior to the enactment of legislation. See, e.g., arts. 61 secs. 1 and 2, 41 French Const.; art 138 sec. 2 Austrian Const. with regard to legislative competences of the Federation or the States; art. 127 sec. 4 Ital. Const. with regard to asserted violations of legislative competences; art. 278 secs. 1, 2, 4 Port. Const.; art. 26 Irish Const.[1]

B. Constitutional review of enacted laws (repressive norm control)

A. Preventive control

1) a. The advantages of a system of preventive norm control would appear to consist

- if combined with the requirement for the Const. Court to decide within a specified short time limit in an early clarification of the constitutional issue, thereby of fortifying reliability and security of the sub-constitutional legal order ("Rechtssicherheit") while repressive (ex-post) norm control quite often leaves the constitutional question pending for years;

- of avoiding the difficulties arising if an enacted law, administered and enforced over years, is declared unconstitutional, even more so if this declaration should have effects ex tunc, (these specific difficulties of repressive norm control, however, being solvable)

- of possibly saving the prestige of the legislator somewhat more than in a system of ex-post norm control if the Const. Court arrives at a finding of unconstitutionality.

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[1] *To some extent comparable are advisory opinions by Supreme Courts or legislative councils in Scandinavian countries or the competences of special parliamentary committees. As a rule, these advisory opinions are not formally binding while in the practice of the Scandinavian states they are widely respected by the legislature. The "Committee on Supervision of the Constitution in the USSR", e.g., established under art. 125 of the Soviet Constitution of 1988 maintained as art. 124 by the amendment to the Constitution of 14 March 1990, and the Law of 23 December 1989 (Vedemosti Sezda narodnych deputatov SSSR i Verchovnogo Soveta SSSR 198, no. 29, st. 572, p. 817; German translation in: Europäische Grundrechte-Zeitschrift 1991, p. 44 ff.) may give advisory opinions; it has no power to nullify an unconstitutional or otherwise illegal act; its advisory opinions have a suspensive effect; it may, moreover, recommend to the Supreme Soviet or to the Council of Ministers to quash unconstitutional or otherwise illegal acts. Comp. H. Hartwig, Das Komitee für Verfassungsaufsicht der UdSSR, in: Europäische Grundrechte-Zeitschrift, 1991, p. 1 ff.*

- of enabling a final and authoritative judgment on the constitutionality of a law consenting to an international treaty before the treaty is ratified with its provisions thus becoming binding on the international level as well as on controversies over competences, f.i., in a federal system.

b. The main disadvantages of a system of preventive norm control (as compared to repressive norm control) would appear to be the following:

- Whoever is or was in a position to review the compatibility of a norm with the constitution will know the frequent and serious difficulties, in particular in respect to economic and social legislation in highly complex societies, to judge a freshly enacted norm, even more so if this judgment has to be rendered within a very short time. Quite frequently the actual and potential consequences of a norm, of the "law in action", at this early stage cannot possibly be ascertained in a reliable way, lacking the empirical experience from the practice of administration and enforcement of the law at stake. A law constitutional on its face in its practical effects may very well turn out to be unconstitutional when concrete cases and controversies are at stake.

- While under a system of repressive norm control the procedure of "abstract" norm control might face the same problems of judging a "fresh" law, lacking the experience from its application in practice, there is usually not the pressure of time to decide (quite often on hundreds of articles of a law) within one or a few weeks. Judicial cognition of the constitutionality of laws needs a certain distance to the actual, day-to-day arguments surrounding the political process of legislation. The quality of decisions takes time.

- Social and economic conditions to which the law originally had been addressed in our affluent societies may change so that the law in action with this change may lead to unconstitutional results no longer justifying to find it constitutional. While this problem also arises in a system of (ex-post) repressive norm control (and there can be solved by allowing a renewed proceedings of norm control), in a system of exclusively preventive norm control this problem remains without a judicial solution. (Whether and when the legislature will react cannot be foreseen).

- Preventive control of legislative norms may also impede the legislature in quickly and immediately reacting to acute situations in need of a normative regulation especially if the initiation of proceedings automatically bars the promulgation of the law until the decision of the court. (This effect, however, can be minimized by fixing short deadlines for the initiation of proceedings as well as for the decision of the Const. Court.)

Thus especially practical reasons drawn from judicial experience with norm control generally would appear to speak more in favour of repressive norm control with the exception of the control of laws consenting to international treaties and controversies over competences, f.i., in a federal system.

c. A solution of the problems listed above might be sought by combining preventive and repressive norm control, f.i., by allowing lower courts which find a law (after its enactment) unconstitutional to refer the issue of unconstitutionality to the Constitutional Court, or by

providing for a complaint of unconstitutionality to the Const. Court against court decisions applying a norm which in the opinion of the complainant is unconstitutional (e.g. art. 280 Port. Const., art. 69 ff. Port. Law on the Const. Court no 28/82), or by proceedings of abstract (ex-post) norm control (e.g. art. 281 Port. Const., art. 62 ff. Port. Law no. 28/82).

However, such combinations might turn out to have serious disadvantages: the effect of legal security (Rechtssicherheit) gained by preventive norm control may be diminished if, should the norm have been found constitutional by the Const. Court, its constitutionality later on can be questioned again. Moreover, it may lead to embarrass the Const. Court if, in such later proceedings, it will find the norm at stake unconstitutional.

A combination might best be feasible in the field of controversies over competences: preventive norm control on these subject-matters brings about an early clarification of the question. After decision of the Const. Court and enactment of the law at issue it should no longer be admissible to question the competence, while other asserted faults might well be subject to repressive norm control. What remains, nevertheless, is the short time limit usually (and, with regard to the impediments on the legislator, reasonably) requested of a procedure of preventive norm control. Questions of competence, in particular in a federal or quasi-federal system may have far-reaching prejudicial effects; to consider them within one or a few weeks might prove inadequate.

2) If, notwithstanding the arguments presented against the introduction of preventive norm control, a State should choose this kind of constitutional review of legal acts in general, or if, as this report would recommend, it rather prefers to submit only laws consenting to international treaties to preventive norm control, a number of procedural questions have to be solved:

- At what time may a proceedings of preventive norm control be initiated, already before or not until after the legislator has given its final vote on a draft law (see, e.g., art. 41 on the one, art. 61 secs. 1, 2 French Const. on the other hand) ? The advantage of waiting for a final decision of the legislator would be that the legislator, well aware of subsequent judicial norm control, might himself eliminate unconstitutional elements of the norm in the course of parliamentary debate; what is more, the Const. Court would not enter into the actual process of law-making (thus, as part of the judiciary, penetrating the sphere of the legislative power). On the other hand, the Const. Court, if empowered to rule on the constitutionality of "pending" acts of legislation, might enrich the parliamentary discussion and allow the legislator to correct himself, sparing him the embarrassment of (at least formally) putting into effect a norm inconsistent with the constitution.

- who shall have the right to initiate such proceedings [2]

[2] *See, e.g., art. 61 sec. 1 French Const.: "Les lois organiques, avant leur promulgation, et les règlements des assemblées parlementaires, avant leur mise en application, doivent être soumis au Conseil Constitutionnel qui se pronouce sur leur conformité à la Constitution". Art. 61 sec. 2: "Aux mêmes fins, les lois peuvent être déférées au Conseil constitutionnel, avant leur promulgation, par le Président de la République, le Premier ministre, le Président de l'Assemblée nationale, le Président du Sénat, ou soixante députés ou soixante sénateurs"; art. 41 sec. 2 French Const.; art. 138 sec. 2 Austr. Const.: Federal or State governments; art. 278 secs. 1, 2 and 4 Port. Const.; art. 26 Irish Const.*

- is submission to the Constitutional Court mandatory ? (e.g. art. 61 sec. 1 French Const.), assuring an authoritative ruling on the constitutionality of every law while delaying legislation and, if the res iudicata effect should hinder the constitutionality of the norm being contested again, preventing a renewed judicial review based on practical experience with the execution of the norm or on later developments;

- or discretionary ? (e.g. art. 61 sec. 2 French Const.; art. 278 secs. 1, 2 and 4 Port. Const.; art. 26 sec. 1 Irish Const.);

- time limits for such submission (e.g., art. 278 sec. 3 Port. Const.: within eight days after receiving the relevant document; art. 26 sec. 1, para 2 Irish Const.: not later than seven days) should be fixed quite short in order to reduce negative impacts on legislative activity and its ability to react to acute situations;

- time limits for decision by the Constitutional Court (e.g. arts. 61 sec. 3, 41 sec. 3 French Const.: within one month; in urgent cases upon request by the government within eight days; art. 278 sec. 8 Port. Const.: within 25 days, the President of the Republic may abbreviate this time; art. 26 sec. 2 (1) Irish Const.: not later than 20 days after submission) should equally be kept short; naturally this might endanger the high standard of judicial reasoning which a special constitutional court is expected to guarantee.

3) Norms subject to and scope of preventive control

a. The norms subject to preventive norm control may include:

- all laws (e.g. art. 61 sec. 2 French Const.; art. 278 sec. 1 Port. Const.)

- special kinds of laws (e.g., art. 61 sec. 1 French Const.);

- laws consenting to international treaties (art. 278 sec. 1 Port. Const.).

Preventive control intervening before the treaty will be ratified (concluded) on the international level might be advisable in order to avoid the treaty's becoming binding on the international level while for constitutional reasons it may not be applicable in the domestic legal order. [3] As mentioned before, this aspect of preventive control is one of its definite advantages and may well induce States to introduce preventive norm control exclusively in this field.

- exclusion of special kinds of laws (e.g. art. 26 sec. 1 Irish Const.: i.a. financial bills); laws for amendment of the constitution; laws to be submitted to referendum; emergency laws ?

- sublegislative norms (e.g., art. 278 sec. 2 Port. Const.: ordinances of regions; implementing ordonnances of general laws).

[3] *See art. 1 sec a) and art. 36 of the Hungarian Act No. XXXII of 1989 on the Constitutional Court.*

b. The scope of review may include:

- only the compliance with the procedure of the legislature as provided in the constitution;

- only questions of legislative competences;

Both of these restrictions of preventive control may well be recommended as it is these questions which can be answered clearly, definitely and indubitably prior to the enactment of the law and prior to any experience with the "law in action". Furthermore, the short time reserved for the Const. Court's decision may not allow more than the investigation of these formal aspects.

- or a full-scale review also as to the competence of the norm-giving organ and to substantive provisions of the constitution, such as fundamental rights or liberties, general principles, standards and doctrines of constitutional law;

This might seem critical regarding the disadvantages of preventive norm control listed above; especially deplorable would be the lack of knowledge on the concrete social and economic contexts in which the norm would be involved in practice.

In a procedure of preventive review of a law consenting to an international treaty, though, only an unrestricted investigation of formal and material compliance with the Constitution can thoroughly avert the ratification of an international treaty later to be found unconstitutional (naturally this is only substantial under the condition that the constitutionality is at all liable to be questioned after the enactment of the law).

- If the Const. Court is not restricted to scrutinizing the compliance with the procedure of legislature and questions of legislative competences, it appears wise to at least limit its jurisdiction to reviewing only those points of constitutional law asserted and substantiated by the applicant, and not to allow it to exert ex officio a full-scale review of all possible points of constitutional law. This would - under the principle of res iudicata - allow repressive control at least of those aspects of the norm which have not been contested in the proceedings of preventive control.

4. Effects of application (submission) to and of decision
of the Const. Court on the (draft) norm at stake:

- To accord the application for preventive norm control suspensive effect on the legislative procedure barring, e.g., promulgation of a law (e.g., art. 61 sec. 4 French Const.; art 26 sec. 1 para 3 Irish Const.) is exactly what could lead to the danger of impeding legislation as described above, while, in accordance with the very intention of such proceedings, it safeguards against an unconstitutional law being enacted and enforced.

- The decision of the Court finding the (draft) norm under review to be unconstitutional will, as a rule, bar promulgation of the norm; otherwise the norm could appear to be valid and in force.

- If such barring could be overcome by special vote of the legislature (e.g., art. 279 secs. 2, 4 Port. Const.: i.a. with regard to international treaties, by two-thirds majority of members

present; Arts. 27 sec. 4 and 33a sec. 2 of the Polish Constitution, 6 secs. 3 and 4 of the Polish Law on the Constitutional Tribunal), the parliament is acknowledged not only as superior to the Const. Court but also as capable of modifying constitutional law by overruling the Const. Court's verdict of unconstitutionality. [4] The rapporteur would not recommend this kind of solution.

- In case of a finding of unconstitutionality the (draft) norm may be referred back to the legislative organ (e.g., art. 279 sec. 1 Port. Const.; art. 33 sec. 2 (also see art. 35 sec. 2) of the Hungarian Act. No. XXXII of 1989) enabling it to "constitutionalize" its act or, depending on the understanding of the role of parliament, to overrule the court's decision.

- One could imagine a rule that a finding of unconstitutionality should bar the legislature from passing a norm with the same content in the future. However convincing this idea may seem at first sight, such a provision would raise the serious and difficult question when the content of a norm is to be considered identical with that of another norm.

- Only in so far as the Const. Court has definitely ruled on specific questions of constitutionality should the lower courts be bound by a finding that the norm at stake (if promulgated) is constitutional, allowing repressive norm control at a later date.

B. Constitutional review of enacted laws (repressive norm control)

Main questions to be solved in a system of repressive norm control will be:

- which categories of norms shall be subject to control

- who may initiate a proceedings, on what standing

- is the control to be exercised by way of a contentious (adversary) procedure or by way of an "objective" procedure (without a formal respondent to the applicant)

- which institutions or persons other than the applicant should have a right to intervene in the proceedings or should have a right or an opportunity to be heard by the court

- to which extent may or must the Const. Court examine the constitutionality of the norm (only the asserted points of unconstitutionality or full-scale examination)

- the contents and effects of the decision of the Const. Court.

1) It is generally possible to subject all categories of norms of the domestic legal order to repressive norm control: laws, rules of procedure of parliamentary bodies, decrees or ordinances with the force of laws, norms of federal, regional or community bodies etc. The review of which

[4] *See P. Walczak, Report to the Directorate of Judicial Affairs of the Council of Europe, March 1990, "Juridiction constitutionnelle et libertés publiques en Pologne", p. 5, as to the conception of the Constitutional Tribunal in Poland.*

of these is to be reserved for the Const. Court should depend on their practical importance, their rank within the hierarchy of norms, and the factual capacity of the Court to deal with its caseload. It would appear reasonable to monopolize only the review of the highest-ranking norms with the Const. Court, i.e. mainly acts of parliament, since the annulment of these should not rest with every regular court for reasons of respect for this supreme democratic organ of the state. The constitutionality of sublegislative acts, on the other hand, may well be adjudicated upon by lower courts.

Within the category of laws it must be decided what kind of laws besides ordinary laws enacted by the legislative bodies are to be reviewed by the Court:

a. also laws amending the Constitution ?

This presupposes that parliament is considered to be bound by the Constitution, not standing completely sovereign, and that the Constitution restricts parliament in altering constitutional provisions. Norm control over laws amending the Constitution implies that the Const. Court is understood to be the guarantor of the constitution even against parliament.

- only with regard to the competence and/or procedure of the legislator (see art. 148 sec. 1 of the Turkish Const. of 1982)

This would essentially guarantee a mere formal compliance of constitutional amendments with the constitution, barring the Const. Court from adjudicating on the constitutionality of their material contents.

- also with regard to the substantive contents of such a law (e.g., under art. 79 sec. 3 of the German Basic Law amendment of certain principles of the Basic Law - the division of the Federation into Länder, their participation, on principle, in legislation, and the basic principles laid down in arts. 1 (human dignity) and 20 (democratic and social federal state, rule of law) is inadmissible).

The idea behind such an extensive control of norms amending the Constitution would be that there exist certain principles of the Constitution which cannot be changed without gravely affecting its fundamental character and which therefore must remain inalterable by the pouvoir constitué. Change - in this understanding - could only be brought about by the pouvoir constituant.

b. organic laws or laws of similar quality; "constitutional laws" (Austria); (observance of competence: procedure, substantive contents) ?

c. laws enacted by popular referendum ? (competence, procedure, substantive contents) ?

d. laws consenting to an international treaty ? (competence, procedure, substantive contents) ?

As these laws may be understood to make the international treaty applicable by state organs on the national level, they are apt to have similar effects as national legislative acts (likely to be

especially dramatic if the provisions are self-executing). Including them among the constitutionally reviewable norms would thus seem consequent. Yet, as stated before, problems arise if such a law is declared unconstitutional and void or inapplicable on the national level when the treaty has already become binding on the international level. For, according to international law, generally a state cannot refuse to fulfil an international treaty on the grounds that this would be contrary to its national law (see art. 27 of the Vienna Convention on the Law of Treaties);

e. laws dating from a time before the entry into force of a (new) constitution. This question will be of particular importance for states enacting a new constitution.(The German Basic Law of 1949 provides that all norms from previous times conflicting with the Basic Law shall not remain in force; the control whether such previous norms are conflicting with the Basic Law is not monopolized with the Federal Const. Court but may (and must) be exercised by every German court facing this question in a pending case pertinent to the ruling. If a court finds such a pre-constitutional norm to be conflicting with the Basic Law of 1949 it does not formally declare such norm to be null and void but must not apply it in the case at stake).

Monopolizing repressive norm control (or at least the power to declare a law null and void) with the Const. Court aims at preserving due respect of parliamentary acts by all inferior courts. Where a new constitution has come into force, ruling laws based on the old constitution to be unconstitutional will only affect the "old" parliament (and with it the former legal order), but not the present legislator. Thus such a monopoly of norm control extending to pre-constitutional legislation does not seem stringently necessary.

f. Only norms of subdivisions of the (central) state (e.g. Switzerland: constitutional complaint only against cantonal norms) ?

The disadvantage of this restraint of norm control may prove to be that the legislation of the (central) state has the tendency to pry into every sphere of social life frequently touching individual rights and freedoms more seriously than the norms of the subdivisions. Hence, more than the latter, the central state's laws may seem to be in need of being reviewed as to their constitutionality.

g. Exclusions of certain categories of laws, e.g. emergency laws, decrees etc. (e.g. art. 148 sec. 1 Turkish Const.) ?

One should be cautious especially in exempting emergency laws from constitutional review because this is apt to increase the danger of an abuse of these instruments. Moreover, it may turn out to be inconsistent with or rather counterproductive to the idea of the legislator's having to comply with the Constitution.

h. Sub-legislative norms ? Shall their control of constitutionality be left to the courts of ordinary jurisdiction or monopolized with the Const. Court ? If jurisdiction by a specialized constitutional court will have gained practical importance, there might always arise the danger of a caseload overburdening this court. It might, therefore, be advisable to allow all other courts to control the constitutionality of sub-legislative norms, although not by a decision with erga omnes-effects but by non-application (res iudicata inter partes); diverging decisions of lower courts should then be solved by the respective Supreme Court of the ordinary jurisdiction.

i. parliamentary rules of procedure ? (See art. 34 of the Hungarian Act No. XXXII of 1989 on the Constitutional Court.)

2) Standards norms will have to comply with in order to be considered valid: Parliamentary acts should only have to yield to the Constitution and, where it is provided by the constitution, to public international law (general rules and/or treaties, as the constitution may provide).[5]

Lower-ranking law must also be compatible with respective superior legal rules, naturally including the Constitution as lex suprema.

3) Initiation of proceedings for repressive norm control:

The question who may initiate a proceedings of norm control in a system of a specialized Constitutional Court, again, is of central importance. Three possible groups of applicants can be distinguished:

- supreme state organs and federal/regional/communal (municipal) entities
- domestic courts (other than the Const. Court)
- private persons and entities
- ex officio (proprio motu) by the Const. Court itself (the rapporteur does not recommend this possibility).

The right to initiate a proceedings might be accorded to

a. a supreme organ or entity (to be defined) of the state, such as the Head of State, the central government, a legislative body (such as a second chamber, house, or federal council claiming that its powers to participate in the legislation at stake have been violated by the other legislative body to the effect that the enacted law at issue is unconstitutional), to a certain number of members of parliamentary bodies, the Prime Minister, the General Attorney, the Ombudsman, to a federal/regional entity (claiming that the law infringes their constitutional competences to legislate and, accordingly, is unconstitutional) (e.g., arts. 1, 2 Belg. Law on Cour d'arbitrage; arts. 37, 39 Ital. Law no. 87/1953; art. 140 sec. 1 sentence 2 Austrian Const.; art. 281 sec. 2 Port. Const.; arts. 161 sec. 1 a, 162 sec. 2 Span. Const.; art. 93 sec. 1 no. 2 German Basic Law). Of particular importance is whether a minority of members of parliamentary assemblies may have the right (legal capacity) to initiate a proceedings (like in Portugal - one tenth of the members of the Assembly of the Republic; in Turkey, art. 150 Const.; art. 162 sec. 1 lit. a Span. Const.; Austria - one third of the members of the National

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[5] *In Hungary, e.g., conformity with international treaties is demanded of parliamentary laws; see 1 sec c), 30 sec. 1 lit. d) and 44 of the Hungarian Act No. XXXII of 1989 on the Constitutional Court. Under the German Basic Law general rules of public international law take precedence over the laws, art. 25 sentence 2 Basic Law. Every German court has the power and duty, under due procedural circumstances, to enforce this precedence. If, in the course of litigation, doubts exist whether a general rule of public international law is an integral part of federal law (art. 25 sentence 1 Basic Law), the court shall obtain, by way of a reference procedure, a decision form the Federal Constitutional Court on the issue of the existence or scope of such rule, art. 100 sec. 2 Basic Law. See also arts. 100 sec. 1 lit. f, 28 Greek Const., art. 52 Greek Law on Special Supreme Court 345/1976.*

Council; Fed. Rep. of Germany - one third of the members of the Federal Diet) because this means that, as a rule, the parliamentary opposition, too, has access to the Const. Court for norm control proceedings.

The right to initiate repressive norm control may also rest with subdivisions of the central State, like federal states, cantons, autonomous regions (e.g., Belgian) communities, provinces, etc. This will be dealt with below (III).

b. The power to initiate a proceedings might be accorded also to the courts of ordinary jurisdiction by providing that a court which in a pending case considers a law unconstitutional on which it would have to base its decision must (either proprio motu or on application of a party) refer the constitutional issue to the Const. Court, and after the Const. Court's decision has to proceed on the basis of this decision. This procedure of "concrete" (or "collateral") norm control involves that the (lower) court has the power to interpret the Constitution and review the law at stake (otherwise it would not be able to arrive at the conclusion of or at doubts as to the incompatibility of the law at stake with the constitution); but such reference procedure bars the courts of ordinary jurisdiction from deciding by themselves that a law is unconstitutional, and instead monopolizes such power of declaring a law unconstitutional on the Const. Court, the advantage of this monopoly being the prevention of disparate rulings on the validity of a norm by different court.

Such reference procedure of concrete norm control, with varieties in details, is provided, for instance, in Austria, art. 140 sec. 1 sentence 1 Const. (on reference by the Supreme Administrative Court, the Supreme Court and the courts of second instance); in Spain, art. 163 Const.; in Turkey, art. 152 Const.; in Italy, art. 1 of the Law no. 1/1948; in Belgium, art. 26 ff. Law on the Cour d'arbitrage; in the Fed. Rep. of Germany, art. 100 sec. 1 Basic Law. It is the specific mode of the power of judicial review of legislative acts which some West European states have taken over from the United States' model.

c. If the respective constitution contains guarantees of self-administration for local communes or municipalities, then associations there may be provided a procedure of complaint to the Const. Court by these entities on the assertion that a law infringes upon the constitutional guarantee of self-administration (e.g. arts. 119a sec. 9, 144 Austrian Const.; art. 93 sec. 1 no. 4 b German Basic Law of 1949), thus fortifying this guarantee.

d. The right to initiate norm control might moreover be accorded to private persons and entities by entering a complaint of unconstitutionality against laws (and other norms) with the Const. Court on the assertion that a norm violates their constitutionally guaranteed rights or liberties (e.g., arts. 161 sec. 1 lit. b, 162 sec. 1 lit. b, 53 sec. 2 Span. Const.; arts. 140 sec. 1 sentence 4 Austrian Const.; art. 93 sec. 1 no. 4a German Basic Law). As laws may infringe upon the rights of individuals - whether only enabling an infringement by the administration or by their self-executing character - the individual should be granted this legal remedy, which can well be conceived as a special form of constitutional complaint.

In order to exclude an actio quivis ex populo it is usually required for admissibility that the complainant is directly and presently affected in his (or her) fundamental rights or liberties provided in the constitution (see also below C.; an actio popularis is admissible in Hungary: see paragraph 21 secs. 2 and 4 of Act No. XXXII of 1989 on the Constitutional Court)).

To be distinguished from this principal kind of complaint (directed against the norm as such) are those kinds of complaints which are directed against executive decisions or decisions of courts on the assertion that these decisions are based on an unconstitutional norm or illegal regulation (e.g. art. 280 Port. Const., art. 144 Austrian Const.).

e. In some constitutions it is provided that organs of the public power, like attorney generals or ombudsmen, may initiate proceedings of norm control acting as "guardians of the constitution" (e.g. art. 162 sec. 1 lit. a Span. Const.; also see art. 19 secs. 1 and 2 of the Polish Law on the Constitutional Tribunal).

As far as their right to challenge the constitutionality of a law does not exclude other possible applicants, this institution may effect the speedy control of norms. It seems preferable to leave the decision whether or not to challenge laws on the allegation of the violation of individual constitutional rights to the individual affected by the law, because he (she) will be the one who will best feel the impact of the law. Limiting the initiation of norm control proceedings to an organ of the public power would presumably confer upon it some kind of discretion whereby the individual constitutional right might be weakened.

f. In some States the Const. Court itself can start proceedings on its own initiative (see art. 19 sec. 3 of the Polish Law on the Constitutional Tribunal; art. 387 last sec. of the Constitution of the Socialist Federal Republic of Yugoslavia), which is quite an unusual feature but may underline the Court's function as guardian of the Constitution.

4) Incidental norm control by the Constitutional Court

The above mentioned procedures of norm control are principal proceedings, i.e. directed immediately against the norm at stake; the subject-matter (in the procedural sense - "Streitgegenstand") is the constitutionality of the norm as such.

To be distinguished from these principal proceedings are proceedings before the Const. Court the subject-matter of which is not the constitutionality of a norm but of some other act based on or indivisibly connected with the norm. In some legal orders it is provided that in this latter kind of proceedings the Const. Court may not only find the act to be unconstitutional but also state in its decision (tenor) the unconstitutionality of such law (norm). See, e.g., paragraph 95 sec. 3 sentence 2 German Basic Law on Fed. Const. Court: If on constitutional complaint against a decision of an administrative authority or of a court the Const. Court finds that the decision attacked is unconstitutional because it was based on an unconstitutional law the Const. Court must declare this law unconstitutional and void with erga omnes effect. According to art. 55 sec. 2 of the Spanish Organic Law 2/1979 on the Const. Court, in such a case the acting Chamber of the Const. Court has to refer the question of the constitutionality of the law to the Plenary Court who may, in a separate judgment, declare the law unconstitutional.

2. Review of unconstitutional omission of legislation

The legal orders providing specialized constitutional courts, as a rule, do not provide for procedures for challenging unconstitutional omissions of legislation. There are, nevertheless,

exceptions and specific situations:

Under art. 283 Port. Const. on application by the President of the Republic, the Ombudsman, or, on assertion of a violation of the rights of the Autonomous Regions, by the President of a Regional Assembly, the Const. Court may rule on the non-compliance with the Constitution by omission of legislative acts required to execute (implement) constitutional norms. If the Constitutional Court finds an unconstitutionality by omission it notifies the legislative organ accordingly.

However, as such questions may arise and efficiently be dealt with in the context of other proceedings, special proceedings designed for the review of an allegedly unconstitutional omission of the legislator generally need not be introduced: In the Federal Republic of Germany, f.i., omissions of the legislator may become the subject-matter of the procedure for Federal-State-controversies or of the procedure for controversies between supreme constitutional organs (art. 93 sec.1 nos. 2 and 1 Basic Law). In these kinds of cases the Const. Court is restricted to the statement that by omitting a law the respondent has violated constitutional rights of the applicant.

Constitutional complaints by private persons or entities against an omission of the legislator in the Fed. Rep. of Germany will only be admissible if the Basic Law contains a specific command in favour of the complainant to enact specific legislation, which is only exceptionally the case.

A special situation may arise under the equal protection clauses of the Constitution: If a law granting favours to certain groups of persons while excluding (by omitting) others in violation of an equal protection clause, this exclusion (omission) is unconstitutional. It may be attacked by constitutional complaint of members of the non-included group. The Const. Court may then, as the case may be, declare the law or parts of it unconstitutional and void or declare that non-inclusion of the relevant group is unconstitutional, admonishing the legislator to bring about an equal solution.[6]

3. Matters of norm verification

Several constitutions assign the respective constitutional courts the task to verify the existence, the scope or the legal quality of certain kinds of norms.

a. With regard to general rules of international public law the German Basic Law in art. 100 sec. 2 provides that if it is relevant in a case pending before a court of ordinary jurisdiction whether a general rule of international public law forms part of federal law the court has to refer this issue to the Fed. Const. Court. The same is true when not the existence as such but the

[6] *While in Austria omissions by the legislator may not, as a rule, admissibly be brought before the Const. Court, incomplete (partial) regulations by a law may become a subject-matter before the Court. This can happen in respect of the distribution of legislative competences between the Federation and the States under art. 12 of the Austrian Constitution if a State law implements only partly the fundamental provisions of a federal law and this omission runs counter such fundamental provisions of a federal law. Such kinds of conflicts are specified of Federations; the direct measuring scale is not the Constitution as such but federal law which takes priority over state law.*

scope of the general rule, pertinent to the pending case, is doubtful. The idea behind this kind of procedure is - in case there should exist "doubts" - to monopolize the verification of general rules of public international law with the Const. Court in order to diminish the danger that the Federation might become responsible under general international law for decisions of its courts violating these rules. Omission of such reference by the court in violation of art. 100 sec. 2 Basic Law affords to a violation of the constitutional guarantee of the "legal judge" (juge légal) under art. 101 sec. 1 Basic Law and may be complained of by constitutional complaint. Greek law even goes further in allowing in matters before the administrative authorities to bring the issue of generally recognized rules of international public law on application by the competent Minister before the Special Supreme Court; the same may be done by the parties of a court proceedings or the person concerned by an administrative proceedings (see arts. 100 sec. 1 lit. f., 28 Greek Const., art. 52 Greek Law on Special Supreme Court 345/1976).

b. For states enacting a new constitution which brings about changes in the internal structure (establishing, e.g., autonomous regions, provinces, federal states with respective legislative conmpetences, replacing a unitary system etc.) it might be appropriate to provide jurisdiction of the Const. Court on the question whether norms dating from time prior to the entry of the new constitution shall be qualified as central-state or regional, provincial, federal or state law, as the case may be. The qualification will be pertinent for the question which entity holds the competence for future legislation and administration in these fields. (Such kind of jurisdiction is provided, e.g., by art. 126 of the German Basic Law).

c. In Greece, the Special Supreme Court has jurisdiction to clarify the issues of substantive constitutionality or of the meaning of a law (in the formal sense) if there have been rendered divergent (contradictory) decisions by the Conseil d'Etat, the Areopag or the Court of Account on this point - a kind of mixed norm control and norm verification procedure, that may be initiated by the Minister of Justice, the attorney general at the Areopag, the general commissars at the Court of Account and at the Administrative Justice, as well as by every person who has a legal interest in the issue.

d. Strictly speaking, the decision of the French Conseil Constitutionnel under art. 41 French Const. whether a subject matter does not belong to the field of legislation (art. 34) might be considered a verification procedure rather than a (preventive) norm control procedure (but this may be considered a mere terminological question).

4. Contents and effects of decisions under a jurisdiction of repressive norm control.

While details of contents and effects of the decision of the Constitutional Court under a jurisdiction of repressive norm control will depend on the specific procedure by which this jurisdiction may be exercised, there are some general problems pertinent:

- Has an application for norm control suspensive effect on the applicability of the norm at stake? Automatically or on special motion by an applicant (see, e.g., art. 19 ff. Belg. Law on Cour d'Arbitrage; art. 161 sec. 2 Span. Const. in respect of norms of Autonomous Regions);

An automatic suspensive effect of an application may not always appear adequate: If already the

initiation of proceedings on an allegation of unconstitutionality later to be judged unfounded would suspend the application of a norm, serious damage may result from the administration not being able to execute the law before the Const. Court's judgment, until which quite a length of time may elapse. Thus it seems wiser to vest the Const. Court with a discretionary power to suspend the applicability of the law enabling it to consider the pros and cons of suspension in every single case. In a sense, this would also underline the general respect for the legislator's decisions while not necessarily implying that legislative acts in dubio be considered as constitutional.

- Has the Court's ruling a norm unconstitutional the effect of nullification of the norm (or part of it), i.e. erga omnes effect (see, e.g., art. 136 Ital. Const.; art. 153 Turk. Const.; art. 140 sec. 7 Austrian Const.; art. 164 sec. 1 Span. Const, art. 38 sec. 1 Span. Law on the Const. Court);

This consequence not only seems to correspond with the abstract character of a valid law. It also prevents further cases based on the allegation of unconstitutionality of the same norm from being brought before the court. Furthermore, the erga omnes nullification is apt to protect the individual (who either may not qualify for application of norm control or who may not in time have initiated possible proceedings against the norm or executive acts based on the norm) against his rights being infringed upon by an unconstitutional law, which is the more justified the less a remedy immediately against the law is available to the individual;

- or must a law found to be unconstitutional be referred to the legislative organ which enacted the norm ( see art. 33a secs. 1 and 2 of the Polish Constitution and art. 6 secs. 3 and 4 of the Polish Law on the Constitutional Tribunal; art. 384 of the Constitution of the Socialist Federal Republic of Yugoslavia: only statutes must be referred to the competent assembly; if this legislator fails to abrogate the unconstitutional provisions of the law within a certain (at request prolongable) time limit, these provisions cease to be valid, which is announced by the Court obviously in a declaratory sentence).

- Has it effects only inter partes; does the res iudicata effect, nevertheless, bind all other public powers and courts;

This effect is exemplified by art. 62 sec. 2 of the French Constitution. This provision must be regarded in awareness of its standing in the context of a system of preventive norm control. There it is adequate to restrict the effects of a norm found unconstitutional by the Conseil constitutionel primarily to the parties and all public (administrative and judicial) authorities as the proceedings must take place prior to the promulgation of the norm (art. 61 sec. 1 and 2 of the French Constitution). In contrast to the situation at the end of a procedure of repressive norm control, there has been until then no false impression of the unconstitutional law's being in force and valid/constitutional. [7] Almost logically it follows that in a system of repressive norm control the Const. Court's finding a norm unconstitutional should lead to a judgment destroying such a false impression efficiently and universally, and therefore with erga omnes effect rather than inter partes.

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[7] *Depending on one's theory on the effects of a law found to conflict with the constitution.*

- If nullity effect: ex tunc or ex nunc (see, e.g., art. 136 Ital. Const.: from the day following the announcement of the decision, a kind of ius superveniens; art. 153 secs. 3, 5 Turk. Const.: also ex nunc, with the possibility of the Court to determine the date, not later than one year, on which the annulment shall come into effect; art. 140 sec. 3-7 Austrian Const.: ex nunc, unless the Court determines a later date, no more than one year; art. 282 sec. 1 Port. Const.; in the Fed. Rep. of Germany the decision, as a rule, has effects ex tunc, but in some cases the Court only declared the law unconstitutional but not void; in Hungary the rule is that the law declared null and void shall not be applied from the day of the publication of the relevant decision in the official gazette; the Const. Court may, however, fix the abrogation of the unconstitutional legal rule or its applicability contrary to this rule if this is justified by a particulary important interest of legal security or of the person having initiated the procedure);

While a theory considering the abrogation of an unconstitutional law to be effected solely by the judgment of the Const. Court could support the idea of nullity ex tunc as well as ex nunc or even pro futuro, a theory based on the assumption that a law contradictory to a constitutional provision is null and void seems to be consistent only with the effect of nullity from the date of promulgation. The latter theory, however, causes difficulties in dealing with administrative acts or court decisions relying on the unconstitutional law: Are they to be considered ipso iure invalid, too ? Can they be challenged again ?

- In case of annulment of a law: what are the effects on preceding laws which were in force until the law, declared unconstitutional, entered into force ? (See, e.g., art. 140 sec. 6 Austrian Const.; art. 282 sec. 1 Port. Const.);

- In case of annulment: what are the effects on administrative acts and court decisions which had been based on the law declared void and which before the annulment already had become res iudicatae ? On (final) sentences by criminal courts ? May execution of such decisions be continued? Criminal and other procedures be reopened ? (See, e.g., art. 140 sec. 7 Austr. Const.; art. 79 German Basic Law; art. 30 sec. 3 Ital. Law no. 87/1953; art. 10 ff., 14 ff. Belg. Law on Cour d'arbitrage; art. 282 sec. 3 Port. Const.; art. 40 Span. Law on Const. Court);

In dealing with these questions, the public interest in upholding administrative acts and court decisions which have become unchallengeable by means of regular legal remedies must be weighed against the imperative of enforcing constitutional law, especially the realisation of individual constitutional rights.

Sentences of criminal courts based on an unconstitutional statute should, as a rule, be subject to renewed revision, as they severely affect the personal freedom of the convicted person. On the other hand, unchallengeable administrative acts as well as court decisions relying on a nullified law need not necessarily become questionable again; enforcing these decisions, though, would amount to demanding compliance with an unconstitutional "order", which could compromise the idea of the predominance of constitutional law. Therefore it seems best to forbid the legal execution of these acts. (Also see sub D. 17 below.)

- Can a law declared by the Const. Court compatible with the constitution, or after an application against the law had been rejected on the merits, at a later date be again subjected to norm control ? (Answers differ from state to state, see, e.g., art. 38 sec. 2 Span. Law on Const.

Court, and should depend, not unessentially, upon whether or not the Const. Court reviews the law in toto and under all aspects of constitutionality. Under the system of the Fed. Rep. of Germany only a fundamental change of circumstances might reopen the possibility of a new proceedings for norm control).

A mere inter partes effect of a decision declaring a law constitutional can be conceived, however with the consequence that the Const. Court may well have to deal with the law again.
If the Const. Court has rejected on the merits an application (or on reference by a lower court) against a law by reviewing only the constitutional faults asserted by the applicant (without exerting a full-scale review of the law) a new application, at least when based on other kinds of assertions, ought to be admissible (excluding, possibly, for res iudicata reasons the original applicant).

## II. Control of the constitutionality of the activities of supreme organs of the state

1. Matters which might be subject to this kind of jurisdiction:

- asserted violations of any kinds of competences, rights, or obligations of supreme organs of the state (to be defined) provided for in the Constitution (see art. 93 sec. 1 no. 1 German Basic Law);

Especially if the Const. Court is intended to serve as the ultimate authority concerning all questions of constitutional law, this breadth of scope seems appropriate.

- only controversies about (respective) competences of a supreme organ of the state (e.g., art. 134 Ital. Const.: controversies between poteri dello stato; art. 126 lit. a Austrian Const.; art. 59 no. 3 and title IV ch. 3 of the Span. Law on the Const. Court);

- may legislative acts, at least under the point of competence, be subject to this kind of control? This is the case, e.g., in the Fed. Rep. of Germany, but the Const. Court in this proceeding must not declare a law unconstitutional but may only state that the enactment of the law has violated the constitutional right or competence of the applicant or constitutes a violation of constitutional obligations towards the applicant by the respondent. In France the observation of competences over matters accorded by art. 34 sec. 3 to the legislator and those assigned to the regulatory powers (pouvoir réglementaire) by art. 37 and art. 38 (temporary ordonnances) of the Const., can be secured by way of preventive norm control, as mentioned already above, art. 41 sec. 2, 61 sec. 2 of the Const;

- controversies over whether conclusion of an international instrument requires prior amendment of the Constitution (e.g., art. 54 French Const.; art. 95 sec. 2 Span. Const.);

- controversies over competences of special (not supreme) organs or entities of constitutional status (e.g., controversies between the Court of Account - Rechnungshof - on the one, the Federal Government, a Federal Minister, or a State Government, on the other hand, over the interpretation of legal provisions, delimiting the competence of the Court of Account, art. 126 a Austrian Const.).

2. The right to initiate such proceedings obviously depends on the matter subjected to constitutional control. The procedure, as a rule, is a contentious proceeding over an asserted violation of the constitutional rights, competences, or obligations of the parties involved. The adversary character will ensure vigorous and adequate argument and consideration of the various phases of the constitutional issues.

Corresponding to the comprehensive matters subject to constitutional jurisdiction under the German Basic Law there is a remarkably wide range of organs and entities capable of initiating and being parties to a proceedings for that purpose: The President of the Republic, the Federal Diet, the Federal Council, the Federal Government, and sections of these organs which have been vested with rights of their own by the Basic Law (e.g. the Federal Chancellor, the Federal Minister of Finance; parliamentary committees of investigation under art. 44 Basic Law) or by the rules of procedure of the Federal Diet (e.g., fractions of political parties in the Federal Diet, or the President of the Federal Diet); the Federal Council. By a plenary decision of the Federal Const. Court even political parties were accorded the capacity to initiate a proceedings under art. 93 sec. 1 no. 1 Basic Law in view of the constitutional status they enjoy under art. 21 Basic Law, for the purpose of defending this status against supreme organs of the Constitution.

3. Procedural questions which will arise under this kind of jurisdiction will, in particular, concern:

- whether there must exist an actual case or controversy between the parties in order for an application to be admissible (no moot or merely abstract question); such requirements should be favoured for the above (sub B II 2.) named reasons.

- admissibility of an application for declaring that there exist or does not exist a special constitutional relationship between the applicant and the respondent;

- will there be required a standing for the applicant, in particular, will the applicant have to show to the satisfaction of the Const. Court facts or circumstances upon which, if true, it cannot be excluded that the applicant might be violated in his constitutional position by the respondent ?

The necessity of an allegation of the violation of the applicant's rights will ward off actiones quasi-populares. Requiring an acute case or controversy in need of a solution will ensure that the Court's decisions exert a practical effect and disallow contentions over mere hypothetical situations.

- or may such proceeding be initiated in the quality of a "guardian of the Constitution" without showing a possible specific violation of such applicant's constitutional position ?

- should the application have a suspensive effect on the applicability or execution of the act at stake (see, e.g., paragraph 36 b of the Austrian Law on the Const. Court);

As stated above regarding repressive norm control, its appears best to vest the Const. Court with the power to suspend a challenged act at its discretion as this is apt to provide flexibility to duly deal with each specific case, avoiding the indifferent rigidity of an automatic suspension.

- should there be a time limit for the initiation of a proceedings (e.g. in German law: within six months after the applicant has gained knowledge of the act or omission allegedly violating his constitutional position; in Austria: four weeks, paragraph 36 a secs. 1, 2 Law on the Const. Court) ?

Demanding initiation of proceedings within a defined time limit will "clear the Court's desk" of cases whose facts have begun to fade or become obscured. Equally, after the deadline, the possible antagonists of constitutional controversies will know that an act has become unchallengeable before the Court, which may well appease the quarrel.

- admissibility of intervention to the proceedings for other supreme organs when the decision might be relevant also to their constitutional position ?

This would allow the Const. Court to gather a full spectrum of legal opinions and arguments, and a wide-angle view of the case and the various interests at stake.

4. As to the contents and effects of the decision: Should the Const. Court be restricted to the declaration that the act or omission at stake violated (or not) the constitutional rights or competences of the applicant or a constitutional obligation of the respondent vis-à-vis the applicant (see, e.g., paragraph 67 German Law on Fed. Const. Court), or should the Const. Court also be empowered to quash an unconstitutional act ?

To annul an act may seem superfluous: either under the condition that legal acts with external effects (i.e. pervading the sphere of intra-organic and inter-organic relations of the supreme organs of the state) can otherwise be challenged and, their unconstitutionality provided, be quashed by the Const. Court; or under the condition that the participants in proceedings over the constitutionality of the activities of the supreme organs of the state can rightly be expected to abide by the tenor and essence of the Court's ruling even if it is of a mere declaratory nature.

On determining on the nature of the Court's judgment one should take the following into consideration: If the Court's decision - as is also conceivable - can impose an obligation on one of the parties, the character of a decision will essentially remain declaratory unless there is some method of enforcing compliance with the decision.

## III. Controversies between the Central State and regional or other subdivisions (federal states, cantons, autonomous regions, provinces, communities, etc.)

Constitutional systems with internal structures providing for a constitutional status of certain types of subdivisions, like federal states, autonomous regions (e.g. Belgian) communities, provinces, or other entities accorded constitutional competences (in the field of legislation, administration, or judiciary) may assign the Const. Court to have jurisdiction over constitutional controversies arising from these structures.

Several arguments render such jurisdiction recommendable: solution of such controversies by an impartial institution guided solely by constitutional law and not by political affinities of its members. If effective, this will prevent the outcome of such controversies from being predetermined by the factual political power of the adversaries. Embedding such controversies

in legal proceedings might also help ease secessionist tendencies of autonomous constitutional entities and promote the acceptance of the distribution of competences, since the Const. Court's objective will be to safeguard this vertical division of powers, adding to the guarantee of subdivisional autonomy.

Part of this kind of controversies may be subject to other constitutional court procedures, like the review of norms by abstract norm control procedures, e.g., if the constitutionality of a law for reasons of federal-state competences to legislate may be at stake. This "redundant" situation may be dealt with either by excluding norm control (over legislative competences) from one procedure or the other, or by a duplicity of possible procedures, granting the applicant a right to choose between one or the other procedure (barring simultaneous proceedings by lis pendens objection).

1. Matters subject to this kind of jurisdiction are primarily conflicts over competences between the central state/federation and the subdivision, or between such subdivisions concerning legislative and administrative competences and, occasionally, as between courts and administrative authorities.

a. Consequently, it is recommendable to subject all laws of the state and of the subdivisions to potential constitutional review by the Const. Court thus enabling it to authoritatively discern the respective spheres of competences accorded to the federal/central state, on the one hand, and its subdivisions, on the other. This does not mean that a special kind of proceedings must be devised because such constitutional review may be exercised in accordance with the (repressive) norm control procedure,[8], [9], [10]

b. Conflicts over competences other than legislative competences, such as over administrative competences, should also be able to be brought before the constitutional courts, as e.g. in Austria (art. 138 sec. 1 lit. c Const., art. 138 sec. 1 lit. a: between a federal court and an

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[8] *As concerns laws (and acts possessing the same quality as laws): In Italy all laws of the State and of the Regions and Provinces may become the subject-matter of this kind of jurisdiction (art. 127 sec. 4 Const., and the relevant provisions in the special statutes for the Regions; arts. 31-35 Law no. 87/1953). The same is true for the Fed. Rep. of Germany (art. 93 sec. 1 no. 3 Basic Law), where, in addition, the compatibility of state laws with (ordinary) federal law is subject to this jurisdiction (the same kind of issues can be raised under the procedure of abstract norm control, art. 93 sec. 1 no. 2 Basic Law, was mentioned above).*

[9] *In Switzerland cantonal but not federal laws are subject to the procedure of federal controversies (art. 113 sec. 1 no. 1 Swiss Const., art. 83 lit.a Law on the Organisation of Federal Judiciary of 1943).*

[10] *In Portugal this kind of controversies may be raised under the procedure of abstract norm control (art. 281 sec. 1 Const.), with regard to law-giving regulations of a Region also under the procedure of preventive norm control (art. 278 Const.); there is no special procedure, as distinguished from these two kinds of procedures, for state-region controversies concerning laws and normative acts of the same quality as laws. In Belgium, Spain and in Austria, too, these controversies are subject to the procedure of abstract norm control (art. 1 sec. 1 Belg. Law on Cour d'Arbitrage; art. 161 sec. 1 lit. a, 162 sec. 1 Span. Const., art. 32 Span. Law on the Const. Court; art. 140 Austrian Const. and art. 138 sec. 2: special case of preventive norm control in respect of legislative competence).*

administrative authority of a state), Switzerland (art. 113 sec. 1 no. 1 Swiss Const.), Fed. Rep. of Germany (Basic Law arts. 93 sec. 1 no. 3, 4; 84 sec. 4 - federal supervision of the administration of federal laws by the states -), in Spain (paragraphs 60 ff. Law on the Const. Court).

c. In addition, controversies as between the subdivisions of a State should also be able to be brought before the Constitutional Courts (see, e.g., Italy: art. 134 sent. 2 Const.; Spain: art. 161 sec. 1 lit. c; Austria: art. 138 sec. 1 lit. c Const. - conflict of competences -; Germany: art. 93 sec. 1 no. 4).

2. For the same reasons applying to judicial controversies between supreme organs of the state named above (sub B II 2. and 3.), only those entities who can claim to have been violated in their specific constitutional rights or competences should be able to initiate proceedings regarding these kinds of subject-matters (with the exception where laws are subject to procedures of abstract norm control: in this regard there seems to be a general public interest in ascertaining the constitutionality of a norm especially because of its abstract character and universal applicability); thus applicants, as a rule, should only be the federal, state, regional or provincial governments acting through specific organs.[11]

The procedure, as a rule, is of a contentious nature (with possible exceptions in those cases where the conflict over an enacted law may exclusively be raised by way of abstract norm control). The contents and effects of decisions vary according to the subject matter.

3. If the subject-matter of the proceedings is an act of an administrative authority or of a court which is found to be unconstitutional, the Const. Court, as a rule, may quash this act. In proceedings of preventive norm control over legislative competences it will usually state which party has the relevant competence (for detailed provisions see, e.g., art. 66 - positive -, art. 72 - negative - conflicts of competences - of the Spanish Law on the Const. Court).

## IV. Protection of Constitutional Rights of Private Persons (Constitutional Complaint)

1. Providing jurisdiction of the Const. Court for the protection of constitutional rights and liberties of private persons, their associations and possible other private entities implies that the constitution guarantees individual rights and freedoms.

Individual constitutional rights to be effective require some means of enforcement. This may be achieved by entrusting the civil and criminal courts and the administrative tribunals with the protection of these rights; and in some countries, e.g. in France, the Conseil d'Etat, the

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[11] *An exception to that is provided in Austrian law: aside from supreme administrative authorities private persons, if affected by a positive conflict of competences in administrative matters, may initiate a proceedings over federal-state controversies ( 48 Law on the Const. Court). In the Federal Republic of Germany the constitutional complaint of a private person or entity (art. 93 sec. 1 no. 4 a Basic Law) cannot admissibly be based directly on the assertion that the act of public power attacked violates the constitutional distribution of competences between the Federation and the States. The applicant may, however, admissibly claim that a law, affecting him directly, or an administrative act or a judicial decision based upon such law, is unconstitutional and void and accordingly violates the applicant in a fundamental right.*

administrative courts have a long and excellent record of protecting the libertés publiques. Vesting a special constitutional court with the power to deal with constitutional complaints of the violation of individual constitutional rights might intensify the protection of these rights and emphasize their constitutional rank. As a result, constitutional jurisdiction in matters of individual rights, if effective, will contribute to strengthening the respect of fundamental rights and liberties of the individual as a person, its dignity and freedom.

On the other hand, a procedure of constitutional complaint of private persons should not be a regular, merely additional remedy lest the Constitutional Court might well be overburdened by the number of cases it will have to deal with. Therefore, the rules governing the admissibility of constitutional complaints of private persons should be diligently conceived.

2. Who should possess the legal capacity to enter a complaint ? The potential complainants should be identical with those who under substantive constitutional law potentially hold the individual constitutional rights. It is a matter of the substantive scope of these rights whether only natural persons or private corporate bodies, only the citizens of the state or every individual are to possess these rights. This predetermines their procedural capacity to be complainants.

3. Which kinds of acts should be subject to constitutional complaint?

Solutions vary from country to country, from including all acts of domestic public power unto limitations to specific kinds of acts (norms of various categories, court decisions, administrative acts). It may appear appropriate, to extend jurisdiction on constitutional complaints to all acts of public authority, i.e. administrative acts, decisions and injunctions of the judiciary and even legislative acts including statutes, sub-legislative norms and ordinances of autonomous bodies[12], [13], [14], [15], [16], [17].

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[12] *Germany: art. 93 sec. 1 no. 4a Basic Law.*

[13] *In Switzerland only acts of the cantons, whether administrative, judicial, or legislative, may be contested by constitutional complaint.*

[14] *In Austria the Const. Court decides on the constitutionality of laws and on the unlawfulness of regulations on application by a person who asserts to have been violated in his rights if the law directly, i.e. without an implementing judicial or administrative decision, affects the applicant (arts. 140 sec. 1 sentence 4, 139 sec. 1 sentence 3 Const.). It has also jurisdiction on applications by private persons asserting violation by an administrative act of their constitutionally guaranteed rights, or of their rights by application of an illegal regulation, of an unconstitutional law or an unlawful international treaty (art. 144 sec. 1). Decisions of courts are not subject to constitutional complaint.*

[15] *In Spain constitutional complaints may be entered against all acts of public power, with the exception of laws in the formal sense, on the assertion of their violation of the constitutionally guaranteed rights and liberties (arts. 161 sec. 1 lit. b, 53 sec. 2, 14 to 29, 30 Const., arts. 41 ff. Law on Const. Court).*

[16] *In Belgium a recours en annulation may be entered with the Cour d'Arbitrage against laws, décrets or "un*

To include acts of legislation and sub-legislation might appear pertinent as laws may be self-executing, immediately, i.e. without any further act of implementation required, encroach upon constitutional rights of individuals. To include acts of the judiciary is consequent, in particular, to the guarantee of procedural constitutional rights such as habeas corpus and procedural due process. Also omissions by the courts, by the administration, even - though on very strict requirements of admissibility - by the legislature may be contested as unconstitutional violation of fundamental rights and liberties of the applicant in the Fed. Red. of Germany.

Whether acts of private persons can be challenged by constitutional complaint is predetermined by the doctrine on which the constitutional rights are founded. In the Federal Republic of Germany, e.g., the constitutional rights and freedoms are understood to protect the freedom of the individual against infringements by the public authorities and to limit governmental power. They are not directly considered to be applicable to private dealings (but as part of objective law, too, they exert a "radiation effect" upon the interpretation of norms, especially through general clauses).

In Spain the Constitutional Court appears to have extended its jurisdiction on constitutional complaints to acts of genuinely private persons by the interpretation of constitutional procedural law: The Court has assumed the cause of complaint to be the decision of the civil court so far as the court, on ruling in private litigation, has failed to provide efficient protection of the individual constitutional rights against an act of a private person. Under the wording of art. 44 of the Law on the Const. Court a judicial decision may only be challenged by constitutional complaint if the alleged violation is immediately caused by the judicial decision. (In the United States similar problems are discussed under the headings: State action).

4. Standing

In order to keep the number of cases of constitutional complaints within reasonable limits an actio popularis should be inadmissible; it should be required that a complainant allege the public authority's infringement on his/her own constitutional rights and freedoms (see, e.g., art. 46 Span. Law on Const. Court; paragraph 90 sec. 1 Germ. Law on Const. Court; in Germany only before the Bavarian Const. Court a complaint quivis ex populo is admissible - the prohibitory effect of standing is compensated by the fees the Bavarian Const. Court may levy).

Furthermore, for the same reason and in order to prevent the court from having to deal with complaints of merely theoretical importance, a complaint should be admissible to contest the constitutionality only of such acts as are claimed to presently and immediately encroach upon the individual constitutional rights of the complainant. This requirement becomes especially important if the complainant challenges the constitutionality of an act of legislation.

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*règle visée à l'article 26ter" of the Constitution (see arts. 1 and 2 sec. 2 Law on Cour d'Arbitrage).*

[17] *In Hungary only legislative acts including statutes, sublegislative norms and ordinances of autonomous bodies can be challenged by constitutional complaint: 48 of Act No. XXXII of 1989 calls for the complainant to have been aggrieved in consequence of the application of an unconstitutional legal rule.*

5. It will promote the effectiveness of constitutional law to have the courts of ordinary jurisdiction also privileged and required to apply constitutional law to a case. Instituting a procedure of constitutional complaint, therefore, cannot mean to replace the jurisdiction of these courts in respect of individual constitutional rights. They should, in particular, be allowed to deal with the constitutionality of administrative acts; all appellate courts should have jurisdiction, in particular, as to violations of constitutional procedural rights, allegedly such as a full and fair hearing and other due (procedural) process rights, committed by inferior courts.

6. Exhaustion of other judicial remedies

Consequently, the cause of complaint may well be effectively removed already in the course of litigation in the regular courts, if the constitutional right has been asserted. Accordingly, the constitutional complaint should be of a subsidiary character, admissible only after the complainant will have exhausted all the regular remedies provided by law (see, e.g., art. 44 sec. 1 lit. a, c Span. Law on Const. Court; paragraph 93 secs. 1, 2 German Law on Const. Court).

It might be advisable, on the other hand, to grant the Const. Court a discretionary power to decide on a complaint before the exhaustion of other judicial remedies if the subject-matter of the complaint is of general importance or if recourse to other courts would entail a serious and unavoidable detriment to the complainant.

7. Time limits for lodging a constitutional complaint

As a rule, it can be assumed that the complainant has the less acknowledgeable interest in asserting his constitutional rights the longer he tolerates a violation. At the same time it might become more and more difficult to prove the facts of the case. For these reasons as well as for the general interest in legal security motivating all time limits in procedural law, a time limit should be fixed for the application to be admissible. It may vary according to the legal nature of the act complained of (in the Federal Republic of Germany the general deadline is one month; if a legislative act is challenged one year, paragraph 93 secs. 1, 2 Law on Const. Court; in Spain the general deadline is 20 days for a complaint against court decisions, three months against normative acts - other than laws -, arts. 44 sec. 2; 42 Law on Const. Court).

8. Suspensive effects of constitutional complaints ?

Presupposing a requirement of the exhaustion of other judicial remedies a constitutional complaint against court decisions is attacking a final decision. Accordingly, the question arises whether entering the complaint should be accorded a suspensive effect (on implementation, enforcement, execution pending). An adequate solution in regard of court decisions or norms attacked would appear to be a denial of suspensive effect, as the rule, but granting the Const. Court, on application, the power to order a suspensive effect under certain conditions in each case respectively, allowing and affording attention to the specific circumstances of the case.

This would give due respect to the facts that a considerable length of time may have elapsed until (in consequence of the subsidiary character of the constitutional complaint) the regular courts will have dealt with the case, that these courts will have or rather ought to have

considered aspects of individual constitutional rights (and will not have found a violation) and that the constitutional complaint should be designed to be an extraordinary legal remedy.

9. Requirement of special admittance of constitutional complaints by the Constitutional Court ?

Especially in regard of the potential caseload of the Const. Court which might be caused, in particular, by the frequency of constitutional complaint, the question should be considered, whether each (admissible !) complaint should, in addition, require prior to a decision special acceptance by the Const. Court, and, if so required, whether non-admittance should be at the discretion of the Const. Court or be bound to certain specified criteria.

The practice of some constitutional courts has proved it to be useful to allow smaller divisions (panels) of the Court to subject complaints to a preliminary examination, to deny acceptance and to dismiss a constitutional complaint a limine in a summary proceedings in the case the complaint is obviously inadmissible or obviously unfounded, or even to decide in favour of the complainant if the complaint is undoubtedly founded (see, e.g., paragraph 93 b Germ. Law on Const. Court). Such kinds of procedure may relieve the stress imposed on the Const. Court (by the vast number of constitutional complaints likely to be filed) enabling it to concentrate on important cases; it will not substantially reduce the effective protection of the constitutional rights in general, this being the danger inherent in according the Const. Court sweeping discretion whether to accept or not an application.

10. Scope of substantive review by the Const. Court

A constitutional complaint will be successful if the Court finds that an individual constitutional right of the complainant has been violated. A Constitutional Court should, nevertheless, not be conceived to perform as an additional ultimate appellate tribunal; its scope of review should be restricted to scrutinizing the challenged act as to the violation of constitutional rights and not as to its lawfulness in general. (This requirement may lead to difficulties in discerning violations of constitutional rights from other aspects of illegality, especially if the right to the free development of one's personality is understood to protect against any unconstitutional infringement, and every act inconsistent with the sub-constitutional legal order is regarded as unconstitutional.)

Furthermore, as the constitutional complaint stands in the context of the realization of individual rights the objective unconstitutionality of a challenged act (for constitutional reasons other than those affecting the complainant's individual constitutional rights) should not suffice to have the court decide in favour of the complainant.

On the other hand, it adds to the efficiency of the protection of the individual constitutional rights if the Const. Court may take into account every aspect of a case and examine it as to the violation of any constitutional right at stake without being restricted to a consideration solely of those aspects expressly claimed unconstitutional by the complainant (as is the practice, e.g., of the Swiss Federal Supr. Court).

An individual right is violated if an act of public authority directly infringes upon it in defiance of constitutional law (immediate violation), but also if the act affecting a right is based upon a

statute or an act of sub-legislation which, for any reason, the Constitutional Court finds unconstitutional (derivative violation). The latter implies that the Constitutional Court shall have jurisdiction on every legal issue of the case including the incidental control of legislation.

11. Contents and effects of decision

If the complaint is founded, the Constitutional Court's decision should, in the first place, be the cassation of the challenged act. As the Const. Court is restricted to judicially reviewing the case under aspects of its constitutionality, it cannot substitute its own act for the one challenged, but must refer the case to the legal entity (court or administrative authority) whose act it has quashed.

If incidenter an act of legislation is judged unconstitutional the Court should have the power to declare the norm null and void with erga omnes effect (see, e.g., paragraph 95 sec. 3 sent. 1 German Law on Const. Court; paragraph 55 sec. 2 Span. Law on Const. Court). Thus, the success of one individual's constitutional complaint would extend to every one else whose rights have equally been or might be violated by the respective law. This would prevent the decision from provoking a flood of similar constitutional complaints against the same legislative act.

## V. Constitutional Complaints of Municipalities ?

If a constitution bestows upon municipalities or districts and their corporate associations, a right of partial autonomy (self-government), it may be deemed appropriate to grant them the right to enter a constitutional complaint alleging the infringement of their respective autonomous rights (competences) in the constitutional court, thus strengthening and securing their privileged status.

Two examples shall illustrate possible conceptions.

While in Switzerland the Federal Supreme Court has considered a local community (though legally a public corporate body) to be privileged to challenge an act by means of the general constitutional complaint, in the Federal Republic of Germany art. 93 (1) no. 4b Basic Law, paragraphs 91 ff. Law on the Const. Court expressly allow the communes or associations of communes to enter "a complaint of unconstitutionality on the ground that their right to self-government under art. 28 has been violated by a law other than a State law open to complaint to the respective State constitutional court". This grants the municipalities and their associations a right to initiate a special individual control of legislative acts. But lacking the constitutional protection of the same rights as private persons enjoy, they are generally considered to be barred from lodging a constitutional complaint alleging the infringement on such individual rights (for instance, of the protection of property).

## VI. Constitutional Complaint for Religious Societies ?

Depending on the constitutional relations between State and religious societies (for instance, recognizing an autonomous sphere of religious self-determination) it might be considered to grant such societies access to the Const. Court on the assertion that their constitutionally

recognized sphere of self-determination has been violated by state public power (legislative, executive, or judicial, as the case may be). In the Federal Republic of Germany religious societies may enter a constitutional complaint on the assertion that the fundamental right to freedom of religion (art. 4 sec. 1 Basic Law) has been violated by encroachment upon their sphere of autonomy guaranteed by art. 140 Basic Law.

## VII. Jurisdiction for Prosecution for the Violation of the Constitution

Aside from constitutional procedures to remove certain holders of high public offices for political reasons from their office (votes of non-confidence by parliament etc.) and reserving criminal proceedings to the criminal courts with their special procedure (perhaps entrusting these kinds of cases to a special High court: see art. 133, 199 Port. Const.; art. 102 of the Spanish Const.; art. 49, 86 of the Greek Const.; while in Austria criminal accusation in connection with official duties may be raised before the Const. Court, art. 143 Austr. Const.), constitutions might provide impeachment procedures for breach of constitutional law and assign these to the jurisdiction of the Constitutional Court. A necessity for this kind of constitutional jurisdiction might be felt only to the extent that there does not exist an efficient political procedure for removal, for instance, if the President of a Republic is elected for a term of several years directly by the people or by a special body, with no power to dismiss him (see, e.g., arts. 54, 61 of the German Basic Law; the Austrian Const., art. 142 sec. 1, probably contains the widest scope of impeachment procedures; only the impeachment of the Landeshauptmann has become practical).

The initiation of such proceedings should require a motion by a certain quorum of parliament (compare art. 61 (1) 2 of the German Basic Law; art. 49 sec. 2 of the Greek Const.) upon which parliament would have to decide on initiating prosecution. In Italy and Austria the constitution features a combination of criminal and constitutional proceedings. The Italian President of the Republic can be impeached in cases of high treason or on "assault on the constitution" (art. 90 Const.), Ministers can be prosecuted on charges of criminal offenses in exercising their offices, according to art. 96 Const. These proceedings became practised during the so-called "Lockheed Affair" from 1975 through 1979. For Austria compare arts. 142, 143 Const.

The decision of the Const. Court may be declaratory stating that there has been a violation of constitutional law. The court may also be vested with the power to remove the accused from office in severe cases (see, e.g., art. 61 sec. 2 German Basic Law, with the power of the Court also to suspend the Federal President from his office while the impeachment proceedings is pending before the Const. Court).

The Basic Law of the Fed. Rep. of Germany provides similar procedures before the Federal Const. Court against judges (see art. 98 sec. 2).

## VIII. Jurisdiction on the Unconstitutionality of Political Parties

In the Federal Republic of Germany[18] the Federal Constitutional Court has exclusive

[18] *Also see art. 9 and 10 (and 103 and 104) of the Portuguese Law No. 28/82 on the Organisation, Activities*

jurisdiction to declare a political party unconstitutional if the party seeks to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic (art. 21 sec. 2 Basic Law, paragraphs 43 ff. Law on the Const. Court), to dissolve the party and to forbid the foundation of substitute (front) organizations (paragraph 46 secs. 1, 2 Law on the Const. Court). The Court also disposes of the power to order the seizure and confiscation of the party's property. This device is thought for preventive protection of the constitution. It may also have a stabilizing effect on the "political landscape"; for as long as the Federal Constitutional Court has not ruled a party to be unconstitutional, it must be considered constitutional and is entitled to all the rights and privileges a political party is granted by the legal order.

Proceedings can be initiated by the Federal Diet, the Federal Council or the Federal Government only, or, if the organization of the party is confined to the area of a state, also by the government of this state (paragraph 43 secs. 1, 2 Law on the Const. Court).

This proceeding has been made use of only twice in the early years of the Federal Republic of Germany (see BVerfGE 2,1; 5, 85). The advantage of monopolizing the power to declare a political party unconstitutional with the Constitutional Court is that this may prevent the abuse of such power by the Executive and its administration.

## IX. Jurisdiction to Control of the Formation of the Supreme Organs of the State by Controlling Elections

A Constitutional Court, conceived as a "guarantor of constitutionality", might be chosen to exercise judicial control of elections. A democratic state will institute elections at various levels of government. In view of this it might not be appropriate to confer the control of all elections upon the Constitutional Court but to assign it only the judicial control of the formation of the supreme organs of the state.

Accordingly, the election of the (federal) parliament should be reserved to review by the Constitutional Court (see, e.g., art. 59 French Const.; arts. 38 f. ord. no. 58-1067 of 1958, art. 8 ord 58-998 of 24.10.1958; art. 58, 100 sec. 1 a, b, c of the Greek Const.; art. 41 sec. 2 German Basic Law; there is a wider scope of judicial control of elections in Austria and in Portugal, see art. 225 sec. 2 c), e) of the Port. Const., arts. 8, 9, 101, 102 Port. Law on Const. Court).

In the Federal Republic of Germany the scrutiny of elections is primarily the responsibility of the Federal Diet (art. 41 sec. 1 Basic Law); complaints against its decisions may be lodged with the Federal Constitutional Court (art. 41 sec. 2 Basic Law). Included in the control of elections is the decision as to whether or not a member of parliament has lost his seat (see, e.g., art. 41 sec. 1 Basic Law).

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*and Procedure of the Constitutional Court of 15 Nov. 1982, amended by Law No. 143/85 of 26. Nov. 1985 and No. 85/89 of 7. Sep. 1989; art. 31 No. 5 of the Polish Constitution, art. 5 secs. 1 through 3 Political Parties Law of 28 July 1990 (Journal of Laws. No. 54, item 312), as to this see: Leonard Lukaszuk, Report on the Mode of Constitutional Jurisdiction in Poland, Warsaw, Oct. 1990, P. 8; idem, The Constitutional Court in Poland, Warsaw, August 1990, note on p. 7a.*

To prevent abuse of the device of constitutional control of elections it might be considered that a single voter may only apply for such jurisdiction admissibly if his application is supported by a certain number of other voters, whereas the member of parliament objecting to his loss of seat in parliament should be able to lodge a complaint individually.

Furthermore, deadlines for the admissibility of applications should be fixed to prevent the procedure of control from disturbing parliamentary work once it has begun.

The Court might be accorded the power to declare an election invalid only if the result of the election, absent the breach of electoral regulations, were different, that means only if the illegality has had an objective (causal) effect on the composition of the elected body or on the single candidate's success.

Should the President of the State be elected directly by the people the judicial control of this election should also rest with the jurisdiction of the Constitutional Court (see art. 141 sec. 1 Austrian Const.; art. 58 French Const.; arts. 127 sec. 2, 225 sec. 2 c, d, Port. Const.; arts. 8 c), d), 92f., 97 f., 105 Port. Law on the Const. Court; in France and in Portugal the Const. Courts not only exercise the judicial but also the administrative control of elections.

### X. Jurisdiction on Deprivation of Specific Constitutional Rights of the Individual

A singular feature of the German Basic Law is art. 18, according to which whoever abuses the freedoms of speech, press, teaching, assembly, association, privacy of the mail and telecommunications, property, or the right of asylum "in order to combat the free democratic basic order" shall forfeit these rights, the Federal Constitutional Court having exclusive jurisdiction to pronounce such forfeiture and the extent thereof.

This proceeding has been of rather small practical significance: the Federal Constitutional Court has had to deal with only two early cases ever, both not leading to a forfeiture. Nevertheless, art. 18 is regarded as one of several elements of the Basic Law's character as a "defensive democracy". The enumeration in art. 18 of forfeitable rights has been criticised by learned authors as obviously a failure. The clear intention of its framers in 1949, founded on the experience of the Weimar Republic and the totalitarian regime of 1933 to 1945 was to prevent the abuse of individual rights and freedoms of the Basic Law, and thus to hinder the guarantee of these rights from becoming self-destructive by being used to overthrow the democratic fundamental order under the shield of constitutional rights.

To accord the power to declare such rights exclusively to the Constitutional Court might be deemed appropriate as other powers may more easily be tempted to arbitrarily use this instrument to silence political opponents.

It might be considered, instead of this system, to provide for an interpreting clause to the constitutional rights and freedoms disallowing their perversion and abuse.

## C. PROBLEMS AS TO THE PROCEDURE OF CONSTITUTIONAL

## JURISDICTION

Drawing up a system of procedural rules to be obeyed in the course of constitutional jurisdiction cannot be dealt with in the abstract as these rules must form a consistent body of norms, adapted to the specific needs of the kinds of procedures the court will have to conduct - according to the scheme of constitutional jurisdiction chosen. The different elements of procedure must, in addition, be put together free of contradiction. This can only be done after defining the kinds of procedures before the court and in the course of imperatively fixing the rules of procedure as a legislator would. Since this report cannot display a set of universally adequate and valid rules of procedure, it restricts itself to focusing on a selected (not at all exhaustive) number of single procedural problems connected with the jurisdiction to be exercised by specialized Constitutional Courts. (Some of these problems have already been touched upon above)

1. It goes without saying that constitutional jurisdiction can only be exercised within a framework of procedural rules. It is a requirement not only of the idea of security of the legal order but also of the guarantee of equal protection of the laws, a fundamental principle of justice that is inherent in a democratic constitution oriented towards the rule of law.

To hold the power and authority to establish these procedural rules means to have crucial influence on the practical implementation of constitutional jurisdiction. This gives great significance to the problem who shall set up these rules.

Including procedural regulations in the constitution itself is likely to overburden this fundamental law with details, which in the course of time may well need to be readjusted, while most constitutions afford a special and complicated procedure to revise constitutional law.

A more practical solution might be to entrust the establishment of procedural rules to the (federal, as the case may be) legislature. This could make these rules more flexible but also accord the legislature considerable influence on the function and working structure of constitutional jurisdiction. A remarkable method has been chosen in Hungary: According to paragraph 29 of Act No. XXXII of 1989 Parliament fixes the rules of procedure at the suggestion of the Const. Court.

As a third possibility it would appear to provide the court with autonomy to create and change its own rules of procedure.

2. Even if this latter possibility is chosen, some principal determinations should be made by the constitution fixing the procedure for establishing and for altering the rules. Besides providing for the subject matters considered to be the most important to be assigned to the jurisdiction of the Court, the Constitution should at the same time provide who may be an applicant (and with some matters a respondent) for the relevant procedure in these matters. The question who has access to the Constitutional Court is one of the most important questions of constitutional jurisdiction. The distribution of the docket in the fields of its activities among its possible divisions may well be left to an autonomous regulation by the Court itself.

3. If constitutional jurisdiction is to guarantee compliance with constitutional law as far as possible, the Court should be under a duty to admit all cases duly presented by application. Only

to ward off the peril of being overburdened by the number of cases might it be considered whether for the procedure of constitutional complaints entered by private individuals the Court might be accorded a discretionary power to deny admittance of a complaint.

4. Regarding the Court's power of investigation, the ex officio exploration of the factual basis of a case should be the rule.

For restricting the court to reviewing a case with respect merely to those aspects expressly claimed to be unconstitutional and to taking into account only the evidence presented by the parties involved would compel the court to scrutinize a case solely "through the eyes of the parties". Therefore, in order to render the court more powerful, one should enable it to review a case under all aspects of constitutional law and independent of the parties' assertions, and consequently have it ex officio examine a case in full as to fact and to law. Furnishing the court with the power to inquire into the facts of the case will strengthen the court's authority and emancipates it from having to rely on the information submitted by the parties. The outcome of constitutional litigation may well be predetermined by the factual circumstances of the case.

This does not mean, on the other hand, that the Constitutional Court should not be allowed to rely on the finding of facts by other courts if it considers such reliance as appropriate; but it should not be barred or curtailed to investigate by itself in order to evade any manipulative statements of the facts by an administrative or judicial organ.

This should be true even with "legislative facts". It is a different question whether the Court may deviate from the evaluation of such facts by the legislator. In this regard the Court will have to respect a prerogative of the legislator within the limits of arbitrary evaluation. Experience from the United States Supreme Court as well as from European Constitutional Courts prove that these courts have been very careful to respect the legislator's prerogative to evaluate legislative facts (in particular in the field of foreign affairs).

5. There appears to be no compelling argument in favour of requiring the parties at all stages of a proceedings to be represented by advocates since the court can rightly be expected to safeguard the procedural and material rights of those involved. In oral hearings, on the other hand, it might be advisable to have the parties represented by advocates in order to rationalize the hearing.

6. To promote not only the process of fact-finding but to provide the Court with a broad spectrum of analytical and evaluative views about the constitutionally protected interests affected by a proceedings not only all the authorities and individuals involved in constitutional proceedings should be heard; the Court, in addition, should have the power to invite any institution or person who in the Court's opinion might be able to contribute to find the law, to submit briefs or be heard in an oral hearing. Those whose powers or rights may be affected by the decision should have the right to file a brief as amicus curiae or otherwise to intervene in order to put forward their interests. To this effect there should be installed an early stage in the proceedings in which the parties and the other participants are allowed to present their view of the case in writing.

7. Oral hearings should be obligatory in all the proceedings where it is important for the decision to gain a broad spectrum in view of the consequences of the ruling, in particular, in

controversies between supreme organs of the States, in federal and quasi-federal controversies, in the procedures of abstract norm control on application by public applicants, in impeachment procedures, (possible) procedures on declaring political parties unconstitutional, and on the forfeiture of fundamental rights; in the other kinds of procedures an oral hearing might be provided facultatively, i.e. if the Court considers it useful to promote the proceedings.

To enable the participants in constitutional litigation to duly present their causes before the court, whether in an oral hearing or in writing, at least the parties (in the strict sense of the word) and the initiator of non-adversary proceedings should be granted access to all the documents presented to the Court and to the records of the case.

8. In some procedures a summary proceedings in respect to their admittance or admissibility may be appropriate in order to reach a speedy decision which appears especially practical where the number of cases tends to be large as may be the case with constitutional complaints entered upon by private persons. (See the remarks on the constitutional complaint.)

9. When shall a judge be barred from voting? When is he considered to be prejudiced? Can a party reject a judge's sitting on the case if the party has reason to fear him to be partial or not impartial?

According to paragraph 18 sec. 1 of the Law on the Federal Constitutional Court of the Federal Republic of Germany a judge is by law excluded from sitting on a case if he is or has been involved in the matter dealt with, if he is related to one of the participants, or if he has exercised an official or professional function in the case (f.i. as a judge, an advocate, or a civil servant in the administration; this provision, however, does not apply to a participation in the procedure of legislation[19] nor to the expression of a scholarly opinion on a legal question relevant to the case, see paragraph 18 sec. 3). A judge can be rejected (but is not by law excluded from exercising his function) if a party to a case can put forward an objectively founded reason that is apt to justify doubts as to the judges impartiality, full proof of prejudice not being required (see paragraph 19 sec. 1). A deadline for the rejection of a judge ends with the beginning of the oral hearing of the case (see paragraph 19 sec. 3).[20]

Who shall decide upon such questions? (The decision should best rest with the other judges as long as they fill the quorum or with another division of the court.)

10. Shall only a qualified majority of the Court decide upon certain kinds of questions ? (According to paragraph 15 sec. 3 German Law on Const. Court the rule is that the court shall decide by the majority; specific kinds of decisions - on the forfeiture of fundamental rights, the unconstitutionality of political parties, and the removal of the Federal President or of federal and state judges from office - afford a two-thirds majority.)

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[19] *Which differs from the Austrian regulation article 12 sec. 4 of the Austrian Law on the Constitutional Court.*

[20] *Also see art. 22 and 23 of the Swiss Federal Law on the Organisation of the Federal Jurisdiction of 16 Dec. 1943 (SR 173.110).*

11. How should the problem of votes being tied be solved ? In Italy, Spain, Portugal, Switzerland and France the (acting) President of the Court disposes of a casting vote; the Law on the German Fed. Const. Court provides in paragraph 15 sec. 3 that in this case an unconstitutionality cannot be stated.

12. Should, f.i. in order to incite scholarly discussions and to make more transparent the discussion among the judges, separate opinions be permitted or should the court speak with one voice to render to it greater authority ?

This may appear to be a question of practicability, the answer being subject to a prognosis: A stabilizing effect on the constitution as "law in action" and on public approval of the constitution may be achieved in both ways: Requiring the Court to speak with one voice provides clear statements on issues of constitutional law[21] and this unison may make the Court appear strong. Allowing the members of the Court to publish separate opinions, on the other hand, may well demonstrate the range of thought and judicial argumentation, which might be considered (in a political, not in legal sense) a democratic trait of constitutional jurisdiction; it would also inspire scholarly debate on constitutional questions, simultaneously revealing conflicts in the reasoning.

13. Should an application have a suspensive effect on the act attacked ? Most urgently in the procedure of constitutional complaint the question is due to arise whether the initiation of the proceedings automatically should have a suspensory effect on the challenged act, making it unenforceable as long as the case is pending.

As a rule, such an effect is generally not attributed to constitutional proceedings, except with the preventive control of legislative acts. Some Constitutional Courts have the power to temporarily enjoin the act under attack from being enforced (see, e.g., German Law on Const. Court paragraph 32, in the course of any proceedings, even in dealing with the abstract control of an act of legislation; once a case is pending the Court even may act so ex officio (motu proprio), not only on application[22]).
As mentioned above, such a flexible system is to be applauded.

By such kinds of instruments for interlocutory relief the efficiency of constitutional jurisdiction is greatly improved in the sense that the Court can avoid its decision being surpassed by the course of events in the meantime.

14. While in most states constitutional proceedings are free of costs, in the Federal Republic of Germany the Federal Constitutional Court may charge a complainant whose constitutional complaint it has turned down in the course of preliminary proceedings or a limine with a fee

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[21] *At least in the tenor of a judgment: The reasons given may, on the contrary, seem "blurry" in points of controversy which remain invisible.*

[22] *Also see Arts. 19ff. of the Belgian Special Law on the Court of Arbitration of 6 Jan. 1989; art. 56 sec. 1 of the Span. Law on Const. Court, 85 of the Austrian Law on the Constitutional Court, art. 9 no. 2 of the Polish Law on the Constitutional Court.*

which can, if the Court considers the proceedings of constitutional complaint to have been abused, be fixed at a maximum of 5000 DM (paragraph 34 secs. 2 to 4 Law on Const. Court). However, one should be cautious not to allow such a provision to be applied so as to de facto bar a complainant from access to the Court.

15. Types of decisions

While some rulings are strictly declaratory (as is usually the case with decisions upon controversies between supreme organs of the state, or between the federation and a constituent state or between states of a federation), a decision declaring an act of legislation null and void can be considered either declaratory or constitutive depending on the doctrine applied in dealing with unconstitutional acts of legislation (ex tunc or ex nunc-effects). Decisions on constitutional complaints and similar remedies challenging a concrete act other than a norm, as a rule, imply the cassation of the act. If the court finds the omission of a supreme organ of the state to violate the constitution, the judgment may purport to a mandamus.

16. Inter partes, erga omnes, quasi-legislative effects of decisions ?

The effect of decisions may differ according to the subject-matter and the kind of proceedings:

a. Decisions on controversies over competences tend to be declaratory decisions. Accordingly, they should have, in the first place, binding effects inter partes. (In all legal systems, to the knowledge of the rapporteur, this res iudicata effect inter partes includes that all public authorities and courts are bound by it, i.e. they have to respect that as between the parties the subject-matter has been finally decided with the respective contents of the decision on the merits).

It might, nevertheless, be wise to allow the Court to authoritatively rule on a question, other than the immediate subject-matter, raised in the course of this kind of litigation if such question is relevant (prejudicial) to the subject-matter at stake, the advantage of this being that the question will not be raised again in the course of new proceedings.

The decision on the controversy over competences might even be accorded an effect beyond the regular res iudicata effects inter partes, to prevent the same issue from being brought in the court again. (paragraph 31 German Law on Const. Court, e.g., extends the binding effect to the ruling on questions of law abstracting this decision from the special facts of the case).

b. Decisions on constitutional complaints containing the cassation of an act become effective primarily inter partes; however, if incidenter an act of legislation is found to violate a constitutional right, it might be appropriate, either to give this finding a quasi-legal effect or to have a special proceedings automatically initiated in which the law is declared unconstitutional erga omnes (see art. 55 sec. 2 and also 40 sec. 1, 38 sec. 1 Span. Law on Const. Court: the question must be submitted to the plenary court). As mentioned before, this would not only discourage further constitutional complaints against acts executing or enforcing the same law but would also ward off further application of the law and thus further violations of individual constitutional rights.

c. In proceedings of preventive control of acts of legislation, decisions may exert a binding effect on all organs of the state (see, e.g., art. 62 sec. 2 French Const.).

d. The concrete (collateral) control of laws should, if the law at stake is found unconstitutional, lead to the nullity of the norm erga omnes just as in the case of abstract control of enacted legislation.

A decision, under these procedures, holding the law to be constitutional should have binding effect erga omnes only if the constitutionality has been positively adjudicated. If an application for concrete or for abstract norm control is rejected (on the merits) the legal effect of the Const. Court's decision should depend on the scope of review it has applied:
d.1 if the Court only reviews the reasons for unconstitutionality asserted by the applicant and rejects them, the law might nevertheless be unconstitutional for other reasons not reviewed. In this case the law must not be declared constitutional but only the application rejected.
d.2 If the Court applies a full scale review and finds the law constitutional it must reject the application and might, in the tenor of the decision, declare the law constitutional, which part of the decision then should have an erga omnes effect.

In Portugal this erga omnes effect is obtained by a special procedural device if a norm in three concrete cases has been found unconstitutional (see: art. 281 no. 3 of the Constitution and art. 82 of the Law on the Constitutional Court). The initiative for the procedure lies with every judge of the Court and with the ministry for public affairs.

e. The nullification of unconstitutional laws might be inadequate under certain circumstances. Thus the German Federal Constitutional Court in some cases (concerning, f.i., a turn over tax) has abstained from declaring a law null and void and restricted itself to declaring it unconstitutional and incompatible with the constitution in order to avoid chaos resulting from a "legal vacuum". As an adequate solution to such kinds of situations might appear (as, e.g., in Austria and Turkey) to accord the Court the power to set a later date on which the law is to lose its force. (In order to give the legislature a chance to fill the vacuum).

17. Ex nunc - ex tunc effects of decisions and some consequences.

If an unconstitutional act of legislation is considered null and void from the date of its enactment, i.e., ex tunc, the decision of the Court finding the law unconstitutional is "declaratory". It, nevertheless, has implications ex tunc (pro futuro): The decision proves all acts relying on the unconstitutional law as their legal basis ("enabling act") to be without such legal basis. There needs to be some rule stating what is to become of these acts. Decisions of the courts or of administrative authorities based on an unconstitutional law may be considered unchallengeable by virtue of the principle of res iudicata (and a corresponding principle of administrative law), although it might appear more appropriate to make them unenforceable ex tunc. With (final) criminal judgments the possibility of reopening a case should be provided.

18. A general problem in the context of the effects of the constitutional court's decisions is whether their binding force is to be attributed only to the ruling (tenor) in the formal sense, or whether the main reasoning (ratio decidendi) should equally be respected, at least by interpreting the tenor in the light of the rationes decidendi (which, however, may be impossible if there are plurality opinions none of which command a majority).

19. A further aspect not to be neglected is how the constitutional Court's decisions (which are not just declaratory) might be enforced. The Court by a relevant provision of law might be accorded the power to determine itself the modalities of enforcement should the regular forms of enforcement, as provided in general procedural law, prove to be inadequate in a specific case.

## D. ORGANISATION OF CONSTITUTIONAL JURISDICTION - SOME ELEMENTS TO BE CONSIDERED

Two guidelines should be followed:

- The independence of the judges of the constitutional court must be guaranteed.

- The Constitutional Court needs an efficient organizational framework to make constitutional jurisdiction operational.

1. In view of the importance of constitutional jurisdiction and its possible scope, this draft report favours a permanent court and not an ad hoc tribunal in the case of a constitutional proceeding being initiated (as, to some extent, in Greece, art. 100 sec. 2, arts. 1-5 Greek Law 345/1976 Greek Const.).

2. The number of judges (members) of the constitutional courts vary throughout Western Europe between nine and sixteen (France: 9, Greece: 12, Belgium: 12, Spain: 12, Portugal: 13, Austria: 14, Italy: 15, Federal Republic of Germany: 16). Determining the number by the constitution itself will make adaptation to the development of the caseload more difficult. Only if it is deemed necessary to ward off attempts at politically motivated manipulations (like F.D. Roosevelt's attempt in the period of New Deal), can it be recommended to fix the number of judges in the constitution. The determination might otherwise well be left to a more flexible (federal) statute.

3. Should the judges sit on every case as a plenum or should there be established two (or more) benches (chambers, divisions, "Senats"). While the latter alternative might well increase the capacity of the court, the inherent danger not to be underestimated is the development (hidden or openly) of divergent lines of jurisprudence which will weaken the Court's authority. In case of several bancs (divisions) it must be arranged how the dockets are to be divided between them and what mechanism is to be implemented if a dispute arises over which bench is competent in a concrete case.

In case one division wants to deviate from a ruling of the other division submission of the issue to the plenary should be obligatory.

It might also be considered to provide for the possibility that a division may refer important cases to the plenary court.

A useful device to reduce the possible "flood" of cases would be to have small panels (e.g. three judges) decide unanimously on the admittance of constitutional complaints entered upon by private persons.

4. Most delicate will be the question concerning the appointment of the judges. Already the question who may suggest candidates for election or appointment is of crucial importance.

With the exception of Greece, all West European countries have their parliaments participate in the procedure of nomination.

- In some countries it is only the parliament that elects the judges (Switzerland, Belgium).

- In Austria, of fourteen judges and six substitutes, the president of the Court, the vice president, six judges and three substitutes are appointed at the suggestion of the federal government, three judges and two substitutes at the suggestion of the Nationalrat, three judges and one substitute at the suggestion of the Bundesrat.

- In Italy, of the fifteen members of the Constitutional Court five are elected by the parliament, five are chosen by the judiciary from among the judges of the highest courts and five are appointed by the President of the Republic.

- In Spain, four of the twelve judges are elected by the two houses of parliament respectively, two are appointed at the suggestion of the government and two at the suggestion of the "General Council of the Judiciary".

- In France, the Conseil Constitutionnel consists of nine members of which three are appointed by the President of the Republic, by the president of the senate, and by the president of the national assembly respectively, and of the former presidents of the republic, who are ex officio members of the Conseil Constitutionnel.

- In the Federal Republic of Germany, according to paragraphs 5 ff. Law on Const. Court, half of the judges are elected by the Federal Diet, the other half by the Federal Council, the federal organ in which the constituent states are represented by members of their government.

If the judges are to be elected by an assembly or a council it must be decided whether the whole body shall take part in the election or if electors shall be chosen who then select the candidates and take the final vote (e.g., special election committee of the Federal Diet in Germany, see paragraph 6 Law on Const. Court).

If the members of the Constitutional Court are to be elected, it should require a qualified majority (which, as a rule, will require the political parties to find a consensus; it will lead to bargaining over candidates but also to a high degree of legitimacy of elected candidates).

In considering the mode of nomination, the possible influences of the different organs of the state participating as well as of the political forces behind them must be estimated and balanced.

Should candidates be subjected to a public hearing before a parliamentary body, like in the United States ? Although this would promote public awareness of the process of and the criteria for nomination, it would expose the candidates to scrutiny by the mass media as well, which - it must be said without denying the eminent importance of the freedom of the press and of broadcasting within a pluralistic democracy - may aggressively pry into the lives and private spheres of the candidates in search of sensational "news" to be uncovered with a tendency not to

abide by the "presumption of innocence" if only something "smells" like a good, especially a scandalous, story.

5. The criteria of eligibility for judges must be fixed diligently in order to make the members of the Constitutional Court as independent as possible not only of those who have elected them but also of other influences affecting their impartiality and their being subject only to law. Aspects to be considered will be:

- What professional qualification shall be required ? Need the judges be jurists? Shall part of them be selected from the judges of the highest courts of the state (which will ensure at least a high quality of judicial techniques) ?

In this connection a problem may arise within states which have experienced a revolution upon which a new constitution is to be brought to life: The judges and jurists may well have been ready servants of the former regime so their appointment as constitutional judges and guarantors of the constitution would seem contradictory and might provoke distrust in their impartiality and in their loyalty towards the new system of government.

- Should there be an age limit, whether maximum (preventing overaging of the court) or minimum (apt to guarantee legal as well as life experience) ?

- Should there be proportional representation of nationalities, lingual groups, minorities or professions among the judges as a plenum or within the divisions of the court ? (See, e.g., art 31 Law on Belgian Cour d'Arbitrage.)

- Shall membership in a political party be incompatible with the office? (In Hungary membership in a party as well as political activities besides those arising from the sphere of authority of the Const. Court is incompatible with the status of a constitutional judge.) Or should only the holding of higher positions be incompatible ? Or shall membership in a political party be considered irrelevant ?

In answering these questions one should consider that, in a pluralistic society, based on individual constitutional (human) rights such as the freedom of speech, of conscience and of association including the right to found and become a member of a political party, it appears only appropriate to let every person enjoy these fundamental liberties and therefore not to exclude the constitutional judges. Nonetheless, this does not mean that a certain degree of self-restraint in making use of these rights cannot or should not be demanded of a judge in order to secure his impartiality and the respect of the people in him and in his office.

- Membership in other supreme organs of the state should be incompatible with the status of a judge to avoid conflicts of interest.

- Judges shall not be allowed to exercise any other professions during their terms of office (teaching at a university might not be considered to be such an incompatible profession). This will allow them to concentrate their energy on their judicial tasks and make them more independent of personal professional or economic ambitions.

6. In exercising their functions the members of the Constitutional Court should be subject

only to the constitution and the law consistent with the constitution. Therefore they must not be responsible in any way to the parliament, the government nor to a minister.

7. Disciplinary measures of any kind and by any other supreme organ of the state should be disallowed in order to defend against the court's jurisprudence being directly or indirectly influenced unduly. Especially unlawful and therefore null and void should be any directive as to the judges' legal opinions or voting on a case.

To preserve their impartiality it must be provided that the judges will not face any kind of disadvantage resulting from their decisions; they must have indemnity.

They must not be suspended or removed from office against their own free will except in cases of their objective inability to perform as judges (for instance in cases of disease or an arising incompatibility; doubts as to their learnedness or judicial capacities should not be sufficient in order to prevent manipulations). This does not exclude the possibility that a judge voluntarily resigns from office. But the power to determine if in a concrete case the conditions for the loss of office exist should be vested with the Constitutional Court only and exclusively and not left to other organs of the state.

It must be considered whether immunity from any prosecution is to be tied to membership in the Constitutional Court. This would guarantee the personal freedom of the judges and prevent them from being "shot out of a case", for instance, by falsely accusing them of criminal offenses. However, in that case, there need to be rules for lifting immunity in certain cases; this power again should rest solely with the Constitutional Court to exclude its abuse.

8. Life tenure or fixed period of office ? As life tenure (like in the US Supreme Court) bears the danger of the Constitutional Court's overaging, the judges should be appointed for a fixed number of years. If reelection will be excluded (in order to strengthen independence) the term should not be too short, because this might affect the continuity of the Court's jurisprudence which is of great importance.

If a Constitutional Court shall be established for the first time, for the same reason the tenure of the first "set" of judges should not be equal in length; the first judges should rather be divided into several groups, one group serving the full term, another f.i. two thirds, and the last one third of the term in order to have the court partially renewed after certain periods successively.

9. Making the judges impeachable might prove to be the heel of Achilles in the organization of the Constitutional Court because the question whether or not to initiate an impeachment proceeding will draw the Constitutional Court into the focus of fierce political debate. On the other hand, it may well be a means of stopping a judge from abusing his office.

10. The judges' salaries should be high enough to make them incorruptible, the sum should be fixed in advance and not allowed to be cut during the whole term of office. Granting the judges pensions after a long term of office also promotes their immunity to the lure of (sometimes very subtle) financial promises after their retirement (which might prove to be a peril inherent in fixed terms of office, the more the shorter the terms might be).

11. There should be as little influence on the court as possible by the parliament's budgetary power and even less by the Executive, such as by the Minister of Justice or Finance. Therefore, the Constitutional Court itself should set up its budget plan, with the parliament formally deciding on it but under a general duty to comply with the Court's estimate of expenditure. It is very important in practice that the Court may itself administer its budget, independent of any interventions by the Executive.

12. The Constitutional Court's efficiency is greatly intensified if there is provided a staff of legally trained law clerks. Their selection should rest with each individual judge because they need to have his full personal confidence.

13. The technical and administrative details of the Court's work should be left to the autonomous determination by the Constitutional Court itself, allowing no external directives. The president (to be elected either in the course of the nomination of the judges or autonomously by the members of the Court themselves) is to be the head of this organizational framework, while remaining primus inter pares as a judge.

The administrative work needs to be done by officials of the court who - to complete the scheme safeguarding the court's independence - should be responsible only to the president of the Constitutional Court who should be their superior.

14. Combination of the functions of a Constitutional and of an Appellate Court ?
To establish at the apex of a judiciary system one court vested with both appellate jurisdiction and constitutional jurisdiction has some advantages:

- If constitutional jurisdiction is newly introduced, a state may want to rely on existing organizational structures, although the precautions which need to be taken in order to secure the independence of the constitutional judges as shown above generally would demand the innovation at least of the rules of the appointment of the judges.

- The constitutional judges will not be in danger of losing from under their feet the ground of dealing with practical litigious cases, as they will not be restricted to ruling on more or less abstract questions of constitutional law.

- The costs of establishing and running such a court may be lower.

But there are severe disadvantages to be taken into consideration:

- The court will not stand so supreme if it is not a special Constitutional Court exclusively dealing with matters of constitutional law, but it will rather appear to be a mere part of the judiciary.

- The ballast of litigious cases it will have to review in the course of its appellate jurisdiction will have to be carried along the way, impeding the speed of dealing with constitutional proceedings.

- In countries with large populations the number of judges would have to be very great in order to sufficiently perform the task of appellate and constitutional jurisdiction.

For these reasons, establishing a singular, exclusively Constitutional Court dealing only with proceedings of constitutional jurisdiction might appear preferable to a combination of the functions of an appellate and a constitutional court.