Conference of European Constitutional Courts

XIIth Congress

Brussels, Egmont Palace, 14-16 May 2002

The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European courts

General report

Part I

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Introduction

It may be expected of general rapporteurs at scientific conferences that they give a survey of the different national reports. Such a survey may offer either an analysis or a synthesis. It may be merely descriptive or it may put forward propositions with respect to content.

Whichever method the authors may prefer, the choice will ultimately be determined by the number of participating constitutional courts and the size of their contributions to the conference. In this respect, the task of the rapporteurs has not become any easier at this XIIth Congress. No fewer than thirty-two constitutional courts – nearly half as many as at the last congress – have sent in a national report – and, it should be emphasized, mostly within the editing time allotted to them, which has made the work of processing easier. Reports were sent in by the constitutional courts of Albania, Andorra, Armenia, Azerbaijan, Belgium, Bosnia-Herzegovina, Bulgaria, Cyprus, Germany, France, Georgia, Hungary, Italy, Croatia, Latvia, Liechtenstein, Lithuania, Macedonia, Moldova, Ukraine, Austria, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, Czech Republic, Turkey, Belarus and Switzerland.

It is impossible for the general rapporteurs to discuss in detail the different systems and the relevant relationship between the constitutional courts and the other courts within each system.
The information offered in the national reports on the basis of the detailed questionnaire that was sent is too extensive for that. Through their ready availability and their subsequent publication in book form, those national reports offer a current survey of the jurisdiction of the constitutional courts and of how they operate within their respective legal systems. The wealth of information supplied in such a survey cannot be contained in a general report.
Furthermore, the main scientific limitation of the working method has to be underlined. The general rapporteurs have based themselves exclusively on the material contained in the national reports, in which comprehensiveness was not sought either. Their mission and the time available in which to complete it did not allow them to consult the (authentic) primary legal sources or relevant studies, supposing this was possible in view of their respective knowledge of languages.

The general report consists of two parts. The first part, written by Judge Alen, offers a detailed examination of the internal judicial relations between the constitutional courts and the other courts. The factors in the different legal systems that determine the relations between the constitutional courts and the other national courts are discussed. First, the author examines how those relations at the institutional level are determined by the place of the constitutional court within the judicial organization, by the very nature of the state structure (choice of the form of government, in which especially the federal nature of the constitution can have certain consequences) and by the settlement of conflicts between the constitutional court and the other courts or of conflicts among those courts. Then it is examined how those relations in the area of constitutionality review are determined by the nature of the constitutionality supervision (diffuse or concentrated, abstract or concrete, general or specific as a result of diversification to reviewed regulations and actions). The first part of the general report, that corresponds to section I, concludes with an overview of the ways in which a case is brought before the constitutional court (direct appeal, preliminary referral and constitutional complaint).

The second part, written by President Melchior, first investigates how those relations between the constitutional courts and the other national courts are structurally embedded or experienced in practice, in a possible threefold context: the organic context, the procedural context and the functional context. In the latter approach, the nature of the review by the constitutional court and its consequences (type of sanction that can be pronounced, the implications of its ruling) as well as the – at least as relevant – different methods of interpretation of the constitutional court and of the other courts are scrutinized in detail (Section II). Finally, the author investigates the possible interference in those relations of the supranational European courts, notably the European Court of Human Rights – whose interference can be real in the member states of the Council of Europe – and the Court of Justice of the European Communities – whose interference can exist solely in the member states of the European Union (Section III).

The theme of the congress – which had also recently been the topic of other international conferences, and which the president of the Polish Constitutional Court described at the opening of the last congress as a "problem […] not devoid of sometimes fundamental controversies" – is ideally suited for gaining insights in comparative law. However much our legal systems may differ, the subject offers sufficient valuable, relevant and analogous points of comparison to allow us to distil the common features and principles. In a separate document that will be circulated at the start of the congress, we will also try to formulate a number of propositions that may prompt a fruitful confrontation of our views on legal systems and the protection of basic rights. Judge Paul Martens has been entrusted with the delicate task of distilling the conclusions from our discussions. We hope that the general report will contain sufficient elements to contribute to the formulation of final conclusions.

I. The factors determining the relations between the Constitutional Courts and the other courts

Before considering in detail the relations between the constitutional courts and the other courts in the member countries of this Conference, it would be appropriate first to examine the elements that determine this relationship.

The relations between the constitutional court and the other courts are determined in the different countries by, in general, the specific features of the legal system and the institutional embodiment of the constitutional and ordinary legal protection, characterized among other things by the different jurisdictions of the constitutional court and the other courts, and in particular by the way in which the constitutionality supervision is organized in terms of the power of the constitutional court and its access, as well as in terms of the force of the rulings (see Part II). The purpose of the questionnaire was to find all this out.
The discussion below takes into account the information that was provided in the national reports in reply to the different questions under I (The constitutional court, the other courts and the constitutionality review).

A. The institutional relationship between the constitutional court and the other courts

§ 1. Place of the constitutional court in the judicial organization

In the large majority of European countries, the constitutional court – as generic name for constitutional courts, constitutional tribunals and constitutional councils – does not form part of the judiciary in the literal sense of the word. Its constitutional position is clearly distinguished from that of the ordinary and administrative courts.

The constitutional court is in most cases a *sui generis* court which is positioned within the state organization opposite the other, more "traditional" state powers – legislative, executive and judiciary – and therefore does not come under the constitutional title that relates to the latter.

Only in an exceptional number of cases does the constitutional court form part of the judiciary, either because the Constitution of the country in question has assigned this specific duty to the highest court of the ordinary judicial authority (such as in Switzerland, where this power has been allocated to the Federal Tribunal, and in Cyprus, where it belongs to the Supreme Court), or because the constitutional court, in accordance with the Constitution, is mentioned among the courts that form part of the judiciary (Federal Republic of Germany, Azerbaijan, Georgia, Poland, Russian Federation, Slovakia[1], Czech Republic, Belarus). Where in the first hypothesis the constitutional court structurally stands at the top of the hierarchy of courts, in the second hypothesis it is juxtaposed with the other state powers, which include the highest courts of the country.

Irrespective of whether the constitutional court forms part of the judiciary or constitutes a separate *sui generis* court, it is always emphasized that it is the highest authority entrusted with a special task, namely to uphold the primacy of the Constitution – according to Kelsen's model, in particular vis-à-vis the legislative – and the authoritative interpretation of that basic standard[2]. In that sense, the constitutional court is always assigned a relative priority in the hierarchy of the jurisdictional bodies. This also applies in the case of the French Constitutional Council, which – pending a possible extension of jurisdiction and apart from its jurisdiction in election disputes – essentially carries out a preventive, prior review.

In order to carry out this specific duty, the constitutional court has in all countries been vested with the specific characteristics of a court, in particular with respect to the independence and impartiality of the members. In this sense it is assumed – and sometimes even expressly emphasized – that the constitutional court in any case forms part of the judicial organization in the broader sense, and within this organization it has been entrusted with a specific mission.

[1] The Slovakian report mentions that the constitutional court forms part of the judiciary, yet stands outside the general judicial organization.

[2] Even if the constitutional court does in principle belong to the judiciary, as it does in Germany, it is stressed that its specific authority sets it apart from the other courts.

§ 2. Impact of the federal state structure on the relationship between the constitutional court and the other courts

In Europe there are only a few countries with a federal state structure. In this connection, two different approaches can be distinguished with respect to the power to establish the judicial organization.

In certain federal states, the judicial organization is essentially a matter of the individual states, without prejudice to the power of the federal government to set up federal courts as well. Those federal courts may be set up either as supreme courts exclusively with jurisdiction at the highest – federal – level of authority, as in Germany[3] and Switzerland[4], or as courts in a judicial organization integrated and hierarchically structured at the federal level, parallel to a similar structure at state level, as in Russia. Although the setting up at state level of constitutional courts is not excluded[5] – though not necessary[6] –, the existence of a federal constutitional court in the federal state structure is unavoidable[7].

In other federal states, such as Belgium and Austria, the power of judicial organization is an exclusively federal matter. This applies *a fortiori* for the centralized states, which are nevertheless characterized by a certain degree of regional autonomy, such as Italy, Portugal, Spain and the Czech Republic[8].

The special impact (the only one mentioned) of the federal state structure on the relationship between the constitutional court and the other courts is to be found in the German report. If a constitutional court of a German *Land* intends to take a decision based on an interpretation of the federal Constitution that deviates from the jurisdiction of the federal Constitutional Court or of the constitutional court of another *Land*, it is obliged to refer to the federal constitutional court on this matter. Another rule that could be derived from the federal form of government is the necessity to include the rules concerning the federal constitutional court in the federal Constitution, even in countries where the judicial organization basically falls within the scope of the individual states.

§ 3. Settlement of conflicts of jurisdiction between courts

In several countries, the constitutional court has been appointed by the Constitution to settle conflicts of jurisdiction between government bodies. Disputes concerning the authority of each of the three state powers – including the judiciary – and sometimes concerning more

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[3] Besides the Bundesverfassungsgericht (Federal Constitutional Court), the Bundesgerichtshof (Federal Court of Justice), the Bundesverwaltungsgericht (Federal Administrative Court), the Bundesarbeitsgericht (Federal Labour Court), the Bundessozialgericht (Federal Social Court) and the Bundesfinanzhof (Federal Finance Court).

[4] Besides the Tribunal fédéral (Federal Tribunal), the Tribunal fédéral des assurances (Federal Insurance Tribunal).

[5] In Germany, all the Länder, except Schleswig-Holstein, have a constitutional court; state constitutional courts also exist in Bosnia-Herzegovina and Russia.

[6] In Switzerland, only the Canton of Jura has its own constitutional court.

[7] In Bosnia-Herzegovina, there is only a federal constitutional court at the federal level of authority; all other courts are organized at the level of the two states, which each have a state constitutional court.

[8] Although Georgia is not a federal state either, the two autonomous republics have their own supreme court.

particularly the different powers of the administrative authorities and the courts are settled by the constitutional court.

In most countries, however, the constitutional court plays no part whatsoever in the settlement of conflicts (of authority or jurisdiction) between the different judicial bodies.[9] This task is usually entrusted to the highest body of the ordinary judiciary or – rather exceptionally – to another specialized legal body (such as the *Tribunal des conflits* in France). In a number of national reports it is emphasized that the constitutional court can intervene indirectly, for example in the evaluation of the constitutionality of statutes that assign jurisdiction to the courts of different judicial authorities (Belgium, France, Ukraine[10], Russian Federation[11], Slovakia). In Germany, the Constitutional Court can examine whether a judicial decision does not violate the basic right to an adequate court, in which (exclusive) case it rules on the competent court. An important exception to the general rule is the Austrian Constitutional Court, which settles (positive and negative) conflicts of jurisdiction between different courts at the request of the courts themselves or at the request of litigating parties.

In several countries, however, there is one important exception to the incompetence of the constitutional court to settle conflicts of jurisdiction between courts: in a number of countries, the constitutional court is the judge of its own competence and thus settles conflicts of jurisdiction between itself and all other courts (Austria, Portugal and the Czech Republic[12]).

[9] An important exception is the *Staatsgerichtshof* in Liechtenstein, which does settle such conflicts and, where appropriate, (exclusively) designates the competent court.
[10] In case of dispute over the jurisdiction of the higher specialized courts, there may be a need for interpretation of the Constitution by the Constitutional Court.
[11] Solely in the context of an abstract review.
[12] In the Czech report, it is pointed out that the Constitutional Court could settle conflicts of jurisdiction between the (highest) ordinary and administrative courts once the latter have been set up.

B. Nature of the constitutionality review

§ 1. Nature of the reviewed acts

a) Regulations with force of law

Virtually all constitutional courts are entrusted with the task of reviewing the constitutionality of statutes and equivalent regulations with force of law[13], including where appropriate also those of state or regional legislators (Belgium, Germany, Georgia, Italy, Ukraine, Austria, Portugal, Russian Federation, Spain, Czech Republic). In Switzerland, however, the Federal Tribunal is not empowered to review federal laws for conformity with the federal Constitution. In Hungary, Italy and Portugal, legislative omissions are also judged by the constitutional court.

Only in exceptional cases is the review restricted to regulations with force of law, as in Belgium. Usually other acts are also reviewed by the constitutional court, it being understood that such review can either be abstract or concrete, preventive (*prior*) or repressive (*subsequent*).

b) Other prescriptive acts of a general scope

These primarily concern other prescriptive acts that have a general scope[14]:
- constitutional amendments and constitutional statutes[15] (Italy[16], Moldova, Ukraine, Romania[17], Turkey[18]);
- regulations issued by constitutional bodies of states (Bosnia-Herzegovina, Russia), by-laws of regions (Italy);
- sources of international law (Albania, Andorra, Armenia, Azerbaijan, Belgium[19], Bulgaria, Germany[20], France, Georgia, Hungary, Latvia, Lithuania, Moldova, Ukraine, Austria, Poland, Portugal, Russia[21], Slovakia, Slovenia, Spain, Czech Republic; for Bosnia-Herzegovina in particular also the decisions of states concerning the relations with neighbouring states and for Belarus also the inter-state legal instruments);

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[13] Including those of an individual scope, for example as expressly mentioned in the reports of Armenia and Portugal. In Croatia, the Constitutional Court is also empowered to rule on regulations with force of law that have lost their legal effect, on condition that the request for such a review is submitted within the following year.
[14] A number of specific powers, such as the evaluation of prescriptive decisions pronounced by the highest courts and by the Attorney General (as in Belarus) and of regulations issued by procuration by private legal persons (as in Portugal), are not discussed.
[15] In certain countries, the constitutional court is also vested with an independent power of binding interpretation of the Constitution, regardless of (abstract or concrete) disputes (Bulgaria, Moldova, Russia).
[16] The "lois de révision constitutionnelle", although the regulations against which reviews are carried out are fairly limited in scope (formal rules and highest principles of state organization).
[17] The Constitutional Court exercises this power *ex officio*.
[18] The power of the court is limited to verifying compliance with the formal rules.
[19] The review is only carried out when the consent act is evaluated.
[20] The Constitutional Court decides, on preliminary referral, whether a rule of international public law forms an integral part of federal law.
[21] The Constitutional Court is also empowered to review agreements between the governments of the individual states of the Federation.

- regulations issued by heads of state and/or by governments (Armenia, Azerbaijan, Georgia[22], Hungary, Croatia, Latvia, Macedonia, Moldova, Ukraine, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, Czech Republic, Belarus, Switzerland[23]);
- regulations issued by central or federal authorities and/or by local authorities (Albania, Azerbaijan, Cyprus, Hungary, Croatia, Macedonia, Austria, Poland, Portugal, Slovakia, Slovenia, Spain, Czech Republic, Belarus, Switzerland) and
- prescriptive decisions (Bulgaria, Russia, Spain, Belarus) and regulations (Andorra, Armenia, France, Georgia, Romania, Spain, Turkey) of legislative assemblies.

c) Decisions of an individual scope

In most countries, the constitutional courts are also empowered to review decisions of an individual scope in the context of a concrete constitutionality review. It may concern decisions by a legislative assembly (Bulgaria), an administrative authority (Austria and the Czech Republic) or a judiciary body. The review of these legal acts is usually limited to the reference criteria, which are quite often provisions concerning basic rights and liberties. The different types of review will be analyzed in more detail when we discuss the constitutional complaint as one of the ways in which a case is referred to the constitutional court. In this way, we have actually indicated one of the main features of this review method, namely that it is essentially directed at the implementing act rather than at the actual regulation, the constitutionality of which is challenged and which underlies the implementing act.[24]

d) Conflicts of jurisdiction

Some constitutional courts are competent to take cognizance of conflicts of jurisdiction between government bodies (Albania, Andorra, Bulgaria, Cyprus, Germany, France[25], Georgia, Hungary, Croatia, Italy, Liechtenstein, Macedonia, Austria, Poland, Russia, Slovakia, Slovenia, Spain, Czech Republic, Switzerland) and between the State and the constituent entities (or among the latter), whether they be states (Belgium, Bosnia-Herzegovina, Germany, Austria, Russia, Switzerland) or autonomous regions, communities or areas (Italy, Spain, Czech Republic).

e) Other acts

Not unimportant, though less relevant for the purposes of the topic of the congress, is the jurisdiction of several constitutional courts to try disputes relating to the election of the head of state and of the legislative assemblies, the criminal liability of the head of state or other public officials, the incapacity of the head of state to govern, ruling on (the constitutionality of) the existence and actions of political parties, and the organization of referendums.

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[22] Including the highest public bodies of Abkhazia and Adjara.
[23] At both federal and cantonal level.
[24] Not the regulation itself is annulled in such a procedure, but the implementing act.
[25] Division of powers between president and parliament.

§ 2. Exclusive nature of the constitutionality review

a) The European model of concentrated review

The authority exercised by the constitutional courts is described in most reports as being exclusive, in other words, only they have jurisdiction to review the constitutionality of the regulations with force of law that are subject to their supervision and to exercise the special powers that have been vested in them. This should not come as a surprise, since nearly all countries have opted for the European model of constitutional jurisdiction, which is characterized by a concentration of the power of review with regard to the prescriptive acts of the legislative bodies in the hands of just one jurisdictional body, the constitutional court. As was mentioned in §1, in many countries other regulations of a general scope are also subject to a constitutionality and legality review by the constitutional court.

b) Departure from the European model

Only one country deviates significantly from the European model, at least as far as concrete constitutionality review is concerned, namely Portugal. The Portuguese Constitution has introduced a mixed system of diffuse review at the basis and concentrated review at the top. This system is a combination of the Anglo-American system of (general) judicial constitutionality review and the European system of concentrated constitutionality review. Every court in Portugal is obliged not to enforce regulations that are contrary to the Constitution. If a court declares a particular standard in a statute or decree unconstitutional, the public prosecutor has to appeal against this decision directly to the Portuguese Constitutional Tribunal.[26] On the other hand, the Constitutional Tribunal has exclusive power with respect to preventive (prior) review.

The exclusivity of the constitutionality review described above – in general terms – needs to be somewhat qualified from different points of view.

A diffuse review can also exist in a legal system where the Supreme Court assumes the role of constitutional court. In Cyprus, the constitutionality review also has to be exercised by the lower courts, without prejudice to the possibility of appeal to the Supreme Court.[27] In Switzerland, the obligation to rule on the constitutionality of legal standards (and implementing acts) is incumbent on all government bodies, and therefore also on the lower courts, which means that the jurisdiction of the Federal Tribunal is not exclusive.[28]

Quite often the ordinary courts also rule on the constitutionality of regulations with force of law, since they are able to judge that the regulation in question is constitutional and should therefore be enforced. In the Spanish report it is stressed that constitutionality review is a competence that is shared with the ordinary courts, it being understood that the ordinary courts cannot pronounce the actual ruling of unconstitutionality, but must submit the

[26] This also applies for a standard in international law.
[27] In accordance with the jurisdiction of the Supreme Court, only the family courts have access to preliminary referral (*see below*).
[28] It should be remembered that the Federal Tribunal is not empowered either to review the constitutionality of federal statutes.

"question of unconstitutionality" to the Constitutional Tribunal.[29] The exclusivity of the jurisdiction of most constitutional courts accordingly lies in their capacity to declare a legislative regulation unconstitutional and, where appropriate, to attach to this the most adequate legal consequence of annulment, which in any case is reserved for the constitutional court.

Moreover, exclusivity of jurisdiction is limited to the regulations and acts that are subject to the control of the constitutional court, and often only in so far as this exclusivity is expressly acknowledged, notably for regulations with force of law and in certain cases only in so far as they date from after the establishment of the Constitution. For example, the jurisdiction of the German Constitutional Court is only exclusive with respect to federal statutes[30]. In Austria, exclusivity of jurisdiction only exists with respect to statutes and ordinances[31]. In general terms we could say that the ordinary courts also contribute to constitutionality control, owing to the fact that, often in the context of upholding the hierarchy of legal standards, they are able to review regulations of a general scope – other than regulations with force of law – for conformity with the Constitution (Armenia, Belgium, Georgia, Moldova, Slovakia). [32]

c) Review of regulations with force of law against international treaties

The exclusivity of constitutionality review may come under pressure if regulations with force of law in the internal legal system need to be reviewed for conformity with international treaties that have been assigned a quasi-constitutional or higher force in the internal legal system, so that they take precedence over internal law. In the Czech report it is emphasized that the ordinary courts, by reviewing statutes against international human rights treaties, are equally called upon to perform constitutionality reviews, having regard to the higher (constitutional) rank of those treaties.[33]

Problems can be avoided if the constitutional court and the ordinary courts have a strictly distinct competence in this area and also abide by this arrangement. In France, the respective jurisdictions of the Constitutional Council and the other courts are clearly circumscribed: the latter (along with the Constitutional Council when deciding questions of fact in election disputes) review statutes directly against international treaties, unless it concerns a *"loi tirant les conséquences nécessaires de la Constitution"*. They acknowledge the exclusivity of jurisdiction of the Constitutional Council to conduct reviews against the French Constitution. Totally different is the legal situation where the constitutional courts also review regulations with force of law for conformity with the international treaties, such as in Hungary, Croatia, Latvia, Moldova, Poland and Slovenia. The consequence of this will be discussed below in Section III. We will already mention that especially the Polish report highlights the constitutional issue. In Poland, the problem of the exclusivity of the constitutionality control

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[29] In this sense, according to the report, only the constitutionality review of international treaties – which is a prior review – is exclusive; see in this connection also the Czech report.

[30] Federal statutes dating before the adoption of the Constitution and the state legislation do not fall within the exclusive jurisdiction of the *Bundesverfassungsgericht*.

[31] In Austria, a parallel jurisdiction exists of the Constitutional Court and the Administrative Court with regard to individual administrative acts. In practice, disputes concerning such acts are first submitted to the Constitutional Court, which examines whether a constitutional right has been violated, and only after that, if necessary, is an appeal lodged with the Administrative Court for violation of subjective rights granted by ordinary law.

[32] In some countries, control of the observance of the hierarchy of all legal standards is reserved for the constitutional court, e.g. Latvia, until the administrative jurisdiction has been finalized, and Slovenia.

[33] The rapporteur deplores the fact that the ordinary courts still display too much hesitation in this respect.

of the various legal acts is the subject of a dispute between the Constitutional Tribunal and (some) courts. The difference in approach concerns the non-application by a court, in a particular action, of a statute that is deemed contrary to the Constitution or to a ratified international convention. The advocates of this view refer to the article in the Constitution which stipulates that constitutional provisions are directly enforceable, unless the Constitution provides otherwise. The opponents of this view invoke the article *"instituant la subordination des juges à la Constitution et aux lois"* (establishing the subordination of the courts to the Constitution and to the laws) and quote the constitutional provision which says that any court that has doubts about the conformity of an enforceable provision with a higher-ranking standard may refer to the Constitutional Tribunal with the request to solve that problem. The exclusivity of jurisdiction of the Constitutional Tribunal consequently lies in the fact that only this court can conduct an abstract constitutionality and legality review, and that only the rulings of this court can result in a prescriptive act losing its binding legal force.

There is no doubt, however, that the power of the ordinary courts to review regulations with force of law against international treaties with a quasi-constitutional legal force must *de facto* lead to a diffuse constitutionality review of statutes, with possible conflicts in jurisdiction between constitutional courts and other courts. The main reason for this is that often the same guarantees are enshrined in both the Constitution and in treaties. The Swiss report points out that the courts, including the Federal Tribunal, which are obliged to enforce in full federal laws that they consider to be contrary to the Constitution, can decline to enforce those same laws if they are contrary to the European Human Rights Treaty. This does not pose any problem in a country with a diffuse constitutionality control, since the constitutional court, as the highest jurisdictional body, is always able in that case to guarantee unity of jurisdiction. On the other hand, in countries with a concentrated constitutionality review and hierarchical juxtaposition of the constitutional court and the highest courts, conflicts seem unavoidable.

§ 3. The preventive or repressive nature of constitutionality review

The constitutionality review carried out by the constitutional courts can take on two different forms: it may be preventive (prior), which implies that the regulation has not yet been established, but it may also be subsequent – and therefore repressive –, which implies that the regulation has already been established.

Many countries have a system of preventive constitutionality review that can be requested solely by public officials or government bodies.[34] This review may concern statutes (Andorra[35], Cyprus, France, Hungary, Poland[36], Portugal[37], Romania), regulations of legislative assemblies (France and Hungary) or international public sources of law, in particular international treaties and international conventions, before they are ratified by the competent body (Albania, Andorra, Armenia, Bulgaria, France, Georgia, Hungary, Latvia, Ukraine, Poland, Portugal, Russia, Slovenia, Czech Republic). Preventive review may also be carried out with respect to matters that are subject to a referendum (Albania and Armenia) or

[34] Prior review does not exist in Belgium, Germany, Italy, Croatia, Liechtenstein, Macedonia, Slovakia, Turkey and Belarus. In Liechtenstein, such a review could be instituted sovereignly, but so far it has been decided not to do so.

[35] It concerns an exclusive power of the co-princes to request a prior review of statutes.

[36] In Poland, preventive constitutionality review of statutes and international treaties is only possible if the President so requests.

[37] Including the regional legislative decrees.

with respect to a planned revision of the constitution (zie Moldavië en Oekraïne[38]). Austria provides for a (rarely applied) form of preventive review for the purpose of settling conflicts in connection with the authority of the federation and the states, the authority of the Audit Office and the ombudsman (Volksanwaltschaft). The Constitutional Court of Bosnia-Herzegovina can, in case of a deadlock between the different communities in the House of Peoples of the parliament with regard to matters of vital importance, review the procedural regularity of the dispute.[39]

Although in France exclusively a prior constitutional review is carried out – in other words, before a statute is enacted, a treaty is ratified or a regulation of a legislative assembly comes into force[40] - a statute is sometimes still reviewed in its entirety, in the context of the preventive review of the amending or supplementing legal provisions, or of the provisions that affect the scope of the statute in question.[41]

Virtually all countries, with the exception of France, chiefly have a system of subsequent constitutionality review of regulations. The existence of a preventive review does not necessarily prevent a subsequent review (Hungary and Ukraine as regards international treaties; Romania as regards statutes; Portugal as regards all prior reviewed regulations). The initiative to initiate constitutionality reviews lies in most cases in the hands of different categories of persons or public bodies.

§ 4. The abstract or concrete nature of constitutionality review

Nearly all constitutional courts practise an abstract as well as a concrete constitutionality review. Where the first type of review consists of ruling on the constitutionality of a regulation, irrespective of its implementation – the procedure is concerned with the regulation as such (see in particular under C, §1 below) –, the second type of review originates either in a concrete legal dispute to be settled by a jurisdictional body (preliminary referral, which precedes the judicial decision; see in particular under C, §2 below), or in the enforcement of that regulation by a judicial or administrative body (a type of constitutional complaint, which follows a judicial decision or an administrative legal act; see in particular under C, §3 below).

Some countries, such as Armenia, France and Poland[42], only provide for an abstract constitutionality review. The Belarus report, too, speaks of the existence of an abstract review only, on the understanding that the referral of a constitutionality issue by the Supreme (Economic) Court and the Attorney General is regarded as a form of direct constitutional appeal.[43]

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[38] *Ex officio*, prior and abstract.
[39] In the report of Bosnia-Herzegovina, this competence is regarded as a type of prior review, which so far has not been applied yet.
[40] The review is mandatory for organic laws and regulations of legislative assemblies, and optional for ordinary statutes and international treaties.
[41] The jurisdiction of the Constitutional Council in election disputes naturally presupposes the existence of such a dispute.
[42] The Polish report states that the review is always an abstract review (even if the review is instituted by a preliminary question or a constitutional complaint) because it always concerns the constitutionality of a prescriptive legal act rather than the way in which it is enforced.
[43] See what the Croatian report says about the absence of preliminary referral and the possibility of instituting proceedings before the Supreme Court.

In Cyprus, the review is exclusively abstract if it takes place *a priori* and exclusively concrete if it takes place *a posteriori*. In Italiy, the review is only abstract in so far as the constitutional dispute concerns the division of powers between the state and the regions. In Switzerland, an abstract review is limited to the cantonal regulations, which can be challenged by *a "recours de droit public"* (public law appeal).

As is demonstrated at greater length below, abstract review is usually only possible on the demand of public bodies exclusively, and sometimes also of special bodies, such as public prosecutors and ombudsmen, or of representative bodies of subordinate administrations and of individuals in a particular dispute.

C. Ways in which a case is brought before the constitutional court

§ 1. Direct appeal

By direct appeal to the constitutional court is meant the direct access which the designated persons have against regulations of which the constitutionality is reviewed.[44] Although a constitutional complaint may also be directed against a regulation and therefore probably ought to be characterized as a direct appeal, this type of judicial procedure is discussed in §3, whether or not on the basis of the choice that the different constitutional courts have made in the national reports, since this procedure is regarded as a form of concrete rather than abstract review, or because the lodging of the complaint does not initiate the actual review procedure, but is merely a petition addressed to the constitutional court to start the review procedure.[45] Appeals that are lodged against acts that are not general in scope and are aimed at offering individual redress of infringements of constitutional rights are heard there as well. The distinction that is made in this way is undoubtedly artificial and perhaps open to criticism from a scientifc point of view[46], yet this is unavoidable when an attempt is made to classify a diversity of constitutionality review systems into abstract categories.[47]

Not so easy to classify under the threefold categories of direct appeal, preliminary referral and constitutional complaint is the possibility that exists in some countries for the constitutional court itself to perform constitutionality reviews *proprio motu* and *ex officio*. In Macedonia, the Constitutional Court is not a passive arbitrator, but an active player in upholding the primacy of the Constitution. In Austria, too, the Constitutional Court can review statutes and ordinances *ex officio* and on its own initiative. Another special procedure exists in Portugal with the possibility of changing over from concrete to abstract review when a regulation has been declared unconstitutional or unlawful, usually on the demand of the Attorney General of

[44] Regardless of whether the review is prior (Cyprus, France, Hungary) or subsequent.

[45] The German report speaks of municipal constitutional complaints (§1) and individual constitutional complaints (§3), because only of the first category is it expressly said that it is to be regarded as a constitutional appeal against federal statutes and statutes of the Länder.

[46] Another complicating factor is that the basic terminology of the questionnaire (constitutional appeal versus constitutional complaint) is not used in all the countries that have sent in a report, and that it is not always clear whether the procedure should be classified under the first or the second category.

[47] Apart from the kind of review criteria that can be invoked, there is little difference between an (abstract) appeal by an individual litigant against a statute in Belgium and an individual constitutional complaint against a statute in Germany, since in both cases the complainant has to demonstrate that the statute affects him or her personally, directly and immediately.

the Republic, without the Constitutional Tribunal being obliged to automatically issue a declaration of unconstitutionality in this procedure.[48]

a) Regulations against which constitutional appeal can be lodged

In the national reports a wide diversity of regulations can be found, which to a large extent coincide with the overview that is given in I, B, §1, and for this reason does not need to be repeated here. In this connection, both preventive and repressive review are discussed, on condition that in both cases the review is abstract. Sometimes a distinction is made between mandatory preventive review and optional preventive review, for instance with respect to organic statutes and regulations of legislative assemblies and with respect to ordinary statutes and international treaties in France respectively.

It should be repeated that in a number of countries constitutional appeal is also possible against general legal standards issued by the executive. In many cases, those standards are reviewed not only for conformity with the provisions of the Constitution (and equivalent standards), but also with the provisions of (directly effective) international treaties and with the statutes, so that the constitutional courts are entrusted not only with constitutionality review, but also with legality review.

b) Persons who have access to constitutional appeal

(1) *General rule: political authorities*

Constitutional appeal is usually only open to political authorities, sometimes with diversification according to the type of regulation against which the appeal is lodged: the President (Albania, Armenia, Azerbaijan, Bosnia-Herzegovina[49], Bulgaria, Cyprus, France, Georgia, Croatia, Latvia, Moldova, Ukraine[50], Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Czech Republic, Turkey), the government (Azerbaijan, Belgium[51], Bulgaria, Germany[52], Italy[53], Croatia, Latvia, Liechtenstein, Moldova, Austria[54], Romania, Russia[55], Slovakia, Slovenia, Spain[56], Czech Republic, Belarus), the Prime Minister (Albania, Andorra, Bosnia-Herzegovina, France, Poland, Portugal[57], Spain) or a minister (Moldova, Portugal), the parliament (Azerbaijan, Portugal[58], Russia[59], Slovenia, Spain[60]), the president of the parliament (Bosnia-Herzegovina, France, Belgium[61], Austria[62], Poland, Portugal[63], Romania)

[48] The concrete review of regulations is performed by chambers, while the abstract review is done by the general assembly.
[49] Each member of the collective presidency is meant.
[50] Only the President and the government can lodge appeals against international treaties and conventions.
[51] Including the governments of communities and regions.
[52] Including the state governments.
[53] Including the governments of the regions.
[54] Including the state governments.
[55] Of the Federation as well as of the entities.
[56] The governments of the autonomous communities are meant. For the central government: the Prime Minister.
[57] The Prime Minister of the Republic or the presidents of the regional governments.
[58] The regional legislative assemblies are meant.
[59] Of the Federation as well as of the entities.
[60] The legislative assemblies of the autonomous communities are meant.
[61] Presidents of legislative assemblies at federal and state level, though only at the request of two-thirds of their members.

or a parliamentary group or member (Albania, Andorra, Bosnia-Herzegovina, Bulgaria, Germany, France, Georgia, Croatia, Latvia, Moldova, Ukraine[64], Portugal[65], Poland, Romania, Russia[66], Slovakia, Slovenia, Spain, Czech Republic, Turkey[67]) or other special public officials (several countries grant this authority to the ombudsmen).

(2) *Exceptions: other authorities too*

Sometimes judicial authorities are also given the opportunity to refer directly to the constitutional court. In Azerbaijan, Bulgaria, Moldova, Ukraine, Poland, Romania, Russia and Belarus, the highest courts and in the same countries and Portugal, the Attorney General of the Republic can refer directly to the constitutional court. In Croatia, every court can petition the Constitutional Court to carry out a constitutionality review, although the Court appears only to be obliged to do so if the request comes from the Supreme Court. In the cases where courts have direct access to the Constitutional Court, the distinction that was made in the questionnaire between "constitutional appeal" and "preliminary referral" is not always clearly identifiable.

Some public officials (e.g. parliamentary group in the impeachment procedure in Armenia; the Attorney General to protect the basic rights and liberties in Georgia), corporate bodies under public law (municipalities in Andorra, Bulgaria, Germany[68], Croatia, Latvia, Liechtenstein, Austria, Poland, Spain[69]) or individuals (election candidates) can have access in order to protect specific interests. These interests may be functional: in Andorra and Romania, for example, only the members of Parliament can oppose the regulations of their legislative assembly.

(3) *Natural and legal persons*

Express direct access by natural and legal persons to the constitutional court only exist in the minority of the countries concerned, although it is often compensated for by the possibility of a constitutional complaint or of requesting certain bodies to refer a case to the constitutional court. In Hungary, anyone can petition the Constitutional Court to carry out a constitutionality review of all legal standards.[70] In Belgium and Austria, anyone can bring an action for annulment of regulations with force of law if they can demonstrate an interest.[71] In Switzerland, the interested parties may also lodge a public law appeal (recours de droit public)

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[62] Presidents of legislative assemblies at federal and state level.
[63] Of the national parliament as well as of the regional legislative assemblies.
[64] Including the Supreme Council of the Crimea.
[65] Of the national parliament as well as of the regional legislative assemblies.
[66] Of the Federal Council and the State Duma only.
[67] What is also special is the fact that appeal is also open to the (biggest) majority party and the main opposition party.
[68] The German report expressly states that municipal constitutional complaints that can be lodged against Federal and state legislation should essentially be classified as constitutional appeals.
[69] Also subject to the obligation to seek the prior opinion of the Council of State or a similar body of the autonomous communities. The same applies for the provinces.
[70] For the review of certain regulations, such as treaties, direct access is limited to certain public officials such as the President, the government, (members of) Parliament, the presidents of the Supreme Court and the Audit Office, and the Attorney General.
[71] In both countries, political authorities are not required to declare an interest.

with the Federal Tribunal, though only against cantonal statutes.[72] In Georgia, they can directly request the review of prescriptive provisions for conformity with constitutional provisions in connection with basic rights and liberties. In Macedonia there is even the general possibility of *actio popularis*, since anyone can file a petition to initiate a constitutionality and legality review of regulations. In Croatia, the Constitutional Court can review the constitutionality of statutes and the legality of decrees at the request of natural or legal persons, although the Court is not obliged to actually proceed to such a review.

c) Time limit for lodging constitutional appeals

The time limit for lodging constitutional appeals may be expressly limited (Andorra: thirty days; France: within a month; Italy and Turkey: sixty days; Belgium: six months or sixty days for acts ratifying treaties; Spain: three months, extendable to nine months in case of conflicts of jurisdiction; Albania: three years). In most countries, constitutional appeals can be brought without any time limit (Bosnia-Herzegovina, Germany[73], Latvia, Liechtenstein, Macedonia, Moldova, Austria, Poland, Portugal, Russia, Slovakia, Slovenia, Czech Republic).

d) The suspension of implementation of the regulation

Suspension of directly reviewed regulations during a procedure before the constitutional court is not an obvious step, although this possibility exists in a significant number of countries. In some countries, a suspension of the implementation of regulations is not allowed (Andorra, Azerbaijan, Bulgaria, Hungary, Moldova, Ukraine, Poland, Portugal, Romania, Russia, Czech Republic, Belarus), not possible owing to the very nature of the procedure, for instance because abstract repressive constitutionality review does not exist (Cyprus, France), or restricted to certain regulations (Italy[74], Spain[75]). In Bosnia-Herzegovina, the suspension may be withdrawn. In Croatia, the Constitutional Court can suspend the implementation of individual decisions or acts if they are based on regulations that are subject to constitutionality review.

In a number of countries, suspension of implementation of a reviewed regulation is expressly subject to the condition that a detriment that is difficult to rectify threatens to arise, for the general or the individual interest (Albania, Belgium, Bosnia-Herzegovina, Georgia and Croatia). In Albania, the fate of the suspension must expressly be decided when the final judgment is passed. In Slovakia, the possibility of immediate suspension of the regulation was introduced very recently. In Turkey, the power of suspension is not expressly recognized, although it is actually exercised by the Constitutional Court when there are strong suspicions of unconstitutionality and the implementation results in serious detriment. In Switzerland, too, the public law appeal is not suspensive, although it is nevertheless possible to request the president of the court to enforce provisional, protective measures.

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[72] The only form of abstract review that is not dependent on the existence of an actual implementing act and can be used as an extraordinary legal remedy.

[73] Except in disputes between the federal authority and the states.

[74] Only in the context of a conflict of authority between the State and the regions can the Constitutional Court decide by means of a well-reasoned decision to suspend the implementation of the acts that have led to the conflict.

[75] Only by the government with respect to statutes of the autonomous communities; automatic suspension that must be upheld or repealed within five months by the Constitutional Tribunal.

§ 2. Preliminary referral - plea of unconstitutionality

With the notable exceptions of France,[76] Portugal,[77] Armenia, Croatia[78] and Switzerland, all countries have a mechanism of preliminary referral or, if it is not formally characterized as such, a mechanism that allows a court hearing the main action which in the course of trying a case that has been referred to it finds that the constitutionality of one of the provisions in question that it seeks to apply could be challenged, to suspend judgment and to refer the question to the constitutional court.[79]

a) Preliminary referral to the constitutional court

(1) *The courts that are authorized to access the constitutional court*

Two models exist to determine which courts are authorized to access the constitutional court. In certain countries, all courts, at whatever level, have this authority, even this obligation, while in other countries only the supreme court or courts can refer a constitutionality question to the constitutional court.

Among the countries where all courts can refer a preliminary question to the constitutional court we find Albania, Andorra, Belgium, Bosnia-Herzegovina, Germany, Italy, Liechtenstein, Macedonia, Poland, Slovakia, Slovenia, Turkey, Russia (where nevertheless there is an exception for the lower courts of arbitration, which cannot refer preliminary questions to the Constitutional Court), Romania, Spain, Lithuania, Hungary, the Czech Republic and Georgia.

Most of the constitutional courts of these countries interpret the notion of "jurisdiction" broadly. The Italian Constitutional Court, which deals virtually only with preliminary questions, considers that the notion of jurisdictional authority must be broadly interpreted, according to the purposes of the review that is carried out.[80] Likewise, the Belgian Court of

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[76] The French report, however, underlines that this subject is currently under consideration in France.

[77] Portugal, however, has an original system of concrete constitutionality review. The courts themselves can, and must, solve constitutionality questions, given that, under the Constitution, they cannot apply regulations that are contrary to the Constitution. When a regulation, which the court refuses to enforce, appears in an international convention, a legislative act or a regulatory decree, the public prosecutor must appeal to the Constitutional Court. Conversely, if a party challenges, in the course of a lawsuit, the constitutionality of a provision, and this provision is enforced by the court, the party in question may appeal to the Constitutional Court.

[78] In Croatia, no procedure exists for preliminary referral. Nevertheless, the courts, like any other body or person, may file a petition for constitutionality or legality review with the Constitutional Court. Moreover, there is also the plea of illegality that allows them to suspend the legal procedure and to request the Supreme Court to lodge an appeal with the Constitutional Court. In view of its particular nature, this legal procedure cannot be fitted into either of the two following models.

[79] There are differences between the systems characterized here as preliminary referral for the purpose of facilitating their comparison. The author of this report does not claim to have a universal definition for preliminary question, but has tried as much as possible to compare the systems described by the national rapporteurs under this term. It should be noted, however, that in certain cases, such as Austria, the mechanism of referral in certain respects resembles an appeal lodged by a court with a view to the annulment of the regulation of which the constitutionality is challenged. The court *a quo*, however, continues to try the case and will pass judgment in order to settle it.

[80] The Italian Constitutional Court regards itself competent to take cognizance of questions put by the disciplinary section of the Magistrates High Council, by the Audit Office in the supervision of the implementation of the national budget, or by a court for the execution of penalties.

Arbitration gives a broad interpretation to the notion.[81] The Spanish Constitutional Court accepts questions referred by the courts in the broad sense of the word, including the courts of audit, and only excludes arbitrators from the definition.

Other countries, though fewer in number, reserve the authority to access the constitutional court directly for their higher courts (Belarus, Azerbaijan, Bulgaria, Ukraine, Moldova, Latvia).

In those countries, the mechanism of preliminary referral is sometimes formalized in two stages. In Ukraine and Moldova, if a discussion about the constitutionality of a statute arises before a court, the latter will suspend the procedure pending before it and submit the constitutionality issue to the Supreme Court, which in turn refers it to the Constitutional Court.

In this respect, Austria has a mixed system: only the higher courts can submit questions concerning the constitutionality of regulations with force of law to the Constitutional Court. On the other hand, if the subject of the constitutionality issue is a regulatory standard, all courts may access the Court. Moreover, the Constitutional Court may *ex officio* review a statute or regulation while examining a case that is pending before it. It may therefore, as it were, refer a preliminary question to itself.

Although the Constitution of Cyprus provides that any court may access the Constitutional Court, the latter decided in 1964[82] that only courts with jurisdiction in family issues may access it directly. The other courts therefore had to rule on constitutionality questions by themselves, since the Constitutional Court takes cognizance of such issues on appeal only.

(2) *Obligation to put preliminary questions*

As regards the referral of preliminary questions, and especially the question whether or not the ordinary courts are obliged to access the constitutional court, the different systems being examined may, it seems, be classified into three main categories, according to the scope that they allow the courts hearing the main action. Certain judicial systems, such as those of Belgium, Bosnia-Herzegovina, Romania, Moldova and Austria, refuse to grant the ordinary courts the least jurisdiction in matters of constitutionality review, and impose on them a strict obligation to access the constitutional court from the moment the slightest doubt arises as to the conformity to the Constitution of any of the regulations that they have to enforce. On the other hand, certain countries have a system that more or less resembles a model of "positive diffuse review", whereby a court is only obliged to put a preliminary question if it is convinced that the provision being examined is unconstitutional,[83] or if it finds that there is no way of interpreting this provision that renders it compatible with the Constitution.[84]

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[81] For example, it has received questions put by the Commission for aid to victims of intentional acts of violence, by the Competition Council, or by an examining magistrate ruling on a request to perform an additional act of investigation.

[82] Supreme Court of Cuprus, Attorney General of the Republic vs. Mustafa Ibrahim et al., 1964, *C.L.R.* 195.

[83] This is the case in Bulgaria, Germany, Italy, where the courts *a quo* act as screening medium, Cyprus, Slovakia, Slovenia, Turkey, Russia, and Hungary.

[84] This is explicitly the case in Germany and the Czech Republic.

Between these two extreme models, in certain countries where the courts are in principle obliged to refer to the constitutional court from the moment there is some doubt as to the constitutionality of a particular provision, we see that in practice the review is shared. In Spain, for instance, the review carried out by the judiciary is strictly limited to issues of conformity, yet once a constitutionality flaw is discovered, the court must refer to the Constitutional Court.

In Poland, some controversy exists as to the authority in this matter of the court hearing the main action. The Constitutional Court and a substantial part of the legal doctrine hold the opinion that if a court has doubts about the conformity of a statute – the application of which is important to the settlement of the case – with the Constitution or with a ratified international convention, it is obliged to put the question to the Constitutional Court.

In Liechtenstein, it seems that, following a recent change in judicial practice, the courts are now obliged to refer to the Constitutional Court in case of doubt.

(3) *Initiation of the preliminary question*

The questions that are put may generally be put *ex officio* by the court *a quo*, or suggested by the litigating parties.[85] It seems that flexibility is the rule in regard to the initiation of the question. In some countries, the decision taken by the court *ex officio* to put a question must mandatorily be submitted to the argument of the parties. This is the case in Spain. In other countries, however, the court is in no way obliged to reopen the proceedings after having decided to refer the question to the constitutional court. This is the case in Austria, Poland[86] and Turkey. In Belgium, the question is debated. Certain systems, like that of Ukraine and Liechtenstein, do not allow the court *a quo* to put a question *ex officio*. Likewise, the courts in Cyprus cannot take the initiative to refer a constitutional problem to the Court, since the parties have to propose and formulate the question themselves. Conversely, the Constitutional Court of Bosnia-Herzegovina has up to now only had questions put *ex officio* by the courts.

In systems where the obligation imposed on the court *a quo* to put the question is strongest, the parties to an action are virtually able to oblige the court to refer the issue to the constitutional court, since it suffices for them to raise a doubt as to the constitutionality of a particular regulation for the court to be obliged to put the question. Nevertheless, in nearly all the judicial systems that have been studied, the court *a quo* essentially has the power to decide whether or not a preliminary question should be put. Consequently, the litigating parties are generally neither able to demand that a question be put, nor are they able to challenge the decision taken by the court hearing the main action to put a preliminary question.

In this connection, an original procedure appears to exist in Slovenia. Alongside the conventional mechanism of preliminary referral by a court decision, Slovenian law allows litigants to submit a question themselves in order to initiate the procedure before the Constitutional Court. In this case, it is for them to demonstrate their interest. The court *a quo*

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[85] The countries that have a "mixed" system of initiation (either *ex officio* by the court *a quo*, or at the suggestion of a litigant, where appropriate through a plea of unconstitutionality) are: Albania, Andorra, Bulgaria, Germany, Italy, Belgium, Turkey, Romania, Spain, Moldova, Hungary, Czech Republic.

[86] The formulation of the question and the pronouncement of the decision to put it to the Constitutional Court do not take place during the court session, but in court chambers, without the litigating parties being present.

is informed of the constitutional procedure, but it is not obliged to suspend the lawsuit pending before it.

(4) *Grounds for the preliminary question*

The weight of the obligation imposed on the courts *a quo* to suspend their proceedings and to refer to the constitutional court is obviously linked to the monopoly position reserved for the latter in the constitutionality review of statutes and, where appropriate, lower regulations. The heavier the obligation, the greater the monopoly position. In Austria and Belgium, for example, the constitutional courts have been vested with the exclusive authority to rule on questions of conformity with the Constitution of regulations for which they have jurisdiction. The courts *a quo* cannot dispense with referring to the Constitutional Court on the grounds that they believe the regulation in question does not violate the constitutional provision. In the countries where such a system exists, the considerations cited by the court *a quo* matter little. If absolutely necessary, the court that refers to the constitutional court may content itself with formulating a question, without accompanying it with a detailed argument. This is also the case for the courts in Bosnia, Ukraine, Azerbaijan, Bulgaria, Georgia and Cyprus, which do not pronounce themselves in their referral decisions on the questions they put to the constitutional court.

In many other countries, however, the courts are only obliged to refer to their Constitutional Court if they are convinced of the unconstitutionality of the regulation in question. In these countries, the review is shared between courts. When they refer to the Constitutional Court, they usually do so by a well-reasoned decision, stating the reasons why they believe that the regulation in question is unconstitutional, and, where appropriate, the positions set forth by the litigating parties. The systems which formally require the courts *a quo* to motivate their decision are those of Slovenia, Andorra, Turkey, Romania, Spain, Latvia and Poland. In several other countries, such as Germany, Russia, Hungary, the Czech Republic and Italy, the court *a quo* conducts a first examination of the constitutionality question.

b) Screening

The need to put in place a "screening" procedure is naturally felt most acutely by those constitutional courts that receive large numbers of preliminary questions. This explains why in certain constitutional courts, all cases are treated according to a rigorously identical procedure.[87]

In most of the systems in question, the constitutional court has the option to refuse to examine a case for reasons of form, procedure, jurisdiction or, where appropriate, the existence of a previous decision by the Court on the same issue. This option is not necessarily reflected in the setting up of a special procedure. It may in fact consist of a first examination of all cases, which may result in a decision not to examine the cases that are specified. The Constitutional Court of Georgia, for instance, holds an administrative session before taking each case into consideration, and during that session it may decide to refuse to take the case in question into consideration. In the Czech Republic, the judge in charge of the enquiry may decide to refuse the question if the procedural conditions have not been fulfilled, or if the case is evidently

[87] This is the case in Andorra, Bulgaria, Romania, Lithuania and Latvia.

unfounded. In Moldova, the president of the court may refuse petitions that do not meet the legal requirements. In Azerbaijan and in Belarus, the same hypotheses give rise to a "refusal to accept for examination".

Several legal systems allow the court *a quo* to complete its petition at this stage.[88]

In Italy, although no special procedure exists for screening questions, the Constitutional Court conducts a first examination for admissibility. Such examination focuses on the rationale for a ruling in terms of the relevance of the question that has been put for the solution of the lawsuit pending before the court *a quo*. Moreover, the Court has the option to declare an order "evidently unfounded". A similar procedure exists in Poland: after the procedure has been initiated, the Constitutional Court is authorized to dismiss a ruling in court chambers if it considers that the ruling is unnecessary or inadmissible (provision upon the constitutionality of which the constitutional court has already ruled in the past, proceedings in a case which is identical in its substance and parties to a case that has already been tried (*res judicata*), hypothesis in which the answer to the question is irrelevant for the ruling in the case before the court).

Finally, certain legal systems have established a faster procedure, different from the ordinary procedure, allowing the constitutional court in certain hypotheses to dispense with an in-depth examination of the question that has been submitted to it. In these hypotheses, the first examination to which all cases are submitted that have been referred to the constitutional court results in a sort of "shunting": certain cases are heard according to the ordinary procedure, while others follow a summary procedure. However, unlike the hypothesis examined above, it concerns a real procedure here, involving several stages and, where appropriate, an opportunity for the interested parties to explain their point of view to the constitutional court. In Russia, a first examination by the court registry may result in a proposal for a ruling of inadmissibility. This proposal is then examined by one of the judges and, where appropriate, leads to a ruling by the Constitutional Court. In Belgium, the judges in charge of the enquiry may decide, after a first examination of the question, that the latter does not fall within the scope of the Court, or that it is evidently unfounded. They then draw up a report accordingly, and the parties before the court *a quo* are given the opportunity within a short time to state their point of view on the conclusions of the judges in charge of the enquiry. If the summary procedure is followed, the Court of Arbitration, if necessary in restricted chambers, issues a ruling. In Albania and in Austria, the Constitutional Court may decide to follow a summary procedure without verbal hearing. Bosnia-Herzegovina and Cyprus also have a so-called "expedited" procedure. In Ukraine, a fast procedure allows the Constitutional Court not to examine questions that are beyond its competence, or which do not meet the requirements laid down by law. This procedure also allows the parties to state their point of view. In Germany, a fast procedure allows the Constitutional Court to refuse questions if the Chamber to which they are referred finds that an interpretation of the challenged regulation that renders it compatible with the Constitution is possible. In Spain, the law provides for a special procedure that allows the Constitutional Court to refuse a question if it finds that it has not been put by a judiciary body in the context of a lawsuit, that the regulation at issue has no force of law, that it does not apply to the case, that the question is not relevant for the solution of the case *a quo*, or that it is evidently unfounded, which is notably the case when there already exists a previous decision by the Court on the same matter. In Latvia, a written procedure exists in certain cases.

[88] This is the case in Hungary and Macedonia.

In none of the systems being examined does the constitutional court have the facility to carry out a "subjective selection" among the cases that are referred to it and to consider only those which appear to the court to be the most important or the most interesting.[89]

c) Scope of referral

Except for the hypotheses of inadmissibility examined above, the constitutional courts to which preliminary questions are referred do not have the facility to restrict their scope of referral. They are obliged to answer all the questions that are put, and are generally also obliged to reply to the considerations set forth by the courts *a quo*.

As regards the possibilities for extending the scope of referral, two issues should be distinguished, namely extension in terms of the regulations reviewed, and extension in terms of the standards of reference or review.

Generally speaking, the constitutional courts to which preliminary questions are referred are not allowed to extend their scope of referral to include prescriptive provisions that are not intended by the question. In other words, no possibilities for extension exist with respect to the regulations reviewed. At the most, a constitutional court that orders the annulment of a regulation or declares it unconstitutional is allowed to extend such an annulment or declaration to other provisions which are not expressly intended, but which are either intrinsically linked to those that were effectively intended or were identical to them. This is the case in Romania, Moldova, Germany, Italy and Spain.

The constitutional courts thus appear to be relatively constrained by the subject of the question that is put to them. Three countries, however, form an exception to this rule: Austria, Slovakia and Macedonia. The Macedonian Constitutional Court may review the constitutionality of provisions that are not intended by the request. It thus practices an *ex officio* review. The same applies for the Slovakian Constitutional Court, which is empowered to extend its scope of referral if during the examination of a case it appears that the constitutionality of another legal provision could be called into question. The Austrian Constitutional Court, while being strictly bound by the arguments of unconstitutionality cited in the decision of preliminary referral, may take cognizance of questions on its own initiative. When, while examining the legality of a regulation, the Court believes that the law itself contains a constitutionality flaw, it will also examine the question of constitutionality of the prescriptive provision at issue. But in this case, too, the Constitutional Court, deciding as court *ad quem*, is strictly bound by its decision, taken as court *a quo*, instituting the procedure for the review of regulations.

Extension of the scope of referral with regard to the reference standards is more common. Several constitutional courts, such as the Belgian Court of Arbitration, the Macedonian Constitutional Court, the Bulgarian Constitutional Court, the Czech Constitutional Court, the Turkish Constitutional Court, the Slovenian Constitutional Court, the Russian Constitutional Court, the Albanian Constitutional Court, the German Federal Constitutional Court and the Italian Constitutional Court point out that they can either raise arguments *ex officio*, or annul the regulation or declare it invalid on a different constitutional basis than that intended by the

[89] Unlike the option available to the Supreme Court of the United States, for example.

question.[90] The Spanish Constitutional Court is theoretically empowered to extend its scope of referral with regard to arguments of unconstitutionality, but it has never done so for litigation of preliminary questions. In Austria, Georgia and Bosnia-Herzegovina, on the other hand, the constitutional court cannot pronounce an annulment or a declaration of unconstitutionality for violation of a different reference standard than that expressly intended by the preliminary referral.

None of the constitutional courts that have been surveyed says that it receives questions of fact connected with an action that has given rise to a preliminary question, with the exception of the Moldovan Constitutional Court, which in the context of its review also refers to the circumstances of a case. The fact remains, however, that the constitutional courts, when examining the relevance of a question for the settlement of an action, must take into consideration the facts as set forth by the court *a quo*, even if it is not to judge them *sensu stricto*.

d) Examination by the constitutional court of the relevance of the question

In this connection, the various reports present diametrically opposed views.

In certain models of constitutional litigation, the relevance of the question for the settlement of an action pending before the court *a quo* constitutes a condition of admissibility of the preliminary question. Consequently, the constitutional court begins its examination of the problem submitted to it by verifying the relevance of the question and, if it considers it not relevant, dismisses the question. Where appropriate, this examination takes place at the end of a preliminary or screening procedure. This kind of review is carried out by the constitutional courts of Andorra, Romania, Turkey, Russia, Bosnia-Herzegovina, Cyprus, Poland and Germany. In Austria, the Constitutional Court examines the relevance, but only refuses the request for review in case of "evident" absence of this condition. In Spain, the admissibility review by the Constitutional Court also extends to what is called the judgment of relevance. The Court only dismisses a question if "an obvious lack of consistency is found in the legal argument with regard to the judgment of relevance", which it does, where appropriate, at the end of an in-depth examination of the logical and direct correlation between a possible annulment of a regulation and the settlement of the legal action. In the Czech Republic, relevance is a condition of admissibility of a question, although it would appear that up to now no questions have been dismissed for lack of relevance.

Conversely, certain constitutional courts refrain strictly from examining the constituent factual elements of the action giving rise to a preliminary question, and therefore decline to ponder over the relevance of the question. In this model, the applicability of a regulation to the facts and the need to obtain an answer to the question posed for the settlement of the action are evaluated only by the court *a quo*, which retains a monopoly in this respect. Consequently, the constitutional court is obliged to answer the question that is put to it, even if it finds that the court *a quo* has made an error by referring to it. This is the case for the constitutional courts in Ukraine, Albania, Belarus, Azerbaijan, Hungary, Bulgaria and Slovakia.

[90] The same applies for the Portuguese Constitutional Court, which is not bound by the arguments adduced in support of the appeal.

In certain systems, the constitutional court, while formally refraining from examining the relevance of a question, seems nevertheless to be evolving towards a certain form of review. Maybe these courts are prompted by a concern to carry out a kind of selection, in the face of the growing number of questions they receive, between "useful" questions and questions that appear devoid of all usefulness. This kind of trend can be observed in Italy and in Belgium. The Italian courts are, in principle, responsible for assessing the import of the question, but they have to justify their referral order. The Italian Constitutional Court examines not the relevance of the question *stricto sensu*, but the grounds for the referral order. This operation allows it, where appropriate, to take a decision of inadmissibility, which in actual fact sanctions a problem of relevance of the question, beyond the lack of grounds.
The Belgian Court of Arbitration also refrains from examining the relevance of the question, and invariably repeats that it is for the court *a quo* to rule on this. A recent decision, however, allows it, in cases where the lack of relevance seems evident, to establish that in reality the referral is groundless, and to conclude its examination either by referring the question back to the court *a quo* in order to re-examine the relevance, or to rule that there is no answer to the question.[91]

e) Interpretation of the question and option of reformulation

Is the constitutional court completely bound by the question as it has been formulated by the referring court, or does it have some room for manoeuvre that allows it, if necessary, to impose its own formulation of the problem that has been submitted to it?

Three trends can be identified in the practice of the countries as set forth in the reports that have been analyzed.

Certain constitutional courts are prohibited – or prohibit themselves – from tampering with the question that has been put, and will therefore never attempt to reformulate it. This is the case for the Slovakian Constitutional Court, the Austrian Constitutional Court and the Romanian Constitutional Court.

Other constitutional courts, such as the Hungarian Constitutional Court, the Belgian Court of Arbitration, the Azerbaijan Constitutional Court, the Albanian Constitutional Court and the Turkish Constitutional Court, do not hesitate to reformulate questions that they consider need reformulating, or to interpret the substance of the petition in a way that would be useful to identify the real constitutionality question being put. In Germany, such a reformulation is possible, but it happens rarely.

Finally, in Cyprus, Andorra, Poland and Georgia, the constitutional court, while refraining from reformulating the question, has the option to refer it back to the court *a quo*, with the request to complete or reformulate it.

[91] In both hypotheses, the court *a quo* still has the option to refer the question once more to the Court, if necessary formulated a bit differently.

f) Interpretation of the reviewed regulation

In the majority of the mechanisms of preliminary referral, a regulation of which the constitutionality is challenged by a court is subject to an interpretation by the court as expressed in the referral decision. Such an interpretation is even inevitably explicit in systems where the referring court is obliged to state the grounds for its decision, or where the court is only permitted to refer to the constitutional court if it is convinced that the regulation at issue contains a constitutionality flaw.[92]

No constitutional court appears to be strictly bound by the interpretation of the reviewed regulation given by the referring court.[93]

Some constitutional courts take into consideration the interpretation that has been supplied to them in the referral decision, while others are not even obliged to make any reference to it.[94] However, they all have the facility to replace it with an interpretation that enables them to "save" the regulation, in other words, to declare it in conformity with the Constitution, albeit solely in the interpretation thus given to it. In Spain, Belgium and Austria, for instance, the constitutional court in principle respects the interpretation given to the reviewed regulation by the referring court, but replaces this interpretation when, by doing so, it is able to give a judgment of "conformable interpretation". On the other hand, when the interpretation of the court *a quo* leads to a verdict of constitutionality, the constitutional court has no cause to challenge this interpretation, even if a different interpretation is equally possible.

In several of the systems studied, the interpretative decisions thus adopted by the constitutional court have value of precedent, not only for the referring courts,[95] but for the constitutional court as well.[96]

g) Parties in constitutional proceedings

Several distinctions can be drawn up with respect to the persons and institutions that can be parties to constitutional proceedings on a preliminary question. Of these distinctions, the one that merits special attention is that according to which the court *a quo* that originated the referral to the constitutional court is considered to be a party to the constitutional proceedings – thereby being assigned an active role in the preliminary procedure – or where any active role is denied to it, and where it remains confined while awaiting the reply of the constitutional court, only to become an active player again once the latter has referred the case back.

In Austria, the court *a quo* is a party before the Constitutional Court, and it is up to the court *a quo* to argue the theory of unconstitutionality, in the absence of a public prosecutor. In

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[92] See above (§2, a), preliminary referral to the constitutional court.
[93] It should be noted that the Moldovan report indicates that the monopoly of interpretation rests with Parliament, but that the Constitutional Court can explain and clarify the provisions, with value of precedent for its own purposes and for the lower courts.
[94] This is the case in Italy, the Czech Republic, Bosnia-Herzegovina, Slovakia, Romania, Azerbaijan, Turkey, Germany, Andorra and Russia.
[95] See below, II, C, the functional link.
[96] This is the case in Cyprus and in Hungary.

Andorra, Russia, Albania, the Czech Republic, Moldova[97], Macedonia, Poland and Slovenia, the referring court is also a party in the constitutional proceedings. In Germany, the federal or federate supreme courts may be called upon by the Constitutional Court to answer questions that it puts to them.

The parties before the referring court become parties before the constitutional court, and are therefore invited to intervene before it, as is the case in Belgium, Austria, Italy, Germany, Andorra, Albania, Slovakia, Romania, Cyprus, Macedonia, Latvia and Belarus. On the other hand, in Russia, Hungary, the Czech Republic, Bosnia-Herzegovina, Spain, Moldova, Poland and Slovenia, the parties before the court *a quo* are not authorized to intervene before the constitutional court. However, a remedy exists in certain cases. In Russia, the parties before the court *a quo* can lodge a complaint directly with the constitutional court. A similar mechanism exists in Slovenia, where the parties are allowed to file a separate petition against the same provision as that covered by the question, and thus to become parties to "their" action through the effect of joinders. In Spain, the compulsory hearing of the parties before the question is put and the fact that their points of view are recorded in the decision of referral are considered sufficient to guarantee their rights of defence in the constitutional proceedings.[98]

The parties to a similar action are generally not allowed to intervene before the constitutional court that has taken cognizance of a preliminary question in the context of an action *a quo* which is not theirs. Nevertheless, remedies exist here too to mitigate the stringency of this principle, with the effect of either also rendering applicable to them the ruling given by the constitutional court, or of allowing them access to the Court by a procedural device. In Austria, for instance, the annulment of a regulation has an impact on all similar actions pending before the Constitutional Court, which may extend the effects of the annulment to other cases. In Belgium, it has happened that the Court of Arbitration allowed the intervention of parties to a similar action, when "their" court had suspended the proceedings before it to await the reply of the Court of Arbitration, without it having put any question to the Court.

For the rest, the legislator that drew up the challenged regulation, usually the executive or the government,[99] or even a member of Parliament, is called upon to state its observations.

Finally, the constitutional courts are generally empowered to invite experts or witnesses to intervene in the constitutional proceedings. These persons, however, do not have the capacity of parties.

The parties before the constitutional court are generally represented by lawyers or duly appointed experts.[100] In Spain and in Poland, the public prosecutor must come forward in all questions of constitutionality.[101]

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[97] It concerns only the Supreme Court.

[98] Except when the constitutionality dispute concerns an "individual" law, or a law without general scope, and this in pursuance of the ruling of the European Court of Human Rights in the case of *Ruiz-Mateos vs Spain*.

[99] In Italy, the president of the Council is represented by the *Avvocatura generale dello Stato*.

[100] Except in Ukraine, Turkey and Azerbaijan. In the Czech Republic, the parties are represented by a lawyer or a notary public.

[101] The reports are often brief on the subject of the presence of a public prosecutor at constitutional proceedings. In the majority of the systems studied, there appears to exist no special public prosecutor attached to the constitutional court.

h) Jus superveniens and other points of law

An amendment made to the reviewed regulation before the end of the procedure before the constitutional court does not always have a direct impact on the procedure. It seems that, as a general rule, the constitutional proceedings follow the course of the proceedings before the referring court. If the amendment has no impact on the outcome of the action before the court *a quo,* it has no effect on the constitutional procedure either. Matters are generally different when the *jus superveniens* renders the action groundless before the referring court.

The question of points of law arising during the course of the constitutional proceedings is also closely linked to that of the examination by the constitutional court of the relevance of the question for the outcome of the action *a quo*.[102] In Austria, where the Constitutional Court examines this question, the occurrence of a legislative amendment with retroactive effect may put an end to the constitutional proceedings, in so far as it renders the action groundless during the proceedings, and consequently deprives the question of its relevance. On the other hand, in case of an amendment with immediate effect, the Constitutional Court is no longer able to annul the regulation at issue, although it may rule that it had been unconstitutional. In Belgium, the Court of Arbitration decides, according to the impact of the legislative amendment on the situation of the parties, either to refer the question back to the court *a quo*, or to restrict the reply to the regulation as it was in force on such-and-such a date, or as it applies to the action *a quo*. In Germany, the constitutional procedure also follows the course of the proceedings pending before the court *a quo.* In Albania, the Constitutional Court puts an end to the procedure in case of *jus superveniens*, at the request of the referring court. In Spain, the amendment of the challenged regulation gives rise to a new ruling on the relevance of the question, after the parties have been heard. In Poland, the Constitutional Court may order a nonsuit, but it may also continue the proceedings and pronounce a judgment if this is necessary to safeguard the constitutional rights and liberties. In Cyprus, a legislative amendment occurring subsequent to the referral to the Constitutional Court has been judged by the latter as being contrary to the principle of the separation of powers.

In case of decease of a party or withdrawal of suit before the referring court, the Constitutional Courts of Austria, Belgium[103], Germany, Hungary, Spain, Poland[104] and Cyprus discontinue the proceedings, whereas the Constitutional Courts of Italy, Andorra, Russia, Albania, Turkey, Romania, Moldova and Macedonia continue the proceedings.

§ 3. Constitutional complaint

a) Definition

In so far as in the different countries that have sent in a report the constitutional complaint can be regarded as one of the ways in which a case is brought before the constitutional court[105],

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[102] See above, §2, d.

[103] The Belgian Court of Arbitration suspends the proceedings if one of the parties before the court a quo dies, and resumes the proceedings when the latter informs the Court of Arbitration that the proceedings on its level have been resumed.

[104] The procedure before the Constitutional Court will be continued if the legal successor of a party to the procedure before the court a quo can have access to the action.

[105] The constitutional complaint as a means to institute legal proceedings was not discussed in the reports of Belgium, Bulgaria, Italy, Lithuania, Moldova, Romania and Turkey.

these proceedings assume a wide variety of forms that are difficult to contain in a generally valid definition.

With this reservation, shall be considered as constitutional complaint any special, in principle subsidiary, legal remedy that can be invoked chiefly on account of the violation of – whether or not restrictively enumerated – constitutional rights and liberties against, in principle, individual jurisdictional or administrative acts of certain public bodies further to a concrete petition or concrete dispute, enabling an individual who believes his rights as referred to above have been violated to submit his case to the constitutional court, which is empowered to subject the challenged act to a constitutionality review. The constitutional complaint generally takes the form of a constitutional appeal in cassation (if it is only directed against judicial decisions), an appeal for violation of constitutionality (if it is directed against all kinds of measures) or any other special procedure for the protection of basic rights. In this sense, the constitutional complaint occurs as a form of concrete constitutionality review, which renders it essentially different from direct constitutional appeal as a form of abstract constitutionality control, even if the latter is also instituted by individuals.[106] Furthermore, the constitutional complaint should be distinguished from the legal remedies that are available at the Supreme Court in a system of diffuse review, as in Cyprus, although this is probably not a general rule either. The public law appeal that is available at the Swiss Federal Tribunal can, on account of its specific features, nevertheless be regarded as a constitutional complaint.

On the basis of this definition, the procedures that exist in a number of countries do not comply with the characteristics of the constitutional complaint and will not be dealt with here, either because they do not serve to settle a concrete dispute, or because they are not instituted directly before the constitutional court. The Ukraine report says that constitutional appeal in the literal sense does not exist in that country, but that every citizen can request the Constitutional Court to give an official interpretation of the Constitution and the laws with a view to safeguarding the individual rights and liberties, in particular when those standards are applied ambiguously by the courts. In Belarus, a person may appeal in a particular procedure to the Constitutional Court in order to complain about shortcomings in the law or about the unconstitutionality of a regulation. This procedure ends with a proposal addressed by the Constitutional Court to the President, the legislative assemblies, the council of ministers or other competent public bodies. In Azerbaijan, constitutional complaints about violations of basic rights and liberties can only be lodged via the plenary session of the Supreme Court.[107]

b) Object of the constitutional complaint

The different types of constitutional complaints are usually only available against all sorts of individual decisions and legal acts originating with jurisdictional bodies and/or administrative authorities, in the context of concrete disputes on which they have to pass judgment, or of concrete requests on which they have to decide. In certain countries – the minority – it is expressly stipulated which decisions and legal acts can be challenged with a constitutional complaint, although in most countries the nature of those decisions is not specifically

[106] In Germany, constitutional complaints of individuals are regarded as a form of concrete constitutionality review.

[107] The report mentions an initiative to establish a direct complaint procedure, which will require that all legal remedies have been exhausted or that no other redress is available.

defined.[108] Examples of restriction in terms of the object of the constitutional complaint can be found in Austria ("the object of the complaint is any individual administrative act of an administrative authority of the last instance") and Switzerland ("public law appeals are admissible against a decision or cantonal decree that violates the constitutional rights of citizens"). General definitions are found in Spain, where a *recours d'amparo* can be lodged against provisions, legal acts and acts of violence by public bodies, public officials and civil servants, although in practice mainly judicial decisions are involved (the violation of a basic right is directly attributable to an act or omission by a judicial body). A similar very general definition is to be found in Slovakia, where any valid and enforceable decision, measure or any other form of interference with rights and liberties can be challenged with a constitutional complaint. In certain countries, decisions that have been taken vis-à-vis local authorities[109] or decisions relating to election disputes may constitute the object of a constitutional complaint. In Switzerland, public law appeal for violation of constitutional rights may also be directed against the idleness of the cantonal authority. In Croatia, a constitutional complaint may also be lodged if a competent authority refuses to act within a reasonable term.

In principle, constitutional complaints are not available against regulations with force of law or regulations of a general, regulatory scope. This general observation must be qualified. A constitutional court may be indirectly called upon to rule on the constitutionality of a general regulation. In Spain, the *recours d'amparo* is never directed against regulations with force of law proper, but indirectly, in connection with the statute being applied, an additional procedure may be instituted against this statute before the general meeting of the Constitutional Court, such at the request of the chamber that takes cognizance of the *recours d'amparo* against the implementing order. In Germany, a constitutional complaint can be lodged directly against regulations with force of law.[110] The Polish report says that a provision of a statute or any other prescriptive act can be the object of a constitutional complaint. In Liechtenstein, a constitutional complaint is directed against an individual decision of an administrative authority or a judiciary body, but if the regulation being applied is declared unconstitutional, this will result in the annulment of the challenged decision as well as of the regulation being applied, even *erga omnes* as far as the latter is concerned.

If constitutional complaints can be lodged against judicial decisions, they often take the form of a constitutional appeal in cassation. It is then an extraordinary legal remedy which in principle can only be used against judgments and decisions pronounced in the last instance. For this reason, too, appeals to the Constitutional Court in the special Portuguese system can be regarded as a specific constitutional appeal against a judicial decision. It can be used in two hypotheses, namely if a court refuses to enforce a regulation on account of it being unconstitutional or unlawful (in which case direct appeal to the Constitutional Court is possible and for the public prosecutor even mandatory), and if a court enforces a regulation despite the constitutionality or legality objection of the parties, in which case exhaustion of the legal remedies is required before the Constitutional Court can be accessed.

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[108] In the Liechtenstein report, we find one negative definition, namely not against the constitutional legal acts of the Prince-Regent, which are explicitly exempt from all judicial control and cannot even be challenged by a constitutional complaint, which has already resulted in a condemnation by (a Large Chamber of) the European Court of Human Rights for violation of Art. 13 of the European Human Rights Treaty.

[109] See for example the constitutional complaints of representative bodies of local government and of political parties for restriction of their various rights, in Albania, Croatia, Liechtenstein, Slovakia, Czech Republic and Switzerland.

[110] It should be remembered here that the municipalities also have the option to lodge constitutional complaints against federal and state laws in connection with and on account of violation of their administrative autonomy; in the German report, however, such complaints are regarded as abstract appeals.

c) Grounds for lodging a constitutional complaint

The grounds for lodging a constitutional complaint are usually limited to the violation of basic rights and liberties, and they must be expressly stated by the complainant.[111] These grounds are defined in general terms or, as is the case in Spain, expressly enumerated. The special procedure of the petition to protect basic rights and liberties in Macedonia can only be instituted if it concerns a violation of rather limited constitutional rights and liberties of which the Constitutional Court, under the Constitution, guarantees the observance. In principle, the constitutional court does not deal with issues of fact in the context of a constitutional complaint procedure. An exception is made, however, for the examination of facts if the violation of basic rights should appear from the facts themselves. The German report, for instance, says that the refusal of a court to take the arguments of the parties into account may constitute a violation of the basic right to be heard by a court of law. In Liechtenstein, an evident error with respect to the determination of the facts may constitute a violation of the prohibition of arbitrary decision-making, which is regarded as an unwritten independent basic right.

d) Option of suspension

Not all legal systems accept the option of suspending the (enforcement of the) challenged act. Suspension is accepted in some countries on condition that this suspension does not conflict with the public interest and on condition that the detriment for the party concerned in the event of the challenged decision being enforced is greater than the benefit for the rest of the community, as is the case in the Czech Republic. In Spain, too, the suspension of enforcement of a decision may be requested; the public prosecutor is involved in the debate on this point.

e) Admissibility of a complaint

(1) *Direct complaint*

The possibility of referring a case directly to the constitutional court was marked earlier as a criterion to be able to regard a procedure as a form of constitutional complaint. This does not necessarily mean, however, that the lodging of a complaint should inevitably set the procedure in motion. A constitutional complaint may be lodged in the form of a petition, namely as a petition to the constitutional court to initiate the procedure, as is the case in Slovenia. In Bosnia-Herzegovina, it is decided by majority vote whether the complaint should be put on the cause list.

(2) *Authority to lodge a constitutional complaint*

A constitutional complaint must in principle be lodged by the aggrieved individual in an administrative procedure or by a party to an action in which a judicial decision has been

[111] A noteworthy exception exists in Liechtenstein where the Staatsgerichtshof can even raise arguments *ex officio* in a constitutional complaint procedure.

pronounced. Since a concrete constitutionality review is involved here, there must be a sufficiently evident connection between the complainant and the challenged decision. This means, among other things, that the complainant must hold the constitutional rights which he claims have been violated. Corporate persons or public officials can initiate the constitutional complaint procedure (Germany, Croatia, Poland, Slovenia, Spain, Switzerland), usually in a special (own) interest (e.g. protection of autonomy by the local authorities[112], or as in Liechtenstein and Switzerland, in case of violation of the rights which a corporate person enjoys as an individual), but sometimes also in the interest of an aggrieved third party (for instance by the public prosecutors or by the ombudsmen[113], *ex officio* or on behalf – and sometimes with the consent – of the citizens).

(3) *Prior exhaustion of legal remedies*

In all countries, the lodging of a constitutional complaint is in principle dependent on whether all other legal remedies against the judicial order or administrative decision have been exhausted. As is emphasized in the Slovenian report, this implies that the constitutional complaint is usually directed against decisions of the Supreme Court or of the higher courts if no extraordinary legal remedy can be used there. What should precisely be understood by "exhaustion of legal remedies" depends on the national law of procedure, which can differentiate according to the nature of the decision against which the complaint is directed. The exhaustion of legal remedies can be defined either in terms of content (the violation of a basic right must have already been adduced before the court of law or the administrative authority) or in terms of form (only against the highest judicial decisions).

In certain special circumstances, the constitutional complaint is admitted without all other legal remedies having been exhausted first, because of violation of specific basic rights, because of the importance of the case, or because of the imminent detriment for the complainant. This is the case when the constitutional complaint is directed against the violation of a basic right to appear in court (for example, the right of access to a court of law, if this was not respected in the previous stage of the procedure with regard to access to courts of law, the reasonable period of time or the effective restoration of rights; e.g. Andorra and Bosnia-Herzegovina). In Latvia, prior exhaustion of legal remedies is not required if the case is of public interest or in the event of imminent detriment for the petitioner. In Slovakia, the same rule applies if the relevance of the case substantially surpasses the individual interest. In Croatia and Slovenia, the precondition of prior exhaustion of legal remedies may be departed from if the violation is evident and there is a risk of irreparable detriment. In Germany and the Czech Republic, too, there are two exceptions to the obligation of prior exhaustion of legal remedies, namely when the interest of the case surpasses the interest of the complainant and if the appeal procedure drags on for so long that it appears to cause a serious detriment. In Austria, the different administrative procedures must be exhausted, but a prior appeal to the Administrative Court is not required, so that the complainant can refer to two courts simultaneously: while the Constitutional Court in principle only considers the violation of constitutionally guaranteed rights or the infringement of the law ensuing from general

[112] The Liechtenstein report says that the right to autonomy should actually be regarded as a "basic right" of the local authorities.

[113] In Slovenia, a complaint may also be lodged by the ombudsman, in the context of an actual case he is dealing with, and with the consent of the party involved. In Spain, the ombudsman can lodge a *recours d'amparo* in all cases.

regulations, the petitioner before the Administrative Court can only invoke the violation of his subjective rights as guaranteed by ordinary legislation.

It is only in Russia that the requirement of prior exhaustion of legal remedies is departed from in a general manner. The constitutional complaint for violation of constitutional rights and liberties is available against all kinds of decisions, when the law has been, or has to be, enforced in a concrete case of which the examination has been completed by or initiated before a court or any other law enforcement body. The constitutional complaint procedure can therefore be initiated during the course of an ongoing judicial or administrative procedure.

(4) *Time limit for submission of a constitutional complaint*

Sometimes a time limit is set for lodging a constitutional complaint: in Liechtenstein fourteen days, in Croatia and Switzerland thirty days, in Germany one month, in Hungary, Slovenia and the Czech Republic sixty days, and in Poland three months. In Macedonia, the submission of a special constitutional complaint is subject to two possible time limits: a subjective time limit (within two months after notification) and an objective time limit (within five years after the act or activity occurred). In Germany, a constitutional complaint against a regulation with force of law that cannot be challenged before another court may be submitted to the Constitutional Court within a period of one year after the effective date of the statute or the publication of the *Hoheitsakte*.

f) Screening procedure

In most countries – with the exception of Andorra, Liechtenstein and Hungary – constitutional complaints are subjected to a preliminary screening procedure that was put in place in order to handle the ever-growing number of cases. In this connection, we can refer to a large extent back to what has already been explained with regard to the handling of preliminary referrals, in so far as the procedures described there also apply to the examination of constitutional complaints. We will therefore now deal only with the peculiarities in certain countries.

Many countries operate a rigorous examination for admissibility, on the basis of which it may be decided to give the case further consideration, even if the existence of a formal screening procedure is denied.[114] Sometimes the outcome of this preliminary examination is decisive for the entry of the case on the cause list and the hearing of the case, which means that the institution of the proceedings already depends on a judicial decision. In Macedonia, a case will not be put on the cause list if it does not meet the conditions of admissibility. The examination for admissibility may concern the capacity of the complainant or the competence of the constitutional court (Albania). In Russia, a preliminary examination of the admissibility criteria takes place, and is carried out by the judge in charge of the enquiry, on the basis of whose report the case will be admitted for further hearing. In Slovakia, the judge in charge of the enquiry can refuse to regard the case as a complaint if the conditions are not met, which will eventually be decided by a panel of three judges. In Spain, a recours d'amparo can be dismissed by a simple, non-reasoned but unanimous decision of a panel of three judges (for instance if the appeal is evidently groundless or an appeal has already been dismissed in an identical case). Only the public prosecutor can appeal against this, in which case a reasoned

[114] See for example the Czech Republic.

decision must be taken. If there is no unanimity, the parties and the public prosecutor may submit pleadings and the panel can rule by means of a reasoned decision. In Poland, each constitutional complaint is examined by one judge, who ascertains whether the admissibility conditions have been met, without prejudice to the option to have the petitioner rectify defects of form within the set time limit. If the constitutional complaint is dismissed by a decision to such effect, an appeal may be lodged with the Constitutional Court, with a panel of three judges.

In a number of cases, the complaint is already judged on its merits, where it is decided whether the legal justification of the complaint is not evidently inadequate for it to merit further consideration. In so far as in some procedures the relevance (or pertinence) of the constitutionality issue is regarded as a criterion to decide to give the constitutional complaint further consideration, those judicial procedures bear comparison with the selection – characterized as "subjective" – carried out by the American Supreme Court as an inevitable result of the steady increase in the number of constitutional complaints being submitted.

In Slovenia, the admissibility of a constitutional complaint is decided by a panel of three judges, a procedure which can already entail a judgment on the merits. If there is clearly no violation, or if the decision will not offer a solution to an important legal question and if, in addition, the violation does not have any major consequences for the complainant, the panel may decide unanimously to dismiss the complaint. However, the case will be examined if three judges of the Constitutional Court, after receiving the unanimous conclusions of the panel of three judges, accept the complaint for further consideration.

In Germany, a constitutional complaint must be admitted for hearing in so far as it has basic constitutional relevance and if it has been lodged with a view to the enforcement of constitutional rights. This may also be the case if a refusal to decide on the complaint causes particularly serious detriment to the complainant. In this connection, a distinction is made between a hearing by a Chamber and a hearing by a Senate: decisions may be taken unanimously by a Chamber, but at least three judges can decide to refer the case to the Senate. A decision of refusal to hear the case need not be reasoned. There also exists a screening procedure to have evidently well-founded constitutional complaints heard by a restricted chamber, which may admit the constitutional complaint by a unanimous decision if the constitutional dispute has already been settled previously and if the complaint is judged to be evidently well-founded. Such a decision has the same bearing as a decision of the Senate, but it produces less work and leads to a faster administration of justice, thereby also enhancing the authority of the decisions taken by the Senate.

In Austria there also exists a summary procedure in case of inadmissibility or evident unfoundedness. The complaint is decided on in chambers, without a public hearing and before a panel of five members. Here, too, a decision of refusal is possible if the appeal does not have sufficient chances of success or if the decision does not serve to clarify a constitutional question. In Switzerland, too, a restricted panel can decide on evidently unfounded or inadmissible appeals, in a chamber of three judges, without a public hearing and with a concise justification.

g) The parties

The constitutional complaint is usually a procedure – often merely in writing – in which only the action of the complainant is certain. In Hungary, the procedure is in writing only, with no other party than the complainant. In those cases, the petitioner can perform all the acts of a regular litigant.

In a number of countries, all the parties involved in the original (judicial or administrative) procedure are allowed to appear, albeit sometimes in a different capacity (e.g. as party of second rank, as in the Czech Republic). The bodies, public officials or persons that took the challenged decision – courts of law or administrative authorities – can be offered the opportunity to take a position, whether or not merely in writing or in public session also, where this exists (Andorra, Liechtenstein, Austria, Russia, Slovakia, Czech Republic; in Switzerland the procedure is, in principle, written, and the parties can submit pleadings within a set time limit – the deliberations proper are usually also in writing). In Poland, the body that has performed the prescriptive legal act underlying the challenged act is even obliged to intervene in the proceedings. In Bosnia-Herzegovina, the court whose decision is being challenged is not regarded as a party, although it is invited to attend the court session, if this takes place. In Spain and Poland, the public prosecutor is always a party to the procedure before the Constitutional Court, while in Albania he can be summoned. In Germany, the complainant can take part if a verbal debate takes place, which happens only rarely. When a constitutional complaint is lodged against a judicial decision, the other party in the main action will also be called upon to state its arguments, as well as the body that has taken the challenged decision on which judgment was passed in that (jurisdictional) dispute. In Macedonia, the ombudsman also takes part in the hearing. In Poland, too, the ombudsman can take part in the procedure, but he cannot extend or alter the constitutional review.

The assistance of a lawyer is often not required (Albania, Liechtenstein, Slovenia, Switzerland), although this is not a general rule. In Andorra, for example, the assistance of a lawyer is obligatory, although exemption may be granted to certain parties, such as the public prosecutor and the court that pronounced the challenged judgment. The same obligation exists in the Czech Republic for natural and legal persons. In Spain, not only the assistance of a lawyer is required, but also that of a barrister, except for law graduates. In Poland, the assistance of a lawyer is required for the submission of the constitutional complaint and, where appropriate, to appeal against a ruling of inadmissibility, although the petitioner can appear in court, either in person or through a representative *ad litem*.

II. The relations between the constitutional court and the other courts

A. The organic link

1. The organic relations between the constitutional courts and the other national courts are principally linked to two aspects of the appointment of constitutional court judges.

The first aspect concerns, with the reservation set forth in the Portuguese report referred to below, the experience in administrative and legal affairs which a prospective member of the constitutional court must be able to show. The second aspect concerns the intervention of administrative or common law courts or of institutions that govern the courts in the procedure for the appointment of judges to the constitutional court.

2. As regards the professional experience that might be required as a judge, it matters little whether or not the constitutional court forms part of the judiciary. The condition of experience as a judge is not encountered more often for an appointment to constitutional courts that are integrated in a single judicial organization than for an appointment to constitutional courts that are not. It emerges from several reports that an appointment as member of the constitutional court is only rarely the normal outcome of a career in the judiciary. Even if a large number of constitutional court members have, or should have, experience in this area, this is very often, as the Portuguese report points out, the expression of a mere personal link rather than an organic link.

Be that as it may, in the various constitutional courts there are many judges with experience in administrative or legal affairs.

Of the sixteen members of the Constitutional Court of the *Federal Republic of Germany*, six must have served with one of the five other supreme Federal courts for at least three years.

In *Austria*, the constitutional provision governing the appointment of constitutional court judges is traditionally interpreted as requiring the presence of at least one judge of common law or administrative law in the constitutional court. One full judge presently holds, besides his post with the Constitutional Court, the post of judge with the Administrative Court. Two of the deputy judges are currently administrative court judges, while two other members are common law judges.

At least one judge with the Court of Arbitration of *Belgium* must have served with the Court of Cassation (Supreme Court) or the Council of State for at least five years. A bill is currently being debated in Parliament which provides that the Court must also number at least one of its former legal secretaries among its members.

In *Spain*, the members of the Constitutional Tribunal must be appointed from among magistrates and public prosecutors, university professors, public officials and lawyers.

The judges of the Constitutional Court of *Italy* must, in accordance with Article 135, paragraph 2, of the Italian Constitution, be appointed from among magistrates, even retired magistrates, of the higher, ordinary and administrative courts, among ordinary university

professors of law, as well as among lawyers who can show at least twenty years of professional experience.

The two judges who are appointed to the Constitutional Court by the Supreme Court of *Latvia* must be magistrates.

Prospective members of the Constitutional Court of *Macedonia* must be able to prove professional experience in the legal domain, the length of which varies according to the experience in question. For an appeal judge, for example, this is nine years.

The Constitutional Court of *Portugal* is composed of thirteen judges, of whom ten are appointed by the National Assembly and three co-opted by them. Six judges, three appointed by the National Assembly and all the co-opted judges, must be chosen from among the judges of the courts.

Of the eleven full members of the Constitutional Court of *Turkey*, the President of the Republic appoints two who have been nominated by the High Court, two nominated by the Council of State, one nominated by the Military High Court, one nominated by the Administrative Military High Court and one nominated by the Audit Office. These nominations are done by the general meetings of the courts concerned, each list containing three candidates who must belong to the presenting court.

In *Slovenia*, the conditions for appointment to the ordinary courts and to the constitutional court differ. This does not mean, however, that members of the Constitutional Court cannot have served with ordinary courts before their appointment. This is currently the case for two of them.

Although it is not a constitutional or legal obligation, the Constitutional Court of *Hungary* has always numbered former magistrates among its members.

The same applies for the Constitutional Court of the *Czech Republic*. At present, four of the sixteen members have served with the Czechoslovakian Constitutional Court, while six of the twelve other members are experienced judges.

Although the national reports do not say so explicitly, the experience required to be appointed to the Constitutional Court appears to include jurisdictional functions, given the general formulation of the qualifications required in *Albania*, *Azerbaijan*, *Georgia*, the *Russian Federation* and *Ukraine*.

3. The courts themselves and the higher institutions of justice often intervene in the appointment of a certain number of members of the Constitutional Court, whether they present a candidate or list of candidates for appointment to the Head of State, or elect the judges directly.

Four of the twelve members of the Constitutional Court of *Bulgaria* are appointed by the joint meeting of the members of the Court of Cassation and the Supreme Administrative Court.

In *Spain*, the General Council of the judiciary nominates two of the twelve members of the Constitutional Tribunal for appointment by the King. One candidate is nominated each time, and the appointing authority is not permitted to make a choice.

The Constitutional Court of *Italy* is composed of fifteen members, three of whom are appointed by the Court of Cassation, one by the Council of State and one by the Audit Office. This means that one-third of the members of the Constitutional Court are appointed by these courts.

The judges of the Constitutional Court of *Latvia* are appointed by Parliament. Two of them are nominated by the Supreme Court.

The High Council of *Moldova* appoints two of the six members of the Constitutional Court.

Two of the nine judges of the Constitutional Court of the Republic of *Macedonia* are nominated by the High Council of State.

As was mentioned above, in *Turkey* the high courts intervene in the appointment of the members of the Constitutional Court.

In *Ukraine*, the Congress of Judges appoints six of the eighteen members of the Constitutional Court.

It is clear from the above that the high courts intervene fairly frequently in the election of constitutional court judges, sometimes even quite a large number of them – the majority of the judges in *Turkey*, one-third of the judges in *Bulgaria* and in *Italy*, etc.

It also happens that the intervention of the courts manifests itself in the election of members of the Constitutional Court via the institution responsible for the organization of the judiciary. This is the case in *Spain, Macedonia, Moldova* and *Ukraine*.

While drawing up this report, we did not come across any cases where the Constitutional Court put forward candidates of its own. With the exception of *Portugal*, the constitutional courts never co-opted any of their members.

B. The procedural link

4. The procedural relations between the constitutional courts and the courts that refer cases to them concern first of all the status of the action before the court *a quo*.

If the action is generally "neutralized" while the Constitutional Court examines the constitutionality question, it emerges from several reports that this situation is not inherent in the reviews occasioned by lawsuits.

The suspension of the proceedings may be staggered and may, as is the case in *Austria*, concern only what cannot be resolved in the absence of the constitutional decision. It may also exclude certain procedures, as a bill currently provides in *Belgium* for interim injunction proceedings and for decisions relating to detention on remand.

Such a suspension may also take place at the end of the proceedings for the purpose of a special hearing on the merits of the referral to the Constitutional Court. This is the case in *Spain*.

In *Portugal*, the proceedings are not suspended if referral to the Constitutional Court takes place at the conclusion of, rather than during, the lawsuit.

5. The procedural relations also concern the dialogue that may unfold between the court that puts the question and the court that is called upon to respond to it.

The reports show that four types of relations may come into being on this occasion.

The first type is that in which the court *a quo* assumes the role of party before the Constitutional Court. This is the case in *Austria* where the court that pas put a question to the Constitutional Court participates in the action like any other party. The court *a quo*, which is invited to the public hearing if such takes place, may be called upon to submit written observations.

The same status of party is given to the court *a quo* in *Albania*, *Andorra*, *Macedonia*, *Poland*, the *Russian Federation*, the *Czech Republic* and *Slovakia*.

The second type of procedural relations exists in the right granted to the Constitutional Court to question the court *a quo*.

Pursuant to §82, paragraph 4, of the Act governing the Constitutional Court of the Federal Republic of *Germany*, "the Constitutional Court may ask the higher jurisdictional courts and the Supreme Courts of the Länder to state how and on the basis of what considerations they have hitherto interpreted the Basic Law with regard to the question in dispute, whether and how they have used in their administration of justice the challenged legal provision, and which associated points of law are awaiting decision".

The Constitutional Court of *Turkey* may question the other courts with a view to clarifying the elements of the question that has been put to it.

The third class of procedural relations between the constitutional courts and the other courts comprises measures of examination or information which the Constitutional Court may impose on the court or a party with a view to filling up any gaps in the case.

The Constitutional Court of *Portugal* may charge a party to remedy the absence of certain documents from the case, such as the document in which the petitioner has raised the constitutionality issue.

The clerk of the Constitutional Court of *Romania* may ask the court *a quo* to complete the details of the referral.

The fourth type of procedural relations between the Constitutional Court and the other courts is that in which such relations are non-existent. This situation is the most common. Numerous reports mention the absence of procedural relations between the constitutional courts and the referring courts, as in the reports of *Azerbaijan*, *Bélarus*, *Belgium*, *Bosnia-Herzegovina*, *Bulgaria*, *Cyprus*, *Spain*, *Georgia*, *Italy*, *Latvia* and *Lithuania*.

C. The functional link

§ 1. The review and its effects

a) Prior review

6. Many constitutional courts carry out an *a priori* review, before the statute becomes effective. Depending on the country, this review can be either obligatory or optional. In all countries it is restrictive: if the Court finds that a statute is unconstitutional, the statute cannot be further elaborated without any other formality.

Prior review only rarely concerns all statutes. For obvious reasons connected with the international responsibility of signatory States to a convention, prior review is carried out chiefly, indeed even exclusively, on statutes approving international treaties. This is the case in *Albania*, *Andorra*, *Bulgaria*, *Cyprus*, *Spain*, *Georgia*, *Hungary*, *Moldova*, *Portugal*, *Romania*, *Slovenia* and *Ukraine*. The *Czech Republic* is planning to give the Constitutional Court this power, limited to the review of international conventions.

Prior review may be carried out before Parliament decides on the statute.

Another method is where the decision of the Constitutional Court is taken between the adoption of the statute by the legislative assemblies and its promulgation by the Head of State.

The obstacle represented by the ruling of unconstitutionality lies most often in its nullifying effect: the statute cannot be promulgated as it stands. The deficiency that it contains must be eliminated, whether by an amendment of the statute or by a revision of the constitution. Sometimes the statute can be confirmed by the legislative assemblies, which authorizes its promulgation. It should be noted that the same strict majority conditions are required for such confirmation as for constitutional laws. A two-thirds majority is needed in *Romania* and in *Portugal*, whose Constitution stipulates that the two-thirds majority thus attained by the members present must represent at least the absolute majority of all the members of the Assembly of the Republic. Even though a statute confirmed in this way may be promulgated, the Head of State is under no obligation to do so.

A ruling of constitutionality by the Constitutional Court produces totally opposite effects. The obligation to promulgate is generally the consequence of the ruling of constitutionality, without prejudice to the normal procedures which the Head of State may follow. In *France*, the President of the Republic can always request a second deliberation on the statute, in accordance with Article 10 of the Constitution. Similarly, the President of the Republic and the Prime Minister of *Portugal* may put their political veto on the statute, notwithstanding the ruling of conformity.

In *Austria*, prior review is concerned only with the division of powers between the Federal State and the Länder. Constitutional disputes relating to this division of powers conclude with an order containing a rule of law (*Rechtssatz*) that gives an interpretation of the Constitution. This rule has force of constitutional law. It cannot be challenged by an *a posteriori* appeal.

With this reservation, a ruling of constitutionality given subsequent to a prior review does not, in principle, prevent the Constitutional Court from being questioned on the same regulation in

the context of a subsequent review. International conventions often form an exception to this rule.

b) Subsequent review

(1) *Direct appeal and incidental appeal*

(a) The effects ratione personae

7. The extent of the effects *ratione personae* of the rulings of the constitutional courts vary according to whether or not the statute in question is judged compatible with the Constitution.

The statute is judged constitutional

8. The ruling by which a regulation is declared in conformity with the Constitution generally has a limited effect, both in terms of the persons intended by those effects and of the arguments developed before the court.

The persons intended by the effects of the ruling are the persons who submitted the case to the Constitutional Court or who are litigants before the court *a quo*: they are bound by the constitutionality ruling as concerns the points of law that were resolved.

The effects of such constitutionality rulings are also limited in terms of the grounds for unconstitutionality. They concern only the grievances that were expressed before the court and in no way prevent other claims of unconstitutionality being formulated with regard to the same statute, by other persons or even by those – petitioners or litigants before the court *a quo* – who are at the root of the ruling by the Constitutional Court. The sentence by which the Constitutional Court of *Italy* dismisses an incidental appeal (*sentenza di rigetto*) does not prevent another court from putting a question to the Court on the same regulation, nor does it prevent the court that referred to the Constitutional Court from submitting another question in which the unconstitutionality is considered from a different point of view. The same applies with respect to constitutionality rulings given in the context of an incidental appeal by the Constitutional Courts of *Austria* and *Romania*, as well as to rulings given by the Federal Tribunal of *Switzerland* on the occasion of an abstract or concrete public law appeal.

Germany forms an exception to the principle according to which constitutionality rulings only have a limited effect, an exception that applies to rulings given further to direct appeals as well as to incidental appeals. The ruling given by the German Constitutional Court definitively concludes the debate, whether this results in the constitutionality or unconstitutionality of the challenged regulation.

The statute is judged unconstitutional

9. The ruling that declares a regulation unconstitutional may be given upon a direct appeal or an indirect appeal.

In the first case, the effect is always general. The ruling of unconstitutionality has an effect *erga omnes.*

Very often the ruling in itself results in the removal of the statute from the legal system. In *Cyprus,* however, the intervention of the legislator is necessary to achieve this result. In other countries, the legal doctrine is divided as to the status of the censured regulation in the legal system.

Rulings of unconstitutionality given in the context of an incidental appeal may have an effect *erga omnes* or an effect *inter partes*.

The most common case is that of the effect erga omnes. This is encountered in Germany, Austria, Azerbaijan, Bosnia-Herzegovina, Bulgaria, Spain, Georgia, Hungary, Italy, Lithuania, Macedonia, Moldova, Russia, Slovenia, Czech Republic, Turkey and Ukraine. Rulings of unconstitutionality given on incidental appeal have relative effects in Albania, Andorra and Slovakia. Preliminary rulings of the Court of Arbitration of Belgium have a "reinforced relative authority", whether or not the Court reaches a conclusion of unconstitutionality. This characterization of "reinforced relative authority" is the result of the circumstance that the ruling in its effects exceeds the normal framework of relative authority, while having no effects erga omnes. In Belgium, these are attached to rulings granting actions for annulment. In Switzerland and in Portugal, the rulings given in response to a concrete public law appeal or against a judicial decision have a nullifying effect, confined to the litigants before the court hearing the main action.

(b) **The effects ratione temporis**

10. Considered from the point of view of its temporal aspects, the ruling of the Constitutional Court may either make its effects felt on the effective date of the censured statute – namely a retroactive effect, *ex tunc* – or only from the date of its pronouncement or publication – namely an effect for the present and future only, *ex nunc*.

The national reports show that where the ruling, constitutionally or legally, has a retroactive effect, there are procedures and exceptions that make it possible to mitigate this effect. Conversely, where the annulment has effect for the present and future only, it is generally provided that this effect can be modulated and made to cover certain past situations.

Unconstitutionality ex tunc

11. Retroactivity generally implies that everything that has been done on the basis of the annulled statute is called into question.

The Constitution or the organic laws of the Constitutional Courts of *Germany*, *Andorra*, *Belgium*, *Spain*, *Italy, Portugal* and *Russia* assign to the rulings of the Court a retroactive effect.

12. In *Belgium*, restoration is organized through a general procedure of withdrawal. In the six months following the publication of the decision annulling a regulation for reasons of unconstitutionality, the withdrawal of all decisions or judgments based on this regulation may

be demanded from the court that issued these decision or judgments. The withdrawal may concern any court order, whether in criminal or civil law, provided that it has become final and conclusive. In criminal cases, the public prosecutor is obliged to request this measure, although it may also be sought by the sentenced party or his heirs. In civil cases, the withdrawal may be requested at any time on condition that the six-month term is not exceeded. Requests for withdrawal may also be made with respect to rulings by the Council of State, while judicial or administrative appeals may be lodged against acts that are based on the annulled statute.

The public authorities of *Andorra* must obliterate the effects of annulled regulations.

Article 79 of the organic law of the Constitutional Court of *Russia* provides that decisions of courts and other bodies that are based on regulations that have been found unconstitutional cannot be enforced and must be revised. Article 87 of the same law prohibits the courts from applying those regulations again.

In the above countries, measures exist to curb the retroactivity, as we will see below.

With the exception of the three countries mentioned above, decisions of the Constitutional Court whereby a statute is judged unconstitutional have no effect on actions that have been finally settled, except for criminal lawsuits. This is the case in *Germany (§ 79 of the organic law)*, *Spain (article 40.1 of the organic law)*, *Italy (article 30, last paragraph, of the organic law)* and *Portugal (article 282, paragraph 3, of the Constitution)*.

It may be concluded that, notwithstanding the *ex tunc* nature of Constitutional Court decisions, it is a general rule that cases that have reached a final settlement are not challenged, with the exception of criminal cases.

Certain legal systems, however, form an exception to this principle.

13. The retroactivity of a ruling by the Constitutional Court may also be cancelled or at least diminished by a decision of the Constitutional Court declaring the temporary or definitive maintenance of all or part of the effects of the annulled regulation.

The legal systems of *Germany*, *Andorra*, *Belgium*, *Spain* and *Portugal* authorize the respective courts of those countries to maintain certain effects, or even all the effects, of an annulled regulation.

Even if a regulation loses all force of law, the same cannot be said of its effects. These effects remain, often in order to avoid a disproportionate situation as a result of the unconstitutionality that has been pronounced. Sometimes the Court decrees this measure in order to allow the legislator to render the law constitutional with retroactive effect and thus to give a constitutionally irreproachable legal foundation to acts that have been performed, or have yet to be performed, on the basis of the unconstitutional law.

It is chiefly the constitutional courts that decide on the maintenance of the effects of the annulled regulation; the effects of this decision in principle manifest themselves *ex tunc*. As we will see, the courts whose decision as a rule produces effects *ex nunc*, generally postpone, in order to achieve an identical result, the very annulment of the regulation and not simply the effects of this regulation.

14. Sometimes the Court may alter the nature of a ruling and decide that it shall have an effect *ex nunc* rather than an effect *ex tunc*. This is the case in *Portugal* in connection with abstract review, when reasons of public security, justice or exceptional public interest so require.

Unconstitutionality ex nunc

15. The non-retroactivity of constitutional court rulings leaves intact the decisions taken and acts performed on the basis of the censured statute. The decision produces its effects sometimes from the moment it is pronounced, sometimes from its publication in the Official Journal.

In principle, the rulings of the constitutional courts of Albania, Armenia, Austria, Azerbaijan, Bulgaria, Croatia, Georgia, Hungary, Latvia, Lithuania, Moldova, Poland, Romania, Slovakia, Slovenia, Czech Republic, Turkey and Ukraine have an effect ex nunc.

The legal systems of *Albania*, *Hungary* and *Moldova*, however, provide for a general exception as concerns criminal lawsuits, which must be revised if they are based on an unconstitutional law.

The Constitutional Court of *Austria* may decide that the effect *ex nunc* does not apply to cases pending before the courts at the time when it pronounced its ruling. This is what the Austrian legal doctrine calls *selective retroactive effect*. Sometimes the Court may extend the retroactive effect to all acts performed before its ruling: this is called *general retroactive effect*. In one ruling, the Austrian Constitutional Court even ordered that finally concluded lawsuits be called into question, which amounts to a retroactive effect pure and simple.

Besides the facility given to the Constitutional Court to modulate the effects of its rulings in time, there are situations where the ruling produces its effects in the past, through the wish of the organic legislator. This is the case for the *Anlaßfall* in Austria. By this is meant the dispute at the origin of the referral to the Constitutional Court. In the event of a ruling of unconstitutionality, the law will not be applied to that dispute. This inapplicability is called the "premium of the petitioner". An extensive interpretation has been given to this, where the unconstitutional statute is no longer applied to the various lawsuits that gave rise to a referral to the Court in connection with the censured regulation.

Unconstitutionality ex tunc or ex nunc *according to the decision of the Constitutional Court*

16. Finally, various constitutional courts have been given the power to decide for themselves, case by case, the date of annulment or the date on which the effects of the statute come to an end. This is the case in *Belarus*, *Bosnia-Herzegovina* and *Macedonia*.

(c) Instruments and mechanisms affecting statutes

17. In order to avoid the effects, whether *ex tunc* or *ex nunc*, attached to censuring decisions, various instruments and mechanisms exist which affect the statute itself rather than focus directly on the effects of an invalid regulation.

18. The Constitutional Court of *Germany* issues rulings of unconstitutionality (*Verfassungswidrigenklärung*) which do not entail the annulment of the law. The verdict of unconstitutionality passed by the Court does not find its logical outcome in the nullity of the law.

The method, which originated in the late fifties, has ultimately been incorporated in the organic law of the Court.

The German report sets forth the main situations that lead the Constitutional Court to adopt such rulings without annulment. Very often, such rulings are issued when the principle of equality is disregarded, this equality being only rarely restored by the mere annulment of the statute. The Constitutional Court therefore issues a ruling of unconstitutionality, allowing the legislator to choose from among the different options that exist the solution it considers the most appropriate to eliminate the inequality that was established.

The Italian and Portuguese reports expressly contemplate the application of this method of ruling without annulment by the Constitutional Courts of their respective countries. Neither in *Italy* nor in *Portugal* can the Constitutional Courts make use of this method, except, in the latter case, in the event of unconstitutionality by an omission on the part of the legislator.

Since 1989, the Constitutional Court of *Spain* sometimes dissociates the unconstitutionality of a statute from the nullity thereof. Besides decisions entailing the nullity of a regulation, the Spanish Constitutional Court issues rulings of "simple unconstitutionality" which, as in *Germany*, go no further than a declaration of unconstitutionality that does not entail the nullity of the regulation. As in *Germany*, too, this type of decision is given chiefly in matters of equality.

Finally, the Constitutional Court of *Austria* issues rulings of unconstitutionality when, following the application of transitional law, it is led to pronounce the unconstitutionality of a statute that has already been repealed. The scope of the term is therefore fundamentally different from that in *Germany* and *Spain*.

19. Different organic laws or sovereign solutions allow the Constitutional Court to defer the annulment, so that it only takes effect at the moment appointed by the Court. This facility exists in *Germany*, *Austria*, *Spain*, *Hungary*, *Latvia*, *Poland*, *Slovenia*, *Czech Republic* and *Turkey*. The Constitutional Court of *Italy* arrived at the same result by adopting *verdicts of immediate unconstitutionality* and *verdicts of deferred unconstitutionality*.

Sometimes the organic legislator only permits such deferment for the maximum term that it fixes: eighteen months in *Austria* and *Poland*, one year in *Slovenia* and *Turkey*.

In order to guarantee legal certainty, the Constitutional Court of *Hungary* may rule that the annulment has retroactive effect or, conversely, only takes effect on the future date specified in the ruling. The same latitude is given to the Constitutional Court of *Latvia*, which can either give the annulment retroactive effect or defer it.

20. Many constitutional courts have recourse to conformable interpretation, which renders the statute constitutional within the meaning specified by the Court.

21. Finally, the constitutional courts issue more and more frequently "technical rulings". By doing so, they pursue multiple objectives – sometimes linked to the effects of the annulment – which cannot be expounded in the context of this report.

(2) *Constitutional complaints*

22. The effect of constitutional complaints is generally confined to the parties to the judgment, the act or the situation at the origin of the referral to the Constitutional Court.

§ 2. Interpretation of the regulations

a) The interpretation of the Courts before the Constitutional Court

23. Except when a text, by its clarity and precision, does not call for an interpretation, the Constitutional Court, when examining its constitutionality, will always be led to interpret it, no matter in what way the case has been referred to it.

24. Even in the case of direct constitutional appeal where, theoretically, the challenged statute has never been applied and therefore has never received a jurisdictional interpretation, the ruling of the Constitutional Court will not be stamped – more or less markedly – any the less by judiciary or administrative case law. It frequently happens that the Constitutional Court takes into account the interpretation that was given on other occasions to similar provisions to those that have been submitted to its review. It interprets the statute in the light of the case law of the other courts.

The best known case is undoubtedly that of the ruling given by the Constitutional Council of *France* in 1971 with respect to the freedom of association, in which the Constitutional Council saw one of the "basic principles recognized by the laws of the Republic" stated in the Preamble of the Constitution of 1946, an observation that was made in 1956 by the Council of State.

The Constitutional Court of *Armenia*, which only deals with direct constitutional appeals, made the same observation: in the formulation of its rulings, the interpretation given in other circumstances by the ordinary courts occupies an important place.

Moreover, the Constitutional Court, in cases of direct appeal, is sometimes led to rectify the interpretation given by the petitioner to the regulation of which it requests the annulment.

25. In indirect appeals, the situation is somewhat different. The Constitutional Court can propound a different interpretation from the one given by the court that put the question. The two interpretations therefore originate with courts that usually belong to two distinct jurisdictional orders, one of which is generally headed by a court, the Court of Cassation or Supreme Court, of which one of the main tasks is precisely to ensure the uniform interpretation of the law.

Where the Constitutional Court forms part of a single jurisdictional authority, the problem may remain intact due to the internal organization of this authority. Sometimes the situation is different. In *Cyprus*, the Supreme Court is vested with the function of Constitutional Court,

which allows the author of the Cypriot report to consider the question concerning the reception of the interpretation of one court by the other as the product of theory or as groundless.

26. Is the Constitutional Court bound by the interpretation given to the law by the referring court? The great majority of the constitutional courts say they are not, at least when the interpretation of the court *a quo* leads to a ruling of unconstitutionality and there exists another interpretation that puts the statute beyond all constitutional reproach.

This position appears to stem from the independence and the mission of the Constitutional Court as well as from the method of interpretation of the laws.

The Court is not bound by the interpretation of unconstitutionality given by the referring court. To decide otherwise would amount to admitting that one single court, by its interpretation, can cause a constitutionally irreproachable statute to be censured, no matter what the effects - *erga omnes* or *inter partes* – of this censure may be. The Constitutional Court, far from fully appreciating the constitutionality of a statute, has only to draw the consequences of the interpretation given by the court *a quo*. By doing so, it would also fail in its duty, which is to declare a statute unconstitutional only if there is no other option. Finally, the rules governing the interpretation of statutes require that an interpretation be given in accordance with the Constitution where several interpretations are possible, independently of any actual censuring of the statute in question. The Court of Cassation of *Belgium* asserted this principle of interpretation in 1950, at a time when the constitutionality review of statutes was not yet contemplated in that country.

The Constitutional Court of the *Czech Republic* arrived at the same solution as the one described above, although it offers a different explanation. The jurisdiction of the Czech Supreme Court is residual, in the sense that it encompasses all that falls outside the scope of the Constitutional Court. This is the case with the interpretation of statutes, except when the interpretation conflicts with the Constitution, in which case it concerns a constitutionality question which is for the Constitutional Court alone to deal with and settle.

Article 2, paragraph 3 of the organic law of the Constitutional Court of *Romania* prohibits it from ruling on the interpretation or application of the law. This provision, however, does not prohibit the Court from issuing "intermediate or mixed rulings" which make the unconstitutionality dependent upon the interpretation given to the regulation.

The Constitutional Court of *Andorra* declares a statute inapplicable when, if several interpretations are possible, only one of these allows a ruling of constitutionality. This inapplicability will be lifted as soon as the legislator has specified the meaning that should be given to the statute.

The question of divergence of interpretation has not yet received a final solution from the Court of Arbitration of *Belgium.* In this connection, it often has recourse to so-called "alternative" rulings. In such a ruling, the Court encounters the interpretation of the court *a quo* which it declares unconstitutional, then sets forth another interpretation in which the statute stands up to the constitutionality review. The enacting terms of the ruling state the two interpretations and the conclusions which each of these leads to. This method allows the Court of Arbitration not to reverse the interpretation of the court *a quo*, while showing it a different course which it is perfectly free to follow. The other approach that the Court of Arbitration

sometimes follows is to retain in the enacting terms of the ruling only the interpretation that renders the statute consistent with the Constitution. As was explained above, the Court of Arbitration has not yet definitively opted for a particular solution.

Article 80, paragraph 3 of the organic law of the Constitutional Court of *Portugal* obliges the Court to review not only the constitutionality of the law, but also of the interpretation that is given to it. The Portuguese report points out that it is not always easy to differentiate the interpretation of the law, which falls within the scope of the Constitutional Court, from the application of the law, which escapes the constitutionality review. That this situation does not cause any problems in Portugal is due to the fact that the Constitutional Court stands at the top of all the Portuguese supreme courts.

27. In *Italy*, the theory of "living law" was developed. By this is meant the regulation as understood and interpreted by the "prevailing and consolidated" case law, i.e. a case law that is not isolated and that emanates from the high courts.

Sometimes characterized as a tribute paid by the Constitutional Court to the Court of Cassation and to all the courts of the judiciary – whose interpretation of regulations constitutes the *proprium* of their duties –, the concept makes it possible to avoid a statute from being censured through ignorance of and disregard for the constant and often eminent interpretation given by the judiciary.

The Constitutional Court will sanction the statute as shaped by living law, if, understood in this way, it is unconstitutional.

Furthermore, the concept makes it possible to correct the interpretation which the court *a quo* gives of the regulation and which leads to a ruling of unconstitutionality. The Italian Constitutional Court bases itself on living law to dismiss this interpretation in a "corrective ruling", which lends the regulation a meaning in conformity with the Constitution. In the absence of living law, the Constitutional Court, faced with an interpretation by the court *a quo* which leads to a ruling of unconstitutionality, adopts an "adaptive ruling", based on an independent interpretation.

The Constitutional Court of *Hungary* has adopted the theory of "living law", which however has recently become confronted with another concept, called legal unity, where the Supreme Court is entrusted with the task of ensuring the jurisprudential unity of every regulation.

b) Interpretation of the Constitutional Court before the ordinary courts

28. The interpretation which the Constitutional Court gives of a regulation forms an integral part of its ruling and has something of its nature of res judicata when it is mentioned in the enacting terms or when it constitutes the essential foundation of the ruling.

Naturally its effects are linked to those of the judgment.

If a ruling of the Constitutional Court has effects *inter partes* only, as is for example the case with indirect appeals in *Slovenia*, the interpretation will *de jure* only have an effect that is confined to the action that was submitted to the court *a quo*.

Where constitutional complaints exist, these may be used against a court that does not respect the ruling – including the interpretation – of the Constitutional Court. An exception to this principle exists in *Austria*, insofar as court judgments are concerned, where an appeal for constitutional protection can never be directed against such a judgment.

29. The Constitution or the organic law of the Constitutional Court may entrust the latter with the task of authoritatively interpreting the Constitution. Such is the case in *Bulgaria,* where requests for interpretation of the Constitution made up the bulk of the cases that were referred to the Constitutional Court in the first years of its existence. In a legal organization that represented a radical break with the past, it was important that the role and place of certain newly created institutions could be clarified. Even today, such requests for interpretation are frequent, and although their number has diminished significantly, they still account for around one-third of all the cases that have been referred to the Bulgarian Constitutional Court since its establishment.

30. The authority of the interpretation of any regulation that a constitutional court can be asked to give is not confined to its legal force.

The influence of constitutional jurisdiction is always considerable and extends to all legal disciplines, which are experiencing an ever-growing "constitutionalization" effect.

III. Interference of the European Courts

A. The European Court of Human Rights

31. Although a majority – and a large majority: 21 constitutional courts – declare themselves not bound by the rulings of the European Court of Human Rights, an even larger majority mentions the preponderant influence of the case law that emanates from its rulings when it comes to determining the substance of the basic rights guaranteed by internal law and the extent of the restrictions that can be placed on them.

Long before the concept of "fair trial" was introduced into the Constitution of *Portugal*, the Constitutional Court had included it in the constitutional provision concerning "guaranteed access to the law and jurisdictional protection". On this basis, it has declared unlawful the provisions that allow the public prosecutor to participate in the deliberations of certain courts. Such participation is censured by the European Court in similar hypotheses.

The European Convention – or the rights that it recognizes – may, in the internal legal system, rank above the laws.

Therefore, while the Constitutional Court of *Germany* has given the Convention the same rank as a federal statute, it is nevertheless true that some of its provisions could be considered as "general rules of international public law" which Article 25 of the Basic Law gives preponderance over the laws.

In *Austria*, the rights recognized by the European Convention have constitutional rank. Infringements of the Convention may be referred directly to the Constitutional Court.

The Court of Cassation of *Belgium* assigns to the rulings of the European Court of Human Rights an "authority of interpretation". Its case law does not deviate from that of Strasbourg. The Court of Arbitration has not yet had the opportunity to pronounce itself on this theory, since it has not examined – or at a certain moment did not want to examine – the case law of the bodies of the European Convention.

In *Liechtenstein*, the courts cannot continue to enforce a statute that has been censured by the European Court since, by doing so, they would, according to the State Court, partly suspend the Convention until the legislator intervenes.

Article 87 of the Constitution of the *Czech Republic* empowers the Constitutional Court to "decide measures that are necessary to give effect to a decision of an international court that binds the Czech Republic, in case it cannot be given effect otherwise".

The conditions of this authority are specified in paragraphs 117 to 119 of the organic law of the Court, more particularly in paragraph 118, which provides that "when a (international) court establishes a violation of basic rights as a result of a statute or any other act, the Government shall submit an action for annulment to the Constitutional Court". Since such an action does not differ in any way from other actions or petitions, there is nothing to prevent the Court from refusing it. For this reason, one can say that the Constitutional Court of the Czech Republic is not formally bound by a decision of an international court. So far, no case has presented itself yet; therefore we cannot know what the attitude of the Czech Constitutional Court would be towards a ruling of the European Court.

The Constitutional Court of *Latvia* considers itself bound by the rulings of the European Court. In its view, this obligation stems from the fact that the Constitution provides that the State recognizes and protects the basic human rights in accordance with the Constitution, treaties and international agreements that bind Latvia. Consequently, one cannot claim that the authors of the Constitution had the wish to set regulations stemming from the Constitution against those stemming from international law. On the contrary, they should be considered as being jointly intended to try and achieve the best possible protection for individuals.

Bosnia-Herzegovina is not a party to the European Convention. Nevertheless, it has incorporated this Convention in its Constitution. No doubt this is the expression of the political will of a nation situated in a region that has been troubled for too long.

32. According to the reports, since the European Convention on Human Rights forms part of the internal legal system, it may – and indeed must – be enforced directly by every court in *Germany, Austria, Belgium, Croatia, Spain, France, Hungary, Italy, Poland, Portugal, Slovakia, Slovenia, Switzerland* and the *Czech Republic*. Several reports, however, mention the lack of enthusiasm with which this obligation is received by the ordinary courts. The Polish report discerns two reasons for this reluctance. Firstly, the courts prefer to base their decisions on regulations of internal law rather than on international provisions; secondly, there is the fact that, as is the case in *Poland*, the procedure appears pointless from the moment most of the rights and liberties are recognized by both the European Convention and the Constitution.

In *Germany*, if a decision only ignores provisions of the European Convention which do not correspond to rights guaranteed by the Basic Law, an appeal for constitutional protection is

not possible, since the European Convention does not rank as a constitutional standard there. In *Austria*, where the European Convention is a constitutional standard, such an appeal is only possible against decisions that are open to appeal for constitutional protection, which excludes judicial decisions in the strict sense.

In the case in question, namely where an act or judgment only infringes the European Convention on Human Rights, constitutional complaints are admissible in *Spain* for censuring an interpretation of the Convention that is not compatible with the constitutional provisions. A similar situation exists in *Slovenia*.

Likewise, when a Portuguese court, by directly applying the European Convention, departs from the Constitution or from the interpretation given by the Constitutional Court, its decision may be submitted to the Constitutional Court, where it will be judged unconstitutional.

The Portuguese situation is merely an illustration of the principle whereby the Constitution takes precedence over directly enforceable conventional law, unless the Constitution itself provides otherwise, as is the case in *Macedonia*.

33. Article 35.1 (formerly Art. 26) of the European Convention provides, "the Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken".

Does constitutional jurisdiction constitute one such domestic remedy that must be exhausted first before a case can be validly submitted to the European Court? Although obviously only the European Court can decide on this question, the authors of the questionnaire wanted to ask the different Courts for their opinion on the matter.

On several occasions, the European Court of Human Rights has given its general interpretation of the obligation imposed on the applicant to exhaust the domestic remedies. The most detailed and complete exposition to date was undoubtedly given in the Akdivar and others judgment versus Turkey, pronounced on 16 September 1996 (*Yearbook of Judgments and Decisions*, 1996 – IV, pp. 1192-1270).

In order to understand the import of this concept, one should not overlook the fact that the exhaustion of domestic remedies reflects the principle of *subsidiarity*, which provides that the international protection of human rights comes into play only in case of deficiency on the part of the State concerned (*Akdivar judgment*, §65). The State is dispensed from answering for acts that could have been put right through procedures already available under its own legal system.

From this rule, the European Court has derived various principles that relate to aspects of recourse under national law.

In the first place, the domestic remedies that must be exhausted first before referring to the European Court must be available and sufficient to afford redress in respect of the breaches alleged. Failing this, the remedies in question lack the requisite *effectiveness* and *accessibility*, in which case they need not be exhausted (*ibid.* §66).

Similarly, those remedies need not be exhausted if "the generally recognized rules of international law" absolve the applicant from the obligation to exhaust the domestic remedies or if a repeated and tolerated administrative practice is of such a nature as to make any proceedings instituted in the country futile and *ineffective* (*ibid.* §67).

In order for the application to be admissible, it does not suffice that the applicant has exhausted the domestic remedies. Another requirement is that the applicant must have addressed the complaints that he has against the State to the appropriate domestic body, at least in substance. Once again, this is a consequence of the subsidiarity principle, since a State cannot be criticized for not having examined complaints that have not been formulated (*ibid.* §66).

Finally, one should take into account the spirit in which the Convention was drawn up and the instruments that its promoters meant to put in place in order to guarantee the protection of human rights. Accordingly, the rule of exhaustion of domestic remedies "must be applied with some degree of flexibility and without excessive formalism" (*ibid.* §69); the rule of exhaustion "is neither absolute nor capable of being applied automatically" (*ibid.*). Finally, it cannot be applied without "having regard to the circumstances of the case" (*ibid.*).

34. Those, then, are the principles. The European Court of Human Rights has already had the opportunity to put them into practice versus constitutional courts. Certain lessons can be drawn from this.

In a first case, it observes that the right to apply to the Italian Constitutional Court rests with the court and not with the litigant parties. Accordingly, none of the parties can be criticized for the absence of application to the Constitutional Court: "The Court would observe that in the Italian legal system an individual is not entitled to apply directly to the Constitutional Court for a review of the constitutionality of a law. Only a court which is hearing the merits of a case has the possibility of making a reference to the Constitutional Court, at the request of a party or of its own motion. Accordingly, such an application cannot be a remedy whose exhaustion is required under Article (35.1). Furthermore, the application would in practice have had to be attached to a "late appeal", which the Court has found not to be sufficiently available and effective in this case" (*Brozicek judgment* vs. Italy of 19 December 1989, Series A, vol. 167, §34; confirmed by the *Spadea and Scalabrino judgment* vs. Italy of 28 September 1994, Series A, vol. 315-B, §§23-25).

In a second case versus Germany, the European Court observed that, failing exhaustion of the ordinary remedies, the applicant would not have been able to submit an appeal for constitutional protection to the Constitutional Court, which he would have had to do if he had been nonsuited in the ordinary remedies: The Court would observe that the applicant also had the possibility and, by virtue of the constant case law of the bodies of the Convention, the obligation to submit a constitutional appeal to the Constitutional Court, in accordance with the relevant provisions of the Basic Law. On the other hand, a case can only be referred to the Federal Constitutional Court after the ordinary remedies have been exhausted. Since in this case the applicant had not appealed against the decisions of the regional court that fixed the terms of his imprisonment, he was too late to apply to the Constitutional Court (*Denkli judgment* vs. Germany of 21 October 1999).

Finally, the European Court held the view that the absence of referral to the German Constitutional Court did not obstruct its own referral through lack of effectiveness, given the

circumstances of the case (*Englert judgment* vs. Germany of 25 August 1987, Series A, vol. 123-B, §§32-33, and *Kalantari judgment* vs. Germany of 28 September 2000).

These precedents show that an applicant cannot be criticized for not having exhausted remedies that are not available (*Brozicek judgment and Spadea & Scalabrino judgment*) and that, in principle, appeals for constitutional protection must be lodged with regard to the basic rights guaranteed in substance by both the Convention and the Constitution, save for the common exceptions to the exhaustion of all domestic remedies (*Denkli judgment, Englert judgment* and *Kalantari judgment*).

35. It emerges from the various national reports that the majority of the constitutional courts that handle *constitutional complaints* believe that this remedy should be exhausted first before a case is referred to the European Court. This opinion is expressed in the reports of *Albania, Germany, Andorra, Austria, Croatia, Spain, Latvia, Liechtenstein, Macedonia, Slovenia, Switzerland* and the *Czech Republic*. These reports specify that appeals for constitutional protection should only be made where they are authorized. Indeed, in several countries, certain judgments and decisions are not open to such an appeal, owing chiefly to the status of the appellant.

Although the reports are not always explicit on this matter, it appears that the position that is supported there is based mainly on the subsidiary nature of the intervention of the Convention bodies.

Hungary, Poland and the *Russian Federation* do not share this point of view: in their opinion, appeals for constitutional protection need not be made before the case is referred to the European Court.

In this respect, those Courts state the extraordinary nature of appeals for constitutional protection and the prolongation of the proceedings that inevitably results from such appeals. Furthermore, it should be remembered that in Hungary and in Poland constitutional complaints can only be used for challenging the constitutionality of a law that has been applied to the case in question.

An individual who has no access to the Constitutional Court is obviously exempted from the obligation to exhaust this "remedy". This is the case in *Bulgaria*, where citizens cannot appeal to the Constitutional Court, whether by a constitutional complaint or otherwise.

36. Must a *preliminary question* relating to the constitutionality of a law in all cases be submitted to the Constitutional Court before being referred to the European Court? As we have seen, the European Court gave a negative answer to this question in its *Brozicek* judgment of 19 December 1989 and its *Spadea & Scalabrino* judgment of 28 September 1994, for the reason that, in *Italy*, a party before a court cannot oblige the latter to refer a question to the Constitutional Court.

The question appears to be linked to the scope that is allowed to the litigant party to provoke a referral to the Constitutional Court. In the first part of this report, it was explained (see referral to the Constitutional Court) that a court has a certain degree of freedom, depending on the country, to decide to access the Constitutional Court. Sometimes, as is the case in *Slovenia*, a refusal by the court can be circumvented by a "parallel" appeal by the litigant parties.

In *Belgium*, a court is, in principle, obliged to put a preliminary question from the moment a litigant party so requests. Each litigant therefore has the possibility of submitting a statute that is intended to be applied to him to the scrutiny of the Court of Arbitration. The preliminary ruling of the Court of Arbitration whereby the statute in question is declared unconstitutional prevents this statute from being applied. According to the Belgian report, the principle of subsidiarity of the intervention of the European Court opposes the lodging of an appeal with Strasbourg before the applicant has first requested the court to put a preliminary question to the Court of Arbitration with regard to the constitutionality – on which depends the applicability – of the law.

37. Finally, *actions for annulment*, where they are open to individuals, must generally be brought within strict time limits and under strict conditions following the adoption or publication of a statute, so that in principle the absence of an action for annulment should not, in our view, be regarded as a non-exhaustion of domestic remedies within the meaning of Article 35.1 of the Convention, except in the hypothesis where the statute, by the simple fact of its existence, places the individual in the situation of "victim" within the meaning of Article 34 of the Convention.

B. THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

38. The relations between the Court of Justice and the national courts are essentially organized by Article 234 of the Treaty establishing the European Community – formerly Article 177 – which stipulates:

"The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
a) the interpretation of this Treaty;
b) the validity and interpretation of acts of the institutions of the Community and of the European Central Bank (ECB);
c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."

While the application of Community law has been left to the national courts, the authors of the Treaty provided for the establishment of a Court of Justice which, among other things, would be responsible for guaranteeing the unity of jurisprudence among this diversity of courts.

To this end, a mechanism of preliminary questions was put in place. A national court that has to apply the Treaty or the acts derived therefrom – the latter constituting "secondary Community legislation" – has the possibility of asking the Court of Justice which interpretation should be given to a particular provision of the Treaty or to a particular act

originating with the European institutions. It may also request the Court to rule on the validity of such an act.

The Court of Justice therefore deals with two types of preliminary questions, namely those concerning the interpretation of the Treaty and secondary Community legislation (giving rise to interpretative rulings) and those concerning the validity of an act based on the Treaty (giving rise to rulings on the validity).

The Court also has jurisdiction to rule on the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. This provision also makes it possible, where necessary, to set aside the general power of interpretation of the Court in this matter. Paragraph c) of Article 234 adds nothing to the jurisdiction of the Court; on the contrary, it allows for departure therefrom.

While the interpretation of a provision given in an interpretative ruling binds the court that accessed the Court of Justice as well as any court that is subsequently called upon to take cognizance of the case, the impact of this ruling on other lawsuits has not been definitively resolved in the legal doctrine. A majority of the authors is of the opinion that those rulings are binding on other lawsuits. Be that as it may, in case of difficulty, a court can always put another question to the Court of Justice.

The validity of an act recognized by the Court of Justice depends on the complaints that were formulated before the Court. Other complaints may be made against the act in another lawsuit and be declared founded.

The ruling of invalidity is binding on the court that put the question, as well as on all courts that subsequently take cognizance of the case. A ruling of invalidity is not an annulment, however. An annulment may be requested in the cases and under the conditions stipulated in Article 230 of the Treaty. Until its withdrawal, the invalidated act remains in the legal system where its legal effect is nevertheless henceforth more than weakened.

Article 234, paragraph 3, of the Treaty requires that "any national court or tribunal against whose decisions there is no judicial remedy under national law" should refer to the Court of Justice any question of interpretation or validity of Community law that is raised before it.

This obligation would be particularly heavy if there were no exceptions to it. There are three exceptions which, for the sake of clarity, the Court of Justice reiterated one by one in its *Cilfit* judgment of 6 October 1982 (*Yearbook*, p. 3415). Firstly, referral to the Court of Justice is not obligatory if a reply to the preliminary question is not necessary for the settlement of the dispute, in other words, if it is not relevant. Secondly, referral is not required if the Court of Justice has already replied to a similar question. Finally, the national court is exempted from referring to the Court of Justice "when the correct application of Community law is so obvious as to leave no scope for any reasonable doubt" (*ibid.* p. 3432).

39. In the light of the brief reminder that has just been given of the role and mission of the Court of Justice of the European Communities in the matter under consideration, the central question that arises with respect to the relations between the Court of Justice and the Constitutional Court is to know whether the latter is "a national court against whose decisions there is no judicial remedy under national law", within the meaning of Article 234, paragraph 3, of the Treaty.

In this respect, two trends emerge from the national reports.

In the first hypothesis, set out by *Germany, Spain* and *Italy*, the Community system and the State system are two separate and distinct systems. Constitutional jurisdiction moves in a different domain from that of Community law. The sole function of constitutional jurisdiction is to rule whether or not a statute is compatible with the Constitution, whereas the Court of Justice refers in its jurisdiction to Treaties and secondary legislation.

The constitutional courts cannot be classified as national courts within the meaning of Article 234, paragraph 3, of the Treaty.

In the other hypothesis, reflected in the reports of *Austria, Belgium* and *Portugal*, the Constitutional Court is classified as a national court governed by Article 234 of the Treaty. In order to clarify the meaning of a statute that transposes a Community regulation into national law, the Constitutional Court may be led to ponder over not only the interpretation of the national regulation, but also and especially the interpretation of the Community regulation which in this case the legislator intended to transpose into national law. To this end, it must refer to the Court of Justice. Similarly, it will ponder over the validity of a Community regulation where an act under national law finds its legal basis.

To date, the Court of Justice of the European Communities has already had questions referred to it on four occasions by constitutional courts, three times by the Constitutional Court of Austria and once by the Court of Arbitration of Belgium. All four cases concerned preliminary questions regarding the interpretation to be given to an act of secondary Community legislation.

40. Must a court refer to the Court of Justice or to the Constitutional Court?

In *Germany*, it is considered that the courts do not have the choice, since the Court of Justice and the Constitutional Court each have their own scope of jurisdiction.

In the report of *Austria*, too, we read that this option does not exist either. The report points out that "a provision of internal law that clearly goes against Community law cannot be called preliminary as a necessary condition for referral to the Constitutional Court".

In *Belgium*, no priority is given to one Court or the other.

The report of *Spain* explains that the conflict between a regulation of national law and a regulation of Community law is not a constitutionality issue.

The question is irrelevant in *France* in view of the inability of the courts to refer cases to the Constitutional Council.

In *Portugal*, referral to the Court of Justice can take place during the course of the legal proceedings, whereas referral to the Constitutional Court takes place after the judgment.

The Constitutional Court of *Italy* requires that the question of the interpretation and validity of Community law be settled before the case is referred to it. If not, the Constitutional Court

returns the acts to the court *a quo* in order that the Community debate is finally settled before the Constitutional Court examines the constitutionality of the law.