I. THE CONSTITUTIONAL COURT'S RELATIONSHIP TO PARLIAMENT AND GOVERNMENT

Professor Tudorel TOADER, PhD, ***Judge of the Constitutional Court***
Marieta SAFTA, PhD, ***First Assistant Magistrate***

1. The role of Parliament (as the case may be, of the Government) in the procedure for appointing judges to the Constitutional Court. Once appointed, can judges of the Constitutional Court be revoked by that same authority? What could be the grounds/ reasons for such revocation?

The status of the constitutional judges, starting with the legislative provisions, the powers of the public authorities related to their appointment, the possibility for the same authorities to dismiss them, as well as the grounds for dismissal, duration of the term of office, as well as the possibility of a new term of office as judges are the factors based on which their independence and even the limitations in the fulfilment of their term are measured.

1.1. Parliament's role in the procedure for appointing the judges to the Constitutional Court.

Varying from case to case, Parliaments play an important role, sometimes even exclusive, in the appointment of constitutional judges.

a – *Parliament has exclusive power to appoint judges to the Constitutional Court.*

Consequently, in *Germany,* all constitutional judges are appointed by the Parliament. Half of the judges of a chamber are elected by the *Bundestag,* whereas the other half – by the *Bundesrat* – which means the directly elected representation of the people and by the *Land* representatives, based on the proportional representation rules. In *Switzerland,* the federal Parliament elects the judges of the Federal Tribunal, based on proposal by the Judicial Committee. In *Poland,* the 15 constitutional judges are individually appointed for a 9-year term of office, by the first Chamber of the Parliament. In *Hungary,* the eleven constitutional judges are elected by the Parliament. In *Croatia*, all thirteen judges are elected by the Croat Parliament. In *Montenegro,* the Constitutional Court judges are appointed by the Parliament.

b - *Parliament appoints part of the judges to the Constitutional Court.*

In *France,* the nine members of the Constitutional Council are appointed for a nine—year term, and, more specifically, three of them every other three years. With every renewal, one member is appointed by the president of the National Assembly and a second by the President of the Senate. In *Latvia*, of the seven judges of the Constitutional Court validated by the Parliament, three are proposed by at least ten members of the Parliament. In *Lithuania,* of the nine constitutional judges, one third is appointed based on proposal by the president of the Parliament. In the *Republic of Moldova*, the procedure to appoint judges to the Constitutional Court is a result of the principle of separation of powers in the State, enshrined in Article 6 of the Constitution, but also of the exclusive substantive jurisdiction of the Court to enforce this principle. Thus, two judges are appointed by the Parliament, two by the Government and two by the Superior Council of Magistracy (Article 136 par. (2) of the Constitution). In *Portugal,* the Parliament shall appoint ten out of the 13 judges. In *Romania*, the appointment of the constitutional judges is based on the provisions of Article 142 par. (3) of the Constitution, as follows: three judges are appointed by the Chamber of Deputies, three by the Senate and three by the President of Romania. It is worth pointing out that the legislator appoints two thirds of the constitutional judges, whereas the executive, through the President of Romania, appoints one third

of their total number. In *Spain,* of the twelve constitutional judges, four are appointed by the Congress of Deputies and four by the Senate. In *Armenia,* the National Assembly appoints five of the nine members of the Constitutional Court. In Belarus, of a number of 12 judges, six are elected by one of the Chambers of Parliament, whereas other six are appointed by the President of the Republic. In Turkey, two of the 17 judges of the Constitutional Court are elected by the Large National Assembly. The rest of 15 members of the Constitutional Court are selected by the President of the Republic.

c – *Parliament appoints constitutional judges based on proposal by the Head of State.*

In *Russia,* the judges of the Constitutional Court are appointed by the Federation Council, in a secret ballot, based on proposal by the President of the Russian Federation.

In *Slovenia,* judges at the Constitutional Court are elected by the National Assembly, through a secret ballot, based on the majority vote of the total number of Deputies, and based on proposal by the President of the Republic. In *Azerbaijan,* the appointment of Constitutional Court judges are made by the Parliament, based on recommendation by the President of the Republic. In *Slovenia,* the Constitutional Court judges are elected by the National Assembly, based on proposal by the President of the Republic of Slovenia.

d – *Parliament makes proposals to the Head of the State with respect to the appointment of judges to the Constitutional Court.*

Thus, in *Austria*, the constitutional judges are appointed by the Federal President, who, is, however, bound by the recommendations made by the other constitutional bodies. Consequently, of the 12 constitutional judges, three are appointed based on the recommendation by the National Council (the Parliamentary Chamber elected through a direct vote based on a proportional system), whereas other three members are appointed based on a proposal by the Federal Council (the Parliamentary Chamber appointed indirectly and which represents the *länder* of Austria). In *Belgium*, the 12 judges of the Constitutional Court are appointed by the King based on a list that is alternatively presented to him by the House of Representatives and the Senate. Usually, the King shall appoint the person who ranks first on the list of that House. Consequently, in reality, the judge is not appointed by the King, but by either the Deputies or the Senators. In practice, when they appoint the judges, the parliamentarian assemblies exercise the principle of proportionality, therefore the composition of the Court shall reflect the composition of the assemblies. Consequently, no candidate will have the opportunity of being recommended, unless they have the support of the political group which holds the respective position.

e – *Parliament expresses its consent in connection with the proposals of the Head of State concerning the appointment of judges to the Constitutional Court.*

Thus, in Albania, the members of the Constitutional Court shall be appointed by the President of the Republic, with the consent of the Assembly. In the Czech Republic, the Constitutional Court judges are appointed by the President of the Republic, based on the consent of the Senate.

f – *Parliament does not participate in the appointment of judges to the Constitutional Court.*

In *Luxembourg*, the Parliament is not involved in the procedure of appointment of judges, whereas in *Ireland*, the Parliament does not have a direct role in the appointment of judges at the Supreme Court. In *Cyprus*, the Parliament does not take part in the appointment of judges at the Supreme Court which is the authority empowered to carry out constitutionality reviews. The members of the Supreme Court are appointed by the President of the Republic. However, the President asks the Court to express its opinion, which is usually observed.

1. 2. The Government's role in the procedure for appointing the judges to the Constitutional Court.

In some States, the Government plays an important role, sometimes an exclusive one in the appointment of constitutional judges.

a – *Government has exclusive power to appoint judges to the Constitutional Court.*

Thus, in *Ireland,* the Government has the exclusive jurisdiction to appoint constitutional judges. The Government, after having selected a candidate for appointment, informs the President of Ireland on their appointment, whereas the President officially appoints the candidate. In *Norway*, the ordinary courts, in whose hierarchy, the Supreme Court rules as a last instance court, are competent to conduct the constitutionality review in terms of laws adopted by the Norwegian Parliament. The Norwegian Parliament does not take part in the appointment of judges. Judges are appointed by the State Council.

b – *Government appoints part of the judges to the Constitutional Court.*

In *Spain,* of the twelve constitutional judges, two are appointed by the Government.

c – *Government makes proposals for the appointment of judges to the Constitutional Court.*

Thus, in *Austria*, constitutional judges are appointed by the Federal President, who, however, is bound by the recommendations made by the other constitutional bodies. Therefore, of the 12 constitutional judges, six are appointment based on proposal by the Federal Government. In *Latvia,* of the seven judges of the Constitutional Court, who are validated by the Parliament, two are proposed by the Cabinet of Ministers.

1.3. Following their appointment, may the same authority revoke the judges of the constitutional court?

In most States, following their appointment, the constitutional judges cannot be dismissed by the authority that vested them with this high office.

By exception, the dismissals may be likely to occur, as follows:

In *Albania*, subsequent to their appointment, Constitutional Court judges may only be dismissed by the Assembly, based on a majority vote of two thirds of the number of members in the Assembly. In *Armenia*, the National Assembly is authorized in the cases and procedures prescribed by Law, on the basis of the conclusion of the Constitutional Court and by a majority vote of the total number of Deputies terminate the powers of any of its appointees to the Constitutional Court. In *Azerbaijan*, the provisions under Article 128 of the Constitution define the grounds and the dismissal procedure applicable to Constitutional Court judges. So, should a judge commit an offence, the President of the Republic of Azerbaijan, based on conclusions of Supreme Court of the Republic of Azerbaijan, may make statement in Milli Mejlis (Parliament) of the Republic of Azerbaijan with the initiative to dismiss judges from their office. Such conclusions of Supreme Court of the Republic of Azerbaijan must be presented to the President of the Republic of Azerbaijan within 30 days after his request. Decision on dismissal of judges of Constitutional Court of the Republic of Azerbaijan is taken by Milli Mejlis of the Republic of Azerbaijan by majority vote. In *Belarus*, according to the Constitution, the President is empowered to dismiss the president and judges of the Constitutional Court on the grounds provided by law with notification of the Council of the Republic. In accordance with Article 124 of the Code on Judicial System and Status of Judges, the said powers can also be terminated by the President if a judge voluntarily applies for resignation or dismissal, or the Constitutional Court asks for the termination of the powers on the grounds provided in the abovementioned Code (for example, appointment to another office or transfer to a different position) with notification of the Council of the Republic. Thereat the Constitutional Court submission shall be adopted by a majority vote of the full composition of the judges thereof. If the Constitutional Court submits for the termination of the judge

powers due to gross violations of his duties, commission of an act incompatible with public service, such submission shall be adopted by no less than a two thirds majority vote of the full composition of judges. In *Russia*, the termination of powers of a judge of the Constitutional Court of the Russian Federation shall be effected by the Federation Council, upon submission of the Constitutional Court.

1.4. Which are the reasons/ grounds for such dismissals?

In *Albania*, after being appointed, the judge of the Constitutional Court can be removed by the Assembly by two-thirds of all its members for violation of the Constitution, commission of a crime, mental or physical incapacity, or acts and behaviour that seriously discredit judicial integrity and reputation. The decision of the Assembly is reviewed by the Constitutional Court, which, when it determines the existence of one of these grounds, declares the removal from office of the member of the Constitutional Court. The examination procedure of the Assembly for the removal from office of the member of the Constitutional Court, for one of the aforementioned grounds, is initiated on the basis of a reasoned petition submitted by not less than half of all members of the Assembly. In *Armenia,* the grounds for termination of the powers of the member of the Constitutional Court are envisaged in Part 3, Article 14 of the Law on "the Constitutional Court." In accordance to the latter, membership in the Constitutional Court shall be terminated on the basis of a conclusion of the Constitutional Court by the appointing body when the Member:
1) has been absent for three times within one year from the sessions of the Court without an excuse;
2) has been unable to exercise his/her powers as Constitutional Court Member for six months because of some temporary disability or other lawful reason;
3) violates the rules of incompatibility related to the Constitutional Court Member prescribed by this Law.
4) expressed an opinion in advance on the case being reviewed by the Constitutional Court or otherwise raised suspicion in his/her impartiality or passed information on the process of the closed door consultation or broke the oath of the Constitutional Court Member in any other way.
5) is affected by a physical disease or illness, which affects the fulfilment of the duties of a Constitutional Court Member.

In *Russia*, termination is possible if the procedure to appoint the Constitutional Court judge was violated, as provided in the Constitution of the Russian Federation and the Federal Constitutional Law mentioned above.

2. To what extent is the Constitutional Court financially autonomous – in the setting up and administration of its own expenditure budget?

2.1 General issues

In most States Members to the Conference, the Constitutions[1] and the infraconstitutional legislation, respectively the laws concerning the organisation and functioning of Constitutional Courts,

[1] Even if the Constitutions do not have specific provisions with respect to the financial resources of the Constitutional Courts (a generic name for courts, tribunals or constitutional councils), the financial autonomy of these public authorities derives from the principle of independence of the judiciary, which is enshrined in the fundamental laws. Thus, for instance, the Constitution of the Russian Federation provides in Article 124 of the Constitution of the Russian Federation a general guarantee of financial independence of courts, stating that they shall be financed only from the federal budget, and that the funding should ensure the possibility of the complete and independent administration of justice in accordance with federal law. To that effect, in its report, the Constitutional Court of Lithuania held in its Ruling of 22 October 2007 that the independence of judges and courts is *"inter alia* ensured by consolidating self-governance of the judiciary, meaning that the judiciary is all-sufficient, and its financial and technical provision."

as well as, in some cases, budget laws or public finance laws, contain various rules that lay out a specific legal regime of financial autonomy of the Constitutional Courts, which is guaranteed by the mechanism of funding, elaboration of the own budget established by law and management of that budget. In a reduced number of cases, either there is no such autonomy (for example, the Constitutional Court of Luxembourg), or, even if such is guaranteed, the financial autonomy does not exist from the practical point of view (an aspect which was highlighted by the Constitutional Court of the Republic of Croatia).

The provisions related to the financial autonomy of the Constitutional Courts and its scope has some particularities, especially in connection with the following: funding, determination of the budget for expenses, its endorsement (including from the point of view of the margin of appreciation and the discretion of the executive and legislative authorities involved in this process), management of the endorsed budget.

2.2 Funding of Constitutional Courts

Constitutional jurisdiction authorities – Constitutional Courts or Supreme Courts (Tribunals), respectively Federal Tribunals, have their own budget, which is integral part of the State budget approved by the law-making authority, as the financial resources of the Courts are represented by the appropriations transferred on a yearly basis by the State. A special case is Portugal, where, besides the financial resources allocated by the State, the Constitutional Tribunal also has its own resources. According to Article 47-B of the Organic Law on its own organization, functioning and procedure, "*in addition to the State budget appropriations, own funds of the Constitutional Tribunal are deemed to comprise the balance managed and carried over from the previous year, the proceeds of expenses and fines, the profit derived of the sale of publications, issued by the Tribunal, or of the services supplied by the documentation department, as well as all the other earnings, which are allocated to it by laws, contracts or in any other way*."

2.3 Drafting the expenditure budget

● In most cases, the draft budget of Constitutional Courts (Tribunals) is determined by them and submitted to the executive authority to include it in the general budget draft law and then submitted to the endorsement of the law-making authority.

However, there are also exceptions from the above-mentioned rule.

Thus, the budget of all Courts in Ireland, including the Supreme Court, is determined by the Government and submitted to Parliament for approval. The budget is negotiated by a consultative process whereby the Courts Service, an independent statutory body which manages the courts and provides administrative support to the judiciary, makes a submission to the Department of Justice and Law Reform. The Department of Justice then negotiates with the Department of Finance on behalf of the Courts Service, but with the participation of the Courts Service, regarding the level of funding. Arising from this process the level of funding made available to the Courts Service is decided by the Government and submitted to the Oireachtas (the National Parliament).

In Monaco, the budget of the Supreme Tribunal is integrated in the general budget of courts and tribunals, set and managed by the Director of the Judicial Services (compared to a Minister of Justice).

The Supreme Court of Norway does not set up its own budget. However the court presents a budget proposal to the National Courts Administration, which is an independent administrative body. The NCA then presents a draft budget for the courts to the Ministry of Justice. The Ministry then presents its framework budget for the Parliament for approval as part of the Government's overall draft annual State Budget. The budget of the Supreme Court is independent of the budget of the lower courts and will thus be dealt with separately.

A similar situation existed in *Germany* where in the first years of activity (1951-1953), the budgetary funds for the Federal Constitutional Court formed an element of the individual budget of the Federal Ministry of Justice. The Federal Constitutional Court was therefore able to register and reason its funding requirements only to the Ministry of Justice, and not directly to the Federal Ministry of Finance and to Parliament's budget committee. A consequence of attribution to the individual budget of the Federal Ministry of Justice was also that the Federal Constitutional Court was not able to independently manage the funds provided for it, and therefore that it was not for instance able to decide for itself on filling posts within the administration of the Court. This state of affairs was however soon regarded as not being compatible with the principle of the separation of powers, or with the legal status of the Court as a constitutional organ. The Federal Constitutional Court has had its own individual budget within the federal budget since 1953. This means that it is able to register its needs independently with the Federal Ministry of Finance.

● There are also cases when the draft budget prepared by the Court is sent or presented directly to the law-maker. In *Belgium*, for instance, according to a customary rule, provided in an agreement concluded between the Chamber of Representatives and the Constitutional Court, it shall determine its budget and, based on that, it shall submit its appropriations application directly to the Chamber of Representatives, whereas it shall also notify it to the minister for budgetary affairs[2].

In *Switzerland* as well, the Swiss Federal Tribunal determines its own budget, it presents it to the competent parliamentarian committees and in the plenary of the Parliament. The Federal Department of Justice and Police (the Ministry of Justice) does not have a say within the budget adoption procedure.

● A matter that calls into debate the real nature of the financial autonomy of the Constitutional Courts has to do with the possibility of the executive authority to have a say on the draft budget submitted by the Constitutional Courts. There are differences among the participating States in connection with this point.

Thus, for instance, in *Poland*, neither the Ministry of Finance, nor the Government has the possibility to interfere with the content of the draft budget sent by the Constitutional Tribunal.

In *Estonia*, the reasonableness and advisability of the budget expenditure is negotiated between representatives of the Ministry of Finance and the Supreme Court (which comprises the Constitutional Review Chamber). Following the negotiations and resolution of disagreements at the governmental level the Ministry of Finance draws up the draft state budget and submits it to the Parliament via the Government. In the budget negotiations with the officials of the Ministry of Finance the Supreme Court is represented by the Director of the Supreme Court and in negotiations with the members of the Government and the Parliament by the Chief Justice. Upon amendment or omission of amounts allocated to the Supreme Court in the draft State budget, the Government of the Republic shall present the amendments with justification therefore in the explanatory memorandum to the draft State budget aimed at the Parliament.

In *Germany*, according to the provisions of the Federal Budget Code, the Ministry of Finance is not required to accept all registered estimates according to the regulations of the Federal Budget Code described above. In the event that the estimates of the Federal Constitutional Court are derogated from, it is nonetheless safeguarded that its registrations are forwarded to the further deciding agencies. The

[2] Actually in Belgium, there is a strong guarantee related to the budgetary autonomy of the Constitutional Court. To that effect, Article 123, § 1 of the special law provides that "the funding required for the functioning of the Constitutional Court shall be recorded under the budget allocated for *dowries*". When the Court had been established, such appropriations were only provided for the Chamber, the Senate and the royal family. Any appropriation titled *dowry* means that the Court is the one to determine the way in which such allocated funding will be used, as it is not broken down through the budget law: this autonomy related to the financial management of the institution has always been regarded as mandatory guarantee for the independence of the institution.

Federal Budget Code provides that derogations in the draft of the Ministry of Finance from the preliminary estimates of the President of the Federal Constitutional Court, just as derogations from preliminary estimates of the Federal President and of the Presidents of the *Bundestag*, of the *Bundesrat* and of the Federal Audit Office, are to be notified to the Federal Government if they have not been carried out in agreement (§ 28.3 of the Federal Budget Code). A corresponding arrangement is provided for in case the draft adopted by the *Federal Government* on the basis of the draft of the Ministry of Finance which forms the basis of Parliament's deliberations derogates in a not consented manner from the preliminary estimates of the organs in question (§ 29.3 of the Federal Budget Code). It is ensured by these means that the Federal Constitutional Court is able to submit its budget proposals in unabridged form to the agency which ultimately decides, namely Parliament.

In *Latvia*, the Law on Budget and Financial Management provides that the budgetary request of the Constitutional Court shall not be amended, up to the submission of the draft budget law to the Cabinet, without the consent of the submitter of the request. Consequent, the Minister of Finance does not have the right to introduce amendments into the budgetary request of the Constitutional Court. The Cabinet of Minister, however, does have the right to introduce such amendments without co-coordinating them with the Court. At present, the Constitutional Court examines a case on compliance of this provision with the Constitution.

In *Portugal*, the possibility of the Government to amend the draft budget developed by the administrative departments of the Court is not completely excluded either. However – it is emphasized – that attention needs to be paid to "the political-constitutional requirement to inform the Parliament as regards the content of this draft, even if the Government has not endorsed it (more specifically when the two bodies did not have a concerted attitude)".

A special case is highlighted by the Constitutional Court of the Republic of Macedonia. According to the national report, at the end of every financial year, the Constitutional Court drafts a Proposed-Budget for the next year in which it projects its needs for funds for an unobstructed functioning and execution of its competences. This proposal is submitted to the Ministry of Finance, which prepares the Draft-Budget of the Republic of Macedonia and submits it to the Government of the Republic of Macedonia, which defines the text and submits it to the Assembly of the Republic of Macedonia for adoption. In this long way the needs are not taken into consideration, and the Court never receives the funds it requests, that is, besides its modesty, in an average it receives 20% less than the funds needed. As the Government is not obliged to take over the projected Budget of the Constitutional Court and include it in the State Budget, the Court is forced to react almost always, even to plead to have an intervention, with an amendment, into the text of the State Budget, in order to have the funds for the Court provided with a view to its normal functioning. This is certainly due, *inter alia*, to the constitutional position of the Government as the only proposer of the Budget before the Assembly and to the fact that the Constitutional Court does not have any instrument whatsoever to fight such setup. Even when using the funds approved in the Budget, the Court has a problem in the enforcement of the payment orders for certain needs.

Also, in *Bosnia and Herzegovina*, even if the relevant rules provide that the Constitutional Court is financially autonomous, it is emphasized that this presents a problem which the Constitutional Court is continuously faced with in its practice.

● As to the principles which the law-making authority needs to observe upon approval of the budget of the Court, within the general budget, it is worth pointing out that according to various legislations, there is a rule according to which the yearly allocated resources for the activities of the Constitutional Court must not be reduced as compared to the budgetary appropriations for the previous fiscal year (*Azerbaijan, Georgia, the Russian Federation*).

Starting from the reality according to which, in some States, the Constitutional Court, through its representatives, does not have the opportunity to assist or actively participate in the parliamentarian

debates in connection with the draft budget law, and consequently, it is unable to influence the decision concerning the amount of the funds allocated for the activity of the Court, an opinion was expressed according to which the Constitutional Court should be provided a more active role in this respect, reflecting its role and importance and that the budgetary autonomy of the Constitutional Court should be governed by law. To that effect, some national laws set forth the participation of the Constitutional Courts (Supreme Courts) representatives in the parliamentarian debates concerning the budget (for instance: *Cyprus, Montenegro, Poland, Turkey*).

2.4 Management of the expenditure budget

Another component of the financial autonomy of the Constitutional Courts is given by the independence in terms of managing the funds allocated through the own budget, within the limit of the endorsed budgetary loans, and, usually, the purpose of the appropriations needs to be preserved.

Most Constitutional Courts show that until now, they have not had any problems with the determination of their own budget or with its management.

There are still exceptions, one of them highlighted by the Constitutional Court of the Republic of Croatia, which shows that, even if its rule of operation contains the guarantee with constitutional force that "the CCRC may independently distribute the assets approved in the State Budget for the functioning of the activities of the CCRC, in accordance with its annual budget and the law", this formal guarantee has not however been realized in practice yet. In everyday legal life the CCRC is considered an “ordinary” budget user to which not only all the relevant regulations related to budgetary issues apply, but also secondary regulations passed by the Government of the Republic of Croatia and the Ministry of Finance, including internal instructions of the Ministry of Finance, especially the State Treasury Department. To conclude, in practice the CCRC enjoys no autonomy in distributing the assets within its annual budget, although this autonomy is expressly guaranteed in the CACCRC.

Just the same, the Constitutional Court of the Republic of Macedonia, even when using the funds approved in the Budget, has a problem in the enforcement of the payment orders for certain needs.

● As to changing the amount of endorsed funds, such may take place during the year within the budgetary correction procedure. In *Armenia*, for instance, in order to ensure the regular activity of the Constitutional Court and to fund the unexpected expenses, a deposit fund is prescribed, which is presented by a separate line of the budget.

In principle, following the endorsement of the budget by law, the appropriations of the Court cannot be decreased any longer. However, such a possibility is provided, for instance, in the case of the Republic of Lithuania, where the appropriations may be reviewed if the State goes through a severe economic and financial situation. Also, in *Croatia*, even if endorsed and established in the State budget, the appropriations for the yearly budget of the Constitutional Court are not sheltered against the interventions of the executive branch of power during the execution of the budget.

● Constitutional Courts draft reports concerning the execution of their budgets, which are submitted to the Minister of Finance, respectively, to the Parliament and subject to the inspection of the Courts of Accounts.

A special case is highlighted in the report of the Constitutional Court of Italy, which shows that, within the endorsed budget, expenses are set by the Court and its internal bodies, in full autonomy, without any type of external interferences, including for purposes of audit or control. In connection to the latter point, it is possible to state that the Constitutional Court does not fall within the scope of application of Article 103, Paragraph 2 of the Constitution, which affirms that "*The Court of Accounts has jurisdiction in matters of public accounts and in other matters laid out by law*." The Court itself - in Case No. 129 of 1981 - decided a dispute stemming from the claim, of the Court of Accounts, to

audit the Treasurers of the Presidency of the Republic and of the two Houses of Parliament. Although the Constitutional Court was not directly involved in the dispute, the *ratio decidendi* of the decision, which rejected the claim advanced by the Court of Accounts, can also be extended to include the Constitutional Court. From that *ratio* it is possible to discern, indeed, that the legal foundation of the Court of Account's jurisdiction to review is not of immediate operation in every case, as it must necessarily face the limits posed by the objective amenability of subjects to review and by the respect for constitutional norms and principles. In particular, the autonomy and independence enjoyed by the highest constitutional organs must be acknowledged not only as consisting in powers of self-organization, but also in the application of constitutional measures, which does not envisage any possibility for invoking administrative or jurisdictional remedies. With regard to the apparatuses at the service of constitutional powers, the exemption from accounts-related judgments (*giudizi di conto*) is the direct reflection of the autonomy enjoyed by the highest constitutional organs, *a fortiori* in light of the absence of detailed and specific constitutional regulation, integrated by unwritten principles consolidated through the constant repetition of uniform courses of conduct. Holding the power to submit the Treasurers of the Presidency of the Republic, and of the lower and upper Houses of Parliament, to auditing review is not, therefore, within the jurisdiction of the Court of Accounts.

3. Is it customary or possible that Parliament amends the Law on the Organization and Functioning of the Constitutional Court, yet without any consultation with the Court itself?

3.1 Regulating the organization and functioning of the constitutional court

Essentially, constitutional justice is institutionalized in the Constitution itself, which means that the fundamental rules for the organisation and functioning of the Constitutional Courts must be stipulated in provisions of a constitutional order.

As at the basis of the constitutional jurisdiction lie statutory provisions with the highest rank in the regulatory hierarchy, change in the provisions regulating the organisation and functioning of the Constitutional Court does not generally constitute a very simple matter, whereas the law-maker cannot significantly change the nature of constitutional justice (see to that respect the report by the Constitutional Courts of *Austria, Belgium, the Republic of Croatia, the Republic of Poland or Romania*). This is deemed to be one of the strongest guarantees to preserve the independent position of the Constitutional Court within the system of political power, as it prevents the law-maker to influence its status through frequent changes of the law (see the report of the Constitutional Court of Croatia).

The provisions of the Constitution are further developed by special laws, based on which the Constitutional Courts adopt own Rules of organisation and functioning.

Particular cases are highlighted in the report of the Constitutional Court of Bosnia and Herzegovina wherein it is emphasized that the Constitution of Bosnia and Herzegovina does not provide that a Law on the Constitutional Court shall be enacted but it provides that the Constitutional Court shall adopt its own Rules of the Court. Thus, the only act, in addition to the Constitution of Bosnia and Herzegovina, which regulates the activity of the Constitutional Court are the Rules of the Court of BiH which have force of an organic law. According to the Rules of the Constitutional Court, the Constitutional Court is the only competent authority to amend the Rules of the Constitutional Court. Also, in the Republic of Macedonia the organisation and functioning of the Constitutional Court is not the subject of legal regulation, but they are regulated by the Constitutional Court itself with a Book of Procedures; it has been found that the possibility for the Constitutional Court to regulate, autonomously, by its own enactment, its work, that is manner of handling and internal organization, has demonstrated its positive side so far in the practice.

3.2 Relationships between the legislative – constitutional court in the framework of the procedure to amend its act of operation and functioning

The general rule that may be emphasized is that the organisation and functioning of the Constitutional Courts (Tribunals) or Supreme Courts is governed by a law, adopted by the legislator, which may be amended without the consultation of the Constitutional Court, in the sense that there is no regulation that might oblige the legislator to undertake such an action, a rule resulting from of the general principle of separation of powers.

In very few cases, it was highlighted that there were either specific regulations, or there was an obligation to send the amending draft law to the Constitutional Court (Czech Republic), or the chief justice of the Constitutional Court had the possibility to take part and take the floor during a parliamentarian meeting (Rules of Parliament of Hungary). Thus, in the Czech Republic, Article 5 par. 1 let. c) of the Rules provides that a draft statute or substantive outline thereof shall be given to the Constitutional Court, the Supreme Court, and the Supreme Administrative Court, if it concerns them as organisational components of the State, or their competence, or the procedural rules that govern them. Thus, the Constitutional Court is always a commenting party for a potential amendment to the Act on the Constitutional Court. However, its comments are of the nature of recommendations and consultations, and the Constitutional Court does not have a veto in the process. In the event of a draft statute (or amendment) submitted by a subject other than the government, the Constitutional Court is not legally entitled to make comments, though the proponent of the statute may ask for its opinion, as may the Parliament during debates.

In some States, the amendment of the such law was conducted at the very proposal of the Constitutional Court [for instance, the special law concerning the Constitutional Tribunal of Andorra (LQTC) or the Law concerning the organisation and operation of the Supreme Court of Norway].

Even if there is no statutory obligation for the legislative to consult the Constitutional Court upon any amendment to the law regarding its organisation and functioning, in practice, such a consultation actually takes place (*Albania, Austria, Belarus, Belgium, Cyprus, Republic of Croatia, Estonia, Germany, Ireland, Republic of Latvia, Lithuania, Luxembourg, Portugal, Norway, Republic of Moldova, the Russian Federation, the Republic of Serbia*), because, as highlighted in various reports (*Azerbaijan, Cyprus, Slovenia*), there is a practice or a custom in this respect.

Consultation may be more or less formal, it may be under the form of invitations addressed to the Constitutional Court to express an opinion at the beginning of the legislative procedure, requests for an opinion or a recommendation, it may take the form of a debate throughout the time when the draft law is developed or of participations in the committee of experts that contribute to the drafting of a new law or to a major review of the law in force.

In this context was invoked (*Germany*) a constitutional principle of faithful co-operation between organs (*Organtreue*) which was first mentioned in a set of constitutional complaint proceedings. The Federal Constitutional Court initially left it open at that time as to whether such a constitutional principle exists and whether, if so, such could be invoked by a complainant in constitutional complaint proceedings[3], but the principle was, however, explicitly recognized in its decisions rendered later on[4]. This principle does not imply that, prior to any exercise of its competence which is related in any way with the tasks of another constitutional organ, a constitutional organ would have to consult this other organ. One could however consider whether or not the principle of faithful co-operation between organs could be considered to have been violated if the organisational and procedural basis of the activity of a constitutional organ was to be changed without the organ in

[3] See Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 29, 221 <233>.

[4] See BVerfGE 89, 155 <191>; 97, 350 <374-375>; 119, 96 <122>.

question previously having been enabled to make a statement on the intended change. For instance, the principle of federal comity (conduct which is well-disposed towards the Federation), on which the principle of faithful co-operation between organs is modelled, has been interpreted by the Federal Constitutional Court in such a way that the duty to give consideration to one another postulated by this principle obliges the Federation to hear the *Land* in question – apart from in cases of particular urgency – prior to making use of the right to issue instructions to which it is entitled with regard to certain administrative matters of the *Länder*[5].

By exception from the above-mentioned rule, such consultations are not allowed, and the following reasons are invoked in this respect: either the separation between the activity of the Court and Parliament, two bodies which operate in distinct spheres and which do not intersect, even if the laws that are to be endorsed aim the Court directly (for instance, *Italy*) or that the operated changes may be subsequently subject to the examination by the Constitutional Court within its constitutionality review in the case of laws (for instance, *the Republic of Armenia*). The Turkish Constitutional Court points out in this respect in its national report that, in practice, at least verbal consent of the Constitutional Court is taken into account in the amendment of its law of organisation. Since the Constitutional Court reviews constitutionality of laws, it is regarded as a delicate issue. It is likely that the law amending the Law on the Organization and Functioning of the Constitutional Court may be brought before the Constitutional Court. For that reason, the Constitutional Court avoids expressing its views on a draft law. For this reason, also in *Ukraine* such consultations are limited in practice.

4. Is the Constitutional Court vested with review powers as to the constitutionality of Regulations/ Standing Orders of Parliament and, respectively, Government?

4.1 Constitutionality review of Regulations/ Standing Orders of Parliament

Constitutional Courts, in most of the cases, have jurisdiction to verify the constitutionality of the Regulations (or equivalent acts) of Parliament (generic name for the legislative authority). This is also in consideration of the fact that the acts that regulate the organisation and operation of Parliament, do occupy, in many countries, a special position in the hierarchy of regulatory acts, and (where they are not expressly listed in the category of laws) they do have the value and force of a law[6], and thus, as a rule, these acts cannot be challenged before ordinary courts but only before Constitutional Courts.

There are also situations where such prerogative is not stipulated. Thus the Constitution of Bosnia and Herzegovina does not explicitly provide that the constitutionality review body has jurisdiction to examine the constitutionality of the Rules on Procedure of the Parliamentary Assembly, and the Constitutional Court so far has not had an opportunity to interpret its jurisdiction in a case on this matter.

The Belgian Constitutional Court does not have jurisdiction to look into the rules that govern the operation of the Federal Parliament and Government.

Luxemburg's Constitutional Court reviews only the constitutionality of laws, and can be referred only through a judicial or administrative court that will address a matter concerning the constitutionality of a law, which needs to be clarified in view of the settlement of the case on its docket. This Court does not have a special jurisdiction to review the Standing Orders of Parliament,

[5] see BVerfGE 81, 310 <337>; see also BVerfGE 104, 249 <270>

[6] Concerning the legal nature of the Standing Orders of the Chambers of Parliament, the report of the Romanian Constitutional Court shows that such acts do not come in the category of laws, because unlike the latter, they can only regulate the internal organisation and operation of the Chambers and are not subject to promulgation by the President of the country. However, in accordance with Article 76 par. (1) of the Constitution, resolutions concerning the Standing Orders of each Chamber shall be passed just like organic laws, by a majority vote of the members in each Chamber, so as to ensure the widest expression of the will of Deputies and, respectively Senators concerning the regulatory stipulations.

respectively Government.

Italy's Constitutional Court has obviously ruled out any possibility of review of the Standing Orders of Parliament. In their report they quote a well-established case-law in this respect, and mention is made to the reference case no. 154 of 1985, where a statement of case inadmissibility (and hence the Court's impossibility to examine the merits) relied on two reasons: firstly the rules of Parliament are not included in the steps stipulated at Article 134, sub-section 1 of the Constitution (according to which "*The Constitutional Court shall rule on [...] controversies arising from the constitutional legitimacy of laws and regulations that have the power of a law, issued by the State and Regions*"); and secondly there is the institutional position of the Chambers of Parliament ("the immediate expression of the people's sovereignty"). Looking at the first reason, the Court – in consideration of the fact that Article 134 of the Constitution has "rigorously set the precise and insurmountable limits of a judge's authority concerning the laws in our legal system" inferred that "since the text [of the Article] ignores the Parliamentary rules, it is only by way of interpretation that such might be included." The impossibility of extended interpretation of Article 134 was thus justified in the light of its declared incompatibility with the system, which characterises Parliament as a central body whose independence must be secured in relation to all the other powers. By transposing this argument from the body (Parliament) to the source (the regulations), the impossibility of reviewing the rules of Parliament derives from the latter's special role as "direct executor of the Constitution," which in itself gives rise to a "particularity," an expression of the fact that "the constitutional preserve of regulatory power comes under the guarantees stipulated by the Constitution in order to ensure the independence of that sovereign body from any other power."

Also the Constitutional Court of Moldova lacks that prerogative.

There are also situations where this prerogative is conditional. Thus, for example, in *Albania* the Standing Orders of Parliament can be the subject to constitutionality review only in cases affecting its provisions of constitutional nature (Judgments no. 29/2009 and no. 33/2010 by the Constitutional Court of Albania).

In *Ireland*, the Supreme Court of Justice established, in its case-law, that courts of law cannot intervene upon the right of the Oireachtas (National Parliament) to establish its own rules and standing orders. Nevertheless, we note that certain judges of the Supreme Court felt there could be exceptions from this principle in case the rights of a citizen are in question.[7]

● In the cases where the Constitutional Courts do have such power, it is specifically provided by those States' Constitutions and by the laws for the organisation and operation of the Constitutional Court, or, in certain situations, will be inferred by way of interpretation, in considering such type of regulations as coming under a certain category (laws) or in considering the position they occupy in the hierarchy of regulatory acts.

Thus, for instance, the Standing Orders of the Grand National Assembly of the Republic of Armenia have the status of a law. Since the Constitutional Court has jurisdiction to exercise constitutionally review over laws, the Standing Orders of the Grand National can also be subject to constitutionality review.

Similarly, the Constitutional Court of the Republic of Croatia stated, in principle, by its Judgment no. U-II-1744/2001 of 11 February 2004, with respect to the nature of the Standing Orders of the Croatian Parliament and established that they have the force of a law. With a number of specific

[7] De Blacam, *Judicial Review* (second edition Tottel, 2009) p.74, about *Maguire versus Ardagh* [2002] 1 IR 385; quoted here is Article 15.10 in the Constitution of Ireland, which reads: *"Each House shall make its own rules and standing orders, with power to attach penalties for their infringement, and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person or persons interfering with, molesting or attempting to corrupt its members in the exercise of their duties."*

distinctions (determined, in the case of Austria, by the meaning of the notion "Standing Orders" in the laws in this State), the same reasoning applies in relation to the jurisdiction of the Constitutional Court of Austria, Estonia, Republic of Macedonia, Republic of Poland, Ukraine.

Along the same line, the Lithuanian Constitutional Court Report stipulates that neither the Constitution nor the Law on the Constitutional Court, which defines the powers of the Constitutional Court, textually establish that review exercised by the Court applies also to the the constitutionality of the Standing Orders of the Seimas or the lawfulness of the provisions of the Rules of operation of the Government. Such power of the Constitutional Court stems from the principles of supremacy of the Constitution, rule of law, hierarchy of legal acts and other constitutional mandatory requirements. The Constitutional Court held, in its case-law that, under the Constitution, there may not be any such laws adopted by the Seimas the compliance of which with the Constitution and constitutional laws would not be subject to investigation by the Constitutional Court; under the Constitution, there may not be any such other legal acts adopted by the Seimas the compliance of which with the Constitution, constitutional laws and laws would not be subject to investigation by the Constitutional Court; under the Constitution, there may not be any such acts of the President of the Republic the compliance of which with the Constitution, constitutional laws and laws would not be subject to investigation by the Constitutional Court; under the Constitution, there may not be any such acts of the Government the compliance of which with the Constitution, constitutional laws, laws and Seimas resolutions on implementation of laws would not be subject to investigation by the Constitutional Court (Constitutional Court ruling of 30 December 2003). Therefore, when the Constitutional Court was investigating the constitutionality of the Statute of the Seimas for the first time, substantiated it by the fact that the statute is a legal act adopted by the Seimas which, under the Constitution, has the force of a law, therefore, it had to be assessed both in the formal and substantive sense. All the more so that there may not be any such legal act adopted by the Seimas the compliance of which with a legal act of higher legal power would not be subject to investigation by the Constitutional Court.

Similarly, the Constitutional Court of Slovenia held in Decision No. U-I-40/96, dated 3 April 1997, that it has jurisdiction to review the Rules of Procedure of the National Assembly. It held that the Rules of the Procedure are certainly not a law in the formal sense, but "in a formal sense [...] a unique legal act which regulates questions of the internal organization and operation of the National Assembly, and procedures for adopting the acts of the National Assembly, as well as the relations of the National Assembly to other State organs."[8] In the circumstances where it results the Rules of Procedure of the National Assembly significantly prevent the exercise of constitutional rights or respect for the functions protected under the Constitution, or makes such exercise impossible, this runs counter the Constitution from the respective points of view.

In *Germany* there is a series of proceedings under which the Rules of Parliament and the Government can become – directly, in part, or only indirectly – the subject of constitutionality review by the Federal Constitutional Court. Thus, in the proceedings for the abstract review of statutes (Article 93.1 no. 2 of the Basic Law, §§ 13 no. 6 in conjunction with §§ 76 et seq. of the Federal Constitutional Court Act) by request of the Federal Government, of a *Land* Government or of one-third of the members of the *Bundestag* the Federal Constitutional Court can – inter alia – review the compatibility of federal law with the Basic Law. According to the prevailing view, "federal law" within the meaning of these provisions includes legal provisions of all levels, including the rules of procedure of the constitutional organs (see Wieland, in Dreier, *GG*, Vol. III, 2nd ed. 2008, Article 93, marginal no. 58; Hopfauf, in: Schmidt-Bleibtreu/Klein, *GG*, 11th ed. 2008, Article 93, marginal no.

[8] Decision by the Constitutional Court U-I-40/96, dated 3 April 1997 (Official Journal of the Republic of Slovenia, No. 24/97, and OdlUS VI, 46), par. 3.

101). In practice, however, the Rules of Procedure of the German *Bundestag* and of the Federal Government have so far never yet been reviewed *in this procedure*. However, provisions contained in the Rules of Procedure of the *Bundestag* have been the subject-matter of a review in disputes between organs (*Organstreitverfahren*) several times.

● Some Constitutional Courts used their case-law to substantiate the subject matter of constitutionality review in this case.

Thus, for instance, the Romanian Constitutional Court established that the subject of the review are the Standing Orders of Parliament, namely the own regulations of the two Chambers as well as the joint regulations, including decisions to amend or supplement the Standing Orders of Parliament, respectively the decisions by the Chambers of Parliament that have a regulatory character and contain stipulations on the organisation and operation of Parliament as a whole, or of each separate Chamber. To that effect, the Romanian Constitutional Court stated that it is not competent to exercise a constitutionality review on the interpretation or application of the Standing Orders of Parliament. By virtue of the principle or regulatory autonomy, as established in Article 64 par. (1) first sentence of the Constitution, the Chambers of Parliament have exclusive jurisdiction to interpret the regulatory contents of their own regulations and decide upon the way such shall be applied, and failure to comply with certain regulatory provisions can be established and settled using exclusively parliamentary procedures [Constitutional Court Decisions nos. 44/1993[9], 98/1995[10], 17/2000[11], 47/2000[12]]. Likewise, the Constitutional Court noting that in certain cases the challenges concerned the incomplete character of certain provisions in the Standing Orders, or a defective formulation thereof, for the purpose of supplementation or amendment thereof; the Court found that such challenges were exceeding its jurisdiction.[13]

Also in the national report of the Spanish Constitutional Tribunal there is a clear distinction between the Standing Orders of Parliament, which come within the scope of constitutionality review, and other acts issued by the same authority which fall under the jurisdiction of ordinary courts. It is thus pointed out that judicial bodies have jurisdiction to rule with respect to Parliament's disputes related to personnel, management and administration of assets, as well as in the case of litigations in matters concerning property or material liability. The acts that can become subject to challenge are those that are issued by the management and administration bodies of the two Chambers in applying parliamentary laws and rules, but never those laws and rules in themselves, without thereby affecting the ability of courts of law to remove the unconstitutional aspect of the challenged parliamentary rule. Parliamentary rules that can come under scrutiny by courts of law are those that cause effects that involve third parties other than Members of Parliament**:** the institution's staff, suppliers, etc.; rules cannot come under scrutiny that have to do with internal regulations for the organization and operation of a Chamber (*interna corporis*).

● The constitutional review can be carried out *a priori* – i.e. before the entry into force of the Standing Orders (example: *Monaco*) or their application (example: *France*), or *a posteriori*, i.e. after their entry into force (example: *Romania*); some Constitutional Courts can exercise the review both *a priori* and *a posteriori* (example: *Constitutional Court of Hungary*).

In *Monac*o, for instance, the National Council's Rules of internal organisation cannot enter into force before their constitutionality is reviewed by the Supreme Tribunal, and if such provisions are found unconstitutional they cannot be applied. The current Rules of the National Council were the

[9] published in the "Official Journal of Romania," Part I, no. 190 of 10 August 1993
[10] published in the "Official Journal of Romania," Part I, no. 248 of 31 October 1995,
[11] published in the "Official Journal of Romania," Part I, no. 40 of 31 January 2000
[12] published in the "Official Journal of Romania," Part I, no. 153 of 13 April 2000
[13] Decision no. 317/2006, published in the "Official Journal of Romania," Part I, no. 446 of 23 May 2006

subject of two decisions by the Supreme Tribunal. Following a finding of unconstitutionality concerning some of its stipulations, the National Council reviewed those stipulations immediately, under a Decision of 28 October 1964; under ruling of 25 May 1965, the Supreme Tribunal found the Rules in their entirety in compliance with the Constitution and applicable law.

In *France*, under Article 61 par. 1 of the Constitution, the regulations of the parliamentary chambers and amendments thereof are subject to a systematic review exercised by the Constitutional Council.

The Constitutional Court of Hungary, as part of its *ex ante* oversight responsibilities, performs the constitutionality review of Parliament's Rules [§1 item a) in the CC Law]. Thus before adopting its rules of procedure, Parliament can ask the Constitutional Court to look into their compliance with the Constitution, with an indication of the stipulations they feel are more likely to require verification. In case the Constitutional Court finds that one of the stipulations in the Rules is unconstitutional, Parliament will strike it out. [§34 sub-sections (1), (2)]. The oversight function can also be exercised *ex post facto* [§1 item b) in the CC Law], and any individual can file a motion for the Constitutional Court to start an oversight procedure [§21 subsection (2) in the CC Law].

● The constitutionality review can be direct, on referral by certain entities specifically and distinctly stipulated by law (e.g. - in *Andorra* – one-fifth of the parliamentarians; in *Romania* – one of the presidents of the two Chambers, a parliamentary group, or a number of at least 50 Deputies or at least 25 Senators); or it can be indirect, as part of exercising a different power stipulated by law.

Some examples of indirect oversight come from the German Federal Constitutional Court: as part of the procedure to settle institutional disputes, on request from a body or a competent division of said body, which exercises its own rights as established by the Constitution or by the internal rules of one of the Federation's supreme bodies, and under which allegations are raised that rights and obligations granted under the Constitution are directly violated or threatened, either through the agency of an act or through an omission by another body or competent division thereof, the German Federal Constitutional Court shall clarify whether the challenged act violated the Constitution. As part of the procedure to settle institutional disputes it is also possible to look at the internal regulations, as well as their rules for implementation.[14] Similarly, stipulations in the Rules of Parliament and

[14] e.g. provisions in the Rules of the *Bundestag*, to the effect that draft laws that engaged a financing from public funds could only be debated if accompanied by a balancing law – intended to cover the incurred expenditure or deficit – were found unconstitutional as of the very first year of operation of the Federal Constitutional Court, as part of an institutional litigation procedure. The Court found they restricted the constitutional right to legal initiative in a manner that was not specified by the Constitution (BVerfGE 1, 144 <158 and following>; on the contrary, the Court ruled the Rule was constitutional that such a draft law should be submitted directly to the budget committee, even if that eliminated one of the otherwise customary three readings of the draft in Parliament. Also unconstitutional were found those stipulations in the *Bundestag* Rules based on which an independent deputy – specifically, a member of the *Bundestag* who had been excluded from his parliamentary group – is precluded from taking part in the proceedings of any parliamentary committee in the *Bundestag*. The Federal Constitutional Court found that in this case, while an obligation did not exist to grant such a person a right to vote on the committee – as such vote would have carried a disproportionate weight – the deputy nevertheless had to be given the opportunity to become a member on at least one of the committees, with a right to speak and bring motions (BVerfGE 80, 188 <221 and next>). In another line, while ruling in an institutional dispute on request from a number of *Bundestag* members, decisions by the *Bundestag* were found constitutional that had limited continuation of a parliamentary debate on a controversial issue to a specific number of hours, and the duration allotted each parliamentary group was proportional to their size. The possibility to limit, in advance, the duration of debates had not been expressly stipulated in the Rules of the *Bundestag*; nevertheless, the Federal Constitutional Court did refer to a specific provision in the Rules – which in fact had already been found constitutional – to the effect that the *Bundestag* could decide to end debates; that provision also included a right to set a given duration for debates from the very beginning, or to limit such duration starting at a certain point in time (BVerfGE 10, 4 <13>). Allocation of speaking time for depending on the size of the parliamentary group was also regarded as being constitutional (BVerfG, Federal Constitutional Court, *loc. cit*. pp. 14 and next; the Rules do not contain any specific stipulations here either, except for one provision that allows inference that such allocation is self-understood). Also, having been referred by a number of Deputies concerning the rules adopted in 2005 concerning

Government that refer to the procedure to adopt regulatory acts can also be the object of an indirect review by the Court, as part of any procedure that regards the validity of that piece of regulation.

● As regards the case-law of Constitutional Courts, as established following the exercise of that power, after reading the reports, we note that they approach a range of legal topics that are in many cases similar, e.g. the ones concerning the majority required to adopt pieces of regulation or other decisions by Parliament, or the matter of the rights of parliamentary groups.

Thus the Constitutional Court of Croatia, for instance, in its Judgment no. UI-4480/2004 of 5 June 2007 (Official Journal issue no. 69/07), repealed those elements of regulation that established the majority needed to adopt laws and other acts of Parliament. The Constitutional Court found that those stipulations were in conflict with Article 81 par. (1) in the Constitution, which reads: *"Unless otherwise specified by the Constitution, the Croatian Parliament shall make decisions by a majority vote, provided that a majority of representatives are present at the session."*

The Constitutional Court of Romania accepted the referral concerning the unconstitutionality of in the provisions under Article 40 par. (1)[15] of the Regulations of the Joint Sittings of the Chamber of Deputies and the Senate[16], and found them unconstitutional, because they granted to the president of the Chamber of Deputies a decisive role in case of equal number of votes and that comes against the constitutional provisions concerning the necessary majorities in adopting parliamentary acts, also provisions that do not contain such mentioning[17]. In a different decision, the same Court found[18] that Article 155 par. (3) of the Standing Orders of the Chamber of Deputies, according to which an application for criminal investigation of Member of the Government *"[...] is to be adopted with the vote of at least two-thirds of the Deputies"* contravenes Article 76 par. (2) in the Constitution which reads that *"(2) Ordinary laws and resolutions shall be passed by a majority vote of the members present in each Chamber"* and, consequently, it is unconstitutional. For the same reasons the Court ascertained the unconstitutionality of similar provisions of the Senate Standing Orders[19].

The Constitutional Court of the Republic of Macedonia, under Judgment U. no. 28/2006 of 12 July 2006, repealed the phrase in Article 231 par. 2: "*by a majority of votes of the total number of member*s" in the Standing Orders of the Assembly of the Republic of Macedonia ("Official Journal of the Republic of Macedonia," no. 60/2002). Article 231 par. 1 of the Standing Orders of the Assembly of the Republic of Macedonia stipulates that the Assembly can hold closed sessions (*in camera* proceedings) on proposal by the President of Parliament, the Government or at least 20 members. Par. 2 al Article 231, in the part that was challenged, stipulated that the Assembly shall decide on the proposal without debating it, with a majority of the votes of all members. Starting from the stipulations of Article 70 par. 1 in the Constitution of the Republic of Macedonia, under which the Assembly sessions are public, as well as par. 2 in the same Article that stipulates the Assembly can decide to work *in camera,* with a majority of two-thirds of the votes of the total number of members, the Constitutional Court found that the challenged text in the Standing Orders of the Assembly of the Republic of Macedonia is in violation of the Constitution because the decision to exclude the public

---

publication of income derived outside the mandate, the Court found – after a very close vote – that the legal stipulation (§ 44a of the Law of the Status of Members of the German *Bundestag – Abgeordnetengesetz*), as well as the detailed rules on the obligation of publication thereof (contained in the "Code of Conduct of the Members in the German *Bundestag*" adopted by the *Bundestag* and which, under §18 in the Rules of the German *Bundestag*) constitute an integral part thereof, are constitutional (BVerfGE 118, 277 <323 and next, 352 and next>).

[15] "*In case of an even vote, the vote of the chairperson in the session is decisive*."

[16] approved under Decision by Romania's Parliament no. 4/1992, published in the Official Journal of Romania, Part I, no. 34 of 4 March 1992.

[17] Article 76 of the Constitution concerning *Passing of bills and resolutions.*

[18] Decision no. 989/2008, published in the Official Journal of Romania, Part I, no. 716 of 22 October 2008

[19] Decision no. 990/2008, published in the Official Journal of Romania, no. 716 of 22 October 2008

from the Assembly's proceedings required the vote of a majority inferior to that of two-thirds that was required by Constitution.

Concerning the relationship within Parliament in terms of organisation within parliamentary groups, and respectively the rights of independent parliamentarians, we should mention the constant case-law of the Romanian Constitutional Court[20] when ruling in the matter of unrestricted ability of parliamentarians to move from one group to another, to join a parliamentary group or to establish a group of independent parliamentarians. Every time such a matter was brought before it the Court ruled that the Rules restricting this right were essentially in violation of Article 69 par. (2) of the Constitution, which rejects any form of imperative mandate.

In the same context but from a different perspective we should note Judgment U. no. 259/2008 of 27 January 2010 by the Constitutional Court of the Republic of Macedonia, which repealed Article 157 in the Standing Orders s of the Assembly of the Republic of Macedonia ("Official Journal of the Republic of Macedonia," no. 91/2008). In its par. 1 the text read that: "*in case a general debate on the draft laws does not take place, the representatives of parliamentary groups can endorse the position of the Government they represent concerning the draft law in a session of the Assembly, in the beginning of debates*," while par. 2 states that such person's addresses cannot exceed ten minutes. Under that Judgment, the Constitutional Court ensured equal rights for parliamentarians who are not members of a group as regards participation in debates on a draft law submitted to the Assembly. In justifying its judgment the Court held that in its view the different position of a parliamentary group vs. that of one member of Parliament should not constitute a problem, e.g. in terms of duration of an address, since the parliamentary group speaks in the name of several representatives while the single parliamentarian speaks individually. Nevertheless, the question remains whether the difference between parliamentarians can go so far as to exclude a representative from debates on a draft law simply because he/she is not a member of a parliamentary group, and whether such limitation is in observance of a parliamentarian's position and status under the Constitution. Consequently, if the Rules state that debates can open in one session of the Assembly then every representative should have a right to take part in the debates and independent members cannot be excluded from that right. The duration of an address, depending on whether a representative speaks on behalf of a group or oneself, is a different matter. From the aforementioned data and considering the concept underlying the Rules of the Assembly regarding the establishment of parliamentary groups and their position, the Macedonian Constitutional Court found that the parliamentarian, who was elected by a direct vote and whom citizens entrusted their sovereignty, cannot be excluded from the right to voce his/her opinion on a draft law for which a general debate has not been organized, simply on grounds that he/she is no part of a parliamentary group.

4.2 Constitutionality review as regards the Standing Orders / Regulations of the Government

Following the examination of the country reports, we note that those Constitutional Courts which do not have jurisdiction to perform the constitutionality review of the Standing Orders of Parliament are also lacking jurisdiction to perform the constitutionality review in case of Standing Orders of Government. Reasons are similar, as shown in the report of the Constitutional Court of Italy, wherein it is stated that the impossibility for the Court to operate a scrutiny for constitutionality is confirmed also in regard to Standing Orders of Government; on one hand, it could be considered possible to simply extend part of the considerations in support of the unreviewability of Parliamentary

[20] Decision no. 44/1993 published in the Official Journal of Romania, no. 190 of 10 August 1993, Decision no. 46/1994 published in the Official Journal of Romania, no. 131 of 27 May 1994, Decision no. 196/2004 published in the Official Journal of Romania, Part I, no. 417 of 11 May 2004.

Standing Orders, and especially in light of the constitutional nature of the organ from which the regulation originates, or on the secondary nature of the rules for the operation and functioning of the Government. Such a placement within the system of legal sources means that the Court cannot, in any case, scrutinize them (unless in exceptional cases), since its jurisdiction is limited to laws and enactments having force of law.

There are also Constitutional Courts which have the power to perform the constitutionality review with respect to the Standing Orders of Parliament, and, however, unable to perform the constitutionality review of the Standing Orders of Government, as in the case of *Andorra*, where the special Law concerning the Constitutional Tribunal only provides the constitutionality review of the Regulations of the General Council, and fails to say anything about the Regulations for the organisation and functioning of the Government.

There are also cases when the Constitutional Court has exclusive jurisdiction to perform the constitutionality review of legal acts, but does not have any powers of review over the acts of the executive power (for instance, *Belgium*).

There are also cases when the particular elements pertaining to constitutionality review of the Standing Orders of Parliament apply also in case of constitutionality review of the Standing Orders of the Government (for example, *Belarus, Switzerland, Germany, Macedonia*), as well as cases when this latter prerogative of the Court has its own features or it is likely to be governed by additional distinctions.

Thus, there are distinction in relation to:

- the nature and the issuer of the statutory act that governs the organisation and functioning of the Government;
- the nature of the acts issued by the Government, whereas the individual acts are excluded from the scope of the constitutionality review.

Consequently, in some cases, the power to perform the constitutionality review of the Standing Orders of the Government results from the general power of the Constitutional Court to conduct the constitutionality review in case of all acts issued by the Government, without making any distinction pertaining to their subject matter. As a result, to the extent in which the rules of organisation and functioning of the Government are set in an act issued by this authority, the respective act belongs by default to the scope of acts subject to the constitutionality review performed by the Constitutional Court. For instance, the Cabinet of Ministers of Ukraine, within its power, shall issue resolutions and bylaws whose enforcement is binding. As one of the prerogatives of the Constitutional Court of Ukraine is to rule on the constitutionality of the acts of the Cabinet of Ministers, whereas the Rules of procedure of the Cabinet of Ministers of Ukraine were approved in a Resolution of this Cabinet, then, consequently, the mentioned act shall fall under the constitutionality review exercised by the Constitutional Court of Ukraine. A similar reasoning shall be applied to the power of the Constitutional Court of the Russian Federation and Lithuania.

In some States, the rules on the organisation and functioning of the Government are established by means of acts issued by other authorities, whose constitutionality review shall fall under the scope of the Constitutional Court. For instance, thus, in *Armenia* the procedure of functioning of the Government of the Republic of Armenia is defined by a decree of the RA President[21]. Taking into consideration, that the RA President's decrees are subject to constitutional review, the legal act, which defines the procedure of functioning of the Government, is also subject to review by the Constitutional Court.

The report by the Constitutional Court of Romania points out that the statutory acts regulating the organisation and functioning of the Government shall be subject to the constitutionality review

[21] Decree of the RA President of 18 July, 2007, on Defining the order of organization of the activity of the RA government and other state governing bodies subject to the latter).

performed by the Constitutional Court to the extent in which they are primary statutory acts – laws (which are issued by the Parliament) or orders which shall be issued by the Government). The Decisions by the Government shall be issued for the organisation of the enforcement of laws [Article 108 par.(2) of the Constitution], and shall constitute secondary statutory acts, and, consequently, they are not subject to the constitutionality review performed by the Constitutional Court, however they may be subject to the legality review carried out by the administrative courts.

In connection to the distinction based on the nature of acts issued by the Government, we note that, in general, the Constitutional Court has the power to review only the statutory or general Government acts. As concerns the administrative acts of individual type, which represent norms of a personal nature, with unique legal effects applicable just to a single case, and, consequently, not-binding to the general public, such cannot be subject to constitutionality review, as pointed out specifically in the report of the Constitutional Court of the Republic of Moldova. Similar features in terms of distinction between individual and regulatory acts are highlighted in the reports of the Constitutional Court of the Czech Republic, the Constitutional Tribunal of Poland or the Constitutional Court of Georgia. At the same time, the Constitutional Review Chamber of the Supreme Court of Estonia exercises its control over the legislation with general applicability: laws adopted by Parliament, respectively regulations adopted by the Government, ministries and local authorities. The Chamber shall not be competent to review the individual acts issued by the Government or the ministries.

At the same time, we can notice that if the Government acts (including those which regulate its organisation and functioning) fall under the category of administrative acts, they automatically fall under the jurisdiction of courts or other administrative authorities. For instance, the report by the Constitutional Court of Turkey points out that there is a separate system of administrative justice, whereas the Government acts fall under the scope of the control exercised by the State Council. The Constitutional Court does not have any power with respect to this category of acts. The report by the Constitutional Court of Latvia also reveals a similar distinction, showing that, according to Article 16 par. (4) of the Law on the Constitutional Court, the Constitutional Court shall rule on other acts by the Parliament, the Cabinet of Ministers, the President, the Speaker of Parliament and the Prime-Minister, except for the administrative acts.

A special situation is highlighted in the report by the Constitutional Court of Austria, where, after showing that "real" regulations (regulations specifying a law) adopted by the Federal Government are subject to constitutional review just as any other regulation, as well as that the Constitutional Court is not entitled to review internal acts of the Federal Government, it is pointed out that, as regards the Rules of Procedure of the Federal Government, there is a particular situation: they do not exist, a fact quite unusual measured by international standards. The internal rules for Government's operating activities are based on individual decisions and "customs" developed in the legal practice of Federal Governments since 1945. The most important such rule is that decisions of the Federal Government must be adopted unanimously. Since this rule undisputedly applies there is no need for further discussion on the interpretation of rules of procedure because in case of a dispute an agreement in the decision-making process will not be reached anyway.

5. Constitutionality review: specify types / categories of legal acts in regard of which such review is conducted.

A. General and individual acts/ Statutory and non-statutory acts.

After reading the reports of the Constitutional Courts, we find that, in practice, it is difficult to attain an uniform approach with respect to the complex category of acts subject to constitutional review , taking into account the particular elements related to the regulation of powers pertaining to the

Constitutional Courts, as well as the existing dissimilarities in connection with the legal systems of the participating countries, determined, *inter alia*, by the structure of these States – unitary or federative, as well as by the difference in conception as regards the constitutionality review.

Moreover, the national reports discuss this issue in a complex manner, and as a result a simple listing of the category of acts subject to review by the Constitutional Courts barely covers a small portion of the rich information conveyed.

Taking into account this complex character and to treat it uniformly, out of practical reasons, namely to supply a basis for the discussion on this subject, we shall proceed to listing out the category of acts on which the Constitutional Courts exercise review, by pointing out the main distinctions and nuances portrayed in the reports under this chapter.

Consequently, some reports make a distinction between general acts and individual acts, respectively, in the case of the latter, based on the entity that issues them.

In some cases, the scope of the acts subject to review is established as such, in the meaning that various regulatory or general acts fall under this category

For example, the Constitutional Court of the Republic of Belarus shows that in performing the *a priori* constitutionality review, the Constitutional Court delivers judgments on the constitutionality of all normative legal acts provided that one of the qualified subjects provided by the law submits the relevant proposal.

The Constitutional Court of the Czech Republic performs the review of laws, as well as of ”other legal regulations”. These are legal documents that were adopted and exist in the required form. The basic requirements for these legal regulations fall into two groups: general requirements (the regulation must be of regulatory nature and is binding on a wide – indefinite – group of subjects) and specific requirements (the regulation must be duly adopted and published, valid and in effect).

Just the same, in proceedings for the review of constitutionality, the Constitutional Court of Slovenia decides upon the constitutionality (and legality) of laws, regulations, local community regulations, and general acts issued for the exercise of public authority.

The Constitutional Court of Serbia is competent to perform the review of a large set of acts, issued by various authorities and legal entities, the common feature of such acts being, as it results from the report developed, their general nature, more specifically: laws and other general acts of the National Assembly, President or Government, general acts of the other authorities and State bodies, statutes and other general acts of the authorities from the autonomous provinces, the statutes and other general acts of the local self-governing entities, general acts of the political parties, trade unions, and citizens' associations, general acts of the organisations that exercise public functions, statutes and other general acts of companies and institutions, general acts of chambers and other associations, general acts of funds and other associations, collective agreements.

Actually, the rule is that it falls under the jurisdiction of the Constitutional Courts to perform the review of general acts. However, there are also cases when the Constitutional Courts are competent to perform the constitutionality review in the case of various individual acts.

Thus, the Constitutional Court of Austria shows that, according to the concept of the Austrian Federal Constitution, every legal act directly interfering with the legal sphere of the addressee is subject to review when it constitutes, abolishes or amends rights and duties. Any such legal act having general effect (i.e. addressing a target group marked by general criteria) is subject to review, as are all individual legal acts provided they are issued by an administrative authority (laws, regulations, agreements concluded between the Federation and the lands, respectively, between the lands in their specific area of jurisdiction). By contrast, individual legal acts by ordinary courts (judgments and decisions) may not be reviewed by the Constitutional Court at all. An exception exists however in the field of asylum law: judgments and decisions of the Asylum Court may be challenged before the Constitutional Court.

The Constitutional Court of the Republic of Croatia performs the constitutionality review in case of individual decisions by all State bodies/ governmental bodies (including final judgments and decisions of the Supreme Court of the Republic of Croatia, as well as of the other courts), bodies of local and regional self-government and legal entities with public authority, with regard to the violation of human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by the Constitution of the Republic of Croatia.

The Constitutional Court of Lithuania is competent to review the legal acts and decides on their compatibility with the Constitution and the laws, irrespective whether they are statutory or individual, whether they have one time applicability (*ad-hoc*) or permanent validity.

In *Germany*, both provisions adopted by the Government, and any other acts or omissions on the part of the Government, may become subject-matter of a constitutional review where the possibility exists that they violate constitutional rights of those who may initiate proceedings of the respective type to protect their rights. Thus, in response to constitutional complaints of parties affected, the Federal Constitutional Court has in several sets of proceedings reviewed information measures of the Federal Government or of individual ministries. Constitutional complaints are normally only admissible once all remedies have been exhausted; the Federal Constitutional Court quashes only the impugned court decisions, but does not rescind the underlying administrative measure, and refers the case to a court with jurisdiction. The court decisions which have approved the acts of the Federal Government are therefore normally the primary subject-matter of the constitutional court's review in such cases. Indirectly, however, – unless the impugned court decisions do not already need to be rescinded because of procedural errors – there may also be findings on the constitutionality of the underlying governmental acts.

The Constitutional Court of the Republic of Macedonia, within the frameworks of the competence for the protection of the freedoms and rights of the individual and citizen, may appraise individual acts or actions which have violated certain rights or freedoms of the citizens, which are safeguarded by the Constitutional Court and it may annul the same. Within the frameworks of this competence the Constitutional Court may appraise also the acts of the courts, that is, court judgments and the individual acts of the bodies of administration and other organizations carrying out public mandates. However, within the frameworks of the constitutional-court control, the Constitutional Court is not competent to appraise the individual acts of the Assembly and the Government.

In *Norway*, courts have the right to review constitutionality of the legislation and to censor administrative documents; however, we need to specify that they do not conduct constitutionality review *in abstracto*. The right to censor administrative decisions includes also the review of the facts in the relevant cases.

Also the Portuguese Constitutional Tribunal sets forth a distinction in this respect, establishing that, in principle, only the administrative documents issued by public entities are subject to its constitutionality review. However, the Tribunal has abandoned the concept of law in a purely formal sense and has developed a broader and, at the same time, formal and functional concept of the legal norm. Under this new concept, the review of a legal document depends on a cumulative verification of specific requirements. First of all, its prescriptive nature, particularly the prescription of a conduct or behaviour rule; secondly, it's heteronymous nature; thirdly, its mandatory nature (its binding content). Therefore, various types of legal norms may be subject to constitutionality review. In addition to the legal norms in a traditional sense (namely general, abstract and mandatory rules issued by public entities), there are also other legal documents, namely the public norms having a mandatory external effect, of an individual and definite nature, as they are set forth in a legislative document, as well as the norms issued by private entities, if the latter have normative powers delegated to them by public entities. Thus, a Portuguese constitutional judge may verify the following legal norms in respect of their constitutionality: laws adopted by the Republic's Assembly, including measure-laws (pieces of legislation having the form of a law and the content of an administrative document), and any other

laws having an individual and definite content; law-decrees (legislative documents of the Government); legislative documents of the *Madeira and Azores* autonomous regions; international treaties and conventions in their simplified form, including international agreement-treaties; documents of statutory nature issued by the Government, the governments of the *Madeira and Azores* autonomous regions, local community bodies, specific administrative authorities (as is the case of civil governors of the regions located in the continental part of *Portugal*), specific public law legal entities, in certain situations, specific non-public entities, which have normative powers delegated to them by public entities; regulatory decisions (*assentos*) rendered by the Supreme Tribunal of Justice; decisions issued by the Supreme Tribunal of Justice for the jurisprudence unification; norms drafted by judges (in their capacity as interpreters) „in the spirit of the system" for the purpose of filling legislative gaps; regulations established by jurisdictions of voluntary arbitration; specific or *sui generis* documents, such as those establishing the rules necessary for the operation and organization of the Republic's Assembly, based on its internal normative autonomy (despite of their nature of *interna corporis* documents); norms included in the by-laws of public utility associations; regulations of public utility associations or of other private entities, in the situations where these benefit from a delegation of authority from public entities; traditional (customary) norms, to the extent that and in the areas in which they are accepted as an internal law source; norms issued by the bodies of competent jurisdiction of international organizations to which Portugal is a party and that are in force in the Portuguese rule of law system.

Similarly, in respect to its competence to review constitutionality of other documents of the government administration bodies, the Hungarian Constitutional Court represents that it has had a consistent practice that depended on whether the documents in question had a normative content or not. At the initial stage of its jurisprudence, the Constitutional Court has decided that other documents issued by the government administration bodies were to be determined based on their content, not on their name (Decision no. 60/1992). In most of the cases, the Constitutional Court – in relation to the Parliament's documents that had been subject to its review - established that those had an individual and definite character or, on the contrary, a normative content, by verifying their purpose, specifications, as well as the period for which the conduct rules included in the relevant documents had been established (e.g., Decision no. 50/2003). Regarding the norms belonging to the range of other documents of the government administration based on their name, not on their content (first of all: Resolution no. 52/1993), the Constitutional Court decided that it had not the competence of jurisdiction, since the document subject to review did not have a normative character and, as a result, rejected the intimation. In the same report, it is stated that there are also different kinds of norms that may not be deemed government administration documents based on their issuer or name and, in such cases, the Constitutional Court rejects petitions, by making reference in the title to the annulment of the reviewed norm and by underlining the fact that such norm can neither generate further rights or obligations nor produce legal effects. It is also stated that there has been a diverging practice related to the possibility of reviewing laws without a normative content. The common element of all these decisions consists of the fact that the starting point was precisely the Law on the Constitutional Court. Such practice was changed when Decision no. 42/2005 was adopted, under which the Court established the following: „The Constitutional Court deemed its competence of jurisdiction to conduct a subsequent abstract review as a competence covering all norms (provisions of a normative nature) deriving from (and protected by) the Constitution". Therefore, the Constitutional Court examined the constitutionality of a decision on consistent interpretation (mandatory for lower courts) rendered by the Supreme Court. The concept of law was addressed in a different manner through Decision no. 24/2008. Under this decision, the Court specified as follows: „The Constitution itself establishes the State's authority, which may adopt laws, and the form under which such laws may be adopted." For the purposes of this decision, a law is a document adopted based on the Constitution.

B. Primary legislation and secondary legislation

In respect to the documents subject to constitutionality review, some reports make a distinction between primary legislation and secondary legislation.

Primary legislation, which has specific particularities, may be subject to review by Constitutional Courts. However, secondary legislation does not fall, in all cases, under the jurisdiction of Constitutional Courts.

Thus, the Constitutional Court of Belgium has exclusive competence in respect of the constitutionality review of legislative documents, but it has no prerogatives of review over documents of the executive power.

In the report of the Constitutional Court of the Czech Republic, it is stated that the Constitutional Court is not authorized to review the consistency of sub-statutory legal norms, even if they are of varying legal force and conflict with each other. The Constitutional Court has noted in this regard: *"The Constitution does not give the Constitutional Court the power to annul sub-statutory legal regulations of lesser legal force due to inconsistency with sub-statutory regulations of higher legal force, or even due to inconsistency with a sub-statutory regulation of the same legal force. Thus, at the level of abstract review of norms, the Constitutional Court is not a universal guardian for the consistency of a hierarchically structure legal order at all its levels. In our constitutional system, conflict between sub-statutory regulations of varying or the same legal force can be addressed at the level of specific review of norms and their application under Article 95 par. 1 of the Constitution*."

Similarly, the Constitutional Court of Italy lacks jurisdiction to review sub-statutory regulations, such as rules that are issued by the Government. Such documents are subject to a review of legality or of compliance with the primary legislation – conducted by judges of ordinary or administrative courts. Therefore, given the fact that secondary rules need to comply with laws, and laws need to comply with the Constitution, these secondary norms have also to inherently comply with the Constitution, while a separate review based on the provisions of the Constitution is not necessary.

Referring to the documents issued by the Government, the Constitutional Court of Romania points out that, according to Article 108, paragraph (1) of the Constitution, the Government issues decisions and ordinances. However, only Government Ordinances [Article 146, item d) of the Constitution and Article 29, paragraph (1) of Law no. 47/1992] which are, such as the laws and the parliamentary regulations, primary legislation, may constitute subject to constitutionality review by the Constitutional Court. Government Decisions are issued for organising the enforcement of laws [Article 108, paragraph (2) of the Constitution], which represent secondary legislation, and, as a result, are not subject to constitutionality review by the Constitutional Court, but, possibly, to a legality review conducted by administrative courts.

C. Categories of documents over which Constitutional Courts conduct reviews

In a synthetic presentation, such documents are as follows:

a) Laws

After reading the submitted reports, we find first a complex approach of the concept of law, in some cases both the formal and the substantive criterion being used for defining it.

Consequently, some reports state that there are subject to constitutionality review laws and legal norms having the force of law, under which are listed for example, in *Italy*, numerous legal norms: laws adopted by the State, legislative decrees adopted based on a delegation (legal norms issued by the executive under an authorisation given by the Parliament) law-decrees, legal norms issued by the Executive as a reaction to specific emergency situations and which, after sixty days, have to be turned into laws adopted by the Parliament. The Court may decide also upon the constitutionality of the legislation adopted by the Regions and the two Autonomous Provinces to which the Constitution conferred legislative prerogatives (*Bolzano and Trento*, which comprise *the Trentino-Alto Adige Region*). Constitutionality review is also conducted over presidential decrees through which a law or a different legal norm is declared repealed following a referendum, according to Article 75 of the Constitution. The Regulations adopted by the European Union are not categorized as laws or legal norms having the force of a law for the purpose of constitutionality review, even though the Constitutional Court stated that the European legislation may run counter to „the fundamental principles of the constitutional system or to inalienable human rights" (case no. 98 of 1965, subsequently confirmed repeatedly); in the event that such incompatibility is found, in observance of the dualist concept regarding the relation between the national and the EU legislation, the Court's review would limit exclusively to the Italian legislation for their implementation, to the extent that it transposes EU norms.

In a similar manner, in *Spain*, in abstract constitutionality review procedures, both in an appeal and in a matter of unconstitutionality, the Tribunal verifies compliance with the Constitution of „the laws, provisions of regulations or documents having the force of law" or, in a synthetic wording, of any „norms having a status of law", namely: autonomy statutes and other organic laws; other laws, provisions of regulations and of State documents having the force of law (it is specified that, in case of legislative decrees, which are provisions with a force of law adopted by the Government based on a delegation granted by the Parliament, the Tribunal exercises its competence without prejudice to the control prerogatives granted to common law courts); international treaties; regulations of the Chambers and of the Cortes Generales (the Parliament); regulatory laws, norms and provisions with a force of law adopted by the Autonomous Communities, with the same exception mentioned in relation to the situations of legislative delegation; regulations of the Legislative Assemblies and of Autonomous Communities.

The reference to the two criteria – the substantive and the formal one – is made also in the report of the Constitutional Court of Hungary, as mentioned above.[22]

However, in most of the cases, the law in a formal sense is considered, as an act of a general nature issued by the legislative power, and which was adopted under a pre-established procedure.

As a rule, all categories of laws, in a formal sense, are subject to review by the Constitutional Court. A particularity in this area, determined by the State structure, is relevant in some of the reports of the Constitutional Courts of the federative States, and refers to the competence of such Courts to review the Constitutions of the States that are included in the federation structure, as well as other rules adopted by such States.

Thus, the Constitutional Court of the Russian Federation has the competence to review the constitutions of its republics. Likewise, charters, laws and other legal norms of the Russian

[22] Point 1 above.

Federation's entities, adopted in areas that fall under the competence of the Russian Federation's State bodies or under the joint competence of the Russian Federation's State bodies and of the Russian Federation's entities are subject to review.

However, there are also cases where specific categories of laws are excluded from the reviews conducted by the Constitutional Courts, by considering either their typology or their scope of regulation.

Consequently, in *Switzerland*, for example, federal laws are excluded from constitutionality review, because the Swiss Federal Tribunal has the obligation to apply them (Article 190 of the Constitution). *Abstract review* is excluded in all these cases (Article 189, paragraph 4 of the Constitution). Instead, within a *definite review,* the Tribunal may find that a federal law violates the Constitution or the international law. In the first situation, it can neither annul the law nor refuse to apply it. It has the possibility to flag unconstitutionality through a decision first and also in its annual management report, submitted to the Parliament, under the section titled „Indications to the attention of the legislator". Also, federal ordinances may not be brought before the Swiss Federal Tribunal (Article 189, paragraph 4 of the Constitution). It results that also *abstract review* is excluded for this category of legal norms. Instead, a *definite review* conducted by the Federal Tribunal is possible. Its extension varies depending on whether an ordinance is based directly on the federal Constitution or on a delegation contained by a federal law. Cantonal laws and ordinances (including communal laws and ordinances) may be subject to *abstract and definite review* without restrictions.

In Luxembourg, the Constitutional Court decides upon compliance of the laws with the Constitution, except for the legislation under which treaties are approved.

In France, starting from March 1, 2010, the Constitutional Council conducts *a posteriori* reviews, through *preliminary* decisions on the issue of constitutionality, over any legal provisions in force, upon notification by the State Council or the Court of Cassation, in relation to an objection raised during a trial pending in court referring to the compliance of these provisions with "*the rights and freedoms guaranteed by the Constitution*". However, the Constitutional Council may not review the laws adopted through referendums and the constitutional laws.

In Hungary, the Constitutional Court annuls laws and other legal norms which it finds to be unconstitutional. The Constitutional Court may annul laws on the State budget and its execution, on general taxes, on stamp and custom fees, on contributions, as well as those referring to the content of laws under which unitary terms in the area of local taxes are established, but only in the situation where, given their content, they violate the right to life and human dignity, the right to personal data protection, the right to freedom of thinking, conscience, and religion or the right relating to the Hungarian citizenship.

As a rule, constitutionality review is conducted upon notification of aspects set forth by the Constitution, or by the laws on the organisation and operation of Constitutional Courts; however, there are Constitutional Courts under which competence falls the systematic review of laws.

Consequently, for example, the Constitutional Court of Belarus, starting from July 2008, conducts mandatory *a priori* reviews over all laws adopted by the Parliament, prior to their promulgation by the President. The Constitutional Council of France conducts a systematic review (Article 61, paragraph 1 of the Constitution) of the organic laws, prior to their promulgation, and of

law proposals that are approved through a referendum procedure, prior to their being subject to a referendum.

b) International treaties

As a rule, international treaties are subject to review by Constitutional Courts.

Review is conducted prior to ratification/promulgation, as a preventive measure or, possibly, as a sanctioning measure for the fact that a treaty was concluded beyond the limits permitted by the Constitution (for example, *Albania, Andorra, the Czech Republic, the Russian Federation, France, Lithuania, Latvia, the Republic of Poland, Romania*) and, in some cases, following ratification (for example, *Serbia*).

In most of the cases, the prepared reports refer to the category of international treaties in general, while other times distinctions are made within this category.

Thus, the Constitutional Court of Azerbaijan, for example, decides upon the inter-State agreements of the Republic of Azerbaijan prior to their coming into force and upon inter-government agreements of the Republic of Azerbaijan.

The Constitutional Tribunal of Portugal states that international treaties and conventions in their simplified form, including international agreement-treaties, are subject to its review.

The Constitutional Court of the Russian Federation specifies that treaties concluded between State bodies of the Russian Federation and State bodies of entities of the Russian Federation, treaties concluded between State bodies of entities of the Russian Federation and international treaties of the Russian Federation that have not come into force are subject to its review.

Both related to the category of laws and to that of international treaties, a special situation is found in Austria, where the Constitutional Court has the competence to review the republication of a law or of a State treaty. Therefore, according to the Austrian Constitution, the supreme constitutional bodies of the Federation and of the Austrian provinces may review republication of laws and treaties. This means that the text of the legal norm in force on the relevant date is authenticated in a wording binding for law subjects. The purpose of this provision is that of transposing in a continuous form, easily accessible, laws or State treaties which wording has become complicated and difficult to understand because of numerous amendments made. The Constitutional Court verifies whether the republication conditions have been observed, namely whether the text has been republished with all amendments adopted by the competent legislator in their exact wording.

c) Regulations of the Parliament[23], other documents of the Parliament

As a rule, documents of general nature of the Parliament (the legislative authority), other than laws, are subject to review by Constitutional Courts (for example, the *Republic of Armenia,*

[23] See answer to question no. 4

Azerbaijan, the Russian Federation, Georgia, the Republic of Moldova, Estonia, Serbia, Spain Ukraine)

In *Estonia*, also the resolutions adopted by the Standing Committee of the *Riigikogu* are subject to review by the Constitutional Court.

In *Romania*, regulations of the Parliament, resolutions of the Plenary of the Chamber of Deputies, resolutions of the Plenary of the Senate and resolutions of the Plenary of the two reunited Chambers of the Parliament are subject to constitutionality review.

In *Ukraine*, legal documents of the Supreme Rada of Ukraine (resolutions, statements etc.), among which „*normative acts of the Presidium of the Verkhovna Rada of Ukraine, which follows from the special status of the Presidium of the Verkhovna Rada of Ukraine in the system of State power of Ukraine before February 14, 1992*", as well as legal documents of the Supreme Rada of the Autonomous Republic of Crimea are subject to review by the Constitutional Court

d) Decrees/Resolutions/Orders/General Acts of the President of the Republic

Some Constitutional Courts have the competence to review general acts issued by the President of the Republic (*the Republic of Armenia, Azerbaijan, the Russian Federation, Georgia, the Republic of Moldova, Estonia, Serbia and Ukraine*).

e) Decrees having force of law (Decree-Laws)/Ordinances/Resolutions/General Acts of the Government/Council of Ministers

Legal norms of the Government are subject to review by Constitutional Courts in States such as *Andorra* (decrees issued based a legislative delegation), *the Republic of Armenia*, *Azerbaijan* (resolutions and orders of the Cabinet of Ministers), *the Republic of Belarus* (resolutions of the Council of Ministers), t*he Russian Federation, the Republic of Moldova, Montenegro* (general acts adopted by the Government: regulations, ordinances, decrees etc), *Georgia, Portugal* (legislative documents of the Government, namely decree-laws), *Romania* (ordinances and emergency ordinances), *Serbia* (decrees, resolutions and other general acts adopted by the Government), *Spain, Ukraine* (documents of the Council of Ministers), *Turkey* (where the Parliament may approve, through a law, authorization of the Council of Ministers to issue „decrees having force of law").

f) Resolutions of the Prime Minister (e.g., *the Republic of Armenia*)

g) Legal norms of the central executive administration bodies (e.g., *Azerbaijan*)

h) Documents/Resolutions of the local public administration/local autonomous bodies

- resolutions of local autonomous bodies (*the Republic of Armenia*)
- legal norms of the central public administration bodies (*Albania*)
- acts issued by the municipality (*Azerbaijan)*
- documents of public authority legal entities, including local autonomous and regional bodies (*the Republic of Croatia*).

i) Other documents

Acts of courts (other than those of an individual nature mentioned under point 1 above)/acts of the General Prosecutor

- decisions of the Supreme Court of the Republic of Azerbaijan (*Azerbaijan*);

– documents of the Supreme Court, the Supreme Economic Court and the General Prosecutor (*the Republic of Belarus*);

- regulatory decisions (*assentos*) rendered by the Supreme Tribunal of Justice[24]; decisions issued for jurisprudence unification purposes by the Supreme Tribunal of Justice; norms drafted by judges (in their capacity as interpreters) „in the spirit of the system," in order to fill legislative gaps; regulations established by jurisdictions of voluntary arbitration (*Portugal*).

Traditional (customary) norms, to the extent and in the areas where these are accepted as an internal law source (*Portugal*).

Decisions of election commissions (through appeal or final appeal (*recourse*) – *Estonia*; in Lithuania, the Court examines the decisions issued by the Central Election Commission or its refusal to review complaints related to the infringement of the election legislation, when such decisions have been issued or other acts have been drafted by the commission after the end of the voting operations in the elections for the Seimas or for the office of President of the Republic (the decision of the Constitutional Court on November 5, 2004), in which case the Constitutional Court practically investigates the legality of the document of the Central Election Commission (whether this Central Election Commission has observed the election law);

Programs of the political parties, in respect of their constitutionality (the Constitutional Court of the Republic of Croatia, the Constitutional Court of the Republic of Macedonia);

Statutes of political parties and civic associations, in respect of their constitutionality (*the Republic of Croatia, the Republic of Macedonia*);

Norms contained in statutes of public utility associations and regulations of public utility associations or of other private entities, in the situation where they benefit from a delegation of authority from public entities (*Portugal*);

Norms issued by competent bodies of the international organisations to which Portugal is a party and which are in force in the Portuguese legal order (*Portugal*).

6.a) The Parliament and the Government, as applicable, proceeds without delay to the amendment of laws (namely of the act declared unconstitutional) in the sense of reconciling it with the fundamental law, according to the decision of the court of constitutional disputes. What is the term established for this purpose? Is there a special procedure in place? Otherwise, specify the alternatives. Give examples.

6.a) 1. If the Parliament and the Government, as applicable, proceeds without delay to the amendment of laws (namely of the act declared unconstitutional) in the sense of reconciling it with the fundamental law, according to the decision of the court of constitutional disputes.

The issue concerning the measures through which a document declared unconstitutional is reconciled with the Basic Law by the Parliament or the Government is very complex, because it gets specific particularities depending on the subject and type of constitutionality review or the effects of the decisions of the Constitutional Court rendered in conducting such review.

[24] A category that has disappeared.

Some of the Constitutional Courts make a clear distinction between the preventive conduct of the law maker, a concerted action or inaction, as general ways of compliance with the decision of the Constitutional Court, namely depending on the typology of decisions (through which unconstitutionality of a norm or legal norm is confirmed, the effect consisting of its invalidation or repealing, decisions confirming legislative gaps or decisions confirming unconstitutionality of a specific interpretation of the law), and the prerogatives under which these are rendered or between the type of constitutionality review– *a priori/a posteriori,* respectively *abstract/definite*.

Generally speaking, without making any distinctions based on the above mentioned criteria, in most of the countries, the aforementioned authorities comply with decisions of the Constitutional Court. There have been even situations where aspects of unconstitutionality have been eliminated before a decision was rendered by the Constitutional Court, namely, at the moment when the Court was notified in a specific case, the law maker, finding that there were flaws in the rule on which ground the Constitutional Court was notified, eliminated them by means of amending the criticized norm (e.g., *the Republic of Latvia*).

However, the nature and promptness of compliance measures is quite different; under this aspect, a series of factors, related in principal to the existence of specific terms and procedures regulated under the law and to the complexity of the issues raised by the reconciliation of the document declared unconstitutional with the provisions of the Constitution having to be discussed, as in some situations, this process requires a longer period of time for finding a solution.

There have been also cases of non-compliance with the decisions of the Constitutional Court (for example: *Croatia, Luxemburg, Poland, Romania*), including under the aspect of incorporating a legislative solution declared unconstitutional by the Court in the text of a new legal norm, as well as cases where such compliance is questionable[25] (for example, *Estonia*).

Thus, the Constitutional Court of Croatia, referring to the non-enforcement of a decision, states that, even though this is an extremely rare situation in the past 20 years, it proves that there are no legal mechanisms in the rule of law system of the Republic of Croatia through which the Croatian Parliament or Government can be forced to enforce the Court's decisions. However, it specifies at the same time that the situation differs significantly when other authorities have the obligation to enforce a decision of the Constitutional Court. In such cases, Article 31, paragraph (3) of the Constitutional Law on the Constitutional Court of the Republic of Croatia applies, which sets forts that „*The Government of the Republic of Croatia ensures, through its central administration bodies, enforcement of the decisions and judgments of the Constitutional Court*".

Also, other Constitutional Courts (for example, those of *the Czech Republic, Italy, the Republic of Poland*) represent that they do not have the legal means to oblige the legislator to adopt a new regulation.

However, the Constitutional Court may sanction a statutory act or a norm that took over a legislative solution declared as being unconstitutional. The Constitutional Court of Romania evinces for this purpose a situation where, noticing that an unconstitutionality flaw found previously had been perpetuated in a new legal norm adopted by the Parliament, it confirmed the unconstitutionality of the

[25] It is stated that it is questionable whether we can speak about compliance with the decision rendered under the constitutionality review in the following situations: where the legislative did not amend the provisions declared unconstitutional through a decision of the Supreme Court, but the legislation was harmonized in practice with the Constitution, or where the legislation was amended formally but unconstitutionality was preserved in its substance.

new act. Thus, through Decision no. 1018/2010[26], considering a previous decision (no. 415/2010) and the obligation of the Parliament to reconcile the unconstitutional provisions with the provisions of the Basic Law, the Court decided that "adoption by the legislator of norms contrary to what was decided upon by a decision of the Constitutional Court, through which it tends to maintain the legislative solutions affected by unconstitutionality flaws, is contrary to the Basic Law". Similarly, the Constitutional Court of Romania sanctioned through its decisions the lawmaking procedure used by the Government, which effect was, in one situation, that the provisions of a legal norm that was repealed and declared unconstitutional – Government Emergency Ordinance no.37/2009 – continued to produce legal effects in the form of a new legal norm - Government Emergency Ordinance no.105/2009 – which took over entirely, with insignificant amendments, the initial provisions in the respective area. On that occasion[27], the Court decided that such situation "calls into question the constitutional behaviour of a legislative nature of the Executive in its relation to the Parliament and, last but not least, to the Constitutional Court."

In the report of the Constitutional Tribunal of Poland it is stated that the introduction of legislative amendments necessary to re-establish the integrity of the legal system, after the Tribunal repeals non-complying provisions, has represented a serious issue for years. The incompetence of the legislator in this respect impedes the efficiency of the Tribunal decisions and impacts adversely the authority of laws. However, it is mentioned that, recently, the situation has been improved. The introduction of a special procedure in the Senate – which seeks to monitor the Tribunal jurisprudence and to prepare specific legislative initiatives based on such monitoring – should be assessed as very beneficial.

6.a) 2. Regulation of terms and procedures. An alternative

In most of the States there is no special procedure or terms under which the Parliament or the Government, as applicable, should amend an act that was declared unconstitutional, in the sense of bringing it in compliance with the Basic Law[28] , according to the decision of the constitutional court, and the conclusion is that, in practice, the actual manner and time interval in which compliance with those provided for by Constitutional Courts is reached tend to remain at the discretion of the legislative.

There are also cases where such terms, respectively procedures, are regulated either through the Constitution or through legal norms regulating the organisation and operation of the aforementioned authorities, or through laws on the organisation and operation of Constitutional Courts. Many of the reports reveal in this context the possibility of the constitutional courts to postpone the entry into force of their decisions concerning unconstitutionality, which amounts to the provision of a deadline for the lawmaker in order to bring into line the respective act with the ruling of the Constitutional. As for the terms set through the documents of Constitutional Courts, we note that, most of the times, their purpose is to grant the legislator the time necessary to take the measures required for eliminating a legislative gap or to regulate a specific issue in accordance with the Constitution. This happens because, as stated in some of the reports, the Constitutional Court can neither oblige the legislative

[26] Part I of the Official Journal of Romania no. 511 on July 22, 2010.
[27] Decision no. 257 on October 7, 2009, published in Part I of the Official Journal of Romania no. 758 on October 06, 2009; see also Decision no. 1.629 on September 3, 2009, published in Part I of the Official Journal of Romania no. 28 on January 14, 2010.
[28] For example: *the Republic of Armenia, the Republic of Belarus, Cyprus, the Republic of Croatia, Estonia, Latvia, Luxembourg, Macedonia, Ireland, the Czech Republic, Monaco, Poland, Georgia*.

power to adopt a law nor can it set time limits for this purpose, considering the principle of separation of powers.

(a) Terms and procedures regulated by the Constitution

According to Article 147 paragraph (1) of the Constitution of Romania, any provisions of the laws and ordinances in force, as well as any of the regulations which are held as unconstitutional, shall cease their legal effects within 45 days from publication of the decision rendered by the Constitutional Court where Parliament or Government, as may be applicable, have failed, in the meantime, to bring these unconstitutional provisions into accord with those of the Constitution. For this limited length of time the provisions declared unconstitutional shall be suspended as of right.

According to Article 125 sec. 3 of the Constitution of the Slovak Republic, if the Constitutional Court holds by its decision that there is inconformity between legal regulations, the respective regulations, their parts or some of their provisions shall lose effect. The bodies that issued these legal regulations shall be obliged to harmonize with the Constitution, with constitutional laws and with international treaties promulgated in the manner laid down by a law, and in cases stipulated by the Constitution also with other laws, governmental regulations and with generally binding legal regulations of Ministries and other central state administration bodies within six month from the promulgation of the decision of the Constitutional Court. If they fail to do so, these regulations, their parts or their provisions shall lose effect after six months from the promulgation of the decision.

(b) Terms and procedures regulated by the Standing Orders/Statute of the Legislative Power

In the *Republic of Lithuania*, as from 2002, the Seimas' Statute includes a special chapter devoted to the implementation of the Constitutional Court's decisions and rulings, which sets forth the procedure for enforcing the decisions of the Constitutional Court under which a specific document is confirmed as being contrary to the Constitution, as well as the actual deadlines for doing so. In order to ensure proper implementation of the Constitutional Court's decision and the amendment of the unconstitutional legal document, one of the Seimas Vice-Presidents is appointed as being in charge of such procedure in the Seimas. Article 181^2 of the Seimas Statute establishes that, within one month after receiving a decision of the Constitutional Court, the Legislative Department has the obligation to provide the Seimas' Legal Commission with proposals for the decision implementation, which the Commission has to examine within maximum two months after the decision was received by the Seimas. The specialized commission or the working group created for this purpose within the Seimas has the obligation, within maximum four months, to draft and submit to the Seimas for review a draft amending the relevant law (or specific provisions of it) or any other document adopted by the Seimas (or a part of it) that was declared unconstitutional. In case of a complex draft, the Seimas' Standing Committee may extend the deadline for submission, which shall not exceed 12 months. Also, there may be a proposal for the Government to prepare a draft amending the law (or provisions of it). The drafts amending unconstitutional laws, prepared for the purpose of implementing decisions of the Constitutional Court, are subject to debates and adoption under the general law making procedure established by the Seimas' Statute. In adopting the new law or the amendment or supplementing of a law in force, the legislator may not disregard the concept given to the constitutional provisions and the legal rationale contained in the decisions of the Constitutional Court.

In the same report it is also stated that, in practice, there are also situations where a term longer than the one set by the Seimas' Statute is granted to the legislator in order to make amendments to a

document (or a part of it) declared unconstitutional. This is possible where the Constitutional Court, rendering in favour of unconstitutionality, orders also the postponement of the official publication of the relevant decision, which means that such rule continues to remain in force until the official publication of the Constitutional Court's decision, even though it was confirmed as being in conflict with the Constitution. The legislator, aware of the fact that the rule will become null by right as from a specific date, has the possibility to debate and draft in advance all such amendments. The Constitutional Court may postpone the official publication of its decision when this is necessary in order to grant a respite to the legislator in order to eliminate the gaps found. The official publication of the Constitutional Court's decision is postponed for the purpose of avoiding specific effects, unfavorable both for the society and for the State, as well as in relation to human rights and freedoms, effects that may occur if the Constitutional Court's decision were published officially immediately after its rendering and if it came into effect on the same day when it was published officially (decisions of the Constitutional Court on January 19, 2005, August, 23, 2005 and June 29, 2010).

In *Romania*, the Chamber of Deputies amended its Regulations[29] in 2010, by introducing a series of rules and deadlines related to the procedure to be followed in the event that the Court confirms unconstitutionality of specific legal provisions, following an *a priori* or an *a posteriori* review. Thus, according to Article 134 of the Chamber of Deputies' Regulations, in cases of unconstitutionality of laws prior to their promulgation, and in the situation where the Chamber of Deputies was the first Chamber notified, the Standing Committee, in its first meeting held after the publication of the Constitutional Court's decision in the Official Gazette of Romania, shall notify the Committee for Legal Matters, Discipline, and Immunities and the Standing Committee notified in the first instance on the draft law or the legislative proposal, in order to re-examine the provisions declared unconstitutional. The same procedure applies also in the situation where the relevant provisions are sent to the Senate, in its capacity as first Chamber notified. The deadline set by the Standing Committee for the report drafting by the mentioned committees may not be longer than 15 days, such report is included on the agenda on a priority basis, and is adopted with the majority required by the ordinary or organic nature of the legislative initiative subject to re-examination. Upon re-examination, the necessary technical and legislative correlation will be done and, following adoption, provisions are sent to the Senate, if the latter is the decision-making Chamber.

According to Article 134^2 of the Chamber of Deputies' Regulation, in case of unconstitutionality of provisions of the laws and ordinances in force, as well as of those of Regulations, and which, according to Article 147, paragraph (1) of the Constitution, cease their legal effects within 45 days from the publication of the Constitutional Court's decision, a term during which these are suspended *de jure*, and, in the event that the Chamber of Deputies was the first Chamber notified, the Chamber's Standing Committee shall notify the Committee for Legal Matters, Discipline, and Immunities and the Standing Committee under which scope of activity the relevant legal norm falls, for the purpose of revising the provisions and reconciling them with the provisions of the Constitution. The revised provisions are included in a legislative initiative, which is distributed to the Deputies and, after the expiry of the 7-day time limit, within which amendments may be submitted, the two committees, within 5 days, shall draft a report on that legislative initiative, which is subject to debates and adoption by the Plenary of the Chamber of Deputies. Such legislative initiative is adopted with the majority required by the nature of the legal norm in question and is sent to the Senate.

(c) Terms and procedures regulated by the Law on the Organisation and Operation of the Constitutional Court

[29] Resolution no. 14/2010, published in Part I of the Official Journal of Romania no. 397 on June 15, 2010.

For instance, in *the Russian Federation*, Article 80 of the Federal Constitutional Law «on the Constitutional Court of the Russian Federation» regulates this issue as follows. In the event that a provision of a federal constitutional law or a federal law (or provisions of it) is declared entirely or partially unconstitutional by a decision of the Constitutional Court, or if, following a decision of the Constitutional Court, a need to eliminate a gap existing in the relevant rule results, the Government of the Russian Federation shall submit to the State Duma, within maximum three months from the publication of the Constitutional Court's decision, a new federal constitutional draft law or a new federal draft law or several connected draft laws or, as applicable, a draft law for the amendment of the law declared initially as being partially unconstitutional. Draft laws shall be discussed by the State Duma under an extraordinary procedure. In the event that a provision of a legal norm of the Government of the Russian Federation is declared entirely or partially unconstitutional by a decision of the Constitutional Court, or if, following a decision of the Constitutional Court, a need to eliminate a gap existing in the relevant rule results, the Government of the Russian Federation, within maximum two months from the publication of the Constitutional Court's decision, shall repeal that legal norm, and either shall adopt a new legal norm or will make amendments and/or additions to the legal norm confirmed as being partially unconstitutional.

In *the Republic of Moldova*, the obligation of public authorities to reach compliance of the laws and other legal norms or of parts of them that have been declared unconstitutional with the Constitution is expressly regulated by the Law on the Constitutional Court. According to Article 28^1 paragraph (1) of the law, the Government, within maximum 3 months from the day of publication of the Constitutional Court's decision, submits to the Parliament the draft law amending and supplementing or repealing a legal norm or parts of it that were declared unconstitutional. The relevant draft law shall be examined by the Parliament on a priority basis. Paragraph (2) of the same Article sets forth that the President of the Republic of Moldova or the Government, within maximum 2 months from the publication date of the Constitutional Court's decision, shall amend and supplement or repeal a legal norm or parts of it that were declared unconstitutional and, as applicable, shall issue or adopt a new act. In the event that, in examining a case, the Constitutional Court confirms the existence of gaps in legislation, due to failure to observe specific provisions of the Constitution, it shall first draw the attention of the relevant bodies on them, through a letter. The Constitutional Court's observations regarding the gaps (omissions) existing in the relevant legal norms due to the non-observance of specific constitutional provisions mentioned in the letter are to be examined by the authority concerned, which, within maximum 3 months, shall inform the Constitutional Court on the examination results.

(d) Terms and procedures regulated by other special laws

In Romania, Law no. 590/2003 on Treaties[30] specifies, in Article 40, paragraph (4), second sentence, that, in the event that, in fulfilling its powers and prerogatives related to constitutionality review, the Constitutional Court decides that the provisions of a treaty which is in force for Romania are unconstitutional, the Ministry of Foreign Affairs, together with the ministry or institution under which jurisdiction falls the main area regulated by that treaty, shall take steps, within 30 days, to initiate procedures necessary for its renegotiation or validity termination for the Romanian party or, as applicable, for the Constitution revision.

(e) Terms set by decisions of the Constitutional Court

[30] Published in Part I of the Official Journal of Romania no. 23 din January 12, 2004

The Constitutional Court of the Republic of Slovenia, when it finds that a law, a different rule or general act issued for the purpose of exercising public authority is unconstitutional or illegal, as it does not regulate a specific issue it should have to regulate, or regulates it in such a manner that does not allow for cancellation or repealing, adopts a declaratory ruling, according to Article 48 of the LCC. The legislator (or the authority issuing such illegal or unconstitutional rule or general act for the purpose of exercising public authority) has to eliminate the unconstitutionality or illegality aspects within the time interval set by the Constitutional Court. The time interval set by the Constitutional Court depends on the circumstances of the case in question, the term within which the legislator has to remedy the unconstitutionality or illegality aspects being of six months or one year.

For example, in Decision no. U-I-207/08, Up-2168/08 on March 18, 2010 (Official Gazette of the Republic of Slovenia No. 30/10), the Constitutional Court, establishing that Article 25 of the Law regulating protection of the right to a trial without unjustified delays is unconstitutional, as it does not regulate the status of the injured parties in whose cases violation of the right to a trial without unjustified delays ceased prior to the date of January 1, 2007, but who did not claim any fair compensation before the international courts until that date, the Constitutional Court required the legislator to remedy the unconstitutionality issues within six months from the publication of its decision in the Official Gazette of the Republic of Slovenia. In Decision no. U-I-411/06 on June 19, 2008 (Official Gazette of the Republic of Slovenia no. 68/08 and OdlUS XVII, 43), the Constitutional Court decided that the 7th paragraph of Article 128 of the Aviation Law was unconstitutional to the extent that it established that, in addition to the data mentioned in the Aviation Law, also other personal data may be processed. The Constitutional Court required the legislator to remedy this unconstitutionality issue within one year from the publication of its decision in the Official Gazette of the Republic of Slovenia. Article 142 of the Procedure Regulation of the National Assembly sets that the National Assembly, in its capacity as legislator, may adopt amendments to the laws referring to the procedure before the Constitutional Court or to the decisions of the Constitutional Court (for example, even when the Constitutional Court confirms unconstitutionality of the reviewed laws) under a simplified procedure. As a rule, the legislative procedure implies three readings, while under a simplified procedure the second and the third reading take place during the same session. A special particularity of the simplified procedure is that there is no general debate over the draft law. Amendments may be submitted directly in the session until the commencement of the third reading of the draft law.

In *the Republic of Belarus*, the Constitutional Court, in some of its decisions, sets a date for their enforcement. Thus, in 1998, an inter-ministerial document of the Ministry of Social Security and the Ministry of Labour was submitted for review before the Constitutional Court. The Court had to decide on the types of payments that had not been paid as contributions to the social insurance budget. In its decision of September 24, 1998, the Court set a date (January 1, 1999) as from which the standards deemed unconstitutional shall no longer be applied. As a result, the Parliament had to reconcile the legislation on State social security with the decision of the Constitutional Court, around the date of December 31, 1998.

In *Hungary*, within the *ex post facto* review, when the Constitutional Court establishes, *ex officio* or based on a notification, that the legislative body did not fulfil its duties and prerogatives according to the authority resting upon it, which resulted in the occurrence of an unconstitutionality situation, the Court orders that the relevant body fulfil its duty, by setting also a deadline for this purpose. The Law on the Constitutional Court does not set forth sanctions, specifying under §49, sub-section (2) only the fact that the body in relation to which an omission was found shall fulfil its duties

and prerogatives within the set deadline. Also, the Law on the Constitutional Court permits the Court to set a term for a law that has been declared unconstitutional to cease its effects or applicability in a particular case, justified by interests related to the legal security or where there is an extremely important interest from the part of the notifying party [§43 sub-section (4)].

Similarly, in *the Czech Republic*, the Law on the Constitutional Court sets forth, under Article 58 paragraph 1, that the decisions (that annul a legal provision or a part of it) become applicable as from the date when they are published in the Official Law Collection, except for the situation where the Constitutional Court decides otherwise. Therefore, the Constitutional Court often postpones enforcement of its decisions, in order to provide the legislator with sufficient time to adopt a new legal norm, which would reflect the Constitutional Court's decision, and would eliminate the unconstitutional issues. In the situation where the Constitutional Court decides to postpone enforcement of a decision that annuls a legal norm or a part of it, its decision on the postponement duration is influenced first of all by reasons related to the complexity of the legal framework to be replaced and to the complexity of the legislative process. In general, enforcement may be postponed for a period of up to 18 months.

In *Austria*, there is a possibility for the constitutional court to set a term for the lapse of the relevant legal norm, but no longer than 18 months. Such legal norm will continue to apply to the situations created prior to its annulment (except for the case on which it was grounded), except for the situation where the Constitutional Court decides otherwise through a decision.

Also, in *the Republic of Poland*, for the same reasons mentioned above, the Tribunal may postpone the date on which an unconstitutional (illegal) provision loses its legal power (the first sentence *in fine* of Article 190, paragraph (3) of the Constitution). In the case of laws, such postponement periods may not exceed 18 months, calculated from the publication date of the relevant decision, while in respect of other types of legal norms subject to review, such period may not exceed 12 months. In the same report, it is also stated that there is a special procedure established only in the rules and norms of the Senate (Article 85a - 85f of the Resolution of the Republic of Poland's Senate on 23 November, 1990 – The Senate Regulation[31]). According to this procedure, decisions of the Tribunal are brought to the knowledge of the Senate's Legislative Committee by the Senate's Marshall. Subsequently, the Committee examines whether it is necessary to take legislative steps in the relevant area (for example, for the purpose of eliminating gaps and inconsistencies from the legal system). Following analysis of the issue, the Committee submits to the Senate's Marshall a proposal to adopt a legislative initiative or informs the Senate's Marshall that legislative measures do not have to be adopted. Depending on the Legislative Committee's opinion, the Senate may submit an appropriate legislative initiative to the Seim. However, the Seim may reject the Senate's initiative.

In order to draw the legislator's attention with respect to the need to amend non-complying normative solutions, the Tribunal has also the right to: express, in its decision reasoning, the need to adopt some amendments that would re-establish the integrity of the legal system; to issue signalling decisions (mandatory for the recipient) and to include the relevant observations in the annual publication titled *Information on Substantive Issues Arising from the Activities and Jurisprudence of the Constitutional Tribunal*.

[31] To these provisions, stipulated in Section IX titled "Enforcement of decisions of the Constitutional Tribunal", the Senate's rules and norms have been added, in compliance with Article 1, paragraph (3) of the Senate's Resolution on 9 November, 2007.

In the same way, in *Bosnia and Herzegovina*, according to the Regulation of the Constitutional Court, a deadline may be set for the reconciliation of the legislation declared unconstitutional by the Constitutional Court, such deadline being of maximum 6 months.

In *the Republic of Latvia*, when the Court decides upon the nullification of a contested norm or document as from a specific future date, according to Article 32 (3) of the Law on the Constitutional Court, it may set a subsequent date as from which the appealed norms that were found as being unconstitutional lose their legal power, in the event that the immediate repealing of the norm would result in a more aggravated or inadmissible situation. Usually, the legislator is provided with a period of 6 months in order to remedy all the deficiencies found.

In *Turkey*, the provisions of the laws that have been annulled by the Constitutional Court cease producing effects as from the publication date of the annulment decision in the Official Gazette. If the Court deems necessary, it may also decide the date on which the annulment decision comes into force, a date that may not be later than one year from the publication date of the decision in the Official Gazette.

In *Ukraine*, where necessary, the Constitutional Court may determine in its decision or opinion the procedure and terms of enforcement and oblige appropriate State bodies to ensure enforcement of the decision or adherence to the opinion (Article 70.2 of the Law). Also, in accordance with Article 70.3 of the Law of Ukraine "on the Constitutional Court of Ukraine" the Constitutional Court of Ukraine has the right to demand from bodies stated in this Article a written confirmation of execution of the decision or adherence to the opinion of the Constitutional Court of Ukraine.

6.b) The Parliament may invalidate a decision of the Constitutional Court: please specify under what terms.

Neither the Constitutions of States nor their infra-constitutional legislation confer to the Parliament or to any other public authority the competence to invalidate decisions of the Constitutional Courts.

There are cases where such possibility existed for the Parliament, but such was eliminated, Constitutions of States being amended for this purpose.

Therefore, in *the Republic of Poland*, for example, between 1985 (the year when the Constitutional Tribunal was created) and 1997 (the year when the current Constitution was adopted) rejection of the Senate's decisions by the Seim was possible. This was a consequence of the presumption, adopted in the communist doctrine of the constitutional law, that the Seim was the supreme body in matter of State authority, superior to all other State bodies (including to courts and tribunals). According to Article 7 of the Law on April 29, 1985 on the Constitutional Tribunal (which is no longer applicable), the Seim had the power to reject a decision rendered by the Tribunal on the unconstitutionality of a law, if, in the Seim's opinion – the relevant law did not violate the Constitution. The Seim's resolution on rejecting a decision of the Tribunal required a majority of at least two thirds, in the presence of at least half of the statutory number of Deputies. The Seim did not have the power to reject a decision of the Tribunal through which it declared the unconstitutionality of a legal document inferior to a law (such decisions were final). The situation changed when the Constitution of 1997 came into force. As from that moment, the Seim had no longer the right to reject decisions of the Tribunal. According to Article 190, paragraph (1) of the 1997 Constitution, all decisions of the Tribunal are final in the sense that they may not be appealed or rejected by any other

public authority body. They have binding character, which means that they are binding for all public authority bodies – including for the Seim.

Similarly, in Romania, such possibility was set forth by the Constitution of 1991, which, prior to its revision in 2003, established, in Article 145, paragraph (1), that *"In unconstitutionality situations confirmed in compliance with Article 144, items a) and b), the relevant law or regulation is sent for re-examination. If the law is adopted in the same form by a majority of at least two thirds of the number of members of each Chamber, the unconstitutionality objection is eliminated, and promulgation becomes mandatory"*. This provision of the 1991 Constitution, justifiably criticized in the specialized doctrine, allowed for the Parliament to become a Court of Cassation in a dispute in which it was a party. Therefore, it was possible for an unconstitutional law to become constitutional through the will of an eligible majority of Deputies and Senators, without a revision of the Constitution, by completing all stages and fulfilling all procedures specified for this. Following the Constitution revision of 2003, this possibility of the Parliament to invalidate a decision of the Constitutional Court was removed, and all decisions of the Constitutional Court are, according to Article 147, paragraph (4) of the Constitution, generally binding.

As stated in some of the reports, even though the competence to invalidate a decision of the Constitutional Court is not conferred to the Parliament, in exercising its constituent powers, it may revise the Basic Law in a manner that would allow for the overcoming of the effects of a decision of a court of constitutional jurisdiction.

For example, in *Slovenia*, the Constitutional Court decided in its Decision no. U-I-12/97 on October 8, 1998, that the legislator has to adopt a voting system based on the majority principle for electing Deputies in the National Assembly, according to the results of a referendum, and the National Assembly amended subsequently Article 80 of the Constitution and established that Deputies are elected based on the proportional representation principle (for example, by means of a proportional voting system).

The Spanish Constitutional Tribunal stated in 1992 that the right granted to European citizens under the Treaty of the European Union – signed in Maastricht, to be elected in the leadership bodies of the local communities was contrary to the Spanish Constitution (Article 13 of the Constitution of Spain: Declaration 1/July 1, 1992). In order to be able to ratify the Treaty of Maastricht, the Parliament had to revise the constitutional provisions. The reform of August 1, 1992, the first – and for now the only amendment of the constitutional text – was the only way to overcome the objection raised by the Constitutional Tribunal.

The Constitutional Court of Austria mentions in this sense that, in principle, the Parliament may not invalidate a decision of the Constitutional Court, but it may adopt a new law, also unconstitutional. In such case, the Constitutional Court will review it again. Since compared to the Constitutions of other States the Austrian one may be easily amended (the only requirement being the presence of at least half of the members of the National Council and a majority of two thirds of the votes expressed), in the past, there has been a situation where the Parliament (re)adopted an annulled law, this time as a law amending the Constitution. This practice has been often criticized in the doctrine, so that (until now) it has not been repeated. But also in such case, the Constitutional Court verifies whether such constitutional law could be an equivalent to a document revising the Constitution completely. In a concrete case, the Constitutional Court invalidated a constitutional law suppressing rights guaranteed constitutionally in a specific area (public procurement), by limiting their duration, of nature to undermine the control authority of the Constitutional Court.

Particular aspects are underlined in the report of the Constitutional Tribunal of Spain, which, as far as the possibility of the Parliament to invalidate its decisions is concerned, makes a distinction based on the scope of the constitutionality review or on the ground for unconstitutionality. For this purpose, it is stated that, when the Constitutional Tribunal does not declare a law as being contrary to the Constitution, but its interpretation and application by the courts, it is always possible to revise the laws that generated a jurisprudential divergence, while the new law may establish expressly the norm which had been deducted by the judicial bodies from the preceding legislative provisions. Also, if the Constitutional Tribunal declares nullity on grounds related to formal flaws (competence of jurisdiction or procedure) or if it interprets a law in its sense according to the Constitution, its decision does not prevent the competent legislator to amend the law, based on the procedure prescribed by the Constitution. Therefore, in such cases, it is possible that the legislator establish a norm different from the one deducted by the Constitutional Tribunal in a previous reading of the law, in light of the Constitution.

7. Are there institutionalized cooperation mechanisms between the Constitutional Court and other bodies? If so, what is the nature of such contacts/what functions and prerogatives are exercised by both parties?

7.1 General aspects

After examining the institutionalized cooperation mechanisms existing between the Constitutional Court and other bodies, which are relevant in the contents of the reports asserting the existence of such mechanisms, it is found that, as a rule, these refer to either the application of conjunct competences, established by the Constitution and by laws, or individual duties and prerogatives of each body or authority, or a broader approach, addressing the area of research or of international collaboration.

The following have been presented as representing institutionalized cooperation mechanisms related to: creation of the Constitutional Court; procedure before the Constitutional Court; other cooperation forms with various bodies in fulfilling their duties and prerogatives; optimization of the legal order; participation of the Court, its judges or its President as members in various bodies, respectively organisations.

7.2 Creation of the Constitutional Court

Judges of the Constitutional Courts are appointed or elected by State authorities, according to a specific procedure,[32] regulated by the Constitution or by the Law on the Organisation and Operation of the Constitutional Court.

7.3 Involvement in the procedure before the Constitutional Court within the exercise of its duties and prerogatives

Such involvement materializes in:

a) referral of the Constitutional Court by the bodies established by the Constitution respectively by the law, in order to review constitutionality of specific legal norms (for example, *Belarus, Belgium, the Czech Republic, Italy, Romania, the Republic of Poland, the Republic of Serbia, the Republic of Slovakia, Ukraine*; we need to underline in this context the specific form of collaboration existing

[32] See the answer to question 1 of the Questionnaire.

between the Constitutional Court and the courts of law within the procedure regarding exceptions of unconstitutionality, emphasized, for example, in the reports of the Constitutional Court of Italy, respectively Romania)[33] ;

b) referral of the Constitutional Court for exercising other of its duties and prerogatives (for example, in *Belarus*, upon referral by the President of the Republic, the Constitutional Court presents its conclusions in relation to the existence of acts of blatant or systematic violation of the Constitution by the Chambers of the National Assembly. When referred by the President of the Republic, the Constitutional Court shall also decide upon the existence of acts of blatant systematic violation of the provisions of laws by the local councils; in *the Republic of Slovakia*, the Constitutional Court conducts the disciplinary procedure against the President of the Supreme Court of the Republic of Slovakia, the Vice-president of the Supreme Court and the General Prosecutor; also, it gives a consultative approval for the initiation of criminal proceedings against or preventative arrest of a judge or of the General Prosecutor; in *Ukraine*, the bodies of the State power set by law and the bodies of local autonomy may refer the Constitutional Court in respect of issues of official interpretation of the Constitution and laws of Ukraine; also, the Supreme Rada of Ukraine may refer the Court in relation to the observance of the constitutional procedure for investigating and reviewing a case regarding the dismissal of the President of Ukraine in relation to an *impeachment* order (Articles 111 and 151 of the Ukrainian Constitution, and Articles 13 and 41 of the Ukrainian Law on the Constitutional Court of Ukraine). Presentation and submission of its conclusions to the Supreme Rada of Ukraine represents a mandatory element in the *impeachment* procedure. For the purpose of creating the conditions necessary for the adoption of such conclusions by the Constitutional Court, judges of the Constitutional Court of Ukraine (no more than three individuals) are invited to the hearings that take place before the special investigation commission in relation to the investigation conducted (Article 175 of the Regulation). Upon request, they will be given the floor during the session of the special investigation commission, for possible observations regarding the violation of the constitutional investigation procedure etc.[34]

c) filing of memoranda or opinions in cases pending before the Constitutional Court, upon request/notification by the Court (for example, *Belgium, the Republic of Macedonia, Romania, the Republic of Serbia*);

d) participation, in established cases, in the procedure conducted before the Court (for example, in *Macedonia*, within the procedure initiated based on a petition for the protection of rights and freedoms, the Constitutional Court summons compulsorily the Ombudsman, in order to attend the public debates session and, if necessary, may summon also other persons, bodies or organisations; in *Portugal*, the General Prosecutor participates in the procedures conducted before the Tribunal, irrespective of the manner it deems adequate for reviewing a case. Therefore, the General Prosecutor may make submissions during the written stage of the procedure, after which he/she may take part to the public session, and the viewpoints presented are usually deemed significantly important; in *the Russian Federation*, there are plenipotentiary representatives of the President of the Russian Federation, the Federation's Council, the State Duma, the Government of the Russian Federation, the Ministry of Justice of the Russian Federation and of the General Prosecutor's Office of the Russian Federation who participate in the proceedings conducted before the Constitutional Court);

e) the obligation of public authorities and of any other persons to provide, upon request by the Constitutional Court, information, documents or deeds held by them, requested by the Constitutional Court for the fulfilment of its duties and prerogatives (for example*, the Republic of Macedonia, the Republic of Moldova, Portugal, Romania, the Russian Federation, the Republic of Slovakia, Ukraine*) .

[33] See the answer to question 3 of the Questionnaire.
[34] See also the answer to question no. 5 of the Questionnaire

In some cases, the requested information may concern precisely the manner of interpretation of a legal norm, in jurisprudence or in the legal doctrine – consequently, in countries such as *Portugal*, the Constitutional Tribunal may request information regarding the manner of interpretation of the legal provisions subject to review in the legal practice from the Supreme Court and the Superior Administrative Court.

In *Romania*, the Regulations on the Organsation and Operation of the Constitutional Court establish that judges-rapporteur may request specialized consultancy from individuals or institutions, based on prior approval from the President of the Court.

Such cooperation of the State authorities and organisations exercising a public function with the Constitutional Court is not optional but mandatory, being related to the exercise of the function of constitutional jurisdiction. In this sense, the Law on the Constitutional Court of the Republic of Serbia sets forth that any failure of a public authority or of a person in charge of providing the Court, within the set term, with the appealed document, the requested documents, the relevant data or information necessary during the proceedings and for rendering the Court decision, as well as an omission of other State and public authorities, of organisations exercising public functions, of natural persons or legal entities to provide, within the set deadline, the data and information relevant for conducting the Court proceedings and for rendering the decision represents a misdemeanour and is sanctioned by a fine payment.

7.4 Other forms of cooperation with various bodies, in fulfilling their duties and prerogatives

We can enumerate the following:

a) cooperation with the Governmental Agent representing the State in the proceedings conducted in compliance with the Convention on the Protection of Human Rights and Fundamental Freedoms before the European Court of Human Rights, where this is a party in a case (providing of information, documents or copies of the requested documents, drafting of conclusions and reports in order to answer *de facto* and *de jure* matters related to the alleged violation of the Convention, organsation of direct consultations – see for this purpose the report of the Constitutional Court of the Czech Republic);

b) relation with the administration in charge of publication of the Official Journal of the State, for the purpose of fulfilling its duty of officially publishing the decisions (thus, in *Spain*, the Constitutional Tribunal cooperates with the Presidency Ministry [the Government], on which the Official Journal State Agency depends, and also with the Journal directly. Ever since 1982, the Tribunal has concluded a series of collaboration conventions with the body publishing the State's Official Journal, in order to ensure dissemination of the constitutional doctrine;

c) obligation of the Constitutional Court to inform/communicate to the authorities established by law the rendered decisions (for example, *Belgium, Switzerland, Romania*);

d) obligation of State authorities to enforce decisions of the Constitutional Court (for example, Article 31, paragraph 3 of CACC, which specifies that „*The Government of the Republic of Croatia ensures, through its central administration bodies, enforcement of the decisions and rulings of the Constitutional Court*".

d) approval of the Constitutional Court's budget[35].

7.5 Cooperation mechanisms that aim at optimizing the legal order

[35] See the answer to Question no. 2 of the Questionnaire

For example, in *Belarus*, one of the forms of cooperation of the Constitutional Court with the President and the Legislative consists of the annual messages regarding the constitutional legality in the State, which are adopted based on specific verified documents. Such annual messages contribute to an optimization of the legal order; similarly, in order to remedy specific gaps, to eliminate conflicts of laws and to ensure an optimum legal regulation or a consistent practice in applying the laws, the Constitutional Court has the right to submit proposals to the President, the Parliament Chambers, the Government and to other State authorities, depending on their competences, related to the need of introducing amendments and/or additions to specific legislative documents or to adopt new legal norms.

The Swiss Federal Tribunal drafts every year a management report intended to the Parliament, which contains also a section titled „indications to the attention of the legislator." In this section, the Tribunal may flag the inconsistencies existing in the legislation or its findings regarding the unconstitutionality of federal norms. The report is discussed by the specialized Committees of the Parliament, which may initiate subsequently the necessary legislative amendments, in order to reconcile the provisions of these federal norms with the Constitution.

In Germany, according to a long lasting tradition, the Federal Constitutional Court organises a meeting with the Federal Government once in approximately two years, and meets once during each legislature with the *Bundestag* Presidium and with leaders of the Bundestag parliamentary groups, for a general exchange of information, without addressing however subjects related to the cases pending in Court or in respect of which the Court may be called upon to adjudicate, or legal matters referring to any of these.

In the *Republic of Serbia*, according to Article 105 of the Law on Constitutional Court, "*The Constitutional Court shall bring to the knowledge of the National Assembly the situations and issues occurred in ensuring constitutionality and legality in the Republic of Serbia, shall issue opinions and shall indicate those cases where adoption and amendment of legislation is necessary or any other steps required for defending constitutionality and legality*".

7.6 Participation of the Court, its judges or its President as members in various bodies or organisations, as applicable

For example, in *Estonia*, the President of the Supreme Court is a member of the Council for the Administration of Courts of Law. The Council is in charge of general matters related to the administration of justice and of the 1st and 2nd rank courts of law, but does not decide upon or debate matters regarding the Supreme Court or the Constitutional Control Section).

In *Romani*a, according to the provisions of Article 48 of the same Regulations on the Organisation and Operation of the Constitutional Court, the Court establishes cooperation relations with similar authorities from abroad and may become a member of international organisations in the area of constitutional justice.

7.7 Other forms of cooperation

We need to specify that, in their answers, some Constitutional Courts[36] (*Albania, the Republic of Armenia, Andorra, Cyprus, the Republic of Croatia, Luxembourg, France, Ireland, the Republic of*

[36] Supreme Courts or Constitutional Council, as applicable.

Lithuania, Latvia and Turkey) state that the legal norms do not establish institutionalized cooperation mechanisms between the Constitutional Court and other bodies.

However, they mention certain forms of cooperation with other institutions or unofficial relations among institutions under certain circumstances, such as, for example, those established under point 5 of Article 46 of the Law on the Constitutional Court of the Republic of Armenia, according to which, "Representatives of the President of the Republic, of the National Assembly, of the Government, and of the Court of Cassation, of the Ombudsman, or of the Chief Prosecutor interested in participating in sessions of the Constitutional Court, may submit an application for this purpose to the Constitutional Court and may receive the documents and deeds of the case under review in advance. Also, they may bring clarifications related to the questions asked by the Constitutional Court, and have the status of invitees in the case hearing"; in *Azerbaijan*, the close relations of the Constitutional Court with the Ombudsman of the Republic of Azerbaijan; in *France*, the existence of memoranda of understanding with State authorities (the Presidency of the Republic, the Prime Minister, the Presidency of the National Assembly, and the Presidency of the Senate), which allow for an electronic exchange of documents within proceedings of referral and notification of the file items and of the decisions; and, finally, in *Turkey*, the occasional cooperation of the Constitutional Court with a series of national public bodies, including with the Judicial Academy, universities, specific international organisations and other supreme courts (the High Court of Appeals, the State Council), contacts that are limited, in general, to symposiums, specific projects etc.

Under this aspect, they also mention the spirit of cooperation characterizing the constitutional institutions, which determines the collaboration among bodies when this is necessary, by observing their scope of competence and their functions, as well as the contacts more or less formal in the area of representation and exchange of ideas, participation of the Court members in workshops and conferences (see the reports of the Constitutional Courts of Austria and Hungary).

II. RESOLUTION OF ORGANIC LITIGATIONS BY THE CONSTITUTIONAL COURT

Professor Iulia Antoanella MOTOC, PhD, ***Judge***
Ioana Marilena CHIOREAN, ***Assistant-Magistrate***
Cristina Cătălina TURCU, ***Assistant-Magistrate***

Introduction

Each Constitution, as basic aw of a State, has the specific regulatory object of organising public powers and regulating the relationships between them by establishing the State's bodies, by establishing both their composition and the appointment procedures and by establishing the jurisdiction of public authorities and the relationships between them. As Thomas Paine[37] stated, "a constitution precedes a government; a government is only a brainchild of the constitution" and a constitution establishing a government also commands both substantial and procedural limits in the exercise of power by such government.

[37] Writings of Thomas Paine, Vol.II (1779-1792): The Rights of Man, p.93

In exercising the duties and jurisdiction specific to the unitary or federal character of the State, such State bodies may, vertically or horizontally, generate legal disputes resulting from legal acts or from the deeds, actions or omissions thereof. As mentioned in Germany's Report, institutional disputes *(Organstreit)* resolution is not intended to reconcile subjective rights but rather to clarify the jurisdiction system set up by the Constitution.

In most participating States, such legal disputes are settled by the constitutional courts except for the following States: Ireland[38], Luxembourg, Monaco[39], Norway and Turkey, where such a procedure does not exist.

The analysis of all the reports sent by participating States shows that the control exercised by the constitutional court as regards legal disputes between authorities is not intended to secure their rights but to settle such disputes primarily in order to ensure compliance of the State bodies' conduct with their jurisdiction as stipulated in the Constitution, for a good functioning of the State based on the separation of its powers and, finally, for safeguarding the supremacy of the Constitution in a State governed by the rule of law.

1. What are the main characteristics of the constitutional legal dispute between public authorities?

In the States where the constitutional court settles legal disputes between institutions, the following main features can be identified depending upon the nature, object, parties and legal grounds of the dispute as well as upon the character of the constitutionality review:

a) As regards the **nature of the dispute**, it has to be a *legal dispute* not a political one. Therefore, in all States, the settlement of institutional disputes is not a political procedure but a jurisdictional one. For instance, in Germany[40], the political minority uses the settlement procedure of the litigation between constitutional bodies in the attempt of asserting its rights against the majority, the institutional disputes being a crucial instrument of the opposition; in Lithuania, the submission of such applications to the Constitutional Court is sometimes used as a legal instrument in the political battle, for instance whenever the opposition tries to prove that the governing forces adopt acts contrary to constitutional norms or whenever it tries to prevent the adoption of certain decisions.

b) As regards the **object of the dispute**, as from the analysis of the reports sent it appears the need for a classification according to the structure of the public authority in that State and by the specific ties between the "whole" and its "parts," as follows:

- in case of a unitary State, there may be:
  - *disputes of jurisdiction – horizontally* – between the State bodies. They can be *positive* (when one or several authorities assume powers, duties or jurisdiction incumbent on other bodies) or *negative* (when public authorities decline their jurisdiction or refuse to carry out actions that are among their duties) and they are the most common, occurring in all States, for instance in Portugal, Serbia, Slovenia, Slovakia and Ukraine;

[38] In its Report points out that, if the Government, a State body or a public body exceeds its constitutional or legal responsibilities, any person injured by the act issued by such body may turn to the courts of law.

[39] Where the relationships between the Prince, the Government and the National Council are "government acts," therefore they are exempted from any jurisdictional control.

[40] According to the German Constitutional Court, the institutional dispute resolution procedure is intended to protect the rights of the State bodies within mutual relationships, not to exercise a general constitutional "guardianship" (BVerfGE 100, 266 <268>).

- *disputes of jurisdiction – vertically* – between central State bodies and regions, or disputes between regions in Italy, or disputes of jurisdiction between central bodies and local autonomous entities, in the Czech Republic, Republic of Macedonia, Montenegro, Serbia, Ukraine;
- *disputes related to the defence of local autonomy;* it is the case of Croatia, where each local or regional autonomous entity may turn to the Court whenever the State, by its decision, infringes the right to local or regional autonomy secured by the Constitution[41]; furthermore, Article 161 of Spain's Constitution regulates the disputes for the defence of local autonomy or statutory autonomy, which allows the Town Halls, General Councils or other local bodies to defend their autonomy against the laws of the State or of own Autonomous Communities[42].

- in the case of a federative State, there may be *federal disputes* (between the State and the bodies of the entities – communities/regions/ cantons/lands) or between the bodies of the entities themselves, as well as *legal disputes/institutional disputes at the State level* – between the federative State's institutions. This is the case of Austria, Belgium, Bosnia-Herzegovina, Germany, Russia and Switzerland.

Another feature regarding the object of legal disputes between State bodies is that – in the States where the constitutional court has this express prerogative – they cannot refer to the infringement of fundamental rights and, such cannot be used in order to perform a constitutionality review of regulatory acts. This is the case with Germany[43], Ukraine, Romania, Italy and the Czech Republic. Exempted from this rule are the cases of Bosnia-Herzegovina, Albania and Ukraine.

In the other States, where the constitutional court indirectly watches over the observance of the rules of separation of powers, by means of the constitutionality review, noteworthy is in Portugal the tendency of avoiding the transformation of the constitutional court into a super-court authorised to regulate State institutions or into an arbitrator.

Also a feature related to the object of the dispute is that, in most States, such procedures cannot be disputes of jurisdiction. For instance, in Spain the disputes opposing executive power authorities to ordinary courts of laws have a specific settlement means, i.e. the jurisdiction disputes which are settled by the Tribunal for Jurisdiction Disputes[44]. In the Czech Republic, such jurisdiction disputes related to the authority to decide/issue the resolution, when the involved parties are courts of law and autonomous, executive, territorial, occupational or professional bodies, or civil courts of law and administrative courts, shall be examined and settled by a special panel made up of three Supreme Court judges and three Supreme Administrative Court judges. Exemption from this rule can be found in Slovenia, where the Constitutional Court decides upon the disputes of jurisdiction between courts of law and other State authorities, as well as in the Republic of Macedonia.

c) As regards the **parties in the dispute**, they must always be State bodies. However, depending upon the structure of the public power in a State and upon the type of dispute, they can be central State bodies (in Italy, Germany, Montenegro, Poland, Serbia, Slovakia), local bodies (Romania and Slovakia), autonomous territorial bodies (Spain, Croatia, Italy, Serbia, the Czech Republic,

---

[41] In addition, if the representative body of a local or regional autonomous entity considers that a law regulating the organisation, responsibilities or financing of local and regional autonomous entities does not comply with the Constitution, it can appeal to the Constitutional Court to examine the constitutionality of the law or of several provisions of the law;

[42] The recent Institutional Law 1/2010 dated February 1 also stipulated the possibility of settling a dispute for the defence of the statutory autonomy of the historical territories of the Basque Autonomous Community;

[43] For this there is an abstract control of laws, initiated as per Article 93.1 no. 2 of the Fundamental Law corroborated with §§ 13 no. 6 and 76 and the following of the Law of the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz* – BVerfGG), upon the request of the Federal Government, of a *Land* government or of one-third of the *Bundestag* members.

[44] Presided over by the Chief Justice of the Supreme Court and consisting of an equal number of Supreme Court magistrates and permanent councillors of the State Council (Resolution TC 56/1990 dated March 29, F J 37).

Ukraine, the Republic of Macedonia) or bodies of the entities in federative States (in Russia, Germany, Switzerland and Bosnia-Herzegovina).

Furthermore, while in some countries such as Andorra and Albania any constitutional bodies can be parties in a dispute, in other countries such as Poland only central State bodies can.

d) As regards the **legal grounds of the dispute,** we can note that in all States this involves the existence of a constitutional relationship between the parties. Therefore, the dispute has to derive from the duties stipulated in the Constitution or from the interpretation of constitutional provisions. For instance in Germany[45], Lithuania, Slovenia and Romania.

e) As regards the **character of the control exercised by the constitutional court,** the analysis of all reports sent shows that it is a concrete and not an abstract one, the authors of the complaint must have a current and concrete interest in its resolution (Italy, Latvia, Slovenia and Germany). Poland's Report points out that this dispute has to be a genuine not a hypothetical dispute.

2. If the constitutional court has jurisdiction to settle such disputes.

In most States the constitutional court has, pursuant to the Constitution, the jurisdiction to settle constitutional legal disputes. In case of Albania, Andorra[46], Azerbaijan, Cyprus[47], Croatia, Spain, Georgia, Italy[48], Hungary, the Republic of Macedonia, Poland, Russia, Serbia[49], Slovakia, Slovenia[50], the Czech Republic and Ukraine the constitutional court is empowered to settle *disputes of jurisdiction*. They can be: positive or negative and can occur both horizontally (between central, legislative, executive and legal powers) and vertically (between central powers and local powers).

A special situation is in Belgium, where the Constitutional Court has the the power to settle only disputes of jurisdiction between the legislative assemblies of the federal State, of communities and of regions.

Moreover, in other States such as Bosnia – Herzegovina, Italy, Germany[51], Montenegro[52], Romania[53], Slovakia, Switzerland and Ukraine, the national Constitution establishes the constitutional

---

[45] In case of an institutional dispute, the Federal Constitutional Court decides upon the interpretation of the Constitution. Even when the decision is essentially rendered to settle the institutional disputes, the Federal Constitutional Court by means of the same decision may decide upon a legal matter relevant for the interpretation of the provision in the fundamental Law to which reference was made (cf. § 67 sentence 3 in BVerfGG).

[46] Pursuant to Article 98 letter d) of the Constitution

[47] Pursuant to Article 139 of the Constitution, the Supreme Court pronounces in last instance on the appeals submitted as regards a dispute of jurisdiction between the Chamber of Representatives and the Communal Chambers or between any of them and the bodies or authorities of the Republic

[48] Pursuant to Article 134 of the Constitution, Italy's Constitutional Court may examine and settle the disputes arisen between state powers (for instance, between the legislative and the executive), between central state bodies and a certain region, or between regions

[49] Pursuant to ArticleArticle 167 par. 2, items 1-4 of the Constitution of the Republic of Serbia

[50] Slovenia's Constitutional Court decides upon the disputes of jurisdiction between State bodies and local community bodies, upon the disputes of jurisdiction between courts of law and other state authorities, as well as upon the disputes of jurisdiction between the National Assembly, the President of the Republic and the Government (Article 160 par. 1 of the Constitution, points 7, 8 and 9).

[51] Pursuant to Article 93.1 no. 1 of the fundamental Law

[52] Any infringement of the Constitution

[53] Romania's Constitutional Court decided that that the fundamental Law stipulates the jurisdiction of the Court to settle any constitutional legal dispute arisen between public authorities and not only the disputes of jurisdiction, positive or negative, arisen from them (Judgment no. 270/2008, published in the Official Gazette of Romania, Part I, no. 290 dated

courts's power to examine not only disputes of jurisdiction between State bodies but also *any other disputes arisen between them*. Thus, in Bosnia – Herzegovina, the Constitutional Court has the jurisdiction to settle positive or negative disputes of jurisdiction or any other litigation arisen in the relationships between the State and the authority of an entity[54] and/or State institutions. In Croatia and Spain, besides the disputes of jurisdiction, the Croatian Constitutional Court, respectively the Spanish Constitutional Tribunal, may also settle a dispute for the defence of local autonomy. In the Czech Republic, the Constitutional Court extended this concept beyond the positive or negative disputes of jurisdiction[55]. In Slovakia, the Constitutional Court adjudicates on any disputes between State bodies as regards the interpretation of the Constitution or of the constitutional laws, as well as on the complaints submitted by the local public administration authorities against an unconstitutional or otherwise unjustified intervention, in matters related to local autonomy, except for the situation when another court has the jurisdiction to offer legal protection.

In Germany, the jurisdiction of settling litigations between the bodies of a *Land* lies in principle with the constitutional court of that land[56].

On the other hand, Armenia, Belarus, Estonia, France, Ireland, Latvia, Lithuania[57], Luxembourg, the Republic of Moldova, Monaco, Norway, Portugal and Turkey do not have a special responsibility stipulated in the Constitution regarding the jurisdiction of the Constitutional Court to settle such disputes, but in some of these States, i.e. in Armenia, Belarus, France, Estonia[58], Lithuania, the Republic of Moldova and Portugal, the constitutional court has the possibility to settle such disputes, indirectly, whenever it exercises an *a priori* or *a posteriori* review of constitutionality of

---

April 15, 2008) http://www.ccr.ro/decisions/pdf/en/2008/D0270_08.pdf. In addition, the Court decided that the notion of constitutional legal dispute refers to any disputed legal situations that arise directly from the text of the Constitution and are not limited only to positive or negative disputes of jurisdiction that might cause institutional blockages (to see Judgment no. 901/2009, published in the Official Gazette of Romania, Part I, no.503 dated July 21, 2009)

[54] Amendment I to the Constitution of Bosnia-Herzegovina, adopted in March 2009, supplemented Article VI with a new paragraph, (4), stipulating that the Constitutional Court of Bosnia and Herzegovina is competent to decide upon any litigation related to the protection of the established status and jurisdiction of the Brčko autonomous district in Bosnia and Herzegovina, litigation that might arise between one or the two entities and the Brčko district or between Bosnia and Herzegovina and the Brčko district, pursuant to the provisions of the Constitution and the sentences given by the Arbitration Tribunal.

[55] Particularly by its decisions no. Pl ÚS 14/01, Pl. ÚS 17/06 and Pl. ÚS 87/06. In the case Pl.ÚS 17/06 dated December 12, 2006, the Constitutional Court first verified whether there really is a dispute of jurisdiction. After confirming its existence, it then analysed the jurisdiction of the body having adopted the final decision and decided that that jurisdiction also lay with another body (joint jurisdiction). In this case, the action of another body was a prerequisite in the adoption of a final decision. The essence of that dispute was whether the minister of justice could decide the appointment of a Supreme Court Justice without the consent of the Chief Justice of the Supreme Court. The Constitutional Court admitted in that context that the Chief Justice of the Supreme Court is a state body, who has an exclusive right of consenting with regard to the appointment of a Supreme Court Justice. Furthermore, it stated that the application is admissible as no other body has the prerogative of deciding in that particular case; it stated that, in its capacity as a constitutionality-protecting legal body (Article 83 of the Constitution), it could not allow the continuation of a dispute between two important state bodies representing the legal power, on the one hand, and the executive power, on the other hand, merely because there was no provision regarding who was authorised to settle such dispute. In a democratic state governed by the rule of law it is not possible that an arbitrary act cannot be submitted to control and, thus, cannot be repealed, despite its obvious illegality or non-constitutionality.

[56] Only under exceptional circumstances, when for instance there is no constitutional court in a land, litigation between the bodies of that *Land* can be brought to the Federal Constitutional Court, pursuant to Article 93.1 no. 4 of the fundamental Law.

[57] Most disputes between authorities refer to the interpretation and implementation of the constitutional principle of the separation of powers in the state.

[58] It is considered that "institutional disputes" may mean the constitutionality control of the general applicable laws (laws and other regulatory acts) as part of the constitutionality control procedure, which may be initiated by the President of the Republic, by the Chancellor of Justice, by local councils as well as, in certain cases, by the courts of law that may address the Supreme Court by means of a resolution. Under such a circumstance, the other party involved in the dispute is *Riigikogu*, the Government, the Ministry or the local public authority having adopted or omitted to adopt the regulatory act.

regulatory acts. Thus, in Portugal, the coexistence of several regulatory powers, mainly of several law-making powers deriving from the Portuguese Constitution[59], also assumes the possibility that a body or an entity violates other body's or entity's responsibilities[60]. This is why, in a way, we can say that when, for instance, it verifies the constitutionality of a decree-law or of a regional legislative decree as against the specific jurisdiction, or of a regulatory act issued by a local authority, the Constitutional Tribunal also settles institutional disputes. In Armenia, the Constitutional Court is competent to settle only those disputes related to the decision made by electoral commissions on the results of the elections.

Special situations can be found in:

- Austria, where the Constitutional Court decides: upon the divergent opinions between the Court of Audit and the public administration as regards the interpretation of the legal provisions setting the jurisdiction of the Court of Audit; upon the divergent opinions between the Ombudsman and the federal government or a federal ministry as regards the interpretation of the legal provisions setting the Ombudsman's jurisdiction; upon the disputes of jurisdiction between the Federation and a land, or between lands, in case both regional authorities claim the same jurisdiction (the so-called positive disputes of jurisdiction); it also decides upon the disputes of jurisdiction between courts of law and administrative authorities as well as between ordinary law courts and other jurisdictions, the Constitutional Court included; it is competent to decide whether a legislative or execution act is of the jurisdiction of the Federation or of the lands; it decides whether there are agreements concluded between the Federation and the lands, or between the lands, as well as in connection with the meeting of the requirements under such agreements by the Federation or by the lands; it pronounces on the *impeachment* procedure initiated against the supreme constitutional bodies of the Republic[61].

- Latvia, where although the Constitution does not include an express responsibility to this purpose the Constitutional Court settles institutional disputes as well. Taking into consideration the responsibilities of the Constitutional Court, such issues can be straightened out, however, by means of litigations only when the contesting norm or act refers to (or affects) the relationships between State institutions or bodies.

- Switzerland, where the Swiss Federal Tribunal adjudicates – by means of an action to a single instance – disputes of jurisdiction between federal authorities and canton authority and also adjudicates civil law or public law litigations between the Confederation and cantons or between cantons[62].

3. Which are the public authorities among which such disputes may arise?

Depending upon the structure of the public power in a State and upon the jurisdiction of the constitutional court in settling institutional disputes, such disputes may arise as follows:

A. In case of disputes of jurisdiction, horizontally:

---

[59] Autonomous regions Azores and Madeira have legislative and regulatory autonomy. Local bodies have only regulatory autonomy.

[60] For instance, the distribution of the legislative power between Parliament, the Government and the Assemblies of autonomous regions set by the Constitution may indirectly generate a dispute of jurisdiction between constitutional bodies.

[61] Such *impeachment* procedures are highly uncommon. There were only two instances during the first Republic (between 1918 – 1933) and another during the second Republic (since 1945).

The federal Chancellery, federal departments or, if stipulated by the federal law, their subordinating administrative units have the right to make an appeal, by means of a so-called public law appeal, if the attacked act is likely to violate the federal laws (Article 89 par. 2, letter a of LTF). Similarly, the communes and the other public law collectivities invoking the infringement of the guarantees recognised by the canton constitution or by the federal Constitution may, in their turn, address to the Swiss Federal Tribunal by means of a public law appeal (Article 89 par. 2, letter c of LTF). In most cases the communes invoke, in support to their request, infringements of the canton constitutional guarantee regarding communal autonomy (cf., for instance, Resolution TF 136 II 274: the appeal against the provisions of the Genovese law on zones and meeting zones).

- between the central State bodies: în Montenegro, Poland [63], Romania, Serbia, Slovakia, Spain[64], Italy[65], Ukraine[66]
- only between legislative, executive and legal powers: in Azerbaijan and Croatia
- only between various law-making bodies: in Belgium
- only between supreme State bodies: in the Czech Republic[67] (Chamber of Deputies, Senate, the President, the Government, the Constitutional Court, and the case-law shows the two supreme courts as well)

B. In case of the disputes of jurisdiction, vertically:

- between central bodies and local bodies: in Slovakia and Romania
- between State bodies and autonomous territorial bodies: in Italy[68], Serbia[69], the Czech Republic, Ukraine, Montenegro, the Republic of Macedonia.

C. In cases of disputes for the defence of local autonomy:

- between general institutions of the State and the Autonomous Communities: in Spain
- between the State and the representative body of a local or regional autonomous entity (when the constitutionality of a law regulating the organisation, jurisdiction or financing of local and regional autonomous units is challenged) or the representative body of a local or regional autonomous unit or the executive power representative in a county, town or municipality (prefect, mayor of the town or of the municipality) if the issue refers to an complaint regarding the infringement of the right to local or regional autonomy, by an individual act issued by the State bodies, in Croatia

D. In case of federative States:

- between the federative State institutions or between the State and the entity bodies or between the bodies of the entities: in Belgium, Bosnia-Herzegovina[70], Russia[71],

---

[63] The bodies of local autonomy units as well as the disputes of jurisdiction between their bodies and the central administration bodies are settled by administrative courts, except for the cases when the law stipulates differently (see Article 4 of the August 30, 2002 Law – Law on the procedures in administrative courts).

[64] But not the King of Spain, who is inviolable (Article 56 of Spanish Constitution) and, therefore, it is impossible to initiate a dispute or any kind of legal action against him.

[65] In the sense of the dispute settled by the Constitutional Court, State power can also be one of the independent public entities that do not classify in the traditional trichotomy of roles, but does exercise the functions stipulated by the Constitution, in full autonomy and independence. Examples can be given: the Constitutional Court itself, the President of the Republic and the Court of Audit in exercising its audit role.

[66] The President of Ukraine; a number of at least 45 deputies; the Supreme Court of Ukraine; the Human Right Parliamentary Advocate; the Supreme *Rada* of Ukraine; the Supreme *Rada* of the Autonomous Republic of Crimea (Article 150 of Ukraine's Constitution).

[67] The dispute of jurisdiction between the Chief Justice of the Supreme Court and the Minister of Justice as regards authority to appoint a judge at the Supreme Court (case no. Pl. ÚS 87/06).

[68] Where the main categories of disputes appear, on the one hand, between bodies or subjects of the state apparatus and, on the other hand, between the State and the autonomous territorial bodies (mainly, the Regions; in theory, the Provinces and Municipalities can be also included here). The last type of dispute has "standardised" subjects, which means that after the bodies representing the State and the regions are identified, disputes will arise only between these bodies. However, the last type of disputes cannot be identified *a priori*, in the sense that the dispute may arise between different bodies. Still, it is possible to make a distinction between the disputes within a single power area and the disputes involving several power areas: as regards the first case, the internal organisation of the power will establish the body having the jurisdiction to settle the dispute; as regards the last case, however, there might arise the problem of establishing the proper entity that is equidistant to the two powers in dispute.

[69] Parties in the dispute may be the following authorities: a) courts of law and other State authorities; b) authorities at the level of the republic and those in provinces or the local autonomy entities; c) authorities in provinces and the local autonomy entities as well as d) authorities of various autonomous provinces or of various local autonomy entities.

[70] Disputes may arise between entities, or between Bosnia and Herzegovina and one or both entities, or between the institutions in Bosnia and Herzegovina. Pursuant to ArticleVI (4) of the Constitution, the Court is competent to decide upon any litigation related to the protection of the established status and jurisdiction of the Brčko autonomous district in Bosnia

Germany[72], where parties in litigation can be both supreme federal bodies and other participants[73], Switzerland, Austria (between the Federation and one land or between lands)

In some countries institutional disputes may arise only between constitutional bodies, such as in Albania[74], Andorra[75], Spain, Romania[76], while in others they may arise between any State bodies: in Armenia, Cyprus[77], Georgia, Montenegro[78], Serbia[79].

In Germany there is special situation related to the possibility of political parties to be parties in an institutional dispute. Thus, the Federal Constitutional Court has however afforded[80] to the parties

---

and Herzegovina, litigation that might arise between one or the two entities and the Brčko district or between Bosnia and Herzegovina and the Brčko district.

[71] Pursuant to Article 125 of the Constitution of the Russian Federation, such disputes may arise: a) between the federal bodies of the state power; b) between the state power bodies of the Russian Federation and the state power bodies of the entities in the Russian Federation; c) between the higher entities of the state bodies in the entities of the Russian Federation.

[72] Among the supreme federal bodies are *Bundesrat*, the Federal President, *Bundestag*, the Federal Government, the Joint Parliamentary Commission (*Gemeinsamer Ausschuss*) and the Federal Assembly (*Bundesversammlung*).

[73] Other parties, in the meaning of § 93.1 no. 1 of the fundamental Law, invested with rights by the fundamental Law or by the regulation of a supreme federal body, are primarily the sections or subdivisions of the supreme federal bodies. Among them are the presidents of *Bundestag* and *Bundesrat*, the members of the Federal Government, political commissions, parliamentary groups, parliamentary groups in sub-commissions and the groups in the meaning of § 10.4 of the *Bundestag* Regulation (GO-BT) (groups of deputies who associate but do not reach the number required to set up a parliamentary group. On the contrary, it is considered that an occasional majority or minority, coagulated as a simple vote, cannot have the capacity of "party." In *Bundesrat* it is considered that parties in institutional disputes can be the president, presidium, commissions and members of *Bundesrat*, in general, as well as the total number of the members of a *Land* in *Bundesrat*.

The applications for the settlement of institutional disputes by the Federal Constitutional Court have been lately filed mainly by the *Bundestag* parliamentary groups. This is proven by the recent decisions made by the Court in the institutional disputes procedure: the judgment dated May 4, 2010 (2 BvE 5/07, EuGRZ 2010, 343), the judgment dated May 7, 2008 (BVerfGE 121, 135), the judgment dated July 3, 2007 (BVerfGE 118, 244).

Unlike § 63 of BVerfGG, which recognizes the possibility of being part of institutional disputes "only" to the component sections of some bodies – *Bundestag*, *Bundesrat* and the Federal Government – which were granted specific rights in the fundamental Law or in the *Bundestag* and *Bundesrat* Regulation, Article 93.1 no. 1 of the fundamental Law extends the area of participants, also including the ones that were granted specific rights in the in the fundamental Law or in the regulation of a supreme federal body. This differentiation has practical significance as regards the participation of political parties and of *Bundestag* members in institutional disputes.

[74] The Judgment no. 20/2007 issued by the Constitutional Court of the Republic of Albania decided that parties in a dispute of jurisdiction can be a constitutional body, on the one hand, and one of its components, on the other hand, as for instance *at least 1/4 of the number of deputies and Parliament.*

[75] Co-Princes, the General Council, the Government, the Superior Council of Justice and the Communes (which are the representative and administration bodies of "parishes" or *parròquies*, public collectivities with legal personality and the right to adopt local regulations, in keeping with the law, in the form of orders, regulations and decrees.

[76] In its Judgment no. 988/2008, Romania's Constitutional court expressly stated the meaning of the "public authorities" phrase, showing that it means: "*Parliament, made up of the Chamber of Deputies and the Senate, the President of Romania, as unipersonal public authority, the Government, the central and local public administration bodies, as well as the legal authority bodies – the High Court of Review and Justice, the Public Ministry and the Higher Council of Magistrates."*

[77] The Supreme Court pronounces in last instance on the appeals submitted with regard to a dispute of jurisdiction between the Chamber of Representatives and Communal Chambers, or between any of them and the bodies or authorities of the Republic. Pursuant to the jurisprudence of the Supreme Court, bodies or authorities are specific legal persons, having the characteristics of actual governing institutions and functioning for and on behalf of a public right primary entity, such as the Republic of Cyprus (municipalities, semi-governmental organisations).

[78] Parliament, the Government, common law courts, local public administration authorities and other state authorities

[79] The common law courts, no matter their jurisdiction level, the state administration authorities (all ministries, the administrative bodies making them up or subordinated to them (divisions, inspectorates, departments), specialised bodies (secretariats, offices)), the authorities of the autonomous provinces as mentioned in the charters of those provinces, the local autonomy authorities (authorities of municipalities, towns and capital city Belgrade), the National Bank of Serbia, the State Audit Institution, the Ombudsman, the Commissar for Public Interest Information etc.

[80] By the Principle Resolution, cf. BVerfGE 4, 27 <31>

which are active at federal level in the exercise of their functions a quality as an organ and has upheld this case-law despite being the object of considerable criticism in the literature[81] insofar as the constitutional legal dispute relates to the status of a political party as a subject of political will-formation and the opposing party is another constitutional organ[82]. In this field, the parties came so close to state organ will-formation that they were said to have disputes between organs available to defend their status.[83]. Outside of this core area, it is however incumbent on the parties to seek their legal protection, after having exhausted the legal remedies before the non-constitutional courts, by means of a constitutional complaint. This applies particularly when the party wishes to assert its constitutional status against a public-law broadcaster[84].

Other special situations are found in Serbia and Ukraine, where the Ombudsman can be a party in an institutional dispute, while in Austria he is party in the opinion divergence procedure between the Ombudsman and the federal Government or a federal ministry as regards the interpretation of legal provisions setting the Ombudsman's jurisdiction.

As to the constitutional court, it can be party in an institutional dispute in Italy and the Czech Republic, while in Romania[85] and Germany[86] the Constitutional Court cannot be a party in such a dispute.

4. Legal acts, deeds or actions that can generate such disputes: are they connected only to the disputes of jurisdiction or do they also occur in cases when a public authority can challenge the constitutionality of an act issued by another public authority? Has your constitutional court settled such disputes? Give examples.

The analysis of all submitted reports shows that the issues having generated constitutional legal disputes can be classified in: a) legal acts and b) actions, measures or omissions.

a) In all the States where the constitutional court settles institutional legal disputes, they can be generated by **legal acts** issued by the public authorities involved in the dispute. Thus, in Spain the disputes of jurisdiction can be caused by the provisions, decisions and any kind of acts adopted, issued or made by any authority, by the State or by one of the 17 Autonomous Communities.

In Bosnia-Herzegovina we note the following acts that can generate disputes of jurisdiction: the Agreement on the establishment of special parallel relationships between the Federal Republic of Yugoslavia and the Srpska Republic[87], which caused a dispute of jurisdiction between the State of

---

[81] Cf. Pietzcker, in: *Festschrift 50 Jahre Bundesverfassungsgericht* Vol. I, 2001, 587 <595>

[82] Cf. BVerfGE 66, 107 <115>; 73, 40 <65>; 74, 44 <48 and following.>; 79, 379 <383>).

[83] The provisions of the Political Parties Law (*Parteiengesetz*) on the financing of parties equally refers to their constitutional status as factors of constitutional life in forming the political will, and the Federal Constitutional Court took them into consideration in the institutional disputes resolution procedure, less those related to the reimbursement and ordering/instruction of the payments made by the president of the *Bundestag*, also pursuant to the parties financing rules (cf. BVerfGE 27, 152 <157>; Pietzcker, in: *Festschrift 50 Jahre Bundesverfassungsgericht* Vol. I, 2001, 587 <594>). Likewise, a political party may stand on the institutional disputes procedure when challenging the publicity the Federal Government made during electoral campaign (cf. BVerfGE 44, 125 <136-137>).

[84] As they do not meet the compulsory requirements of § 2.1 of the Political Parties Law – (cf. BVerfGE 1, 208 <227>; 13, 54 <81 and following.>; 74, 96; 79, 379 <384-385>).

[85] Pursuant to the Judgment no.53/2005 issued by the Constitutional Court of Romania, published in Romania's Official Gazette, Part I, no.144 dated February 17, 2005, the parties in a constitutional legal dispute can be only the public authorities referred to in Title III of the Constitution, i.e. *Romania's Parliament, Romania's Government, Public Authority* and *Legal Authority*, while the Constitutional Court is regulated by Title V of Romania's Constitution.

[86] The Federal Constitutional Court does not have any position in the state's management, therefore it cannot initiate litigations between bodies; Stern, in: *Bonner Kommentar zum GG – Zweitbearbeitung* –, Article 93, margin no. 92 and following.).

[87] See the decision made by the Constitutional Court of Bosnia-Herzegovina No. *U 42/01* dated March 5, 2001

Bosnia and Herzegovina and one of the two component entities, the Srpska Republic[88]; the Insurance Agency Law in Bosnia and Herzegovina[89], which generated litigation on the distribution of jurisdiction between the State and the entities.

In Romania, an example is the decisions made by the High Court of Review and Justice whereby it did not only clarify the meaning of legal regulations or of their scope but, invoking legislative technique mistakes or non-constitutionality mistakes, it re-enforced norms that had no longer been valid as they had been repealed by regulatory acts issued by the law-making authority. These decisions made by the Supreme Court generated a constitutional legal dispute between judiciary, on the one hand, and the Parliament of Romania and the Romanian Government, on the other hand[90].

In Italy the disputes between the State and the region can also refer to acts that do not have the force of a law, such cases being specifically called "disputes of responsibilities."

In Montenegro, the Constitutional Court decides upon any form of "infringement of the Constitution" occurred following the enactment of an unconstitutional law, regulation or any other general or individual act.

b) Moreover, in all the States where the constitutional court settles institutional legal disputes, they can be generated by **actions or measures or omissions,** materialized or not in legal acts, of the public authorities involved in the dispute. Thus, in Germany[91] any conduct on the part of the opposing party can be regarded as legally material which is suited to harm the legal status of the applicant. An act within the meaning of § 64.1 of the Federal Constitutional Court Act is not restricted to only being one single act,but may also be the issuance of a law or cooperation in an act of creating provisions; the resolution of parliament on the rejection of a legal initiative can also be qualified as an act in the dispute between organs. Also, the issuance of or change to a provision of the Rules of Procedure of the German Bundestag may constitute an act within the meaning of § 64.1 of the Federal Constitutional Court Act if it is able to mean that the applicant is currently legally. The application of the Rules of Procedure themselves, by contrast, is not a permissible object of attack in disputes between organs. The rejection of a motion for recognition as a parliamentary group or as a group in the German Bundestag according to § 10.4 of the Rules of Procedure of the Bundestag also does not constitute an act which is able to give rise to a dispute between organs. Omission, conversely, means to not carry

[88] In particular, the issue was whether the consent of the Parliamentary Assembly of Bosnia and Herzegovina had to be asked for before ratifying the Agreement. In connection with this aspect, the Constitutional Court found that, pursuant to Article III (2) of the BiH Constitution, an agreement regarding the establishment of a special parallel relationship includes a constitutional restriction on the sovereignty and territorial integrity because the agreements with states and international organisations can be concluded (exclusively) with the consent of the Parliamentary Assembly of Bosnia and Herzegovina. Therefore, an agreement setting up special parallel relationships falls under the Constitutional Court's control because the agreements with states and international organisations require the consent of the Parliamentary Assembly. In this case the Constitutional Court decides that the consent of the Parliamentary Assembly is not required to set up special parallel relationships with neighbouring countries and, therefore, the Agreement was concluded in compliance with the Constitution of Bosnia and Herzegovina.

[89] In this case, the Constitutional Court ruled out that the Parliamentary Assembly of Bosnia and Herzegovina is competent to adopt the challenged legal provisions, pursuant to Article IV (4) letter (a) corroborated with Article III (1) letters (a) and (b) of the Constitution of Bosnia and Herzegovina, as they are meant to harmonize the laws on insurance companies as well as with the relevant laws in the European Union, and thus Bosnia and Herzegovina fulfils its obligations under the Stabilization and association Agreement (Constitutional Court's Judgment no. *U 17/09* dated March 27, 2010).

[90] Judgment no. 838/2009, published in Romania's OfficialJournal, Part I, no.461 dated July 3, 2009.

[91] The object of institutional disputes is the actual litigation regarding the jurisdiction or statutes of constitutional bodies. §64.1 sentence 1 of the Law on the Federal Constitutional Court (BverfGG) defines it by using such terms as "measure or omission of the opposing party" whereby the applicant's rights and responsibilities stipulated by the fundamental Law were injured or put under direct threat. The measure or omission has to be objectively present and legally relevant.

out an act[92].A constitutionally relevant omission may for instance consist of the Federal President refusing to sign a federal statute, the Federal Government refusing to respond to a parliamentary question or the Federal Government refusing to permit the Bundestag or the committee of inquiry to inspect the files[93].

In Italy the disputes between central State bodies and regions or between regions can arise in connection with any type of measure or act, except for the primary ones, for which there is a special procedure: the one for the control of constitutionality of laws. The disputes between State powers (i.e. the executive, legislative and legal powers but also between the State and other bodies) can refer to adopted measures but also to a legally relevant conduct or action which allegedly violates the integrity of the autonomy and independence granted to a certain body by the Constitution. The aforementioned actions can consist of deeds, formalised or not in acts, positive or negative, which lead to a certain result. Inactions, in the mentioned meaning, are also to be included here.

In the Czech Republic the disputes of jurisdiction, pursuant to Article 120 par. 1 of the Constitutional Court Law, mean the disputes between State bodies related to the authority to issue decisions, to implement measures or perform other actions in the area specified in the complaint. In the Czech Republic's legal system, the Constitutional Court cannot decide upon other disputes but upon those related to the actual application of regulations. In such procedures, the Constitutional Court cannot verify the constitutionality of regulatory acts issued by State bodies; therefore it cannot sort out the legislative authority disputes. The control of regulations is part of the second type of procedures.[94]

As regards the second question, the following situations can be noticed:

a) In most States, the situations having generated disputes are linked only to the jurisdiction of the public authorities involved.

Thus, if the infringement of powers was caused by laws, the dispute should be settled in compliance with the procedure used for the constitutionality review of regulatory acts. It is the case of Andorra, where if the infringement of powers was caused by a law of the General Council or by a legislative decree of the Government, the dispute should be settled in compliance with the procedure used for the constitutionality review stipulated in Chapter II Title IV of the special Law on Constitutional Tribunal, in all its aspects, including the one related to the active procedural quality[95].

In Macedonia, the first case[96] referred to a negative dispute of jurisdiction between the Central Registry Office of the Republic of Macedonia and the First-Instance Court in Shtip, when both authorities had declined their authority to record a mention for the registration of an administrator in the Trade Registry. By the decision made, the Constitutional Court decided that the Central Registry Office of the Republic of Macedonia was the competent authority to make that registration. By Judgment U. no. 143/2008 dated October 15, 2008 the positive dispute of interests between the First-instance Court in Skopje and the Securities Commission was settled. In that case, both authorities considered themselves competent to pronounce a temporary interdiction measure related to the securities of a trading company, company that filed the complaint with the Court for the settlement of the dispute of jurisdiction. The Constitutional Court found in favour of the First-Instance Court, ruling that the court not the Securities Commission was competent to pronounce that measure.

---

[92] Bethge, in: Maunz/Schmidt-Bleibtreu/Klein/Bethge, *Bundesverfassungsgerichtsgesetz*, §64, marginal no. 36. But more than with the positive action, the issue of legal relevance appears in the case of an omission. Omissions cause legal consequences when there is the legal obligation to take action (Klein, in: Benda/Klein, *Verfassungsprozessrecht*, 2nd ed. 2001, § 26, marginal no. 1025). If this is not the case, the application for the acknowledgement of an unconstitutional omission has to be denied as inadmissible because the admissible object does not exist (BVerfGE 104, 310).

[93] Bethge, in: Maunz/Schmidt-Bleibtreu/Klein/Bethge, *Bundesverfassungsgerichtsgesetz*, § 64, marginal no. 36.

[94] See Article 87 par. 1 letter a) and letter b) of the Constitution

[95] This has never been registered with the Tribunal in Andorra

[96] See Judgment U.no.159/2007 dated November 14, 2007

In Italy the Court pointed out that, thus, legislative measures are possible to be challenged but only when they could not be the subject of an incidental complaint, on the basis of an exemption of non-constitutionality[97].

b) The situations having generated legal disputes are also linked to the constitutionality of the act in question.

Such situations can be seen in Albania, Bosnia-Herzegovina, Estonia, Latvia, Lithuania, Moldova, Montenegro, Russia and Ukraine.

In Albania, when the settlement of the dispute of jurisdiction refers to acts issued by the bodies in dispute, the Constitutional Court also examines the constitutionality or legality of such acts in order to settle the dispute[98].

In Latvia the institutional disputes are settled only in jurisdictional framework, when the Court pronounces on the compliance of the challenged act or rule with the higher legal rule. Thus, if certain challenged rule is in any way connected to the jurisdiction of an institution, it will be examined in the concrete case.

In Lithuania, most disputes between authorities settled by the Constitutional Court refer to the interpretation and implementation of the constitutional principle of the separation of powers in the State. There are the applications requesting the examination of the constitutionality of those regulatory acts setting the responsibilities of State institutions and regulating their relationships, principle that can be indicated directly or implicitly.

In Moldova, the Constitutional Court declared as unconstitutional several Government resolutions whereby the principle of the separation of powers was violated. On October 5, 1995 the Constitutional Court submitted the Government Resolution no. 696 dated December 30, 1994 to the control of constitutionality.

In Ukraine, the main characteristic is that such disputes of jurisdiction vary depending upon the object of the application filed by the subject entitled to address to the Court, in connection with the constitutionality of the acts adopted by a State body or the official interpretation (usually in systemic relation with the provisions of Ukraine's Constitution[99]). Pursuant to Article 152 of Ukraine's

---

[97] The procedure that represents the "normal" way to challenge a law or a regulatory act but which may come upon certain "blockages" – as phrased by the former Chief Justice of the Constitutional Court, Gustavo Zagrebelsky – arisen because, in order to refer the Court, the law should be applicable in a specific case, but this cannot be relied on in the case of several categories of laws, such as electoral laws, fund-allotting laws, etc.

[98] In its judgment no. 20 dated 04.05.2007, the Constitutional Court, taking into consideration the right of the parliamentary minority (1/4 of deputies) to set up an investigation committee in the capacity of a "constitutional authority," acknowledged that Parliament's decision refusing the setting-up of such a committee generated a dispute of jurisdiction. Therefore, it decided to settle the dispute of jurisdiction arisen between the 1/4 of the deputies, on the one hand, and Parliament, on the other hand, ruling to nullify, on grounds of non-constitutionality, the act having generated the dispute – *Parliament's decision*.

In its decision no.22 dated 05.05.2010, the Constitutional Court acknowledged that a dispute of jurisdiction was generated by the way in which the Assembly's decision on the setting-up of an investigation committee formulated the object of the parliamentary investigation, by the investigation carried out by that committee as well as by that committee's establishing the unlawfulness of the KRRT decisions, thus creating a blockage in the exercise of the jurisdiction of plaintiff Tirana Municipality. Therefore, the Court decided to settle the dispute of jurisdiction between this authority and the Assembly of the Republic of Albania by nullifying the decisions made by the Assembly of the Republic of Albania "as regards the setting-up of the Investigation Committee" and "as regards the approval of the report and conclusions of the investigation commission."

[99] Chapter 10 of the Law on Ukraine's Constitutional Court sets the characteristics of the procedures in the cases related to the constitutionality of the legal acts having generated litigations about the jurisdiction of the constitutional bodies of Ukraine's state power, of the bodies of the Autonomous Republic of Crimea and of the local autonomy bodies. Pursuant to Article 75 in the aforementioned law, the grounds to refer the Court must be a dispute of jurisdiction between the state constitutional bodies, the bodies of the Autonomous Republic of Crimea and the local autonomy bodies, if one of the subjects entitled to refer the Court considers that the acts of Ukraine's Supreme *Rada*, the acts of Ukraine's President, the

Constitution, by the decision of the Constitutional Court the laws and the other legal acts, in full or in part, will be declared unconstitutional if they do not comply with Ukraine's Constitution or if their drafting, adoption or enforcement procedure set by Ukraine's Constitution has been violated. Therefore, the Constitutional Court decides in the constitutional litigations between the public bodies of the State power referred to in Article 150 of Ukraine's Constitution as regards the issues related to the constitutionality of the acts issued by such bodies, including on the disputes of jurisdiction as well as the constitutionality of that act.

Special situations can be found in:

- Serbia, where institutional disputes brought to the Constitutional Court of Serbia refer to the disputes of jurisdiction between public authorities, but it is possible that one of the authorities in dispute starts the control procedure of the constitutionality and legality of a general act, as part of the settlement of the disputes of jurisdiction. Under such circumstances, the Constitutional Court shall treat the application for the control of constitutionality and legality as a previous matter upon which the result of the settlement procedure of the disputes of jurisdiction depends. Under such a circumstance, it will suspend the examination of the disputes of jurisdiction until the completion of the regulatory control. The Constitutional Court can decide the beginning *ex officio*[100] of the control of the regulatory act, the judgment of the disputes of jurisdiction being suspended until the completion of the control[101].

- Slovenia, where in the settlement of a disputes of jurisdiction the Court can decide ex officio to exercise the constitutionality control of the regulation if it considers that this contributes to the settlement of the dispute and can repeal or annul the regulation or the general act issued in exercising public authority which is found unconstitutional or illegal in that procedure[102].

- in Switzerland, where the Swiss Federal Tribunal cannot be apprised in legislation matters except for deciding whether a canton rule usurps the legislative jurisdiction of the Confederation but not the other way round.

5. Who has the right to refer the constitutional court in order to settle such a dispute?

The analysis of the reports sent shows the need to classify the entities that have the right to refer the constitutional court – depending upon the express regulation of the constitutional litigation court's responsibility to settle institutional disputes. The following differences can be noticed:

A. In the States where the constitutional litigation court has the express authority to settle constitutional legal disputes, we find the following situations:

a) In most countries, the entity that has the right to refer the constitutional court in order to settle an institutional dispute can be any party in that dispute. This is the case, for instance, of Albania, Bosnia and Herzegovina, Cyprus, Croatia, the Republic of Macedonia, Montenegro, Serbia, Slovenia, Italy, Germany and Russia.

b) In other States, such as Azerbaijan, Andorra, Georgia, Spain, Romania, Poland, Slovakia, Ukraine, the entities that have the right to refer the constitutional court in order to settle an institutional dispute are expressly and restrictively stipulated by the Constitution and/or by laws and they can be both the public authorities at the top of the State powers and the supreme bodies of autonomous entities. Therefore, the entities can be:

- the President of the country: in Azerbaijan, Georgia, Poland, Ukraine, Romania, Slovakia,

---

acts of Ukraine's Council of Ministers, the legal acts of the Supreme *Rada* of the Autonomous Republic of Crimea setting the jurisdiction of the abovementioned bodies do not comply with Ukraine's Constitution.

[100] Article 50 par. 2 and Article 53 in the Constitutional Court Law.

[101] To date, the Constitutional Court has never had to settle disputes of jurisdiction which would require the constitutionality (and legality) control of an act.

[102] Article 61 par.4 of the Constitutional Court Law.

- the King: in Spain
- the Chambers of Parliament/the presidents of one Chamber of Parliament / a certain number of parliamentarians: in Georgia (one fifth of the Parliament members), Poland (the Marshals of *Seim* and of the Senate), Romania (one of the presidents of the two Chambers of the Parliament), Spain (Congress/Senate), Ukraine (a number of at least 45 Deputies, Ukraine's Supreme *Rada* and the Supreme *Rada* of the Autonomous Republic of Crimea),
- the Government/the head of the Government: in Andorra, Georgia, Romania, Poland, Spain, Slovakia, Croatia
- one fifth of the total number of members of the National Council of the Republic: in Slovakia
- the supreme court: in Poland (the President of the Supreme Court/ the President of the High Administrative Court), Ukraine (the Supreme Court), Azerbaijan
- any court of law: in Slovakia
- the Attorney General/the Attorney General's Office: in Slovakia and Azerbaijan
- the President of the Superior Council of Magistracy or of the General Council of the Legal Power: in Romania and in Spain, respectively
- one-fifth of the number of members of the General Council in Andorra
- autonomous entities/their supreme bodies: in Andorra (the 3 Communes), Georgia (supreme representative bodies in Abkhazia and Ajara)
- authorities of local public administration: in Slovakia
- the Ombudsman: in Ukraine (Human Right Parliamentary Advocate) and Serbia

B. In the States where the constitutional litigation court does not have the express authority to settle constitutional legal disputes but it has the possibility to settle such disputes indirectly when exercising an *a priori* or *a posteriori* control of the constitutionality of regulatory acts, one can notice that the entities that have the right to refer the constitutional court in order to solve an institutional dispute are the same public authorities that can make the complaint about the constitutionality control of regulatory acts. Such situations can be found in Armenia, Belarus, France, Estonia, Lithuania, the Republic of Moldova and Portugal.

6. What is the settling procedure of such a dispute?

In all the States where the constitutional litigation court settles institutional disputes the complaint is made by a written act (application/ complaint/resolution) drafted in observance of certain requirements of form, and justified.

In some States there is a time frame within which such complaint can be filed: for instance, in Germany the application shall be filed within 6 months from the date when the measure or the omission was acknowledged; in Cyprus the application has to be filed within 30 days from the challenging date of such a responsibility or jurisdiction; in Slovenia the affected authority has to formulate an application for the settlement of the dispute within 90 days from the date when it discovered that another authority intervened or assumed the jurisdiction.

Moreover, in all States the first procedural step is in writing.

Special situations are noticed in Spain, where there is the obligation to fulfil a previous procedure[103] and in Azerbaijan, where the examination of the admissibility of the application is compulsory[104].

[103] Before apprising the Constitutional Tribunal, the body considering that its responsibilities were injured has to address to the body having abusively exercised such responsibilities and to require the repeal of the decision having brought about the undue assumption of responsibilities. To this end it has a 1-month period from the date when the decision having caused the dispute was acknowledged. If the body to which the notification is addressed states that it acts within the limits of the

Another special situation appears in Andorra, where one party dropping their action results in the annulment of the action. In the Czech Republic, before the constitutional court pronounces, the author of the application – with the consent of the Constitutional Court – is allowed to withdraw it. The Constitutional Court may decide, however, that the interest in settling the disputes of jurisdiction in a particular case exceeds the plaintiff's will, so it will continue the procedure. But when it accepts the withdrawal of the application, it stops the procedure. Furthermore, during the procedure, the Constitutional Court can decide to deny the application if: the settlement of the disputes of jurisdiction lies with another body, pursuant to a special law, or the settlement of the disputes of jurisdiction lies with a body higher than the two bodies between which the disputes of jurisdiction appeared.

In other cases, the Constitutional Court pronounces on the merits of the case, deciding which is the competent body to settle the problem having generated the dispute. When the disputes of jurisdiction appeared between a State body and an autonomous region, it decides whether the problem is of the jurisdiction of the State or of the autonomous region.

In Estonia, the Supreme Court can suspend, on substantially justified grounds, the implementation of the attacked regulatory act or of certain provisions thereof, until the date when the decision made by the Constitutional Court is to produce its effects, while in Croatia the Constitutional Court can order the interruption of procedures in front of the bodies in dispute until it pronounces its decision. Likewise, in Italy the plaintiff is ensured a preliminary protection in the form of an order whereby the attacked act is suspended[105].

According to sent reports there is also a verbal procedure in the following States: Belarus, Bosnia and Herzegovina, Romania, Poland[106], Italy[107]. During such a procedure evidence is brought and any clarifications needed for the case are made.

In Italy the disputes between State powers show several significant characteristics. The body claiming that its legal authority were violated will apprise the Court, but its application will comprise only the description of facts and probably the responsible act. The Court decides whether the application is admissible; if it is, the Court will establish the body (or bodies) that are to be summoned as defendant. The plaintiff will have the obligation to notify the defendants and to file the application once more with the court registry, together with the proof of the delivery of notifications. From that moment on the dispute between the State powers begins the settlement procedure, which is similar to the one applicable in the constitutionality control and the disputes of responsibilities between the State

---

constitutional and legal exercise of its responsibilities, the body considering that its responsibilities were unduly taken over will take the dispute to the Constitutional Tribunal within one month from that date. It can also do this if the notified body does not correct its decision within one month of receiving the notification. Procedure is simple. Having received the seizing application, the Tribunal sends it within ten days to the challenged body and grants it one month to formulate pertinent assertions.

The litigation-examining application related to the separation of powers between the legislative, the executive and the legal system is commonly submitted to the panel set up in the Constitutional Court, which within 15 days has to rule on the admissibility or inadmissibility of that application. The decision made by the panel of the Constitutional Court regarding the admissibility or inadmissibility of the application is sent, on the same day, to the body or the official person having requested the examination. The Constitutional Court has to start the examination of the main issue of the application within 30 days from the date when the application was admitted.

[105] The Court can run an investigation as well, which the Chief Justice of the Court assigns to a judge-rapporteur. Sometimes the investigation is also meant to offer the plaintiff a preliminary protection in the form of an order suspending the challenged act (in the disputes of jurisdiction, this authority has already been recognised by Law no. 87 / 1953; in cases filed directly, suspension of the implementation of a law was approved only by Law no. 131 / 2003).

[106] Which mentions that there is no special procedure for the settlement of institutional disputes, but the same procedure for the law's constitutionality control has to be followed.

[107] After the investigation is completed, a hearing takes place during which the parties in the dispute can express their opinions, pointing out and integrating, as the case may be, the content of the application or of the initial action, or subsequent conclusions registered around the date of the hearing.

and the regions. The most important difference is that, with the disputes between State powers, the issuance of a suspending order related to the challenged measure is not possible.

In all States the settlement of the institutional dispute by the constitutional litigation court is made in the Plenum, and in all cases the constitutional litigation court pronounces an act in writing, binding for the parties, whereby the dispute is settled (such as a resolution in Montenegro, Poland, Italy, Romania, Croatia), which is published in an official publication (only the final part is published in Poland).

7. What solutions are pronounced by the constitutional litigation court. Illustrate

Depending upon the express regulation of the constitutional litigation court's responsibility to settle institutional disputes, the following solutions can be noticed:

A. In the States where the constitutional litigation court has the express jurisdiction to settle constitutional legal disputes, we notice the following:

a) In most States the adopted solution can be the annulment/ invalidation/repeal of the act having generated the dispute: Albania, Andorra, Azerbaijan[108], Cyprus, Montenegro[109], the Republic of Macedonia, Serbia, Slovenia, Ukraine.[110]

b) In other States the constitutional court establishes the competent body to decide on the case. Thus, in Croatia, in the case of a positive/negative dispute of jurisdiction, the Constitutional Court pronounces a decision whereby it establishes the competent body to decide on the case. In Hungary, before 2005, the Constitutional Court – established the competent body and appointed the body bound to take action; or – rejected the application because there was no dispute. In the Republic of Macedonia the Constitutional Court establishes the competent body to decide on the case. In Poland the Constitutional Tribunal pronounces a decision appointing the competent State body to adopt certain measures or to perform an action (to settle a certain case)[111]. In Serbia the Court will pronounce

[108] The Constitutional Court nullified two Orders issued by the head of the executive in Baku

[109] In this case the decision has the effect of invalidation. It ends a constitutional litigation and removes the unconstitutional norm, removes the infringement to the human rights and citizen liberties, settles the dispute of jurisdiction, establishes whether the President violated the Constitution, decides on the banning of a political party or of a non-governmental organisation, establishes whether any law was violated during the elections.

[110] The Constitutional Court can acknowledge the interference of the state power body in the exclusive jurisdiction of another body, the lack of jurisdiction of the state power body in the matter being the object of litigation and can declare the non-constitutionality of the issued regulatory act. The Constitutional Court can confirm the jurisdiction of the state power body by acknowledging that the provisions of the regulatory act stipulating such jurisdiction or the act issued by that body in exercising its jurisdiction, which is the object of litigation, comply with Ukraine's Constitution (constitutional).

[111] The Tribunal defines the area of that body's jurisdiction and the way they "differ" from other state bodies' jurisdiction (see below the comments on the decision in the case Kpt 2/08). To date, the Tribunal has pronounced only in two cases related to disputes of jurisdiction (cases Kpt 1/08 and Kpt 2/08). In the case Kpt 1/08, the First Chief Justice of the Supreme Court referred the Tribunal requesting to settle a dispute of jurisdiction which, in his opinion, had arisen between the President of the Republic of Poland and the National Council of Magistrates (KRS) in connection with the appointment of judges. The dispute appeared when the President of the Republic refused to appoint several judges (in January 2008), although their candidacies had been positively assessed and submitted by the National Council of Magistrates. In the opinion of the First Chief Justice of the Supreme Court, the refusal to appoint positively assessed candidates equals to their independent "assessment" by the President of the Republic, despite the fact that the Council had the responsibility to assess the candidacies. The Tribunal refused to examine the merits of the case, considering that there was not a genuine dispute of jurisdiction. Both state bodies exercised their constitutional and legal responsibilities in their own area of jurisdiction (Resolution dated June 23, 2008, no. Ref. Kpt 1/08). In the case Kpt 2/08, the Tribunal had to settle the dispute of jurisdiction between the President of the Republic of Poland and the Council of Ministers (the Government), in the context of differentiating the representation responsibilities of the Republic of Poland at a session of the European Council. The issue referred mainly to which of the state bodies was competent to determine and to present the position of the Republic of

a decision annulling any measures adopted by the authority challenged as lacking jurisdiction. In Romania the Constitutional Court can pronounce the acknowledgement of the existence of a dispute between 2 or several authorities and its settlement consisting in the conduct to be followed; the acknowledgement of the existence of a dispute and the acknowledgement of its extinction by adopting an attitude compliant with the Constitution; the acknowledgement of the non-existence of a constitutional legal dispute; the acknowledgement of the Court's lack of jurisdiction in examining certain acts of public authorities; the acknowledgement of the non-admissibility of an application for the settlement of the dispute between State „powers." In the Czech Republic the Constitutional Court pronounces on the merits of the case, establishing what body has authority to settle the problem having generated the dispute;

c) another solution can be denial, i.e. the acknowledgement of the lack of grounds of the application/complaint, as it is in Italy and Romania, where the Constitutional Court can find that a constitutional legal dispute does not exist[112];

B. In the States where the constitutional litigation court does not have the express jurisdiction to settle constitutional legal disputes but it has the possibility to settle such disputes, indirectly, when exercising an *a priori* or *a posteriori* control of the constitutionality of regulatory acts, the constitutional litigation court examines the application or the complaint related to the constitutionality of a piece of regulation and pronounces one of the following solutions:

a) it declares the piece of regulation as unconstitutional (entirely or in part);
b) it declares the piece of regulation as constitutional;

Such situations can be found in Albania, Belarus, Bosnia-Herzegovina, Russia[113], Armenia, Estonia, Ukraine.

Poland and whether the President of the Republic could decide to attend such a session. By Resolution dated May 16, 2009 (no. Ref. Kpt 2/08), the Tribunal ruled that the President of the Republic – in his capacity as supreme representative of the Republic of Poland – can decide to attend a European Council session if he considers it useful for the fulfilment of his tasks as President of the Republic stipulated in At. 126 par. (2) of the Constitution. But this does not mean that the President alone can decide and present the position of the Republic of Poland, because pursuant to Article 146 par. (1) of the Constitution the Council of Ministers is in charge of the internal and external policy issues of the Republic of Poland. The Council of Ministers exercises a general control in the area of the relationships with other states and international organisations (Article 146 par. (4) item (9) of the Constitution). Moreover, the Council deals with the state affairs that are not ascribed to other state bodies (Article 146 par. (2) of the Constitution). As neither the constitutional provisions nor the legal ones stipulate that the responsibility to decide and present the position of the Republic of Poland in European Union bodies and reunions is ascribed to any state body (for instance, to the President of the Republic), these responsibilities are expected to fall in the jurisdiction area of the Council of Ministers. In the name of the Council of Ministers, the position of the Republic of Poland is presented by the president of the Council of Ministers (prime minister), who secures the implementation of the policies adopted by the Council of Ministers (for instance, Article 148 par. (4) of the Constitution), or by a member of the Council with jurisdiction in the field (for instance, the minister of foreign affairs). However, the Tribunal pointed out that Article 133 par. (3) of the Constitution instates the obligation that the President of the Republic, the prime minister and the relevant minister cooperate in the foreign policy area. In the context of the European Council sessions, this cooperation has to involve, among others, informing the President about the syllabus of a certain reunion and the agreed position of the Council of Ministers in that issue, the information of the Council of Ministers by the President of the Republic about his intention to attend a certain session, the making of arrangements as regards the form and size of such participation (including the President's possible participation in the presentation of the position of the Republic of Poland as set by the Council of Ministers) as well as the observance of agreed measures.

[112] Romania's Constitutional Court acknowledged the lack of jurisdiction in examining several acts by public authorities (Judgment no.872 dated October 9, 2007) as well as the inadmissibility of an application for the settlement of the dispute between state "powers." (Judgment no.988 dated October 1, 2008).

[113] Where the Constitutional Court can declare the norm as constitutional (in full or in part) in the constitutional legal meaning given by the Constitutional Court.

8. Means to implement the constitutional court's decision: conduct of the involved public authorities after the dispute is settled. Give examples.

In all States the judgment returned by the constitutional litigation courts related to the settlement of institutional disputes are mandatory.

The analysis of filed reports shows that in most cases the public bodies involved in the dispute did comply with the judgments returned by the constitutional litigation courts in considering this general binding character.

For instance, in Germany the provisions of Article 93.1 no. 1 of the Fundamental Law corroborated with the provisions of § 67.1 sentence 1 of BVerfGG introduce the assumption that, in mutual relationships, constitutional bodies will observe the judgment returned by the Federal Constitutional Court which ruled on the non-constitutionality of a measure, without the need to pronounce an express obligation and its fulfilment. This state of mutual respect (*Interorganrespekt*) between constitutional bodies, deriving from the principle of the State governed by the provision stipulated in Article 20.3 of the Fundamental Law as an obligation of both the executive and the legislative not to take any measures against the Fundamental Law, offers enough guarantees that all the parties in the litigation procedure comply with the legal findings of the Federal Constitutional Court.[114]

In most cases[115], there is no special procedure for the enforcement of decisions/resolutions made by the constitutional litigation courts, e.g. in Latvia, Lithuania, Poland, Romania.

As an exception, in Albania the power to implement the Constitutional Court's decisions is exercised by the Council of Ministers by means of the competent public administration bodies. The persons who do not implement the Constitutional Court's decisions or who hinder their implementation, when such action is not a criminal violation, shall be liable to a fine of up to 100 thousand *leke*, enforced by the Chief Justice of the Constitutional Court through a final judgment that stands for a writ of execution. Likewise, in Montenegro, the Government of the Republic of Montenegro, upon the Constitutional Court's request, ensures the enforcement of the Constitutional Court's judgment, while the related expenses are to be covered from the budget.

A special situation can be found in Croatia, where the Constitutional Court sets the bodies entitled to enforce its decisions as well as the way in which they are to be enforced. By setting the means for the enforcement of its decisions, Croatia's Constitutional Court actually orders the competent bodies to implement general and/or individual measures comparable to those enforced on the Member States by the European Court of Human Rights.

Likewise, in Germany the Federal Constitutional Court also has authority to pronounce a temporary ordinance[116]. In such cases, besides the finding itself, the Court can enforce a specific, compulsory conduct[117] on the opposing party; moreover, whenever necessary, the Court can secure the enforcement of its decision by an enforcement order[118].

---

[114] (Umbach, in: Umbach/Clemens/Dollinger, *BVerfGG*, 2nd ed. 2005, § 67, marginal no. 17; Schlaich/Korioth, *Das Bundesverfassungsgericht*, 8th ed. 2010, marginal no. 83; Voßkuhle, in: v. Mangoldt/Klein/Starck, *GG*, Vol. 3, 5th ed. 2005, Article 93, marginal no. 115).

[115] For instance, in Bosnia and Herzegovina there is no department in charge with their enforcement. However, if its decisions are not implemented or are enforced with delay or the Constitutional Court is notified with delay about the measures taken, the Constitutional Court shall pronounce a judgment stating that the decision was not enforced. Such judgment will be sent to the jurisdictional prosecutor or to another body that has jurisdiction to enforce the decision, appointed by the Constitutional Court

[116] Cf. BVerfGE 89, 38 <44>; 96, 223 <229>; 98, 139 <144>

[117] Bethge, in: Maunz/Schmidt-Bleibtreu/Klein/Bethge, *Bundesverfassungsgerichtsgesetz*, § 67, marginal no. 36

[118] Voßkuhle, in: v. Mangoldt/Klein/Starck, *GG*, Vol. 3, 5th ed. 2005, Article 93, marginal no. 115

III. ENFORCEMENT OF THE CONSTITUTIONAL COURT DECISIONS

PUSKÁS Valentin Zoltán, ***Judge***
BENKE Károly, ***Assistant-magistrate in chief***

1. The Decisions by the Constitutional Court

a) are final;

In principle, in all the States the decisions rendered by the Constitutional Courts are final.

Portugal is a special case, as in certain conditions the decision of the Constitutional Court on matters of unconstitutionality may be defeated. Thus, the President of the Republic has the mandatory suspensive right to veto and must return the draft law found as unconstitutional to the Parliament. However, the draft law may be confirmed by Parliament if it adopts it again based on the votes of two-thirds of the attending Deputies, on condition that this number should be higher than the absolute majority of Deputies exercising their functions. In this case, the draft law will end up again at the President who may promulgate the law or ratify the international treaty – except for the case when the President of the Republic refuses to do so (Articles 279-2 and 4 of the Constitution of Portugal). In such a case, the law or the international treaty cannot be enacted and cannot be applied.

b) may be appealed, in which case the holders of such right, the terms and the procedure shall be pointed out;

The decisions rendered by the constitutional court cannot be appealed in any participating State.

c/d) cause *erga omnes* / *inter partes litigantes* effects.

Given the binding character of the decisions of the Constitutional Courts, more specifically, their *erga omnes* or *inter partes litigantes* effects, in most of the States, the decisions of unconstitutionality of a draft law cause *erga omnes* effects. Most certainly, the situation is different in those States that adopted the American model of constitutionality review, a case when the rule of judicial precedent is applied (Norway).

In order to provide examples for the statements made above, as well as to clarify the specific aspects encountered in the participating countries, we will list, below, the position adopted by various countries:

- besides the *inter partes litigantes* character, inherent to any court ruling observing the res judicata principle, the constitutional court decisions are binding for all courts and for all other public institutions or authorities. The same holds for the decisions of the plenum and for the decisions of the two senates. However, the decision to deny the unconstitutionality motion as inadmissible is not binding. The *erga omnes* effect of the constitutional court decisions is limited and does not extend to third-party private persons (Germany).

The full *erga omnes* effect applies to the abstract and concrete constitutionality review in case of laws and individual motions of unconstitutionality related to legislative acts. Consequently, only those decisions have the power to cancel one law or to find it compatible or incompatible with the Constitution.

- only the ruling returned following the *amparo* constitutionality review has *inter partes* character (Andorra);

- in Austria, the decisions returned following the constitutionality review exercised on the legal acts have *erga omnes* effects, such effects being applied only for the future, whereas those that are aimed at individual acts cause *inter partes* effects. Mention should be made that the constitutional court has the power to declare laws unconstitutional even retroactively; nevertheless, the rule is that the principle of non-retroactivity shall be applied (unlike Germany, where retroactivity rules);

- the Constitutional Court has the power to suggest possible ways to overcome the unconstitutionality it identifies. The public authorities and institutions which are the addressees of its decisions must respond within the timeframe provided by the court on the enforcement and observance of its decisions (Belarus).

- in Estonia, the constitutional court has the power to delay the entry into force of its ruling, which is seen as a **limitation of the *erga omnes* effect** that the ruling produces. Such a stay of the entry into force of the ruling of the constitutional court is also to be found in Georgia or in Poland, but only in Estonia this is interpreted as a limitation of the *erga omnes* effect of the ruling.

- the ruling whereby the constitutional court finds that a legal provision is unconstitutional in a certain interpretation is not binding for all courts except for the *a quo* judge, consequently, one may infer from that that it only produces *inter partes* effects. However, if the courts try to enforce the interpretation dismissed by the Court, it may supplement its initial ruling by another one finding that the law is unconstitutional - the so-called system of "double ruling" (Italy);

- in Latvia, the binding character of the ruling by the constitutional court is translated both through the binding character of the ruling itself and by the binding character of the interpretation, given by the court, of the law that is challenged;

- the binding character of the decisions is doubled by the binding character of the contents of the acts by the Constitutional Court which interpret the provisions of the Constitution (Lithuania);

- in the Republic of Macedonia, the span of the binding effects of the decisions depends on the object that is referred to and the nature of the matter settled;

- in the Republic of Moldova, the ruling of the Constitutional Court must be enforced within the timeframes specified in the ruling, as it enters into force on the date when it is adopted;

- Norway implements the American model of legislative constitutionality review, consequently, the decisions by the Supreme Court in constitutional matters shall be only *inter partes* binding. However, this effect is doubled by the rule of the legal precedent, to the effect that the lower courts are bound to apply the judgments returned by the higher courts;

- in Poland, Romania or Serbia, the decisions of the constitutional courts are, in general, mandatory;

- in Russia, the *erga omnes* effect of the ruling is translated into the fact that it may constitute grounds for the jurisdictional authority to repeal legal provisions similar to the ones that have been found unconstitutional. Moreover, review of the court ruling may be an action applied for not only in a specific case, but also in other cases for which the ruling presents interest;

- in Serbia, decisions that settle constitutional challenges introduced by an individual and which find that an individual act or action breached or deprived the respective individual of their human or minority rights safeguarded in the Constitution may also be applied to those individuals who have not made such challenges if they are in the same situation. However, if such a connection cannot be proven, then such a ruling shall keep to its *inter partes* character.

- in Slovenia, even if the decisions returned in cases of motions of unconstitutionality have *inter partes* effects, they may acquire *erga omnes* effects only if the legal rule on which the challenged individual act was based is found unconstitutional. However, in principle, the procedure used for the settlement of the motions of unconstitutionality only acknowledges the *inter partes* effects of the decisions by the constitutional court;

- in Switzerland, during the abstract review, in case the disputed cantonal rule is cancelled, the ruling may produce *erga omnes* effects. However, during the concrete review, the ruling cannot

produce such effects any longer; still, finding unconstitutionality during this review as well may bestow *erga omnes* tones to the ruling, to the effect that if the unconstitutional rule continues to be enforced, in a specific case, any individual may have it declared unconstitutional again. Consequently, the public authorities, taking into account this situation, choose to set aside the unconstitutional rule, even if the ruling of the Federal Tribunal a priori has *inter partes* effects;

Not in the least, it is worth mentioning that in certain countries the Constitution provides *in terminis* that the decisions of the Constitutional Courts are enforceable (i.e. Republic of Macedonia, Montenegro, and Serbia).

In terms of the decisions concerning the denial of motions of unconstitutionality during the *a posteriori* review, in principle, they bear *inter partes* effects, except for countries such as France, Turkey or Luxembourg, where a new challenge concerning the unconstitutionality of a law already challenged before cannot be grounded in the same reasons or cannot take into account the same grounds. It is worth mentioning that in Portugal or Romania, if the challenged law is found in line with the Constitution, it does not mean that it cannot be challenged again in terms of a new motion of unconstitutionality as the constitutionality of the law is not an absolute.

In exchange, the decisions concerning dismissals of motions of unconstitutionality during the a priori review bear limited *erga omnes* effects, most certainly limited to the scope of the subjects involved in the ratification procedure.

2. As of the day of the publication of the ruling in the Official Journal/ Gazette, the legal provision declared unconstitutional:

a) shall be repealed;

b) shall be set aside until the legal provision/ law declared unconstitutional is set in line with the provisions of the fundamental law;

c) shall be set aside until the law maker shall invalidate the ruling of the constitutional court;

d) other options;

2.1. The unconstitutionality ruling in the case of a law **enters into force** either as of the day when it is returned (by way of an example, this happens in Belarus, Estonia, Georgia, Ukraine, Republic of Moldova), or as of the day when it is published (by way of an example, this happens in Armenia, Austria, Belarus, Croatia, France, Italy, Latvia, Serbia, Turkey, Albania, Romania, the Czech Republic), or as of a date provided in the ruling (by way of an example, this happens in Azerbaijan related to the laws and other regulatory documents, or some of their provisions, the intergovernmental agreements of the Republic of Azerbaijan), or as of the date following the publication of the ruling (by way of an example, this happens in Bosnia and Herzegovina, Slovenia).

An interesting situation can be found in Azerbaijan, where the decisions of the Constitutional Court may enter into force at various moments, depending on the area of interest:

- on a date provided in the contents of the ruling in the case of the unconstitutionality of laws and other legislative acts or their provisions, the intergovernmental agreements of the Republic of Azerbaijan;
- on the date when the ruling concerning the separation of the powers between the legislative, the executive and the judiciary, as well as concerning the interpretation of the Constitution and the laws of the Republic of Azerbaijan is published;
- on the date when the ruling concerning other matters under the jurisdiction of the Constitutional Court is returned;

In the Republic of Moldova, the decisions of the Court may enter into force on the date when they are published or on the date provided in the ruling. In the Czech Republic, the Court may also decide that the ruling shall enter into force on the date when it is returned.

2.2. However, most of the countries under analysis provided in their domestic legislation the opportunity of the constitutional court to **delay to a certain date** the moment when the unconstitutionality ruling shall enter into force (up to one year since the publication of the ruling – Turkey, up to six months since the publication of the ruling – Bosnia and Herzegovina, up to six months since the return of the ruling – Estonia, around six months – Latvia, 12-18 months in Poland, up to 18 months in Austria, one year in Turkey and Slovenia; to that effect, see also the example of Germany, Croatia, the Czech Republic or Georgia). In other countries, the term of this timeframe is a matter of decision by the Constitutional Court (Armenia, Belarus, France, and Russia).

This timeframe shall bear no effects on the case that resulted in the cancellation of the legal act, but shall apply to all acts that would be adopted by the administrative authorities or courts until the date of its expiry (Austria). Consequently, the legal act cannot be challenged anymore until the expiry of this timeframe, after which its *ipso jure* effects shall cease (Austria).

Such delay may be enforced until to the occurrence of a certain event/ act (Belarus).

When ordering a delay, the situation that might arise as of the moment of the cancellation of the unconstitutional provisions shall be taken into account, namely, no prejudice should be brought to the fundamental rights of the plaintiffs and other persons and no significant damages should be caused to the interests of the State or of the society (Latvia).

The reasons for such a delay all gravitate around the principle of stability in connection with the legal relationships, but, besides this principle, other aspects also arise such as the need to provide sufficient time to the authority that adopted the unconstitutional legal provision to repeal it, amend it, supplement it (Belarus), respectively, to harmonize the unconstitutional provision with the ruling of the Court (Bosnia and Herzegovina), to avoid regulatory omissions (Croatia).

In Russia, if the immediate cancellation of the regulatory provisions could have a negative effect on the balance of the constitutional values, the Constitutional Court may stay the enforcement of its ruling and may provide a subsequent date to repeal the legal provisions declared unconstitutional. In Armenia, if the Constitutional Court finds that, by declaring the act unconstitutional and, consequently, by invalidating it or any of its provisions as of the moment when the Court returns its ruling, severe consequences will be unavoidable for citizens and the authority of the State, so as to damage the legal certainty as a consequence of the nullification of the respective act, then the Constitutional Court has the right to declare the act as unconstitutional and, at the same time, to postpone the day when the act will be nullified.

If the incompatibility is not eliminated within the timeframe specified, the Constitutional Court will stipulate in a subsequent ruling that the provisions found unconstitutional are no longer in force (Bosnia and Herzegovina).

A special case is Germany, where the Federal Constitutional Tribunal finds that the challenged legal act is incompatible with the Constitution, but does not nullify it, to provide to the lawmaker a margin of appreciation and sufficient time to adopt a new regulation in the following cases: (1) when the lawmaker must have several options to eliminate the unconstitutionality (2) if it is a matter of general interest to have the transition from an unconstitutional to a constitutional stage of law implemented gradually, especially in those cases when the declaration of nullity would create a situation even less compatible with the Constitution as compared to the current one. Among the steps envisaged there may also be circulars concerning the continuous application of the unconstitutional law either as unchanged or amended. When the perpetuation of the unconstitutional provisions cannot be accepted even in an amended form, it is up to the Federal Constitutional Court to develop a provision that should either be transitory or taken as a benchmark. When it declares its incompatibility, the Federal Constitutional Court also has the possibility to refrain from ordering the continuous application of the unconstitutional law. But – unlike the nullification declaration – such a solution is justified only if it simultaneously imposes a timeframe by which the lawmaker should adopt new

legislation, in line with the Constitution, when the Court deems that a transitory regulation is not mandatory. Consequently, the unconstitutional provision becomes inapplicable until the entry into force of the new law and, as such, any proceedings ongoing in courts must be suspended.

Unlike the situation of the countries already mentioned, there are also other countries where the constitutional court does not have the power to delay the effects of its ruling, namely, it cannot postpone the moment when the legal act found unconstitutional must cease its effects – for instance, in Portugal or Romania.

2.3. Depending on the constitutional system, the decisions of the constitutional courts are governed either by the principle of non-retroactivity, or the principle of retroactive application, or they accept both principles with certain nuances, as will be the case in what follows.

The following are included in the first category of countries: Romania (where, according to Article147 par.4 final phrase of the Constitution, the decisions "take effect only for the future"), Armenia, Belarus (where the phrase is used that the unconstitutional act "ceases its effects"), Republic of Moldova (where the unconstitutional provisions become null and shall no longer be applied as of the moment when the respective ruling by the Constitutional Court is returned) or Serbia.

Germany is included in the second category, where, according to the tradition of the German public law, any provision that is contrary to another one which is of a higher order shall be *ipso jure* and *ex tunc* null, resulting *eo ipso* into the nullification of a law contrary to the Constitution.

In Belgium, the nullified legal provision disappears from the legal order, as if it had never been adopted. The retroactivity inherent to the restoration of a *status quo ante* results in the *ex tunc* quashing of the provision. Retroactivity is seen as the logical consequence of the unconstitutionality, as it vitiated from the onset the nullified provision. To limit the effects of the nullification, which can severely harm legal certainty, if the Court deems it necessary, it shall indicate in a general provision the effects of the nullified provisions that shall be considered final or those that shall be temporarily maintained for a period that shall be specified. The Constitutional Court shall nullify the challenged provision as a whole or partially. Consequently, the annulment may aim all challenged provisions, but it may only confine to a single provision, phrase or even to a single word. Sometimes, the Court decides to *modulate* its annulment: in conclusion, it will nullify a legal provision or any part thereof but only "to the extent to which" they are unconstitutional.

In Ireland, where the constitutionality review is performed by the supreme court of justice, the unconstitutional law is nullified either as of the moment of its entry into force, if it is a law adopted subsequent to the entry into force of the 1937 Constitution, or as of the date of the entry into force of the Constitution, if it is a pre-constitutional law.

Austria is included in the third category, where, even if in principle, the ruling bears effects only for the future, the Court may choose to declare inapplicable the legal act with retroactive effects (such a vision gives rise to problems based on the principle of res judicata in the case of decisions that were adopted yet unchallenged), as well as Armenia (where the retroactivity of the Court's ruling is imposed only when the provisions found unconstitutional are under the Criminal Code or the law concerning the administrative liability), Republic of Macedonia or Slovenia, which are countries where the Constitutional Court may not only repeal a law, but also repeal or nullify a regulation or general acts adopted to exercise the public authority, as well as adopt a declaratory ruling wherein it may state that the act it reviewed was unconstitutional or unlawful.

In Italy or Montenegro, the unconstitutionality ruling causes retroactive effects, except for the cases already finally concluded – *facta praeterita*; it is worth mentioning that the enforcement of the unconstitutionality ruling in pending cases is deemed retroactive as it is enforced to acts which had already occurred. Italy also acknowledges the concept of "acquired unconstitutionality," more specifically the limitation of the retroactive effects of unconstitutionality decisions, namely that the constitutional court declares that a legal provision, which had been compatible with the Constitution

when it had entered into force, has in time become unconstitutional because of various events, so that the effects of the ruling shall appear as a consequence of the former.

There are also cases when the Constitutional Court has the jurisdiction to provide that the unconstitutionality ruling shall produce effects as of the date of the entry into force of the respective legal act (Latvia). Moreover, if the Constitutional Court finds that the challenged norm is not line with a legal act of a higher order, and declares it null as of the date of the publication of the Constitutional Court ruling, with respect to the author of the motion or a certain circle of persons, the effects of the ruling by the Court shall begin to surface as of the date when the act came into force or was enforced. The procedure is applied by the Constitutional Court to prevent most efficiently the violation of individual rights.

To decide whether to nullify or repeal a law, a regulation or a general act, the Constitutional Court must take into account all circumstances which are relevant for the observance of the constitutionality and lawfulness, especially the severity of the breach, its nature and significance with respect to the exercise of the citizens' rights and liberties or the relationships established based on those acts, the legal certainty, as well as any other aspects which are relevant for the settlement of the case (Republic of Macedonia – Article 73 of the Regulation concerning the Constitutional Court).

2.4. In terms of the substantive law effects caused by the decisions of the constitutional courts, more specifically, the courts tasked to perform the constitutionality review, it is worth mentioning that such decisions impose various effects, as the case may be:

1. Repealing effect or elimination of the unconstitutional law from the legal system (Albania, Armenia, Andorra, Estonia, Croatia, Hungary, Italy, France, Latvia, Lithuania, Republic of Macedonia, Republic of Moldova, Poland, Russia, Turkey, the Czech Republic, Ukraine, Slovenia, and Romania).

By way of an example, in Lithuania, even if the text of the Constitution uses the phrase according to which the provision found unconstitutional "shall not be applied," both the Court doctrine and its jurisprudence interpret this phrase in the sense that the unconstitutional law shall be eliminated from the legal system. The Seimas, the President of the Republic, or the Government, as the case may be, are bound by the Constitution to acknowledge that such a legal act (part of it) shall no longer be valid or (if it is impossible for them to perform this without appropriately regulating the respective social relationships) they shall amend it so as the new regulation should not be in conflict with the legal acts of a higher order, among which (and in the first place) the Constitution. However, even until the date when this constitutional obligation is fulfilled, the legal act (part of it) shall not be applied in any case, and the legal power of the law shall be cancelled[119].

Besides the repealing effect of the ruling, in the Republic of Moldova, the Government, no later than 3 months of the date of the publication of the ruling of the Constitutional Court, shall submit in Parliament the draft law concerning the amendment and supplementation or the repealing of the legal act or of the various parts of it declared unconstitutional. The respective draft law shall be examined by the Parliament as a matter of priority. In Russia too, the repealing of the unconstitutional provisions shall not cancel the obligation of the lawmaker that adopted it to eliminate them from the legal system, according to the procedure and the deadlines set in the mentioned Federal Constitutional Law. At the same time, loss of constitutional legitimacy in the case of a legal act shall constitute a "different sanction which is much more severe than a simple repealing of a legal act"[120] (Romania).

2. Simple substantive setting aside, as the unconstitutional act is still in force and may be formally applied (Cyprus, Luxembourg, Norway or Belgium[121] as regards the objection of

[119] The Constitutional Court's decisions published in the Romanian Official Journal of 6 June 2006

[120] Decision no.414/14th of April 2010, published in the Romanian Official Journal, Part I, no.291/4th of May 2010

[121] The legal act found unconstitutional shall continue to exist in the legal order and must be enforced in any situation beyond the dispute that gave rise to the preliminary ruling, even if the respective legal act was declared unconstitutional. A

unconstitutionality). Consequently, the Parliament may repeal the unconstitutional act, but even if it does not do so, the act continues to exist, but will not be applied any longer in the adoption of any decision or of any other act by the authorities (Cyprus). The situation in Norway amounts to the same effect, as should the Supreme Court declare one law unconstitutional, it cannot nullify it. In exchange, the jurisdictional bodies shall repeal it/ amend it according to the ruling by the Court.

3. Setting the act aside, accompanied – as the case may be – by the action of the authority that adopted the unconstitutional legal act (Belarus). Consequently, the unconstitutional legal acts shall not be applied by courts until the authority that adopted them bring the required amendments to them.

4. Setting the act aside, accompanied by nullification/ repealing based on the type of exercised review (Portugal). It is worth mentioning that based on the nature of the exercised review, the Court will either nullify the legal act, or, by finding it unconstitutional will merely setting it aside in the case pending before the judge, as it shall not be applicable any longer in that case. To fill out the legal void created through this decision, the Constitutional Tribunal may order the re-entry into force of the legal act(s) that had been repealed, as the case may be, through the provision declared unconstitutional (Portugal).

In Switzerland, if in terms of the constitutionality review of the federal laws, the lawmaker does not have any obligation, in terms of the cantonal laws, it is worth mentioning that the law found unconstitutional during the abstract review shall be repealed, whereas the law found unconstitutional during the concrete review shall be cancelled in the sense that neither the authorities can enforce it, nor the citizens should observe it anymore. However, the lawmaker authority shall conduct the amendment/ repealing.

5. Finally, in Germany, the ruling whereby the Federal Constitutional Court declares the unconstitutionality of the law does not have constitutional character; it shall not quash, invalidate nor reform the law, but it shall only present its findings, at most it shall set aside the lawfulness appearance in terms of the validity of the law.

Unconstitutionality may be expressed either by finding the legal act incompatible with the Constitution or by declaring null the legal act under analysis. However, the substantive benefit of finding the incompatibility resides most particularly in that, unlike the declaration of nullification, it does not immediately generate facts, but the incompatibility statement may be accompanied by transitional enforcement steps, ordered by the Federal Constitutional Court. That is why the legal consequences of an incompatibility statement shall be caused by the contents of the enforcement order returned by the Federal Constitutional Court together with its ruling.

2.5. Effects on individual acts

The ruling finding the unconstitutionality of a legal act, besides the direct effects on the unconstitutional legal act, may also be applicable to those administrative or judicial acts adopted following the enforcement of the unconstitutional legal act. Consequently, in Austria, finding unconstitutional a law on which an individual legal act of an administrative authority of last resort or of the Court for asylum-seekers was based, as challenged before the constitutional court, may cause their nullification, whereas the administrative authority is bound to issue a decision in line with the legal position expressed by the Constitutional Court.

The same happens in Belgium - cancellation of a legal act means that the court decisions that were based on the cancelled act will lose its legal grounds, but this does not mean that the respective

---

preliminary ruling shall only be binding for the courts, and not for the administrative authorities or the private persons. The unconstitutionality as found and comprised in the preliminary ruling has no impact on the court decisions bearing res judicata authority, which were based on the unconstitutional legal act. During this procedure, unlike the appeal for nullification, the Court was not provided with a possibility to limit the effects of its ruling on a preliminary matter. True, even in such a case, identifying unconstitutionality is likely to bring prejudice to the legal certainty. Even the Court itself tries sometimes to modulate the temporal effects of its ruling.

decisions will disappear all together *ipso facto* from the legal order. The date of the publication in the Official Gazette (*le Moniteur belge*) of the cancellation decision shall give rise to a deadline of six months during which an appeal may be filed for the retractation of these decisions. In terms of the administrative acts issued based on a cancelled act, according to the organic law, special remedies may be used to cancel such decisions no later than six months since the publication of the Court ruling in the Official Gazette. However, when the Court decides to maintain the effects of the cancelled provision, then it is no longer possible to launch any legal proceedings to nullify the acts based on the cancelled provision.

There are States, like Lithuania, where the decisions based on the legal acts declared against the Constitution or the law shall not be executed any longer if they had not been already executed prior to the ruling of the Constitutional Court to have produced its effects. At the same time, each State institution shall be bound to revoke its acts of a lower order (their provisions) that were based on the act declared unconstitutional. In the same way, in Montenegro, the ruling finding unconstitutionality shall suspend the irrevocability clause in the case of individual acts, whereas the individual acts based on the unconstitutional law shall be amended by the jurisdictional authority based on request by the interested person, this procedure being subject to various terms and conditions.

In Serbia, any person whose rights were violated through an individual act adopted based on the unconstitutional act shall be entitled to apply to the jurisdictional authority with a view to putting the respective act in line with the ruling of the Constitutional Court in no more than 6 months. If the amendment of the individual act cannot correct the consequences related to the enforcement of the unconstitutional act, the Constitutional Court may rule that such consequences should be removed through a restitutio in integrum, the award of damages or through any other way. Such a vision is grounded on the fact that a final individual act adopted based on an unconstitutional legal act cannot be applied or enforced. Any enforcement of such an act that has begun shall cease.

Also in the Republic of Moldova the acts issued to enforce legal provisions or parts of them declared unconstitutional shall become null and shall be repealed. In Republic of Macedonia as well, the unconstitutional act cannot operate any longer as grounds for the adoption of other acts in the future or for the enforcement of individual acts adopted based on it.

In Germany, when it is referred with an unconstitutionality complaint, the Constitutional Tribunal – while it finds that it is not the law that is unconstitutional but the steps ordered by the authorities or certain court decisions – shall establish which provisions of the Fundamental Law were violated through the concrete measure or omission. Such a finding of unconstitutionality already involves binding effects. Moreover, the Federal Constitutional Court shall quash the challenged decision, which it shall sent to the jurisdictional court, according to the judicial procedure, the measure thus being quashed, whereas the court that has to rule shall be bound by this finding of unconstitutionality.

2.6. Suspension by the constitutional court of the challenged legal act

This institution appears in such States as Germany, Belgium or Lithuania. In Belgium or Germany, suspension lies with the discretion of the Court, whereas in Lithuania, it is *ex officio* in the case of a certain type of complaint.

Thus, in Belgium, the Constitutional Court may suspend the legal act that is the subject of an appeal for nullification. The Court assimilates the suspension to a temporary annulment. However, unlike the annulment, the suspension does not have a retroactive effect. In Lithuania, according to the Constitution, a legal act shall be suspended when the President of the Republic or the Seimas *in corpore* shall refer the Constitutional Court with an application to rule on its constitutionality. Once, following the examination of the case, it is found that the challenged act is in line with the Constitution, its legal effects are reinstated.

2.7. Specific matters related to the unconstitutionality ruling returned following the procedure of unconstitutional exception

- Austria: in the specific case at the constitutional court (the situation of unconstitutionality complaints) that gave rise to the regulatory review procedure, the ruling of the Constitutional Court involves a so-called "adjusted legal situation" (*"bereinigte Rechtslage"*). This means that, while ruling in this case, the Court must ignore the nullified legal act (the so-called "prize for the winner of the case"). Consequently, in most cases, the Constitutional Court shall also nullify – continuing with its procedure – the measure taken by the administrative authority, as the legal situation must be assessed as if the invalidated legal act had never existed.

- during the constitutionality review in the case of legal acts which are no longer in force, the ruling of the Estonian Supreme Court shall produce *inter partes* effects, whereas the challenged act shall be deemed unconstitutional starting the moment when the Supreme Court was referred with this matter. Unlike Estonia, in Romania, the decisions of unconstitutionality of the legal acts which are no longer in force have *erga omnes* effects limited to the pending cases of the administrative and judicial authorities; such a legal act is deemed unconstitutional from the date when the Constitutional Court decision is published[122].

3. Once the Constitutional Court has already returned an unconstitutionality ruling, to what extent is it binding for the court that tries the case on the merits, as well as for the other judicial courts?

According to the American model of constitutionality review, the ruling by the Supreme Court is binding for all courts of a lower legal order, as well as for the Court itself (Cyprus, Estonia, Ireland[123], Luxembourg, Monaco, and Norway). At the same time, the courts of a lower legal order generally pursue the alignment of their own jurisprudence to that of the Supreme Court, to the effect of avoiding sustaining appeals filed against their own decisions (Switzerland).

According to the European model of constitutionality review, the unconstitutionality ruling in connection with the concrete constitutionality review shall be binding not only for the seizing court but also for all other national courts (Germany, Lithuania, France, Hungary, Latvia, Moldova, Poland, Romania or Turkey). However, in some cases, the act which was found to be unconstitutional shall continue to exist in the legal order and must be enforced in any situation beyond the dispute that gave rise to the preliminary ruling, even if the respective act was declared unconstitutional. A court that were to see a matter brought before it – in a different dispute – in connection with an identical subject would not bound to refer the Court any longer; in this case, when returning judgment the court shall enforce the solution provided by the Court, which takes precedence (Belgium[124]). A court decision or decisionsthat were based on the unconstitutional act and that have already been returned shall not lose their *res judicata* authority because of the unconstitutionality ruling returned in an unconstitutionality exception motion (Belgium, Spain). A binding judgment means both its orders and its reasoning are binding[125] (Germany, Romania). Moreover, the courts are bound by the provisional enforcement

[122] See Decision no.766/15th of June 2011, published in the Romanian Official Journal, Part I, no.549/ 3rd of August 2011

[123] The constitutionality of the law may be challenged before the High Court as a court of first instance, whereas the latter's ruling can only be challenged at the Supreme Court

[124] As a preliminary ruling shall only be imposed to courts and not to administrative authorities or private individuals, the unconstitutionality ruling within the preliminary procedure gives rise to a new deadline for the submission of an appeal for nullification, which is part of the abstract review proceedings (Belgium). The ruling of the Constitutional Court has *res judicata* authority as of the date the ruling is received by the *a quo* judge (Belgium);

[125] In the Czech Republic there is a dispute concerning the doctrine which has not been settled convincingly by the Constitutional Court yet, namely to what extent the grounds of the ruling are mandatory; the jurisprudence of the Court

decisions delivered by the Federal Constitutional Court (Germany), but the purely procedural decisions are not binding (Germany, Romania).

The consequences of the ruling by the Constitutional Court are essentially quasi-normative (Lithuania, Romania). Also, it is worth to be mentioned that the judgment determining the competence of the Federation or the *Länder* for the adoption of an act of legislation or executive has the rank of a constitutional law and may therefore only be amended by constitutional law (Austria).

If the Constitutional Court decides that the legal act under criticism is unconstitutional and nullifies it "in terms of the aspects mentioned in the ruling" or "in connection with certain provisions," the fact that this ruling is binding means that the common courts should enforce the respective provision in line with the Constitution and the elements highlighted by the Constitutional Court (Romania, Armenia, Italy[126], Belgium, Spain[127]). So, as a matter of principle, when the Constitutional Court nullifies a court ruling, the case shall be sent back to the ordinary court, which must reopen the procedure and return a different ruling (the Czech Republic[128]). In connection with the complaints formulated against court decisions or decisions by other public authorities concerning violations of the rights and liberties provided in the Constitution and in the ECHR, the Court, allowing this appeal, shall nullify the respective ruling, send the case back to the respective court in view to reinitiate the proceedings, whereas this latter court shall be bound by the ruling of the Constitutional Court (Bosnia and Herzegovina). Likewise, the Constitutional Court may provide the manner in which its decisions shall be implemented, and such shall be binding for the ordinary courts (Slovenia, Serbia) and if the court decisions, irrespective of the level of jurisdiction, are nullified by the Constitutional Court, such shall cease to produce legal effects as of the date they were returned (Albania)[129].

The Constitutional Court ruling shall constitute grounds for the review of the court ruling that was returned, if the latter ruling has not been enforced yet (Russia, Ukraine). As a consequence of the ascertained unconstitutionality, the respective ruling shall constitute a new circumstance that was not taken into account during the initial trial of the case, therefore the legal remedy for the review of the ruling returned by the ordinary court may be exercised against the person who submitted the individual application based on which the Constitutional Court declared the unconstitutionality and consequently nullified the respective legal act (Armenia, Azerbaijan). Also subject to review, based on the unconstitutionality ruling returned by the Constitutional Court are: the decisions of ordinary courts against those persons who, on the date when the ruling was returned by the Constitutional Court concerning the constitutionality of the legal provision, had a possibility to exercise their right to refer the Constitutional Court (Armenia, Azerbaijan).

---

tends to consider these grounds not as binding *de jure* precedents for the public authorities and institutions, however, they are binding for the Court, which cannot deviate from them unless it reconsiders its jurisprudence. Still, these grounds are *de facto* observed by the public authorities and institutions.

[126] If a legal text that established an exception from the common law was repealed, then the judge must apply the general rule, whereas if a repealing law was declared unconstitutional, it is possible to "revitalize" the repealed law. Decisions may be ablative (the unconstitutionality of a legal act is declared "to the extent to which" it establishes certain facts), additive (they declare the unconstitutionality of a legal act "to the extent to which it does not" cause a specific outcome), substitutive (they declare the unconstitutionality of a provision "to the extent to which" it provides more for one result "to the detriment" of another), additive by principle (through such an unconstitutionality ruling, the Court does not specify the new regulatory content that the regulation should cover, but confines itself to suggesting what the judge should pursue in order to implement the principle) and the interpretative decisions that maintain the constitutionality of the law in a certain sense (Italy);

[127] All judges and all courts shall interpret and apply the laws and the regulations according to "the constitutional provisions and principles, in line with the interpretation arising from the decisions returned by the Constitutional Tribunal, in any of the proceedings" (Spain);

[128] When the Constitutional Court rules to postpone the enforcing date of its judgment on the unconstitutionality of an act, the regular courts must interpret such questioned acts in a constitutional manner, namely in line with the opinions expressed by the Constitutional Court, even if the respective act remains formally in force;

[129] The cases shall be sent for review to the court whose ruling was quashed

A final criminal sentence, which was based on a legal provision that was subsequently declared unconstitutional and repealed, shall cease to produce effects as of the date of the entry into force of the ruling (Croatia). Also, if by the ruling of unconstitutionality in criminal or administrative jurisdiction cases concerning a procedure of punishment in which, as the legal act applied was nullified, results a reduction of the punishment or the sanction, or an exclusion, exoneration or limitation of liability, the latter shall be subject to review (Spain). Decisions of the Supreme Court returned during the constitutionality review shall cause procedural consequences at the level of the civil, criminal and administrative jurisdiction trials and shall serve as cause for review for all three categories of procedures (Estonia); the Constitutional Court shall also order the review in a criminal trial completed through a decision that cannot be appealed any longer (Hungary). At the same time, if there is no possibility to suspend the trial of the case in court *a quo* when it refers the Constitutional Court with an unconstitutionality exception, the unconstitutionality ruling returned following this complaint shall cause the review of the court ruling returned in the meantime in that case, both in civil and in criminal matters, based on application (Romania). Even if the procedural rules do not comprise any specific provision that should stipulate the possibility to apply for the retrial of a case and taking into account that the law based on which the court returned a final ruling was nullified through a ruling by the Constitutional Court, such a legal remedy should be required because of the *erga omnes* effect of unconstitutionality decisions (Republic of Macedonia).

The victim may apply to the jurisdictional authority to cancel the individual act adopted based on the unconstitutional law (Republic of Macedonia, Montenegro, Croatia). In issuing a new individual act, the issuing authority act is bound to observe the legal position expressed by the constitutional court in the ruling that repeals the act which violated the constitutional right of the plaintiff (Croatia). However, if the consequences as a result of the interpretation of the legal act or regulation cancelled through the ruling of the Constitutional Court cannot be removed through the amendment of the individual act, the Court may order the removal of such consequences through reinstating the status quo, with the award of damages or in any other way (Republic of Macedonia); in Croatia, any natural or legal person, whose complaint seizing the Constitutional Court was sustained and resulted in the repealing of the legal provision or regulation that was challenged, may apply to the jurisdictional body to amend the individual act that violated their rights and that was issued based on the provisions of the law or regulation that was repealed. If the losses sustained as a consequence of the violation of the rights of the party cannot be redressed, the victim may apply to the jurisdictional court, within six months since the date of the publication of the ruling of the Court in the Official Gazette, to ask for compensation for the damage sustained.

Some specific aspects resulting from the submitted national reports:

- in Portugal there is no true exception of unconstitutionality to the extent to which the common courts may settle the unconstitutionality matter by themselves – they have authority to review the constitutionality of the legal acts and to rule that these should not be applied (diffuse review). This is rather an avenue of reviewing court decisions, but is exclusively applied to issues of constitutionality. For this reason, the Constitutional Tribunal shall only be referred to rule on issues of constitutionality as an appellate court;

- the dismissal decisions returned during an unconstitutionality appeal or a dispute in defence of local autonomy prevent the further raising of this matter by using any of the two available avenues [appeal on law or unconstitutional matter], as long as it is grounded in the violation of the same constitutional provision (Spain);

- within the procedure applicable to the unconstitutionality complaint, the ruling of the Constitutional Court shall be binding for the court whose individual act or measure was found by the Court in violation or in dismissal of various human or minority rights or fundamental liberties in the

case of a given person and the ruling shall be enforced according to the manner provided by the Constitutional Court (Serbia).

4. Does the lawmaker, during both the *a posteriori* and the *a priori* review, meets its constitutional obligation every time to eliminate all unconstitutionality aspects within the set deadlines?

4.1. The replies to the questionnaires envisaged especially the case where the constitutional courts postpone the entry into force of their decisions concerning unconstitutionality, which amounts to the provision of a deadline for the lawmaker to observe in order to align the respective act with the ruling of the Constitutional Court (Austria, Slovenia). Setting a deadline wherein the lawmaker should act, preserving the effects of an unconstitutional act until a given future date, finding unconstitutional a legislative loophole are but forms of self-limitation for the constitutional judge who, far from suppressing the attributes of the lawmaker, reinstates the latter precisely to its lawmaking power (Belgium).

Aligning the unconstitutional text may take the specific form of amending the challenged legal act or its repealing followed by the adoption of a new legal act that could regulate the social relations taken into account in the unconstitutional act (the Czech Republic, Norway). Usually, the lawmaker fulfils this mandate by the deadline, even when the subject of the future regulation gives rise to big political controversies (Germany, Austria). When the lawmaker does not succeed in taking action by the deadline, the ruling of the Constitutional Court shall enter into force (Germany, Austria).

Quite on the contrary, in other constitutional systems, the lawmaker is not bound by the obligation to repeal a law that was declared unconstitutional, but in practice this shall be aligned to the unconstitutionality ruling (Cyprus, Luxembourg). At the same time, in Switzerland, at the federal level, the lawmaker does not have any obligation arising from the case when the Federal Tribunal finds one federal law unconstitutional, during the specific constitutionality review.

4.2. In connection with the deadlines within which the lawmaker must take action, the law of the Republic of Moldova provides that the Government must take action within two months of the date of the publication of the Constitutional Court ruling, whereas according to Article 147 par. (1) in the Constitution of Romania, Parliament or the Government, as the case may be, are bound to bring the unconstitutional law in agreement with the ruling of the Constitutional Court within 45 days of the return of the ruling during the *a posteriori* constitutionality review.

In other States, even if the national law does not provide a deadline or the way in which the lawmaker should take action (Serbia, Russia, Portugal, Norway, Republic of Macedonia, Georgia, Armenia, Azerbaijan, Romania[130], Belarus, Belgium, Lithuania[131]), it must still take action with celerity (Andorra), the unconstitutionality decisions being enforced accordingly (Montenegro, Croatia, Azerbaijan; in the Republic of Moldova in the year 2009, 2 decisions had remained unenforced; in Lithuania, out of 140 decisions finding unconstitutional acts, 101 were enforced; in Hungary, the lawmaker failed to fulfil its obligation to eliminate the unconstitutional omissions in a number of 18 cases out of 103; in Belarus, a total of 215 decisions were enforced out of the 292 returned by the Constitutional Court, the rest being partially enforced or in the process of being enforced; in Bosnia and Herzegovina all decisions returned during the abstract constitutionality review between August 2009 – March 2010 have been enforced), since the lawmaker is bound to enforce the decisions of the constitutional court (Belgium, Lithuania). In exchange, in Albania, if a legal act is nullified and if the

[130] In the case of the *a priori* constitutionality review.

[131] The Lithuania Report even uses the phrase that the response of the lawmaker should take place "accordingly and promptly."

new relations urge for a legal regulation, the jurisdictional bodies shall be notified concerning the ruling of the Constitutional Court, so as to be able to take the steps provided in the ruling of the Court, without any time limitation in this respect.

Due to its importance, the decisions of the Constitutional Tribunal are fully observed, either by the other judicial bodies, or by the political and administrative bodies (Portugal). There are even cases when the lawmaker eliminates the status of unconstitutionality even before the return of the ruling by the constitutional court (Latvia), more specifically, once the Court was referd in a certain case, the lawmaker, seeing that there are deficiencies in the regulation that serves as grounds for the complaint submitted to the Constitutional Court, will remove them by amending the act under criticism.

At the same time, with a view to increasing the number of enforced decisions of the Constitutional Courts, the following were taken into account:

- some Constitutional Courts develop a pack of proposals to amend and supplement the Law concerning their organization and operation, so as to improve the future way in which the decisions of the Constitutional Court will be enforced (Azerbaijan);
- some Constitutional Courts also have the authority to issue recommendations to the legislative and executive authorities, so as to amend the act based on the legal arguments brought by the Constitutional Court or to adopt an adequate regulation regarding the subject that was examined by the Constitutional Court (Azerbaijan);
- according to the Law of 25 April 2007, a parliament committee is tasked to monitor the legislation and may, as the case may be, draft legislative initiatives to enforce the decisions of the Constitutional Court (Belgium);
- exchange of letters between the Constitutional Court and Parliament (Republic of Moldova).

In certain various exceptional cases, when the lawmaker was reluctant to eliminate various provisions, the Constitutional Tribunal was forced to declare null the legislation adopted contrary to the constitutional doctrine (Spain, Republic of Macedonia);

To conclude, it is worth highlighting the classification made in its report by Estonia concerning the behaviour of the lawmaker faced with various unconstitutionality decisions, as follows:

- extraordinary cases when the lawmaker aligned very quickly and precisely to the decisions of the court tasked with constitutional review;
- ordinary situations when the timeframe allocated by the lawmaker is in line with the complexity of the issue;
- procrastination when there are obvious and excessive delays in implementation, when the Parliament is manifestly lacking the political will to solve the problem raised by the Court.

Similar classifications are applicable to both Turkey or Romania.

4.3. In other States, the actual unconstitutionality ruling returned by the Constitutional Court does not generally mandate that the lawmaker take the required action to remove the status of unconstitutionality, as it is removed by the very ruling of the Court (Poland, Armenia). However, the need for such intervention by the lawmaker within a preset deadline arises most particularly when the Constitutional Court finds the unconstitutionality of the legal act under criticism "from the point of view of the aspects mentioned in the ruling" or "with respect to certain provisions" (Armenia), in which case the Constitutional Court – by its ruling – creates a legislative void (Armenia, Belgium, Poland, Hungary), when a preliminary ruling is returned (Belgium, Switzerland – in the case of cantonal acts), when it returns decisions adding to principles (Italy), when the Court finds unconstitutionality and does not declare it (Italy, a case when the law is not nullified, but the Court expresses its doubt concerning the constitutionality of the law, and consequently, the lawmaker must

take action as soon as possible to avoid a case of unconstitutionality) or when the Court draws the attention of Parliament to an issue of constitutional order (Republic of Moldova).

In some cases, an obligation appears to arise on the part of the lawmaker to the effect of amending the Constitution so that the regulation under criticism could be part of the positive law (see, for instance, the case of Ukraine, where the Constitutional Court found the Rome Statute of the International Criminal Court unconstitutional, and this treaty never entered into force owing to the fact that there was no political will to review the Constitution).

4.4. In the case of the a priori review, the legislative process concerning the law declared unconstitutional shall stop, but this does not mean that a new legal draft cannot be initiated observing the unconstitutionality ruling (Ireland). As a matter of fact, if a provision which was declared unconstitutional, would still be promulgated and published, the administrative acts adopted based on this law would inevitably be subject of nullification by the administrative judge (France).

5. What happens when the lawmaker fails to remove the unconstitutionality character within the timeframe provided in the Constitution and/ or legislation? Give examples.

5.1. There are cases when the unconstitutional ruling is unclear with respect to the changes that must be performed in order to put the respective provision in line with the Constitution, therefore time and reflection are sometimes required to decide on the new phrasing or on a new political solution (Norway). There are also cases when the lawmaker does not know how to enforce the ruling of the Constitutional Court that declared a legal act unconstitutional. In such a case, the President of the Seimas shall submit an application to the Constitutional Court to require the interpretation of the provisions of a ruling, and once they receive such interpretation, they will take the adequate steps (Lithuania).

5.2. Each State has built a system whereby it attempts to require the lawmaker to comply with the decisions of the constitutional courts and determine it to act within the meaning of those decisions. Such systems have an administrative or criminal constraint component, as the case may be, but also a constitutional one.

In the first category there is either the administrative (Republic of Moldova and Albania) or the criminal (Russia, Montenegro, Bosnia and Herzegovina) liability for failure to enforce the decisions of the Constitutional Court.

There is a more diversified array of instruments in the second category that put first the need to have the decisions of constitutional courts enforced by the lawmaker. To that effect, take for instance the following examples:

- if the lawmaker does not align to the ruling of the Federal Constitutional Court whereby it is required to adopt new legislation, the Court may impose various enforcement steps (Germany). Consequently, the Constitutional Tribunal, if the deadlines set for the lawmaker are not met, then may act as a positive quasi-lawmaker (for instance in the case when the employment benefits for public servants shall be set). It may also instruct the lawmaker to adopt a new regulation by a set deadline and may order that the previous law be applied “no later than that date.” Such a situation arose when various fiscal provisions had been declared unconstitutional and the lawmaker had failed to adopt a new regulation so that the respective legal text had not been applied subsequent to that date. At the same time, if deemed necessary, the Tribunal may retroactively order the limitation of the time interval within which the legal provisions shall be applicable, which means putting pressure on the lawmaker, at risk, for instance, of losing taxes to be collected for the State budget (Germany);
- the jurisdictional bodies (Parliament or Government) may apply for extension of the deadline set for the setting aside of the legal provisions declared unconstitutional, on which the Constitutional

Court must return a ruling (Croatia, Belarus). Such a practice unreasonably postponed the deadline set for the setting aside of the provisions declared unconstitutional, with the whole array of resulting negative consequences (Croatia);

- there are no legal mechanisms under the legal order that can force Parliament or the Government to enforce the decisions of the Court concerning the repealing of laws or (secondary) regulations, or part of their provisions that had been declared unconstitutional (Croatia). The Supreme Court of Justice does not have the means either to oversee the observance of its decisions (Estonia);

- failure of the lawmaker to act may instate a certain status of unconstitutionality (the Czech Republic). However, the lack of intervention by the lawmaker does not constitute too severe a problem in those cases which are not of impact for the public opinion (Turkey);

- in exceptional cases, when the Constitutional Tribunal considered it necessary to have a legislative intervention that should supplement the alignment of laws with the Constitution, it also suggested a "reasonable timeframe" wherein the lawmaker should take action, even if, in principle, according to Spanish law, there are no timeframes wherein the lawmaker should take action with a view to align to the constitutional decisions, as the ruling shall be applied as such (Spain);

- failure to observe a previous ruling by the Constitutional Court may cause the unconstitutionality of the law adopted as a consequence (Armenia);

- in certain circumstances, the lawmaker is likely to be held accountable and forced to pay compensation if it adopted a legal act that is found unconstitutional (Belgium);

- the law (respectively, the general act) shall cease to exist (Austria, Spain, Romania), which means that a certain field of the social relations could remain unregulated, consequently regulatory loopholes might occur. Such omissions may be eliminated within the process of interpretation and application of the law by the general jurisdiction courts and specialized tribunals (Lithuania). Unless supplemented by the lawmaker, such loopholes may be overcome in extremis through the precise application of the Constitution by the courts (Republic of Macedonia). Also, unless the lawmaker succeeds in concluding the political compromise acceptable to all parties, the constitutional court may solve the issue based on the constitutional values and the general legislation (Estonia). Moreover, if the lawmaker does not remove the unconstitutional faults, any person may exercise their rights, for instance, by directly applying the Constitution and the interpretation given in the ruling of the Constitutional Court (Latvia);

- if the lawmaker fails to take action, as the Court may repeal a law, it may also suspend it (temporarily setting it aside), which is to be viewed as a less severe intervention as compared to the repealing, but which is required when the constitutional values at risk cannot be defended through the usual means any longer (Slovenia);

- the constitutional responsibility involves such steps as the dissolution of the (representative) legislative body of the State power or the dismissal of the leadership of an entity (Russia);

- if one ruling is not enforced or if it is deemed that there appeared a delay in either its enforcement or in informing the Constitutional Court concerning the actions taken, the Constitutional Court shall return a ruling wherein it shall mention that its ruling was not enforced and, as the case may be, it shall also provide the manner of its enforcement. This ruling shall be forwarded to the jurisdictional prosecutor or to any other body that has jurisdiction to enforce the ruling, appointed by the Constitutional Court (Bosnia and Herzegovina).

6. By means of another act, can the lawmaker again put in place a legislative solution that was declared unconstitutional? Provide arguments.

6.1. First of all, a distinction should be made between the requirements of form and those of substance. In connection with finding a law unconstitutional on grounds of form, the fulfilment of that requirement (the adoption of that act by the jurisdictional body, comprising the legislative solution in a

given type of legal act) results in the possibility of the substantive solution included in the respective regulation to be instated again (Estonia, Spain).

In terms of the substantive unconstitutionality, the answers may be classified taking into account the prior provision of such interdictions in the domestic legislation.

A category of States, such as Russia or Lithuania, provided such a prohibition in the Law concerning the organization and operation of the Constitutional Court. The specific regulation of the interdiction to instate the legislative solution declared unconstitutional is doubled by the jurisprudence of the Constitutional Court (Lithuania).

Most States have not provided in their legislations such a prohibition, which does not necessarily mean that the lawmaker has an automatic possibility to further again the legislative solution declared unconstitutional. Such a likelihood was limited either (1) through the interpretation of the constitutional and legal texts which regulate the effects of the decisions by the constitutional courts (Armenia, Cyprus, Georgia, Ireland, Latvia, Republic of Moldova, Montenegro, Turkey); or (2) through the jurisprudence of the constitutional courts (Germany, Croatia, Spain, France, Azerbaijan, Belarus, Republic of Macedonia, Poland, Romania, Serbia, Ukraine); or (3) through the opportunity that the constitutional courts have to again declare the respective legislative solution unconstitutional (Austria, Italy, Luxembourg, Norway, Slovakia, Slovenia, Switzerland, the Czech Republic).

(1) This situation is aimed at the meanings and effects that the binding character of the decisions by the constitutional courts may produce;

(2) Finding unconstitutional any legal provision makes it impossible not only for the lawmaker to adopt new acts with an identical content, but also the enforcement by the courts of law of similar provisions stipulated in other acts (Azerbaijan).

The interdiction of instating the unconstitutional legislative solution again is not absolute in Germany or Croatia, where, as a matter of principle, the lawmaker is deprived of the right to again instate the legislative solution declared unconstitutional if all relevant aspects and circumstances remained unchanged.

A special case may be found in Germany, where the first senate of the Constitutional Tribunal considers that the lawmaker has the responsibility to adjust the legal system to the evolution of social conditions and conceptions concerning the legal order and, consequently, in principle, the lawmaker may fulfil this responsibility including by adopting a new regulation with the same content. Moreover, failure to accept such a phrasing may result in the "freezing" of the Tribunal jurisprudence, so that the decisions, once returned, would be set in concrete forever, leaving the lawmaker bereft of any other possibility to adjust itself to the social and economic evolutions characteristic of a modern, free and dynamic society. However, if the legal act is reiterated, the first Senate will ask the lawmaker not to ignore the reasons why the previous law was declared unconstitutional by the Federal Constitutional Tribunal and to use such legal construct and provide reasons for it only when there are special grounds.

The second senate, even if it does not share the vision of the first, considers that the lawmaker may again instate the legislative solution found unconstitutional on condition that the factual circumstances, respectively the legal arguments set forth by the lawmaker, should have changed.

(3) If a change occurred with the factual and legal circumstances, a provision that was at some point in time declared unconstitutional may not be incompatible with the Constitution any longer, given the new factual and legal status (Italy).

6.2. Other States have never been confronted with such a situation, therefore, the doctrine considers that the lawmaker shall be prohibited from adopting a legal provision identical to the one declared unconstitutional (Belgium), or there is a conflict in the doctrine if unconstitutionality decisions shall be binding only for the executive and the judicial branches or for the legislative branch as well (Portugal). In agreement with the special law, there would be a possibility that the Court could

suspend the new act, without it being mandatory any longer to bring solid evidence and a prejudice that can hardly be compensated (Belgium)

6.3. The impossibility to again instate the legislative solution declared unconstitutional may be overcome by amending the Constitution, especially in the case of the European accession process (Spain, France, Hungary), but also when the lawmaker refuses to further become subject to a certain jurisprudence of the Constitutional Court (Hungary).

7. The Constitutional Court has the possibility to task other bodies with the enforcement of its decisions and/ or provide the manner in which they shall be executed in a certain case?

According to the reports presented, by way of a principle, it is worth mentioning that, based on whether the domestic legislation provides the power of the constitutional courts to task other bodies with the enforcement of their decisions and/ or provide the manner in which they shall be executed, two categories of States may be highlighted, as follows:

A) States where such leverage is not provided, where there is no such possibility, namely Armenia, Azerbaijan, Cyprus, Hungary, Ireland, Latvia, Lithuania, Luxembourg, France, Republic of Moldova, Montenegro, Romania, Poland, Russia, Slovakia, the Czech Republic or Turkey. In these conditions, it is the task to the administrative and judiciary authorities to see to it that the Court ruling shall be observed, therefore, the enforcement of the Court decisions depends to a great extent on the cooperation of the other bodies within the legal system (Italy). At the same time, even if the constitutional court imposes guidelines in its ruling, their effectiveness depends on the authority of the Constitutional Tribunal, as well as on the extent to which the executive bodies are open to cooperating with the Tribunal (Poland).

B) States where, under one form or the other, the constitutional courts may play a role in appointing the body that has authority to enforce their decisions and/ or providing the manner in which they shall be enforced. It is worth mentioning, by way of an example, that:

- in Albania, the enforcement of the decisions of the Constitutional Court shall be ensured by the Council of Ministers through the intermediary of the jurisdictional bodies of the public administration, but the Constitutional Court as well may appoint another body to enforce its ruling, and, if the case may be, it may provide the means for the enforcement. Moreover, the president of the Constitutional Court, through a final ruling which is enforceable, may apply an administrative fine if the ruling of the Court is not observed;

- in Austria, enforcement of decisions by the Constitutional Court shall be performed by common courts or by the Federal President according to the distinctions operated in the Federal Constitution. If the Federal President has authority to enforce such decisions, then the President shall be the addressee of the enforcement application submitted by the Constitutional Court. At the same time, the ruling shall be enforced according to the instructions received through the intermediary of the federal or States' authorities, the Federal Army included, consequently tasked by the President and at the latter's discretion;

- in Croatia, the Government ensures the enforcement of Court decisions and decisions through the bodies of the central administration; however, the Court itself may provide the authority which shall be tasked with the enforcement of its ruling or decision, as well as the way in which the ruling or the decision must be enforced. Consequently, the Court shall in fact order the jurisdictional bodies to implement the steps of general and/ or individual character as a result of its decisions. At the same time, the Court shall be authorized to indicate the procedure, the deadlines and the specific means for the enforcement of its decisions (Russia), but it may also place an obligation on the shoulders of the jurisdictional State bodies to ensure the enforcement of its ruling or the observance of its opinion (Ukraine);

- in the Republic of Macedonia, the decisions by the Constitutional Court shall be enforced by the body that issued the law, the general regulation or the general act that was nullified or repealed through the ruling by the Constitutional Court. If necessary, the Court shall request the Government of the Republic of Macedonia to ensure the enforcement of its decisions;

- in general, in Germany, the Court itself may ensure the implementation of its decisions by means of independent transitional arrangements or orders on the further application of statutes which have been rejected. The Federal Constitutional Court was given jurisdiction for also executing its decisions; consequently, the Court itself may state in the respective decision by whom it is to be executed. Furthermore, the Court may also regulate the "method of execution" in individual cases in accordance with this provision. The Federal Constitutional Court is also entitled to task individuals, authorities or organs which are subject to German state power to carry out concrete execution measures. Against this background, it is explained why the Federal Constitutional Court knows two forms of tasking to execute decisions: The Court may either task an agency in general terms to execute decisions and leave it to implement the execution measures at its own discretion, or the Court may entrust an agency with a concrete execution measure which is precisely determined, and hence make the tasked party "the executing organ" of the Federal Constitutional Court. To the extent to which is necessary, the Tribunal may also use other bodies to enforce its transitional decisions.

If the Court finds any political parties unconstitutional, the Court shall mandate the Ministers of internal affairs of the States to dissolve the respective parties and to ensure that the ban is applied to those organizations that could replace the latter;

- in Serbia, the Constitution grants to the Constitutional Court the prerogative to issue a special order that shall provide the means for the enforcement of its ruling, the order being, in its turn, mandatory. The enforcement shall either be done directly, or through the agency of a jurisdictional body of the central administration, according to the means of enforcement provided in the ruling by the Court;

- the Court may provide the authority that would execute the ruling, as well as the enforcement means, if need be. This is practically an authorization sanctioned to the Court to fill out the legislative loopholes that might arise from the ruling of unconstitutionality. In terms of their legal nature, such decisions shall be distinguished from the ruling returned following the constitutionality review. The provision concerning the enforcement means through the decisions that find unconstitutional any legislative omission shall also be likely to transitionally fill out that respective legislative omission. (Slovenia);

- in the case of the *amparo* constitutionality review, the organisational Law of the Constitutional Tribunal provides that the latter may decide "who is responsible to enforce such decisions and, as the case may be, solve the problems occurred during enforcement." Enforcement provisions may also be included in the returned ruling or in any other subsequent acts. The Tribunal may also nullify any ruling that would go against the one returned in the exercise of its powers the moment it is enforced (Spain);

- in those cases that involve both constitutionality reviews and more specific subjects, the Supreme Court may set a very precise procedure with a view to enforcing its decisions (Estonia);

- in the Republic of Moldova, the Government drafted a decision concerning the legal mechanism applicable to its actions and the actions of the reporting public authorities in order to enforce the decisions of the Constitutional Court, whereas in the Republic of Macedonia, the direct monitoring concerning the enforcement of the decisions of the Court is a matter of the tasks and responsibilities performed by its Secretary General;

- in Norway, that applies the American system of legislative constitutionality review, the unconstitutionality decisions shall be imposed *inter partes*, which, in terms of their enforcement, means that if one of the parties fails to fulfil its obligation, then the other party may apply to the jurisdictional authorities for assistance.