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A D D E N D U M
Revised / révisé

Replies to the questionnaire on the execution of constitutional review decisions

Belgium, Croatia, Cyprus, Denmark, Germany, Iceland, Kazakhstan, Liechtenstein, Luxembourg, Norway, Romania

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

Belgique, Croatie, Chypre, Danemark, Allemagne, Islande, Kazakhstan, Liechtenstein, Luxembourg, Norvège, Roumanie

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Belgium / Belgique

QUESTIONNAIRE SUR L'EXECUTION DES ARRETS DES JURIDICTIONS CONSTITUTIONNELLES

Réponse pour la Belgique
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I. Questions générales sur le contrôle de constitutionnalité.

Remarques introductives.

La notion de contrôle de la constitutionnalité des lois est assez récente en Belgique. Elle a été introduite par la révision constitutionnelle du 29 juillet 1980, concrétisée par la loi du 28 juin 1983. Ces textes ont consacré l'existence d'une « Cour d'arbitrage » ayant pour mission de régler les conflits de compétence entre le législateur fédéral et les législateurs des entités fédérées, Communautés et Régions, soit dans la terminologie belge, les conflits entre la loi (fédérale), le décret (des Communautés et des Régions wallonne et flamande) et l'ordonnance (de la Région de Bruxelles-Capitale).

La révision constitutionnelle du 15 juillet 1988, mise en œuvre par la loi spéciale du 6 janvier 1989, a notablement étendu la compétence de la Cour d'arbitrage, ainsi que les modalités de sa saisine.

La Cour d'arbitrage est désormais non seulement compétente en matière de conflits de compétence provoqués par l'intervention de plusieurs législateurs au niveau fédéral ou des entités fédérées, mais aussi pour vérifier le respect par chaque législateur du principe d'égalité et des principes constitutionnels régissant l'enseignement.

Techniquement, le contrôle de la Cour d'arbitrage reste toujours limité : il ne s'étend pas à l'ensemble de la Constitution. Mais cette restriction est largement apparente. La jurisprudence de la Cour conçoit en effet le principe d'égalité de manière si large qu'elle parvient par ce biais à englober indirectement dans son contrôle de très nombreuses dispositions constitutionnelles, voire des droits consacrés par des textes de droit international directement applicables (la Convention européenne des droits de l'homme, par exemple).

Pour ne prendre qu'un exemple de ce contrôle « par ricochet », si la Constitution réserve la réglementation d'une matière donnée à la loi, la Cour d'arbitrage verra une violation du principe d'égalité en cas de délégation excessive du législateur à l'exécutif. Partant de l'idée que tous bénéficient en principe de la protection que la Constitution assure en exigeant l'intervention du législateur, la Cour considère comme une rupture du principe d'égalité l'abandon par le législateur du domaine que la Constitution lui réserve en exclusivité.

Les textes de base dont actuellement l'article 142 de la Constitution belge et la loi spéciale du 6 janvier 1989 sur la Cour d'arbitrage (ci-après citée : L.C.A.).

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

1) Le contrôle de constitutionnalité des actes normatifs.

En Belgique, la Cour d'arbitrage n'est compétente qu'en ce qui concerne ce type de contrôle. Seuls les lois, décrets et ordonnances (c'est-à-dire les « lois » adoptées par les entités fédérées) peuvent être soumis à la censure de la juridiction constitutionnelle.

a) **Contrôle préventif** : inexistant dans l'état actuel des choses (une partie de la doctrine plaide en faveur de l'instauration d'un contrôle préventif en matière de traités).

b) **Contrôle abstrait ou principal.**

Un recours en annulation d'une loi, d'un décret ou d'une ordonnance peut être introduit dans un délai de six mois suivant la publication du texte (art. 2, § 1er L.C.A.).

En cas de loi (décret ou ordonnance) portant assentiment à un traité, le délai est réduit à soixante jours (art. 2, § 2 L.C.A.).

Peuvent introduire un tel recours :

- le Conseil des ministres fédéral ou le Gouvernement d'une Communauté ou d'une Région ;
- Les présidents des différentes assemblées législatives au niveau de l'Etat fédéral ou au niveau des entités fédérées à la demande de deux tiers de leurs membres ;
- toute personne physique ou morale justifiant d'un intérêt (art. 2 L.C.A.).

Ainsi, les personnes physiques, les associations, sociétés, belges ou étrangères peuvent introduire une action en annulation d'une loi (au sens large comprenant décret et ordonnance) devant la Cour. Celle-ci interprète la notion d'intérêt de façon assez extensive.

Le requérant peut, à l'urgence, demander à la Cour d'arbitrage la *suspension* de la norme attaquée en invoquant à son encontre des moyens sérieux et en démontrant que son exécution immédiate risque de causer un préjudice grave difficilement réparable. La même possibilité est ouverte lorsqu'un recours en annulation est exercé contre une norme identique à une norme déjà annulée par la Cour d'arbitrage et qui a été adoptée par le même législateur (art. 20 L.C.A.). Cette seconde hypothèse n'a jamais été rencontrée dans la pratique. Quant à la première (moyens sérieux et risque d'un préjudice grave, difficilement réparable), la Cour d'arbitrage n'accorde la suspension que dans de très rares cas.

c) **Le contrôle concret ou incident des normes.**

Lorsqu'une question qui relève de la compétence de la Cour d'arbitrage est posée devant une juridiction quelconque, judiciaire ou administrative, celle-ci doit en principe adresser une question préjudicielle à la Cour d'arbitrage (compatibilité de la norme législative –*sensu lato*– avec les règles de partage de compétence ou respect du principe d'égalité ou des règles constitutionnelles en matière d'enseignement).

Une distinction doit toutefois être opérée selon le niveau de ces juridictions.

En ce qui concerne *l'ensemble* des juridictions, à l'exception des juridictions dont les décisions ne sont pas susceptibles de recours, elles peuvent s'abstenir de poser à la Cour la question préjudicielle soulevée devant elles dans trois cas :

1° lorsque la Cour a déjà statué sur une question préjudicielle ou un recours en annulation ayant le même objet ;
2° lorsque la juridiction estime que la réponse à la question préjudicielle n'est pas indispensable pour rendre sa décision (question non pertinente) ;
3° lorsque la norme législative querellée ne viole manifestement pas une des règles constitutionnelles soumises au contrôle de la Cour d'arbitrage ou les règles de partage de compétence entre l'Etat, les Communautés et les Régions (théorie de l'acte clair) (art. 26, § 2 L.C.A.).

Ces trois exceptions laissent en réalité une assez grande marge de manœuvre aux juridictions qui peuvent les invoquer, quant aux questions préjudicielles à soumettre à la Cour d'arbitrage.

En revanche, les juridictions dont la décision *n'est pas susceptible de recours*, en pratique *la Cour de cassation et le Conseil d'Etat*, ne peuvent utiliser les trois exceptions précitées pour se soustraire à l'obligation d'interroger la Cour d'arbitrage. Elles doivent toujours poser à la Cour d'arbitrage les questions préjudicielles qui leur sont soumises par les parties (sauf le seul cas d'irrecevabilité de l'action).

Le système est donc très rigide en ce qui concerne la Cour de cassation et le Conseil d'Etat. Cette rigidité s'explique par la crainte éprouvée par le législateur de voir ces deux juridictions suprêmes, dans l'ordre judiciaire et dans l'ordre administratif, se soustraire abusivement à leur obligation d'interroger la Cour d'arbitrage. On constate toutefois en pratique que tant la Cour de cassation que le Conseil d'Etat ont omis de poser certaines questions à titre préjudiciel à la Cour d'arbitrage, alors que le texte légal leur en faisait obligation.

Pour être complet, ajoutons qu'à côté du contrôle de constitutionnalité traité ici, existe un contrôle de « conventionnalité » par rapport aux dispositions de droit international directement applicable. Ce dernier contrôle est exercé directement par l'ensemble des juridictions et s'exerce sur toutes les normes de droit belge, législatives ou infra-législatives.

d) **Les actes normatifs échappant au contrôle de constitutionnalité.**

Dès que la norme prend la forme d'une loi *sensu lato* (loi, décret ou ordonnance), elle est soumise au contrôle de la Cour d'arbitrage.

La Cour n'a fait aucune distinction : elle a par exemple affirmé sa compétence à l'égard des lois dites spéciales (qui doivent être adoptées à majorité renforcée), des lois budgétaires ou des lois portant assentiment à un traité (et ce tant dans le cadre du contrôle abstrait que du contrôle concret).

La Constitution et ses révisions échappent à la compétence de la Cour.

De même, les actes inférieurs à la loi ne relèvent pas de sa compétence. Ces actes ou règlements, tant au niveau fédéral qu'à celui des Communautés et Régions ou encore au niveau des provinces et des communes, peuvent être annulés par le Conseil d'Etat ou se voir opposer l'exception d'illégalité devant toute juridiction généralement quelconque, ce qui entraîne la non-application de l'acte ou du règlement dans l'espèce jugée (art. 159 Const.).

2) L'examen des omissions constitutionnelles en matière législative.

Dans de rares cas, statuant en matière d'égalité, la Cour d'arbitrage a relevé une infraction au principe d'égalité, cette violation ne provenant pas, selon la Cour, de la disposition législative elle-même soumise à sa censure, mais découlant du défaut de la part du législateur d'avoir prévu une autre disposition.

3) Recours du type « Verfassungsbeschwerde » et « amparo ».

Ces recours n'existent pas en Belgique.

4) Autres compétences de la juridiction constitutionnelle.

La Cour d'arbitrage n'exerce pas d'autres compétences que celles décrites plus haut. Ce n'est qu'en doctrine que ces questions sont discutées (en ce qui concerne par exemple l'interdiction de partis extrémistes ou la validité des élections législatives).

Il est bien évident que la Cour d'arbitrage intervient dans le cadre des conflits entre entités infra-étatiques ou entre celles-ci et l'Etat fédéral. Telle est même la raison de l'instauration de cette juridiction, en 1980, et l'unique compétence qu'elle avait à cette époque. Telle est aussi la raison d'être du nom (Cour d'arbitrage) que la Cour constitutionnelle a gardé. Cependant, ces conflits sont appréhendés selon les deux types de recours exposés plus haut (recours en annulation et question préjudicielle) et ne font l'objet d'aucune règle particulière.

B. Les effets des arrêts de la juridiction constitutionnelle.

1) En ce qui concerne les actes normatifs (points a) à f)).

Les effets d'un arrêt de la Cour d'arbitrage sont très différents selon qu'il s'agit d'un arrêt rendu sur recours en annulation (A) ou d'un arrêt rendu sur question préjudicielle (B).

A-1. Les arrêts *d'annulation* ont l'autorité absolue de la chose jugée à partir de leur publication au Moniteur belge (art. 9, § 1er L.C.A.).

La norme doit être considérée comme inexistante et n'ayant jamais existé. Cette annulation s'impose à toute autorité et toute personne quelconque. Elle a en principe un effet rétroactif (art. 8, al. 1 L.C.A.). L'annulation peut être partielle ou totale (*ibidem*). La Cour ne peut modifier la norme (*sous-question B)*). Une annulation partielle peut cependant avoir un effet très semblable dans la pratique, surtout lorsque la Cour annule une disposition « en tant que… », « en ce que… », etc.

Si le principe est celui de la rétroactivité, la Cour peut cependant, notamment pour des raisons de sécurité juridique ou pour des raisons tenant aux difficultés administratives et financières, indiquer dans son arrêt « par voie de disposition générale, ceux des effets des

dispositions annulées qui doivent être considérés comme définitifs ou maintenus provisoirement pour le délai qu'elle détermine » (art. 8, al. 2 L.C.A.). La Cour fait parfois usage de cette possibilité de moduler les effets d'un arrêt dans le temps (*sous-question d)*).

La loi belge prévoit, suite à un arrêt d'annulation de la Cour d'arbitrage, une procédure particulière de rétractation à l'encontre des décisions judiciaires passées en force de chose jugée. Cette rétractation s'applique aux jugements en matière pénale (art. 10 à 14 L.C.A.), en matière civile (art. 16 L.C.A.) ou contre un arrêt du Conseil d'Etat (art. 17 L.C.A.). La demande de rétractation doit être introduite dans les six mois à dater de la publication de l'arrêt au Moniteur belge. En outre, les actes et règlements des diverses autorités administratives ainsi que les décisions des juridictions administratives peuvent, nonobstant l'écoulement des délais légaux, faire l'objet d'un recours, suite à l'annulation de la norme législative qui leur servait de fondement, dans les six mois à dater de la publication de l'arrêt d'annulation au Moniteur belge (art. 18 L.C.A.).

A-2. Les arrêts rendus par la Cour d'arbitrage portant *rejet* des recours en annulation sont obligatoires pour les juridictions en ce qui concerne les questions de droit tranchées par ces arrêts (art. 9, § 2 L.C.A.). La doctrine tend à considérer que ces arrêts de rejet ont, en ce qui concerne les points de droit tranchés par la Cour, *de facto* une autorité absolue de chose jugée.

A-3. Un arrêt ordonnant la *suspension* provisoire de la norme attaquée paralyse toute application à dater de la publication au Moniteur belge de l'arrêt, publication qui doit avoir lieu dans les cinq jours de son prononcé (art. 24 L.C.A.). Dans ce cas, la Cour doit rendre son arrêt sur la demande en annulation dans les trois mois du prononcé de l'arrêt ordonnant la suspension. A défaut, la suspension cesse immédiatement ses effets.

B. Les arrêts rendus sur *question préjudicielle* ne lient en droit strict que le juge qui a posé la question ou tout autre juge (par exemple, en appel) statuant sur la même affaire (art. 28 L.C.A.). La norme n'est pas susceptible d'annulation dans le cadre du contentieux préjudiciel. Il s'agit, le cas échéant, d'un simple constat d'invalidité laissant subsister la norme.

Toutefois, la portée d'un arrêt rendu sur question préjudicielle dépasse ce strict effet obligatoire à l'égard du juge qui a posé la question (ou des juges statuant sur la même affaire).

En effet, les juges statuant dans d'autres affaires et qui rencontrent la question déjà tranchée par la Cour d'arbitrage, soit sur recours en annulation, soit sur question préjudicielle (cas qui nous intéresse ici) peuvent s'abstenir de reposer à nouveau la question, à condition, bien évidemment, de suivre la réponse antérieurement apportée par la Cour d'arbitrage. Tel est le comportement habituel du juge, sauf s'il peut espérer provoquer, par une nouvelle question, un revirement de jurisprudence qui, sauf circonstances nouvelles, paraît très peu probable. La réponse de la Cour dans une affaire donnée a donc, au-delà de son effet obligatoire relatif, un effet *jurisprudentiel* plus généralisé.

Comme il a déjà été dit, les juridictions suprêmes (la Cour de cassation et le Conseil d'Etat) ne peuvent faire usage de cette exception, tirée d'une réponse antérieure de la Cour, à l'obligation de principe de s'adresser à la Cour d'arbitrage. Même lorsque celle-ci a déjà apporté réponse à la question posée, ces juridictions suprêmes doivent en principe réinterroger la Cour d'arbitrage. Ainsi que nous l'avons souligné plus haut, cette règle s'explique par le sentiment de méfiance éprouvé par le législateur à l'égard de l'esprit de collaboration entre les différentes Cours suprêmes (Cour d'arbitrage, Cour de cassation et Conseil d'Etat).

En pratique, dès qu'une disposition législative a été déclarée contraire à la Constitution dans le cadre d'une question préjudicielle, la règle ne sera plus appliquée par les juges. Il n'en reste pas moins que la règle subsiste et qu'elle continue en principe à être mise en œuvre par l'administration.

Cet effet limité des arrêts rendus sur question préjudicielle est susceptible d'entraîner des difficultés. C'est en vue de les résoudre que la loi sur la Cour d'arbitrage prévoit qu'après un arrêt sur question préjudicielle constatant l'inconstitutionnalité d'une norme législative, le Conseil des ministres fédéral ou les Gouvernements de Communauté ou de Région peuvent, dans les six mois, demander à la Cour l'annulation de la règle (art. 4, 2° L.C.A.). Malheureusement, cette faculté n'est que très peu utilisée en pratique.

Il découle de tout ceci qu'aucun organe n'intervient dans la mise en œuvre de l'arrêt par voie d'abrogation. La décision de la Cour s'impose d'elle-même, avec des effets différents selon la nature de l'arrêt (*sous-question c)*).

2) En ce qui concerne la protection des droits constitutionnels.

Sans objet pour la Belgique.

3) Autres questions.

a) On considère que la Cour d'arbitrage n'est pas liée par ses précédents. Les changements de jurisprudence, s'ils ne sont pas inexistants, sont toutefois très rares.

b) L'effet de *res judicata*, absolu ou relatif, dépend de la nature de l'arrêt (cf. *supra*).

c) Le droit belge ne précise pas *expressis verbis* le niveau occupé par un arrêt de la Cour d'arbitrage dans la hiérarchie des normes. Seuls les effets des arrêts sont envisagés par la loi sur la Cour d'arbitrage.

d) Les arrêts doivent être publiés au journal officiel, soit le Moniteur belge. Les arrêts rendus sur recours en annulation sont publiés en entier et ceux rendus sur question préjudicielle par extrait (art. 114 L.C.A.). Les arrêts sont rédigés, prononcés et publiés en français, en néerlandais et en allemand s'il s'agit d'arrêts rendus sur recours en annulation ou si l'affaire a été introduite en allemand. Dans les autres cas, les arrêts sont rédigés et prononcés en français et en néerlandais. Ils sont publiés au Moniteur belge avec une traduction en allemand (art. 65 L.C.A.).

En outre, la Cour doit assurer la publication de ses arrêts dans un recueil officiel (art. 114, al. 2 L.C.A.). Ils peuvent aussi être consultés par internet.

e) Dans certains cas, la Cour a consenti à admettre comme constitutionnelle une législation à condition qu'elle soit modifiée dans un délai raisonnable. La Cour n'a jamais fixé de délais précis en vue de préserver la marge de manœuvre du législateur, spécialement en ce qui concerne les matières dont les implications financières sont importantes. Dans une affaire récente, il a été demandé à la Cour de fixer un tel délai. La Cour s'y est refusée. Elle a simplement constaté qu'en l'espèce, le « délai raisonnable » était expiré sans répondre explicitement à la question de principe de savoir si elle était compétente pour fixer un tel délai précis (arrêt du 29 novembre 2000 – n° 121/2000).

II. Quels sont les moyens d'assurer l'exécution des arrêts de la juridiction constitutionnelle ?

L'article 115 L.C.A. énonce que les arrêts de la Cour d'arbitrage sont exécutoires de plein droit. Le texte précise que le Roi en assure l'exécution. Ceci signifie qu'il peut être recouru à la force publique dans la mesure où celle-ci serait nécessaire à l'exécution de l'arrêt. A cette fin, le greffier appose sur les expéditions des arrêts, à la suite du dispositif, la formule ci-après :

« Les Ministres, les membres des Gouvernements des Régions et des Communautés et les autorités administratives, pour ce qui les concerne, sont tenus de pourvoir à l'exécution du présent arrêt. Les huissiers de justice à ce requis ont à y concourir en ce qui concerne les voies de droit commun ».

III. Cas d'inexécution.

On ne relève pas de cas d'inexécution d'un arrêt de la Cour d'arbitrage en Belgique.

IV. Cas d'exécution insatisfaisante.

La situation quant à l'exécution des arrêts de la Cour d'arbitrage paraît en général très satisfaisante en Belgique. L'autorité de la Cour est grande et ses décisions ne sont guère contestées, même lorsqu'elles tranchent des questions très délicates sur le plan politique, par exemple des controverses portant sur l'organisation fédérale de l'Etat. On peut même dire que la Cour a contribué au développement d'une véritable culture constitutionnelle en Belgique. Ainsi, la section de législation du Conseil d'Etat, saisie de projets ou de propositions de loi, attire-t-elle souvent l'attention du législateur sur la jurisprudence de la Cour d'arbitrage.

Ceci ne signifie pas qu'aucun problème ne se pose.

Dans certains cas, un législateur dont une norme avait été annulée par la Cour d'arbitrage a reproduit une norme semblable. Il en a été ainsi de dispositions de décrets budgétaires de la Communauté française prévoyant, pour des années successives, des subsides à des associations culturelles situées dans des communes flamandes à facilités linguistiques. Ces décrets budgétaires ont fait l'objet d'annulations répétées de la part de la Cour d'arbitrage.

A cet égard, il convient de noter que la législation elle-même prévoit l'hypothèse où un législateur reprendrait une disposition identique à celle annulée par la Cour d'arbitrage, puisqu'elle permet dans ce cas que la Cour puisse suspendre immédiatement cette nouvelle norme (art. 20, 2° L.C.A.).

Les difficultés de mise en œuvre des arrêts de la Cour d'arbitrage se situent cependant plus sur le terrain juridique que politique.

Ainsi, lorsque la Cour dénonce ce qu'il est convenu d'appeler une « lacune législative », cette constatation pose de toute évidence problème, puisque l'intervention du législateur est

requise pour rétablir le principe d'égalité. Ces cas sont toutefois jusqu'à présent très rares. Dans un de ces cas, le législateur est effectivement intervenu en vue de combler la « lacune » dénoncée par la Cour.

Plus sérieux sont les problèmes suscités par la portée des arrêts rendus sur question préjudicielle (cf. *supra*). Ces arrêts constatent, le cas échéant, une inconstitutionnalité, mais n'anéantissent pas la norme qui continuera, par exemple, à être appliquée par l'administration. La possibilité pour les différents gouvernements d'introduire, suite à un tel arrêt, un recours en annulation de la norme est certes prévue (art. 4, 2° L.C.A.), mais, comme déjà dit, très rarement utilisée. De manière plus générale, la doctrine regrette le manque de réaction des différents législateurs, suite aux arrêts de la Cour d'arbitrage. Bien souvent, seule l'intervention du législateur est susceptible de rétablir une réelle cohérence dans une matière dont certains aspects partiels ont été invalidés par la Cour constitutionnelle.

La portée des arrêts de la Cour prête aussi parfois à discussion. C'est plus particulièrement le cas lorsque la Cour annule ou invalide dans certaines limites ou avec des réserves (« en ce que », « en tant que », etc, formules dont la Cour fait fréquemment usage) ou invalide dans une interprétation (« interprétée en ce sens que ») ou, au contraire, n'admet la validité de la norme que dans une certaine interprétation (« interprétée en ce sens que »).

Bien souvent, la discussion surgit, dans le cadre des questions préjudicielles, de déterminer la compétence d'interprétation qui revient au juge du fond et celle qui appartient à la Cour d'arbitrage. Cette question fait actuellement l'objet d'assez vives discussions en droit belge. Certaines divergences de jurisprudence, quoique non dramatiques, ont pu être décelées entre le juge constitutionnel d'une part, le juge judiciaire ou le juge administratif d'autre part. C'est afin d'éviter ces divergences que le législateur a imposé aux juridictions suprêmes, Cour de cassation et Conseil d'Etat, d'interroger sans possibilité de dérogation la Cour d'arbitrage sur les questions relevant de sa compétence. Cependant, comme il a déjà été souligné, cette obligation théorique reste sans sanction et n'est, dans certains cas, pas respectée par les juridictions sur lesquelles elle pèse.

Croatia / Croatie

AD: CONSTITUTIONAL REVIEW DECISIONS - C R O A T I A

Sources:
1) The Constitution ("Narodne novine", 56/90, 135/97, (8/98), 113/2000);
abrv. = CON
2) The Constitutional Act on the Constitutional Court of the Republic of Croatia ("Narodne novine", 99/99);
abrv. = CACC; it should be amended after the recent changes of the Constitution.

I. General questions on constitutional review

A. The type of constitutional review and its subject:

1. In case of the Constitutional Court of the Republic of Croatia "1b" covers the answer. The Court reviews in abstract review constitutionality of laws (enacted) and constitutionality and legality of other regulations (sub-legislative norms, mainly rules issued by executive, presidential decrees, acts by local governments and self-governments); excepted are the Constitution itself and amendments to the Constitution.

2. There is no review of unconstitutional omission of legislation in a sense that the Court passes **decisions** about the issue, but the Changes of Constitution, passed on November 9th 2000, 113/00, introduced in art. 62. (125. of the original text) that Constitutional Court observes implementation of constitutionality and legality and notifies the House of Representatives of the Croatian Parliament about observed phenomena; also if the Constitutional Court ascertains that the competent body has not passed the regulations necessary for the implementation of constitutional provisions, laws and other regulations, and it had obligation to pass such a regulation, the Court notifies the Government about it, and it notifies about it the House of Representatives if the Government was the body which was obliged to pass the regulation in question.

3. The Court decides about constitutional complaints against individual acts of state bodies, bodies of local and regional self-government and legal persons vested with public authorities when by these acts are violated fundamental freedoms and rights of man and citizen and right to local self-government guaranteed by the Constitution. This is the text of mentioned change of the Constitution, previously the relevant provision said that the Court protects constitutional freedoms and human rights and Constitutional Act on the Constitutional Court explicitly mentioned "decisions of the judicial or administrative authority or other bodies of the public authority".

4. Other areas of constitutional review are: jurisdictional conflicts between legislative, executive and judicial branches; impeachment of the President of the Republic; constitutionality of programs and activities of political parties, control of constitutionality and legality of elections and national referenda.

According to the mentioned changes Constitutional Court decides that the Speaker of the Croatian Parliament shall, in case of illness or incapability of the President of the Republic, have temporary duty of the president of the Republic; the same happens in the case of death of the President of the Republic. Also the Court decides about appeals in cases in which judge is relieved of his office and about appeals on disciplinary responsibility of judge.

B. The effects of constitutional review decisions:

1. Concerning normative acts:

a. The constitutional review decisions are not merely declaratory in a sense that person whose right has been violated by an individual act grounded upon the repealed law or another repealed or annulled regulation has the right - within determined time limits - to request from the competent body the change of this individual act.

b. The Constitutional Court cannot modify the disputed norm, it can repeal laws passed by legislator and repeal or annul other regulations.

c. The Court decisions must be implemented by other organs.

d. Effects of annulment can be postponed by Court's decision; the legal effects of Court's decision start on day of publication of the decision unless the Court determines another day.

e. In case of abstract constitutional review of normative acts the Court's decision has erga omnes effects. In similar cases decided after a final decision in one individual case the Court - unless something fundamentally different has occurred - decides its cases in the same way and other courts are expected to respect interpretation of the Constitutional Court; if they do not the case comes as constitutional complaint before the Constitutional Court.

f. See A. 3.; not "orders", "notifies" that they have a duty to....

2. Concerning the protection of constitutional rights:

a. The disputed act is quashed and the case is sent back to the competent authority for a new ruling; the Constitutional Court does not decide on the matter, but the mentioned competent body is bound by decision and interpretation of the Court.

3 Constitutional review decisions have

a. binding force, erga omnes force
b. res iudicata force only when the same persons disputes the same norms and with the same reasons. The Court may review the constitutionality of the law, respectively the constitutionality and legality of other regulations even in the case when the same law or regulations have already been reviewed by the Court.
c. It could be said that repealment and annulment have the force of law.
d. Decisions are published in official journal.
e. There is no decision with such a declaration about becoming unconstitutional; there are the effects of the decision which say that certain provisions or laws **are** unconstitutional and they may be postponed.

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

1. There is the norm, the art. 30. of CACC:

"(1) The decisions and the rulings of the Constitutional Court are obligatory and every individual or legal person shall obey them. (2) All bodies of the central government and the local self-government and administration shall, within their constitutional and legal jurisdiction, execute the decisions and the rulings of the Constitutional Court. (3) The Government of the Republic of Croatia ensures, through the bodies of central administration, the execution of the decisions and the rulings of the Constitutional Court. (4) The Constitutional Court may determine which body is authorized for the execution of its decision, respectively its ruling. (5) The Constitutional Court may determine the manner in which its decision, respectively its ruling shall be executed.

III. What are the consequences...

Not researched or known so far. But it should be stressed that submitters from finalized cases do not apply for protection again.

IV. Cases where decisions are not executed

The Court has in 1998. (12th of May) passed decision by which a law regulating pensions was repealed. New law passed in December 2000 ("Narodne novine", 127/00). My personal opinion is that the reason for delay has had mainly financial nature. The legislator has been constantly reminded by the general public (pensioners, the number of them is not small in this country) and by the press about the need to obey the Court's decision.

There also were conflicts between Constitutional Court and Supreme Court which held that the courts, being autonomous and independent, are not obliged to obey the Constitutional Court's interpretations of Constitution and law.

V. Cases of unsatisfactory execution

No information has reached the Court that a norm, found unconstitutional by its decision, continues to be applied, in individual cases; but in the history of this Court there were several cases in which the norm found unconstitutional by the Court was, with the same essence, reaffirmed by legislator through another law or through renewed text of the repealed law.
The reasons were always connected with financial resources, but also, perhaps, the reasons of the Court's decisions were not strong or applicable enough.

Cyprus / Chypre

Replies by the Supreme Court of Cyprus

I. General questions on constitutional review

A. The type of constitutional review and its subject:

1. constitutional review of normative acts

a. preliminary review

Preliminary review is expressly envisaged by Article 140(1) of the Constitution whereby "the President and the Vice-President of the Republic acting jointly may, at any time prior to the promulgation of any law or decision of the House of Representatives, refer to the Supreme Constitutional Court (now the Supreme Court) for its opinion the question as to whether such law or decision or any specified provision thereof is repugnant to or inconsistent with any provision of this Constitution". By virtue of Article 140.3 of the Constitution "in case the Supreme Court is of the opinion that such law or decision or any provision thereof is repugnant to or inconsistent with any provision of this Constitution such law or decision or such provision thereof shall not be promulgated by the President and the Vice-President of the Republic".

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

Questions of unconstitutionality are examined as questions of law in the proceedings whether civil, criminal or public law proceedings, only when relevant to the determination of any issue in the proceedings.

c. concrete or incidental review of norms

In addition to preliminary review (see Point a. above) there can take place incidental review. It is examined in the proceedings referred to in Point b above. In public law matters the Supreme Court is vested with "exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority is contrary to any of the provisions of this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person". In dealing with such recourses the Supreme Court examines incidentally the constitutionality of normative acts, only if the question of constitutionality is relevant for the determination of any of the issues arising in the recourse.

d. normative acts that are not subject to constitutional review

All normative acts are subject to constitutional review as envisaged by Article 140 of the Constitution and incidentally as described in Points b. and c. above.

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

There cannot be such a review. The Supreme Constitutional Court held (vide **Papaphilippou v. Republic, 1 R.S.C.C. 9**) that the omission to enact legislation is so closely linked with the exercise of legislative power that it cannot be regarded as an omission of the nature which is amenable to a recourse under Article146.1 of the Constitution (see Point c., above).

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

The Supreme Court has on many occasions pronounced on questions concernig the protection of constitutional rights.

Examples of such rights are:

(i) Right to liberty and security of person which is safeguarded by Article 11 of the Constitution.

(ii) Right to a fair trial.

(iii) Right to respect for private and family life and right to respect for and to secrecy of correspondence and other communication which are safeguarded by Articles 15 and 17 of the Constitution.

(iv) Right to freedom of thought, conscience and religion which is safeguarded by Article 18 of the Constitution.

(v) Right to property.

Also lower Courts have jurisdiction to decide matters concerning the protection of constitutional rights.

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

The creation and functioning of political parties is safeguarded by Article 21(3) of the Constitution. No direct review of unconstitutionality of political parties is envisaged by the Constitution. However, under Article 21(3) of the Constitution restrictions may be placed by law, on the relevant right, as "are absolutely necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the rights and liberties guaranteed by this Constitution to any person". In the event of enactment of such a law there may take place a preliminary review or an incidental review as indicated, respectively in Points I A a., b. and c. above.

Referenda: There is no provision in the Constitution for constitutional review of referenda. In the event of enactment of a law governing referenda its unconstitutionality may be reviewed preliminarily or incidentally as indicated above (see Points I A a., b. and c.).

Conflicts between infra-state, entities and conflicts between state-bodies: Under Article 139 of the Constitution the Supreme Court has "jurisdiction to adjudicate finally on a recourse made in connexion with any matter relating to any conflict or contest of power or competence arising between the House of Representatives, and the Communal Chambers or any one of them and between any organs of, or authorities in, the Republic:

Provided that nothing in this paragraph contained shall apply to any conflict or contest between any courts or judicial authorities in the Republic, which conflict or contest shall be decided by the Hight Court."

The provisions of the above articles are wide enough to cover conflicts between the above bodies.

B. The effects of constitutional review decisions:

1. Concerning normative acts:

a. Are constitutional review decisions merely declaratory?

They are merely declaratory.

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

It is declared null and void. The body exercising constitutional review cannot modify the norm. Where, however, a section of the Law is found to be unconstitutional and such part of the law is severable from the rest the declaration of unconstitutionality may be limited to the particular provision of the Law.

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

If the unconstitutionality review is the one envisaged by Article 140 of the Constitution (vide Point I A a. above) the unconstitutional norm cannot be promulgated. If the review is an incidental one the unconstitutional norm ceases to be applied but a repealing act is not inevitable.

d. Can the effects of annulment be postponed?

No.

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

The effects of the decision are "binding on all courts and all organs or authorities in the Republic and shall be given effect to and acted upon by the organ or authority or person concerned" (vide Article 146(5) of the Constitution) but they do not go beyond the individual case. They cannot affect similar cases which were not adjudicated upon by the Court (vide ***Pavlides v. Republic (1967) 3 C.L.R. 217***) or have been concluded.

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

Under Article 146.1 of the Constitution if any organ, authority or person exercising any executive or administrative authority is held guilty of an omission to do an act prescribed by law the Supreme Court may upon a recourse by an interested person declare "that such omission, either in whole or in part, ought not to have been made and that whatever has been omitted should have been performed".

No time is fixed by the Constitution but the authorities are expected to act within reasonable time.

2. Concerning the protection of constitutional rights:

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

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

If the decision which is quashed is an administrative decision it is sent back to the original authority for a new ruling. If it is a court decision then the body exercising constitutional review decides on the matter.

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

See a. above.

3. Furthermore, do constitutional review decisions have:

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

Yes.

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

Constitutional review decisions which annul acts or decisions taken by administrative bodies have binding force both inter partes and erga omnes and by virtue of Article 146.5 of the Constitution such decisions "shall be binding on all courts and all organs or authorities in the Republic and shall be given effect to end acted upon by the organ or authority or person concerned". Constitutional review decisions regarding decisions taken by lower Courts are binding inter partes.

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

They do not have force of law but the ratio decidenti of the constitutional review decision is binding on both the Supreme Court and lower Courts by virtue of the doctrine of judicial precedent (stare decisis).

d. are they published in an official journal?

Yes. They are published in the Cyprus Law Reports which is an official journal.

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

There is no power in the Courts to make such a declaration.

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

Yes. The rules that apply in the cases mentioned in point 1.A.4 above have already been explained (see Point I.A. 4 above).

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

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

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

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

In the case of preliminary constitutional review the Law is not promulgated.

In the case of constitutional review of decisions taken by administrative bodies the review is incidental and the case is sent back to the administrative body or authority concerned for re-examination and taking of a new decision in the light of the Court decision.

In the cases of constitutioned review of decisions of lower Courts, which is incidental, the decision is quashed.

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

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

Questions of non-execution of constitutional review decisions may, perhaps arise only in relation to constitutional review of decisions of administrative bodies, under Article 146.1 of the Constitution. If the body responsible for the decision omits to comply within a reasonable time then the individual concerned may apply to the Supreme Court for an annulment of the omission by filing a recourse under Article 146.1 of the Constitution. He may allege breach of res judicata and abuse of powers.

IV. Cases where decisions are not executed?

Usually the administration complies with the decisions.

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

No.

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

V. Cases of unstatisfactory execution

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

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

No.

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

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

No.

Denmark / Danemark

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

I. General questions on constitutional review

A. The type of constitutional review and its subject

1. Constitutional review of normative Acts

a) Preliminary review

Before the Government introduces a bill before the Parliament, the ministry responsible for the drafting is obliged to send the bill to the Ministry of Justice for an examination of its constitutionality. In addition, the Speaker of Parliament examines all bills. If a bill is found to be unconstitutional the Speaker recommends to Parliament to dismiss the bill.

b) Abstract or principal review (direct claim of constitutionality)

c) Concrete or incidental review of norms

There is no separate constitutional court in Denmark. In Denmark all ordinary courts of law hold the authority to declare an Act passed by Parliament unconstitutional.

The review of the constitutionality of an Act can assume the following forms:
- Review of whether the legislative procedure has been adhered to.
- Review of whether the principle of the separation of powers has been adhered to.
- Review of whether an Act is materially constitutional, having regard e.g. to civil and political rights.

As a general rule, only a party with a particular and individual interest in having a decision on a question can take action. Thus, the concept of "popular complaint" or "abstract or principal review" is not generally recognised in the Danish administration of justice. On one occasion, however, the Supreme Court ruled that a number of Danish citizens had a sufficient legal interest in having the constitutionality of the Act of Parliament regarding accession to the Treaty of the European Union decided on the merits (see *Bulletin* 1996/2, [DEN-1996-2-002]).

d) Normative Acts that are not subject to constitutionality of law

In Denmark all normative Acts are subject to the above-mentioned review.

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

There is no special procedure – judicial or other – in which the legislature can be obliged to fulfil its constitutional responsibilities.

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

There is no specific procedure corresponding to that of *Verfassungsbeschwerde*. The protection of constitutional rights takes place through the procedure of abstract and concrete constitutional review described under I.A.c.

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

All constitutional questions are subject to the review described under I.A.c.

B. The effects of constitutional decisions

1. Concerning normative Acts:

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

Court decisions concerning constitutional review are binding but only in relation to the particular case at hand.

If, in a concrete case, an Act of Parliament, a statutory instrument or some other regulation is found to be unconstitutional, it will not be applied in that particular case. The court, however, is not empowered to annul the Act concerned. It is up to the authority, which enacted the regulation, to withdraw or amend it.

The court decision has no retroactive effect. A party, who has been subjected to a regulation that is later found unconstitutional, may, however, seek to have his case reopened according to the normal procedural provisions. Furthermore, he may seek compensation for any damages suffered as a result of the application of the unconstitutional regulation.

2. Concerning the protection of constitutional rights:

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

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

If a court quashes a decision by a public authority on the grounds that it is unconstitutional the effect will be that the administrative decision is invalid. It depends on the legal basis in question

whether the court itself will make a new decision in order to replace the invalid decision or whether the court will leave it to the public authority to make a new decision.

3. Furthermore, do constitutional review decisions have?

a) Binding force (binding the body exercising constitutional review itself)?
b) *Res iudicata* force (*inter partes*; *erga omnes*)?
c) Force of law (see for instance § 31.2 of the German law on the constitutional court)?

Court decisions concerning constitutional review are binding but only in relation to the particular case at hand (cf. the answer to question I.B)

d) Are they published in an official journal?

In modern times, there has only been one instance – apart from decisions relating to compensation in relation to expropriation – where the courts have found provisions in a Parliamentary Act unconstitutional (see Bulletin 1999/2 [DEN-1999-2-005]). On this occasion the decision was published in the legal gazette, *Lovtidende*.

Generally speaking, there is no official journal for Danish court decisions. There is, however, public access to all court decisions and all important court decisions are published in the (un-official) Danish legal journal, *Ugeskrift for Retsvæsen.*

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

Decisions, which declare a norm unconstitutional if it is not modified within a certain period, are not known in Danish law.

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

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

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

In Denmark there are no special procedures or norms regulating which authority has to execute the constitutional review decisions nor any norms or procedures concerning the designation of an executing body.

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

The parties to a case where the court has performed constitutional review, have the same remedies against delays in execution of the decision, as they have in other cases.

IV. Cases where decisions are not executed

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

To our knowledge, there have been no cases of non-execution.

V. Cases of unsatisfactory execution

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

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

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

In modern times, there has only been one instance – apart from decisions relating to compensation in relation to expropriation – where the courts have found provisions in a Parliamentary Act unconstitutional (see Bulletin 1999/2 [DEN-1999-2-005]). On this occasion, the decision was published in the (official) Danish Law Gazette. The concerned provisions, which were not applied after the judgment, were subsequently annulled by an Act of Parliament.

Germany / Allemagne

(supplement)

-----Original Message-----
From: g.nolte@jur.uni-goettingen.de
[mailto:g.nolte@jur.uni-goettingen.de]
Sent: Monday 29 January 2001 18:56

Subject: Re: Report and synoptic table on the execution of decisions

In response to your suggestion to supplement my report on the execution of constitutional court judgments I would like to add the following text.

Yours sincerely, Georg Nolte

V. Cases of unsatisfactory execution

In a few of those cases in which the Constitutional Court has permitted the temporary continued application of an unconstitutional law (i.e. when it has declared a law to be merely unconstitutional rather than void) the legislator has not reenacted a constitutional law within the timeframe which was indicated by the Court. The most recent case concerns the decision in which the Constitutional Court had declared that prisoners have a constitutional right to receive a certain minimum level of pay for their work within the prison system. In this case the Court found that the existing rates were too low but it gave the legislator time until 1 january 2001 to raise the rates. The Bundestag failed to terminate the legislative procedure by this date. In its decision, however, the Court had provided for such a contingency by declaring that the regular courts would be empowered to autonomously set the appropriate rates from 1 january 2001 should the legislator not have acted until then. As this case suggests, legislative inactivity is not completely exceptional in Germany. In most cases, however, it is merely legislative inertia rather than serious political controversies which are the cause for the delayed implementation of the Constitutional Court's original decision by the legislator.

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Iceland / Islande

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REPLY FROM ICELAND
to the Questionnaire on the Execution
of Constitutional Review Decisions

The following is to set forth a reply to the above Questionnaire as applicable to the Republic of Iceland. The responsibility for the text rests solely with the rapporteur.

Introductory remarks

The reply relates to constitutional review exercised by the **Supreme Court of Iceland**, the national court of ultimate appeal, under the **Constitution of the Republic of Iceland No. 33 of 17 June 1944** as amended to date, the only amendments relevant to the matter having been adopted by Constitutional Law No. 97 of 28 June 1995 (and No. 100 of the same date) entering into force on 5 July 1995.

Iceland does not have a separate constitutional court, and the right to judicial review of the constitutional validity of ordinary legislation rests with the common courts of general jurisdiction (now 8 District Courts as a first instance and the Supreme Court as the second and final instance), which also have jurisdiction in administrative law matters. The right itself is not directly provided for in the Constitution, but is generally accepted in theory and practice as resting on tradition developed through judicial interpretation of the Constitution, notably its principle of the separation of powers and those concerning human rights.

Under this tradition, having the status of customary constitutional law, the common courts have the power to invalidate or set aside provisions of statutory law which are held to be in conflict with the Constitution, within limits of proper judicial restraint. They also have the possibility of construing and interpreting statutory provisions so as to bring them into line with the Constitution, and this recourse is more frequently seen to be followed.

It is inherent in the tradition that the access to the courts over constitutional issues is subject to the same limitations as the access to court in general, so that they have to be brought up for resolution as part of an actual conflict in an ordinary lawsuit involving a sufficient legal interest (in Nordic parlance, *rettslig or retlig interesse*) by the party bringing the suit.

The boundaries for legal interest in this sense are flexible to some extent, and the access to court also has been facilitated by some recent law reforms. These notably include a widening of the right to sue for declaratory judgments involving the recognition of a right or status, which may serve to simplify the groundwork of the suit, and also the introduction of rules for accelerated procedure in lawsuits against governmental authorities. The latter reform perhaps was adopted primarily with actions over administrative law issues in mind, but it also affects the constitutional issues as such.

I. General questions on constitutional review

A. The type of constitutional review in Iceland and its subject

1. Constitutional review of normative acts:

a. A preliminary review of normative acts (proposed legislation in the Althing or governmental regulations to be issued under enabling legislation) does not occur. In principle, the courts of Iceland are not empowered to give advisory opinions, whether on the constitutional or administrative plane or in relation to private conflicts.

b. An abstract or principal review (upon a direct claim of unconstitutionality) also is not exercised. The subject for review has to be brought up as a matter of actual conflict by an individual or legal entity having a sufficient legal interest to claim acess to court over the issue.

c. A concrete or incidental review of norms *ex post facto* may be carried out by the courts both of first and second instance (in the latter case, by way of an appeal from the lower instance) in the course of deciding an ordinary action at law (civil or criminal), provided that the cause for review is appropriately pleaded by the parties to the action. Exceptionally, the court concerned might find it proper to bring in the matter of its own accord (*ex officio*) and invite the parties to debate the issue and adduce relevant and available evidence thereon.

d. No normative acts are exempted *a priori* from becoming subject to constitutional review by the courts of law when properly addressed. On the other hand (and as another matter), the courts may decide not to replace a norm embodying an element of doubtful constitutional validity by a norm or interpretation of their own (emanating from a court judgment) on the ground that the matter in issue is one that depends on or has to be resolved by a value assessment which under the Constitution should properly belong with the legislature (the elected representatives of the people).

2. Review of unconstitutional omission of legislation:

A case for review of a failure by the legislator to act when it is obliged to do so by the Constitution generally will not arise in a manner enabling the courts to provide a direct remedy, as the courts are not empowered to produce statutory law or to issue directives for legislation to the Althing. However, if the situation involves a lacuna in statutory law with results affecting a right or status of specific persons which is nevertheless entitled to legal protection, the courts may have to produce a concrete solution as between the parties able to bring the matter into court. Such solution(s) might conceivably lead to the development of a common law rule.

On the other hand, the results of a failure to legislate conceivably may be such as to give rise to a right for damages/compensation from the State to specific parties injured by such failure, and the courts then will be able to provide an indirect remedy by awarding such damages. By way of parallel example, the Supreme Court recently has awarded damages to an Icelandic lady employee who was denied compensation from a State fund for wages lost in an employer bankrupty, on grounds that the denial resulted from a failure of the legislator to bring the statutory rules on the said fund in line with an applicable EU directive, as required under the EEA treaty and the Icelandic legislation affirming its validity. (Judgment of 16 December 1999 in case No. 235/1999, *Erla María Sveinbjörnsdóttir v. the Icelandic State.*)

3. Decisions concerning the protection of constitutional rights (Verfassungs-beschwerde, amparo):

A procedure for special submission to a judicial body of ultimate appeal to deal with a complaint of interference with constitutional rights is not available under Icelandic law. - However, the Icelandic act or code of general civil procedure No. 91/1991 does contain provisions enabling the courts concerned (the competent District Court and the Supreme Court in its turn) to allow accelerated proceedings in a legal action against the State or governmental authorities, which facilitates the access to court over constitutional issues.

4. Other areas of constitutional review:

Procedures for constitutional review in specific relations, such as those involving the unconstitutionality of political parties, the holding of referenda, conflicts between infra-state entitites or conflicts between state bodies, are not available in Iceland. Challenges or solutions in respect of these matters can only be sought by the means afforded in an ordinary and properly brought lawsuit before the common courts by parties having sufficient legal interest. The jurisdiction of the courts may extend to conflicts between state entities or bodies on this basis.

B. T*he effects of constitutional review decisions*

1. Concerning normative acts:

a. In Iceland, constitutional review decisions will not be declaratory in content, as they will be expressed in terms of a court judgment having binding force between the parties to the case concerned (and eventually as judicial precedent), and as the courts cannnot be called upon for an advisory opinion (see I. A. 1. a above).

However, they probably will be declaratory in the sense that the judgment concerned usually will not be concluded by a statement or sentence that a specific statute or a specific provision thereof is held invalid, but rather a sentence to the effect that a sum of money in issue is owed to (or not owed by) the claimant, that a governmental decree affecting the claimant is invalid or that a specific status or right of the claimant is recognised, etc. The constitutional ground for such result, i.e. the unconstutionality and consequent invalidity of a statute (or, more frequently, an individual provision thereof), will instead be described and declared in the judicial premises leading to the concluding statement or sentence.

b. The norm which is declared contrary to the Constitution is to be regarded as invalid (as null and void or without effect) in the context or relation in which it was considered by the court, which may or may not extend to its entire content and applicability. The declaration will have immediate effect upon the binding delivery of the judgment.

The court exercising constitutional review cannot modify the norm in the sense of producing a different norm of its own within the statute itself. However, a modification tantamount to replacement may occur if the court is able to resolve the matter in issue by declaring an interpretation of the norm which may differ from that indicated by the letter of the law or seen by the government or other party relying on the statute, but has the effect of removing the problem of unconstitutionality and bringing the norm into line with the Constitution.

c. The decision of the court need not be implemented by the legislator by a repeal of the normative act under review, as the norm is in fact to be regarded as a dead letter (or set aside) in all respects in which the effect of the decision applies. – The practical consequences of the decision as regards the text of the statute concerned may be none, i.e. if the setting aside of a specific provision thereof does not render the statute unworkable or unacceptable by the legislature as then composed. In the opposite event, the consequence presumably will be a parliamentary/governmental initiative for a formal amendment or repeal of the statute.

A recent example is a Supreme Court decision of 3 December 1998 in case no. 145/1998, *Valdimar Jóhannesson v. the Icelandic State (H.1998.4076*), where a specific provision of the law on management of fisheries in Icelandic waters was found to be unconstitutional, and a government decision refusing a fishing license to the complainant was annulled. The provision mainly restricted the number of vessels to be used in the fisheries, and by an amending law adopted by the Althing in January 1999, the restriction was repealed. - The converse occurred with a Supreme Court decision of 3 December 1992 in case No. 129/1991, *Bjarnheidur Gudmundsdóttir v. the Minister of Finance et al. (H.1992.1962*), where a provision of a law setting aside the wage clauses of a union agreement for civil servants and replacing them with wage terms set out in the law itself was found unconstitutional. The provision had annulled a 4,5% wage increase as of a certain date, and the court awarded a corresponding sum to the complainant. Following the decision, the same increase was granted and paid out to all other civil servants covered by the agreement, without an amendment being made in the law.

d. The effects of the annulment or setting aside of the statute or provision cannot be formally postponed. - If parliamentary reaction in relation to the norm set aside is delayed, or if executive implementation of the norm is continued without appropriate regard to the result of the decision, this would entail the risk of new recourse to the courts by those injured by the norm. - Conceivably, however, the nature of a norm might be such that a period of adjustment to the result of its review might be reasonable and constitutionally viable, and the legislature then might be justified in determining a certain postponement.

e. The constitutional review by the Icelandic courts will be incidental and concrete, and the effects of their decisions are formally limited to the concrete case before the court. However, the review conclusion expressed in the resulting judgment will have immediate effect as a judicial precedent grounded in customary constitutional law, so that *de facto* the norm in issue or the unconstitutional aspect thereof is thereafter to be regarded as inoperable.

If similar cases already have been the subject of a final judicial decision, such decisions will not be affected except in the sense that the new precedent may become a cause for reopening of the earlier cases under the ordinary procedural rules therefor (see 3.a. below). If an injured party does obtain appropriate redress out of court (e.g. where the decision has not related to status which cannot be properly vindicated without a new court decision), this may suffice to settle the issue.

As regards prior final decisions within the administrative sector, it would follow that these should be reconsidered by the competent public authority to the extent that they or their consequences can be effectively altered after the fact. Failing that, the persons injured by the decisions presumably would be able to take the authorities to court in order

to obtain restitution or redress, subject to generally applicable limitations of time and circumstance.

f. The court exercising constitutional review cannot order another body to act in respect of the norm reviewed, except by way of such orders as can be embodied in an ordinary court sentence in the concrete case. Thus the court can e.g. order the government to suffer the quashing of an executive decision based on the norm, to recognize a certain status of a party to the case, or to allow him specific restitution (where this can properly be accomplished) or redress by way of damages. But the court cannot order the government to issue a new general regulation or the parliament to pass a new law.

2. Concerning the protection of constitutional rights:

a. Where the court exercising constitutional review quashes a decision by a public authority (an administrative body or official, etc.) on grounds that it is unconstitutional, the effect will be to remove the validity of the decision and any acts taken on its basis. The court cannot order the authority to take a new decision, except where such order may properly be embodied within a sentence providing for the restitution or recognition of a status of the party to the concrete case. The decision thus will not be sent back to the original authority for a new ruling, so that if such ruling is necessary to complement the judgment delivered by the court, the injured party to the case or a third party with similar interest may need to request it from the authority.

As regards decisions of a District Court failing to observe an unconstutionality recognized by the Supreme Court, the cassation system is not followed in Iceland, so that the Supreme Court will pronounce a new judgment replacing that of the District Court. The case will not be remitted to the lower court unless this is necessary for other procedural purposes.

b. As implied under a. above, the court exercising constitutional review in respect of a claim for protection of constitutional rights (against a decision or ruling by a public authority or otherwise) will itself decide upon the rights of the claimant, in so far as such decision can be embodied or stated in the sentencing conclusion of an ordinary judgment (declaratory and/or executory).

3. Furthermore, the following applies to constitutional review decisions of the Icelandic courts:

a. The decisions have binding force for the court concerned in relation to the concrete case at hand. The resulting judgment cannot be altered except by way of a reopening procedure, which is only allowed within very strict limits for causes such as the unforeseen appearance of new material evidence (where the parties cannot reasonably be blamed for its late discovery) or otherwise to permit repairment of gross injustice.

b. The decisions will have *res judicata* effect as between the parties to the concrete case. They will also have *res judicata* effect *erga ommes* as a judicial precedent, the scope of the effect depending on the scope of the reasoning by which the court established the unconstitutionality of the norm reviewed or the need for protection of the constitutional right in issue (i.e. whether the reasons of the court were highly specific or of general application).

c. The decisions will not have ordinary force of law. Although judicial precedent is recognised in Iceland as one of the sources of law, it does not have the binding force of statutory legislation. Its direct force primarily lies in the fact that the courts may be expected to follow the precedent in all similar cases. It is thus regarded as a principle of customary law that the lower courts should follow the precedents of the Supreme Court. The Supreme Court also may be expected to follow its own precedents as a matter of course, although the Court formally has the power to change them in a later case.

The occasions on which the Supreme Court has departed from its own decisions so as to create new precedent are extremely rare. Furthermore, the departure in most cases may be characterised as not representing a break with consistency, but rather as involving a reaction to legal and social developments in the surrounding world. In other words, mostly the departures may be seen as a reflection of the truth that judicial precedent is not a static, but a dynamic source of law.

It may be of interest to note that the most recent examples of departure by the Supreme Court from an established view reflected in prior decisions are related to the work of the Commission and Court of Human Rights in Strasbourg and other developments in the field of human rights. An outstanding one is the landmark decision of 9 January 1990 in case no. 120/1989, *the State Prosecution v. Gudmundur Breidfjörð Ægisson* (H.1990.2), where the Court decided in effect that the requirements for judicial impartiality set out in the code of criminal procedure now had to be interpreted with a stronger and stricter view to judicial independence than that previously applied. The result was that the judge handling the case in the District Court had to be disqualified due to formal association with the investigating power in the district, despite the absence of any indication of partiality in the specific circumstances and despite the fact that the reference of the case to the judge fully accorded with the procedural system then existing under the code. The situation was similar to the one examined by the Commission of Human Rights in March 1989 in the case of *Jón Kristinsson v. Iceland,* and among other considerations, the Court took note of the stand there taken by the commission. A further change in the same field was made by the judgment of 18 May 1995 in case No. 103/1994, *the State Prosecution v. Sveinn Eiríkur Sigfússon* (H.1995.1444), where the Supreme Court disqualified a deputy district judge from handling a case on the ground that the existing conditions of tenure of judicial deputies were not compatible with the principle of judicial independence. – Among decisions of the Court of Human Rights which have influenced the expressed views of the Supreme Court towards the constitutionality of particular norms, the ones involving matters from Iceland include *Thorgeir Thorgeirsson v. Iceland* (25 June 1992 (No. 239), 14 E.H. R.R. 843, relating to the freedom of expression) and *Sigurdur A. Sigurjónsson v. Iceland* (30 June 1993 (No. 264), 16 E.H.R.R. 462, relating to the freedom of association).

d. The constitutional review decisions of the Icelandic courts are not published in an official journal devoted to laws or regulations or to constitutional matters in particular. In the case of the Supreme Court, they are regularly published among its other decisions in the Supreme Court Reports (appearing in 2-5 volumes annually), together with the respective District Court judgments. The decisions also are made public immediately upon their pronouncement, by the issue of copies and on the Internet. This latter procedure is similarly followed in the District Courts.

e. Under the Icelandic system of concrete and incidental control, the situation of a court decision declaring that a norm will become unconstitutional if it is not modified within a

certain period is not likely to arise. On the other hand, the Icelandic courts may incidentally come to face situations where a normative act has been expressly adopted for a specific period or otherwise for temporary purposes, and may be considered constitutionally viable precisely because of its temporary nature.

This last may be said to have been experienced with the legislation on the management of fisheries in Icelandic waters which has been developing since about 1980. The initial laws and regulations imposing major restrictions on the number and capacity of fishing vessels and on the quantity of catch (quotas of specific fish stocks) were adopted for successive fixed terms of one, two and three years, whereas in 1990, they were framed in a law which had an indefinite term in the ordinary manner, but did include provisions for a future review of the system prescribed. The constitutionality of this important legislation was not seriously challenged in the Supreme Court until the law of 1990 had been in force for some time, the main challenges to date having been handled in the judgment of 3 December 1998 above cited (see I.A.1.c.) and a judgment of 6 April 2000 in case No. 12/2000, *the State Prosecution v. Björn Kristjánsson et al*. Although the prior temporary legislation was not directly in issue, both judgments contain statements which may be said to indicate that the laws concerned would have been deemed constitutional in their time, at least partly due to their short-term validity.

If an existing norm is challenged in court and held to be constitutional primarily in view of its temporary nature, and the norm subsequently is maintained in force without change, the court decision on hand will not have any direct effect on the resulting position, so that a further challenge in a new court action will have to be made if the norm is to be set aside.

It may perhaps be noted that this problem was posed in an opinion delivered by the present rapporteur in the above Supreme Court case of 6 April 2000, where four justices held the existing quota system under the 1990 law to be constitutionally viable, considering all its aspects (being based on a value assessment of the legislator and within his appropriate scope of action), while two justices found the system so discriminatory as to be unconstitutional. In my separate opinion as the seventh judge, it was held that the system must be considered to have been valid in February 1999, when the infractions in issue were committed, on account of the law of 1990 being temporary in nature despite the absence of a fixed term of validity. It was further stated, however, that the law could not remain constitutional for any length of time unless its existing discriminatory features were to be offset by major counterbalancing features in the favour of national and private interests other than those favoured by the existing system.

As already indicated, the answers to the previous questions have depended on the fact that the Icelandic constitutional review is based on concrete control. There are no special rules for the cases mentioned in point I.A.4 above.

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

1. There is not any norm specifically indicating which authority has to execute the constitutional review decisions in Iceland. This results from the fact that the review is carried out by the courts in their ordinary course of business.

2. (In fine) The way the system works in practice is that the execution of the review decisions falls within the ordinary system for execution of court judgments. If the concrete case results in an executory judgment (for payment of damages, repayment of taxes, return of property, etc.), the order implied in the judgment will be executable by the body in charge of the execution of civil claims affirmed by court judgment. If the judgment concludes in a declaratory sentence (for the quashing of a government decision, the recognition of a right, etc.) the result exceptionally may be such as to enable the excecutory body to effect proper performance. Beyond this, where the correction or redress of the consequences of an unconstitutional norm or the breach of a constitutional right is outside the competence of the executory body, the reviewing judgment simply must be expected to be obeyed by the public authorities or other parties concerned, who otherwise run the risk of challenge by further court action. - The competence of the executory body does, of course, only extend to the consequences of a normative act and not to its norms themselves.

The task of executing court judgments used to be regarded as a judicial function and was vested in special regional courts (Courts of Executions, Courts of Auctions), from which appeals could be made to the Supreme Court. By procedural reform legislation entering into force in 1992, the function was separated from the judicial system and is now wholly vested in the Sheriffs or County Commissioners for each administrative district, who respresent the local arm of the national government and are supervised by the Ministry of Justice. Their decisions or decrees in the course of executing judgments may be referred to the competent District Courts, who will handle the matter in summary or short-form proceedings, generally subject to summary or complaint-form appeal to the Supreme Court.

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

It follows from the description in II. above that it should always be possible to secure compliance with a constitutional review decision to the extent that the power to fulfill the requirements set out in the court judgment is within the scope of competence of the County Commissioners as executory bodies.

Outside this scope, if a public authority or other party fails to obey the immediate requirements of the judgment in relation to the complainant who has obtained a recognition of unconstitutionality in the concrete case, and/or if it continues to follow the norm set aside or the unconstitutional line of action condemmed in the judgment, the authority or other disobeying party will run the risk of challenge by further court action by the complainant and/or other persons in a similar position. There also will be a risk of action against the authority by way of such means as may be afforded by provisions of the laws on public administration and the criminal code against abuse of power and other breaches committed by public authorities.

As regards the problem of continued formal existence of a legal norm deemed to be unconstitutional by a court decision, this can only be remedied by the action of a parliamentary majority in the Althing towards repeal or amendment of the norm. If this is not forthcoming, a parliamentary member or group possibly could attempt to make the matter a cause for impeachment of the government Minister responsible in the field of the norm, but the instigation of impeachment proceedings, or a vote of non-confidence against the Minister (which also might be proposed), would require the approval of a parliamentary majority.

IV. Cases where decisions are not executed

There are *no* recent cases where a constitutitonal review decision has not been executed in Iceland.

It may be noted, however, that as the constitutional control in Iceland is concrete and *ex post facto* and dependent on the party complaining of unconstitutionality having sufficient legal interest in the matter, the claims arising out of the unconstitutionality will normally be considered subject to the ordinary general conditions or limitations for such claims. Thus a money claim for compensation or repayment may be barred by the statute of limitation (the limitation period mostly being 4 years for commercial and most contract claims and 10 years for ordinary tort claims), or because of prolonged and excessive passivity on the part of the complainant. If the barring by these general rules is in evidence when the issue of unconstitutionality is first brought before the court, the action usually will fail.

As an example of the effect of the statute of limitation, it may be of interest to note the recent case of an import firm which complained of a special tax or duty on certain foodstuff imports levied over a period of some years. In a resulting judgment of 19 December 1996 is case No.427/1995, *Þrotabú S. Óskarssonar & Co. hf. v. the Icelandic State* (H.1996.4260), the Supreme Court found that the levying of this tax as from the effective date of a Ministry regulation of February 1998 was in conflict with the taxation provisions of the Constitution, the authorisation from the legislator to the government Minister for determining the incidence and rate of the tax having involved an excessive delegation of power. The Court thus delivered a declaratory (recognition) judgment quashing a decree of the State Customs Commission which had established a claim in arrears against the firm by way of redetermining the proper tax on its imports in 1988-1992 (after discovering that the firm had reacted to the tax by asking its foreign suppliers to disguise the true price of the foodstuffs in their invoices so as to lower the tax amount).

The estate in bankruptcy of the firm subsequently brought suit for repayment of the tax actually paid in the said period according to the import price then declared. In a Supreme Court judgment of 10 December 1998 in case No. 146/1998 (H. 1998.4180), it was found that the firm and estate had allowed the relevant 4-year period of limitation to pass without making a money claim, even though there had been ample reason to protest against the tax at the time of import. The prior suit for recognition of unconstitutionality was held not to have been so framed as to break the period. The money claim thus failed completely, and a similar result was experienced by a few other firms which brought suit on the basis of the 1996 decision, although some of them received partial repayment. – The cases are perhaps interesting because the Supreme Court did not distinguish the claims over an unconstitutional tax from an ordinary claim for overpaid taxes as regards the period of limitation, but it is to be noted that the claims were framed in terms of repayment (of the gross amount of the tax or such part thereof as the firm might not have been able to pass along to its customers), but not in terms of damages in tort for net loss.

V. Cases of unsatisfactory execution

A situation where an unconstitutional norm continues to be appplied has *not* recently arisen in Iceland.

It may be noted that we perhaps came somewhat close to a problem of this nature in connection with the judgment of 3 December 1998 cited in I.B.1.c. and I.B.3.e. above on the management of

fishing rights. The case arose over a restriction on the number and capacity of fishing vessels provided for in Article 5 of the relevant Act No. 38/1990, but many people felt that the reasoning employed by the Supreme Court equally involved a condemnation of the restrictions by way of fish stock quotas regulated by Article 7 and related provisions of the Act. The Government, however, took the view that only Article 5 was affected, and the subsequent amendment of the Act was carried out accordingly, despite minority protests in the Althing. This view of the Government was borne out in the later decision of 6 April 2000, where all the justices agreed that the prior judgment could not be directly cited against the validity of the quota rules under Article 7. The opponents of the quota thus only had the limited consolation that the minority justices also found these latter rules to be in actual or potential conflict with the Constitution.

As a final reply concerning points IV and V, the question of decisions of ordinary higher courts being declared contrary to the Constitution does not properly arise as a problem in Iceland, since we do not have the a separate Constitutional Court.

The constitutional provisions and general laws pertinent to the subject of the Questionnaire may bee listed as follows:

Constitution of the Republic of Iceland No. 33 of 17 June 1944, as amended, in particular its Article 2 (on the separation of powers), Chapter V, Articles 59-61 (on the judiciary, where Article 60 affirms the power of the courts to review actions of the executive power, while review of legislation is not directly mentioned) and Chapter VII, Articles 65-77 (on human rights, including an Article 70 on access to court and fair hearing).

- *Act No. 62 of 19 May 1994 on the European Human Rights Convention, where in Article 1, the Convention of 4 November 1950 on the Protection of Human Rights and Freedoms with its Protocols No. 1, 4, 6 and 7 as amended by Protocol 11 is given the force of law in Iceland.*
- *Act No. 15 of 25 March 1998 on the Judiciary, including its Chapter II on the Supreme Court of Iceland.*
- *Act No. 91 of 31 December 1991 on Civil Procedure, as amended, including its Chapter I on jurisdiction, Chapter IV on causes of action (esp. Articles 24-25), Chapter XIX on accelerated procedure, Chapter XXIV on complaint-form appeal, Chapter XXV on ordinary appeal, and Chapters XXVI-XXVII on the reopening of decided cases.*
- *Act No. 19 of 26 March 1991 on Criminal Procedure, as amended, including its Chapter I on jurisdiction, Chapter XVI on complaint-form appeal, Chapter XVIII on ordinary appeal, and Chapter XXII on the reopening of decided cases.*
- *Act No 90 of 1 June 1989 on Executions.*
- *Act No. 31 of 23 April 1990 on Attachment of Assets, Injunctions et al.*
- *Act No. 90 of 23 December 1991 on Forced Sales.*
- *Act No. 21 of 21 February 1994 on the Seeking of an Opinion of the EFTA-Court on Interpretation of the Agreement on the European Economic Area.*

While the legislation above listed provides the framework for action of the common courts empowered to carry out constitutional review, and for the execution of their decisions, none of its provisions specifically deal with such review.

Reykjavík, 21 November 2000

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QUESTIONNAIRE SUR L'EXECUTION DES ARRETS DES JURIDICTIONS CONSTITUTIONNELLES (CDL [2000] 45)

I. Questions générales sur le contrôle de constitutionnalité

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

Les compétences de la Cour d'Etat (Staatsgerichtshof) sont énumérées dans la Constitution liechtensteinoise (ci-après «Cst.») du 5 octobre 1921, LGBl. 1921/15 (art. 104 [art. 62 lit.f, 80] et 112) et dans la Loi sur la Cour d'Etat (ci-après «Loi») du 5 novembre 1925, LGBl. 1925/8. Cette Cour d'Etat de 1921/1925 est une «Cour constitutionnelle». Elle réunit les caractéristiques d'une juridiction constitutionnelle de type moderne, concentrée sur une seule Cour et institutionnellement séparée de la juridiction ordinaire.

1. Le contrôle de constitutionnalité des actes normatifs

a. Le contrôle préventif

Un contrôle préventif des actes normatifs dans le sens technique du mot n'existe pas.

Cependant, la Cour d'Etat est compétente de rendre des avis d'expertise sur des questions générales du droit constitutionnel et administratif, sur des questions de la législation et des projets de lois et sur l'interprétation de lois ou d'ordonnances, sur demande du gouvernement ou du parlement (art. 16 Loi). Les avis rendus ne sont pas contraignants, mais dans la pratique tels avis se sont révélés comme une sorte de contrôle préventif efficace.

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

Le contrôle abstrait des lois est assuré sur demande du gouvernement ou d'une commune (art. 104 par. 2 Cst. et art. 11 et 24 Loi). Dans le cas d'une ordonnance (de l'exécutif), également 100 citoyens sont habilités à s'adresser directement à la Cour constitutionnelle en vue d'un contrôle abstrait, dans un délai d'un mois depuis la publication de cette ordonnance (art. 26 Loi).

c. Le contrôle concret ou incident des normes

Le contrôle concret ou incident des normes (lois et ordonnances) est prévu en cas de recours individuel constitutionnel (Verfassungsbeschwerde: art. 23 combiné avec art. 24, 25 Loi) ou sur demande d'un tribunal ordinaire dans une affaire pendante devant celui-ci (art. 25 et 28 Loi);

ainsi que (concernant seulement les ordonnances en cas d'application) sur demande d'une commune (art. 25 par. 2 Loi).

d. Les actes normatifs échappant au contrôle de constitutionnalité

Il n'y a point d'actes normatifs échappant au contrôle de constitutionnalité.

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

Selon la jurisprudence de la Cour constitutionnelle l'absence de législation simple ne peut pas faire objet d'un contrôle (abstrait) des normes. Par contre, si telle omission législative a pour effet une violation des droits individuels constitutionnels garantis, l'individu peut recourir à la Cour constitutionnelle (Verfassungsbeschwerde) qui constate et réprime la violation résultant de l'omission législative.

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

Le recours individuel (Verfassungsbeschwerde) est prévu contre toute décision d'un tribunal ou d'une autorité administrative, après épuisement des voies de recours ordinaires, pour violation des droits garantis par la Constitution ou pour violation des droits fondamentaux de la Convention européenne des Droits de l'Homme ou du Pacte international relatif au Droits civils et politiques. Exception: Nul recours existe en cas de violation directe, commise par le Prince.

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

- Interprétation contraignante de la Constitution à effet *erga omnes* en matière de litige d'interprétation entre le gouvernement (Prince) et le parlement sur une disposition constitutionnelle spécifique (art. 112 Cst., art. 39 par. 1 Loi);

- Décision en matière de conflits de compétence entre tribunaux et autorités administratives (art. 104 par. 1 Cst.);

- Décision en matière de mise en accusation d'un ministre (Ministeranklage) par le parlement (art. 104 par. 1 Cst.);

- Décision sur demande en nullité en matière d'élections ou de référendums (art. 104 par. 2 Cst.);

- Décision comme Cour administrative dans des domaines très restreints et spécifiques (art. 104 par. 2 Cst.).

B. Les effets des arrêts des juridictions constitutionnelles:

1. En ce qui concerne les actes normatifs:

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

Non. Voir les effets exposés ci-après.

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

La norme déclarée contraire à la Constitution par la Cour constitutionnelle (contrôle abstrait ou incident) est annulée par celle-ci avec effet *ex nunc erga omnes* (art. 38 par. 2-5, aussi art. 24 par.1 Loi). La norme en question ne peut pas être modifiée par la Cour constitutionnelle.

Une innovation jurisprudentielle récente (controversée) est l'»Appellentscheidung»: Si, d'une part, il n'y a pas de contradiction *strictu sensu* d'une norme avec la Constitution et si, d'autre part, la norme n'est pas en pleine concordance avec la Constitution, la Cour rend une décision d'appel («Appellentscheidung») vis-à-vis du législateur, en vue d'amender la norme en question (voir Herbert Wille, Die Normenkontrolle im liechtensteinischen Recht auf der Grundlage der Rechtsprechung des Staatsgerichtshofes, Liechtenstein Politische Schriften, vol. 27 [1999], p. 315s.).

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

Non. Voir exception (Appellentscheidung) *supra* lit. b par. 2.

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

L'annulation d'une norme prend effet avec la promulgation du dispositif de l'arrêt dans la gazette officielle des lois (Landesgesetzblatt), sous réserve d'un report des effets de l'annulation à une date ultérieure qui n'excède pas les six mois (art. 43 par. 2 Loi).

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

Dans tous les cas, l'arrêt de la Cour constitutionnelle est d'effet *erga omnes*, dans la mesure où une norme est annulée. Telle annulation a force de loi («législation négative»). L'effet de l'annulation saisit le cas concret décidé par la Cour constitutionnelle dans le cadre d'une Verfassungsbeschwerde, et s'étend (où il y a lieu) sur toutes les affaires pendantes devant d'autres instances, mais ne met pas en question les affaires passées en force de chose jugée.

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

En cas de l'annulation d'une norme, le gouvernement est légalement tenu de publier aussitôt le dispositif de l'arrêt dans la gazette officielle des lois (art. 43 par. 2 Loi). Egalement le gouvernement doit rendre public les arrêts de la Cour constitutionnelle intégralement ou en partie (sauf exceptions). Les arrêts sont reproduits dans le recueil officiel («LES») des décisions des tribunaux ou autorités administratives (art. 43 par. 3 Loi).

En cas d'une «Appellentscheidung», celle-ci s'adresse au législateur, en vue d'une action législative (voir *supra* lit. b par. 2).

2. Concernant la protection des droits constitutionnels:

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

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

Le tribunal ou l'autorité administrative, dont la décision est attaquée, participe directement (comme «belangte Behörde») à la procédure devant la Cour constitutionnelle. En cas de cassation d'une décision, l'affaire est réouverte devant l'instance inférieure.

b. Est-ce que la juridiction constitutionnelle statue elle-même sur la question?

Non.

3. En outre, est-ce que les arrêts des juridictions constitutionnelles ***(en cas d'un recours individuel constitutionnel [Verfassungsbeschwerde]):***

a. lient celles-ci?

La décision de la Cour constitutionnelle lie cette Cour seulement dans la mesure où la décision est une *res iudicata*. La Cour peut changer sa jurisprudence dans une affaire ultérieure.

Evidemment, si dans le cadre d'un recours individuel (Verfassungsbeschwerde) une norme est déclarée inconstitutionnelle, l'annulation de la norme a un effet *erga omnes* (comme c'est le cas dans un contrôle abstrait).

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

Il y a effet entre les parties. En cas de cassation d'une décision d'un tribunal ou d'une autorité administrative, cette instance est liée en l'espèce à l'opinion exprimée par la Cour constitutionnelle (art. 42 par. 2 Loi). Par contre, le principe anglosaxon de la «stare decisis» n'existe pas.

En revanche, si dans le cadre d'un recours individuel (Verfassungsbeschwerde) une norme est déclarée inconstitutionnelle, l'annulation de la norme a un effet *erga omnes* (comme c'est le cas dans un contrôle abstrait).

c. ont force de loi (voir par exemple le § 31.2 de la loi allemande sur la Cour constitutionnelle)?

Non.

Par contre, l'annulation d'une norme anticonstitutionnelle (contrôle incident ou abstrait) a force de loi («législation négative»). En outre, en cas d'une interprétation contraignante de la Constitution, telle interprétation de la Cour a force de disposition constitutionnelle (voir aussi réponse en bas, premier tiret).

d. sont publiées dans un journal officiel?

En principe, les arrêts sont publiés intégralement ou en partie dans le recueil officiel («LES») des décisions des tribunaux ou autorités administratives (art. 43 par 3 Loi). En cas d'une annulation d'une norme, il y a aussi publication de la teneur de l'annulation dans la gazette des lois. Voir *supra* I B 1 f par. 1.

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

Lorsque le délai (de six mois maximum) expire sans que le législateur ait agi, la norme inconstitutionnelle devient nulle *ipso iure*.

La réponse aux questions précédentes varie-t-elle selon le type de contrôle de constitutionnalité (par exemple: contrôle concret/contrôle abstrait)?

Ces questions sont traitées *supra* (I B 1 a-f, 2 a-b, 3 a-e)

Des règles spéciales s'appliquent-elles dans les domaines mentionnés au point I.A.4 ci-dessus?

En ce qui concerne les autres compétences de la Cour constitutionnelle:

- En matière d'interprétation contraignante de normes constitutionnelles, l'interprétation par la Cour constitutionnelle a force de disposition constitutionnelle à effet *erga omnes* (voir art. 39 par. 1 Loi). Les règles de publication en cas de contrôle de normes s'appliqueraient *per analogiam* (voir *supra* I B 1 f par. 1).

- Quand il y a recours en nullité concernant une élection ou une votation (référendum), la Cour constitutionnelle déclare, s'il y a lieu, nulle et non avenue l'élection ou la votation.

- En matière de conflits de compétence, la Cour constitutionnelle ne tranche que la question (préalable) à quelle instance revient la compétence d'agir en l'espèce (art. 39 par. 2 Loi). L'arrêt passe en force de chose jugée dans les deux semaines après notification, et les instances concernées sont liées à l'opinion exprimée par la Cour (art. 42 par. 1 et 2 Loi).

- En cas de mise en accusation de ministres ou lorsque la Cour est saisie en qualité de Cour administrative spéciale, la Cour constitutionnelle statue, en analogie avec les juridictions ordinaires, en la matière (art. 39 par. 3, art. 50 Loi).

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

La réponse à cette question tiendra compte de la législation relative à l'exécution des arrêts des juridictions constitutionnelles, soit par d'autres tribunaux, soit par des organes exécutifs. En particulier:

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

2. **Sinon, existe-t-il une norme prévoyant que la juridiction constitutionnelle ou une autre autorité détermine l'organe compétent pour exécuter les décisions de la Cour constitutionnelle? Comment le système fonctionne-t-il en pratique?**

En cas d'annulation d'une norme infraconstitutionnelle (contrôle abstrait ou concret) ou d' interprétation contraignate d'une disposition constitutionnelle, la teneur de l'arrêt passe en force à effet *erga omnes* avec la promulgation dans la gazette officielle des lois (art. 43 par 2 Loi).

Si, en cas de violation d'un droit constitutionnel garanti, une décision d'un tribunal ou d'une autorité administrative est cassée, l'arrêt passe en force de chose jugée dans les deux semaines après la remise de l'arrêt (aux parties et) au tribunal ou à l'autorité administrative concernée (art. 42 par. 1 Loi). Par ce moyen, la procédure initiale (Ausgangsverfahren) est réouverte devant cette instance inférieure en question.

Si la Cour constitutionnelle annule une élection *in globo* ou partiellement, le gouvernement est obligé de faire le nécessaire pour renouveler l'élection (art. 66 par. 3 Volksrechtegesetz, LGBl. 1973/50). Il en est de même, *mutatis mutandis*, en cas d'une annulation d'une votation (art. 74 Volksrechtegesetz).

En cas d'une décision de la Cour constitutionnelle dans un conflit de compétence, la loi laisse (en principe) aux organes ou parties concernées le soin d'introduire ou de poursuivre leur cause.

Quant aux matières de mise en accusation de ministres ou de juridiction administrative spéciale, les auteurs de ces réponses s'abstiennent d'exposer les différentes règles sur l'exécution d'un arrêt de la Cour constitutionnelle.

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

Tels cas ne se sont pas présentés.

IV. Cas d'inexécution

A. <u>Pouvez-vous citer des cas récents d'inexécution d'un arrêt de la juridiction constitutionnelle de votre pays?</u>

Non.

B. Si oui, est-il possible d'identifier les causes de cette inexécution (telles que: motifs politiques/raison financières/manque de clarté de l'arrêt/caractère inadéquat des normes en matière d'exécution des arrêts)?

___

V. Cas d'exécution insatisfaisante

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

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

Non.

B. Quelles sont les causes? Découle-t-elle du pouvoir de décision de la juridiction constitutionnelle (absence d'effet erga omnes, caractère déclaratoire de l'arrêt), ou d'autres causes, telles que celles mentionnées sous IV.B supra?

___

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

Non.

Bendern/Liechtenstein, 17 janvier 2001

Luxembourg

Complément de réponse au questionnaire sur « L'exécution des arrêts des juridictions constitutionnelles »

(Questions II à V)

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

Au Grand-Duché de Luxembourg il n'existe pas de dispositions législatives relatives à l'exécution des arrêts de la Cour Constitutionnelle.

Il est rappelé que le Luxembourg a opté pour un système de contrôle concret par le biais du renvoi préjudiciel. La juridiction qui a posé la question préjudicielle, ainsi que toutes les autres juridictions appelées à statuer dans la même affaire, sont tenues, pour la solution du litige, dont elles sont saisies, de se conformer à l'arrêt rendu par la Cour.

Les arrêts n'ont donc qu'un effet inter partes et déclaratoire, malgré l'absence d'obligation légale, il appartient par la suite au pouvoir politique et en l'occurrence au gouvernement et au législateur d'intervenir suite à un arrêt déclarant une norme contraire à la Constitution. Les moyens d'exécution légaux faisant défaut, seule la volonté politique des responsables est déterminante.

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

En droit le problème de l'inexécution des arrêts ne se pose pas vraiment étant donné que les arrêts ont uniquement un effet inter partes.

En fait, dans l'hypothèse où une norme est déclarée inconstitutionnelle et que la norme en question ou la Constitution n'est pas modifiée par la suite, pose un vrai problème. La loi est muette sur ce point, la pratique luxembourgeoise trop courte pour juger des façons possibles pour parer à cette insuffisance.

IV. Cas d'inexécution

Il est rappelé que l'on ne peut pas parler d'exécution ou d'inexécution strictu sensu, alors que les arrêts ont uniquement un effet déclaratoire et que la Cour Constitutionnelle n'a pas la compétence d'ordonner l'exécution de ses propres arrêts, faute de dispositions législatives.

Si la question se posait l'on serait plutôt tenté de parler de problèmes de suivi des arrêts ; or de tels problèmes ne se sont pas posés au Luxembourg.

Ainsi, il y a lieu de préciser que jusqu'à ce jour la Cour Constitutionnelle a rendu 10 arrêts, le premier datant du 6 mars 1998.

Parmi les arrêts (au nombre de 5) qui ont déclaré des normes contraires à la Constitution, l'on peut relever les points suivants :

- Dans une première série d'arrêts (arrêt du 6 mars 1998 et trois arrêts du 18 décembre 1998), la Cour Constitutionnelle a déclaré certaines dispositions de plusieurs règlements ministériels non conformes à l'article 36 (qui traite de l'organisation du pouvoir réglementaire) de la Constitution, alors que les mesures d'exécution des lois (règlements et arrêtés) doivent être prises par le Grand-Duc seul et non par les ministres.

Concernant ce point particulier la Commission des institutions et de la révision constitutionnelle vient de déposer le 6 février 2001 une proposition de révision de l'article 36 de la Constitution, afin de se conformer aux prédits arrêts. Cette procédure fait suite aux 4 arrêts prémentionnés et constitue en quelque sorte l'exécution de ces arrêts.

- Ensuite, reste à citer un arrêt du 26 mars 1999 qui a déclaré une norme inconstitutionnelle, en l'occurrence l'article 380 du Code Civil luxembourgeois (article relatif à l'autorité parentale). Sur ce point, il y a lieu de remarquer que le législateur n'est pas encore intervenu en vue de mettre la disposition en question en conformité avec la Constitution, mais que le groupe parlementaire socialiste a l'intention de prendre une initiative en ce sens.

V. Cas d'inexécution insatisfaisante

Pour l'instant il est trop tôt pour en juger.

13.02.2001

Lydie ERR
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Norway / Norvège

Replies to the questionnaire on the execution of constitutional review decisions

Introduction:

The Norwegian Constitution of 17th May 1814 is – after the United States Constitution – the oldest written constitution in effect today. The Constitution has no provision concerning judicial review. Judicial review has however been practised by the Supreme Court since the last half of the 19th century, and the Supreme Court's competence to exercise judicial review is therefore considered well-established customary law.

All cases involving judicial review are handled by the ordinary courts; the case will start in the District or City Court and eventually be handled by the High Court before it reaches the Supreme Court.

I. General questions on constitutional review

A. The type of constitutional review and its subject:

1. b/c/d Constitutional review of normative acts

The court can only interfere in relation to an act that has already come into force. There is no preliminary review.

However, according to the Constitution, the Parliament may obtain the opinion of the Supreme Court on points of law. Such opinions will only be advisory to the parliament, and the possibility is seldom used.

The constitutional review is limited to cases where an actual conflict is brought before the court for decision.

A court case must be brought by someone – normally an individual – having sufficient legal interest in the matter. No normative acts are exempted from becoming subject to constitutional review. The right to review also includes the right to review the legality of regulations prescribed by ministries or other bodies pursuant to the provisions of statute.

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

This does not occur, but the courts may note omissions.

3. Decisions concerning the protection of constitutional rights

Yes.

4. Other areas of constitutional review

The right to review includes the control of the legality of administrative (Government) decisions.

B. The effects of constitutional review decisions:

1. a/b/c/d/f
If an act is deemed unconstitutional it becomes inapplicable in the specific case.
It is for the Parliament (the Storting) to amend the laws.

1 e and 3 a/b

A decision will formally have effect only with respect to the parties. The precedential effect of the decision will depend upon how general or how specific the reason given for the setting aside of the law in the particular controversy.

2. The court may decide the case itself or send it back to the lower instance for a new ruling.

3. a/b/d/e
See also 1/e
A decision has binding effect between the parties. The court is not strictly bound by its earlier decisions.
The decisions are published in the Norwegian Law Gazette (Norsk Retstidende) and the Lovdata information system. New decisions can also be found on the Internet.

II.

The execution of the review decisions falls within the ordinary system for execution of court judgments. For instance, for payment of damages, the order implied in the judgment will be executable by the body in charge of the execution of civil claims affirmed by court judgments.
See also 1 e and 3 a/b.

IV and V

No.

Oslo, 5 February 2001

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Romania / Roumanie

Replies to the questionnaire on the execution of constitutional review decisions

The Romanian Constitution of 1991 has adopted a combined system of constitutional review of normative acts in which both the *a priori* and *a posteriori* review are cumulated at the same body – the Constitutional Court.
(art.144 from the Romanian Constitution).

I. General questions on constitutional review

A) The type of Constitutional review and its subjects:

1. Constitutional review of normative acts

a. Preliminary review

According to art.144 a) of the Romanian Constitution the Constitutional Court decides on the constitutionality of normative acts before their entering into force at the request of the President of Romania, of one of the two Presidents of the Chambers of Parliament, of the Government, of the Supreme Court of Justice, of at least 50 members of the Chamber of Deputies or 25 members of the Senate.

In case the Constitutional Court declares a normative act unconstitutional before its coming into force, the Decision acts as a **suspension veto,** because the effect is to send the normative act for re-examination in the Parliament. If the normative act is adopted in the same form with a majority of at least two-thirds of the members of each Chamber of Parliament, the claim of unconstitutionality is waved and its promulgation by the Romanian President is compulsory. On the contrary, if the said majority is not met the normative act will not be promulgated.

b. Abstract or principal review

There is no such form of constitutional review specified in the Romanian Constitution. The authority of the of the Constitutional Court is limited to the provisions of art.144 and these provisions are of strict interpretation.

c. Concrete or incidental review of norms

A posteriori review relates to legal norms that are already in force. The Constitution al Court may be seized only by a Court of justice which has a pending case in which one party or the Court itself considers that a legal norm on which depends the judgment of the Court is unconstitutional. In such case the Court suspends the hearings and sends the file to the Constitutional Court to decide upon the claim of unconstitutionality of the said legal norm. If the Constitutional Court declares the legal norm unconstitutional this leads to a re-judgment of the case. In civil cases the decision of the Constitutional Court profits only to the parties who raised the exception of unconstitutionality. In criminal cases the decision leads to the re-judgment of all cases in which the conviction was based on the legal norm declared unconstitutional.

d. Normative acts that are not subject to constitutional review

Subject to Constitutional review are only the following normative acts:

- laws voted by the Parliament but not yet promulgated;
- internal regulations of the Parliament;
- laws in force and Ordnances of the Government assimilated to laws.
-

All other normative acts (i.e. decisions or regulations of Ministries or other central or local authorities) are excluded from the constitutional review, their accordance with the law being decided by the Court of justice. Also, normative act that are no longer in force, being abrogated either explicitly or tacitly, can not be subject to constitutional review. Also, laws that were adopted and promulgated in spite of a Constitutional Court decision declaring unconstitutional the said normative act before its promulgation (see pct.A.1.a above), are also excluded from constitutional review.

2. Review of unconstitutional omission of legislation

The Romanian Constitution does not provide that the Constitutional Court may rule on such omissions.

3. Decisions concerning the protection of constitutional rights

The protection of constitutional rights is achieved through the Courts of justice, the Constitutional Court having no role in this.

4. Other areas of constitutional review

The Constitutional Court can decide on the constitutionality of regulation of the Parliament if the claim is raised by one of the Presidents of the two Chambers, or at least 50 deputies or 25 senators(art.144-b).

Also according to art.144 - d,e,f,g,h and I of the Constitution the Constitutional Court has competences in the election of the President of Romania (by scrutinizing the procedures for the election and confirming the results of the elections), establishes the facts that may lead to the ad-interim exercise of the Presidency, acts as counseling body for the request of suspending the President, scrutinizes the procedure for the national referendum and confirms its results, verifies the compliance with the regulations in case of legislative initiative by the citizens, decides upon claims regarding the constitutionality of a political party.

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

1. Concerning normative acts:

The two types of constitutional review of normative acts by the Constitutional Court are carried out at different moments in time – the first during the process of law-making and the second during its application – so the effects of constitutional review can not be the same. Despite this, the Romanian Constitution uses a unified regulation regarding their effects stating that "… **the decisions of the Constitutional Court are mandatory and rule only for the future. The decisions are to be published in the Romanian Official Gazette**."

As described at pct. A1a) above in case the Constitutional Court declares a normative act unconstitutional before its coming into force *the effect is to send the normative act for re-examination in the Parliament*. If the normative act is adopted in the same form with a majority of at least two-thirds of the members of each Chamber of Parliament, the claim of unconstitutionality is waved and its promulgation by the Romanian President is compulsory. On the contrary, if the said majority is not met the normative act will not be promulgated. Nor during the preliminary review, neither during the concrete review, the Constitutional Court can modify the norm. This is the prerogative of the Parliament, as the sole body invested with the power of law-making. Furthermore the Constitutional Court can not decide on the interpretation or application of a legal norm but only in respect to its accordance with the Constitution. (art.2 Law no.47/1992 modified by Law no.138/1997, regarding the organization and functioning of the Constitutional Court).

In case of regulations of Parliament, if the Constitutional Court decides the unconstitutionality of the regulations the decision is sent to the concerned Chamber of Parliament to re-examine the regulation and to amend it in accordance with the Constitution.

In case a legal norm is declared unconstitutional while in force the decision is mandatory and with immediate effects for the Court of Justice where the claim of unconstitutionality was raised, and as said above the decision profits only to the party involved in the pending civil case. In criminal cases the decision is also mandatory and with immediate effects and leads to the re-judgment of all cases in which the conviction was based on the legal norm declared unconstitutional.

2. Concerning the protection of constitutional rights:

See A.3.above.

3. According to the Constitution, the Constitutional Court has

prerogatives not only for the constitutional review of normative acts but also in other matters as confirmation of elections, establishing states of facts, performing as first and last forum of justice in litigation brought directly before the Constitutional Court (i.e. unconstitutionality of political parties). The general interpretation is that even if all the Constitutional Court Decisions are mandatory, their effects are different according to the "case of unconstitutionality" involved. All Constitutional review decisions are published in the Official Gazette. In case of preliminary review the only obligation is to send back to the two chambers of Parliament the normative act declared unconstitutional to be re-examined. The Parliament can disregard the decision of the Constitutional Court and if adopted with a number of at least two-thirds of the members of each Chamber the normative act is promulgated and the claim of unconstitutionality is waved. This situation was interpreted as being the process of law-making is the full prerogative of the Parliament and no other authority can intervene to limit this prerogative.

In case of incidental review the decision through which a normative act is declared unconstitutional have effects from the it was published and become mandatory for the Court of justice where the claim of unconstitutionality was raised. The decision is sent to each of the two Cambers of the Parliament and to the Government. The effects are only for the future. The decision has *res iudicata* force, but the decision is not considered as amending the unconstitutional normative act. There is neither a time limit nor an obligation for the legislative body to remedy the situation.

In case of a decision where a political party is declared unconstitutional the decision is sent to Bucharest Tribunal which erases the said party from the repertoire of political parties.

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

In case of a decision of the Constitutional Court reviewing and declaring unconstitutional a normative act before its promulgation the decision has only to be published in the Official Gazette and to be sent for re-examination to the Parliament. There is no obligation for the members of the Parliament to amend the normative act according to the decision of the Constitutional Court.

In case of a decision reviewing a normative act in force, by means of incidental review, the decision is mandatory for the Court who deferred the claim of unconstitutionality. If the Court disregards the decision of the Constitutional Court this situation can be corrected by appealing against the decision of the Court of justice on the ground that the Court did not act according to the decision of the Constitutional Court which is, as said above, mandatory for the Court of justice. So the appeal to the higher Court of justice is the way to ensure the execution of the constitutional review decision.

In case of a decision regarding the unconstitutionality of a political party the failure of executing the decision of the Constitutional Court (erasing the party from the repertoire) gives grounds for administrative penalty. The remedy is also administrative.

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

See above.

IV. Cases where decisions are not executed

There were no cases of un-executed Constitutional Court decisions.

V. Cases of unsatisfactory execution

There were no cases of unsatisfactory execution of Constitutional Court decisions.

Alexandru Farcas
Romania