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***The role of the constitutional court in the consolidation of the
rule of law***

Bucharest, 8-10 June 1994

Proceedings

The role of the constitutional court in the consolidation of the rule of law

***Proceedings of the UniDem Seminar organised in Bucharest on 8-10 June
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TABLE OF CONTENTS

Opening session 2

A. Introductory statement by Ion ILIESCU, President of Romania	3
B. Introductory statement by Professor Antonio LA PERGOLA, President of the European Commission for Democracy through Law	4
C. Introductory statement by Mr Vasile GIONEA, President of the Romanian Constitutional Court.....	11
The role and competences of the constitutional court.....	15
A. The role and competences of the constitutional court - Report by Professor Luis LOPEZ GUERRA, Spain.....	16
B. The role and competences of the constitutional court - Report by Prof. Florin VASILESCU, Judge at the Romanian Constitutional Court	27
Summary of the Discussion.....	39
Organisation, operation and practice of the constitutional court	42
A The constitutional court of Italy - the guarantee for its independency - Report by Prof. Antonio BALDASSARRE, Judge at the Italian Constitutional Court	43
B. Organisation, operation and practice of the constitutional court - Report by Prof. Victor Dan ZLĂTESCU, Judge at the Romanian Constitutional Court	49
Summary of the Discussion.....	62
Decisions of the constitutional court and their effects	64
A. Decisions of the constitutional court and their effects - Report by Prof. Helmut STEINBERGER, former judge at the German Constitutional Court	65
B. Decisions of the constitutional court and their effects - Report by Prof. Vasile GIONEA, Member of the Academy, President of the Romanian Constitutional Court.....	91
Summary of the Discussion.....	98
The relations of the constitutional court with the ordinary courts and other public authorities	100
A. The relations of the constitutional court with the ordinary courts and other public authorities - Report by Prof. Michel MELCHIOR, President of the Belgian Court of Arbitration	101
B. The relations of the constitutional court with the ordinary courts and other public authorities - Report by Prof. Antonie IORGOVAN and Prof. Miha CONSTANTINESCU, Judges at the Romanian Constitutional Court	119
Summary of the Discussion.....	124
Closing session.....	125
Closing speech by Mr Robert BADINTER, President of the French Constitutional Council	126
List of participants	127

Opening session

Chaired by Professor Antonio LA PERGOLA

Opening statements by

- a. Mr Ion ILIESCU, President of Romania*
- b. Professor Antonio LA PERGOLA, President of the European Commission for Democracy through Law*
- c. Mr Vasile GIONEA, President of the Romanian Constitutional Court*

A. Introductory statement by Ion ILIESCU, President of Romania

Mr Ion ILIESCU, President of Romania, welcomed the participants in the Seminar and thanked those who had contributed to its organisation.

Since 1989 profound changes had taken place in Romania and the most important one of them was the adoption of the new Constitution. He was grateful to the foreign specialists who had assisted in the drawing up of the Constitution, not least to the members of the Venice Commission who had participated in an exchange of views with the Constitutional Commission on the main principles to be incorporated in the Constitution. There had been a wide ranging public debate and Parliament had examined each article of the Constitution in detail.

One of the topics discussed already then was the role of the Constitutional Court. The Constitutional Court of Romania was still a recent institution with only two years of experience but this experience was already interesting and should provide a useful starting point for the debates.

B. Introductory statement by Professor Antonio LA PERGOLA, President of the European Commission for Democracy through Law

1. It is a privilege to address this distinguished audience. Our gathering is being honoured by the presence of the Head of State and of the Chief Justice of the Constitutional Court of our host country. Let me convey to both of them the heartfelt gratitude of the Venice Commission. Let me thank warmly all our Romanian friends for their generous hospitality.

Romania is now a member of the Council of Europe. The stage is set in this magnificent building for a debate that has aroused the interest of judges, scholars and lawyers from all over Europe. Democracy is spreading across our continent. Courts as guardians of the constitution have appeared or are springing to life in almost every country arisen from the ashes of oppressive dictatorship. The progress of constitutional justice, in one form or another, runs like a connecting thread through our common history. Hans Kelsen conceived the Austrian Constitutional Court in 1920. That was an intense but troubled and transient season of institutional engineering. Other sister courts were established soon after World War II. The remaining ones have been created at various stages subsequently. First with lasting peace and now with the growing number of democracies, constitutional justice has attained its present importance and diffusion. This is more than a tendency. It is an established novel form of constitutionalism. Once the constitution is laid down as supreme law, its observance needs to be guaranteed. And it is. Kelsen's opinion that there should be an appropriate judicial body to perform the function has been tested by experience and has proven sound. This is by itself a striking fact, a sign of our times, and one that calls for our reflection. Bucharest is the place where our minds can meet. We share the awareness that, after the breakdown of ideological walls, a fruitful dialogue must begin between old and new courts. We need an all-round view of constitutional justice, mature and emergent.

Each court has of course its own problems. All of them, though, administer the values which make us rediscover Europe as the unbroken area of one and the same civilisation.

My opening remarks are not meant to deal with any of the topics reserved for the distinguished rapporteurs. From all of them I have no doubt much to learn. I shall simply attempt to set out the reasons why constitutional justice lies at the very heart of the endeavours in which the Venice Commission is engaged: the series of UniDem seminars and Conferences of which this is a part, the Bulletin on Constitutional Case-Law and the report of Models of Constitutional Jurisdiction by our friend Professor Steinberger. This report is available here in English, French and Russian. I am convinced that the reports at this seminar as well as the

discussions will constitute a further important contribution not only to the scientific analysis of constitutional jurisdiction but also to its development in the practice of the new democracies.

2. *Constitutional justice, let me explain, is a central concern of the Venice Commission because it regards democracy and law at the same time. It affects, and I am tempted to say it inspires, the actual working of the constitution as a frame of government and a bill of rights. There is an interaction here between constitutional justice and the institutional context in which it is put in place. Constitutional justice is established to guarantee democracy as a political system with its underlying worlds of values. It is also true, however, that to perform its proper role it requires, no less than it guarantees, a certain view or type of democracy, which must be clearly understood. Within the broader conceptual framework that explains its raison d'être, constitutional justice can then be appreciated as a specific technique to raise the rule of law to new heights, to develop and perfect with the advanced views of present day constitutionalism the nineteenth century notions of the Rechtsstaat.*

While the broad and the technical aspects of our phenomenon are, to be sure, intimately connected, each deserves a separate comment.

How do we, then, first of all define the type of democracy that is needed to ensure constitutional justice its rightful place?

At the beginning of this century Lord Bryce put forward the celebrated distinction between rigid and flexible constitutions. He had the foresight to predict that the only flexible constitution left in existence would sooner or later be that of Britain, which was his native country. The rigid constitution has in fact become the common answer to the present need for the stability of the political order. Constitutional justice has followed in its wake and given utterance and meaning to the view that basic charters cannot be unmade or changed by ordinary law. But it is not only a question of procedures. The discipline of the amending process, important as it may be, cannot disclose the entire view of what happens, and of how a political system is formed, under a rigid constitution. We must not lose sight of the substantive values in view of which procedural arrangements are made.

Let me take the point further. Look at the idea of the rigid constitution in the sharp light of time. It dates back to the end of the eighteenth century. After the great revolutions of that epoch, a new outlook on constitutionalism set in on both sides of the Atlantic. Radical or absolute democracy, which was the product of revolutionary dogmas, came to be replaced by constitutional democracy, and the

formula of the rigid constitution was aptly forged by the skilful political craftsmen of that day to serve this purpose. The choice between radical and constitutional democracy was made then for the first time, but it has remained ever since an option from which no constitution-maker may evade.

Radical democracy is one where sovereignty resides in the whole people, which is supposed to speak and act through an all-powerful assembly. The executive and other political organs revolve as satellites around the legislative body, that monopolises all important decision-making. We have seen such radical views, which in theory describe the purest imaginable form of democracy, degenerate in practice either in a chaotic gouvernement d'assemblée or in the iron-clad hegemony of a political force that rules from behind the wings of the parliamentary scene. A rigid constitution is true to its form when it removes this monopoly of power, even though it may be a power fully legitimised by popular election. Once this choice is made, the notion of a rigid instrument and the range of its possible use are brought into sharper focus. Powers must be allotted between different organs, subdued to limitations, entrenched in their respective organs, subdued to limitations, entrenched in their respective spheres and thus separated or properly balanced, according to the classical doctrines of political liberalism. Constitutional democracy is therefore, by definition, a system where there is a balance of powers and values which under the rigid type of charter becomes a cogent guideline of the governmental process.

It is no paradox, however, that Britain, despite its flexible constitution, has provided the model for one version or another of constitutional democracy, depending on which stage in the evolution of its political system, which is based on custom and spontaneous growth, was being taken into account by foreign constitution-makers. There are rigid constitutions that borrow some of their features from the raw material of British experience in balanced government. Two such cases come to mind when we think of our topic. One is the separation of powers enshrined in the American constitution. The independence of the judiciary vis-a-vis the other powers, with bar and bench as a genuine aristocracy of the robe, derives from British tradition. The other case, as it well-known, is that of constitutional monarchy. Adopted by several countries in the European continent, constitutional monarchy has later evolved, as had happened in Britain, into a parliamentary regime. This development has taken place in the continent both under a weakened monarchy or in the context of a newly-created Republic. In the United States, constitutional justice has always meant, from Marbury vs. Madison on, "diffuse" judicial view of legislation. Each judge is enabled not to apply in the case with which he is dealing a statute or any other provision he deems unconstitutional. The Supreme Court determines in the last instance, thanks to stare decisis, which laws offend the constitution and thus must to all intents and purposes be held to have vanished from the statute book. Constitutional

monarchy, for its part, left no room for constitutional justice as long as the sovereign had the exclusive if infrequently exercised power of disallowing an act of parliament on constitutional grounds. The idea of a Constitutional Court was not advanced until later, after the monarchy had been supplanted by a democratic republic. Kelsen's preoccupation was to explain that the constitutional controls by the Head of State which he thought had been illusory in the former system would now be turned into effective judicial guarantees. His views seemed at the time a daring departure from the accepted scheme of things, and they were vehemently opposed by other thinkers. Carl Schmitt believed that the good old *pouvoir neutre* of the monarch of bygone days could revive with a fresh title of democratic legitimacy in the republican Head of State as the only natural guardian of the Constitution. The Court Kelsen had engineered, said Schmitt, was a self-defeating contrivance, a disguised branch of the legislature that had nothing to do with jurisdiction and was bound to fall prey to political parties. Kelsen countered this attack by arguing that the Court was a true and proper judicial body, except that in the logic of his *Stufenbau* jurisdiction acquires the dual nature of a law creating as well as a law applying process. The Head of State, too, conceded Kelsen, could be custodian of the Constitution in his own sphere. This could depend however on positive law. The popularly elected German President of the Weimar time was, because of his emergency and other far-sweeping powers, involved in the actual conduct of politics. He was not, and could not be, the neutral Head of State Schmitt was portraying as *Hüter der Verfassung*.

The passage of time seems to have settled this heated *querelle*. Things have gone the way Kelsen had pointed out. Heads of States and Constitutional Courts share in a good many countries the custodianship of the Constitution but, in discharging this duty, each of them plays a distinctive part: the Head of State moderates institutional life, and this may well mean that many of his attributions belong in the sphere of high politics; the Court's remit remains after all within the boundaries of justiciable constitutional questions. What strikes the present day observer, at any rate, is that neither Schmitt nor Kelsen realised, as they were crossing swords, that they were both on the same side of the watershed between radical and constitutional democracy. The two scholars were equally opposed to unfettered democratic power. Both favoured some kind of balanced government, but here their preferences differed. Kelsen was wary of the strong executive and thus inclined towards a constitutional democracy modelled on the parliamentary government, of which Victorian England had offered the first and foremost example. His idea of the Constitutional Court figured in this picture as a novelty related to the continental philosophy of the rigid Constitution. The Constitution, thought Kelsen, must be made of unequivocal rules and guarantee the fairness and transparency of parliamentary debate. It was the legal instrument that could mitigate the harshness of majority rule. The minority was to be allowed to challenge unconstitutional laws before the Constitutional Court. Here was the

technical invention of what was later defined as centralised constitutional control. The court could be set in motion by a fraction of members of Parliament or by other qualified bearers of public office. Thus conceived, the European variety of constitutional justice arose in a fashion which seemed diametrically opposed to the diffuse judicial review we find in the United States.

3. *The difference between the continental and the American systems has narrowed in the later development of constitutional justice. The Supreme Court of the United States has devoted increasing time and attention to the central place it fills in constitutional litigation. And the problem constantly debated in that country is that of seeing what reading of the fundamental text, what attitude towards the political process, should guide the Court in shaping its role as the chief dispenser of constitutional justice. As to the role of Constitutional Courts in Europe, it has grown, far beyond Kelsen's expectations, possibly as a result of the complexity of written Constitutions, where broad principles and pragmatic norms coexist with detailed rules, and the whole text needs expert and laborious reading by an authoritative interpreter. Be that as it may, constitutional justice has become a far-reaching jurisdiction. Centralised control has been combined in certain systems with incidental control. This last control is exercised on a petition from all or certain of the other courts, which will suspend the proceeding until after the Constitutional Court has ruled on the question they have raised; and this question must of course refer to a law which, unless declared unconstitutional by the Court, the judge below would have to apply in an actual case. This kind of prejudicial incidental question, as the expression goes, is an ingenious device, and has brought our brand of constitutional justice a good deal nearer to the spirit, if not the technicalities, of judicial review as practised in the United States. What matters more, constitutional jurisdiction is generally structured in Europe in terms of powers that are suited to Courts more or better than to organs of another nature. Regardless of whether the Constitutional Court is formally integrated into the judiciary or not, the Court acts as a judge because it is one : judicial procedure fits the substance of its powers like a glove. It goes without saying that the powers of Constitutional Courts may, and do in fact vary, even significantly, from one case to another. I can only draw a thumb-nail sketch of how these powers are usually outlined in constitutional texts.*

3.1 *The underlying idea is that the Court has a monopoly of binding constitutional interpretation. Where there is a career judiciary that does not compare to its American counterpart as one of the three equal powers of the State, Court members have to be chosen from the circle of experienced and prestigious lawyers in a manner that suits their rank and they are given such immunities as are necessary to guarantee the independent exercise of their duties. The hard core*

of the Court's jurisdiction lies, of course, in the power to secure the respect of the Constitution by any or all of several possible means : the control of legislation and other acts resulting from the exercising of public functions, the settlement of conflicts arising between the chief organs of the State or between different levels of power, the adjudication of claims made directly by individuals for the alleged infringement of a basic right. In all these cases the authority has been vested in the Court to annul the act that it deems unconstitutional. This power of annulment, when it was first foreseen, had elicited serious perplexity in more than one quarter of legal opinion. The critics of our institution described it as the deadly lightning which the Court would send, as Jove from his throne, to kill the laws that according to democratic rules embody the will of the people. But then annulment is indispensable to constitutional justice, and it must be read as a corollary of the power to interpret the basic text and ascertain its violation. There are ways, however, in which it can be circumscribed. In certain systems the Court can declare a law unconstitutional but defer its removal to grant the legislature enough time to make new provisions that harmonise with the Court's own pronouncement. In other cases the Court can directly amend rather than annul an unconstitutional law. If the text in question is vitiated by an omission, it can stand on the statute-book, but by virtue of the Court's ruling what was missing is included in its provisions, and as a result these are brought into agreement with the Constitution.

3.2 At any rate, the power of annulment reaches as far as the power of control vested in the Court. The old Rechtsstaat was concerned with the legality of administration. The Court climbs to the higher plane where the object of review is the constitutionality of legislation, and its jurisdiction may well embrace a varied field of normative phenomena : statutes, decrees, treaties, popular enactment of repeal of law by referendum. Even constitutional amendments and delegation of sovereignty to supranational bodies can be liable to control and scrutiny by the Court if the question hinges on a prohibition or limitation that none of these acts can legally transgress.

In South Africa, to recall one instance that I happened to have watched at close quarters, the Constitutional Court, yet to be established, will have among its projected tasks that of verifying whether the definitive Constitution will lock, stock and barrel conform to all the intangible principles enshrined in the provisional Constitution. Never before had the principle of legality and the width of judicial control been carried to such extremes. The underlying outlook, one should think, is an almost unlimited reliance on the resources of our institution. There is another area of constitutional justice worth recalling and it is that which relates to unconstitutional behaviour, rather than unconstitutional law. Here the Court can be called upon to sanction the commission of a wrong. And the sanction will not be the annulment of an act but the removal or disqualification from office of

the wrongdoer. Impeachment of Heads of States or governments and ministers, which was once the exclusive reserve of parliamentary assemblies, is a field where Constitutional Courts can wield powers of this kind, unless they sit as criminal judges and are thus enabled to punish impeached officials that are found guilty. Other comparable remedies against constitutionally relevant wrongs may be the dissolution of political parties hostile to the democratic order, the suspension or decadence from active citizenship of those who abuse their rights. A caveat here is on order, though. The area of wrongs must be carefully explored and defined before deciding that the Court should move as the natural judge of such matters. True enough, the legal technique of constitutionalism is at the service not only of implementation of the democratic order but also of its defence against the risk of subversion. The pursuance of this latter goal may involve the adoption of repressive measures, and it is a well taken point that the Constitutional Court is one seat where the mise en oeuvre of controls and sanctions of this order is apt to be surrounded by appropriate guarantees. Yet the fact remains that the vigilance over the exercise of freedom should be viewed as a marginal or exceptional attribution of the Court, the essential mission of which is to see that the authority and power are hemmed in as they should be by the Constitution.

4. *The Court is the cornerstone of constitutional democracy just as Parliament is the hallmark of representative government. The growing appeal of constitutional justice lies in the moral force it has acquired in the eyes of the citizens. The Court is trusted to secure the enjoyment of freedoms and rights through the observance of the Constitution. It is not viewed as a magistracy directly legitimised by democratic investiture and it could not be. The Court's authority stems, rather, from its being a wise and trusted custodian of legality. Let us not forget, however, that the values of law and reason are interwoven with the other values of a democratic system. Authoritarian regimes have sometimes produced judicial bodies with the outward trappings of a Constitutional Court. They have likewise placed a sham parliament as the shadow of a symbol of collective rule behind an autocrat or dictator. But we know from experience that these are deceitful fictions. We can tell, if I may quote an Italian proverb, pure gold from faked coins. The point, then, is that through the lens of constitutional justice we can see constitutional democracy in its proper perspective. Any Court with the powers I have outlined will be equally compatible with different forms of government: monarchy or republic: federal, decentralised and unitary States. But the one thing it does not tolerate is untempered power in a democracy. The growth of constitutional justice speaks for itself. Facts have defeated the proposition that democracy must be an absolute democracy, that constitutional democracy is a contradiction in terms, that the officials who act as the agents of democracy must in the nature of things be free of constitutional restraints. These*

words were written by Roscoe Pound, the great Harvard philosopher, who thought that absolute democracy was a pious wish, and constitutional democracy a lasting achievement. I heard him say many years ago that the whole of Europe would one day be imbued with the sense of legality that is the energising principle of constitutional democracy. How right he was. Even the Courts existing within European institutions reflect the faith in law which we share and cherish. When they interpret the treaty, remove illegality or guarantee individual rights, we can see a sparkle in their function of what in our domestic systems we understand as constitutional jurisdiction. Yes, the role of the Constitutional Court has gone a long way from Kelsen's time to our present day. It has become a central support for the technique of democracy, and a fruitful point of reference when Courts are built above the nation States. Like all great ideas that travel throughout our continent it is there to stamp its mark on our Weltanschauung as European lawyers.

C. Introductory statement by Mr Vasile GIONEA, President of the Romanian Constitutional Court

Romania has the honour to act as host for three days to this seminar at which eminent jurists from many European countries and even from other continents will debate fundamental problems regarding the constitutional characteristics, organisation and functioning of Constitutional Courts or Councils which must safeguard compliance with constitutional law in each country and guarantee its supremacy.

After the second world war, and especially in the past four or five years, it has become increasingly obvious that there is a need to establish specialised institutions to analyse and decide on compliance of laws with the Constitution. This is an indispensable requirement for the consolidation of a constitutional democracy. In certain countries, the powers of this institution are sufficiently wide whereas in other countries they are more limited. For example, matters may be referred to our Constitutional Court only by the President of Romania, one of the presidents of the two chambers, the government, the Supreme Court of Justice, or a group of at least 50 deputies or 25 senators. In any event, experience has shown that it would be necessary for the Constitutional Court or Council to intervene automatically whenever they noted that a law was not in compliance with constitutional provisions. Unfortunately, Article 144 (a) of the Constitution of Romania limits the competence of the Constitutional Court to intervening of its own motion in only one case: this is where there is an initiative to revise the Constitution, a rare situation in practice.

At the other extreme, any citizen has the right to bring a matter before the Constitutional Court. The result of this is that the Court is submerged with unfounded appeals and cases. If other authorities such as the State Counsel's Department, the Romanian Academy, the appeal courts and the ministries, the law faculties and the Institute of legal research also had the right to bring cases before the Court, that would make it possible to exert more effective scrutiny of the constitutionality of laws.

The judges of the Constitutional Courts are independent in the performance of their duties and cannot be removed for the duration of their appointment. Their independence, the fact that they cannot be dismissed, and the fact that they cannot be members of any political party protects them from any possible political influence from either the legislature or the executive.

In many countries, decisions of the Constitutional Courts are definitive and enforceable which constitutes a guarantee of the authority vested in these bodies.

In Romania, when the Court declares that a law is unconstitutional before its promulgation, the law is sent to parliament for re-examination. If it is adopted in the same terms with a majority of at least two-thirds of the total members of each Chamber, the objection of unconstitutionality is rejected and promulgation becomes compulsory.

This provision may seem to be a violation of the separation of powers in the State in so far as the legislative authority has the right to overrule the decisions of a judicial authority.

If we do not take into consideration the difficulty there is in obtaining, in both Chambers, a majority of two-thirds of all votes in order to set aside the decisions of the Constitutional Court, in principle, any decision of unconstitutionality given by the latter could be declared invalid.

This raises a question about the ability of the Court to safeguard the constitutionality of laws.

If the matter is placed before it by one of the presidents of the two Chambers, of a parliamentary group or a number of at least 50 deputies or 25 senators, the Court will also give an opinion on the constitutionality of the rules of procedure of the Chambers of Parliament. In this case, the latter no longer have capacity to declare invalid the decisions of the Court by a majority of two-thirds of the number of elected deputies and senators; they have to align the provisions of the rules on those of the Constitution, in compliance with the Court's decision.

Obviously, all these problems and many others will be analysed with expertise during the two days of the seminar and we shall arrive at conclusions likely to justify amending the laws for the organisation and operation of the Court.

After two days of intense technical activity we shall offer our colleagues and guests an excursion to Sinaia, in the Carpathians, and then, via Brasov, to Bran Castle.

The town of Sinaia was named after the monastery of Sinaia built in 1695 by Mihai Cantacuzino, the brother of Serban Cantacuzino, voivode of Walachia (1678-1688). Mihai Cantacuzino had accompanied his elderly mother, Ilinca to Bethlehem, Jerusalem and then Mount Sinai. In memory of that successful, long and difficult journey to the Holy Places he had the monastery built.

At Sinaia we shall visit the splendid castles of Peles and Pelisor, illustrating the gothic style, and the monastery where there is the grave of Tache Ionescu, the famous lawyer and eminent politician who fought for the abandoning of the Triple Alliance and Romania's entry into the first world war at the side of France, against Germany and the Austro-Hungarian Empire.

Bran Castle, built in 1212 by the Teutonic Knights and rebuilt in 1377 was regarded as the gateway to Transylvania, a border fortification between the Bucegi mountains and the Fagaras mountains.

It is believed that this is the very castle where the fantastical story of Dracula took place. Dracula was the son of Vlad Dracul. He was one of the great voivodes of Walachia because he had the courage to face the Turkish army which had come to punish him for his insubordination. He surrounded the army, led by Hamza Pasa, and impaled the prisoners that were taken, along with their leader.

That is why Mahomed the Second, the conqueror of Constantinople, came to Walachia at the head of an enormous army to punish the rebellious voivode. On that occasion, also, the Ottoman army suffered huge losses.

It was by chance that Mahomed managed to escape the dagger of Tepes, at night in his tent. When he withdrew he admitted with admiration that the Romanian voivode deserved to rule an empire, not a small country like Walachia.

Under his rule, the country earned the respect of its neighbours; no one dared to attack it, and it was very well organised internally. Thieves and idlers were severely punished and the country prospered. The legends which surrounded the personality of Vlad Tepes because of his bold and implacable temperament have done nothing to diminish his greatness.

During this excursion, dear colleagues, you will have the chance to admire only part of the marvellous Romanian countryside.

I hope that this will be an invitation for you to come back to Romania for your holidays. You could travel along the Black Sea coast with its ancient Greek and Roman remains, or visit the famous Danube Delta, with thousands of species of fauna and flora, or the majestic Carpathian range which stretches from the Danube to the north of the country; you could admire the country people in their rich villages and the famous painted monasteries whose exceptional artistic and historic value has been recognised by UNESCO and taken under its protection.

Ladies and Gentlemen, I wish you every success in your work during the seminar and pleasure and relaxation during your stay in Romania.

FIRST WORKING SESSION

The role and competences of the constitutional court

Chaired by Professor Antonio LA PERGOLA

- a. The role and competences of the constitutional court
Report by Prof. Luis LOPEZ GUERRA, Vice-President of the Spanish Constitutional Tribunal*
- b. The role and competences of the constitutional court
Report by Prof. Florin VASILESCU, Judge at the Romanian Constitutional Court*
- c. Summary of the Discussion*

1. Introduction

What is known as the "European model" of constitutional justice has its origins in the constitutions of Czechoslovakia and Austria of 1920. From this date onward, many constitutions have created constitutional courts following this model, not only in Europe, but also in Latin America, Asia and Africa. This circumstance offers an ample amount of experience which permits the study and analysis of the role and function of this institution in the consolidation of the rule of law. In addition it allows a comparison of the diverse compositions and competences which each of these courts have assumed in order to evaluate the advantages and disadvantages which each offers. Based on comparative experiences and particularly on the Spanish experience, I would like to summarise the common role which constitutional courts play in the different legal systems in which they are present, the competences which they have which allow them to fulfil this role, and the appropriateness of these competences to fulfil the goals established for the courts.

2. The Functions Common to All Constitutional Courts. Interpretation and Defense of the Constitution.

The Kelsenian model of constitutional justice provides for a court which is distinct and separate from the ordinary court system, with a different composition and different procedures, and having the power to examine the constitutionality of norms passed by Parliament and, if necessary, to annul any such norms found to be in conflict with the constitutional text.

a. In its origins, this model put the accent on the defense of the Constitution as the supreme norm. As the highest law of the State, all the State's powers are limited by the Constitution's mandates, and the organs of the State may only act within the bounds of the competences which the Constitution grants them. To act beyond the realm of these competences would constitute ultra vires conduct with respect to the Constitution and, thus, the commission of acts which would be legally invalid. And this is especially dangerous for the system when these acts are performed by the legislature, creating general norms which are contrary to the Constitution. Judges, the Administration and, in general, all public powers as well as ordinary citizens are subject to law and must obey its mandates and are, thus, in a position of subordination, even when confronted with laws which are unconstitutional. The creation of a constitutional court with the competence to annul unconstitutional laws makes it possible to maintain the principle that all

powers are subject to the law while, at the same time, guaranteeing that the law will conform to the Constitution.

This defensive characteristic of constitutional justice, which is reflected in the constitutional literature of the first third of the century and in the famous polemic between Hans Kelsen and Carl Schmitt,¹ can be understood only if we take into consideration one revealing fact. Constitutional courts appear historically during the creation of new democratic regimes and, in many cases, after experiences of authoritarian regimes in which constitutional norms and guarantees had been violated or disregarded, often with the collaboration of the legislature. Such was the experience in Germany in the period between the World Wars or in countries with a history of unconstitutional tendencies such as Spain, which established a constitutional court in the Constitution of 1978. Thus, the establishment of constitutional jurisdiction is linked with the desire to guarantee democratic constitutional stability in the light of past and present dangers and to prevent constitutional mandates from being eroded and eventually suppressed by a parliamentary majority which disregards the Constitution. The objective of constitutional jurisdiction is to defend the Constitution from possible situations which might threaten its integrity.

b. But the defensive function of a constitutional court is not its only role, and I might venture to say that in many countries it is not even its most important. In Western Europe, in the decades following World War II, the evolution of political conditions resulted in the lessening, if not the elimination, of dangers and threats to the democratic constitutional systems which had existed earlier in the century. But, in addition, it has become obvious that the role of constitutional courts is not limited to declaring a given law or norm unconstitutional. In many cases, the constitutional courts confirm the constitutional legitimacy of laws which they examine, and their decisions in these cases also have profound consequences. This is a result of the fact that constitutional courts not only defend, but also interpret the Constitution. On the one hand, they make explicit the principles and mandates implicit in the Constitution and, on the other hand, they establish a means by which to interpret and harmonise precepts in the Constitution which may appear to be in conflict or even unrelated to each other.

The interpretative role of constitutional courts, as opposed to their purely defensive function, has a positive impact in providing general criteria and guidance for the acts of public powers. This clearly does not imply providing political guidance, a task which corresponds to organs of political direction and

¹ The discussion of the role of constitutional courts as defenders of the Constitution is reflected in the two classic works of C. SCHMITT, *Der Hüter der Verfassung*, Tübingen, 1931, and H. KELSEN, "Wer soll der Hüter der Verfassung sein?" in *Die Justiz*, 11-12 (1930-31), 576-628.

orientation, but rather the defining of the meaning of the concepts found in the Constitution, and of the general framework within which public powers may act. In this manner, through the interpretation of the Constitution, the Constitutional Court provides the other powers of the State with conceptual tools and criteria for their conduct. Thus, the Constitutional Court plays not only a defensive role, but also a role in the creation of the legal order.²

This role of the supreme interpreter of the Constitution is often expressly outlined in legal texts. In the case of Spain, the Organic Law of the Constitutional Court defines it as the "supreme interpreter" of the Constitution, and the Organic Law of the Judiciary orders all judges to apply the law "in accordance with the interpretation handed down in the decisions of the Constitutional Court in all types of cases." (Article 5.1) The German Law on the Constitutional Court grants to the Court interpretative functions in its Article 13 and this power is also reflected in all of the Court's other express powers. At any rate, the interpretative function of constitutional courts is now a reality which has been soundly confirmed by years of practice, regardless of the legal provisions for such. It is clear that the relevance of this function will depend on its power to make its decisions binding on the other powers of the State, and above all the judges of the ordinary courts.

c. The double role of defending the Constitution and, by means of its interpretation, of creating legal criteria, and even legal rules, is possible due to the fact that constitutional courts are defined as judicial organs. The judicial character of these courts means, among other features, that they cannot act on their own accord but rather only in legal procedures initiated by others or in specific cases provided for in the Constitution. They must follow criteria determined by the Constitution, and not by political opportunity or convenience. Their decisions must be explicitly grounded on the dictates of the Constitution, and their independence and impartiality should be guaranteed by their status and by the procedures which the Court follows. Whether they are integrated in the judicial pyramid of the court system or not, the jurisdictional nature of constitutional courts gives them the legitimacy necessary to adopt resolutions which have undeniable political consequences. But this factor cannot obscure the fact that constitutional courts not only resolve conflicts, but also and with greater frequency than other courts establish with their precedents norms which are incorporated into their respective legal systems.

² See, for instance, G. ROLLA in his work *Indirizzo politico e Tribunale Costituzionale in Spagna*, Napoli, 1986, p. 47: "le rationes decidendi contenute nelle pronunce delle corti costituzionali tendono--come è stato autorevolmente riconosciuto--a far nascere un diritto pretorio capace d'influire sulla reale vita dell'ordinamento, affiancandosi, se non alle leggi in se, al diritto come vive e come viene usato dai giudici." He quotes L. ELIA, *La Corte Nel Quadro Dei Poteri Costituzionali*, 1982.

3. *The Diverse Competences of Constitutional Courts*

From the earliest constitutional courts of 1920, the constitutional courts established in different countries according to the European model have assumed diverse types of competences. Common to all of them is control of the constitutionality of norms passed by the legislative powers. But to this basic and defining competence many others have been added, more or less closely related to the objective of defending the constitution. In general, four broad groups of competences have been assumed by constitutional courts in those European countries having a consolidated system of constitutional jurisdiction:

a. *Control of the Constitutionality of Statutory Law (Norms With Force of Law)*

Although this kind of control is common to all organs of constitutional justice, a diversity of procedures exist among them which can be grouped under three types of control: preventive control, control by action and incidental control.

b. *The Resolution of Conflicts Between Territorial Entities within the State*

Logically, this competence is assumed by constitutional courts in those States having a complex and/or decentralised territorial structure. As we will see later, this competence may overlap with the previous one when the conflict between territorial entities materialises in a challenge to a law considered to be unconstitutional.

c. *The Defense of Fundamental Rights Recognized in the Constitution*
by means of the constitutional court resolving cases of individual appeals against the violation of these rights on the part of the powers of the State or of other individuals (constitutional complaint).

d. *A group of competences which have in common the intervention of the court in legal procedures considered particularly important for the political life of the State*

This last group is less directly related to the defense of the Constitution. This group includes competences as diverse as the control of the constitutionality of political parties, which exists in Germany, the jurisdiction of the Italian Constitutional Court in trials against high public officials, or the control over electoral procedures exercised by the French Constitutional Council, among others.

The practical significance of all of the above competences is quite diverse. In some countries, the predominant function continues to be the defense of the Constitution and, in general, the protection of the constitutional system. However, in others the Constitutional Court's major role centres on the interpretation of the Constitution and the creation of rules of law. And, as we shall see, as the constitutional system stabilises, the second function tends to take precedence over the first.

4. Constitutional Control over Legislative Norms

The constitutional court's control over the constitutionality of norms passed by the legislative powers has always been the common denominator and traditional nucleus of constitutional jurisdiction. From a Kelsenian perspective, this competence would be the very justification for the existence of these courts, having a monopoly on the power to reject laws passed by Parliament when they are considered to be unconstitutional.

However, a comparative analysis of the European systems of constitutional justice and their specific practices would demonstrate, on the one hand, the existence of various means for examining the constitutionality of legal norms and, on the other, that the principles which inspire each of these means and the consequences which they imply may also be very different.

In general, systems of abstract control of legal norms may be distinguished from those which represent a concrete control. In the first case, the constitutional court rules, before or after a law has been put into effect (depending on whether it has a system of a priori or a posteriori control, or both), on the constitutionality of the norm, but without any reference to a concrete conflict arising from the application of the law in a particular case. The court's ruling is the consequence of an abstract examination of the legal text, either because it has been challenged in an abstract action of unconstitutionality or automatically, by constitutional imperative. But the ruling on any given law is dissociated from any application of the norm in a concrete case.

On the contrary, what is known as concrete control of constitutionality takes place when a judge, faced with the obligation of applying a given law, considers that this law is certainly, or most probably, unconstitutional. The procedure followed in these cases is similar in all western European countries: the judge halts the judicial proceedings a quo and raises the question of the law's possible unconstitutionality before the constitutional court (court ad quem).

Both abstract and concrete systems of constitutional control have similar consequences: the constitutional court must rule on the compatibility with the

Constitutional of a given legislative norm. However, it is easy to see that both procedures arise from different perspectives.

*a. In a situation of abstract control, a definite purpose of protection or defense of the Constitution predominates, in a perspective which might be termed negative. This type of procedure is not lacking in certain dramatic overtones. Before a law has had time to be applied and, in the case of prior control, even before a law has been formally promulgated, this norm, approved by an organ which represents popular sovereignty, is challenged as being contrary to the Constitution. This may be considered a challenge to the constitutionality of a law at first glance, *ictu oculi*, without the necessity of witnessing the practical effects of its application. Indeed, in most cases, the time limits for contesting a law in such a proceeding are quite limited and, thus, its unconstitutionality should seem quite evident to those who decide to challenge the norm's validity.*

In addition, this perspective of defense or protection of the constitution is reinforced by limitations on who may have standing to challenge a norm before the Constitutional Court. European legal orders usually restrict this possibility to relevant organs of the State or to significant percentages thereof (one third of the representatives of the German Bundestag, or 50 Deputies or Senators in the case of Spain). Only an organ of the State or a significant part of it may accuse the Parliament of violating the Constitution.³ Evidently, the purpose of this limitation on standing is to restrict the procedure to serious cases in which the supremacy of the Constitution is actually considered to be in obvious danger.

These characteristics make abstract constitutional control a technique which is used only exceptionally in consolidated democratic regimes. In a setting of open political competition and alternative political options for power, minority political parties in the opposition would hardly feel the need to accuse the parties in power of violating the Constitution. On occasion, however, constitutional jurisdiction has been said to have become a form of protection for political minorities.⁴ But this affirmation is debatable. Continuous challenges of the majority party's loyalty to the Constitution does not seem to be an appropriate technique for guaranteeing the stability of a regime. And in a democratic framework, minorities

³ However, in Hungary an *actio popularis* was introduced whereby individuals could initiate a process of abstract control. On this point, see Adam ANTAL, *Le contrôle de la constitutionnalité des actes administratifs et gouvernementaux en Hongrie*, Pecs, 1992, p. 25. The *actio popularis* in this sense can also be found in the constitutional jurisdictions of Latin American countries. See, for example, the Constitution of Colombia of 1991 (Article 241) or the Constitution of Nicaragua of 1987 (Article 187).

⁴ See L. FAVOREU, *Les Cours Constitutionnelles*, Paris, 1986, pp. 14-15: "L'omnipotence d'un pouvoir majoritaire stable et homogène fait naître la nécessité d'une justice constitutionnelle dans les régimes parlementaires ou semi-parlementaires européens de type continental".

have other, less extreme ways of defending their interests. In addition, another aspect of this technique must be considered: a challenge by a minority group to the constitutionality of a law passed by the parliamentary majority must almost inevitably be interpreted as an act of partisan politics. And as a result, the decision of the Court in this case will inevitably have undesirable political overtones.

Thus, it is no wonder that abstract control is rarely used. It is almost nonexistent in Italy, and in Spain it represents a small percentage of all cases brought before the Constitutional Court. Likewise, in Germany it also represents a minimum of the cases heard. Only in France, due to the limit of the scope of the French system of constitutional justice, does abstract control continue to represent the most relevant part of its caseload.

b. Just the opposite may be said of concrete control of constitutionality, where the constitutionality of a law is analysed when applied to a concrete case. In such situations, the defense of the Constitution vis-à-vis the legislative powers takes second place. Procedures of concrete control (Richterklage, questione de costituzionalità or cuestión de inconstitucionalidad) make it possible to examine laws already applied on multiple occasions over a long period of time, without implying any (explicit or implicit) criticism of Parliament. In addition, a judge's a quo questioning of the constitutionality of a law must obviously be done in the light of the circumstances of a specific case and is frequently a technical and specialised procedure.

Thus, more than a technique for defending the Constitution from parliamentary attacks, concrete constitutional control has become a procedure for interpreting the Constitution and for deducing from it rules which are applicable in specific cases. The interpretative character of the decisions handed down in cases of concrete control are evidenced by the frequent use of a verfassungskonforme Auslegung, or "presumption of constitutionality". In these cases, the constitutional courts declare that the law in question is not unconstitutional if it is interpreted in a given way, in accordance with the mandates of the Constitution. In this manner, constitutional jurisdiction leads to a progressive and systematic definition of the legal order, deducing from the Constitution those criteria which should inspire the interpretation and application of the law.

In these cases, the creative force of constitutional jurisprudence lies in the binding character of the Court's decisions, and not only in the concrete decision as to whether the law in question is constitutional or not, but also in the reasoning contained in these judgments, the ratio decidendi, which reveals or defines the constitutional imperatives which must be followed by all powers of the State.

Thus, concrete control has become a means by which Constitutional Courts may interpret and create Law. Its importance is even more evident as the constitutional system stabilises and the debate over the correctness of the legislature's activities gives way to a discussion of the interpretation and practical application of the Constitution. In Italy, concrete control is the normal means of action for the "Corte costituzionale." And in Spain, the ever-growing number of questions of constitutionality presented by judges in the ordinary courts has made this the most usual means of examining the constitutionality of legal norms.⁵

5. The Resolution of Territorial Conflicts

In those countries with a complex territorial structure, whether it be federal or regional, the Constitutional Court often takes on the task of resolving conflicts among the diverse territorial entities. This may be done by means of the usual procedures of abstract control, (challenging State or Federal laws), or by means of specific procedures designed for the purpose of resolving regional conflicts, as occurs in Spain and Germany.⁶ In some cases, such as occurs with the Belgian Arbitration Court, the need to resolve territorial disputes appears as the basic function and origin of these organs of constitutional jurisdiction.

The importance and characteristics of this competence vary according to the system of territorial division present in each country and to the problems which arise from this division. In systems such as that of so-called co-operative federalism, which exists in Germany, the use of this competence by the Constitutional Court has been limited.⁷ But in Spain, the Constitutional Court's function as mediator among the autonomous regions has been perhaps its most outstanding contribution to the constitutional system. The imprecise nature of the constitutional provisions for the division of power among the diverse territories and the absence of means and procedures for arriving at political agreements in these conflicts have caused both the Spanish State and the individual Autonomous Communities in Spain to appeal frequently to the Constitutional Court in order to

⁵ The number of cases of concrete control ("cuestiones de inconstitucionalidad") before the Spanish Constitutional Court is increasing steadily and by 1992 had reached around 500, while proceedings for abstract control are far less numerous. Leaving aside claims relating to the delimitation of territorial competences (see next section), between 1980 and 1992 only 63 "abstract" appeals were lodged against parliamentary laws.

⁶ On the role of constitutional courts in the resolution of territorial conflicts, see the collection of reports presented at the VI Conference of European Constitutional Courts: Tribunales Constitucionales Europeos y Autonomías Territoriales, Madrid 1985.

⁷ According to Professor D. GRIMM, until 1980 the Federal Constitutional Court of Germany had dictated only 43 decisions concerning conflicts between the Federal Government and the Länder. See D. GRIMM, "Le Fédéralisme Allemand: Développement Historique et Problèmes Actuels" in J. TORNOS, Le Fédéralisme en Europe, Barcelona, 1991, p. 50.

define their respective powers. For this, they have used either procedures of abstract control, challenging before the Court either State or regional norms having the rank of law, or a procedure called "conflict of competences" which allows the Constitutional Court to examine administrative norms. The significant role which the Constitutional Court has played in designing and defining the new semi-federal Spanish State has led some to call it a "jurisprudential State of autonomies".

At least in the Spanish case, this competence is far removed from any function of "defending the Constitution". In reality, and given the imprecise nature of the Spanish Constitution in defining Spain's territorial order, the function of the Constitutional Court has been to select, from among various conflicting interpretations, the one which it considers most closely reflects the constitutional rules. In this sense, the Court's function as "creator of Law" has been indisputable. In some cases, the Court has been called upon to rule in conflicts where the State or the Autonomous Communities felt that some fundamental aspect of their territorial organisation was in jeopardy. But the majority of cases involves disputes over which territorial entity has jurisdiction in administrative questions which, in themselves, are of secondary importance. For this reason, in the constitutional jurisprudence concerning territorial conflicts, the final decision in each case has been less important than the legal arguments contained in the ruling. These arguments are the basis of a coherent and systematic body of doctrine which serves to orient the State and regional legislative and administrative powers in the construction of a complex territorial organisation which was only generically outlined in the Spanish Constitution.

6. The protection of Fundamental Rights by means of Constitutional Jurisdiction

That the original theoretical concept of the constitutional court as an instrument designed only to "defend" the Constitution is no longer valid can best be evidenced by the existence in many cases of specific procedures before these courts which seek to guarantee the protection of specific fundamental rights of individuals. The right of individuals to present an appeal before the Constitutional Court exists in Austria, Hungary, Germany, Spain and Switzerland (before the Federal Supreme Court) under various denominations (Verfassungsbeschwerde, recurso de amparo, etc.). In Spain and Germany this constitutional complaint is of the utmost significance and is designed as a means by which the Constitutional Court can remedy individual violations of any of the fundamental rights defined as such in the Constitution.

The most relevant characteristic of this procedure is that it does not seek a ruling of the constitutional court on general legislative or administrative norms, but

rather on the individual acts of specific public powers and, indirectly, of individuals (by means of the application of the doctrine of Drittwirkung der Grundrechte). Thus, acts which normally do not constitute a threat to the integrity of the Constitution are judged by means of this procedure. In the constitutional complaint in Spain and Germany, it is not the constitutionality of a law applied by a judge or by the Administration which is under consideration, but rather if the fundamental rights of one or various individuals have been violated by such application. Thus, it is an act which is being judged, rather than a norm.

Apparently, this procedure is designed to protect the rights of individuals. But one Court with relatively few members would obviously find it quite difficult to guarantee by itself respect for the fundamental rights of all citizens. The number of decisions of this type in which the Constitutional Court could rule would, of necessity, be quite limited. For this reason, in the case of individual constitutional complaints, the true impact of the judgments handed down by Constitutional Courts resides not so much in the direct effects they have on the claimant, but rather in the fact that they establish criteria and principles derived from the Constitution which are binding in the interpretation and application of fundamental rights. Thus, the decisions resulting from these constitutional complaints have a greater "systematic" rather than individual dimension.

In both Germany and Spain, a constitutional complaint may be raised against any and all public powers in the event of the violation of a fundamental right, in a procedure which has often been described as a "universal appeal". In consequence, by remedying the violations of these rights the Court may hand down instructions pro futuro to all powers of the State as to how they should orient their actions in the application and respect for fundamental rights. To be certain, the rulings handed down in cases of constitutional complaints only resolve the specific case as raised. But the reasoning in the judgment gives rise to a general ruling which, as such, has a value erga omnes. By means of the individual's constitutional complaint, the Court may guide the action of the judicial, executive and legislative powers in all matters concerning fundamental rights. This has special significance in those cases in which determination of the scope of a fundamental right requires a consideration of the opposing social interests involved, such as the case of balancing freedom of expression and information with the right to privacy or to a good name.

At least in the case of Spain, the constitutional complaint has been the instrument which has provided the Constitutional Court with the most opportunity for judicial "creativity" by means of constitutional interpretation. But this potential for creativity is accompanied by obvious problems which should not be overlooked :

a. First the vast number of constitutional complaints presented each year constitutes a strain on the efficiency of the Court and on the time required for study and deliberation prior to issuing a decision.⁸ If the procedures for abstract or concrete control of constitutionality and conflicts of competences brought before the Court each year can be counted by the tens or at most by the hundreds, literally thousands of constitutional complaints are received at the Court annually. This results in, first of all, the necessity of establishing a type of filter, both outside and within the realm of constitutional jurisdiction. Outside, access to constitutional jurisdiction is limited to those complaints which have already exhausted all means for appeal which exist in the legal system, granting the constitutional complaint merely a subsidiary function. Within the Constitutional Court itself, in both Germany and Spain a procedure exists to examine each case a *limine* in order to determine whether it raises questions related to the protection of fundamental rights or, on the contrary, merely attempts to prolong the judicial process in an effort to obtain a favourable ruling. The Constitutional Courts of both Germany and Spain have procedures which permit them to reject appeals a *limine* when they are found to be clearly inadmissible, similar to the denial of *certiorari* exercised by the United States Supreme Court. Even so, the process of examining all complaints lodged, in order to make this selection, represents a notable investment of time and work which logically takes away from the other functions of the Court.

b. The constitutional complaint also has a second disadvantage. At least in Spain, the subsidiary nature of this procedure means that in almost all of the cases in which the Constitutional Court must rule, there exists a previous judgment which has been handed down by another judicial organ. In consequence, the Constitutional Court is forced to review previous court rulings and is placed in a position in which it must be the "judge of judges", and not the judge of norms provided for in the Kelsenian formula. In addition, in theory the Constitutional Court should limit itself to reviewing the decisions of other judges only in cases involving violations of fundamental rights. But despite this fact, on occasion tensions have arisen between the Constitutional Court and other ordinary courts, and particularly the Spanish Supreme Court, in cases in which they believe the Constitutional Court to have acted *ultra vires*, reviewing judicial decisions not directly related to the protection of fundamental rights.

⁸ In Germany, between 1951 and 1979, the Court dictated 3,089 full resolutions on *Verfassungsbeschwerden*, and 30,174 decisions on the non-admissibility of complaints. In comparison, only 695 rulings were handed down involving *Richterklagen*, and 47 on abstract control of constitutionality proceedings (data from K. SCHLAICH, "El Tribunal Constitucional Federal Alemán" en *Tribunales Constitucionales Europeos y Derechos Fundamentales*, Madrid, pp. 156-157. In Spain, from 1980 to 1993 a total of 24,000 "recursos de amparo" were presented before the Constitutional Court, according to the Court's statistics. Only 2,000 (8%) were deemed admissible.

7. Competences to Intervene in Specific Cases

In addition to the competences described above, many countries provide for procedures before their constitutional courts for purposes which, although they may not fall within the realm of the classical image of the institution, are considered important for maintaining the constitutional system. As an example we might cite :

- *The resolution of conflicts involving electoral processes (Austria, France, Germany),*
- *The resolution of conflicts between constitutional organs (Italy, Spain, Germany, France),*
- *Decisions as to the admissibility of referendums (Italy, Austria),*
- *Decisions as to the constitutionality of political parties (Germany), and*
- *Acting as a court of justice in cases involving high public officials (Italy, Austria).*

With the possible exception of conflicts between constitutional organs, these are competences which might easily be exercised by other powers of the State and, thus, are granted to the constitutional court due only to their relevance in assuring the stability of the constitutional system. In some of these cases the Court's role as defender of the Constitution may be the dominating factor. But, perhaps for this very reason, many of these competences are exercised on very rare occasions. On the other hand, these are competences which can directly influence the political debate at a given moment, thus compromising the constitutional court's role of impartiality and neutrality.

As to jurisdiction in electoral matters, this competence may be specifically attributed to the constitutional court (as is the case in Austria, France and Germany), or be considered as falling within the court's obligations to protect fundamental rights (as is the case in Spain where the rights to elect and to be elected are considered as fundamental rights). In both cases, the constitutional court's jurisdiction in electoral matters becomes a source of rules of law and can be considered to be part of the court's function in the creation of norms by means of interpretation, thereby developing and clarifying the legal order.

B. The role and competences of the constitutional court - Report by Prof. Florin VASILESCU, Judge at the Romanian Constitutional Court

The Constitutional Court's supremacy is now a generally accepted principle but would be no more than a declaration of intent were it not guaranteed by institutions ensuring its application. Nowadays, review of constitutionality has become a virtual necessity. Prof. Mauro Cappelletti's remark seems almost

axiomatic, to the effect that while the 19th century was the age of parliaments the 20th century is the age of constitutional justice.⁹ Even so, the earliest constitutional review procedures, brought into being by the same necessity, found some reflection at the very dawn of constitutionalism, and gained ground through the development either of constitutional law or of judge-made law. In this respect, we must acknowledge the outstanding contribution of the abbé Sieyès who, following his famous address on 2 Thermidor Year III, was chiefly responsible for the foundation of a guardian Senate whose purpose was to set aside any law or act of government contrary to the standards laid down in the Constitution of Year VIII¹⁰. It was an unprecedented solution for that period and was to be taken up again in the French Constitution of 1852. This procedure of review by a political body proved nevertheless unworkable because the Head of State had undue control over it¹¹.

Early last century, in the absence of clear constitutional provisions, court practice came to sanction the other, i.e. judicial, form of review. So it was with the youthful United States where the memorable proceedings in the Marbury v. Madison case of 1803 had repercussions which spread as far as Europe. This probably accounts for the Greek and Norwegian imitation of the self-reliance practised by certain bodies in the absence of any constitutional text. Accordingly, the Greek Constitutional Court in rulings delivered in 1871 and 1897 held that the judiciary could not deem invalid a law not manifestly inconsistent with a superior norm embodied in the Constitution¹², and the Norwegian authorities decided in 1890 and 1893 that laws held unconstitutional could not be enforced¹³.

Romania is another country which followed this pattern. In 1912 the judgment delivered by the Tribunal of Ilfov in the leading case of the law on tram companies and upheld by the Court of Cassation after consultation of two eminent French specialists upheld the claim that the impugned statute was unconstitutional, on the ground that where a court is faced with conflict between the Constitution and an ordinary Act of Parliament it is justified in verifying the constitutionality of the latter even if there is no constitutional text authorising it to do so¹⁴.

⁹ D. Rousseau - *La justice constitutionnelle en Europe*, Paris, Montchrestien, 1992, p.9.

¹⁰ J. Barthélemy and P. Duez - *Traité de droit constitutionnel*, Paris, Dalloz, 1933, p. 204.

¹¹ J. Barthélemy and P. Duez - *op. cit.*, p.206.

¹² E. Spiliotopoulos - "Grèce" in *Annuaire international de Justice Constitutionnelle*, 1985, *Economica*, Aix.Marseille, pp.435-6.

¹³ L. Duguit - *Les transformations du droit public*, Paris, A. Colin, 1913, p.100.

¹⁴ L. Duguit - *op. cit.*, p. 101.

Romania was among the first countries in our century to give this type of judicial review constitutional force, under the provisions of Article 103 of the 1923 Constitution stipulating that only the full Court of Cassation was entitled to judge the constitutionality of laws and declare inapplicable those not in accordance with the Constitution, and providing also that the ruling on unconstitutionality be restricted to the case under consideration.

The 1938 Constitution, under which the dictatorship of King Carol II was instituted, retained this formula in Article 75.

There followed years of totalitarian oppression during which our country, like others which went through similar trials, experienced political regimes utterly incompatible with the purpose and the functions of constitutional review.

Such forms of government were abolished for all time in 1989, but the pre-war traditions lingered in the Romanian national consciousness and clearly displayed their influence during the proceedings of the Romanian Constituent Assembly from September 1990 to November 1991 following the May 1990 elections.

The draft Constitution, prepared by the Committee which the Assembly had formed for that purpose, proposed to set up a Constitutional Court on the European pattern with the intention of bringing Romania into line with the new democratic standards established throughout Europe.

This option was taken not in imitation as certain critics allege but because it was better suited to a transitional, post-totalitarian society; furthermore, there had been a similar course of events in other countries such as Spain, Portugal and Hungary.

Without going into detail, I would emphasise the following problems: limited effects of court decisions in judicial review of constitutionality; distrust of the judiciary as being entirely a product of the old regime; inability to censure unconstitutionality in laws not directly affecting citizens' rights, eg those governing the various aspects of state organisation; lack of protection for the opposition in the event of unconstitutional legislation being enacted over the protests of the opposition parties.

In any case, the members of the Constituent Assembly put up a stiffer resistance to the scheme than might have been expected. They found it inadmissible that a non-elected body should have first and last say as to the constitutionality of certain

laws enacted by the nation's representatives chosen by the direct democratic vote of the electors.

This traditionalist outlook was reflected in the limitation of the Constitutional Court's role and functions. It is stipulated in Article 145 of the Constitution that any laws or regulations made by Parliament and subsequently found unconstitutional by the Court must undergo a process of reconsideration by Parliament. Should a law which has been declared unconstitutional be re-enacted by Parliament by a two-thirds parliamentary majority rejecting the Court's finding of unconstitutionality, the law is forwarded for promulgation. This was not without precedent considering that the legislation of still other countries resorts to the same procedure, though somewhat infrequently. Nonetheless, it conflicted with the general principles governing constitutional review. A further limitation related to the Court's functions: those concerning parliamentary electoral disputes were rejected and assigned exclusively to the Chambers; nothing was specified regarding the Court's authority to verify ex officio the constitutionality of institutional legislation; the final paragraph of Article 144 of the Constitution, providing that the Court could be vested by law with other responsibilities corresponding to its specific role, was deleted so that the definitions of its functions in indents a) to i) were strictly limitative.

Consequently, relying on other provisions of the Constitution, and under the terms of the Act on the organisation and operation of the Court¹⁵ issued in May 1992 following the Constitution's adoption initially by the Constituent Assembly and subsequently by national referendum in December 1991, an effort was made to secure the most suitable framework for an institution which was to uphold the rule of law in Romania. Such a framework was mandatory if the new authority was to play its part and prove workable under the prevailing conditions as a "neglected child" of the constitutional order.

First of all the judges were recognised as independent and irremovable, their office being incompatible with service in any other public or private capacity except teaching in higher legal education. As a result, the judges forming the present-day Constitutional Court belong to no political party, and teaching in the various state-run or private higher education establishments is their sole occupation apart from judicial office.

Secondly, the Constitution requires them to possess law degrees, high professional competence and at least 18 years' experience in juristic activity. All present judges

¹⁵ Act No. 47 of 18 May 1992 published in the "Monitorul Oficial" of Romania, Part I, no. 101, 22 May 1992.

of the Court are doctors of law, most being university lecturers (two belong to the Romanian Academy).

Lastly, the constitutional provisions ensure that the composition of the Court is "freshened up" through its three-yearly reconstitution, appointments being made in equal proportions by the Chamber of Deputies, the Senate and the President of Romania.

On appointment, judges swear an oath whereby they undertake to honour and defend the Constitution by sincerely and impartially discharging the duties allotted to them as judges of the Constitutional Court. Swearing-in takes place before the Head of State and the Speakers of both Houses of Parliament. Judges have immunity and cannot be relieved of office by the bodies which appointed them.

These arrangements are designed to give the Constitutional Court judges credibility and to reassure civil society that the 9 members have the requisite training and independence to perform their functions properly.

Romania is in the midst of a difficult transitional period for which there are no rules, so that each country concerned must find its own way. Prof. Claus Offe of Bremen University lately remarked that the upheaval now occurring in Central and Eastern Europe was a revolution without a historical model or revolutionary theory to guide it, its salient feature no doubt being the absence of any theoretical construct or prescriptive argumentation with regard to the major problems confronting it.¹⁶

He points out that earlier transitions to democratic rule bear no resemblance to those of the present day; the three classes of situations known to date therefore have completely different characteristics. These are the "postwar democracies" (Italy, Japan, Germany), the former Mediterranean dictatorships (Portugal, Spain, Greece) and the South American authoritarian regimes (Argentina, Brazil, Chile, Paraguay). In all three cases the modernisation processes are of a strictly political and constitutional nature in that they are confined to the relationship between the state and society and do not involve a comprehensive reform of the economy since capital exists and remains in the possession of its owners. The complexity of our dilemma is heightened by the fact that it requires economic problems and problems of democracy to be solved simultaneously. Privatisation and the market economy do not constitute the object of the claims to certain rights made by a given social class; they are simply aspirations to economic prosperity,

¹⁶ C. Offe - *Vers le capitalisme par construction démocratique*, in "Revue française de science politique", vol. 42, no. 6, December 1992, p.924.

pending whose attainment there is every reason for the present situation to dominate society's concerns¹⁷.

In the same vein, rather jestingly perhaps, Jacques Rupnik made this comment: "After the war the communists attempted to build socialism in countries where there was no proletariat, but today the restoration of capitalism is contemplated without a middle class"¹⁸.

In Bidegaray's opinion, Romania is at an intermediate stage of transition to democracy, that is somewhere between the decisive moment and the "acclimatisation" period¹⁹ in which the state institutions find their foundations with difficulty. In these circumstances, the tendency displayed by Parliament to dominate political affairs and take up a leading position among the state institutions appears perfectly normal to the writer. It is all the more natural considering that Romania, at least since the Autumn 1992 elections, has full multi-party democracy under minority government by a party with the more or less conditional backing of several political formations whose representation in Parliament is more limited, and a largely united opposition comprising some 40% of members.

This situation was bound to have direct repercussions, such as a certain weakness in government, inevitably affecting in turn the Constitutional Court's activity. In other words, Romania is far removed from the so-called majority parliamentarianism which demands safeguards for the legislature over the executive; rather, the opposite applies.

Before assuming the censorial role discussed by Prof. Gérard Conac, I therefore consider that the role of mentor to be performed by the constitutional judge is essential from our standpoint, and that the Court's functions should include that of a referee instructing the contestants in the proper rules of play²⁰.

However, this could not possibly come about in just two years; a fairly protracted process is to be anticipated since the "implanting" of the Court into parliament-government relations is ill-received at times by either one of these political powers.

¹⁷ C. Offe, pp. 925, 928, 932.

¹⁸ Quoted by C. Bidegaray - *Reflections sur la notion de transition démocratique en Europe centrale et orientale*, in "Pouvoirs", no. 65/1993.

¹⁹ *Idem*, p. 134.

²⁰ G. Conac - *Les Cours Suprêmes en Afrique*, vol. II, Paris, Economica, 1989, p. XVI.

What is crucial to the success of this operation, as Prof. Louis Favoreu said, is the standing of the Court's decisions and the acceptance of its pronouncements in upholding a new democratic order which is at times given interpretations altogether alien to its substance and spirit. As things stand, is it true to say that the necessity and value of the Court are recognised?

Going by just a few of the major decisions delivered recently, there is cause for optimism. Hopes are raised by some positive responses to unfavourable rulings from certain interested political entities and from the media, for without doubt there has also been dissatisfaction. The judges of newly formed courts have to undergo a daily test of rectitude and professionalism in that their every decision is noted, commented on and assessed by public opinion and society at large.

Of course we cannot presume to make the Court fully reliant on constitutional machinery, firstly because of its dependence on referrals whether by certain political authorities or by numerous other bodies. The Court may take proceedings of its own motion only as regards initiatives for revision of the Constitution. Secondly, its functions are rigorously demarcated.

The Court was not even able to intervene when a dispute arose between Parliament and the government over the interpretation of Article 8 of the Constitution concerning government reshuffles since its capacity to interpret the Constitution was recognised only in the rigorously defined cases enabling it to proceed upon the referral of claims concerning laws or government regulations.

These functions of the Constitutional Court fall into several categories.

A. A first broad group is formed by those which concern review of constitutionality as such, and this includes several types of review:

- 1. The first is preventive (a priori) verification of constitutionality, applied to laws passed by Parliament but not yet promulgated.*
- 2. The second concerns review of the constitutionality of the standing orders of the houses of parliament, naturally after their adoption.*
- 3. A third category comprises a form of retrospective control, which acquires prescriptive force, exercised by resolving the objections of unconstitutionality which parties in litigation make before the courts to specific provisions of laws and government regulations.*

4. *Again under the provisions of the basic law embodied in the Constitution, the Court decides on objections concerning the constitutionality of a political party.*
 5. *Lastly, the Constitutional Court verifies the constitutionality of initiatives for revision of the Constitution.*
- B.** *A second broad group of functions concerns adjudication in disputes over presidential elections and in situations brought about by interim presidential office or by the President's removal from office.*
- C.** *Lastly, the Court is assigned functions in respect of the validity of the exercise of legislative initiatives by citizens and the organisation and conduct of referenda.*

A. *Within the first broad group of activities, the Constitutional Court fulfils its function as guardian of the supremacy of the Constitution conferred by Section 1 of the Act governing its organisation and procedure, which also stipulates that the Court is the sole authority in Romania exercising constitutional jurisdiction.*

1. *Under Article 144 a) of the Constitution, the Court rules on the constitutionality of laws before their promulgation. The right to refer matters of this kind is vested in the President of Romania, the Speaker of each house of parliament, the Government, the Supreme Court of Justice, the Chamber of Deputies (at least 50 members i.e. about 14%) and the Senate (at least 25 members i.e. about 17%).*

Article 77 of the Constitution provides that laws are to be promulgated within 20 days after submission to the President of Romania, so that the Head of State is able to carry out this operation immediately upon receipt of the law. In such circumstances it is at least theoretically possible for hasty promulgation to prevent the right of referral to the Court from being exercised. To guard against this eventuality, Section 17 of the institutional Act relating to the Court provides that before its submission to the President for promulgation the text of the law must be retained by the Secretary General of each house of parliament for 5 days (2 days only under the urgent procedure). Members are notified of this in plenary session, so that they have 5 days or alternatively 2 days in which to obtain the required number of signatures should they wish to apply to the Constitutional Court. The Supreme Court of Justice is also notified. Obviously, the entities which

have locus standi can still ask the Court to declare a law unconstitutional even after expiry of the time-limit if it has not yet been promulgated by the President. However, experience shows that almost every objection to laws on the ground of unconstitutionality have been entered within the time-limit.

Any claim brought before the Court naturally has the effect of suspending the right to promulgate the law, whether a single provision or several provisions thereof are challenged.

The Court deliberates on applications referred as a full bench, after taking note of any observations which the two Chambers and the Government may see fit to produce.

The judges, at least two-thirds of whom must take part in the deliberations, adopt their decisions by a majority vote. Decisions are disclosed to the authorities concerned and published in the "Monitorul Oficial" of Romania.

Where the Court has determined that certain provisions are unconstitutional, upon receipt of its decision the Speakers of the Houses of Parliament are required to act in accordance with Article 145 of the Constitution by opening the procedure of reconsideration. The objection of unconstitutionality is removed if a two-thirds majority of both the Chamber of Deputies and the Senate finally votes to uphold the formulation originally adopted by Parliament. There has been only a single case²¹ where the Court's decision was not put down for discussion in the Chamber of Deputies, which instead elected to draw up a new bill, complying with the Constitution of course, replacing the law which the Court had rejected.

The point is that the impugned statute - partly unconstitutional in that it infringed the principle of separation of state powers - could not be promulgated and carried into effect.

In the writer's opinion, this constitutional review activity has great political significance owing to the publicity which it receives and the obligations placed on Parliament by a finding of unconstitutionality. At the same time, it is important for the Court's prestige and specifically its independent standing that the validity of its decisions on constitutional justice be recognised. There is a real epidemic of suspicion that the Court's decisions are made under the influence of one political power or other. The results of its activity have nonetheless proved that such apprehensions are altogether unfounded.

²¹ Decision no. 6/1992 on the unconstitutionality of certain provisions of the Act on measures preceding settlement of the legal status of buildings which became State property after 23 August 1944.

Indeed, an examination of the Constitutional Court's current practice over the two years since its establishment (June 1992- June 1994) certifies that 20 decisions under Article 144 a) of the Constitution were delivered (a larger number of claims were referred but some were joined because they concerned the same law). Seven of the decisions (or 35%) found constitutional defects in certain of the statutory provisions at issue, and the majority of these (five) arose from direct applications made by parliamentary opposition groups (one decision to admit a claim concerned a referral by the Supreme Court of Justice and another originated in an application from a PSDR group of parliamentarians which formed and supports the present government). At the same time, in one of its decisions the Court rejected an application by the Supreme Court of Justice and in two others it considered unfounded the only applications ever received from the Government. The President of Romania has not referred a claim to the Court as yet.

2. Another form of review which has political value concerns examination of the constitutionality of parliamentary standing orders at the request of the Speaker of either House, a parliamentary group or the same number of Deputies and Senators as is stipulated for review of laws before promulgation.

Here it is no longer possible to vote down by a two-thirds qualified majority a finding of unconstitutionality in the rules of procedure in question. In this case, reconsideration entails bringing them into line with the Constitution as directed by the Court.

Four cases have been settled to date, two of them brought by opposition parliamentary groups (one was allowed); the other two arose from a request to the Court by the Speakers of both Houses to examine in their entirety the standing orders of the Senate and the Chamber of Deputies from the angle of compliance with the Constitution. In its decisions the Court held that a fairly large number of the provisions embodied in the standing orders were contrary to the terms of the Constitution, and ruled accordingly.

3. Concrete (i.e. a posteriori) review of statutory provisions which have come into force, performed after their promulgation, makes up another large sector of the Court's business. This form of review can even be applied to the provisions of government regulations, for instance when claims of unconstitutionality are made before judicial bodies by any party to litigation or by the judicial body of its own motion. As in Italy, the lower courts from which such claims originate are the sole authorities entitled to apply to the Constitutional Court, by interlocutory judgment stating their opinion on the objection raised (if raised by the parties, of course). The Romanian regulations acknowledge the same condition of "rilevanza" in that

the settlement of the case must follow from that of the objection²². The court below can suspend judgment in the case until the Constitutional Court has ruled on the objection.

The Constitutional Court examines the objection as a panel of 3 judges. Where it is deemed manifestly ill-founded the case may be settled without the parties appearing, if all judges agree.

If the parties are called, the State Counsel's Office also takes part in the proceedings, upon the Court's prior request to make submissions.

The possibility of appealing the Court's decision by petition of the parties or the State Counsel's Office is a peculiarity of this type of procedure. The petition is heard by a panel of 5 judges headed by the President of the Court or his replacement.

It is emphasised that where this "concrete" review applies, the members of parliament cannot reject the Court's finding of unconstitutionality.

Once the Court's decision becomes final - i.e. there has been no petition appealing the decisions delivered by the panel of 3 judges, or any appeal has been dismissed - it is binding non-retroactively on all public authorities (Article 145 (2) of the Constitution).

Since its formation the Court has handed down numerous decisions (some 200) in such cases, most of them in the affirmative as some applications concerned objections by parties in litigation to certain enactments dating from before 1989 and no longer in accordance with the provisions of Romania's new democratic Constitution.

4. Regarding the settlement of claims relating to the constitutionality of a political party, it is to be noted that they can be referred to the Court only by the Government or the Speaker of either Chamber. They are heard in full session on the basis of a report submitted by the reporting judge, in the presence of the claimant and the State Counsel. The political parties implicated can be declared unconstitutional if their aims or activities oppose political pluralism, the principles of a law-based State or the sovereignty, integrity or independence of Romania (Article 37(2) of the Constitution).

²² J. C. Escarras - *La saisine de la Cour Constitutionnelle par voie d'exception*, in "Revue française de droit constitutionnel", no. 4/1990, p. 86; likewise, L. Favoreu - *Les cours constitutionnelles*, Paris, PUF, 2nd edition, 1992, pp. 77-8.

The Court has not dealt with any such cases to date.

5. *Regarding ex officio scrutiny of initiatives to revise the Constitution, Section 37 of the institutional Act concerning the Court provides that the reform bill or legislative proposal shall be submitted to the Constitutional Court, which is required to determine whether or not the statute is constitutional within 10 days, its ruling being delivered in full court by the vote of two-thirds of its members. Like all other decisions of the Constitutional Court on review of constitutionality, the ruling is published in the "Monitorul Oficial" of Romania. It is tabled in Parliament together with the bill or proposed revision at issue.*

B. *The Constitutional Court ensures compliance with the procedure for electing the President of Romania and certifies the election results in accordance with Act no. 69/15 July 1992 on the election of the Head of State²³.*

Objections to candidatures can be lodged up until 20 days before the elections by any person or body (citizens, parties, other organisations, etc), and must be resolved by the Court within 48 hours of being registered; the decision is final and delivered in full court by the judges' majority vote.

During the 1992 presidential elections the Court registered 43 objections, all dismissed, to all 6 contenders in the first round of the presidential elections.

The objections did not raise issues which would have rendered the candidatures in question unlawful by constitutional standards.

The Court can also decide upon claims of improper conduct of elections (Section 24 of Act no. 690/1992) referred by individual candidates or political formations, but has received no such claims to date.

In its review of presidential elections, the Court examines the electoral records forwarded by the Central Electoral Bureau, certifies the lawfulness of the procedure, then makes a writ declaring the operation valid and submits it to Parliament where it is read, after which the President swears the oath prescribed by the Constitution.

As to the other aspects, it should be observed that for the purpose of having the President suspended the Court, at the request of Parliament, issues an opinion which is adopted by the full court on the basis of a report submitted by 3 reporting judges and then transmitted to the Speaker of each Chamber.

²³ *Published in the "Monitorul Oficial" of Romania, no. 164, on 16 July 1992.*

The Court establishes by a decision that there are circumstances warranting an interim presidential office as prescribed by the Constitution (where the office of Head of State falls vacant or the President is temporarily prevented from holding office or relieved of office). Proceedings are instituted at the request of the Speaker of either Chamber.

These circumstances are determined by the full Court, again by the judges' majority vote.

C. The procedure for verifying that the conditions under which citizens are to exercise their legislative initiative are met and that the rules governing the organisation and conduct of the referendum are complied with has yet to be adopted, although Section 36 of Act No. 47/1992 provides that it shall be settled by law.

By way of conclusion, it may be fitting to raise some questions. Is a transitional society compatible with review of constitutionality as practised in countries with democratic traditions? Might it not rather be a luxury, a device characteristic of a State firmly founded on the rule of law and not of another which is only at the formative stage?

The correct answer is undoubtedly the one given in Article 51 of the Constitution which provides that observance of the Constitution, its supremacy and the laws is binding, while Section 1 of the Act governing the Court defines its aim as that of guaranteeing the supremacy of the Constitution.

The Constitution embodies rules establishing a mandatory democratic framework in which, as in a crucible, all the recipes for achieving the goals of society are prepared.

This framework must not be overstepped in any way or for whatever reason, as long as it reflects the will freely expressed by the people who have sanctioned it by their vote. Otherwise, the official high-handedness and rule by decree which we have already borne unwillingly for half a century will be victorious once again. Our memories of it are too recent to pass into oblivion. Consequently, there is but one reply to my admittedly rhetorical questions: if there is no Constitution, none of this is relevant.

c. THE ROLE AND COMPETENCES OF THE CONSTITUTIONAL COURT

Summary of the Discussion

Participants underlined that people in the new democracies of Central and Eastern Europe had very high expectations of the Constitutional Courts, in particular as regards the protection of human rights. Several newly established Courts were therefore flooded with a great number of cases. This endangered their ability to decide within a reasonable time and to examine the cases in detail. Several participants therefore pleaded against procedures like the actio popularis in Hungary or Verfassungsbeschwerde which allow private persons to bring cases before the Constitutional Court. When drawing up the Romanian Constitution, there had been exchanges of views with the German Bundesverfassungsgericht and it had been pointed out that only about 2% of Verfassungsbeschwerden were successful. It had therefore been decided that it would not be feasible to introduce a system of direct constitutional complaint in Romania.

In this context it had also to be taken into account that the courts had an enormous task in dealing with the past. It was not possible for Parliament to amend all the old laws at the same time and therefore there was a co-existence between the new constitution and preconstitutional statutes. This problem had arisen before in Spain and there had been a discussion whether the ordinary judge should have the power not to apply preconstitutional laws which he deemed to be contrary to the Constitution or whether there was a monopoly of the Constitutional Court to annul such laws. In principle it had been accepted that even ordinary courts did not have to apply such laws but in cases of doubt they had to refer the question to the Constitutional Court.

As regards the distinction between the defensive role of the Constitutional Court and the interpretative role involving also the creation of law, it was pointed out that both roles were extremely important in the former communist countries at the moment. Defence of the constitution is obviously a prime task in a new democracy where the memory of past dictatorship is still fresh. Interpreting the Constitution can lead to the creation of new law. This should not in any way lead to consider the Constitutional Court as not being part of the judiciary. It has to be acknowledged that already the Roman judge had a law making function and this cannot be regarded as alien for a court. It is interesting to note that Article 149 of the Bulgarian Constitution expressly states that the Constitutional Court shall "provide binding interpretations of the Constitution".

The role of the Court has always to be a strictly judicial one. If the view was expressed that in Romania the Constitutional Court should get the power to initiate proceedings on its own and to control related and not only directly submitted questions, it was pointed out that in the West, for example in Italy, the Constitutional Court did not have such a power and that this would change its nature.

In general the Constitutional Court has an important role in defending the Constitution, in particularly human rights in the new democracies. If the administrative courts have the task of ensuring that the executive fully complies with ordinary laws, it is up to the Constitutional Court to ensure that laws are compatible with the Constitution.

SECOND WORKING SESSION

Organisation, operation and practice of the constitutional court

Chaired by Mr Robert BADINTER, President of the French Constitutional Council

- a. The Constitutional Court of Italy - The guarantee for its independency
Report by Prof. Antonio BALDASSARRE, Judge at the Italian Constitutional Court*
- b. Organisation, operation and practice of the constitutional court
Report by Prof. Victor Dan ZL_TESCU, Judge at the Romanian Constitutional Court*
- c. Summary of the Discussion*

A The constitutional court of Italy - the guarantee for its independency - Report by Prof. Antonio BALDASSARRE,
Judge at the Italian Constitutional Court

Writing in the middle of the 19th century, John Stuart Mill said that a Supreme Court of Justice endowed with the power of judicial review is a very peculiar, even though useful, institution of modern plural democracy. If I may say so, the peculiarity inherent in the Constitutional Court - as it is structured in the Italian legal system - is even greater.

This peculiarity is founded on three different grounds: (1) the Constitutional Court does not form part of the Judiciary, but is an independent institution operating at the highest level of the constitutional system; (2) the effect of determining constitutionality by adjudication can not only be to declare a statute void, but can also, to a certain extent, be to alter its content; and (3) constitutional justices do not have a lifetime term, but are appointed for nine years only.

The Constitutional Court and the Judiciary

The Judiciary is organised as a national court system, historically patterned on the French legal model and consisting of two judicial hierarchies: the ordinary courts and the administrative courts.

The first hierarchy constitutes the so-called "judicial order". It is an autonomous order independent of every other "Power of the State", consisting of courts at many levels (justices of the peace, pretori, courts of first instance, labour tribunals, courts of appeal, etc.). Each level exercises a specific jurisdiction and the next court in the hierarchy has appellate jurisdiction over the cases decided by the lower court. The highest of the ordinary courts is the Court of Cassation, which is the final authority on points of law only, in the sense that it may order a retrial or quash a judgment if the legal reasoning of the lower court is found to be defective or unsound.

Since the judicial personnel of the ordinary court system are drawn from a career service into which one enters by examination, in order to safeguard the independence of the Judiciary the framers of the 1948 Constitution decided to take the control of judicial careers away from the Minister of Justice (as it had been established in previous regimes) and vest it in an independent organ called the "Superior Council of the Judiciary". This organ, presided over by the President of the Republic, is composed of the President and the General Procurator of the Court of Cassation as de jure members and thirty members elected as follows: two-thirds by all career judges from among the various categories of the

judiciary; and one third by Parliament in joint session from among full professors of law and lawyers with fifteen years of practice. As the organ of "self-government of the Judiciary", the Superior Council of the Judiciary has full powers over appointments, assignments, transfers, promotions and disciplinary measures in regard to judges.

The hierarchy of administrative courts is not a part of the judicial order, and no judge pertaining to that hierarchy is therefore subject to the authority of the Superior Council of the Judiciary. Nevertheless, administrative courts are now staffed by judicial personnel who, like regular judges, are drawn from a career service and recruited by competitive examination (except for some members of the Council of State, up to 50%, filled by political appointment, often of senior civil servants). The administrative courts, which are primarily concerned with the legality of the acts of the public administration, consist of the Regional Administrative Courts, which are at the lower level, and the Council of State, which has appellate jurisdiction from the regional courts. A specialized administrative court is the Court of Auditors, which has jurisdiction in matters of public accounting and in some other matters specified by law. The administrative courts' independence is guaranteed by the method of entry and the career structure of the judicial personnel, as well as by the constitutional principle according to which in the performance of their functions they are subject, like any other judge, only to law.

The Constitutional Court stands outside the Judiciary both ordinary and administrative. The Constitution does not place it in the section dedicated to the Judiciary (Part two, Title IV), but under the separate section concerning "Constitutional guarantees" (Part two, Title VI), namely, in the same section dealing with amendments to the Constitution and constitutional law-making. In other words, the Constitutional Court is a special institution acting in a judicial manner, established to safeguard the Constitution in the event of infringements of fundamental principles by the legislator.

With regard to the rights and duties of citizens, the Constitutional Court's jurisdiction is strictly limited to judicial review, in the sense that it is the only institution vested with the power to decide on the constitutionality of statutes. If an individual feels that his constitutional rights have been violated by a statute (whether national or regional), he may apply to an ordinary or administrative court to have the question raised before the Constitutional Court. If the judge deems that the constitutionality issue is not arbitrary, he has to refer it to the Constitutional Court, whose decision is final. For individuals, access to the Constitutional Court is limited to this possibility. Only Central or Regional Governments can directly refer issues of constitutionality to the Court when any of them decide to challenge the legitimacy of statutes.

To complete the picture of the Constitutional Court's functions, I have to say that, in addition to judicial review, it dispenses justice in the political arena, in the sense that it decides on infringements of the Constitution at the highest institutional levels, i.e. the President of the Republic and the other "Powers of the State". In particular, the Court decides: (1) on the impeachment of the Head of State sought by Parliament in joint session; (2) on conflicts arising over constitutional assignments of powers between Government, Parliament and the Judiciary as well as between the Central and Regional Governments, and between Regional Governments. In the event of a dispute over respective powers, either party can refer the issue to the Constitutional Court.

Finally, the Court has the constitutional power of deciding whether a referendum proposal may be admitted to the popular vote, since the Constitution forbids referendums to repeal tax laws or laws on the budget, laws of amnesty and of pardon, or laws authorizing the ratification of international treaties. Provided that the referendum is in accordance with the Constitution (Art. 75) and is designed to totally or partially repeal a legislative act, and is requested by five hundred thousand electors or by five Regional Councils, the Court also judges whether the initiative to be submitted to popular referendum has an homogeneous content.

The Constitutional Court's real authority

In order to perform all the functions connected with the Constitutional Court's role in guaranteeing the Constitution, the framers of the 1948 Constitution established a body composed of fifteen justices: five appointed by the President of the Republic, five elected by a two-thirds majority (or a three-fifths majority after the third ballot) in a joint session of Parliament, and five elected by the higher courts, i.e. three by the Court of Cassation, one by the Council of State and one by the Court of Auditors.

As a court - albeit a very special court - the Constitutional Court is bound to act in a judicial manner, namely to follow similar procedures to those provided for in the administrative courts. The similarity is due to the circumstance that the latter courts are concerned with the legality of acts of the public administration, while the Constitutional Court carries out the judicial review of statutes. In other words, both courts have jurisdiction over acts. In particular, with regard to the cases submitted to judicial review, the Constitutional Court does not decide on disputes between parties, but, legally speaking, it does settle questions arising from conflicts between statutes and the Constitution. This means that the Court has only two ways of deciding the case: either declaring a statute free of constitutional

flaws or declaring it void. In the latter case the law is annulled beginning on the day following the publication of the decision and, as a rule, ceases to have effect retrospectively.

The Constitutional Court is therefore the guardian of the Constitution. As such, its powers and activities are subject only to the rules of the Constitution and to other constitutional laws which establish the conditions, forms and time limits for hearing cases and deciding them, as well as the guarantees of independence for the justices and for the Court itself. In other words, while the ordinary and the administrative courts are subject to laws, the Constitutional Court is subject only to the Constitution and to other constitutional laws. In short, while the Judiciary is the key-authority under the “rule of law”, the Constitutional Court is the key-authority under the “rule of the constitution”.

Since the Constitutional Court began operating in 1956 it has gradually broadened its power and strengthened its role within the Italian legal system. As I have already said, the Court is primarily concerned with judicial review and it therefore produces decisions on statutes declaring them void, totally or partially. At its very beginning, the major problem lay in the enforceability of the Court’s decisions, so that the first President of the Constitutional Court, the former Head of State, Enrico De Nicola, resigned after one year because a Cabinet minister refused to comply with a decision of the Court. But the battle was won in a short time. Realising the ignorance of its decisions on the part of civil servants and politicians, the Court began to use its power in a very pervasive way during the 1960’s, thanks to widespread support by public opinion. In particular, in declaring a statute partially void the Court sometimes replaces one or more words in the law with other words in order to make the same statute conform to the Constitution. Furthermore, to overcome the Government’s failure to carry out decisions of the Court, when it is requested to, it declares as unconstitutional the failure of the legislature to fulfil constitutional duties and, by so doing, it creates new rules, which are complete preceptive norms and are automatically effective.

Thanks to the ordinary and administrative courts’ loyalty in implementing the Constitutional Court’s decisions and thanks to the massive support of public opinion, the Court has strengthened its attitude toward judicial activism. Its strong legitimacy in the public mind is due to the fact that it provides quasi-legislative decisions acting, in a judicial manner, with the aim of ensuring an impartial and balanced implementation of constitutional values. And the more both parliamentary and governmental decision-making are ineffective and lacking, the more the Court’s decisions respond to the people’s expectations.

The Guarantees of the Court’s independence

When people speak about guarantees of independence they may be referring not only to legal guarantees, but also to customary and ethical guarantees. Even though the latter are the most important, I will only deal here with the first ones.

The Constitutional Court is the living symbol of the Constitution, that is, of law destined to endure for many decades. This means that the Constitutional Court has to transcend and to act above and beyond the changes occurring in the political arena. For this reason, the Constitutional Court is - and must be - completely insulated from political control, including Government/Parliament and the pressure of political parties/interest groups.

To this end the most relevant guarantee would be perpetual tenure of office. But this provision is very rare in the Constitutions of Western democracies. Apart from the American Supreme Court experience, terms of office are usually short in the European constitutional courts (mostly nine or twelve years) and, in particular, in the Italian Court, where the justices have a nine-year term. But this provision is counterbalanced by many other guarantees designed to ensure the Court's and the justices' independence.

These guarantees are distinguishable in that some of them relate to the justices as such and others concern the Court as an institution.

With regard to the guarantees of independence of the Court's members, the Italian Constitution provides, first of all, a strict rule on incompatibility. Article 135 (5) provides that a justice may not concurrently be a member of Parliament or a Regional Council, a practising lawyer or hold any other post or office (e.g. mayor, university lecturer, company director and so on). In addition, the justices are not allowed to be members of political parties or be involved in political activities.

A second very important guarantee is provided by the fact that no one may be appointed or elected as a justice of the Constitutional Court if he does not possess specific professional qualifications for that office. Under Article 135 (2), the justices can be chosen from among the judges of the higher courts (ordinary and administrative), full professors of law and lawyers with twenty years' practice. This provision means not only that no justice can sit in the Court without being outstandingly competent in the field of law, but also that the justices are chosen from among people constrained by the tradition of their profession or their office to act independently and impartially.

Many justices today are firmly convinced that secrecy of the Court's decision-making process is a major guarantee of the justices' independence. In

accordance with a two centuries tradition in our country - unlike the experience of the United States of America and the Western European democracies after the Second World War - no dissenting opinions and no record of the vote of the Court are published. At the present time this is the subject of much debate since many scholars, including authoritative members of the Court, are looking for a greater transparency and visibility of the Court's decision-making process, and are in favour of publishing dissenting opinions.

A further guarantee relates to the justices' status. They may not be immediately re-appointed and they may not be removed, exempted or suspended from office except as a result of a decision of the Constitutional Court itself adopted in the event of unforeseen physical or civil incapacity, moral unworthiness or serious violations of the duties connected to their office. In general, the justices are not responsible for acts performed in the exercise of their functions; this means that they may not be prosecuted for opinions expressed or votes cast in the exercise of their functions. Furthermore, no justice may, without the authorisation of the Constitutional Court, be prosecuted, arrested or otherwise deprived of personal liberty or subjected to personal or domiciliary search unless caught in the act of committing a crime for which the warrant or the order to seize is mandatory.

The last guarantee for the justices' independence concerns their remuneration. Their salary is determined by law and, in any case, it cannot be lower than the salary of the highest member of the Judiciary (i.e. the President of the Court of Cassation).

A second set of guarantees is provided to ensure the independence of the Constitutional Court as an autonomous Power of the State, that is as an institution independent of every other Power. To this end the Constitution vests the Court with complete autonomy concerning its organisational structure, self-government and financial management.

As to its internal organisation, the Court has its own rules, which are subject only to the Constitution and the special statute provided by Article 137 (2) of the Constitution for the establishment and functioning of the Court itself. In other words, the Court, like the Parliament, is vested with primary normative powers designed to structure the organisation of its offices, i.e. to determine the spheres of competence, duties and responsibilities of its officials. The Court also has domestic jurisdiction over cases regarding its employees about their post and remuneration.

There are various guarantees designed to ensure the Court's self-government. With regard to the justices, the Court reviews the validity of the professional qualifications for the office possessed by its members once they are appointed by

the President of the Republic or elected by Parliament or the supreme judicial bodies. At the same time, as I have already mentioned, it decides on unforeseen causes of ineligibility for, or incompatibility with, the office of a member of the Court. Decisions on these matters are final.

Furthermore, the Court chooses its own president from among its members, usually among its senior members. The president is responsible for distributing cases among the justices in order to file documents necessary for the decision and, in general, to prepare the file on them. The president represents the Court before the public and in relations with other Powers and, inside the Court, is the chief manager. In this latter task he is assisted by a presidential bureau, composed of five justices elected from among the senior members by the plenum of the Court, i.e. by all fifteen justices.

Finally, the Constitutional Court has complete financial autonomy. In particular, each year the Court approves the budget and the accounts of expenditure, and the Minister of the Treasury is then bound to set aside the appropriate funds and resources to meet the Court's requirements.

B. Organisation, operation and practice of the constitutional court - Report by Prof. Victor Dan ZLĂTESCU, Judge at the Romanian Constitutional Court

The well-known constitutionalist Louis Favoreu, in his study dedicated to Constitutional Courts, distinguished between a "European model" and an "American model"²⁴.

The Constitutional Court of Romania, established according to the Constitution of 1991, is a typical illustration of the "European model" as far as both its organisation and functioning are concerned. It is, as the above mentioned author writes, a jurisdiction created purposely and exclusively for cases of constitutional dispute, being outside the ordinary judicial apparatus as well as independent of other public powers.

The organisation and functioning of the court is governed by the provisions of the Constitution and of Law no. 47/1992.

²⁴

Louis Favoreu, *Les cours constitutionnelles*, Paris, P.U.F, Introduction, p. 3

First, the Court has a constitutional status, its organisation and functioning principles having been established by the Constitution. The provisions of Law no. 47/1992 (on its organisation and functioning) simply reinforce the constitutional provisions.

Second, it holds a monopoly on matters concerning the Constitution throughout the country. No other Court has authority to pass pronouncements on the constitutionality of laws. The Constitutional Court, as Article 1 of the organisation and functioning law provides, is the unique authority of constitutional jurisdiction in Romania.

Since a true jurisdiction is characterised by both preventive review and the a posteriori review of normative acts, as well as of other functions established by law and exercised beyond the State's judicial apparatus, the Constitutional Court is organised in the same way.

A characteristic feature in this respect is that all of its nine judges are jurists. As provided by Article 38(1) of the organisation and functioning law, the judges of the Constitutional Court must have a background of extensive legal training, a high level of professional competence and experience of at least 18 years working in the legal field or in legal higher education.

The nine judges are appointed, in principle, for a nine year period; a term of office that cannot be extended or renewed. The system adopted by the Constitution of Romania is similar to that provided for the European Court of Justice. Three of the judges are appointed by the Chamber of Deputies, three by the Senate and three by the President of Romania.

The law provides that the Court is renewed in its composition every three years by a third of its judges. To this end, it provides in its Article 52 for a transitional system. With the first Constitutional Court, both Chambers and the President of Romania shall appoint three judges each, one for 9 years, one for 6 years and another for 3 years. The three judges will be selected by each Chamber according to the number of votes; the candidate with the most votes secures the nine year term of office.

According to this system, in the elections held after the Court's first three years of activity, all judges will then be elected for a nine year term.

The Constitutional Court has a President (one of the nine appointed judges), elected by the judges themselves by secret vote, and this President remains in office for a period of three years. The President's mandate cannot be renewed.

The law, in order to guarantee equality, provides for a special procedure to elect the President. Thus, each group of judges appointed by the Chamber of Deputies, by the Senate and by the President of Romania may propose one single candidate. In case no candidate has a majority after the first ballot, a second ballot between the first two or a drawing of lots shall be organised.

The proceedings for the election of the President shall be chaired by the judge most senior in age.

The law also provides that the President of the Court may appoint a judge to substitute him during his absence. It was formally agreed during the first two years' of operation that the substitute should be appointed every time such a circumstance occurred and also that it should be a different person each time (ensuring that each judge takes his turn).

In the event that the office of President becomes vacant, another judge shall be elected at the end of the three year period.²⁵

The collective body of the Constitutional Court is referred to as the Plenum of judges.

The law only refers to the Plenum, in its capacity as a jurisdictional body, when it provides in its Article 8 that the Court's jurisdiction shall be exercised in Plenum or in Panels of jurisdiction.

²⁵ *The President's powers are provided for under art. 11(1) of the Law and consist of the following:*

- a) co-ordinating the activity of the Constitutional Court and distributing the cases for consideration;*
- b) convening and presiding the Court's plenary sessions;*
- c) representing the Court before public authorities and other organisations (Romanian or foreign);*
- d) ascertaining the cases of judges' end of mandate, provided by the law, and notifying the public authorities that appointed them to fill the vacant office;*
- e) exercising other powers as provided by law or under the Standing Orders of the Constitutional Court.*

Paragraph (2) also provides that the President manages the budget.

Indeed, according to Article 20 of the Law, a priori review of constitutionality by the Constitutional Court is exercised in plenary sessions. This is the only aspect of the Plenum's activity mentioned by the law. The others are to be taken from the Standing Orders on the organisation and functioning of the Court.

According to Article 4 of the Standing Orders, the Plenum of the Constitutional Court exercises the powers that, as they have been provided by the Law, can only be achieved by majority decision of the judges. Also, it is provided that the Plenum of the Constitutional Court shall take any measure needed to ensure the proper conduct of the Court's activity.

The practice deriving from these provisions further illustrates that the Plenum is not a mere body of jurisdiction, but also the managerial body of the Constitutional Court.

It can also be recalled in this connection that the election of the Constitutional Court's President is the responsibility of the members of the Plenum.

In keeping with the texts which refer to the competence of the Plenum, the latter has taken to pronouncing, in cases where it finds inconsistencies in the practice of the Constitutional Court's various Panels, decisions of interpretation designed to eliminate such inconsistencies. The basis of such decisions can be found in the provisions of Article 26 (2) of the Court's Standing Orders, where it states that in the event that a Panel of 3 or 5 judges wishes to depart from a former decision of the Plenum or of a Panel, it should address the Plenum. The interpretation given by the Plenum by a majority of votes then becomes binding on the Panels.

It is understandable that the few decisions so far pronounced in this manner were quite an event in the Court's practice. They offered the opportunity for some interesting theoretical developments on disputed matters to be reconsidered and proved their usefulness in the unification of the Court's jurisprudence, as well as in the orientation of the interpretation given by ordinary Courts' to the constitutionality of certain laws.

It is worth mentioning that the Plenum requires a quorum of two thirds of the members of the Court. It adopts decisions by majority vote in exercising its powers (as established by the Constitution and Law no. 47/1992), and in all other cases by majority vote of the above-mentioned quorum.

It should be pointed out that the office of judge is incompatible with any public or private office, except teaching offices in legal higher education.

In cases where, on appointment, a candidate for the office of judge holds another office that is incompatible with the former, or where he/she is a member of a political party, his consent to the appointment, as required, shall incur his agreement to present his resignation from that office or from the political party of which he is a member.

The nine judges of the Court are independent in the exercise of their powers and irremovable throughout their term of office.

Judges of the Constitutional Court may not be arrested or prosecuted for major or minor offences without the approval of the Chamber of Deputies' Standing Bureau, the Senate's Standing Bureau, or the President of Romania (depending on the body that appointed the respective judge) or following a request by the Attorney General. Moreover, the Law provides for a special authorisation to try offences allegedly committed by judges of the Constitutional Court, that is authorisation from an official on the Supreme Court of Justice.

Starting with the date of his prosecution, the judge is, by law, suspended from his office. If, finally, he is convicted then he is, by law, released from the office of judge of the Constitutional Court, but if he is pardoned, suspension ceases.

The mandate of the judges ceases in the following three instances:

- a) expiration of the term of office, resignation, loss of electoral rights, release by law, death;*
- b) in case of incompatibility or the impossibility of exercising the office of judge for more than 6 months;*
- c) in the case of a violation of Article 16 (3) or Article 36 (3) of the Constitution or for a serious violation of the duties incumbent on a judge.*

2. The procedure of the Court differs according to whether it is engaged upon resolving an objection of unconstitutionality raised during a lawsuit or whether it is engaged upon other functions.

The general rule is that cases are tried in plenary session. This happens with the review of constitutionality of laws prior to promulgation (a priori review), the review of constitutionality of Parliament's Standing Orders, the question of compliance with the procedure for the President of Romania's election, the determination of challenges to the constitutionality of a political party, approval of the suspension of the President of Romania, and, finally, ascertaining the

circumstances justifying the interim in the exercise of the office of President of Romania.

Decisions on these matters are passed by a simple majority of the Plenum's members and they are final, i.e. they cannot be challenged.

In an attempt to establish the way in which the Plenum determines cases, we will highlight several situations and draw comparisons in terms of the way that the law regulates the resolution of various types of cases.

In some cases, the judicial decision prevails. This is the case with a judgment on the constitutionality of a political party, in that it is similar to the determination of a trial, although after a hearing with the challenger, the challenged political party and the Public Ministry.

To this end, one of the judges prepares a Report, evidence is put forward and conclusions are drawn. The judgment is made in accordance with the procedural provisions of Law no. 47/1992 and with the applicable Standing Orders, which are themselves linked to the provisions of the Civil Code.

The judicial decision prevails also in the case of challenges related to candidacies for the office of President of Romania.

In the exercise of other plenary jurisdiction, few procedural problems are raised. Many procedural problems are, however, raised as a result of a posteriori review.

This is less the case with the review of the constitutionality of Parliament's Standing Orders (the first of the two kinds of a posteriori control), where the debates are conducted in plenary session, because the decisions are not likely to be challenged; instead, the order is submitted to the respective Chamber for re-examination of the texts found to be unconstitutional.

The most striking procedure is to be found in the second form of a posteriori review, that is in relation to objections of unconstitutionality.

In these cases, the Constitutional Court decides upon issues of constitutional law raised before the ordinary courts.²⁶ It is, however, unable to solve any other aspects of the legal action. When the objection is raised before the ordinary Court, the latter seizes the Constitutional Court; after the Constitutional Court

²⁶ See: V D Zlatescu, Irina Moroianu Zlatescu, *Judecarea exceptiei de neconstitutionalitate (Judgment of the Objection of Unconstitutionality)*, in "Human Rights" issue no. 3/1992, page 10 and the following.

makes a decision about the constitutionality, the decision is final and the ordinary Court resumes the case, taking into account the decision of the Constitutional Court.

The objection of unconstitutionality is the only instance when the Court does not meet in plenary session, but in Panels. Session is public and is conducted in accordance with the rules of procedure adapted to the peculiarities of constitutional disputes.

The session is also attended by the representative of the Public Ministry who has been summoned.

A peculiarity of the Romanian system is that judgments as to constitutionality have two stages of jurisdiction.

Judgment on the substance (meaning, of course, the substance of the constitutional dispute) is given by a Panel of three judges. It is based on a Report prepared by one of them, and on the viewpoint of the two Parliament Chambers and of the Government (whose opinions the Constitutional Court is obliged to ask for) and upon any evidence that may have been produced.

The law does not provide for restrictions on evidence so that, in principle, the Panel may order any evidence to be produced. Since, however, constitutional disputes do not require facts to be established - that is the function of the ordinary Courts - production of evidence from witnesses, depositions or expert evidence is unlikely to be required for such proceedings.

Even when the fact of unconstitutionality can be determined from the circumstances of the case, it has become the standard practice of the Constitutional Court to pronounce judgment on the unconstitutional aspects of the text put forward; the ordinary Courts, on the other hand, will assess afterwards whether the principle established applies to the facts or not.

Judgment follows, in principle, the procedure stipulated in the Civil Code. The term "in principle" is used because, in certain important respects, Law no. 47/1992 deviates from the Code as it stipulates special rules for constitutional disputes.

Thus, seizure of the Constitutional Court, according to art. 31(4), is effected by the ordinary Court before which the objection of unconstitutionality was raised; this is done via a report that has to include the viewpoints of the parties and the opinion of the ordinary Court on the objection of unconstitutionality, including also any possible evidence put forward by the parties. Also in cases where the

objection is raised ex officio by the ordinary Court, the journal will include claims of the parties as well as the necessary evidence.

The law provides that, pending the resolution of the objection of unconstitutionality, the ordinary Court may order suspension of the proceedings. The report is submitted within 5 days from the decision to transmit the case.

The fact that seizure of the Constitutional Court is not an act of the parties, but of the ordinary Court, means that the Constitutional Court is still bound by such seizure when the objection is subsequently withdrawn by the party that raised it.

The underlying objective of constitutional review is here in evidence. Such review, though arising from actual cases, is not available to satisfy individual interests. The effects of the decisions pronounced by the Constitutional Court on the unconstitutionality of a legal text extend also to expressing the general interest in eliminating any cause of legal conflict with the Constitution.

Judgment is given on the basis of a Report prepared by one of the judges.

It is interesting that, while ordinary courts have no power to censor the objections invoked (being under an obligation to seize the Constitutional Court whatever their opinion on the grounds for the objections), in the case of the Constitutional Court the law provides for a filtering procedure, not on grounds of suitability, but on the grounds of the manifestly ill-founded nature of the objection.

It has been proved many times that in practice parties often raise objections of unconstitutionality to obtain adjournments of the proceedings. To consider such objections would not only overburden the Constitutional Court with a useless amount of work, but would also seriously disrupt the speed of resolving legal actions and would incur unnecessary expense.

That is why, by analogy with the European Convention on Human Rights, Article 24(2) of the Law authorises the rapporteur judge who finds the objection to be totally ungrounded or related to circumstances that cannot be the subject of an objection of unconstitutionality to inform the President so that the latter may convene the Panel in order that they may decide, by unanimous vote, to reject the objection without convening the parties.

It is quite hard to believe that this provision can be abused, because the dissatisfied party can challenge the decision and the resolution of any such appeal will be carried out by bringing together the parties.

Judgment of the objection of unconstitutionality can, as has already been said, be effected in two stages of jurisdiction. The law provides that the decision by the three-judge Panel may be challenged by the parties only through an appeal within 10 days of the decision. The appeal is judged by a five judge Panel, one of which is the President of the Constitutional Court (or his substitute) who chairs the proceedings. If the appeal is upheld, the Panel shall, by the same decision, pronounce the objection to be well-founded.

There are jurists who think that this two-staged system of jurisdiction is excessive and that objections should, de lege ferenda, be solved in both the first and second instance by a panel of 5 judges.

As suggested by the word "only", the appeal is the only way to challenge the decision passed on the merits of the case. Otherwise, although the appeal has been reintroduced into Romanian legislation following modification of the procedural Code and the Law on Judicial Structure, which was later adapted to the Law on the Constitutional Court's Organisation and Functioning, it is unanimously acknowledged that such a possibility is incompatible with the principles of organisation of constitutional disputes.

We also believe that neither appeals for annulment nor appeals in the interest of the law are compatible with the procedure that is specific to the review of constitutionality.

As regards withdrawals - challenge and revision - an interesting decision by the Court's Plenum stipulated that the same use of "only" excludes such possibilities.²⁷

Besides these two stages of jurisdiction, the Constitutional Court's judicial activity also suggests, in certain circumstances, the intervention of the Plenum.

Thus, as has been shown, in the case of disagreement among the various Panels, the Court's Plenum is seized and, after having analysed and discussed the respective decisions, gives its decision on interpretation. This decision does not, of course, have the power to annul the previously pronounced final decisions, but they act as a point of reference - a binding one - for those pronounced thereafter.

3. It is very difficult in such a small amount of time to make a complete, if not exhaustive, analysis of the Romanian Constitutional Court's practice, which has become richer and more diverse over the last 2 years.

²⁷ See the Constitutional Court's Decision no. 2/25.03/1994

For this reason we shall try only to briefly point out some of the most interesting ways in which the system has developed.

Like a true pillar of the State governed by the rule of law, the Constitutional Court is bound to be an essential actor in ensuring respect for human rights.

Having to choose between:

i) the monist system, whereby international treaties ratified by a State are self-executing and directly applied in practice without the need to have them formally integrated in internal legislation; and

ii) the dualist system, whereby international norms must be incorporated into internal legislation in order for them to be applied.

The Constitution opted formally for the former system, stipulating in its Art. 20 that provisions referring to human rights in the Universal Declaration of Human Rights, the two International Covenants and treaties ratified by Romania belong de jure to the national legislative system, taking precedence over internal legislation.

The Constitutional Court has had a few opportunities to directly apply these principles in decisions of unquestionable theoretical interest.

Thus, by means of a priori review, a law that provided a five year extension of housing leases was challenged before the Constitutional Court on the grounds that such an extension violated the rights of the proprietor. The Court rejected the complaint, on the grounds that the lease did not affect the substance of the provision, but was a mere administrative act that did not infringe upon the substance of the right of the owner. The Court stated that with a balanced legislative policy - taking into account the constant scarcity of houses, particularly in large cities - there has to be some balance between the interests of the owners and those of the tenants. Applying the provisions of Art. 11 of the International Covenant on Economic, Social and Cultural rights - concerning a standard of living for everyone and the system that implies the right to adequate housing - the Court pronounced the extension of the housing lease to be constitutional.²⁸

In another case, when the Constitutional Court was seized with the question of the unconstitutional nature of a law which fixed much higher taxes for civil servants

²⁸ Constitutional Court's Decision no. 69/1993

than for other workers, the Court pronounced a decision stating that the text was unconstitutional. Invoking the provisions of Art. 20 of the Constitution, it applied the provisions of the Universal Declaration of Human Rights and those of the Covenant on Economic, Social and Cultural Rights concerning the prohibition of discrimination.²⁹

We shall also mention the case regarding the law concerning war veterans, which included some provisions that were deemed unconstitutional; these provisions failed to recognize as war veterans persons in the territories temporarily occupied before the Second World War who had been forced to enrol in the enemy's armed forces and who had fought against the Romanian Army.

It was deemed that the condition for qualifying as a war veteran, i.e. of not having fought against the Romanian Army, resulted in a discrimination prohibited by the Universal Declaration and the two Covenants of Human Rights, as well as by the Constitution of Romania.³⁰

Another ongoing concern of the Constitutional Court is the idea of full implementation of the principle of non-retroactivity of the law.

Prior to this Constitution, non-retroactivity of the law was only provided for by the Civil Code. Therefore, it was only applied at the level of legislation and could, at any time, be removed by a stipulation of retroactivity in a law; which is perfectly possible as long as the Civil Code itself is nothing but a law that can be dispensed with by another law. One could say that prohibition of retroactivity was meant only for the judge, not for the legislator, to whom it was not in the least binding.³¹ Art. 15(2) of the Constitution has since provided that "the law acts only for the future, with the exception of the more favourable penal law", and the position is now totally different. The summons of non-retroactivity of the law is no longer meant just for the judge, but for the legislator himself, who cannot deviate from this principle - as was often the case in the past - except for a less tough penal law. Before the present Constitution came into effect it was deemed that an interpretive law had a retroactive effect, as if it had been in force ever since the latter had been adopted. Such an interpretation is no longer possible, and so the interpretive law applies only for the future.³²

²⁹ Decision no. 6/25.02.1993

³⁰ Decision no. 47/17.05.1994

³¹ See I Filipescu, V D Zlatescu, Dreptul civil constitutional român ("Romanian Constitutional Civil Law") in the periodical "Dreptul" ("The Law"), issue no. 3/1994, page 44 and the following

³² Ibid. loc. cit.

The Constitutional Court has pronounced several decisions regarding non-retroactivity of the law. Recently, it has deemed as unconstitutional the provision of a law that fixed the taxes of agricultural income by reference to a calculation as from 1 January 1994, the law only being adopted, however, in May this year.³³

There are more such examples. The idea of strongly defending non-retroactivity of the law is, and will be, one of the prevailing concerns in the practice of the Constitutional Court.

A third idea that has dominated our practice lies in monitoring the constitutionality of the legal regulation of property.

We shall mention here the matter of obtaining the right of ownership. The Constitutional Court was firm in deeming nationalisation as unconstitutional. Unlike expropriation for a public use, provided for by the Constitution and which is permissible where just compensation is paid in advance, nationalisation is not allowed for by the Constitution. For this reason, the text in which it is mentioned in the Law on the status of free zones³⁴ was deemed unconstitutional. At the same time, the decision was undoubtedly an expression of the strong animosity that Romanian society feels towards the idea of nationalisation, an institution that was so abused by the totalitarian regime.

Another topic, which recurred in relation to numerous decisions and which was also the cause of marked disagreement in the case law, is that of the pre-revolutionary concept of so-called "offences against public property". This category of offences used to introduce an aggravated penalty for damage of any kind - theft, embezzlement, etc - against what was called "public property", a concept mainly meaning "socialist State property" or "collectively owned property".

These forms of ownership, typical of a controlled economy, have been abolished. The privatisation process has led to the emergence of commercial companies with State or private capital, as well as of autonomous companies having the right of ownership over the things they own.

Therefore, there is no longer "State-owned" or "collectively owned" property, but private property. According to Art.41(2) of the Constitution, private property shall be equally protected by law, irrespective of its owner.

³³ Decision no. 49/17.05.1994

³⁴ Decision no. 4/1992 in Romania's Official Gazette, Part I, issue no. 182/30.07.1992

As a result, establishment of an aggravated penalty for damage to the possessions of these patrimonies, as well as all possession of what is termed "State-owned property", is deemed unconstitutional.

It has been admitted, however, that a scheme of special protection should be kept for those assets in respect of which Art. 135(4) of the Constitution provides that they "shall be exclusively public property". These are natural resources of all kinds: methods of communication, the air space, waters with hydropower possibilities, and those resources which can be used by the public: beaches, territorial waters, natural resources of the economic zone and the continental shelf, as well as (and this is a provision of great interest) other assets established by law.

Following some contradictory decisions, the Constitutional Court's Plenum pronounced a very well-known decision of interpretation³⁵ which confirmed the practice to the above mentioned effect.

The decisions confirming free access to justice generated particular interest, and provoked valuable contributions from the Constitutional Court.

According to Art. 125(3), of the Constitution, "the competence and procedure of courts shall be regulated by law", and according to Art. 128 "the parties concerned and the Public Ministry may make appeals against decisions of the Court in accordance with the law." Consequently, it was deemed that administrative-judicial measures provided for by the law represent a protective measure, meant to solve certain categories of litigation more quickly, in relieving the ordinary Courts and sparing them from trial expenditures. Enforcement of these procedures is under no circumstances meant to restrict access to justice, which would lead to the elimination of intervention by the ordinary Courts, as provided by law. An interpretive decision, pronounced by the Constitutional Court's Plenum by reference to the provisions of Art. 21 of the Constitution, states that the decision of a judicial body shall be subject to judicial control by the Administrative Court or another competent Court as provided by law, whilst not of course obliging the parties to exercise this right.

Furthermore, it is also stated that free access to justice infers access to the procedures by which justice is imparted. The judge has the exclusive authority to institute the rules of proceedings before the ordinary Courts, the principle of free

³⁵ Decision no. 1/1994

*access to justice inferring the unrestricted possibility for those interested to make use of these procedures, in the forms and means provided for by the law.*³⁶

We cannot mention here all the areas in which the Constitutional Court's practice has developed.

It is important to point out that, during two years of activity, this system has brought about a rich amount of theories and ideas leading to the constitutionalisation of all areas of law; these theories and ideas have started to be assimilated in judicial practice, thus making a contribution to what has been called the "constitutional cleansing" of our legal system, which system is going through a profound period of transition.

c. ORGANISATION, OPERATION AND PRACTICE OF THE CONSTITUTIONAL COURT

Summary of the Discussion

Participants discussed the consequences of the Ruiz Mateos decision of the European Court of Human Rights for Constitutional Courts. In this decision the European Court of Human Rights for the first time has declared Article 6, paragraph 1, of the European Convention on Human Rights applicable to proceedings before a Constitutional Court. This decision may be interpreted in a very narrow way as being due to the fact that Ruiz Mateos was expropriated directly by a specific statute and that his only chance to contest this act was to contest the validity of the statute, something which can only be done before the Constitutional Court. There is however also the possibility that the European Court of Human Rights will in the future apply Article 6 of the Convention to cases before a Constitutional Court where individuals are directly concerned. The execution of such decisions of the European Court of Human Rights may pose difficult problems and require amendments to laws in particular in so far as procedures before constitutional courts are regarded as objective and not as contentious procedures. Countries establishing a Constitutional Court should bear this problem in mind from the beginning.

The Ruiz Mateos case also highlights the problem of the relationship between national Constitutional Courts in general and the European Court of Human Rights. Contradictions are possible between the interpretation of a national constitution by the Constitutional Court and of the Human Rights' Convention by the European Court.

³⁶ Constitutional Court Plenum's decision no. 1/January 1994 on the citizens' free access to justice in the defence of their legitimate rights, freedoms and interests.

Another topic raised during the discussions were the guarantees for the independence of judges. It was stressed that apart from the legal guarantees ethical values were very important and that each judge had to ensure according to his conscience that he performed his duties independently and in accordance with the law.

THIRD WORKING SESSION

Decisions of the constitutional court and their effects

Chaired by Professor Adrian NASTASE, President of the Chamber of Deputies of the Romanian Parliament

- a. *Decisions of the constitutional court and their effects*
Report by Professor Helmut STEINBERGER, former judge at the German Constitutional Court

- b. *Decisions of the constitutional court and their effects*
Report by Prof. Vasile GIONEA, Member of the Academy, President of the Romanian Constitutional Court

- c. *Summary of the Discussion*

A. Decisions of the constitutional court and their effects - Report by Prof. Helmut STEINBERGER,
former judge at the German Constitutional Court

Preliminary Remarks

The following report deals only with the effects in a strictly legal sense of decisions of Constitutional Courts. The general role which a Constitutional Court plays in the political process of respective States will not be discussed. Such a role depends very much upon the prestige a Constitutional Court has been able to attain in the respective political society. In the United States or in Germany, e.g., hardly any law is passed that has not been intensively checked by the competent organs participating in legislative functions (competent ministries of the Government, legislative committees of chambers of Parliament) as to whether it will stand a constitutional test before the Supreme Court or the Federal Constitutional Court. Politically speaking, a very considerable preventive effect thereby results from the existence of constitutional jurisdiction. But this matter goes far beyond the subject of this report.

I.

1. The legal effects of decisions of Constitutional Courts depend on a variety of factors and their interactions:

- *the competences of Constitutional Courts;*
- *the kinds of procedures by which the various competences are exercised by the Constitutional Court, e.g. by contentious (adversary) proceedings or "objective" proceedings without formal procedural participants;*
- *the specific subject matter of proceedings and the subject matter of the decision (both need not be necessarily identical); the substantive, personal and temporal scopes of the subject matter decided upon;*
- *the scope of norms which the Constitutional Court takes into consideration in deliberating and deciding upon a specific case (e.g. only norms on competences or also substantive norms; only those norms pleaded by an applicant as violated, or all conceivable norms against which the compatibility of the impugned act or omission with the Constitution or other superior law might be tested);*

- the kinds of procedural participants to a proceeding (highest State organs; private persons or entities; referring courts; intervenients to a proceeding);
- the reasons for a decision: procedural, like non-acceptance of an application; or (in-)admissibility on the merits of an application (founded or unfounded); or unfounded only because of a constitutionally required restrictive or extended interpretation of a norm ("verfassungskonforme Auslegung").

Considering the broad scope of competences Constitutional Courts have been assigned by constitutions and laws in the various States, it is imperative to restrict this report to the most important kind of decisions, i.e. the review of norms by Constitutional Courts, and their effects. Even within this restriction one finds a considerable variety of effects of decisions in the various legal orders³⁷. In practice, the principal distinction is between decisions with effectiveness erga omnes and those whose effects are limited to the specific case at stake.

2. One can distinguish three principal kinds of effects of decisions which review norms:³⁸

- res judicata effects
- erga omnes effects (going beyond res judicata effects)
- effects equal to formal laws (effects having the force of law).

a) Res judicata in a substantive sense³⁹ means the obligatory force of a decision, i.e. its authoritative conclusive force in determining its contents. This

³⁷ Just for example: While decisions of Constitutional Courts in a considerable number of legal orders which declare unconstitutional a norm in the concrete (collateral) review of a norm are assigned an erga omnes general effect, such decisions by the Belgian Arbitral Court and by the Portuguese Constitutional Court merely have a res judicata effect. Such decisions finding the norm at stake not incompatible with the constitution in Italy only have the limited effect to the judgment a quo. For further examples see José Manuel Cardoso da Costa, *La justice constitutionnelle dans le cadre des Pouvoirs de l'état, à la lumière des modalités, du contenu et des effets des décisions sur la constitutionnalité de normes juridiques, Rapport Général, dans: Justiça Constitucional e Espécies, Contend e Efeitos das Decisoes sobre a Constitucionalidade de Normas, VII Conferencia dos Tribunais Constitucionais Europeus, Lisboa, Tribunal Constitucional, 1987, pp. 119-142. In Turkey such decisions imply a judgment of "constitutional conformity" with the consequence that the issue may not be re-examined for ten years (Art. 152(4) of the Law on the Constitutional Court, Official Gazette No. 17863).*

³⁸ There are also other kinds of effects which in the context of the subject matter dealt with in this report are of less importance: the internal force of a decision binding the Constitutional Court itself, e.g. its own interlocutory decisions on procedural issues. A final decision may be the basis for the decision on costs. The fact that a final decision has been rendered may form a factual element for other norms to be applicable.

conclusive force is binding not only upon the parties⁴⁰ to the decision but on (principally) all public authorities within the jurisdiction in respect of the identical subject matter decided upon by the court. This effect is determined by the personal, substantive and temporal limits of the subject matter. The res judicata effects in respect of successive cases with identical subject matter vary under different legal orders, in particular depending on whether a new application has to be rejected as inadmissible⁴¹ or as unfounded (on the merits) due to the conclusive effect of res judicata.

However this may be solved in respective legal orders, inherent in the institution of res judicata is a preclusive effect in the sense that the parties to the case and possible other applicants bound by the res judicata effects of the (first) decision are barred from bringing about a court decision contradicting the conclusive content of the first decision. This preclusive effect corresponds to the prohibition on the courts from rendering decisions on the identical subject matter deviating from the decision having res judicata.

The institution of res judicata may be elaborated upon by laws on Constitutional Courts⁴². Alternatively, in many such laws it appears to be simply presupposed and taken for granted. Even where it is not expressly mentioned in laws on Constitutional Courts, res judicata can be derived as a principle of the rule of law, of the "État de droit", the "stato di diritto", the "Rechtsstaat". The rule of law aims at legal peace and legal security in the resolution of controversies. This is also precisely the aim of the institution of res judicata. Accordingly it enjoys a constitutional dimension and is valid in procedures of Constitutional Courts and applies to the effects of their decisions. This does not exclude that the law may determine the scope of res judicata effects in respect of decisions of Constitutional Courts in a manner different to that of the decisions of ordinary courts, e.g. in extending the personal scope of the effects of decisions declaring norms to be unconstitutional beyond the parties to the specific case to have an erga omnes effect.

³⁹ *In a formal sense res judicata means the finality in the sense of the non-appealability of a decision. As Constitutional Courts are courts of last instance in domestic jurisdictions, this formal procedural aspect does not pose problems in the present context.*

⁴⁰ *While other private persons having had no procedural right to be heard on the subject matter of the proceedings will not be bound by the decision.*

⁴¹ *See, e.g. Decision of the Slovenian Constitutional Court of 11 February 1993, Odlôcbe in sklepi ustavnega sodisca II.letnik zbirke Leto 1993, 17., p. 39 f.*

⁴² *See, e.g. art. 69 para. 2 no. 3 of the Lithuanian Law on the Constitutional Court; art. 79 of the Russian Law on the Federal Constitutional Court.*

b) *Erga omnes effects*

As a rule, res judicata effects in general procedural law are restricted to the parties of the case, to possible other formal participants in the proceedings, and to public authorities dealing with the identical subject matter (other courts; administrative authorities). Unless otherwise provided by the legal order (res judicata effects may be extended, e.g., to successors of parties to the rights or obligations in dispute), private third parties are not bound by the conclusive and preclusive effects of res judicata.

In a number of legal orders⁴³ it is provided in constitutional laws or in laws on the Constitutional Court that decisions of the Constitutional Court shall have a binding effect erga omnes, i.e. beyond the personal scope of the res judicata effects, on all public authorities, and on natural or moral persons or entities subject to the legal order of the respective domestic jurisdiction. In scholarly doctrine it is controversial whether such kind of provisions merely mean an extension of res judicata effects or whether they produce a specific kind of effect.

The erga omnes effects of this kind of decision, nevertheless, are also subject to substantive, personal and temporal limits.

In distinction to the res judicata effects, this kind of erga omnes effect is not restricted to the identity of the subject matter of the case with its substantive, personal and temporal limits but extends to the abstract object of the procedure, i.e. independently of specific parties and their rights or obligations. In particular, not only the tenor of the decision but also the rationes decidendi form part of the erga omnes effect. For example a specific interpretation by the Constitutional Court of a constitutional provision to the exclusion of other interpretations, if it constitutes a ratio decidendi, may result in an erga omnes effect and bind all other courts or public authorities when deciding on different matters where the interpretation of this constitutional provision is relevant, if only as a prejudicial question. While the res judicata effects do not extend to parallel cases or cases successive to the (first) case by other parties, the erga omnes effect does so.

⁴³ Compare, e.g., paragraph 31(1) of the German law on the Federal Constitutional Court (BVerfGG); arts. 6 and 106 of the Russian Law on the Federal Constitutional Court of 24 June 1994, which entered into force on 23 July 1994; art. 10(1) of the Law on the Constitutional Court of the Republic of Belarus, adopted on 30 March 1994; art. 14(6) of the Bulgarian Constitutional Court Act of 30 July 1991 and art. 35(1) of the Bulgarian Rules on the Organisation and Activities of the Constitutional Court of 6 Dec. 1991; para. 27(7) of the Hungarian Law on the Constitutional Court of 1989.

The erga omnes effects extend also to private persons or entities not participating in the respective procedure but by an indirect way: they may rely on the (legal) fact that courts and public authorities are bound by these effects.

Constitutional Courts, on the other hand, should not be considered to be bound by these erga omnes effects (as distinguished again from res judicata effects to which they are bound): they may "overrule" prior cases and their "doctrines", thereby keeping constitutional law open for development.

- c) *In a number of constitutions or laws on Constitutional Courts it is, moreover, provided that certain kinds of decisions of Constitutional Courts shall have the force of (formal) laws, which means that they have to be applied or respected as law, e.g. by courts or administrative authorities and also by private entities, whenever called upon to do so within the scope of their application. They do not share the rank of the Constitution but rather of the norm reviewed by the Constitutional Court⁴⁴. This effect is provided, in particular, for decisions taken in proceedings for abstract review of norms (e.g. with regard to the existence or extent of general rules of international law or to norms from times before the actual constitution entered into force). It may also arise when the Constitutional Court, while dealing with another principal subject matter by way of incidental review, declares a prejudicial norm to be compatible or incompatible with the Constitution.*

This kind of "force of law" effect is to be distinguished from res judicata as well as from the erga omnes effect. Although these kinds of decisions have the force of law, they are not to be qualified as a legislative but as a judicial function. Like laws their effects have substantive, personal and temporal limits.

Only the tenor of this kind of decision gains force of law, but this can include the substantive content of the decision if contained in the tenor.

Procedural decisions, e.g. non-acceptance of the application or its inadmissibility, do not have this effect. The same is true of decisions on the merits rejecting an application as unfounded, even if the reasoning finds the norm to be compatible with superior law. The reasoning, on the other hand, may be adduced to interpret the tenor and thereby determine the extent of the

⁴⁴ Compare, e.g., para. 31(2) of the German law on the Constitutional Court; already para. 3 of the law implementing art. 13(II) of the Weimar Constitution of 1919 had provided for a force of law effect for decisions of the Reichsgericht. See also Art. 72(2) of the Lithuanian Law on the Constitutional Court no. I-67 of 3 February 1993.

force of law effect; but the reasons do not by themselves, in an isolated manner, have this effect.

3. *In practice, mainly two problems emerge from decisions declaring the incompatibility of a norm with superior law, either with the constitution or, e.g. in federal states, with federal laws:*
 - a) *Does the force of law effect relate only to the concrete norm reviewed by the Constitutional Court or does it extend to existing and to future norms which have an identical or essentially the same content as the norm reviewed?*

The solution to this problem depends on what is considered the subject matter of the review proceedings. If this is the concrete norm at stake, the force of law effect of the decision declaring the norm compatible with the Constitution does not extend to existing or to future norms with an identical or essentially the same content as the norm decided upon. If, on the other hand, the subject matter of the proceedings is not the concrete norm at stake but the question as to whether norms of this kind are compatible with the Constitution, the force of law effect extends to existing and to future norms with identical or essentially the same contents. To the author, the second model is to be preferred.

Whether a norm has an identical or essentially the same content cannot be determined by an abstract formula; it eventually depends on the Constitutional Courts' evaluation. It may be remarked, nevertheless, that a future norm, in spite of an identical wording with the norm reviewed by the Constitutional Court, may meet quite different factual, e.g. socio-economic, situations and for this reason may operate as quite a different "law in action". In such situations the force of law as well as well as the res judicata and the erga omnes effects of the decision, where the prior norm is found to be unconstitutional, shall not extend to the latter norm⁴⁵.

The same is true with regard to (parallel) norms with identical or essentially the same contents if the norms stem from different legislators (as may happen in federal or regionally structured states).

- b) *If the concrete norm under review is upheld by the Constitutional Court as compatible with the Constitution or other superior law but only on the basis of a certain interpretation, excluding other variants interpreting the norm as*

⁴⁵ See, e.g. paragraph 22(3) of the Hungarian Law on the Constitutional Court; paragraphs 41, 47 and 96 of the German Law on the Constitutional Court require "new facts" for restricting the temporal limits of the subject matter of a prior decision.

unconstitutional, set out in the reasons for the decision, are the reasons excluding as unconstitutional those other interpretations included in the force of law effects?

It is a controversial question, in case-law and in doctrine, as to whether interpretations finding norms at stake to be unconstitutional in the reasoning (but not in the tenor) of the decision of the Constitutional Court have force of law effects. While the reasons for the decision can be adduced for the purpose of the limited personal scope of res judicata effects in order to determine the scope of the tenor, legal security and transparency especially for private persons and entities demands that the force of law effects and erga omnes effects should be restricted to express and definite statements in the tenor of the decision of the Constitutional Court. In other words: exclusion of interpretations finding norms at stake to be unconstitutional only in the reasons of the decision should not have force of law effects. At the same time the inter partes res judicata effect of the decision remains unaffected by this consideration.

II. Effects of decisions of Constitutional Courts in preventive review proceedings

- 1. Preventive review of norms means review by the Constitutional Court prior to the enactment of laws or other normative acts⁴⁶. The scope of preventive review as well as the grounds on which decisions may be based varies, as can be seen, very much. While in Portugal principally all normative acts with the force of law (laws, decree-laws, regional legislative ordinances, international treaties) may be subject to preventive review on all grounds, in Austria, Italy and Spain it is limited to questions concerning the distribution of powers between the central State and its subdivisions (federated states, regions) or, as in Spain, to international treaties.*
- 2. The effect of decisions of Constitutional Courts declaring the legislative text submitted as incompatible with the Constitution consists in the prohibition of the final enactment (promulgation) of the bill⁴⁷. The head of the State or the*

⁴⁶ See, e.g., art. 61(1) and(2) and 41(2) of the French Constitution; art. 144 of the Rumanian Constitution, arts. 13, 17 and 37 of the Rumanian Law on the Constitutional Court; art. 26(4) of the Hungarian Constitution, paragraphs 1 lit. a, 30a and 33 of the Hungarian Law on the Constitutional Court. Preventive review proceedings are also provided for in Poland and in Estonia.

⁴⁷ E.g., in France and in Portugal. See also Art. 35(2) of the Hungarian Law on the Constitutional Court.

competent Minister may be compelled to veto the bill or ordinance⁴⁸. This does not necessarily mean that the legislative process on the bill is or has to be terminated⁴⁹; the legislature may well continue its procedure and correct (constitutionalise) the bill⁵⁰. Only if the Constitutional Court has plainly denied any competence to the respective (e.g. federal or regional) legislator over the subject matter, the legislative procedure is doomed to be terminated.

In Portugal the bar to the enactment of a bill or an ordinance found unconstitutional by the Constitutional Court can be overcome by a special vote of the competent norm creator requiring a two-thirds majority of the members present if such majority is higher than the absolute majority⁵¹.

3. *Whether a decision of the Constitutional Court declaring a bill or part of it to be incompatible with the Constitution (or superior norms) shall bar the future enactment of an identical bill or other normative text will, besides the question of identity of the future bill, also depend on the scope of review the Constitutional Court has applied.*

If the ruling on the (first) bill found to be incompatible with the Constitution was (exclusively) based on constitutional defects in the legislative procedure (required majorities or quorum; consent or non-opposition by a second chamber), such a ruling will not bar the enactment of an identical bill in the future, because those defects may be avoided by the future legislator (e.g. if required majorities or the consent of a second chamber may be assembled).

If the ruling was based on the lack of competence of the specific legislator (e.g. federal or regional) to enact the bill⁵², a future identical bill before the

⁴⁸ See, e.g. art. 279(1) of the Portuguese Constitution.

⁴⁹ Art. 279(1) of the Portuguese Constitution provides that in such cases the President of the Republic or the competent Minister has to send back the bill or ordinance to the competent organ. See also art. 145(1), sentence 1 of the Rumanian Constitution. If the law is passed again by a majority of at least two thirds of the members of each Chamber the objection of unconstitutionality shall be removed, and proclamation thereof shall be binding.

⁵⁰ Section 33 para. 2 of the Hungarian Law on the Constitutional Court expressly provides that Parliament or the person or organ (body) having submitted the bill shall eliminate the unconstitutionality; see also Section 35 para. 2 of this law.

⁵¹ Art. 279(2) and (4) of the Portuguese Constitution.

⁵² The scope of preventive control by the Austrian Constitutional Court is limited to legislative competences of the Federation or the member States (Länder), art. 138(2) of the Constitution; it does not extend to substantive provisions of constitutional law, such as fundamental rights. The Constitutional Court must pronounce whether the submitted bill comes within the legislative competence of the federal or of the states' legislative competences. The tenor must be framed as a

same legislator will be barred unless constitutional competences over the subject matter have changed.

The situation is more controversial where the decision on the incompatibility of the (first) bill with the Constitution was based on the violation of substantive provisions of the Constitution, e.g. of fundamental rights of private persons or entities. In the context also of decisions declaring unconstitutional enacted law, the question likewise arises whether the legislature is barred from a repeated adoption of a like legal act or part thereof. The German Constitutional Court, for example, has denied that the legislature⁵³ is thus barred, a decision not without opposition in scholarly discussion. It is a matter for debate as to whether this reasoning, in the context of repressive review, might also be valid in the context of preventive review.

- 4. The rationale for preventive review procedures, i.e. to gain legal security within a short period of time on the constitutionality of a normative text, might be undermined if a bill recognized as constitutional by the Constitutional Court in a procedure of preventive review could, after its enactment, be subjected to repressive review - provided the Constitutional Court had the power of full-scale review, i.e. extending to aspects of competence and to substantive provisions of the Constitution, such as fundamental rights.*

III. Effects of decisions of Constitutional Courts in repressive review proceedings

The effects of decisions of Constitutional Courts on enacted norms are of considerable variety in the various legal orders. Regarding the effects of repressive decisions finding an enacted norm unconstitutional, the legal orders under report have in common that such norms, as a rule, shall no longer be applicable. Different solutions nevertheless exist in reply to whether such norms are considered null and void as of the time of their enactment (ex tunc, ab initio) or as of the time of the decision of the Constitutional Court (ex nunc, pro futuro) or from a date that has been determined by the Constitutional Court itself. What

legal rule which according to the case law of the Constitutional Court has the rank of a federal constitutional law (collection of the decision no. 3055/1956).

⁵³ BVerfGE 77, 84 104.

can be said in general is that decisions declaring (in their tenor) a norm to be unconstitutional have a general binding effect erga omnes.

Widely similar solutions appear to exist with regard to the question of what effect is to be given to decisions on the constitutionality or unconstitutionality of a norm which are closely related to the factual situations in which that norm operates: a fundamental change of the factual situation always means that further proceedings may be required to challenge a subsequent norm of a similar nature. In such circumstances, a decision finding a norm unconstitutional does not bar a new law, even if identical in text with the prior law, nor is the new law in these circumstances covered by the res judicata or erga omnes effects of the (first) decision.

Differences, in particular with regard to future norms identical with a norm that has been declared unconstitutional, appear to result from different conceptions of the subject matter of the (first) decision: Is the subject matter the concrete specific norm actually decided upon, or is the subject matter the type of content contained in the norms, the actual norm decided upon being only representative of that content.

Other differences appear to result from the scope of review the Constitutional Court was allowed to apply as well as from the scope of review it has actually applied in the specific case. This may be relevant to the question whether and to what extent the reasons of a decision will have binding force.

Again a difference between the various legal orders appears to exist in relation to the question as to whether the finding by the Constitutional Court of the incompatibility of a norm with superior law is of declaratory or of annihilative effect. Those who start from the "pyramidal" structure of the legal order, implying that norms of a lower level which are violating norms of the higher levels are void from the time of such violation on, tend to accord such decisions a declaratory effect. Those who consider it to be a disposable question as to which consequences might be accorded to such violations tend to be more flexible and to leave it to the legislator to qualify such decisions as declaratory or as annihilative. Conclusions are drawn from these concepts with regard to the question from what date onwards (ex tunc, ex nunc, pro futuro) norms found incompatible with superior law by the Constitutional Court shall be considered as void, non-valid, inapplicable, repealed, or as no longer in force.

Most legal orders considered here appear to follow the Austrian model¹⁸, with some modifications as the case may be.

¹⁸ Arts. 140(5) sentence 2, 139(5) of the Austrian Constitution provide that the repeal of a law or an ordinance as unconstitutional by the Constitutional Court takes effect from the day when the repeal was promulgated by the Federal Chancellor or the competent Landeshauptmann, unless the Constitutional Court sets another term, which must not exceed the space of one year with laws or the space of six months with ordinances repealed. See also, e.g., art. 100(4) sentence 2 of the Greek Constitution, art. 136 of the Italian Constitution., art. 30(2) on the Italian Law no. 87/1953; art. 153(3) and (5) of the Turkish Constitution., Art. 161(3) of the Slovenian Constitution; art. 8(2) of the Belgian Special Law on the Arbitral Court; art. 72(1) of the Lithuanian Law on the Constitutional Court; the Bulgarian Constitutional Court by decision of 30 Dec. 1992 has repealed provisions of a law ex nunc. See further paras. 40 and 42 of the Hungarian Law on the Constitutional Court (ex nunc), if not ordered otherwise by the Constitutional Court, para. 43(4); art. 161 para. 1 of the Slovenian Constitution of 1991.

According to art. 282(1) and (2) of the Portuguese Constitution, such decisions have ex tunc effects; if however, the security of the legal order, equity or a considerable unusual public interest so require the Constitutional Court may set a more limited space of time for their effects.

Germany, on the other hand, follows the concept of voidness of the norm ab initio with the consequence that the decision is considered a declaratory judgment, not a repealing or invalidating decision. The rigidity of the ex tunc effect induced the German legislator (see paras. 31(2) and 79(1) of the Law on the Constitutional Court) and the Federal Constitutional Court in certain kinds of cases not to state the nullity of the norm but merely its "incompatibility" with the Basic Law, BVerfGE 28, 324 [362 f.], 81, 242 [263], which nevertheless has the effect that the norm is inapplicable. Only in exceptional cases the Constitutional Court has ordered a temporary further applicability of unconstitutional norms (BVerfGE 87, 114, [137]).

1. Effects of decisions in abstract review proceedings

By abstract review one can understand procedures whose principal subject matter is the question as to whether a norm is compatible or incompatible with superior norms, and whose purpose is to safeguard the objective legal or constitutional order⁵⁴. Abstract review exists not primarily for the safeguard of individual

According to art. 22 of the Bulgarian Constitutional Court Act, acts which have been declared unconstitutional shall not be implemented; if issued by an incompetent organ the Constitutional Court shall declare such acts null and void, Section 3. While apparently related to non-normative acts these provisions do not appear to simply exclude normative acts.

⁵⁴ See, e.g., art. 140(1) sentence 2 of the Austrian Constitution; arts. 1 and 2 of the Belgian Law on the Arbitral Court; arts. 149(1) nos. 2 and 150 of the Bulgarian Constitution; arts. 37 and 39 of the Italian Law no. 87/1953; art. 218(2) of the Portuguese Constitution; art. 161(1)a, 162(2) of the Spanish Constitution; art. 93(1) no. 2 of the German Constitution; art. 125(2) a-c of the Russian Const. of December 12, 1993; art. 160(1) of the Slovenian Constitution; art. 150 of the Turkish

interests but for the general interest of a community in the observance of the legal or constitutional order. The scope of possible applicants is accordingly restricted, as a rule, to persons or institutions who by their public functions have a corresponding responsibility.

Procedures for abstract review by Constitutional Courts are provided for in most European countries that have established Constitutional Courts.

a) *Decisions in abstract review proceedings are capable of having res judicata effects.*

aa) *With regard to procedural decisions rejecting an application as inadmissible, the res judicata effect consists merely in the statement that for the reasons given a decision on the merits at present is excluded. If the procedural obstacles can be lifted, this res judicata effect does not preclude a new application on the same substantive matter.*

bb) *Decisions rejecting the application on the merits as unfounded:*

In this case, Constitutional Courts may either simply reject the application in the tenor or may, in addition, positively state that the norm under attack is compatible with the Constitution (or other superior law, e.g. federal law).

Only if such a positive statement is included in the tenor will such a decision appear capable of having a force of law effect.

In either case, the rationes decidendi are important: it follows from these reasons what scope of review the Constitutional Court has applied and, accordingly, the scope of the res judicata effects. If the Constitutional Court - in rejecting the application - did not take into consideration certain superior norms, the res judicata effect is limited with regard to the scope of review actually applied by it⁵⁵. A repeated

Constitution; para. 1a, 19 ff. of the Hungarian Law on the Constitutional Court of 1989; art. 63 ff. of the Lithuanian Law on the Constitutional Court of 3 February 1993.

In several states not only (formal) laws but also sub-legislative norms, in Hungary even administrative provisions, may be the object of control of constitutionality and of legality by the Constitutional Court.

⁵⁵ *Art. 140(3) of the Austrian Constitution, e.g., provides that the Constitutional Court may repeal a law only to the extent the applicants have applied for. Only if the Constitutional Court is of the opinion*

application by the same applicant pleading the unconstitutionality of the norm for reasons of superior law not considered by the Constitutional Court in the (first) decision would not be barred by res judicata - but only to that extent.

cc) Decisions finding a norm incompatible with superior law:

(1) Their res judicata effects consist in the statement that the reviewed norm is incompatible with superior law. The scope of this statement follows from the rationes decidendi.

In practice, Constitutional Courts base such kind of decisions not infrequently solely on one or two norms of the superior law, this being sufficient for the result, and they do not consider any further norms of the superior law which might also support the violation. Compatibility of the norm under review with these further norms, accordingly, is not covered by the res judicata effects.

If the legislator enacts a new norm which does not suffer from the defects stated by the Constitutional Court, there is no res judicata effect resulting, conversely, in a finding that the new norm is compatible with the superior law - it might suffer from defects not taken into consideration by the first decision of the Constitutional Court. This is relevant, of course, only if the successive norm is in essence identical with the prior norm, in practice a rather rare circumstance.

(2) If the Constitutional Court has applied its full scope of review⁵⁶ to the impugned law and the legislator subsequently enacts a new law with identical content, the question as to whether the legislator and the Constitutional Court itself are bound by the res judicata effect of the first decision depends again on the concept of subject matter. If the subject matter is considered only as the constitutionality of the specific former law, then the new law is not covered by the subject matter of the (first) decision; if the subject matter of the (first) decision is considered as the issue of the constitutionality of the type of content of that law, then the second law, if in content essentially identical with

that the law as a whole was enacted by an incompetent organ or was not duly promulgated does it have to repeal the whole law (with the exception stated in sentence 3 of Section 3 of art. 140); see also art. 9 para. 2 of the Belgian Special Law on the Arbitral Court.

⁵⁶ Art. 22(1) of the Bulgarian Constitutional Court Act expressly provides that the Court shall not be limited to the indicated grounds for non-conformity with the Constitution.

the (first) law, is covered by the res judicata effect of the first decision and would bar a decision of the Constitutional Court deviating from its first decision. (It has been mentioned before that a fundamental change of the factual situation which the new law meets will change the subject matter of the procedure and accordingly not bar a new decision on the merits).

The res judicata effects - as distinguished from the erga omnes and the force of law effects - extend only to persons or organs who are formal participants in the proceedings or to those who are otherwise included by positive law. Applicants not covered by such personal limitations of res judicata, e.g. private persons who may attack the norm in question as the principal object of a constitutional complaint (where the legal order provides for such possibility), are not barred by the (first) decision of the Constitutional Court from attacking the norm.

The same is true with applications against parallel norms of identical content if the norms have originated from different legislators, as may be the case in States of federal or regional structure. A difference in legislators always means that different abstract review proceedings are necessary⁵⁷.

b) Erga omnes effects

While bound itself by res judicata effects within their substantive, personal and temporal limits, the Constitutional Court is not itself bound by the erga omnes effects of its decisions on the compatibility or incompatibility with superior law of the norm reviewed by it.

Erga omnes (or generally binding) effects of decisions of Constitutional Courts in abstract review proceedings are provided for in most of the legal orders under report. They extend the binding force of the decision far beyond the personal scope of res judicata effects to all persons and entities of a public or private nature.

Whether norms violating a superior law are repealed, invalidated, nullified or declared void, be it ab initio or pro futuro, decisions with such kinds of content have in common that the respective norms from the determined time

⁵⁷ See, e.g., Art. 4 nos. 1 and 3 of the Belgian Special Law on the Arbitral Court.

*or period of time onwards are no longer applicable and shall have erga omnes effects or, where so provided for, even the force of law*⁵⁸.

*It is a controversial question and may be worth discussions whether the erga omnes binding effect is binding or not on the Constitutional Court itself and, if it is not binding, whether the Constitutional Court is otherwise barred from deviating from its own decision declaring a law incompatible with the Constitution and from holding a new identical law to be constitutional. Equally controversial is the question as to whether the legislator is bound by this erga omnes binding effect*⁵⁹.

c) *The force of law effects of decisions reviewing norms.*

*Some legal orders provide that certain kinds of decisions of Constitutional Courts in review proceedings shall have the force of law*⁶⁰. *This means that all persons or entities of a public or private nature subject to the jurisdiction of the respective legal order will be privileged or bound directly by these kinds of decisions of Constitutional Courts*⁶¹. *This implies that in successive*

⁵⁸ See, e.g., arts. 14(6) and 22(2) of the Bulgarian Law on the Constitutional Court of 30 June 1991; arts. 93(4) and 100(4) sentence 2 of the Greek Constitution; art. 21 of the Greek Law 345/1976; art. 62 para. 2 of the French Constitution (for preventive norm control decisions); art. 136 para. 1 of the Italian Constitution; arts. 139(6), 140(6), 140a(2) of the Austrian Constitution; art. 125(6) of the Russian Constitution; art. 72(1) and (2) of the Lithuanian Law on the Constitutional Court; art. 281 of the Portuguese Constitution; art. 164(1) sentence 2 of the Spanish Constitution, art. 40(2) of the Spanish Organic Law on the Constitutional Court provides, that in any case the jurisprudence of the courts of ordinary jurisdiction on laws, provisions and acts is to be considered as corrected by the doctrines (doctrina) which derive from the decisions of the Constitutional Court in procedures of abstract or concrete review; art. 1 of the Slovenian Law on the Constitutional Court; art. 27(2) of the Hungarian Law on the Constitutional Court; art. 10(1) on the Belarus Law on the Constitutional Court; para. 31(1) of the German Law on the Constitutional Court.

⁵⁹ Both questions are very controversial in Germany. While the Constitutional Court denies a binding effect upon itself (BVerfGE 4, 31 [38]; 20, 56 [86 f.]; 33,199 [203]; 39,169, as well as upon the legislator (BVerfGE 77, 88 [104]), this is contested in scholarly doctrine (see, e.g., Benda/Klein, Verfassungsprozeßrecht, 1991, note 1254).

⁶⁰ See, e.g. art. 100(4) of the Greek Constitution; art. 72(2) of the Lithuanian Law on the Constitutional Court; the most comprehensive provision in this context appears to be para. 31 sec. 2 of the German Law on the Constitutional Court; decisions in the following kinds of procedures shall have the force of law: in case of differences of opinion or doubts on the formal or substantive compatibility of federal or state (Land) law with the Basic Law, or on the compatibility of state law with other federal law, on the request of the federal government, a state government, one third of the members of the federal diet, or on request by a court; in case of doubt whether a general rule of public international law is an integral part of federal law when such decision is requested by a court; in the case of differences of opinions on the continuance of pre-constitutional law as federal law; on complaints of unconstitutionality (art. 93(1) nos. 4a and b of the Constitution), if the Constitutional Court declares a law to be compatible or incompatible with the Basic Law or to be null and void.

⁶¹ See, e.g. Art. 72(2) of the Lithuanian Law on the Constitutional Court.

court proceedings everybody may rely on the decision of the Constitutional Court and that the courts of ordinary jurisdiction can no longer question the decision of the Constitutional Court. Also, the Constitutional Court itself will be bound by such kinds of decisions in successive proceedings.

A force of law effect of decisions rejecting the claim of unconstitutionality can be accorded only to the tenor of the decision of the Constitutional Court and only to the extent that it positively states the rule that shall have force of law; decisions merely rejecting an application as unfounded on the merits are not capable of having the force of law.

Decisions declaring the norm at stake to be incompatible with superior law are capable of having force of law effect. The extent of this effect depends, on the one hand, on whether the legislator is considered to be bound by this effect, and, on the other hand, on the conception of the subject matter of the proceedings. If one considers again the subject matter to comprehend the question as to whether the type of content of the disputed norms decided upon is compatible or incompatible with superior norms, the force of law effect also extends to future norms of essentially the same content - provided, again, that the factual situation can be evaluated as not having fundamentally changed, and provided, moreover, that one considers the legislator to be bound by decisions accorded the force of law.

If one denies that the legislator itself is bound by decisions accorded the force of law⁶², or considers the subject matter of such decision to comprehend only the actual norm at stake, but not the kind of norms with essentially identical content, there is no bar either to the legislator enacting an identical norm in the future or to the Constitutional Court deliberating anew on the constitutionality of such a future norm.

d) *Summary*

If the Constitutional Court has rejected on the merits an application for review confirming the compatibility of the norm at stake with superior law, the validity of the norm is res judicata. A new application in respect of the same norm cannot lead to a decision deviating from the first decision. The res

⁶² *The German Constitutional Court denies that the legislator itself is bound by the force of law effect on the grounds that art. 20(3) of the Basic Law provides that "legislation shall be bound by the constitutional order", while "the executive and the judiciary shall be bound by law and justice". While in the opinion of this rapporteur this argument is convincing it is opposed by some scholarly doctrine.*

judicata effect, nevertheless, has subjective, substantial, and temporal limits. It does not extend to persons or entities who were not formal participants in the review proceedings. A fundamental change of the factual situation changes the subject matter of a new application procedure.

A specific problem is whether a new application against the same norm can be admitted in circumstances where it relies upon new legal concepts developed by constitutional doctrine. Constitutional rules and principles are also subject to conceptual changes and developments. If accepted by the Constitutional Court such a change may eventually lead to the result that the Constitutional Court considers a norm to be unconstitutional which it had formerly considered as constitutional.

The force of law effect operates inter omnes; as a consequence it also bars applications against the same norm by persons and entities who have not been participants in the prior proceedings. Nevertheless, the force of law effect also has substantive and temporal limits. It appears to be somewhat controversial whether a new application against the same norm, formerly declared compatible with superior law, can admissibly be based on legal grounds not dealt with by the Constitutional Court in its first decision (although it was not precluded by its available scope of review). As far as fundamental changes in factual circumstances and fundamental developments in constitutional doctrines are relevant, reference is made to the remarks above.

2. Effects of decisions in concrete review proceedings

There is a terminological consensus that by concrete review proceedings is meant procedures where a court or other authorised organ⁶³ in a case pending before it has doubts or considers a law to be unconstitutional where the validity of that law is relevant to its decision and refers the issue of its constitutionality (or, where so provided for, of the compatibility of a norm with superior law) to the Constitutional Court. Such kinds of procedures are provided for in most legal orders under consideration⁶⁴, with some variations

⁶³ See, e.g. para. 39 of the Hungarian Law on the Constitutional Court, whereby even private parties to the pending case may bring about such reference, para. 38.

⁶⁴ See, e.g., art. 26 of the Belgian Special Law on the Arbitral Court; arts. 149(1) no. 1 and 150(2) of the Bulgarian Constitution; art. 100(1) lit. e of the Greek Constitution., art. 6 lit. e of Greek Law no. 345/1976, art. 48 ff. of the Greek Law on the Special Supreme Court; art. 1 of the Italian Law on the Constitutional Court, art. 23 of the Italian Law no. 87/1953 in connection with supplementary provisions of 16 March 1956; arts. 89(2) to(4), 139(1) and 139a of the Austrian Constitution; art.125(4) of the Constitution of the Russian Federation of 12 December 1993, arts. 96 to 100 of the Russian Law on the Federal Constitutional Court; arts.106, 110 para.2 of the Lithuanian

in particular as to the kinds of courts authorised to initiate the reference procedure, the kinds of norms subject to it, the required degree of conviction or doubt by the referring court, the scope of review by the Constitutional Court, and the effects of decisions.

- a) *The subject matter of concrete review is the legal question as to whether the norm referred to the Constitutional Court is compatible with superior law. The referring court is not considered, as a rule, to be a participant in the sense of the subjective element of the subject matter (unlike the applicant in abstract review procedures), nor are any public organs or persons authorised to formally intervene in the procedure. The parties to the case pending before the referring courts may nevertheless be heard by the Constitutional Court.*

The factual context of the norm has the same importance for the identity of the subject matter of the procedure as in the case of abstract review, because it co-determines the substantive content of the subject matter. If the factual situation is fundamentally changed, the identity of the subject matter is again changed, and a prior decision by the Constitutional Court accordingly will not bar a new challenge to an identical norm. Neither its res judicata or erga omnes effects, nor its force of law-effects, will operate as a bar to a new decision on the merits.

As the referring court is not a subjective element of the subject matter of the procedure, the subject matter is not changed by the mere circumstance that various courts at the same time or successively may have referred the same norm to the Constitutional Court; this does not result in the inadmissibility of "parallel" references as long as the Constitutional Court has not rendered a final decision on the merits. In addition, the objection of lis pendens in idem re does not apply because, as has been mentioned, the referring courts are not subjective elements of the subject matter.

Constitution, arts. 65 no. 1, and 67 of the Lithuanian Law on the Constitutional Court; art. 144 lit.c of the Romanian Constitution, arts. 13(1) lit. Ac, and 23 of the Romanian Law on the Constitutional Court; art. 152 of the Turkish Constitution; art. 163 of the Spanish Constitution; art. 156 of the Slovenian Constitution; art. 38 of the Hungarian Law on the Constitutional Court; art. 8 CH.III/a of the Albanian Constitution; art. 152 of the Estonian Constitution; art. 14 of the Croatian Law on the Constitutional Court; arts. 11,12,25, and 28 of the Polish Law on the Constitutional Court; art 144 of the Slovakian Constitution, para. 38 of the Slovakian Law on the Constitutional Court; art. 95 of the Czech Constitution, para. 64(4) of the Czech Law on the Constitutional Court; art. 101(2) of the Kazakhstan Constitution; art. 87 of the Kyrgyzstan Constitution; art. 100(1) of the German Constitution; paras. 13 no. 11, 80 ff. of the German Law on the Constitutional Court. Art. 100(2) of the German Constitution provides for a reference procedure to verify whether or to what extent general rules of public international law form an integral part of German federal law.

- b) *The Constitutional Court's scope for review of the norm referred, in general, is not limited by the arguments submitted by the referring court nor by the arguments of parties to the case pending before the referring court.*
- c) *With regard to the res judicata effects of decisions in concrete review proceedings, the same considerations as with abstract review are valid in respect of temporal and substantive (objective) limits⁶⁵.*

(1) Differences may exist, however, in respect of the subjective limits of the res judicata effects. Only where the legal order authorises public organs or private persons or entities to formally intervene in the procedure before the Constitutional Court will such persons or bodies be covered by the personal scope of res judicata. This means, as indicated above, that, in particular, neither referring courts nor the parties to the case pending before them are as such covered by the personal scope of the res judicata effects deriving from the decision of the Constitutional Court. Without formal participants in the proceedings before the Constitutional Court, there will be no subjective scope for such res judicata effect. Nor will the Constitutional Court itself in such a kind of situation be bound by res judicata. A particular legal order, nevertheless, may provide otherwise⁶⁶.

The referring court is bound by the decision of the Constitutional Court on the merits not because of any subjective scope of res judicata but from an inner procedural binding effect (comparable to that binding a lower court to the decision of a court of appeal referring the case back to the lower court).

(2) When there are formal participants before the Constitutional Court its decisions are capable of res judicata effects. Then also the Constitutional Court is bound. With decisions declaring the norm referred incompatible with superior law, their effects correspond to the effects in abstract review proceedings: the res judicata covers the statement that the norm referred is

⁶⁵ See above Chapter III.1.

⁶⁶ Art. 9, paragraph 1 of the Belgian Special Law on the Arbitral Court, e.g., provides that the decisions of the Arbitral Court nullifying a norm have "l'autorité absolue de la chose jugée" from the time of their publications in the *Moniteur belge*. Art. 38 sec. 3 of the Spanish Organic Law on the Constitutional Court provides that the parties to the case before the referring court are bound by the decision of the Constitutional Court. Art. 48 of the Greek Law on the Special Supreme Court deals with a procedure comparable to concrete norm control: If the Council of State (*Conseil d'Etat*), the *Areopag* or the Court of Account in questions of substantive constitutionality or the meaning of a formal law have rendered contradictory decisions, the special Supreme Court on application shall settle the dispute. The right of application is also vested in every person having a legal interest. Parties to the procedure before the Special Supreme Court are, besides the applicants, also all parties to the proceeding in which the decision to refer the case to the Special Supreme Court has been rendered. The decision of the Special Supreme Court is accorded *erga omnes* effects.

incompatible with superior law. The precise extent of the tenor may be ascertained by the rationes decidendi of the reasons for the Constitutional Court's decision.

- d) *Erga omnes and force of law effects accrue to these decisions under similar conditions and to an equal extent as in the case of abstract review decisions.*

If there have been no formal participants before the Constitutional Court in the concrete review proceedings, the effects of the decision comparable to res judicata effects will result exclusively from the erga omnes generally binding (and force of law) effects of the decision, unless provided otherwise by the particular legal order⁶⁷.

While the Constitutional Court itself is bound also in concrete review proceedings by res judicata effects (if, as has been mentioned above, a decision is capable at all of producing res judicata effects) as well as by the force of law effects, if so provided in the respective legal order, it is not considered to be bound by the erga omnes effects of its decisions. Unless otherwise provided in law⁶⁸ it might be possible that a renewed reference by a court of the same norm which had been previously found to meet with no objection would be admissible and result in a decision finding the norm now to be incompatible with superior law in circumstances where the referring court in the reasoning of its second referring decision convinces the Constitutional Court to change its mind.

- e) *If the Constitutional Court in its decision finds the norm referred to be unconstitutional, the legislator is bound to repeal norms of an identical content. Similarly the courts in a relevant reference situation have to refer other such norms to the Constitutional Court. Such a reference is not barred as inadmissible because parallel norms are covered by the erga omnes and, where so provided in the particular legal order, by the force of law effects of the decision. A corresponding reference obligation must be assumed if a legislator repeats the enactment of a norm with an identical or essentially identical content to the norm found incompatible with superior law by the Constitutional Court.*

⁶⁷ See above Chapter III.1

⁶⁸ Art. 152(4) of the Turkish Constitution, e.g. provides that no allegation of unconstitutionality shall be made with regard to the same legal provision until ten years have elapsed from the publication in the Official Gazette of the decision of the Constitutional Court dismissing the application on its merits.

In all these situations, as has repeatedly been stated, the temporal and substantive limits of the erga omnes and force of law effects will have to be observed.

f) *Relationship of concrete review decisions to decisions in constitutional complaints proceedings.*

The decision on the norm referred to the Constitutional Court in concrete review proceedings is binding upon the referring court; it has to proceed and decide the case on the basis of the Constitutional Court's finding that the norm referred is compatible or incompatible with superior law, as the case may be.

In a number of legal orders, nevertheless, complaints of unconstitutionality against the final decisions of courts, after exhaustion of judicial remedies against the decision, may be brought before the Constitutional Court on the assertion that the decision of the court violates the constitutionally guaranteed rights or liberties of the complainant⁶⁹.

If an admissible constitutional complaint is brought before the Constitutional Court against a court decision which was rendered after the court had requested during its proceeding a decision by the Constitutional Court on the compatibility of a relevant norm with superior law, the question may arise whether the Constitutional Court in the constitutional complaint proceedings against the decision of the court is bound by its former decision on the merits following the request for concrete review.

In such a circumstance, the subject matters of the concrete review proceedings and of the constitutional complaint are not identical. Accordingly, the res judicata effect will not bar the admissibility of the complaint. While the Constitutional Court itself is not bound by the erga omnes effect of its decision in the concrete review procedure, it will also be bound by the force of law effect, if that is provided for in the particular legal order, in respect of the decision on the constitutional complaint. The complainant can therefore rely on this force of law effect.

⁶⁹ See, e.g., art. 113(1) no. 3 of the Swiss Constitution, against decisions of cantonal courts; section 95 (2) of the Maltese Constitution; arts. 161(1) lit. b, 53(2), 14 to 29 of the Spanish Constitution, arts. 41 ff. of the Organic Law on the Constitutional Court; arts. 280 of the Portuguese Constitution, 70, 72 of the Portuguese Law 28/82 as amended 1989; art. 12(4) of the Russian Constitution may imply complaints against judicial decisions; paras. 1 lit. d, 48 of Hungarian Law on the Constitutional Court; arts. 160(1) of the Slovenian Constitution 1991; art. 93(1) no. 4a of the German Constitution.

3. Effects of decisions reviewing norms in constitutional complaint proceedings

In a number of legal orders, a complaint of unconstitutionality may be brought directly against norms as the principal subject matter of the procedure⁷⁰. For admissibility, and in particular for standing, it is in general required that the complainant must claim to have been directly violated by the impugned norm in his/her constitutionally guaranteed rights or liberties, i.e. that the violation results purely from an administrative or judicial act implementing the norm⁷¹.

- a) *While the primary function of the constitutional complaint certainly is the protection of individual subjective rights guaranteed by constitutional law, it operates at the same time to safeguard the Constitution as part of the objective legal order. This is not without consequences for the determination of the subject matter of the constitutional complaint, and consequently for the effects of the decisions of the Constitutional Court. The subjective element of the subject matter is the request of the complainant that the Court declare void, repeal or invalidate the norm attacked, whereas the objective element is the compatibility of the norm with constitutionally guaranteed rights and liberties.*
- b) *There exist a number of divergences between the various legal orders providing for such kinds of constitutional complaint on how they are to be dealt with by the respective Constitutional Courts e.g. with regard to the scope of review⁷² or of the type of decision requested, but these will not be pursued here in detail.*

⁷⁰ See, e.g., arts. 1 and 2(2) of the Belgian Special Law on the Arbitral Court; arts. 139 (1) sentence 3, 139 a, sentence 2, 140(1), sentence 4 of the Austrian Constitution; art. 84(1) of the Swiss Law on the Organisation of the Federal Judiciary (against cantonal norms); art. 93(1) no. 4a of the German Constitution; paras. 90 ff. of the German Law on the Constitutional Court. In Greece everybody who has a legal interest may intervene in a proceeding before the Special Supreme Court, arts. 13(1), 48(1) lit. b, Law 345/1976 which may lend the procedure a function equal to a constitutional complaint, while such complaint is not provided for as a separate kind of procedure. See also arts. 96 to 100 Russian Law on Federal Constitutional Court, art.125(4) of the Constitution of the Russian Federation of 12 December 1993; art. 160 paras. 1 and 3; 161 para. 2 Slovenian Constitution; art. 127 of the Slovakian Constitution, para. 49 ff. Slovakian Law on Const.Court; art. 87 sec. 1 lit. d Czech Const., para. 72-74 of the Czech Law on Const. Court.

⁷¹ Paragraph 48(1) of the Hungarian Law on the Constitutional Court appears to require the violation of rights by the application of an unconstitutional norm. The principal subject matter before the Constitutional Court, accordingly, would not be the norm but the act of application, possibly a court decision in the course of exhausting other legal remedies. The question of the constitutionality of the applied norm in such situations would be a prejudicial issue.

⁷² In Switzerland it is the practice of the Federal Supreme Court to take into consideration only those aspects of the asserted unconstitutionality of a cantonal norm which have been alleged by the complainant. In Germany the Constitutional Court has extended its scope of review not only beyond

It may be worth discussing whether, if the complaint is admissible, the Constitutional Court may review a possible violation of other fundamental rights or liberties not claimed to have been violated by the complainant, or even norms beyond fundamental rights, such as possible violations of legislative forms or competences. If so, the procedure of constitutional complaint would tend to operate even more as an instrument to safeguard the objective constitutional order.

Depending again on what one considers to be the subject matter of the procedure - the compatibility or incompatibility of the norm under attack with the fundamental rights or liberties in concreto of the complainant, or the compatibility or incompatibility of the kind of contents of the norms under attack with fundamental rights or liberties in general - the Constitutional Court, on the second view, may find the norm under attack to be unconstitutional even if it does not violate, in concreto, the rights or liberties of the specific complainant.

- c) *If the norm under attack is found unconstitutional according to the scope of review applied by the Constitutional Court, it will be repealed, declared void or invalidated as unconstitutional⁷³; whether the constitutional provision which is violated must be expressly cited in the tenor depends on the respective legal order⁷⁴. The tenor accrues to res judicata, and its extent may be ascertained by the rationes decidendi. In a subsequent complaint the Constitutional Court is bound by the res judicata effect, provided there is identity of subject matter (with its subjective, substantive and temporal limits), and must have regard to the prejudicial character of the (first) decision in the subsequent case.*

the fundamental rights claimed by the complainant as having been violated but also to other norms of the Basic Law or constitutional principles (see, e.g. BVerfGE 87, 181 [196 f.]; 76, 256 [363]), a practice that is controversial in scholarly literature as to its admissibility. In Austria the Constitutional Court in constitutional complaints may repeal a law only to the extent it has been expressly pleaded by the complainant. Otherwise, the law would have to be applied in the procedure before the Constitutional Court itself. If, nevertheless, the Constitutional Court finds the law as a whole to have been enacted by an incompetent legislator or has been promulgated in an unconstitutional manner, it must repeal the whole law, unless such total repeal would operate against the interests of the complainant, art. 140(3) (see also art. 139(3)) of the Constitution).

⁷³ *As to the variety in the various legal orders of the formula of tenors in respect of the time from which the unconstitutionality shall operate (ab initio, pro futuro, as determined by the Constitutional Court) see above.*

⁷⁴ *In Germany para. 95(1), sentence 1 of the Law on the Constitutional Court provides that the decision upholding a complaint shall state which provision of the Basic Law has been infringed and by what act or omission.*

Neither the rationes decidendi nor the interpretations in the reasoning of the Constitutional Court of constitutional or subconstitutional norms are as such capable of a type of isolated res judicata effect. That is even true of violations of other fundamental rights which the Constitutional Court has found if they are mentioned only in the reasons but not in the tenor of its decision. Whether the decision accrues an erga omnes force or a force of law effect depends on the particular legal order⁷⁵. If it does provide for an erga omnes effect such effect comprises the tenor and the rationes decidendi. All addressees of the erga omnes binding force of the decision may rely on the incompatibility of the norm attacked with superior law as stated by the Constitutional Court. This may be ascertained also from the rationes decidendi. As mentioned before, however, the Constitutional Court itself in a subsequent proceeding is not bound by the erga omnes effects but may overrule its former decision.

- d) *If the constitutional complaint is rejected on the merits by the Constitutional Court, the effects of the decision depend on the framing of the tenor.*

If the tenor merely rejects the complaint, this does not as such imply that the norm under attack is constitutional - it may simply mean that the fundamental rights or liberties of the complainant have not been violated by it: the impugned norm might not be compatible with other provisions of the Constitution which have not been included in the review. The force of law effect, if provided for at all in the particular legal order, will only comprise positive statements in the tenor to the effect that the norm under attack is compatible with the Constitution (or superior law).

The force of law effects may be relied upon also by persons who are not participants in the constitutional complaint⁷⁶.

4. Effects of incidental decisions reviewing norms

⁷⁵ See above. Art. 9(1) of the Belgian Special Law on the Arbitral Court accords to decisions nullifying norms in the sense of art. 1 "l'autorité absolue de la chose jugée".

⁷⁶ Para. 95(1) sentence 2 of the German Law on the Constitutional Court authorises an unusual decision: If the constitutional complaint is successful the Constitutional Court may at the same time declare that any repetition of the act (or omission) complained of will infringe upon the Basic Law. This provision is applicable also in respect of norms. Whether the provision only excludes repetitive norms by the same legislator or inhibits norms of essentially the same content as have been attacked by the complaint but enacted by other legislators is controversial. If such a norm were a law, the inhibitory effect would in any case result from the force of law effect under para. 31(2), sentence 2 of the Law on the Constitutional Court.

In a number of legal orders it is provided that the Constitutional Court, while dealing with some other principal matter of procedure, may nevertheless decide upon the incompatibility of a prejudicial norm with constitutional or with other superior law⁷⁷. It may do so by a separate decision, like in Spain by the Plenary Court, or jointly with the decision on the principal subject matter. If in the latter case the statement of the unconstitutionality of the norm is part of the tenor, the effects of this decision are similar to those in abstract or concrete review proceedings. If the principal subject matter, e.g., is a decision of a court based on the unconstitutional norm, the court's decision will be repealed, even if the Constitutional Court has stated the incompatibility of the norm at stake in the reasons only.

The question of the unconstitutionality of a norm may also become prejudicial in procedures the subject matter of which is the question of legislative competences, e.g., between the central (federal) State and its subdivisions (federated states, regions, provinces with legislative powers) or even between supreme organs of the (central) State such as the respective legislative competences of chambers of parliament.

5. Other effects of decisions declaring norms to be incompatible with the Constitution or with other superior law.

As has been remarked above, there are various answers in the legal orders to the question from what time on (ex tunc, ex nunc, as determined by the Constitutional Court) a norm declared unconstitutional by the Constitutional Court shall be considered repealed, void, invalidated, inapplicable or entering out of force. The question remains as to what the effect of such a decision will be

- *on legislative acts which had been amended or repealed by the norm declared unconstitutional,*
- *on administrative acts, and*

⁷⁷ See, e.g., arts. 139(1), sentence 1 2d alternative, Sections 2 and 3; 139a sentence 1 2d altern., sentence 2; 140(1) last altern.; Sections 2 to 4 of the Austrian Constitution; if a Senate of the Spanish Constitutional Court considers a constitutional complaint against a decision of a court successful because the law applied by the court violates rights and liberties, it submits the issue of the unconstitutionality of the law to the Plenary Court which may declare the law at stake unconstitutional in a new judgment. This judgment accrues the same effects as a decision in concrete review proceedings, arts. 55(2) and 38 of the Organic Law on the Constitutional Court. If the German Constitutional Court holds a constitutional complaint against a decision to be successful because it rests on an unconstitutional law, the law will be declared null and void or incompatible with the constitution, para. 95(3), sentence 2 Law on the Constitutional Court.

- *on judicial decisions based on such norm prior to the decision of the Constitutional Court.*

Regardless of whether in the respective legal orders the decision of the Constitutional Court on the norm is considered to have effects ab initio or pro futuro, the solutions adopted in respect of judicial decisions and administrative acts are similar to a considerable extent, although differences exist in particular with regard to procedures⁷⁸.

In respect of legislative acts it is occasionally expressly provided (for example in Austria and Portugal) that the legal provisions which had been amended or repealed by the law declared unconstitutional are revived from the date on which the decision of the Constitutional Court becomes effective⁷⁹, unless the Constitutional Court determines otherwise. Most legal orders remain silent, however, on this question.

Whatever the answer may be, the Austrian and Portuguese solutions appear to be wholly adequate considering that any other solution might face quite complex and, as the case may be, unforeseeable problems.

Administrative and judicial acts which had become final prior to the decision of the Constitutional Court but had been based on the norm declared unconstitutional remain unaffected, as a rule, but may no longer serve as titles for execution. Nor may the decisions of the Constitutional Court be outmanoeuvred by repetition of an identical administrative act against the same addressee.

Final penal judgments (sentences) will, as a rule, be subject to resumption procedures before the criminal courts under the respective codes of criminal procedure. As regards further execution of private law judgments, objections against their execution may be interposed under the respective codes. In some legal orders resumption procedures may be initiated also in respect of administrative court procedures⁸⁰.

⁷⁸ Art. 22(4) of the Bulgarian Constitutional Court Act provides that the "legal effects" which have occurred on the basis of an act declared unconstitutional shall be resolved by the organ which has issued it.

⁷⁹ See, e.g., Art. 282(1) of the Portuguese Constitution; Art. 140(6) of the Austrian Constitution which also provides that the publication of the Constitutional Court's decision must make known whether and which legal provisions shall enter into force again. For a comprehensive survey on these questions in the new legal orders of East European states see Georg Brunner, *Die neue Verfassungsgerichtsbarkeit in Osteuropa*, in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 53 (1993), p. 819 ff., 849 ff.

⁸⁰ For details see, e.g., arts. 10 ss., 16 to 18 of the Belgian Special Law on the Arbitral Court which provide for comprehensive resumption procedures with regard to penal, private law and administrative court decisions; art. 51 of the Greek Law on the Special Supreme Court which, i.a.,

B. Decisions of the constitutional court and their effects - Report by Prof. Vasile GIONEA, Member of the Academy, President of the Romanian Constitutional Court

I. According to Section 13 of Act no. 47/1992, the Constitutional Court issues decisions, judgments and opinions.

A. There are four types of claim which give rise to decisions:

- a. claims concerning the constitutionality of laws before their promulgation. Authority to refer such claims to the Constitutional Court is vested solely in the President of Romania, the Government, the Supreme Court of Justice, the Speaker of the Senate and of the Chamber of Deputies, and a group of 50 Deputies or 25 Senators;*
- b. claims concerning the constitutionality of parliamentary standing orders, referred by either Speaker, a parliamentary group or a minimum of 50 Deputies or 25 Senators;*
- c. objections raised before the courts alleging the unconstitutionality of laws and government regulations;*
- d. objections relating to the constitutionality of a political party.*

B. Judgments are also delivered in four cases, where the Court:

- a. ensures compliance with the procedure for electing the President of Romania and confirms the election results;*

provides that administrative acts, issued during a retroactive space of time of the declaration of unconstitutionality of a law must be revoked by the administrative authorities within six months; according to art. 30 paragraphs 3 and 4 of the Italian Law no. 87/1953 with regard to penal sentences execution and all consequences of a penal nature are terminated; art. 140(7) of the Austrian Constitution; art. 282(3) of the Portuguese Constitution; art. 72(2) of the Lithuanian Law on the Constitutional Court provides that all governmental institutions as well as their officials must revoke executive acts or provisions thereof which have been based on an act that was found unconstitutional by the Constitutional Court; paragraph 43(2 to 4) of the Hungarian Law on the Constitutional Court; paragraph 79(1 and 2) of the German Law on the Constitutional Court.

- b. *determines that there are circumstances warranting an interim in the office of President of Romania and submits its findings to the Parliament and the Government;*
 - c. *oversees compliance with the procedure laid down for organising and conducting referenda, and confirms the results thereof;*
 - d. *verifies fulfilment of the requirements for the exercise of legislative initiatives by citizens.*
- C. *The Court gives advisory opinions on any proposal to suspend the President of Romania from office.*

The decisions and judgments of the Court are delivered in the name of the law, under Section 13 (2) of the aforementioned Act.

I find the division of the Constitutional Court's pronouncements into decisions and judgments questionable. Judgments have a broader ambit than decisions; they take in both decisions and rulings. Pronouncements headed "judgments" should therefore have been termed rulings or, alternatively, if these are regarded as emanating from lower judicial authorities (magistrates and courts), all pronouncements of the Constitutional Court could be referred to as decisions.

As explained above, Constitutional Court proceedings can be instituted only by the President of Romania, the Speaker of either House of Parliament, the Government, the Supreme Court of Justice, a minimum of 50 Deputies or 25 Senators and, ex officio where initiatives for revision of the Constitution are concerned, by a parliamentary group alleging constitutional defects in the standing orders of the Houses of Parliament, and by the authorities before which objections of unconstitutionality have been raised.

In the United States, citizens are also able to allege the unconstitutionality of a law before any judicial authority.

In Austria, Belgium, Spain, France, Italy, Poland, Portugal, Turkey and Yugoslavia, locus standi before the Constitutional Court or Tribunal is enjoyed by political and public authorities (the Head of State or the Government, the parliamentary assemblies or their presidents, a specified number of parliamentarians - 1/3 of the members in Austria, 1/10 in Portugal, 60 deputies or senators in France, 50 in Spain and Portugal, and the ombudsman and the state prosecutor in Spain).

In Spain, Italy and Germany, any judicial body can refer to the Constitutional Court a constitutional complaint made before it. In Austria, only courts of appeal may do so⁸¹.

- II.** *When on referral of a claim by the competent authority the Constitutional Court reviews a law before promulgation and finds it contrary to the provisions of the Constitution, it does not make a decision setting aside the unconstitutional terms of the law but merely **ascertains** their unconstitutionality. In this case the Court's decision is not subject to appeal. The normal implication would be that the decision is final upon delivery. However, Article 145 (1) of the Constitution specifies that the law is returned to the Chambers of Parliament for reconsideration. "If the law is passed again in the same formulation by a majority of at least two-thirds of the members of each Chamber, the objection of unconstitutionality shall be removed, and promulgation shall be binding".*

It should be made clear that Article 145 (1) of the Constitution refers to the review not only of laws before promulgation but also of the standing orders of each House of Parliament. These are also to be returned for reconsideration. A similar arrangement applies in Portugal and Poland⁸². Where a law is at issue, the two Houses may decide by a qualified majority that it complies with the constitution, in which case the objection of unconstitutionality is rejected and the law must be promulgated. With standing orders this possibility is not available to the Chambers as they are compelled to abide by the Constitutional Court's decision.

Consequently, the decision whereby the Court declares a law or certain provisions thereof unconstitutional is not binding at the time of its delivery but only upon its acceptance by the two Chambers after they have reconsidered the law. The effects of the decision are therefore subject to a condition subsequent, namely confirmation by the Houses of Parliament.

Decisions in which the court holds unconstitutional certain provisions of the Chamber of Deputies and Senate standing orders are binding and irreversible upon delivery. They are therefore effective "ex tunc".

The ability of the Chambers (under Article 145 (1) of the Constitution) to push through parliament a law declared unconstitutional by the competent

⁸¹ Louis Favoreu, *Le modèle européen de la Cour Constitutionnelle*, p. 3.

⁸² D. Rousseau, *La justice constitutionnelle en Europe*, pp. 29-30 and 109.

body is not legally justified and can be regarded as contrary to the separation of State powers.

In the situation described above, the legislature is applying its censure to the rulings of a judicial authority.

The Constituent Assembly caused this principle to be embodied in Article 145 (1) but whatever its vindication it conflicts with the other fundamental principle, the separation of powers which applies in all other law-based States. It has been argued, groundlessly of course, that if the principle in question had not been embodied in Article 145 (1), the Constitutional Court would have been placed above the Parliament. The Constitutional Court is Romania's sole authority with constitutional jurisdiction; it is independent vis-à-vis all other State authorities and bound only by the Constitution and the Act governing its organisation and operation (no. 47/1992).

Regrettably, neither Article 145 of the Constitution nor the aforementioned Act specifies a time-limit within which the Houses of Parliament must reconsider a law declared unconstitutional, so that indefinite deferral of this process is possible unless Parliament has an interest in passing the law.

The Constitutional Court has its decisions published in the "Monitorul Oficial" a few days after they are drawn up, in order to notify the authorities and the public of the reasons why a law has been declared unconstitutional. At all events, until such time as the Chambers reconsider the law it will be neither promulgated and published nor carried into effect. It remains at a standstill until the Chambers have voted either to accept or to reject the finding of unconstitutionality.

A question arises as to whether the two Houses can dispense with reconsideration of a law which has been declared unconstitutional. Having regard to Article 145 (1) of the Constitution which provides that where unconstitutionality is ascertained in accordance with Article 144 (a), and to Section 20 (2) of Act no. 47/1992 under which the Constitutional Court's decision must be referred to the Speakers of both Chambers in order to set in motion the procedure defined in Article 145 (1) of the Constitution, the writer contends that Parliament is compelled to reconsider the law.

As provided by Article 144 (c) of the Constitution and by Section 23 of Act no. 47/1992, the Court rules on objections of unconstitutionality made before judicial bodies in respect of laws and regulations issued by the Government.

If during its proceedings the lower court of its own motion or one of the parties alleges the unconstitutionality of a provision in a law or regulation which is crucial to the outcome of the proceedings, the objection raised is referred to the Constitutional Court for a ruling as to the constitutionality of the provision.

The lower court is required to refer the objection of unconstitutionality to the Constitutional Court and may not refuse to do so by invoking the unfoundedness of the objection. It is the court before which the objection was raised which refers it to the Constitutional Court by an interlocutory decision setting out the parties' submissions in support and in rebuttal of the objection, together with the opinion of the court and the evidence adduced by the parties.

Where the objection was raised by the lower court of its own motion, the interlocutory decision must embody a statement of grounds, together with the submissions of the parties and the requisite evidence.

Pending settlement of the objection of unconstitutionality, the lower court may suspend its proceedings by a reasoned interlocutory judgment. This is subject to appeal within 5 days of delivery.

Objections may not concern statutory provisions whose constitutionality has been established in accordance with Article 145 (2) of the Constitution.

The Constitutional Court, sitting as a division of 3 judges, is required to determine the plea of unconstitutionality referred by the trial court before which it was made. One of the three judges dealing with the case is appointed reporting judge by the President of the Division. If the plea is found to be manifestly lacking in foundation or if it invokes the unconstitutionality of a statute already declared to be in compliance with the Constitution under Article 145 (1) thereof, the reporting judge advises the Division to dismiss the objection of unconstitutionality, so that the Division may dismiss it by majority vote without calling the parties (Article 24(2)). If the objection is not manifestly devoid of foundation the reporting judge forwards the interlocutory decision to the court below and to the Government and the Chambers of Parliament, stating the deadline within which they may lodge their submissions, and also makes the necessary arrangements for taking evidence up to the date of the final hearing. The parties and the State Counsel are summoned to appear on the hearing date fixed. Proceedings are adversarial because of their quasi-judicial nature.

*The Constitutional Court's decision may be challenged by the parties **solely** by lodging an appeal within 10 days after notification. The appeal is heard by a full panel of 5 judges, obviously not including those who heard the case giving rise to the appeal. The panel is headed by the President of the Court or a substitute, and both decisions, that is the decision appealed and the decision on the appeal, are adopted by majority vote.*

If the appeal is allowed the Court rules in the same decision on the objection of unconstitutionality.

The decision given on appeal is irreversible and has erga omnes effects⁸³. As a result, other parties in other proceedings can no longer allege the unconstitutionality of a statute declared constitutional by the Court. If the statute was declared unconstitutional it can no longer be applied by any tribunal until the Houses of Parliament have brought it into line with the Constitution.

It should be observed that in the case of review a posteriori, the Court's decision to uphold the objection of unconstitutionality does not compel the Houses of Parliament, as in the case of review a priori, to reconsider the law with the possibility of rejecting the finding of unconstitutionality by a majority of 2/3 of the votes cast by each Chamber.

The terms of a law declared unconstitutional are inapplicable, with the effect of repeal, unless amended by Parliament to comply with the Constitution.

*The rules of procedure for ascertaining constitutional defects in certain statutory provisions differ according to whether review is conducted a priori or a posteriori, and this is totally unjustified. Whether the terms of a law are found contrary to the Constitution **before or after** promulgation hardly matters. Since the effects are the same, the procedure prescribed should also be the same. The irreversible decision establishing the unconstitutionality of a law or regulation provides the legal foundation for judicial review at the request of the party raising the objection of unconstitutionality in a civil case.*

In criminal cases the decision constitutes a legal foundation for retrial in cases where sentence was passed on the basis of the statutory provision declared unconstitutional. According to law, these provisions solely concern legal relationships established after the 1991 Constitution entered into force. Final decisions establishing the unconstitutionality of a law or regulation with a bearing on civil and criminal proceedings are forwarded to both

⁸³ Louis Favoreu, *op. cit.*, p. 4.

Chambers and to the Government, naturally so that they may take steps to amend the statute in question. Such decisions are binding, but not retroactively (Section 26 of Act no. 47/1992).

Article 150 of the Constitution, placed in Title VII "Final and Transitory Provisions", stipulates that laws and all other enactments remain in force in so far as they comply with the Constitution. The Legislative Council, within 12 months following the entry into force of the Act instituting it, is to examine the constitutionality of legislation and make suitable proposals to the Parliament and Government. This presumably concerns legislation pre-dating the Constitution which is to be amended or repealed as the case may be if at variance with the Constitution.

It rests with the ordinary courts to determine that a law has been totally or partially repealed by the new Constitution of Romania. The question has been raised whether, should they fail to do so, the function could be performed by the Constitutional Court as Romania's sole authority with constitutional jurisdiction (Section 1 of Act no. 47/1992), which may not be contested by any public authority.

The Court took this function upon itself by finding, for instance, that the provisions of the Penal Code concerning public property were partially repealed by Article 150 of the Constitution, considering that only the assets specified in Article 135 (4) were public property while the assets of commercial companies were private property, so that theft of such property was not to be regarded as theft of State assets but as theft of private property.

In legal writings it has been stated that Section 1 of Act no. 47/1992 should be interpreted as meaning that the Constitutional Court is the sole authority of constitutional jurisdiction for the purposes of verifying the constitutionality of laws issued after the adoption of the Constitution or even of certain earlier legislation where legal relationships connected therewith come into being after the adoption of the Constitution. It must be conceded that, as regards legislation passed before the present Constitution took effect and also the legal relationships established before that date, competence to determine whether such legislation complies with the constitutions under which it was passed lies with the judicial authority⁸⁴.

This disputed opinion seems devoid of substance to the writer.

⁸⁴ Adrian Vasiliu, *La Cour Constitutionnelle, sa place et son rôle dans l'Etat de droit*, in "Les Droits de l'Homme", no. 1 2/1993, pp. 26-7.

Section 26 (3) of Act no. 47/1992 stipulates that the Court's finding that a law is unconstitutional pursuant to an objection of unconstitutionality raised in a civil or criminal case gives the party the right to have the proceedings reviewed. These provisions apply solely to legal relationships established after the 1991 Constitution came into force.

Although the provisions of the Penal Code on public property were still being applied to thefts involving private property of commercial companies notwithstanding their repeal by Article 150 of the Constitution, the Constitutional Court acted correctly in that its decisions concerned legal relationships which were based on statutory provisions pre-dating the 1991 Constitution but which came into being after the new Constitution's entry into force.

The theft which caused prejudice to the commercial companies after the entry into force of the 1991 Constitution could no longer be defined as theft of public property; the accused were therefore justified in raising objections of unconstitutionality during the criminal proceedings and the objections were decided in their favour by the Constitutional Court.

c. DECISIONS OF THE CONSTITUTIONAL COURT AND THEIR EFFECTS

Summary of the Discussion

As regards the effect of norm control decisions, there is a characteristic difference between systems with a centralised control of norms and systems with a diffuse control of norms: in centralised systems, usually the Constitutional Court or the Supreme Court will strike down the law, in a diffuse system it will only not apply the law to the specific case. The exception is Ireland where both the Supreme Court and the High Court can declare a law unconstitutional.

As regards the scope of the binding force of a decision by a Constitutional Court, an important question is whether the subject matter of a dispute is the specific norm in the precise form in which it has been submitted to the Constitutional Court or any norm of this kind with a similar content. There is a precedent in Turkey where the Constitutional court decided that the legislature was prevented by an old decision of the Constitutional Court to reintroduce a new law with a similar content.

Article 145 of the Romanian Constitution gives Parliament the possibility to adopt by a two-thirds majority in both chambers a law declared unconstitutional by the Constitutional Court. This is the same majority as the one required for amending the Constitution. This law reflects the philosophy of sovereignty of Parliament

within Romania and it was argued that a law adopted by Parliament has a presumption of constitutionality in its favour, that this presumption is rebutted by a negative decision of the Constitutional Court but can then be re-established by a two-thirds majority of Parliament. This makes it a quasi-constitutional law. The rule is linked to the system of a priori abstract norm control where the Constitutional Court is involved a legislative process. In practice it is obviously difficult to get a two-thirds majority in both chambers of Parliament.

Most participants in the discussion criticised this rule. It is contrary to a philosophy according to which nobody is sovereign under the Constitution but in which the Constitution is supreme. This philosophy which goes back in particular to Alexander Hamilton has found a particular by clear expression in Article 79, paragraph 3 of the Germany Basic Law which does not allow amending certain fundamental principles of the Basic Law.

Since it was argued in this context that it is difficult to accept that a five to four majority of the Constitutional Court can strike down a law adopted by a two-thirds majority in parliament, the question was raised whether the striking down of laws should not require a qualified majority within the Constitutional Court. This seems an interesting proposal though no precedent was known to the participants in the discussion. Qualified majorities are required only for exceptional procedures like for declaring a political party unconstitutional under the Germany Basic Law.

FOURTH WORKING SESSION

The relations of the constitutional court with the ordinary courts and other public authorities

Chaired by Professor Vasile GIONEA, Member of the Academy, President of the Romanian Constitutional Court

a. The relations of the constitutional court with the ordinary courts and other public authorities

Report by Prof. Michel MELCHIOR, President of the Belgian Court of Arbitration

b. The relations of the constitutional court with the ordinary courts and other public authorities

Report by Prof. Antonie IORGOVAN and Prof. Mihai CONSTANTINESCU, Judges at the Romanian Constitutional Court

c. Summary of the Discussion

A. The relations of the constitutional court with the ordinary courts and other public authorities
- Report by Prof. Michel MELCHIOR, President of the Belgian Court of Arbitration

Contents

Introduction

A. Relations between the constitutional court and the ordinary courts - preliminary points of law

- I. Courts able to refer preliminary points of law*
- II. Appeal against the decision to refer*
- III. Relevance of the point of law*
- IV. Interpretation of the law under review*
- V. Those involved in the proceedings before the constitutional court*
- VI. Dialogue between referring judge and constitutional court*
- VII. Erga omnes or relative effect of the judgment of unconstitutionality*
- VIII. Use of the constitutional court judgment by the referring court*

B. Relations with other authorities

- I.1. Authorities able to appeal to the constitutional court to set aside a law*
- I.2. Authorities able to appeal to the constitutional court for preventive review*
- II. Public authorities involved in the proceedings*

Introduction

This report does not claim to be exhaustive or to deal with, or even mention, all aspects of the subject. More time, at the very least, would have been necessary. Furthermore, this was neither the wish nor the conception of the seminar's organisers. The goal of this colloquy is to bring together various experiences in the area of constitutional review, the reports being there only to stimulate discussion.

We will attempt to give general consideration to the problems raised by the theme of the relations between the constitutional court and the ordinary courts and the public authorities, without referring to the solutions adopted by particular State judicial systems. However, the rapporteur will allow himself to illustrate his

remarks with examples and solutions drawn in particular from the practice of the constitutional court to which he belongs. This information will generally be given in the footnotes.

A. *Relations between the constitutional court and the ordinary courts - preliminary points of law*

I. *Courts able to refer preliminary points of law*

1. *Obviously the constitutional court's workload and the procedural problems to be resolved will be less where the legislation limits the number of courts competent to refer to the constitutional court preliminary points of law for a decision as to the constitutionality of laws.*

The less access to the constitutional court is limited, the more likely it will be that an unmanageable congestion of cases in the constitutional court will develop. Moreover, where courts other than supreme courts (even appeal courts alone) are able to refer points to the constitutional court, problems relating to respect for the jurisdictions of the ordinary courts and the constitutional court arise. These will be examined below⁸⁵.

2. *In reality, the legislature enjoys absolute freedom of judgment in this matter, as reasonable justification may be found for all the various solutions it is likely to adopt.*

Thus, the limitation of access to the constitutional court only to the supreme court or courts, or in any event to those whose decisions are not subject to appeal, has the advantage of simplicity. But it is still necessary to answer the question as to whether these courts are bound to refer preliminary points of law or whether they are free to assess - without appeal and therefore by definition without review - the relevance or appropriateness of referral to the constitutional court⁸⁶ ⁸⁷. Furthermore, fortunately not all cases brought before the courts are referred to the supreme court; this means that incontestable problems of constitutionality are

⁸⁵ See in particular points II and IV below.

⁸⁶ In this regard, we can cite the particularly balanced solution adopted within the framework of the European Community (Art. 177 E.C.) which, for reasons of the efficiency of community law, (which may be transposed to constitutional review), makes a distinction between the courts which are bound to refer preliminary points of law - those whose decisions are not subject to appeal - and the other courts who have the possibility of referring such points.

⁸⁷ This solution is particularly open to criticism if the supreme court can give as a reason for its decision not to refer its opinion that the law in question is not unconstitutional.

not likely to be examined and resolved by the constitutional court. Therefore one has to weigh up the requirements of respect for the constitution by the legislator - and a correlative right of particular importance for the citizen - and those of the "practicability" of the system of constitutional review.

3. *It is, however, understandable that, for reasons of practicability and remembering that in principle the higher courts do not refer points of law whose relevance for the settlement of the case is not obvious or do not raise real problems of constitutionality, the legislator or the constituent assembly reserves the right to refer preliminary points only to courts, other than the supreme court, of a certain level in the hierarchy of the judicial system.*

4. *It may also be that it broadens the possibility of access to the constitutional court. This can be done in two ways: either by enumerating the courts or categories of courts able to refer preliminary points of law⁸⁸, or by allowing all courts to do so⁸⁹.*

Where the second option is chosen, it is likely to present the constitutional court with certain difficulties. It will have to decide whether the body applying to it is in fact a court, that is a body independent of the parties to the litigation which must decide the case impartially by applying to the facts of the case the legal rules applicable to it.

In this respect it will not always be easy to judge, particularly in the areas of administrative and criminal law, if a particular public authority is an administrative authority intervening in the settlement of a case⁹⁰ - in which case there can be no preliminary point of law - or a quasi-judicial commission whose members are independent of the administration. In the second case only can a preliminary point of law be legitimately referred⁹¹.

⁸⁸ *But this solution is perhaps open to the criticism that a difference of treatment is thus established between the various types of courts which is difficult to justify.*

⁸⁹ *This is, for example, the solution adopted by Belgium (former Article 107ter of the Constitution; Article 26 of the loi spéciale sur la Cour d'arbitrage).*

⁹⁰ *A supervising authority, for example, particularly when it is collegial.*

⁹¹ *See on this point the European Court of Justice in respect of the so-called judicial competence of the director of taxation who has authority to decide on the lawfulness of taxation (Corbiau judgment of 30 March 1993, [1993] ECR p.1300, points 15-17). This court considered that the notion of court could not refer to an authority which is of the nature of a third party in relation to the one which adopted the decision which is the subject of the appeal. ..Placed at the head of the fiscal administration, the director has an obvious organic link with the services which established the contested taxation and against which the appeal introduced before him is directed...which is confirmed by the fact that where an appeal is lodged before the competent court, the director is a party to the case.*

5. Finally, if every court is able to apply to the constitutional court, it remains to be determined whether the arbitrators chosen by the parties to settle their case may be considered courts, especially where their mandate is to decide on the basis of the positive law in force and not in equity. Even if such arbitrators or commissions of arbitration are called upon to decide on the basis of positive law, it does not seem necessary to accord them the status of courts⁹². This must be reserved for institutions created by the legislator. After all, where the sentence of the arbitrator is not spontaneously carried out, it will be for the injured party to take the case to a real court to obtain the necessary *exequatur*; it is possible that at this stage the judge might refer a preliminary point of law.

II. Appeal against the decision to refer

6. In principle, it is not desirable that an appeal be lodged against the decision of the judge who refers a preliminary point of law. Such an appeal is likely, in itself, to lead to the law at issue escaping constitutional review.

Generally, and in principle, it is not desirable for a "suspect" law to escape such review and continue to figure in the judicial system. This is a point of view which seems beyond criticism.

But one cannot help imagining a situation in which the preliminary point of law was referred by the judge only because he was bound to do so - without being able to assess the relevance of the point. One can also imagine the case where a "normal" judge would never have referred the point, as it appears so obvious that there can be no - valid - doubt as to the constitutionality of the provision at issue.

The fundamental question is the following: who within the internal legal system is best qualified - even exclusively qualified - to decide such constitutional questions? The answer is obvious: it is the constitutional judge. In this respect, it is not unusual for a provision everyone agrees to be constitutional to be held invalid by the constitutional judge!

7. But it is true that "crazy" points can be referred by judges on their own initiative or, again, because they have referred points raised before them by the parties to a case without exercising any review.

⁹² The European Court of Justice has considered that arbitration authorities cannot be regarded as courts within the meaning of Article 177 E.E.C. - See in particular the *Noordzee* judgment of 23 May 1982 (case 102/81), [1982] ECR p. 1095.

Lastly, there is reason to fear that parties whom the judge cannot, or believes he cannot, oppose (for whatever reason) refer preliminary points of law only as a delaying tactic. Here the requirements of the satisfactory administration of justice come into play.

Two solutions are possible: either allowing an ordinary higher court to dismiss the preliminary point of law (although it could have been the subject of constitutional review), or giving the constitutional court the possibility of giving a negative reply to such a question on a presupposition of absurdity, by a simplified and almost immediate procedure.

III. Relevance of the point of law

8. *One of the most delicate problems relating to the preliminary point of law is the judgment, by the possible referring court, on the one hand, and the constitutional court, on the other, as to the relevance of the point in relation to the information necessary for the resolution of the case. The question is of fundamental importance when the referring court is part of a set of courts different from that of the constitutional court.*

9. *Where, in the "European" or "kelsenian" system, the constitutional court is outside the judicial or administrative organisation of the ordinary courts, it is important to try to safeguard as far as possible the reciprocal independence of the two court systems - constitutional and ordinary.*

In principle - and perhaps by definition - it is for the possible referring court to rule as to the relevance of the preliminary point of law he refers or is invited to refer for the settlement of the case before him.

10. *Allowing the constitutional court to rule on its relevance amounts to allowing it to censure the work of the referring court which, by definition, is not subordinate to the constitutional court. It is not, by definition, for the latter to interfere in the settlement of the actual case which must be decided by the judge of the referring court. It would be interference if the constitutional judge decided whether the decision as to the abstract point of law put to him by the referring judge, who does not come under his authority, is such as to enable that judge to be genuinely assisted in the settlement of the concrete case he must rule upon.*

11. *The wise path, which respects the reciprocal independence of both types of courts, is not to allow the constitutional court to rule on the relevance of the point of law referred to it nor consequently, on the basis of this assessment, to*

decide not to rule on the point of law. Such a possibility leads indeed to that of censure of the referring court⁹³.

12. It can certainly be argued that a preliminary point of law is only one which is necessary or useful to the settlement of the case before the referring judge and that this is a condition of the jurisdiction of the constitutional court and therefore a question which can only be within the jurisdiction of the constitutional court. In itself, this opinion is correct, but it has the disadvantage of allowing the constitutional court to judge the assessment of the referring judge. Of course, aberrant cases may present themselves. For example, cases where it is obvious to any reasonable observer that the law at issue cannot be of use in the settlement of the actual case before the referring judge. This does not seem to us to be sufficient reason to allow the constitutional court not only not to rule on the point but to reject it and therefore to a certain extent to nullify it and thus censure the referring judge. Another "aberrant" case: the referring judge gives an interpretation of the law to be reviewed by the constitutional court which is manifestly erroneous, incorrect and contrary to common sense. Should the court reject such a point, which is obviously of no relevance to the settlement of the actual, concrete case which the referring judge has to rule on? This is a different type of problem from the one that has just been discussed and will be examined below⁹⁴.

13. In conclusion, it appears not only desirable because wise, but necessary because implied by the independence of the ordinary judge in relation to the constitutional judge, that the latter cannot have authority to review and censure the step taken by the referring judge. It would seem that it must be thus even if some constitutional or analogous courts (e.g. the European Court of Justice⁹⁵) have, in practice, considered it appropriate, necessary and even justified to adopt a different solution because, for example, the law to be reviewed could not be involved in the settlement of the case or, again, because there was no concrete, actual case and the point of law was in fact referred as an "academic" legal consultation asked of an institution whose function is not to play such a consultative role.

⁹³ The Belgian Court of Arbitration has adopted this solution. It considers that it is for the judge who has raised the point of law to check whether a ruling on it is indispensable for his decision. Thus, when the matter is lawfully put to the Court it is not required to decide whether its decision will be useful to the settlement of the case pending before the a quo judge. See, for example, judgment no. 15/93 of 18 February 1993, consid. B.1.

⁹⁴ See below, paragraph 15 ff.

⁹⁵ See in particular, the Salonia judgment of 16 June 1992 (case no. 126/80), [1992] ECR, p. 1563, point 6, and Lourenço Dias judgment of 16 July 1992 (case no. 343/90), [1992] ECR, p. 4703.

Such an attitude can be understood - and justified - for reasons of expediency (avoiding an overburdening of work) or legal reasons (here it is not a matter of genuine preliminary points of law, i.e. necessary to give a concrete judgment in an actual case). It nevertheless remains the case that such behaviour on the part of the constitutional court constitutes a supervision of the courts which, by definition, do not come under its authority.

14. *All things considered, it appears preferable to choose not the solution of the establishment of a subordinate relationship of the ordinary courts to the constitutional court, whether de facto or de jure, but, on the contrary, the confirmation - at the price of possible incongruity - of the independence of both sets of courts.*

IV. Interpretation of the law under review

15. *When the validity of a law is referred to the constitutional court an essential problem must be confronted: who is competent to give the authoritative interpretation of the contested law?*

16. *The simplest, and perhaps the most logical, solution is that it is for the constitutional court to determine the scope of the law in question. This solution, which has the merit of convenience, can be justified by the consideration that the constitutional court is situated in the hierarchy of State bodies at a level equivalent to that of the legislator. Indeed, it is a sort of "negative" legislator as it can nullify the work of the legislator which, in this comparison, can be described as "positive".*

This solution has the disadvantage of implying that the other courts - judicial or administrative - are subordinate to the constitutional court as to the scope and meaning of the law which is the subject of constitutional review.

17. *It is possible that this competence is not attributed to the constitutional court, in particular because the court was created after the establishment of the ordinary courts, including the supreme court. The constitution may indeed have attributed to the supreme court the competence and duty to ensure uniformity in the interpretation of the law. Does the establishment of a constitutional court put this prerogative in question? It might: but it would be necessary that the interpretation of the statutory intent justifies such a solution which would, moreover and especially, be a sort of institutional revolution.*

If the answer to the question is positive despite the difficulties which have been mentioned, the uniformity of the interpretation of the scope of laws will be ensured and this to the justified benefit of the constitutional court.

18. *It is possible that the applicable legislation has given no answer to this question: one is then faced with a situation in which two bodies independent of each other will have to reach a modus vivendi in this respect in order to ensure the coherence of the legal system.*

19. *One can first envisage a case in which, at least apparently, the jurisdiction of the ordinary courts, under the control of the supreme court, has not been affected by the appearance of the constitutional court. Here, logically, the constitutional court will review the law as interpreted by the ordinary courts.*

First case: the supreme court refers a point of law to the constitutional court. In this case, it must be one thing or the other: either the referring court has not interpreted the law or it has specified in the point it has referred the scope it gives to the law. If the law has not been interpreted this will, in all likelihood, be because its scope is obvious and clear and cannot give rise to several interpretations. The constitutional court's task will be easy: a positive or negative answer poses no problem in respect of the prerogatives of the constitutional court or those of the supreme court.

On the other hand, if the law has been interpreted by the supreme court by specifying the scope in the grounds of the decision to refer or in the preliminary point itself, the logic of the situation is that the constitutional court must assess this interpretation of the law in the light of the requirements of constitutionality and the answer will be positive or negative.

Thus the respective competences of the two courts will have been deployed correctly and without conflict.

20. *But it may be that the supreme court's interpretation results in the law under review being found unconstitutional while another interpretation is technically possible and that this latter interpretation, which the constitutional court is in a position to discover directly itself or on the basis of the observations formulated by the parties involved, would escape this major sanction.*

It seems to be in the nature of a constitutional court to safeguard where possible the legislator's work: the legislator must benefit from a presumption that it wished to respect the constitution.

The problem encountered here is of fundamental importance. What can and should be the attitude of the constitutional court? Will it bow to the supreme court's interpretation and condemn a law which could escape this sanction? Or

will it set aside the supreme court's interpretation and replace it with its own conciliatory interpretation?

21. *We see here interference between the two jurisdictions which should in principle remain parallel and therefore, for that very reason, never meet!*

Eliminating this interference, prohibiting it, entails the dramatic consequence that a law which could be regarded as constitutional will have to be regarded as unconstitutional.

22. *Whatever the solution adopted, there is an incoherence in the institutional mechanism: either the constitutional court does not adequately perform its function (which is to give the legislator the benefit of a rebuttable presumption of respect for the constitution), or an important supreme court prerogative is infringed, which is to interpret laws and ensure the uniformity of that interpretation in the other courts.*

23. *The conflict between the two courts is obvious where the constitutional court, in its judgment or in the grounds on which it is based, gives an interpretation different from the supreme court's. Will the latter yield or maintain its point of view? In this case, it seems it will have to give in to the constitutional court, as it is difficult to imagine the supreme court relying for the settlement of the case on an interpretation which is unconstitutional in its eyes.*

The solution is less obvious in the reverse situation, where the supreme court considers constitutional the interpretation of the law which it has been bound to submit to the constitutional court under the mechanism applicable in that State. It may be that this interpretation was not accepted by the latter which considered it had to substitute another. In this case it is possible, but not desirable from the point of view of constitutional review, for the supreme court not to take account of the constitutional court's sanction and apply its own interpretation to the case before it.

24. *A less dramatic situation may however be imagined. The constitutional court may observe in its reasons that an interpretation of the law other than the one submitted to it by the supreme court is possible, and that this other interpretation is not unconstitutional, and address in its judgment only the - unconstitutional - interpretation submitted by the supreme court. The latter is thus invited - though not constrained - to modify its original interpretation and replace it with the conciliatory interpretation suggested, but not imposed, by the constitutional court⁹⁶.*

⁹⁶ *This is the solution most often adopted by the Belgian Court of Arbitration. It considers that it is not for the Court to impose an interpretation of a provision on a judge who raises a preliminary point of*

25. *The problem under discussion is of a different dimension when a point is submitted to the constitutional court by a court other than the supreme court and therefore, by definition, under the latter's supervision.*

This "lower" court may refer to the interpretation given by the supreme court or again may not give an autonomous interpretation of the law in question, contenting itself with citing the law, which may be interpreted as an implicit but certain reference to the supreme court's case-law. In these cases, we are, mutatis mutandis, in the situation described above.

On the other hand, it may be that the "lower" court gives the law in question an interpretation different from the supreme court's or in any case an interpretation that cannot be reconciled with that court's case-law.

In this case, taking account of what was said above and of what has been adopted by the constitutional system on the subject of the possibility of lodging an appeal against the decision on a preliminary point of law, it is logical that the constitutional court must in the first place take account of the interpretation of the law provided by the referring court. It may be that this interpretation - like the different one given by the supreme court - may receive a "certificate of constitutionality". This presents no difficulty for the constitutional court. It will have "saved" the law at issue and it will be for the supreme court to decide whether it is appropriate to give it its own interpretation or the "lower" court's for the settlement of the concrete case which may come before it. In the second hypothesis, it will then be for the supreme court to refer the question of the constitutional validity of the interpretation it has decided to adopt to the constitutional court, according to the rules governing the relations between constitutional court and supreme court applicable in the State in question.

26. *The situation is much more complex when the constitutional court considers that the "autonomous" interpretation given to the law by the "lower" court does not stand up to constitutional review while another interpretation of the law is possible - notably the one adopted by supreme court case-law - which is in accordance with the requirements of the constitution. Will the constitutional court consider itself bound by this interpretation or will it set it aside in favour of the "conciliatory" interpretation, especially if it is the supreme court's usual interpretation?*

law; but in its judgment it may indicate in which interpretation a provision violates the constitution and in which other interpretation it does not. See in particular judgment no. 64/93 of 15 July 1993, consid. B.4.

It is in the nature of things that the constitutional court should seek to give a "certificate of constitutionality" to the provisions referred to it. In the case in question, there appears to be nothing against the constitutional court setting aside the "lower" court's interpretation in favour of another which is in accordance with the constitution. The word "nothing" in the previous sentence is perhaps a little strong but in any case there is no irremediable infringement of the supreme court's jurisdiction and essential role since it will be able, at a later stage of the proceedings, to modify or adopt the interpretation that found favour with the constitutional court or, alternatively, to adopt the "heretical" interpretation of the "lower" court and refer the question to the constitutional court (which amounts to the first problem discussed above).

V. *Those involved in the proceedings before the constitutional court*

27. *When a preliminary point is referred, one must ask whether it will immediately be examined only by the constitutional court, with no other "party" being involved, or whether the court will only give its decision at the end of a procedure enabling others - who should be specified - to express an opinion as to the reply that should be given.*

28. *The first option has the merit of simplicity. It allows for speedy treatment and, therefore, will not slow down too much the consideration of the case by the referring judge. It has the disadvantage, however, of giving the constitutional court no assistance: it will have to accomplish an extremely important task alone, using only its own human and documentary resources.*

29. *The second option has the definite disadvantage of postponing for a period the settlement of the case in relation to which the referring judge has submitted the point. On the other hand, it has the advantage of giving the court greater clarification of the various legal aspects of the point referred to it so as better to define and understand them.*

In addition, for many European countries it is important to take account of the fact that the institutions of the European Convention on Human Rights are likely to confirm the solution adopted by the European Court in the Ruiz-Mateos judgment according to which the guarantees of Article 6 of the Convention are applicable to the preliminary procedure before a constitutional court, since this procedure may be decisive for litigation concerning the determination of civil rights or obligations or of a criminal charge which the referring judge has to decide upon.

In this respect it seems desirable (and even necessary, in application of Article 6 (1) of the E.C.H.R.) that the parties to the case before the referring judge be able

to give their point of view to the constitutional court according to procedures determined by law. This may be by the submission of written memorials or by observations at a public hearing or by a combination of the two. This seems to be the minimum implied by the European Convention on Human Rights. This means that, in a criminal case, the prosecution will also be able to give its point of view. Similarly any parties claiming damages or the individual who has brought a private prosecution will be entitled to be heard.

It may also be thought desirable for various public authorities which have an interest in the law at issue also to be able to become involved, for example the author or authors of the law under review, i.e. the assemblies which passed the Act or the executive responsible for its sanctioning, promulgation or application. In a federal State, one might also envisage organising the involvement of the federated legislative or executive authorities, particularly where the point referred concerns the question as to whether the legislator which passed the law was competent to do so.

One might also consider giving any private or public individual with an interest in the case the possibility of involvement. This could extend, for example, to organisations and charities whose activity is closely concerned with the law under review.

30. *In addition, persons who are parties to an identical or comparable case to the one which gave rise to the referral may be involved. Doubtless when the time comes for the court hearing their case to apply the law in question this court will be bound to refer a new preliminary point or, alternatively, it could apply to their case the solution contained in the judgment given by the constitutional court. But is it not justified for persons who are parties to cases comparable to the one which has given rise to the first preliminary point to be able to submit their own observations to the constitutional court? Although arguable, one must not hide the fact that such a possibility is likely to engender serious difficulties for the constitutional court in the handling of cases referred to it because of the potentially very great number of people involved⁹⁷.*

VI. Dialogue between referring judge and constitutional court

⁹⁷ *In Belgium the provision of the loi spéciale sur la Cour d'arbitrage which allows any person able to show they have an interest in the case before the referring court to submit a memorial to the Court was the subject of a very restrictive interpretation - see, in particular, judgment no. 56/93 of July 1993 (consid. B.2.6. to 2.6.8) - despite the fact that the judgment given on the preliminary point of law may have an indirect effect on cases comparable to the one during which the point was submitted. It is indeed quite probable that the constitutional court will uphold its previous case-law when dealing with a legal problem analogous to the one already decided.*

31. *In many state systems which regulate the procedure for preliminary points of law the involvement of at least (and necessarily, according to the implications of the Ruiz-Mateos judgment of the European Court of Human Rights) the parties to the case before the referring judge is provided for. But what is the situation of the judge who refers the preliminary point? Can he too communicate with the constitutional court? It seems not, because this would alter the relationship of reciprocal independence which must exist between the two sets of courts.*

However, it is not without interest for the constitutional court to know - as a factor to be taken into consideration in its deliberations - the position of the referring judge as to the reply to be given on the point he has referred and as to the grounds for such a decision. This is particularly useful to the constitutional court when the ordinary judge is bound to refer the point raised before him by one of the parties to the case.

32. *There seems to be only one solution to this problem: that the ordinary judge states in his decision to refer either the reasons why he questions the constitutionality of the law at issue, or - when the question is not raised by him, but is imposed on him by one of the parties - his own feeling as to its constitutionality.*

Furthermore, when the preliminary point appears absurd or incomprehensible to the constitutional court, there is generally no provision enabling it to question the referring court, but there is no logical reason why a state system could not provide for this possibility.

VII. Erga omnes or relative effect of the judgment of unconstitutionality

33. *When a judge has referred a point to the constitutional court and it considers in a judgment that the provision at issue is contrary to the constitution, several possibilities may present themselves:*

- *The legislator, and only the legislator, is bound by this decision. It must remedy the unconstitutionality by passing a new law (itself subject to review). In this case the referring judge applies the law or awaits the legislative modification. This solution is unsatisfactory since, in the absence of the legislator's reaction, the judge may have to apply the law declared unconstitutional or be unable to decide the case pending before him.*

- *The court's judgment has an erga omnes effect: the unconstitutional law is eliminated from the legal system; it cannot, therefore, be applied by the judge who must find another legal basis on which to decide the case⁹⁸.*
- *The court's judgment has only a relative effect, limited to the concrete case which gave rise to the preliminary point. The judge is no longer able to apply the law to the case before him; he must settle it on another legal basis⁹⁹.*

Conversely, the law has not been eliminated from the legal system; it may, therefore, continue to be applied, although it has an objective defect following the court's judgment.

All then depends on the conditions placed on referral to the court. The first possibility is that the judge may not be bound or even requested to take into consideration the judgment given earlier in respect of the law: he will then simply be able to apply it to the case before him. Another possibility is that he is invited as a matter of constitutional law to take the court's judgment into account; either it allows him not to refer it to the court on condition that he applies its judgment, or, unhappy with the solution adopted by the court, he refers a fresh point to it relating to the "relegated" law, but with grounds enabling the court to go back on its case-law. In other words, the trial judge could be exempted from referring a preliminary point in relation to the law contested before him on condition that he follows the solution contained in the earlier constitutional court judgment. When such a system is adopted, it is obvious that the judgment on a preliminary point has a higher value than the relative effect of ordinary judgments, without having erga omnes force, since the judge is still able to refer to the court a law which has not been declared void but declared valid or invalid.

VIII. Use of the constitutional court judgment by the referring court

34. *As for the use the referring judge must make of the judgment given by the constitutional court on the preliminary point, the answer is, in principle, simple: the referring judge must apply to the case before him the solution contained in the operative words of the judgment¹⁰⁰.*

⁹⁸ See below paragraphs 34-36.

⁹⁹ See below paragraphs 34-36.

¹⁰⁰ It may, however, be that the referring judge prefers, as against the solution of unconstitutionality contained in the judgment, the one - in accordance with constitutional requirements - "suggested" in its grounds by the constitutional court. See above paragraph 24.

This simplicity is obvious where the constitutional court declares that the provision at issue is in accordance with the constitution: the referring judge then simply applies the (validated) provision to the facts of the case he is called upon to decide.

This simplicity may only be apparent when the constitutional court's judgment consists of a declaration of unconstitutionality. In such a case, it is not certain that the referring judge can easily decide the case before him.

35. *If, for example, the constitutional court's judgment declares that it is unconstitutional to criminalise conduct which it is required to regulate, the situation presents no difficulty: the referring judge cannot find a person guilty of the charge against him. Similarly, if the constitutional court has declared unconstitutional the law referred to it, on the grounds that it contains a discriminatory element, it will be enough for the referring judge to apply to the case before him the law applicable to the comparable category in relation to which the discrimination has been established¹⁰¹ or, if this makes it possible to decide the case, to decline to apply the discriminatory provision with the case becoming moot because of the unconstitutionality established¹⁰².*

The situation is more complicated when the law is declared unconstitutional on the grounds that it is not justifiable to apply to a particular category of persons, because of their specificity, a law which in other respects is constitutional. What law will the referring judge have to apply to this particular category? He will perhaps invent a law which does not exist in the legislation but which is implied by the reasoning in the decision of unconstitutionality¹⁰³.

36. *Moreover it is possible that the finding of unconstitutionality is such that it is difficult to imagine that the referring judge, even basing himself on the grounds*

¹⁰¹ *For example, if it has been held discriminatory in a succession to apply to children born outside wedlock rules different from those provided for children born in wedlock, when deciding a case which calls into question the rules applicable to natural children, the judge simply applies the rules applicable to children born within wedlock.*

¹⁰² *For example, where it is considered discriminatory to allow an authority to sanction a particular type of behaviour, the referring judge only has to nullify this sanction or, according to the case, declare inadmissible the proceedings instigated by the authority.*

¹⁰³ *For example, it has been judged that the application of a law relating to territorial jurisdiction of a court was unconstitutional for a particular category of citizens because the law did not enable them to plead their case in their language. To limit oneself to not applying the "defective" law would mean that cases involving these citizens could not be settled by the courts, which would be highly regrettable and, in some cases, contrary to the European Convention on Human Rights. The judge must "find" another law which enables the case to be settled; for example, he will establish an exception to the exclusive jurisdiction of the judge appointed by the defective law in favour of another court which enables the citizens concerned to have their case heard in their language.*

of the constitutional court judgment, can elaborate ex nihilo a substitute regulation. In such a situation, one can perhaps imagine applying to the case the previous law which has been repealed and replaced by the defective law. But there may have been no previous law¹⁰⁴ or, again, this possible earlier law may also be unconstitutional. Then it is appropriate to await the legislator's intervention, but how are pending or new cases to be settled while waiting for it to pass a new law¹⁰⁵?

B. Relations with other authorities

37. *At least two questions must be dealt with:*

- a) *Which State authorities may refer a law for constitutional review to the constitutional court?*
- b) *Which authorities can or should be involved in the proceedings before the constitutional court? One might also determine the scope of the constitutional court decision with respect to public authorities and consider the relationship between the constitutional court and other public authorities in areas other than the constitutionality of laws. But these questions will not be discussed in this report.*

I.1. Authorities able to appeal to the constitutional court to set aside a law

38. *When a law (sensu lato) has been passed, the question of its constitutionality is likely, in principle, to interest all public authorities which must be regarded as unable to have regard to unconstitutional legislation and, in particular, as only able to apply laws fulfilling constitutional requirement.*

In order to avoid the mushrooming of referrals and a crippling workload for the constitutional court, it is judicious to divide public authorities into two categories: those which will not have to demonstrate a (particular) interest in the introduction

¹⁰⁴ *Thus, the authorities have created a new tax to finance, at the indirect expense of users, the equipment necessary to treat the waste produced by those users. Such a tax is found to be unconstitutional where its necessity is obvious for the safeguarding of the public interest. It is hardly possible to envisage that the referring judge might himself "create" such a tax. In this case, it would be necessary to await a fresh intervention on the part of the legislator. Conversely, where the law found to be "unconstitutional" is designed to regulate relations between private individuals, it seems that one cannot put up with a "legislative void", if only because of the requirements of Article 6 para. 1 of the European Convention on Human Rights. It might be appropriate in such cases, which must be statistically rare, to enable the constitutional court to "imagine" a transitory system (an illustration of such a solution is the position adopted by the German constitutional court on the subject of systems of matrimonial property).*

¹⁰⁵ *See previous note.*

of the appeal, in other words those whose interest will be presumed irrefutable, and those which must show a particular interest in respect of the subject or character of the law at issue.

In the first category might be included the Cabinet (or its president); in a bicameral system, one of the chambers, more specifically the one which has had to yield to the other. The question also arises whether it is appropriate to authorise a certain proportion of the members of legislative assemblies to refer matters to the constitutional court as members may, in the course of (or after) the legislative process, have doubts as to the validity of the Act passed by their assembly. But this would, in a sense, amount to enabling parliamentarians to continue a purely political conflict at constitutional level and use the constitutional court for political ends. In federal States, it may also be very appropriate to enable federated legislators and the governments of the federated States to refer laws to the constitutional court. This is anyway the case for matters concerning respect for laws which determine the respective jurisdiction of the central and federated governments. But this possibility may be extended to other aspects of constitutional review.

39. *One can also consider granting a right of appeal to some other public authorities: for example, the Attorney General or the supreme court prosecuting authorities. In order for their appeals to be examined, they must demonstrate a functional interest. The appeals of such authorities will only be admissible if it is established that the law at issue affects the attributions and prerogatives (constitutionally) conferred on them. Their appeal will also be admissible where the law at issue establishes a difference of treatment in any respect between the authority and other comparable authorities.*

40. *In any event, it appears justifiable to bestow the right of appeal only on individual political authorities, for example, provinces, municipalities, burgomasters, mayors, and not on civil servants who might have an interest in the law, not because it changes their status, but because they will have to apply it.*

I.2. Authorities able to appeal to the constitutional court for preventive review

41. *Where the state system has established not an a posteriori constitutional review, but a system of preventive review, as is the case in many States, the number of authorities able to refer a matter to the constitutional court must apparently be limited. In an inegalitarian bicameral system, the possibility must certainly be given to the chamber which has had to yield to the other. It also appears natural to give this possibility to the Head of State and/or the head of government. The involvement of the supreme court prosecuting authorities and the*

ombudsman or mediator might also be envisaged. In a federal State, the federated legislative and executive authorities might also be able to do so, principally where the allegation of unconstitutionality rests upon a violation of constitutional provisions concerning jurisdiction.

But, by definition, because referral to the constitutional court happens before the law's promulgation and official publication, it is difficult to see how the right of appeal could be extended to other public authorities and, particularly, to private individuals.

Of course, in a desire to enable the sanctioning of a possible violation of the constitution committed by the parliamentary majority, it is also expedient to enable a proportion of the parliament, or even any member, to refer a law to the court.

II. Public authorities involved in the proceedings

42. *On the subject of the involvement of public authorities in the constitutional review procedure, it does not seem necessary to distinguish between a direct appeal to set aside or a preliminary point of law. Indeed, the interest of these authorities is the same as to the question of constitutionality whatever the nature of the referral to the constitutional court, even if the scope of the court's judgment differs according to the type of referral.*

43. *In the case of a preventive review, the question of the length of the procedure is essential since the legislative process is held up. In this case, the constitutional court is usually given only a quite brief period in which to give a judgment as to the constitutionality of the law. It is difficult to envisage a broad possibility of involvement being given in such circumstances to public authorities. At most, one might regard it as expedient, or even necessary, that the law-making body whose act is contested be involved. But at present provision is rarely made for such involvement in preventive review. On the other hand, enabling other authorities to become involved in the treatment of the case by the constitutional court could only lead to a probably unjustified lengthening of the review procedure.*

44. *In the case of a posteriori review, even if it might prolong the period when there will be doubts as to the constitutionality of the law under review, it seems right - and even justified - that the proceedings be as far as possible in accordance with the requirements of the due process of law, as the concept has, in particular, been developed by the institutions of the European Convention on Human Rights. This is all the more true since the involvement of political authorities in the proceedings will enable the constitutional court to be better able*

to assess and meet the legal difficulties raised by the law under review by having regard to the observations and memorials of those authorities.

It would seem that the Chambers of Parliament whose legislation is at issue must be able to be involved, as too must the government, which has to apply the law and which often in our European constitutional systems is the origin (the veritable author) of the contested law. In a federal system, one might also consider that the legislative and governmental institutions of the federated states should also be involved.

Moreover, the nature of their functions should enable authorities such as the Attorney General or the supreme court prosecuting authorities, as well as the ombudsman or "mediator", to be involved in constitutional review proceedings without demonstrating a particular interest.

45. As far as the other public authorities are concerned, they should not be able to become involved unless they can demonstrate a particular interest with respect to the law under review. In fact, the latter possibility of involvement should be systematically very limited. It could even be excluded ab initio or on a discretionary basis by the law governing the constitutional court, without it being possible to regard the proceedings as unfair.

B. The relations of the constitutional court with the ordinary courts and other public authorities -
Report by Prof. Antonie IORGOVAN and Prof. Miha CONSTANTINESCU, Judges at the
Romanian Constitutional Court

The purpose of the Constitutional Court of Romania is to guarantee the precedence of the Constitution. It is, therefore, Romania's unique authority of constitutional jurisdiction. In this capacity, within the framework of the control on the constitutionality of laws, of Parliament's Standing Orders, and of Government Orders, three categories of relationships are identifiable between the Constitutional Court, the ordinary Courts and other public authorities. These may be examined in terms of: a) seizure of the Court, b) the written procedure and c) the oral procedure, applicable to constitutional disputes.

I. Seizure of the Constitutional Court

The relationships between the Constitutional Court and the ordinary Courts and other public authorities, in terms of the Court's seizure, depend upon whether such seizure is based upon art.144 (a), art. 144 (b), or art. 144 (c) of the Constitution.

The first hypothesis - art. 144 (a) of the Constitution - concerns the control on the constitutionality of laws prior to promulgation. With such a priori control, the court may only be seized by public authorities representing the "classical

authorities", namely: 1) the President of either Parliament Chamber, 2) at least 50 Deputies, and 3) at least 25 Senators (from the legislative authority); 4) the President of Romania, and 5) the government (from the executive authority); and 6) the Supreme Court of Justice (representing the judicial authority).

Seizure triggers the discontinuation of the promulgation procedure, whereas the decision ultimately pronounced by the Constitutional Court re-triggers the procedure for the examination of the law by Parliament in cases where the law was declared unconstitutional, or the resumption of the promulgation procedure in cases where, on the other hand, the Court found the law to be constitutional.

According to art. 145 of the Constitution, on re-examination, the Parliament can reject the Court's decision of unconstitutionality by passing the law again, in its original form, by at least a two-thirds majority of each Chamber.

As a result, with preventive control prior to promulgation, the consequences of the Court's decision can vary.

Two essential features of this jurisdiction are its symmetrical nature and its procedural nature. The symmetrical nature results from the fact that the Court's competence corresponds with the discontinuation of promulgation, that the acceptance of the objection of unconstitutionality induces re-examination of the law, and that rejection induces a resumption of the promulgation procedure. The procedural nature results from the sequence of direct and indirect effects of seizure, namely, the judicial consequences of the decision in the case. The symmetrical and procedural nature of these relationships determine the status of the Constitutional Court as defender of the precedence of the Constitution in political disputes arising from the legislative process.

The procedure for the control of the constitutionality of Parliament's Standing Orders, under art. 144 (b) of the Constitution, is exclusively a posteriori. In this case, standing only extends to the "legislative authority", that is 1) the President of either Chamber, 2) a parliamentary group, 3) at least 50 Deputies, or 4) at least 25 Senators. In circumstances where, by decision of the Court, certain provisions of Parliament's Standing Orders have been declared unconstitutional, the Chambers will be obliged to harmonize the Standing Orders with the constitutional provisions in question. As with control prior to promulgation, the Constitutional Court's relationships with other organs in reviewing the constitutionality of Standing Orders are determined by the sequence of the direct effects of seizure - triggering the Court's competence - and its indirect effects, that is, the obligation of the Chambers to harmonize their Standing Orders with the Constitution in the event that the Court finds that certain provisions are unconstitutional.

Regarding seizure of the Court under art. 144 paragraph (c) - arising from an objection of unconstitutionality to a law or an order - the relationships incurred by such seizure concern exclusively the Constitutional Court and the ordinary Court before which the objection was raised. According to the law, the objection may be raised by the ordinary Court ex officio or upon request of the parties. In the latter case, the ordinary Court is obliged to express its opinion on the objection, which opinion is published in the official journal associated with the ordinary Court in question. Since the Constitutional Court is not bound by the opinion of the ordinary Court, the ordinary Court is involved in the exercise of the review undertaken by the Constitutional Court only as the first jurisdictional body to express its opinion on the objection invoked.

Thus, the procedure for solving the objection has a primary judicial stage, when the parties state their position and arguments and the ordinary Court expresses its opinion, and a second stage, when the constitutional matters in dispute are discussed exclusively before the Constitutional Court. The existence of the primary stage signifies the partnership of the ordinary Court in the review undertaken by the Constitutional Court and is warranted because the objection of unconstitutionality was originally raised before the ordinary Court and because the judicial authority as a whole is a guarantee for the citizens' rights and fundamental freedoms. From this point of view, therefore, there is a link between the role of the Constitutional Court and that of the Ordinary Courts.

The review of the constitutionality of laws has a contentious nature because it arises from the competing position and arguments of the parties or of other authorities or, as in some cases, between persons interested in the resolution of the case.

The first stage of all constitutional proceedings is a written procedure, while the second stage, applicable solely to the objection of unconstitutionality, is an oral procedure.

II. The written procedure before the Constitutional Court

The written procedure is characteristic of all three forms of review we have mentioned: review prior to promulgation, review after promulgation on the constitutionality of the Parliament's Standing Orders or, as far as laws and orders are concerned, the subsequent review of the constitutionality of such instruments by means of the objection of unconstitutionality.

With the review prior to promulgation and the objection of unconstitutionality, the written procedure consists of the Parliament Chambers and the Government expressing their opinions on the objection or, as the case may be, on the exception of unconstitutionality. This procedure obliges the Constitutional Court to request these viewpoints and gives the above mentioned authorities the right to communicate them.

With the review of Parliament's Standing Orders, viewpoints are requested from the Chambers' Standing Bureaus.

The only exception is the case when the authority itself that seized the Constitutional Court is the one that is supposed to express its opinion, as well as the case when, with the procedure concerning the objection of unconstitutionality, the Constitutional Court rejects the objection as obviously unfounded without summoning the parties. However, this last hypothesis can be altered in the case of a subsequent appeal to the full Court from such a decision of a panel.

With all cases, the written procedure is a preparatory stage; it is the preliminary stage before the debate and, with control prior to promulgation or with control on the constitutionality of the Standing Orders, once completed the Court's Plenum proceeds directly to deliberation and judgment in order to resolve the objection of unconstitutionality.

In addition, the written procedure allows the rapporteur judge the right to request the necessary information and documentation from any public authority or any other legal person so that he is in a position to compile his Report. Once again, the nature of the relationship between the Constitutional Court and that authority or legal person is reflected in the obligation of the latter to communicate the requested information and documentation in due time.

The written procedure in constitutional disputes is indissolubly linked with public law, since it is set up to ensure that the main authorities of the legislative process are involved - the Parliament's Chambers and the Government - in the resolution of the objection.

In this manner, public authorities involved in the written procedure for constitutional review - the Parliament's Chambers and the Government, as well as ordinary Courts - are associated with the Constitutional Court and their participation thus expresses the pluralism inherent in constitutional disputes arising within the framework of public law.

III. The Oral procedure before the Constitutional Court

The oral procedure is characteristic of the objection of unconstitutionality. The relationships between the Panel and the participants in the proceedings - the parties and the Public Ministry - are the same as in civil proceedings, according to the Civil Code. They do not therefore have anything particular or distinctive in comparison with civil law proceedings, except for the fact that the only way to challenge the decision pronounced is by appeal to a differently composed Panel.

Unlike the partners of the Constitutional Court with the written procedure, the parties and the Public Ministry in the oral procedure enjoy the procedural position of participants, as with any other proceedings.

IV. Other jurisdiction

Besides the review of the constitutionality of laws, the Constitutional Court has other tasks too, such as contentious matters connected to the election of the President, the resolution of challenges to the constitutionality of political parties, ascertaining the results of a referendum, etc. In exercising these powers, the jurisdiction of the Court as well as the standing of partners or participants will vary with the particular circumstances of cases. However, within the limits of this report, we have confined ourselves only to the process of the review of the constitutionality of laws, not only because it is the most important process, but also because it defines the status of the Constitutional Court.

Also, there are a series of relationships between the Constitutional Court and various subjects of law during the execution of its decisions, and this is where constitutional disputes may overlap with administrative disputes. According to 145 paragraph 2 of the Constitution, decisions of the Constitutional Court shall be binding, but it is possible for certain public authorities to decline to obey them, in which case those interested turn to the Constitutional Court for support. In our opinion, this is a shortcoming in the organic law relating to the Constitutional Court that would have better provided for the right of the Constitutional Court to apply, just like an administrative Court, a certain penalty for each day's delay. Since such a provision is missing, the Constitutional Court confines itself to suggesting to successful petitioners that proceedings be instituted before the administrative courts, as the decision of the Constitutional Court either orders that a legal instrument should no longer be carried into execution or eliminates doubts as to the constitutionality of a legal instrument.

c. THE RELATIONS OF THE CONSTITUTIONAL COURT WITH THE ORDINARY COURTS AND OTHER PUBLIC AUTHORITIES

Summary of the Discussion

Many countries in continental Europe, among them in particular Germany, France and Belgium have a separate constitutional Court, other countries like the United States, Japan or Ireland have Supreme Courts but no Constitutional Court. Supreme Courts have, in varying degrees, the power to strike down laws within the framework of concrete norm control. In Ireland not only the Supreme Court but also the High Court has this power, in Japan, on the other hand, the Supreme Court out of self restraint does not exercise such a power. This self-restraint is motivated by a general reluctance to accept that a few non-elected members of the Judiciary can invalidate a law enacted by the representatives of the people.

A main argument against the setting up of a separate Constitutional Court is the danger of politisation of such a court. The recent experience of Russia shows that this is one of the main problems for the newly established democracies. On the other hand, there is a need to establish quickly whether a large number of norms are compatible with the Constitution and abstract norm control seems therefore indispensable for example in Romania. Apart from this specific situation, there is a growing tendency towards concrete norm control. Judges prefer to decide on real cases instead of regarding abstract hypothetical situations. Concrete norm control also strikes a better balance between the competences of the judiciary and the legislature. The widespread use of concrete norm control procedures can to a certain extent replace the constitutional complaints procedure. In Italy it has therefore not been felt necessary to introduce a procedure similar to the German Verfassungsbeschwerde or the Spanish amparo.

There is a presumption in favour of Parliament having wished to adopt an act compatible with the constitution. If different interpretations of a norm are possible, the interpretation making the norm compatible with the Constitution is therefore to be preferred. Within these limits it cannot be said that the striking down of laws by a court violates the principle of the separation of powers. On the contrary, politicians often like the court to take unpopular decisions for them.

Within federal countries like Belgium or Russia the Constitutional Court has an essential role. Both the federal state and the federated states have a tendency to use their competences until their limits and therefore there is a need to have a judicial institution ensuring the respect for the distribution of competences. A further problem is the co-ordination between the federal Constitutional Court and the Constitutional Courts of the various states.

Closing session

*Chaired by Mr Robert BADINTER,
President of the French Constitutional Council*

*Speech by Mr Robert BADINTER, President of the
French Constitutional Council*

Closing speech by Mr Robert BADINTER, President of the French Constitutional Council

Mr Badinter stressed that he did not intend summing up in a few minutes the wide-ranging and fruitful discussions which had taken place at the seminar, but wished instead to resituate the topic of the seminar - the development of constitutional justice - in the context of European integration.

*European jurists were now living through a unique moment in history: a Europe of law was in the process of being born or, rather, reborn. A common body of European law, a *ius commune europaeum*, was re-emerging. In addition to areas governed by conventions, this included a highly organised component, namely the European Union, in which over half of economic legislation fell directly within the powers of the Union. And there was also another area, i.e. that of the Council of Europe and the European Convention on Human Rights. The latter Convention took precedence over any national provisions which were not consistent with its terms, just as European Union law took precedence over national legislation.*

*There was thus European law, the law of the European Union, and European human rights law, shared by the member states of the Council of Europe. What was remarkable, was the fact that all universities were teaching this law in the same way. In the thirteenth and fourteenth centuries, students could study such *ius commune europaeum* in Bologna, Heidelberg, Cracow, Salamanca or at the Sorbonne, and this was not fundamentally different to what was happening today.*

Constitutional courts were making a decisive contribution to this common body of law. Although they were national courts, they followed developments in other European states very closely, and it was clear that they were moving in the same direction harmoniously and without discord. They co-operated very closely and kept abreast of each other's activities. As a result, they were able to apply the same fundamental principles when settling issues raised in the context of national law.

A common body of European law was therefore developing throughout Europe, and it was more the law that was pushing the politicians towards integration than the other way round. Law embodied the very characteristics of tomorrow's integrated Europe:

- *on the one hand, all those involved were guided by the same fundamental principles which lay at the heart of this Europe based on law;*

- *on the other, legal form and practice and cultural traditions varied from one State to another. And this was good and proper, for every nation had to find a way of giving effect to these principles that was consistent with its own specific features.*

There was thus a common body of principles enriched by cultural diversity.

This combination of factors meant that it was a privilege for the seminar participants both to be Europeans, jurists and Constitutional Court judges and to be living through this crucial period.

List of participants

ROMANIA/ROUMANIE

M. Ion ILIESCU, Président de la Roumanie
M. Adrian N_STASE, Président de la Chambre des Députés
M. Vasile GIONEA, Président de la Cour constitutionnelle
M. Antonie IORGOVAN, Juge à la Cour constitutionnelle
M. Ioan MURARU, Juge à la Cour constitutionnelle
M. Florin VASILESCU, Juge à la Cour constitutionnelle
M. Mihai CONSTANTINESCU, Juge à la Cour constitutionnelle
M. Victor Dan ZL_TESCU, Juge à la Cour constitutionnelle
M. Viorel Mihai CIOBANU, Juge à la Cour constitutionnelle
M. Miklo_FAZEKA_, Juge à la Cour constitutionnelle
M. Teodor MELESCANU, Ministre des Affaires étrangères
M. Gavril Iosif CHIUZBAIAN, Ministre de la Justice
M. Gheorghe TINCA, Ministre de la Défense
M. Valeriu BOGD_NESCU, Président de la Cour Suprême de Justice
M. Ion BOGDAN, Président de la Cour des Comptes
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M. Petru GAVRILESCU, Membre de la Commission européenne pour la démocratie par le droit
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M. Cornel BÂRSAN, Doyen de la Faculté de Droit de Bucarest
M. Ion SMEDESCU, Recteur de l'Université roumaine américaine
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M. Nicolae COCHINESCU, Procureur Général financier à la Cour des Comptes
M. Raul PETRESCU, Procureur au Parquet Général
M. Ovidiu Z_RNESCU, Juge à la Cour Suprême de Justice
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