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(VENICE COMMISSION)

STUDY

ON INDIVIDUAL ACCESS TO CONSTITUTIONAL JUSTICE

Adopted by the Venice Commission
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on the basis of comments by
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Executive Summary

1. Among the member and observer states of the Venice Commission, very few countries do not provide at least some type of individual access to question the constitutionality of a norm or individual act. These are Algeria, Morocco, the Netherlands and Tunisia (France can no longer be classified in this group after its recent constitutional reform). It is possible to distinguish between direct individual access, in which individuals are given the possibility to challenge the constitutionality of a given norm or act directly and indirect individual access, in which the constitutionality can be challenged only through state bodies. Many countries have a mixed system, both with direct means of access to constitutional justice and with indirect means.

2. As concerns indirect individual access, several bodies are entitled to challenge the constitutionality of a norm. Among them, the most common ones are the ordinary courts through preliminary proceedings as well as members of Parliament to the extent that they act on the basis of a petition by an individual. Some countries under review also grant standing before the constitutional court or equivalent body to the ombudsperson. The Venice Commission considers that ombudspersons, where they exist, are important elements of a democratic society protecting human rights. Therefore, when ombudspersons exist, they should be given the possibility to initiate constitutional review of normative acts on behalf of or triggered by individuals.

3. Indirect access to individual justice is a very important tool to ensure respect for individual human rights at the constitutional level. The existing choices are broad and many possibilities coexist. An advantage of indirect individual access is that the bodies filing complaints are usually well-informed and have the required legal skills to formulate a valid request. They can also serve as filters to avoid overburdening constitutional courts, selecting applications in order to leave aside abusive or repetitive requests. However, indirect access has a clear disadvantage, as its effectiveness relies heavily on the capacity of these bodies to identify potentially unconstitutional normative acts and their willingness to submit applications before the constitutional court or equivalent bodies. Therefore, the Venice Commission sees an advantage in combining indirect and direct access, thereby creating a balance between the different existing mechanisms.

4. As concerns direct individual access, several models exist in the countries under review: the *actio popularis*, in which anyone is entitled to take action against a norm after its enactment, even if there is no personal interest; the individual suggestion, in which the applicant only suggests that the constitutional court control the constitutionality of a norm, leaving the decision to do so at the court's discretion; the quasi *actio popularis*, in which the applicant does not need to be directly affected, but has to challenge the norm within the framework of a specific case; finally, the mechanism of the direct individual complaint,

that exists in various sub-forms. Among these mechanisms, the *actio popularis* creates the evident risk of overburdening the constitutional court.

5. In some Council of Europe member states, depending on the specific conditions and consequences, an individual complaint to the constitutional court or equivalent body can be considered by the European Court of Human Rights to be an effective remedy against a violation of the European Convention on Human Rights and can thus be seen as a filter for cases before they come to the Strasbourg Court. The Court's statistics show that those countries in which such a full constitutional complaint mechanism exists have a lower number of complaints (in proportion to the number of their population) before the Court than others, which do not have such a mechanism. Such complaint mechanisms therefore help to avoid overburdening the European Court of Human Rights.

6. The Venice Commission considers that, with respect to the types of norms which can be submitted for constitutional review, the constitutional court should be in charge of verifying the constitutionality of statutory acts only, leaving in principle the control of lower ranking texts to ordinary courts, in order to avoid its overburdening.

7. Constitutional review proceedings typically comprise several formal requirements and filters to avoid the overburdening as well as the misuse of remedies before the court. First, in order to open the proceedings, there are often time limits for lodging applications. However, such time limits should be reasonable and permit the preparation of the complaint by the individual him or herself or to find a lawyer. The constitutional court should also be able to extend deadlines only in exceptional cases. Second, free legal aid should be provided when necessary. Third, concerning fees, the Venice Commission recommends that the fees should not be excessive and only be used in order to deter abusive applications and the financial situation of the applicant should be taken into account when fixing them. Fourth, decisions issued by the constitutional court are final and it should be possible to reopen the cases only in very exceptional circumstances (such as a condemnation by the European Court of Human Rights). Fifth, the exhaustion of remedies is necessary in countries with concentrated control of constitutionality to avoid an overburdening of the constitutional court. Sixth, it should be ensured that the remedy available is appropriate to repair the applicant's complaint (e.g. accelerated proceedings in cases of excessive length of proceedings).

8. Among the procedural principles applicable to constitutional review, the constitutional court should adopt its decisions within an appropriate delay to respect the right to access to constitutional justice. In adversarial systems, parties to the proceedings before the ordinary courts should be given the possibility to present their views at the constitutional level.

9. Concerning interim measures, the Venice Commission is in favour of the possibility to suspend the implementation of a challenged individual and/or normative act, if the implementation could result in further damages or violations which cannot be repaired once the unconstitutionality of a provision is established. Especially for normative

acts, the extent to which non-implementation itself would result in damages and violations that cannot be repaired must be taken into account as well. Ordinary judges will usually be obliged to suspend the case before them if they submit to the constitutional court a question of constitutionality of the law applicable to that case. In cases of irreversible damage of individual rights, suspension should be obligatory.

10. Finally, the constitutional court should be able to continue analysing the petition even after it was withdrawn, if a public interest is at stake. However, if the challenged act loses its validity, there is no shared view on the possibility of the constitutional court to continue (or not) the procedures. The mere discontinuation of a case may be insufficient in order to protect human rights in cases of concrete review or individual complaints. Nevertheless, it is controversial if constitutional courts should be enabled to decide whether to award themselves or to initiate pecuniary compensation for the violation of a right in order to redress the breach to the individual's human rights.

11. To ensure an adequate balance between the interest of individual access to constitutional justice and the risk of being overburdening the constitutional court, the Venice Commission recommends that the constitutional judges be supported by qualified assistants and that their number should be determined in accordance with the case-load of the court. The overburdening of a constitutional court may also be avoided by an appropriate distribution of cases to chambers. However, a mechanism should exist to preserve the coherence of the constitutional court's case-law.

12. The effects of the decision issued by the constitutional court are also quite varied. The decision may only affect parties or everyone, depending on the *inter partes* or *erga omnes* effect (*ratione personae*) or may have different effects in time (*ratione temporis* effect).

13. According to its *ratione personae* effect, the decision may have effect only *inter partes* or *erga omnes*, the latter resulting in the invalidation of a normative act or making it inapplicable to future cases. In most of the countries under review, when the constitutionality of a norm is challenged, the constitutional court is entitled to remove it from the legal order or to decide at least on its unconstitutionality, leaving the decision to enact a new law to the legislator. However, in some countries, the constitutional court's powers are more limited and the decision only has binding effect for the parties to the case. In common law countries, with diffuse review of constitutionality, *stare decisis* also has a strong influence beyond the individual case, as precedents issued by the Supreme Court (or equivalent) are compulsory for lower courts unless they distinguish the case from the precedent or overrule it with adequate reasoning.

14. Decisions concerning the unconstitutionality of a normative act may have different temporary effects, either *ex nunc*, when the invalidity takes place from the moment in which the decision is issued, or *ex tunc*, in which the act is declared void from the very moment of its adoption, which has important consequences for individual cases. Only few countries have introduced *ex tunc* effect to constitutional court's decisions and most of them have attenuated effects to preserve the validity of final court decisions.

Introduction

15. By letter of 21 April 2009, the Permanent Representative of Germany to the Council of Europe, Mr Eberhard Kölsch requested, on behalf of the German Government, an opinion on individual access to constitutional justice. He pointed out that "such a study could be a valuable contribution to the promotion of national remedies for human rights violations and could thereby essentially help to guarantee the long-term effectiveness of the European Court of Human Rights". The Commission invited Mr Harutyunian, Ms Nussberger and Mr Paczolay to act as rapporteurs on this issue. The present report is prepared on the basis of their contributions and those of the liaison officers with the constitutional courts and equivalent bodies in the member and observer states of the Venice Commission, as well as those by the members who were called upon to verify the correctness of the information on their own legal systems.

16. A first draft of this report (CDL(2010)004) was discussed at the 9th meeting of the Joint Council on Constitutional Justice of the Venice Commission (Venice, 1-2 June 2010). The Commission invited the liaison officers to provide their remarks on this text and replies to a questionnaire by the end of September 2010. The Venice Commission is grateful to the liaison officers for their most valuable help.

17. The present report was adopted by the Commission at its 85th Plenary Session (Venice, 17-18 December 2010).

General remarks

18. A fundamental shift in the importance of constitutional protection of human rights has occurred over the past 60 years in Europe and beyond. Respect for human rights is now considered to be an essential part of any democratic society[1]. Mechanisms that allow individuals to directly or indirectly invoke these rights conferred upon them are, as a result, becoming increasingly important.

19. This draft study provides an overview of such mechanisms which exist in the Venice Commission's member and observer states. It does so in order to contribute to a better understanding of the great variety of adopted solutions, but also to analyse the merits of the various systems[2].

20. The draft study draws from the constitutions and legal texts contained in the Venice Commission's CODICES database[3]. The Venice Commission is grateful to its li-

[1] CDL-STD(1995)015, *The protection of fundamental rights by constitutional courts*, Science and Technique of Democracy, no. 15

[2] This study does not relate to the hierarchy between EU legislation and national law of the member states, even if some elements of the review of the Court of Justice of the European Union have similar features to those exercised by the Constitutional Courts.

[3] CODICES can be ordered on CD-ROM or found online on www.codices.coe.int. However, some texts are not published in CODICES: for San Marino, the revised version of the Declaration of Citizens' Rights has been used. Some translations have been made by the Secretariat, notably the legal provisions of Chile, Peru, Argentina, San Marino and Uruguay. The laws of Luxemburg and Monaco have been kept in their original French versions. References to all legal texts that have been used that are not included in CODICES can be found in the bibliography.

aison officers and to all the members for their contribution to the Bulletin on Constitutional Case-law, the database as well as to the present study.

21. In this study, the following definitions[4] are used:

(i) *Constitutional jurisdiction* means judicial institutions and procedures, which have been created in order to guarantee a state's constitutional order[5];

(ii) *Constitutional review* means a court's power to examine whether a legislative act or lower-ranking act conforms with the Constitution[6] and, in cases of incompatibility, to declare the former legally null[7] and void or inapplicable;

(iii) *Individual access to constitutional justice* means the various different mechanisms that enable violations of individuals' constitutionally guaranteed rights, either separately or jointly with others, to be brought before a constitutional court or equivalent body. Access mechanisms are either: indirect or direct. Indirect access refers to mechanisms through which individual questions reach the Constitutional Court for adjudication via an intermediary body. Direct access refers to the variety of legal means through which an individual can personally petition the Constitutional Court i.e., without the intervention of a third party;

(iv) *Constitutional Court* means constitutional courts, tribunals, councils and, if not specified otherwise, other supreme courts which have been identified as fulfilling the functions of a constitutional court[8].

22. Many authors believe that a written Constitution is a prerequisite for constitutional review[9]. In the framework of individual access to constitutional justice, this would mean that if no written text is given a specific status (primacy), there would be no need – and no possibility – for any organ, whether the Parliament or a court, to distinguish between legal and constitutional matters and thus to review the former using the latter as the standard, which could lead to the annulment of ordinary laws. However, some countries have – often in addition to a written Constitution -unwritten or customary constitutional law[10] or principles that can serve as review standards in addition to international treaties[11] and customary international law. The

[4] These definitions only serve as a guidance to determine the scope of this study without purporting to provide any judicial answer to complicated terminological questions.

[5] CDL-STD(1993)002, H. Steinberger, *Models of constitutional jurisdiction*, Science and Technique of Democracy, no. 2.

[6] CDL-INF(2001)009 Decisions of constitutional courts and equivalent bodies and their execution. It should be noted that the question of community law as a standard of review is not dealt with in this report as it applies only to half of the states under consideration.

[7] A. Cavari, "Between Law and Politics: Constitutional Review of Legislation" *Paper presented at the annual meeting of The Law and Society Association, Renaissance Hotel, Chicago, Illinois*, May 27, 2004, in: http://www.allacademic.com/one/www/www/index.php?cmd=www_search&offset=0&limit=5&multi_search_search_mode=publication&multi_search_publication_fulltext_mod=fulltext&textfield_sumit=true&searchmodule=multi_search&search=Search&search_field=title_idx&fulltext_search=Between+Law+and+Politics%3A++Constitutional+Review+of +Legislation, accessed 4 May 2009.

[8] CDL-INF(2001)009 Decisions of constitutional courts and equivalent bodies and their execution.

[9] See, for instance, J.-F. Flauss, "Human Rights Act 1998: Kaléidoscope", in: *Revue française de droit constitutionnel* No 48 2001/4, P.U.F., Paris, p. 695 f., or P. Pernthaler, *Allgemeine Staatslehre und Verfassungslehre*, 2nd rev. ed., Springer Verlag, Vienna, 1996, p. 174.

[10] Korea: Constitutional Court, "Relocation of the Capital Case", no. 2004, Hun-Ma554•566 of 21.10.2004, CODICES: KOR-2004-3-003.

[11] Austria: fundamental principles, a change of which would entail a total revision of the Constitution (Article 44.3 of the Constitution) and which the Constitutional Court even uses as a standard for substantial review of constitutional amendments, see decision of 11.10.2001, VfSlg. G12/00, CODICES: AUT-2001-3-005. Article 10.2 of the Spanish Constitution and its importance for the perspective of granting *amparo* in cases of breach of fundamental rights.

United Kingdom, of the Venice Commission's member and observer states, is the only one not to have a formal or hierarchically distinguished written Constitution[12]. As a consequence ordinary laws cannot be reviewed on their compatibility or conformity with a written Constitution. This is not to say that constitutional review does not exist in the UK. It exists in two ways: first by reference to European Union law as the UK courts are required to review the compatibility of UK legislation with EU law and, where it is incompatible, disapply UK law; and secondly, since the introduction of the UK Human Rights Act 1998, a review power was introduced enabling its higher courts to examine the compatibility of UK legislation[13] with those human rights protected by the European Convention on Human Rights 1950[14]. In the latter case, this limited, secondary, form of constitutional review provided by the 1998 Act enables the courts to declare ordinary UK laws incompatible with protected human rights; albeit they remain law and the UK Parliament is left with the choice whether to amend or repeal the specific law[15]. The UK has also developed an advanced system of administrative law, that applies to all forms of executive decision, including secondary legislation, and this system now includes enforcement of the duty to protect Convention rights.

23. All other member and observer States of the Venice Commission[16] base their legal system on a written Constitution, or, as is the case in Israel, on Basic Laws or other documents that have a semi-constitutional rank[17] and are considered the "supreme law of the land", the top of the hierarchy of norms. This supremacy manifests itself formally in specific rules of creation, for instance through higher quota for their adoption, and/or materially in that Constitutional norms should contain provisions of particular importance for the functioning of the state and the protection of the individual. Such a written doc-

[12] D. MAUS has pointed out, that it is not completely right to describe the UK as a country without a written Constitution. Indeed, this country has some written constitutional norms. The fact that there is no Constitutional Court is also somehow modified through the creation of the Supreme Court and the *Constitutional Reform Act* adopted in 2005, D. MAUS, "Le recours aux précedants étrangers et le dialogue des cours constitutionnelles", 24 janvier 2009, *World conference on Constitutional Justice*, Cape Town, accessible at http://www.venice.coe.int/WCCJ/Papers/AND_Maus_F.pdf ,
p. 6, last access August 2010.

[13] The control of legislation based on the Human Rights Act extends to the devolved legislatures in Scotland, Wales and Northern Ireland. In the case of these legislatures, legislation that is incompatible with a Convention right may be held to be *ultra vires*, outside the competence of the legislature in question.

[15] D. Fontana, "Secondary Constitutional Review: American Lessons from the New British System of Constitutional Review", in: http://www.allacademic.com/meta/p178285_index. html; A. Kavanagh, Constitutional Review Under The UK Human Rights Act, Cambridge University Press, Cambridge, 2009.

[16] Since the 2002 amendments to the Declaration of Citizens' Rights and of the fundamental principles of the San Marinese legal order, San Marino also seems to have a written Constitution. Before, the Declaration, together with the Statutes dating from 1600, could hardly be called a Constitution, but gave rise nevertheless to a certain review of compliance of normative acts with the principles: Ordinary courts had to refer the question of compatibility to the Great and General Council (Article 16 Declaration of Citizens' Rights and of the fundamental principles of the San Marinese legal order). The 2002 amendments seem to give the Declaration even clearer supra-legislative value in that not only special quota for its revision are required, but a "*Collegio Garante*" of the "constitutionality" – the use of this term is another indication for the quality of the legal document at hand − of norms is instituted. This *Collegio Garante* reviews the constitutionality of laws, and other acts having the force of law with respect to the Constitution, at the initiative of certain state organs and also in a preliminary ruling procedure initiated by an ordinary court or a party to a process. See http://www.consigliograndeegenerale.sm/new/ricercaleggi/vislegge.php3?action=visTestoLegge1&idlegge=6175&twid th=580&=, accessed 20 February 2009). The judges of the Collegio also have the power to deliver final decisions in civil, administrative and penal cases as single judges (see http://www.consigliograndeegenerale.sm/new/index.php3, Article 26).

[17] See http://www.knesset.gov.il/laws/special/eng/basic8_eng.htm

ument needs to be protected in order to keep its supremacy: it is not enough to merely declare that all normative acts in a country, especially laws, should respect the Constitution. The legislator's or executive's incapacity or unwillingness to comply with this obligation should be sanctionable in the sense that their acts need to be reviewed and possibly invalidated if they are unconstitutional. The level of protection and the techniques used to protect the supremacy of the Constitution varies significantly among the states covered in this study. In some states, the historical development of the state and the constitutional order sometimes with long periods of authoritarian or totalitarian rule has had an impact on this, or the moment of promulgation of a new Constitution, or the legal tradition of a state as a common law or civil law system.

24. Insofar as individual access to constitutional justice is concerned, constitutional review is exclusively or at least primarily focused on human rights. Therefore, as stated in the French Constitution of 1791, in order to be relevant for individual access, the constitutional texts must necessarily articulate, either as part of the text or as an appendix, a number of defined human rights.

25. In order to elucidate the general framework of the comparative analysis, a number of preliminary considerations are made concerning constitutional review's the historical background and the evolution of constitutional review, as well as on the different types of constitutional review (concentrated vs. diffuse, *a priori vs. a posteriori*, abstract vs. concrete) and on the different competences of constitutional courts.

26. While the present report tries to cover all member and observer states of the Venice Commission, it focuses on specialised constitutional review systems and certain recommendations made are applicable only to these systems.

1. Historical background

27. Many authors have attempted to create idealised types of constitutional justice by classifying existing legal systems according to the existence of a Constitutional Court, its competences, its nature and the time when legal review of acts takes place. This is most commonly done by describing what is said to be, an "American model", which is then opposed to a "European" or "Austrian" model, which in turn is presented as distinct from the "French" model of *a priori* review. This daft study eschews placing an emphasis on such idealised models; not least because many recent Constitutions often contain elements of various models. It focuses instead on an element by element comparison of the national solutions related to individual access.

28. At the beginning of the 18th century, the idea of constitutional review was credited to the activity of the Privy Council of Great Britain, which invalidated the acts of colonial legislatures if they contradicted the laws adopted by the British Parliament for those colonies or the common law. The first state to introduce constitutional control (and to use the term "constitutional court") was the United States in the famous 1803 *Marbury vs. Madison* case, which opened a path to constitutional control for citizens. In postcolonial United States, the concept of natural law, and thus of legal hierarchy, and the idea

of a social contract where the citizen may demand that the government fulfill its obligations were very present. On a more institutional basis, the threat of upcoming institutional conflicts and deviations in a system of vertical separation of powers showed the necessity of constructing a framework to avoid such clashes. The common law character of the American legal system, a heritage of its past as British colonies, explains the introduction of a diffuse system of review (see below), even if the United States' Supreme Court has extended its powers through legal practice so that it now holds a relatively strong position in the system of checks and balances.

29. In Europe, the German Constitution of 1849 (*Paulskirchenverfassung*) was the first to explicitly provide for individual constitutional complaint in § 126 lit. g[18]. However, it never entered into force. In Belgium, France and Switzerland, similar models were also discussed, but not implemented. In Austria in 1867, Article 3 lit. b *Staatsgrundgesetz* über die Einrichtung eines Reichgerichtes introduced the competence of the Reichsgericht (the "empire court") to adjudicate citizens' complaints based on violations of their constitutionally guaranteed rights. The Supreme Court of Norway, in 1866, declared itself competent to control the constitutionality of laws[19] and the *Marbury v. Madison* heritage was embraced by the Romanian Court of Cassation in 1912[20].

30. In the 20th century, Kelsen's model of concentrated review vested a single court with the competence to remove unconstitutional acts from the legal order, only on application by authorised constitutional bodies.

31. The constitutional settings, and in particular constitutional court practice, after World War II reflect a paradigm shift towards the protection of individual human rights carried out by only one of the constitutional powers (the courts or a separate Constitutional Court).

32. Almost all civil law countries chose to give the power of constitutional review to a specific court that is either at the apex of the judicial system, or situated outside the ordinary justice system. It is quite clear that this challenges Parliamentary authority and might lead to the fear of a "government of judges"; as Constitutional Courts can void acts of Parliament without being directly elected and accountable to the electorate. Exceptions to this general principle, however, are present in some countries outside Europe: pursuant to Article 79 of the Constitution of Japan, the appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment. In the above-mentioned case, if the majority of the voters favours the dismissal of a judge, he or she shall be dismissed. France, the Netherlands and the UK have traditionally been reluctant to introduce constitutional

[18] "Zur Zuständigkeit des Reichsgerichts gehören … Klagen deutscher Staatsbürger wegen Verletzung der durch die Reichsverfassung ihnen gewährten Rechte"

[19] D. MAUS, op. cit., p. 2. See also E. HOLMØYVIK, "Why did the Norwegian Constitution of 1814 Become a Part of Positive Law in the Nineteenth Century?", blogit.helsinki.fi/reuna/Holmoyvik-paper-Tartu.doc; K. M. BRUZELIUS, "Judicial Review within a Unified Country", http://www.venice.coe.int/WCCJ/Papers/NOR_Bruzelius_E.pdf, last accessed September 2010.

[20] See G. CONAC, «Une antériorité roumaine: le contrôle juridictionnel de la constitutionnalité des lois», *Mélanges Slobodan Milacic, Démocratie et liberté: tension, dialogue, confrontation,* Bruylant, Belgique, 2007.

review[21]. In the UK, the doctrine of parliamentary sovereignty applies, making Parliament the supreme legal authority in this country, which can create or "end" the validity of any law. Generally, the courts cannot overrule its legislation and no Parliament can pass laws that future Parliaments cannot change[22]. In the Netherlands, which is a civil law country, constitutional review of Acts of Parliament by the judiciary is prohibited (Article 120 of the Constitution). However, Article 120 is under discussion at present. Moreover, it should be noted that self-executing provisions of international treaties and decisions of international organisations may be directly referred to in court proceedings, in which case the courts are obliged to review domestic law, including Acts of Parliament, for their conformity with those provisions of international law and to withhold in the specific case the application of the Act or other domestic law provision that is in violation of international law. Since many such provisions of international law have their equivalent in Dutch constitutional law, to that extent the Netherlands may nevertheless be considered as having a system of constitutional review in the material sense. Likewise, France has introduced *a posteriori* review alongside the existing abstract priori review of constitutionality of the legislation and thereby veers away from its traditional respect of the rigid separation of powers[23].

33. The Latin American states most often reflect a strong American influence with diffuse review and a strong Supreme Court (e.g. Brazil, Mexico). Some have opted for a specialised Constitutional Court (e.g. Peru, Chile). Most of the countries from the Maghreb follow the French model that existed before the 2008 reform.

2. Diffuse vs. Concentrated Review

34. The oldest model of constitutional review is the American one. This is characterised by diffuse, incidental control, which offers direct access to constitutional justice for individual citizens as they can raise issues of constitutionality before the courts. Ordinary courts are entitled to assess the constitutionality of any legal norm or individual act. Judges of such courts are able to disapply any norm or act which they hold to be unconstitutional. This is advantageous as complainants do not have to, as they would otherwise, endure lengthy proceedings before a Constitutional Court. This advantage must however be set against the possibility of, and inconvenience that might be generated by, different ordinary courts considering the same constitutional and legal matters simultaneously. This can lead to conflicting decisions: to incoherence and uncertainty in the law as different courts may interpret constitutionality of the same norm differently. It can also then lead itself to lengthy, costly appellate proceedings if decisions are appealed to the Supreme Court. If such appeals are not made the law is left in an uncertain state with

[21] Nevertheless, in France, before the reform introducing the preliminary priority ruling in 2008, ordinary judges, even if they were not allowed to conduct a «constitutionality control», could conduct a «conventionality control», i.e., they established the conformity of the domestic legal provisions to international treaties, such as the European Human Rights Convention, ensuring the protection of human rights.

[22] http://www.parliament.uk/about/how/sovereignty/. However, the Human Rights Act 1998 has established that courts should assess the compatibility of any legislation with the rights included in the ECHR and they can make a declaration of incompatibility, which may be followed by a process amending the legislation. It is entirely a matter for Parliament however as to how and it legislation is thus amended. See above, and Human Rights Act 1998, section 4.

[23] See French Constitutional Law of 23 July, 2008.

no definitive judgment providing a clear interpretation of the Constitution[24]. Nonetheless, diffuse review remains a perfectly valid form of constitutional justice[25].

35. While he even rejected the idea of introducing rights litigation as such[26], Hans Kelsen invented an alternative to the diffuse model. In the 1920 Austrian Constitution he developed the concentrated review model[27].

This model met with extraordinary success[28] in countries in transition to democracy. It was, for instance, copied by Germany and Italy after WW II; by Spain[29] and Portugal at the end of the 1970s; and by virtually all Central and Eastern European states, becoming evident mainly after the fall of communism. In a concentrated system a separate court, usually placed outside the ordinary court system, is given the power to review the constitutionality of normative acts. Constitutional review in such a system is carried out by a Constitutional Court or a single Supreme Court which has, in addition to its ordinary appellate jurisdiction, competence to carry out constitutional review. Such review is carried out either via indirect access or direct access. The former occurs in ordinary proceedings. The judge (the ordinary judge) hearing those proceedings will suspend them where an issue of constitutionality arises[30] and will then issue a preliminary request to the Constitutional Court to determine the issue. The latter occurs where an individual complaint is made directly to the Constitutional Court, usually after the exhaustion of all other legal remedies. Two main advantages can be seen in the concentrated model: i) greater unity of jurisdiction; and ii) legal security as it does not permit divergent decisions on issues of constitutionality to arise, which would render the application of a statute unclear.

36. Classifying a legal system as diffuse or concentrated can be difficult. The nature of a system is determined by a Court or Courts' material competences, which determine whether or not there is one single institution that is entitled to decide constitutional matters. Accordingly this study divides the Venice Commission's member states' legal systems into three types: first, those which have a diffuse form of constitutional jurisdiction; secondly, those which have a concentrated one; and thirdly, those which have a special type of constitutional jurisdiction[31].

[24] M. Kau, Bundesverfassungsgericht und US Supreme Court: *Die Bedeutung des United States Supreme Court für die Errichtung und Fortentwicklung des Bundesverfassungsgerichts*, Springer, Berlin/Heidelberg, 2007, p.304 f. Also, the example of *Marbury vs*. Madison was quickly followed by Monaco and Norway.

[25] CDL(1998)059, Opinion on the reform of Constitutional Justice in Estonia.

[26] Kelsen, Hans, *La garantie juridictionnelle de la Constitution, Revue de.Droit.Public*, 1928, vol. 44, pp. 197-257. The individual appeal to the Constitutional Court of Austria in administrative cases was already provided for by Article 144 of the first version of the Austrian Federal Constitution Act (B-VG), BGBl. 1/1920. Also the predecessor of the CC, the *Reichsgericht*, had such a power already. However, direct access for the individual to directly challenge laws and regulations before the CC has been introduced in 1975 by amendment of Articles 140 and 139 B-VG (Article 1.8 BVG BGBl. 302/1975).

[27] The first Constitutional Court, however, was not set up in Austria, but in Czechoslovakia in February 1920 (Constitutional Act no. 21/1920 Coll.). The Austrian Court followed some months later, in October 1920.

[28] As L. Garlicki puts it, "following a period of authoritarian rule, the existing courts were unable to offer adequate guarantees of structural independence and intellectual assertiveness." (See L. Garlicki, "Constitutional courts versus supreme courts", *International Journal of Constitutional Law* 2007 5(1), Oxford University Press, Oxford, in: http://icon.oxfordjournals.org/cgi/content/full/5/1/44#FN59#FN59, accessed 11 February 2009).

[29] Although Spain had had a Court before 1978, the one established under the 1931 Constitution.

[30] The ordinary judge can be obliged to do so upon request by a party (e.g. Belgium) or can do so only when he or she shares the doubts raised of a party or has him or herself doubts about the constitutionality of a provision to be applied in the case.

[31] CDL-JU (2001)22, G. Brunner, *"Der Zugang des Einzelnen zur Verfassungsgerichtsbarkeit im europäischen Raum"*, report for the CoCoSem seminar in Zakopane, Poland, October 2001, p. 35f.

37. Countries whose systems of constitutional review are entirely diffuse constitutional review are: Denmark; Finland; Iceland; Norway and Sweden.

38. By way of contrast, concentrated review exists in: Albania; Algeria; Andorra; Armenia; Austria; Azerbaijan; Belgium; Belarus; Croatia; Czech Republic; France; Georgia; Germany; Hungary; Italy; South Korea; Latvia; Liechtenstein; Lithuania, Luxembourg; Moldova; Montenegro; Poland; Romania; Russia[32]; Serbia; Slovakia; Slovenia; Spain; "The Former Yugoslav Republic of Macedonia"; Turkey and Ukraine. The Algerian, French, Moroccan and Tunisian constitutional councils are also institutions which specialise in constitutional review, albeit their focus differs from that of the above-mentioned constitutional courts.

39. "Special constitutional jurisdiction" can be found in a number of the Venice Commission's member and observer states. To a certain degree these countries have a diffuse system of review, but each has a Supreme Court (or even a "Constitutional Court"[33]), which has the capacity to invalidate normative acts or to rule in cases (sometimes even on the merits) upon demand of a lower court. Brazil for instance has a mixed system of constitutional review. Andorra, Chile and Peru[34] have a constitutional court or tribunal with vast powers.

40. Argentina, Brazil, Canada, Cyprus[35], Estonia, Greece, Ireland[36], Israel, Japan[37], Malta, Mexico, Monaco, Portugal, San Marino, South Africa[38], Switzer-

[32] All references made to the Federal Constitutional Law on the Constitutional Court of the Russian Federation are based on the text in force at present. However, a major reform is being enacted and will enter into force on the 11 February 2011, which will change the number of the articles references in this Study and may challenge some of the information contained here.

[33] Such in the case of Andorra. In the case of Portugal, the Constitutional Court is an autonomous jurisdiction with specific competences, but there is a generalised system of diffuse review of constitutionality exercised by ordinary courts. Estonia has a special chamber on constitutional matters at the Supreme Court (although ordinary judges can also control constitutionality) and Peru and Chile have Constitutional Tribunals

[34] H. Nogueira Alcala, *"El recurso de proteccion en Chile", Anuario iberoamericano de justicia constitucional*, no. 3, 1999 , Madrid, 1999, in: http://dialnet.unirioja.es/servlet/articulo?codigo=1976169, accessed 25 February 2009.

[35] In accordance with the 1960 Constitution, still applicable in Cyprus, two Supreme courts were established: (a) the Supreme Constitutional Court and (b) the High Court of justice. Because of the circumstances that arose in 1963, entailing paralysis of the judicial authorities, the Supreme Court of Cyprus was established by the Administration of Justice (Miscellaneous Provisions) Law (33/64). The two Supreme Courts were joint into the present Supreme Court of Cyprus which has all the powers and jurisdiction of both courts in accordance with the administration of justice (Miscellasneous Provisions) Law of 1964. Thus currently the Supreme Court of Cyprus is also the Supreme Constitutional Court of the land (deciding pre-emptively questions of constitutionality of proposed legislation, when asked to do so by the President of the Republic, adjudicating upon questions of conflict of power or competence arising between organs or authorities in the Republic and deciding on the constitutionality of existing laws). It is also the Administrative Court of the land with exclusive revisional jurisdiction. As Administrative Court, the Supreme court consisting of panels of single judges has first instance jurisdiction, whereas consisting of panels of five judges have appellate and final jurisdiction.

[36] The Supreme Court and the High Court may declare the unconstitutionality of a normative or individual act and attribute damages to the complainant; see http://www.supremecourt.ie/supremecourt/sclibrary3.nsf/pagecurrent/9034466B2045E5EC802574320051162 5?open document&l=en, accessed 9 April 2009

[37] H. Hyun Lee, Rapporteur, Report for the Asian Constitutional Courts, in: http://www.venice.coe.int/WCCJ/Papers/KOR_Kong%20Hyun%20Lee3_E.pdf, accessed 10 March 2009.

[38] While ordinary courts are competent to hear cases involving constitutional matters, the Constitutional Court of South Africa is the highest court on constitutional matters. The Constitutional Court may be directly accessed or accessed by means of appeal from a lower court, and has exclusive jurisdiction over a number of matters including the confirmation of a declaration of the constitutional invalidity of a normative act (statute) by an ordinary court.

land[39] and the USA each have diffuse review systems, although they each provide their Supreme or constitutional courts (as in the case of South Africa and Portugal –where there is a Constitutional Court) with special review competences. For the purpose of this study, the proceedings, and review activities, of these supreme courts will also be examined. The Netherlands has an even more diffuse system. There is neither a special court, nor a supreme court with special review competences. Every court in the Netherlands has the power (and duty) to review national law in the light of human rights conventions and other self-executing treaties.

41. Unsurprisingly diffuse and concentrated systems rarely exist in their pure form. *Stare decisis*, for instance, introduces an element of harmonisation insofar as judicial interpretation is concerned in diffuse systems. In concentrated systems, by way of contrast, the constitutional court is far from being unanimously recognised as the only body competent to review and interpret statutes concerning their constitutionality.

42. The Portuguese system combines concentrated and diffuse review. There, ordinary courts can refuse to apply a law which they deem unconstitutional but this non application is valid only in the specific case and the law as such remains valid. However, once a law is found unconstitutional three times by the ordinary courts, the public prosecutor's department may request the Constitutional Court to annul the law with general effect.

3. Abstract review vs. review related to a specific case[40]

43. When a constitutional court carries out an abstract review, it examines a specific law or regulation without reference to a specific case or set of proceedings. From what has been said about diffuse review and review related to a specific case, it follows that diffuse normative review is necessarily related to a specific case. Concentrated review can however be both abstract and related to a specific case[41].

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[39] The following peculiarity of constitutional review in Switzerland should be noted: Article 190 of the Federal Constitution of the Swiss Confederation states: "The Federal Supreme Court and the other judicial authorities shall apply the federal acts and international law." This means that the Federal Supreme Court can deny applicability to unconstitutional cantonal and intercantonal laws, federal decrees, and to ordinances of the Federal Assembly, the Federal Council, and the Federal Administration. The Federal Supreme Court may question the constitutionality of a federal act or international law in its considerations, but cannot formally review them.

[40] The wording is deliberately chosen to avoid the terminological confusions linked to different meanings of the pair of opposites abstract – concrete review in different languages or legal cultures. One can distinguish those for whom the distinctive factor is the trigger of a review (abstract-without relation to a case, concrete because an individual is being affected in his/her legal positions). Secondly, in German legal terminology, constitutional review can be considered concrete if it takes place in preliminary ruling procedures, where constitutional complaints constitute a third, separate type of review operated by the Constitutional Court which are not called "concrete".

[41] W. Sadurski argues that even if review is related to a concrete case, the continental European Constitutional Courts follow abstract considerations in assessing the law. Unlike, for instance, the American Supreme Court, European review techniques are based on Kelsen's idea of cleaning of the legal order. Therefore, according to Sadurski, *Constitutional Courts don't decide on the merits of the individual case. See mainly W. Sadurski, Constitutional Justice East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective, Kluwer, 2002 and Rights Before Courts: a Study of Constitutional Courts in Post-Communist States of Eastern and Central Europe*, Springer, 2005.

4. *A priori vs. a posteriori* review

44. Review can take place before or after the enactment of a normative act. Abstract review can take place before and after enactment. Review related to a specific, concrete, case is of necessity however only possible after the enactment of a general act[42].

45. Abstract review, and the capacity to carry out a review after the adoption but before the enactment of a law, is often identified with the French model of review. In contrast, the US review model is *a posteriori* and incidental i.e., related to a specific case[43].

46. *A priori* review may only be initiated by specific bodies, designated in the Constitution or in any law which establishes a constitutional court, as having the power to do so. It cannot be initiated individuals. In South Africa, for instance, the President can refer a Bill before it is passed by Parliament to the Constitutional Court. It can then evaluate its constitutional validity. Other countries which adopt this approach are: France (after the vote of the law but before its enactment) and Canada.

47. With the growing importance and protection of fundamental rights national legislators must decide which role the constitution and, consequently, the constitutional courts should play: should they only protect the objective constitutional order (which also includes the protection of fundamental rights in the sense that these are part of the objective constitutional order)? Or should there be a specific guarantee of subjective fundamental rights conferred on the individual by the Constitution? There is a clear tendency towards the introduction of mechanisms that allow for the protection of individual, fundamental, rights through the constitutional court and, more specifically, for individual access. The constitutional order itself needs also to be preserved and individual cases serve often as means to learn about shortcomings and to provide for a better implementation of the constitutional provisions.

The opposite of the original Kelsenian model, where only constitutional bodies were entitled to approach the constitutional court, is one which provides the means for individuals to question the constitutionality of a normative or individual act which may harm their interests.

48. Any applicant can express his or her doubts about the constitutionality of a normative or individual act during the proceedings. In systems with a diffuse control of constitutionality, it is the ordinary judge who decides on the constitutionality or unconstitutionality of a provision, although there are several modalities. Where the judge declares a provision unconstitutional it will not be applied.

49. A central focus of this study is constitutional complaints and constitutional review as far as the latter can be initiated directly or indirectly by an individual and not only by constitutional bodies. However, it must be noted that abstract *a priori* and *a pos-*

[42] Unless the normative act is a disguised individual act.

[43] Abstract *a priori* review puts the Constitutional Court in the position of an arbiter – typically between the executive and the legislative or a parliamentary minority with standing before the Constitutional Court – and generally considered as being politically sensitive. See Rosenfeld, "Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts", report prepared for the UniDem Seminar 2003, in: CDL-STD(2003)037 Science and Technique of Democracy no. 37 (2003), T. Ginsburg, Comparative Constitutional Review, 2008.

teriori control initiated by a constitutional body, often aimed in principle at preserving the constitutional order, can raise questions related to fundamental rights and is therefore paramount to protecting these rights.

50. This study is divided into four sections. In section I, access to constitutional review is analysed and the different actors, who can initiate constitutional review proceedings, are identified i.e., either individuals through direct access, or other bodies in the case of indirect access. In section II the nature of proceedings themselves, the requirements and different procedural rules are analysed. In section III the effects of constitutional review on challenged normative acts is analysed. Finally, in section IV further questions regarding constitutional review are examined.

I. ACCESS TO CONSTITUTIONAL REVIEW

51. Historically, the main type of constitutional review is carried out by ordinary judges through incidental review in diffuse review systems.

Incidental review takes place at any stage of the ordinary proceedings by any ordinary judge. Contrary to specific constitutional complaints, contesting the constitutionality of norms by way of incidental review can be raised during the course of any type of proceedings. Access to constitutional review is therefore open to any person who has standing in ordinary proceedings. The effectiveness of this type of review relies both on the individual's knowledge of their rights and on the ordinary judge's capacity and willingness to investigate violations of fundamental rights. Both conditions are not entirely obvious[44]. This system works well where it is well rooted in the legal culture, such as in the United States, Canada and in the Scandinavian countries.

52. There are few countries that do not provide any means for the individual to question the constitutionality of a general or individual provision, not even indirectly through preliminary ruling procedures. These are Algeria, Morocco, the Netherlands and Tunisia. France used to belong to this group of countries, although the Council of State (*Conseil d'Etat*) could review the constitutionality of any act below the level of statutory acts. However, a recent constitutional reform has changed the French position. The new Article 61-1 of the Constitution, introduced in 2008, introduces a "priority question of constitutionality". This reform allows any individual to challenge before an ordinary judge the constitutionality of a legislative act which arguably restricts their rights and freedoms guaranteed by the Constitution. The judge will decide whether or not to send the question to the *Conseil d'Etat* or the Court of Cassation, which will respectively decide on whether to refer this question to the Constitutional Council.

53. Because individual access predominately serves the function of protecting an individual's fundamental rights and, as these rights – with the exception of political rights

[44] See X. Philippe, "Le contrôle de constitutionnalité des droits fondamentaux dans les pays européens", *Actes du colloque international "L'effectivité des droits fondamentaux dans les pays de la communauté francophone"*, Port-Louis (Île Maurice), 29-30 septembre, 1er octobre 1993, p. 412.

(e.g. right to vote) and sometimes also social rights (e.g. right to social security) are usually conferred upon citizens and non-citizens alike, individual access provisions typically concern all members of society[45]. Nevertheless, the protection of non-citizens may be less comprehensive than the protection of citizens.

54. Constitutional courts can be approached by different bodies or by individuals. A straightforward method of classification would distinguish between claims by public or constitutional bodies, including courts[46], and claims by private, natural, or moral persons. In some states, e.g., Albania, Austria, Croatia, Hungary, Moldova[47],or "The Former Yugoslav Republic of Macedonia" the constitutional court may start review proceedings *proprio motu*. However, such a classificatory system is not entirely satisfactory. It is not because *a priori* review is normally open only to certain constitutional bodies and not to individuals, while *a posteriori* review, on the other hand, when it exists, can be initiated by individuals and by constitutional bodies. As stated above, the present study distinguishes between **direct** and **indirect** access. Indirect access means that any individual question reaches the constitutional court for adjudication through the intermediary of another body, whereas direct access comprises all legal means given to individuals to directly petition the constitutional court without the intervention of a third body.

<table>
<tr><th colspan="3">Indirect</th><th colspan="9">Direct</th></tr>
<tr><td colspan="3">Related to a concrete case</td><td colspan="3" rowspan="2">Abstract</td><td colspan="6">Individual complaint/related to a concrete case</td></tr>
<tr><td></td><td colspan="2">Preliminary ruling procedures</td><td colspan="3">Against normative acts</td><td colspan="3">Against individual acts</td></tr>
<tr><td>Ombudsperson</td><td>Preliminary request</td><td>Exception/objection of unconstitutionality</td><td>Actio popularis</td><td>Quasi actio popularis / legal interest</td><td>Individual suggestion</td><td>Normative constitution-alcomplaint</td><td>Russia: Individual complaint</td><td>Ukraine: Constitution-alpetition/submission</td><td>Amparo</td><td>Constitutional revision</td><td>Full constitutional complaint</td></tr>
</table>

55. The classification followed here therefore explores two issues: first, the actors involved in cases of indirect access to constitutional review; secondly, individuals' direct access to constitutional review. The subject of review is studied, as are the rights protected.

[45] According to Article 125 of the Constitution of Russia, "citizens" are entitled to apply to the Constitutional Court, but the Constitutional Court has given a broad interpretation of this term, including also foreigners and stateless persons.

[46] The Venice Commission's Systematic Thesaurus lists *inter alia* Head of State, legislative bodies, executive bodies, organs of federated or regional authorities, organs of sectoral decentralisation, local self-government bodies, the public prosecutor, the ombudsperson. Furthermore, there is a systematic distinction between referrals by a court (especially as concerns preliminary questions) and claims by private or public bodies. See CDL-JU(2008)031 Systematic Thesaurus.

[47] Art. 135 from Constitution provides that the Constitutional Court exercises its control only on request. However, article 72 of the Code on constitutional jurisdiction provides that the Court can review its own decisions *proprio motu*, but there is no text or practice of starting proceedings of review of the normative acts *proprio motu*.

I.1. Types of access

I.1.1. Indirect access

I.1.1.1. Ordinary courts introducing preliminary ruling procedures

See 1.1.20 Table: Indirect individual access: Preliminary requests

56. Preliminary ruling procedures are amongst the most common types of indirect individual access. If an ordinary court has doubts whether a normative act applicable in a concrete case violates the constitution, it brings a preliminary question before the constitutional court. The benefit of this procedure is that ordinary courts are well-informed and capable of making valid requests. Ordinary courts serve as an initial filter and can help minimise the number of abusive or repetitive requests. Furthermore, preliminary ruling procedures complement the abstract consideration of any provision, as they facilitate review arising from concrete situations in which a provision is applied or should be applied[48]. This advantage can, in some court systems, also has its drawbacks. First, the effectiveness of preliminary ruling procedures heavily relies on the capacity and willingness of ordinary judges to identify potentially unconstitutional normative acts and to submit preliminary questions to the constitutional court. Secondly, it relies, to a lesser extent, on individuals using the procedure. Preliminary ruling procedures exist in many states included in this study, with the exception of Portugal and Switzerland[49]. In Lithuania, preliminary questions constitute the only type of individual access to the constitutional court. In Belarus, when trying a case, preliminary requests constitute the only type of individual access to the constitutional court, apart from petitions to various state bodies. In states with diffuse constitutional review systems, preliminary questions are however relatively uncommon due to the competence that ordinary courts have to assess the constitutionality, or otherwise, of an applicable act.

57. In many states (e.g. Albania, Algeria, Andorra, Armenia, Belgium, Bulgaria, Croatia, Czech Republic, France, Hungary, Lithuania, Moldova, Poland, Slovakia, Spain, Turkey and Ukraine) parties to proceedings before an ordinary court may suggest that a preliminary question be submitted to the constitutional court. Such suggestions, which may be rejected or accepted, do not however fetter the judge's discretion to refer a preliminary question.

58. Where parties can make such suggestions in the course of ordinary proceedings they can be placed in a strong position. Parties to such proceedings can rely on a procedural remedy – the "exception of unconstitutionality" where they have doubts concerning the constitutionality of a statute that is to be applied in those proceedings. This form of exception may be lodged with the ordinary judge. The judge is then obliged to consider it and justify any refusal to refer the question to the constitutional court. Refusals to refer can only validly be made however on a certain limited number of grounds (e.g., the exceptions are clearly unfounded etc.[50]). Even though the ordinary judge's decision is final,

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[48] CDL-INF(1996)010 Opinion on the draft law on the Constitutional Court of the Republic of Azerbaijan.

[49] See *Bericht des Schweizerischen Bundesgericht für die VII. Konferenz der europäischen Verfassungsgerichte*, p. 17, in: http://www.confcoconsteu.org/reports/Zwitserland-DE.pdf, accessed 2 June 2009.

[50] In France, for example, the priority preliminary ruling needs to meet several requirements: the question has to be serious, it has to be new (a question that the Constitutional Council has not yet answered) and has to be applicable to the specific case.

there are procedural limits on their, and the ordinary courts, autonomy. This type of access exists in certain countries, e.g., Albania, Chile, Greece, Hungary, Italy, Luxembourg, Malta, Portugal and San Marino. In South Africa, permission (leave) to appeal to the constitutional court can be granted only by the Constitutional Court, though a declaration that a statute is invalid must be confirmed by the Constitutional Court and must therefore in all cases be referred to that Court. In other cases individuals can bring their complaint to that Court only if permission to appeal is granted, or if direct access is granted.

59. The "exception of unconstitutionality" can thus be considered to be a very effective means of achieving individual access if the ordinary court must send a preliminary question; as is the case, for example, in Romania or Slovenia.

60. In Albania, Andorra, Armenia, Austria[51], Belgium, Belarus, Bosnia-Herzegovina, Croatia, Czech Republic, Georgia, Hungary, Italy, Liechtenstein, Lithuania, Luxembourg Malta, Poland, Slovakia, Slovenia, Romania, Russia, Spain, "The Former Yugoslav Republic of Macedonia", Turkey and Ukraine all ordinary courts are competent to initiate a preliminary ruling procedure by bringing a question before the constitutional court.

61. The submission of preliminary questions can be limited with the aim of raising the quality of the submissions. In Austria (concerning laws), Azerbaijan, Belarus, Bulgaria, Greece, Latvia, and Moldova only the highest courts are authorised to bring preliminary requests. In Cyprus, only courts that have jurisdiction in family issues can refer preliminary questions. In Russia and Belarus, the highest courts are also authorised to initiate an abstract review procedure. In France, a two level filter system has been set in place for the priority preliminary ruling: first, any ordinary judge, only at the request of one of the parties to the case, can refer the preliminary question to the highest court; then, the highest court can bring the question before the Constitutional Council.

62. While this is an effective tool to reduce the number of preliminary questions and consistent with the logic of exhaustion of remedies (the individual should follow the ordinary sequence of courts), this leaves parties to proceedings in a potentially unconstitutional situation for a long period of time if lower courts are obliged to apply the law even if they have serious doubts as to its constitutionality. **From the viewpoint of human rights protection, it is more expedient and efficient to give courts of all levels access to the constitutional court**. There are also other alternatives. In Germany, for example, all courts have to take into consideration all questions of constitutional law and they are obliged to refer a question to the Constitutional Court, if they are convinced that a certain norm is unconstitutional – mere doubts are not sufficient. This helps both to reduce the number of preliminary questions without unnecessarily prolonging rather obvious unconstitutional situations.

I.1.1.2. Ombudsperson

See 1.1.19 Table: Indirect access: Ombudsperson

63. Most of the Venice Commission's member and observer states have an om-

[51] With the exception of first instance courts.

budsperson institution (Mediator, Parliamentary Commissioner, etc.), usually appointed by national parliaments[52] . These ombudspersons are independent and impartial. In many states, ombudspersons are considered to be human rights protectors (People's Advocate etc.) who try to find viable solutions when human rights violations have occurred.

64. From the perspective of human rights protection, the Venice Commission recommends that **"the mandate of the Ombudsman or Human Rights Defender should include the possibility of applying to the constitutional court of the country for an abstract judgment on questions concerning the constitutionality of laws and regulations or general administrative acts which raise issues affecting human rights and freedoms.** The Ombudsman should be able to do this of his/her own motion or triggered by a particular complaint made to the institution"[53]. It is the ordinary courts' primary task to provide remedies against illegal acts. However, when a constitutional court is also competent to control the constitutionality of individual acts, it seems logical to also give the ombudsman (or ombudsperson) a right to bring individual cases to the court. In any case, as access to the constitutional court via an ombudsman only offers indirect access to it, this mechanism cannot replace direct access, but has to be seen as a complementary process. The choice made between the different mechanisms or whether to create parallel options will depend on the legal culture of any given country.

65. In many states, the ombudsperson does not have standing to apply to the constitutional court and may only file reports to Parliament, suggesting the submission to the CC of the constitutionality of certain legal provisions and facilitate the resolution of conflicts between the public administration and an individual (e.g. Greece, Lithuania or the Republic of Korea)[54]. In countries such as France or the United Kingdom even if the ombudsperson has direct competence in ensuring the protection of an individual's rights, they do not have standing before the ordinary courts. In France, the Ombudsman (*Médiateur de la République*) has the power of injunction "on any administrative body" and even on courts (in order to obtain documents, etc.).

66. In diffuse review systems, the ombudsperson, if it has been vested with the power to initiate judicial proceedings, must do so at the competent ordinary court – not at the Supreme Court (e.g. the specialised Ombudsman in Finland). Brazil, although not strictly a diffuse review country, has modified its legislation in 2009 and the Public Defender can now initiate legal proceedings before the Judiciary for the protection of constitutional rights.

67. In concentrated constitutional review systems, the ombudsperson may have the power to initiate constitutional review proceedings. As examples, Croatia's, Estonia's, Montenegro's, Portugal's, Slovenia's, Spain's and "The Former Yugoslav Republic of Macedonia"'s ombudsmen may initiate such proceedings, normally to protect fundamental rights, and may do so without their having to be a concrete case.

[52] According to the "Paris Principles" on national human rights institutions, UN General Assembly resolution 48/134 of 20.12.1993.

[53] CDL-AD(2007)020, Opinion on the possible reform of the Ombudsman institution in Kazhakstan, 2007.

[54] G. Kucsko-Stadlmayer, "The Competences of European Ombudspersons – Description and Analysis of the Status Quo", in: http://www.ioi-europe.org/index2.html.

68. The Azerbaijani, Peruvian and Ukrainian ombudspersons have the power to initiate review of a normative act in relation to a concrete case with which the ombudsperson is currently dealing. A similar power exists in Austria, although that is limited to the review of general administrative acts. Furthermore, in Azerbaijan, the ombudsperson has standing to initiate review in cases of unconstitutional court decisions where it has been petitioned to deal with it. In South Africa, the Public Protector may approach the Constitutional Court or other courts to fulfil their mandate to protect the public against unlawful state action, but may not investigate court decisions.

69. In some of these cases, the ombudspersons' capacity to initiate review proceedings gives individuals the possibility to reach the constitutional court, albeit indirectly, in situations where they would normally not have access to it. The ombudsperson therefore opens new ways of access.

70. Sometimes, the ombudsperson intervenes in cases where the individual would have the possibility to do so on his or her own, but the ombudsperson, through their legal expertise, helps to improve the quality of petitions (see e.g. Bosnia and Herzegovina, Latvia[55], Russia, Slovenia[56]). The Spanish Ombudsperson may lodge a claim of *amparo* against all acts of public authorities on behalf of any individual(s) who, to their knowledge, have been affected by the challenged act so as to include them in review proceedings. In these cases, the ombudsperson's rights do not, in principle, go beyond the individual's rights. On the contrary, the Slovak Ombudsperson only indicates if the complainant has the possibility of lodging a constitutional complaint, but does not initiate such proceedings[57].

71. Chile, which is one of the two Latin American states that does not have an ombudsperson (Uruguay is the second), is currently considering whether to include three new articles in the Constitution and create the institution of *"Defensor del Pueblo"*[58]. Israel does not have an Ombudsman, but any person or entity can raise constitutional questions before the Supreme Court.

I.1.1.3. Other bodies

72. In some countries, the Prosecutors' Office has access to the constitutional court (e.g. Article 101 of the Constitution of Armenia, Article 130 of the Constitution of Azerbaijan, Article 150 of the Constitution of Bulgaria), which could be relevant to this study as a form of indirect access.

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[55] Ombudsman Law, Section 13: In the performance of the functions and tasks specified by this Law, the Ombudsman has the right: 8) to submit an application regarding the initiation of proceedings in the Constitutional Court if an institution that has issued the disputable act has not rectified the established deficiencies within the time limit specified by the Ombudsman".

[56] According to Article 50.2 of the Constitutional Court Act of Slovenia the ombudsman for human rights may, under the conditions determined by this Act, lodge a constitutional complaint in connection with an individual case that he or she is dealing with. In addition, Article 52.2 of the Constitutional Court Act stipulates that the ombudsman for human rights may lodge a constitutional complaint with the consent of the person whose human rights or fundamental freedoms he or she is protecting in the individual case.

[57] Article 14 Law on the Ombudsman, in: http://www.vop.gov.sk/act-on-the-public-defender-of-rights, accessed 28 April 2009.

[58] See, in particular, *Segunde informe de las comisiones unidas de constitucion, legislacion y justicia y de derechos humanos, nacionalidad y ciudadania recaido en el proyecto de reforma constitucional que crea el Defensor del Ciudadano*, in: http://www.ombudsman.cl/pdf/informe2-ddhh.pdf, and other documents by the Iniciativa chilena para establecer al Defensor del Pueblo.

73. In some countries (e.g. in Albania, Andorra, Armenia, Austria, Belgium[59], Croatia, Czech Republic, France, Portugal, Poland, Latvia, Spain, Moldova, Romania, Russia, Turkey, Ukraine etc.), a certain number of members of Parliament or some other bodies or authorities (such as the President, the Prime Minister, etc.) may also challenge normative acts before the constitutional court. Belarus, by way of example, does not have an ombudsperson. Individuals there, who are not entitled to appeal directly to the Constitutional Court, have indirect access to it. They do so by using their initiative to draw the constitutionality of acts to the attention of those authorised bodies and persons vested with the right to forward motions to the Constitutional Court (i.e. the President of the Republic of Belarus, both parliamentary chambers – the House of Representatives and the Council of the Republic – the Supreme Court of the Republic of Belarus, the Supreme Economic Court of the Republic of Belarus and the Council of Ministers of the Republic of Belarus).

I.1.2. Direct access

See 1.1.21 Table: Direct individual access: Constitutional and legal bases

I.1.2.1. Abstract review (review not related to a specific case)

I.1.2.1.1. *Actio popularis*

74. *Actio popularis* implies that every person is entitled to take action against a normative act after its enactment, without needing to prove that he or she is currently and directly affected by the provision. As Kelsen put it, *actio popularis* is the broadest guarantee of a comprehensive constitutional review, as any individual may petition to the constitutional court. They are perceived as merely fulfilling every citizen's duty as a guardian of the constitution. The complainant does not need to be a victim of a violation of their fundamental rights[60]. *Actio popularis* plays a minor role in Liechtenstein, where several conditions need to be met in order to file an *actio popularis*,, Chile, Malta[61] and Peru. It has also contributed to clearing up the legal order in Croatia, Georgia, Hungary[62] and "The Former Yugoslav Republic of Macedonia"[63]. In South Africa, an individual may approach the court in order to defend the public interest. However, Kelsen concluded that *actio popularis* did not provide a practicable means to affect constitutional review as it can attract abusive complaints[64]. In Croatia, ***actio popularis*** **has led to the over-**

[59] The President of the Parliament can challenge normative acts before the Constitutional Court at the request of two thirds of the members (art. 2, 3º of the Special Act on the Constitutional Court).

[60] A. van Aaken, "Making International Human Rights Protection More Effective: A Rational-Choice Approach to the Effectiveness of Ius Standi Provisions", *Preprints of the Max Planck Institute for Research on Collective Goods Bonn* 2005/16, Bonn, 2005, p. 14, in: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=802424#, accessed 23 February 2009.

[61] CDL-JU (2001)22, G. Brunner, *"Der Zugang des Einzelnen zur Verfassungsgerichtsbarkeit im europäischen Raum"*, report for the CoCoSem seminar in Zakopane, Poland, October 2001, p. 35f.

[62] For example, concerning death penalty issues. See on the comparative perspective, W. Sadurski; *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Springer Netherlands, Dordrecht, 2005, p.6.

[63] CDL-JU (2001)22, G. Brunner, "*Der Zugang des Einzelnen zur Verfassungsgerichtsbarkeit im europäischen Raum"*, report for the CoCoSem seminar in Zakopane, Poland, October 2001.

[64] H.Kelsen, cit.in: R. Ben Achour, *"Le contrôle de la constitutionnalité des lois: quelle procédure ?", Actes du colloque international " L'effectivité des droits fondamentaux dans les pays de la communauté francophone "*, Port-Louis (Île Maurice), 29-30 septembre, 1er octobre 1993, p.401, in: http://www.bibliotheque.refer.org/livre59/l5905.pdf, accessed 7 February 2009.

burdening of the Constitutional Court, an issue on which the Venice Commission has also pronounced itself critically[65]. Most countries do not therefore include the *actio popularis* as a valid means to challenge statutory acts before the constitutional court. In Israel, individuals may petition the Supreme Court sitting as the High Court of Justice, alleging that their constitutional rights were violated. In addition, various human rights or other organizations may file a petition as "public petitioners" seeking to further general public interests. These groups are not required to show a personal interest in the petition, though they can file a petition on behalf of private petitioners that were directly affected by a governmental or normative act.

I.1.2.1.2. Individual suggestion[66]

75. A variant of abstract review in which the individual has a role to play is the possibility of "individual suggestion", which leaves a margin of discretion to the constitutional court. Individuals may approach the constitutional court in a direct manner, suggesting that the court review the constitutionality of a normative act. However, the individual cannot insist that the constitutional court commences proceedings. It is in reality a case in which the individual can "encourage" the court to act *proprio motu*, a possibility that is rather unusual. However, some countries, such as Albania, Hungary and Poland envisage this possibility in certain cases. In Montenegro and in Serbia, the denial of review must follow a preliminary proceeding and be motivated.

I.1.2.1.3. Quasi actio popularis (necessity to prove a lawful interest)

76. The institution of a *quasi actio popularis* takes up a middle position between the merely abstract *actio popularis* and normative constitutional complaint. The standing rules of *quasi actio popularis* are more restrictive and thus avoid some of the problems related to *actio popularis*, as the applicant needs to prove that he or she has a certain legal interest in the general norm. The rules of standing are closely related to those applicable to normative constitutional complaint, except for the fact that an applicant does not need to be directly affected[67]. They only need to establish that the legal provision interferes with their rights, legal interests or legal position[68]. This type of access to the constitutional court exists, for example, in Greece.

I.1.2.2. Specific case review: the individual complaint

I.1.2.2.1. Against normative acts only

I.1.2.2.1.1. Normative constitutional complaint[69].

[66] The term used by G. Brunner is "Anregung" (incitement). In fact, there seems to be no common form of denomination in the different states, ranging from "suggestion" to "proposal".

[67] See W. Sadurski, op.cit., p. 6f.

[68] Article 24 (2) Law on the Constitutional Court. [65] CDL-AD(2008)030 Opinion on the Draft Law on the Constitutional Court of Montenegro.

[69] Term used in German: *Unechte Grundrechtsbeschwerde*, see CDL-AD(2005)005; para. 22, S. R. Dürr, "Individual Access to Constitutional Court in European Transitional Countries", in: B. Fort (ed.), *Democratising Access to Justice in Transitional Countries. Proceedings of the Workshop "Comparing Access to Justice in Asian and European Transitional Countries"*, Sang Choy International, Jakarta, 2006, p. 59.

77. An individual is given the right to complain against the violation of his or her subjective fundamental rights through an individual act based on a normative act. Thus, the initiative for review is related to a concrete case. However, in systems providing for a normative constitutional complaint only, the individual act applying a normative act cannot be attacked before the Constitutional Court, and the subsequent control by the constitutional court does not concern the implementation of the normative act. This can raise concerns regarding the effective protection of individual fundamental rights, if only the implementation of a constitutional law or equivalent act violates such rights. Normative complaints exist (often together with other form of complaints) for example in Armenia, Austria, Belgium[70], Georgia, Hungary, Poland and Latvia, Luxembourg, Russia, Romania. A limited form has been introduced in Estonia, where certain Parliamentary resolutions and Presidential decisions can be challenged. According to Article 96 of the Russian Federal Constitutional Law on the Constitutional Court, citizens "whose rights and freedoms have been violated by the law that has been applied or ought to be applied in a specific case" may file a direct complaint to the Constitutional Court. Yet, on this basis it is only possible to check the constitutionality of the law on which the individual act is based, but not the concrete application of the law in the individual case. The Russian individual complaint is thus a special form of concrete norm control[71]. The present French system is close to the normative constitutional complaint, as the Constitutional Council is allowed to control legislative acts and it is an abstract control; if the act is declared unconstitutional, the act no longer exists n the French legal order.

I.1.2.2.1.2. Constitutional petition.

78. In Ukraine, if an individual sets forth that diverging applications of a law could lead to, or have led to, a violation of their constitutional rights, they can demand a binding interpretation by the Constitutional Court. In such a case the interpretation of a normative act rather than an individual act is in question. Thus, the constitutional petition materially fulfils the function of a normative constitutional complaint[72].

I.1.2.2.2. Against individual acts: full constitutional complaint

79. With the growing value of human rights protection, one can observe a clear tendency towards opening constitutional review of individual administrative acts and decisions of the judiciary upon application by the individual[73], as human rights violations are often the result of unconstitutional individual acts based on constitutional normative acts[74]. **The Venice Commission is in favour of the full constitutional complaint, not**

[70] CDL-JU(2008)032 M.-Fr. Rigaux, "Introduction of a Constitutional Review of Laws: Benefit, Purpose and Modalities", *Report for the seminar on constitutional jurisdiction*, Ramallah, 2008.

[71] see Brunner, Der Zugang des Einzelnen zur Verfassungsgerichtsbarkeit im europäischen Raum, Jahrbuch für Öffentliches Recht 2002, p. 226.

[72] V. Skomorocha, Konstytucijnyj Sud Ukrajiny: dosvid i problemy, Pravo Ukrajiny no. 1/1999, cit. in: CDL-JU (2001)22, G. Brunner, *"Der Zugang des Einzelnen zur Verfassungsgerichtsbarkeit im europäischen Raum"*, report for the CoCoSem seminar in Zakopane, Poland, October 2001, p. 34.

[73] CDL-AD (2004)24 Opinion on the draft constitutional amendments with regard to the Constitutional Court of Turkey.

[74] CDL-AD (2008)029 Opinion on the draft laws amending and supplementing 1) the Law on Constitutional Proceedings and 2) the Law on the Constitutional Court of Kyrgyzstan.

only because it provides for comprehensive protection of constitutional rights, but also because of the subsidiary nature of the relief provided by the European Court of Human Rights and the desirability to settle human rights issues on the national level.

I.1.2.2.2.1. The role of full constitutional complaint.

80. Full constitutional complaints undoubtedly provide the most comprehensive individual access to constitutional justice and hence the most thorough protection of individual rights. An individual may, as a matter of subsidiarity[75], complain against any act by the public authorities which violates directly and currently their fundamental rights. To be precise, an individual may challenge a general act if it is directly applicable on them, or challenge an individual act addressed to them. This possibility exists, for example, in Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Croatia, Cyprus[76], the Czech Republic, Georgia, Germany, Latvia, Liechtenstein, Malta, Montenegro, Poland, Serbia, Slovenia, South Africa, Spain[77] and Switzerland[78], "The Former Yugoslav Republic of Macedonia" and Slovakia. One can find various conditions to and sub-forms of constitutional complaints. The most prominent is "constitutional revision", where an individual is given a remedy against final decisions by ordinary courts, but not against individual administrative acts. This is the case in Albania, Bosnia and Herzegovina, Chile[79] and Malta[80] . In Austria, on the other hand, only individual administrative acts and decisions of the Asylum Court can be reviewed: civil or penal decisions cannot be reviewed[81].

81. In full constitutional complaint proceedings, the constitutional court will usually not decide on the merits of the case. Rather, it will consider its constitutional aspects only (for further information, see paras. 206 et seq below). In addition, the court will in principle not review whether the entire hierarchy of norms has been respected (e.g. re-

[75] Subsidiarity means that all other remedies must be exhausted.

[76] According to Article 146(2), the challenging person is required to show that any existing legitimate interest which he or she has either as person or by virtue of being a member of a community is adversely and directly affected by an administrative act or omission. The concept of "interest" is not similar to the concept as applied in civil law. It must be concrete of a financial or moral nature. There must be *legitimatio ad causum* in contrast to a general complaint of bad administration to sustain recourse.

[77] It is important to note that Spain's writ of amparo should be regarded as a full constitutional complaint. It takes place as a last instance recourse before the Constitutional Court. However, it should not be confused with the specific *recursos de amparo* existing in most Latin American countries (such as Chile, Peru, Argentina and Mexico), a specific type of constitutional complaint where the individual is being given a specific action to defend his/her rights before ordinary courts. It is also important to note the 2007 reform adopted in Spain, in which there is a new admissibility condition to grant the *amparo*, requiring that the issue raised in the case has to be "constitutionally relevant".

[78] The Constitutional Court of Belarus, contrary to a previous practice adopted under part 4 of art. 122 of the Constitution (see judgment D-184/05 of 2 March 2005), is no longer accepting individual appeals.

[79] Against certain types of resolutions by the higher courts (a*uto acordados*).

[80] It is interesting to note that the constitutional petition can also be brought against potential violations of fundamental rights.

[81] However, individual administrative acts can be challenged parallel to a recourse to the Supreme Administrative Court: First, the Constitutional Court verifies whether constitutional rights have been violated and in the negative it refers the case to the Administrative Court for verification whether ordinary laws have been violated. This was seen by the Austrians as a lacuna to be overcome.

view of legality of an individual act). The function of full constitutional complaints, in the first instance, is to protect individual's constitutionally guaranteed rights.

I.1.2.2.2.2. Individual complaints as a national "filter" for cases reaching the European Court of Human Rights

82. An important aspect of individual complaints to the constitutional court against human rights violations is the question whether such a complaint has to be exhausted according to Article 35.1 of the European Convention on Human Rights before a person can appeal to the European Court of Human Rights, as is the case for example for the *amparo* complaint to the Constitutional Court of Spain. The discussion of this topic is especially relevant in view of the extremely large case-load of the Court (some 120,000 cases in 2010) and the need to solve human rights issues on the national level before they reach the Strasbourg Court as called for by paragraph 4 of the Interlaken Declaration, which insists on the subsidiary nature of the Convention mechanism:

> "4. The Conference recalls that it is first and foremost the responsibility of the States Parties to guarantee the application and implementation of the Convention and consequently calls upon the States Parties to commit themselves to: …
>
> d) ensuring, if necessary by introducing new legal remedies, whether they be of a specific nature or a general domestic remedy, that any person with an arguable claim that their rights and freedoms as set forth in the Convention have been violated has available to them an effective remedy before a national authority providing adequate redress where appropriate;
>
> …"[82]

83. In countries where a specialised constitutional court exists, an individual complaint to that court seems like a logical choice for such a remedy because, typically, such a complaint is also subsidiary on the national level and only arises after the exhaustion of appeals to ordinary courts. It is thus that the last possible step on the national level must be taken before the possibility of an application to the European Court of Human Rights comes into play.

84. It seems evident that certain other types of individual access to the constitutional courts discussed in this study can be excluded as such from being an effective "domestic remedy": an *actio popularis* is directed against a norm in the abstract and would not normally be an appropriate remedy against a concrete human rights violation. Also a "normative" individual appeal – directed only against a normative act, but not its application in an individual case – would not be sufficient as a national "filter"[83] because in practice human rights violations are most often not the result of the "technically correct" appli-

[82] High Level Conference meeting at Interlaken on 18 and 19 February 2010 at the initiative of the Swiss Chairmanship of the Committee of Ministers of the Council of Europe, Interlaken 19. February 2010.

[83] As it is, for example, the case of Hungary, where no full individual complaint mechanism exist; but "only" normative constitutional complaint. The European Court of Human Rights has stated that it is therefore not necessary to submit the application to the CC before lodging the file before the European Court, ECtHR, *Weller v. Hungary*, judgment of 31 march 2009.

cation of an unconstitutional law – which can be challenged in this type of appeal -but frequently they are the result of an unconstitutional individual act, which can but not necessarily is based on a law, which is in conformity with the constitution. A large number of human rights violations would thus escape a normative complaint and the filter-effect would remain marginal.

85. An interesting example of an attempt to introduce such a remedy concerns Turkey. In view of the high number of Turkish cases before the Strasbourg Court, the Constitutional Court of Turkey proposed, in 2004, the introduction of an individual complaint to that Court relating to constitutional rights, which are also covered by the European Convention on Human Rights. The explanatory memorandum for these amendments explicitly states that "[t]*he introduction of constitutional complaint will result in a considerable decrease in the number of files against Turkey brought before the European Court of Human Rights"*. In September 2010 a Constitutional reform package was adopted by referendum, which includes the introduction of a form of individual complaint to the Constitutional Court. In accordance with the new text of the Article 148 of the Turkish Constitution, everyone has the right to introduce individual complaints to the Constitutional Court relating to constitutional rights which are also covered by the European Convention on Human Rights. It is stated in this Article that the procedural rules concerning how to introduce the complaint will be established by an act which shall be enacted in the next two years.

86. In its opinion on these draft amendments, the Venice Commission found that the draft amendments were "justified, and follow solutions already known in other European countries and they meet European standards"[84]. The Commission thus recognised that an effective individual complaint to a constitutional court can be a national filter for cases before they reach the European Court of Human Rights[85]. This has also been confirmed by a large number of studies and research on this issue, explaining, for example, why the number of applications against the UK, mainly before the Human Rights Act 1998, was much larger than against other countries, or by comparing the number of complaints lodged at the Strasbourg Court versus France in comparison with Germany or Spain[86].

87. In order to constitute such a filter, and to require its exhaustion in the sense of Article 35.1 of the Convention, a national remedy has to be effective according to Article 13 of the Convention. The question of how an individual complaint has to be conceived in order to be an effective remedy is however complex.

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[84] CDL-AD(2004)024, Opinion on the Draft Constitutional Amendments with Regard to the Constitutional Court of Turkey. The Venice Commission however questioned whether the individual complaint should be limited to constitutional rights, which were also covered by the Convention. It seemed that the purpose of this limitation was to exclude social rights from the scope of the individual complaint. The issue of social rights seems to be the reason why the Austrian Constitution does not include a complete "bill of rights" and why instead the Convention has been ratified on the level of constitutional law, thus allowing individual complaints to the Austrian Constitutional Court on the basis of the rights contained in the Convention and its Protocols.

[85] This part of individual complaint was part of a constitutional reform package adopted by referendum on the 12 September 2010.

[86] See among others, A. STONESWEET, H. KELLER, *A Europe of Rights*, Oxford University Press, 2008; see also SZYMCZAK, *La Convention européenne des droits de l'homme et le juge constitutionnel national, Bruylant*, Bruxelles, 2007; D. AGNANOSTOU.

88. The answer will vary from country to country. Even for any given country a constitutional complaint may be an effective remedy for some Convention violations, whereas according to the Strasbourg Court's case-law, it may not be effective for other violations. In particular, a distinction has to be made between cases of alleged excessive length of proceedings and violations of "other" human rights.

89. Various elements have to be taken into account when determining whether a remedy is effective in the sense of Article 13. Where an individual has an arguable claim to be the victim of a violation of a Convention right they should have a remedy before a national authority. That authority does not necessarily need to be a judicial authority, but it must be one which has relevant powers to decide such claims and provide redress[87]. The contracting states are free to choose the remedy, which they provide and sometimes an aggregate of several remedies provided may be sufficient[88].

90. In the case of an individual complaint to a constitutional court, the judicial nature of the national authority does not need to be discussed. However it may be questioned whether in all cases the powers of a constitutional court will be sufficient. The court must be in a position to provide redress through a binding decision in the case. A mere declaratory decision on unconstitutionality will not be sufficient; the complaint must be "effective" in practice as well as in law[89]. If the violation of the Convention right, as well as the Constitution, concerns a positive obligation, the court should be in a position to order the state authorities to take the action, which they failed to take in the given case. The court must be obliged to hear the case or at least to consider the grievances submitted. The court must also be accessible: unreasonable demands relating to costs or representation could, for instance, render an appeal "ineffective". When the consequences of measures would be irreversible, a constitutional court should be in a position to prevent the execution of such measures[90].

91. In the framework of its Report on the Effectiveness of National Remedies in Respect of Excessive Length of Proceedings[91], the Venice Commission discussed the remedial effectiveness of constitutional complaints. Based on the European Court of Human Rights'[92] case-law, the Commission found that "[t]he obligation to organise its judicial system in a manner that complies with the requirements of Article 6.1 of the Convention also applies to a Constitutional Court"[93] itself. This means that if a country intends to introduce a process of individual complaint to its constitutional court, this has to be done in a way which does not excessively prolong the total length of the procedure.

[87] The individual also has to complain about the violation of the Convention right in the national proceedings. Failing to do so, will result in a finding of non-exhaustion of domestic remedies by the European Court of Human Rights, see for example, ECtHR, *Debono v. Malta*, no. 34539/02, decision of 10 June 2004.

[88] See ECtHR, *Silver v. UK*, judgment of 25 March 1983.

[89] See ECtHR, *lhan v. Turkey*, judgment of 27 June 2000, para. 58.

[90] See ECtHR, *Čonka v. Belgium*, judgment of 5 February 2002, para. 79.

[91] CDL-AD(2006)036rev, adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006).

[92] See ECtHR, *Gast and Popp v. Germany*, judgment of 25 February 2005, para. 75. 93 CDL-AD(2006)036rev, paragraph 33.

Consequently, the court has to have the capacity – and the resources – to deal effectively with the additional case-load[94].

92. A main issue in the discussion of remedies against the excessive length of procedures is a distinction between acceleratory remedies, that is to say those which have a positive effect on the termination of an ongoing case, and compensatory remedies. Here, the Venice Commission found that that *"in terms of the [Strasbourg] Court's case-law, it is an obligation of result that is required by Article 13. Even when none of the remedies available to an individual, taken alone, would satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may be considered as 'effective' in terms of this article"*[95]. The Commission found that in order to be effective, a remedy would have to have both acceleratory[96] and compensatory aspects[97]:

> *"182. In cases where the national legal system does not provide for acceleratory remedies (which is the case for most domestic legal systems), the individual is not afforded before his own authorities an equivalent redress to that which he may obtain in Strasbourg; there, the subsidiarity principle is deficient. Under these circumstances, the individual may argue not to have lost his status of victim even after obtaining (mere) pecuniary compensation in a domestic procedure and may challenge his need to exhaust the domestic remedy in question.*
>
> *183. In conclusion, the Venice Commission considers that, in order to comply fully with the requirements of Article 13 of the Convention in relation to the reasonable time requirement laid down in Article 6 §1 of the Convention, Council of Europe member States should provide in the first place acceleratory remedies designed to prevent any (further) undue delays from taking place at any time until the proceedings are terminated.*
>
> *184. In addition, they should provide compensatory remedies for any breach of the reasonable time requirement which may have already occurred in the proceedings (prior to the introduction of the effective acceleratory remedies)."*

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[94] Concerning doubts on the promptness of a individual complaint, see ECtHR, *Belinger v. Slovenia*, no. 42320/98, decision of 2 October 2001.

[95] Paragraph 137.

[96] See ECtHR, *Slavicek v. Croatia*, no. 20862/02, decision of 4 July 2002: *"According to the new law everyone who deems that the proceedings concerning the determination of his civil rights and obligations or a criminal charge against him have not been concluded within a reasonable time may file a constitutional complaint. The Constitutional Court must examine such a complaint and if it finds it well-founded it must set a time-limit for deciding the case on the merits and it shall also award compensation for the excessive length of proceedings. The Court considers that this is a remedy which must be exhausted by the applicant in order to comply with Article 35 § 1 of the Convention"*. See also ECtHR, *Debono v. Malta*, no. 34539/02, decision of 10 June 2004; ECtHR, *Andrásik v. Slovakia*, no. 57984/00, decision of 22 October 2002 and ECtHR, *Fernandez-Molina Gonzalez and others v. Spain*, no. 64359/01, decision of 8 October 2002.

[97] The compensation has to be in a reasonable relation to what the applicant would have obtained from the Strasbourg Court, see ECtHR, *Dubjakova v. Slovakia*, no. 67299/01, decision of 10 October 2004: *"Whether the amount awarded may be regarded as reasonable, however, falls to be assessed in the light of all the circumstances of the case. These include not merely the duration of the proceedings in the specific case but the value of the award judged in the light of the standard of living in the State concerned, and the fact that under the national system compensation will in general be awarded and paid more promptly than would be the case if the matter fell to be decided by the [Strasbourg] Court under Article 41 of the Convention"*.

93. **Therefore, if a state intended to introduce a process of individual complaint to the Constitutional Court with the purpose of providing a national remedy or filter for cases that would otherwise reach the Strasbourg Court, i.e. providing an effective remedy in the sense of Article 13 of the Convention and to require its exhaustion under Article 35.1, such a process should provide redress through a binding decision in the case. The court must be obliged to hear the case and there must not be any unreasonable demands as to costs or representation.**

94. **In addition, in cases of alleged excessive procedural length, an individual appeal to the constitutional court should enable it to effectively order the speedy resumption and termination of the proceedings before the ordinary courts or to settle the matter itself on the merits. In these type of cases, the constitutional court should be able to provide compensation[98] equivalent to what the applicant would receive at the Strasbourg Court.**

I.2. The acts under review

95. Different types of legal acts can be reviewed according to their conformity with several types of higher-ranking legal norms, either individual or normative legal acts. Individual acts, as understood here, include administrative acts where an administrative body[99] decides in an individual case, but also (final) court decisions. Normative acts are international treaties[100], laws and rules that have the force of law, decrees and regulations by the executive, general rules of local self-governing bodies[101] that have a generally binding effect, that is, without distinct or distinguishable addressees.

96. In states with system of concentrated review, it is very common that constitutional review of laws or equivalent acts with force of law exists[102]. This is consistent with one of the traditional objectives linked to the introduction of concentrated constitutional jurisdiction, namely the protection of the constitutional order. Also, the prevalence of review of individual acts is increasing as more and more states opt for full constitutional complaints.

97. In diffuse review systems, typically any act, normative or individual, that is relevant to a concrete case, may be challenged. Therefore, the individual may question the constitutionality of any law that should be applied in a proceeding, any decision of an inferior court and any administrative act that may be brought up due to the applicable pro-

98 See in this respect the Cocchiarella judgment (ECtHR, GC, Cocchiarella v. Italy, 29 March 2006, mainly paras. 76-80 and 93 to 97).

99 All types of administrative bodies constitutionally entitled to issue such acts can be taken into consideration, including regional or local administrative bodies, even though some federal states dispose of federated constitutional courts that review acts issued by the federated authorities as far as their compatibility with the Constitution of the federated state is concerned, for instance Germany.

100 If these have infra-constitutional value.

101 E.g. According to Article 100.1 of the Constitution of Armenia, decisions of local self-governing bodies are the subject of constitutional review.

102 *General Report, XIIth Congress of the Conference of European Constitutional Courts*, (A. Alen, M. Melchior), Brussels, 2002, p.7, in: http://www.confcoconsteu.org/en/common/home.html, accessed 23 February 2009. However, it should be noted that in Switzerland, the Federal Supreme Court can only review cantonal laws concerning their conformity with the federal Constitution.

cedural law. In South Africa, an ordinary court can declare a normative act (statute) unconstitutional, but such a declaration must be confirmed by the Constitutional Court before it becomes effective.

98. In some states (e.g., Belarus, Belgium, Brazil, Chile, Germany, Hungary, Liechtenstein, Peru, Poland, Slovenia, South Africa and "The Former Yugoslav Republic of Macedonia"), the constitutional court can address violations resulting from omissions, following an application by an individual[103]. In Belarus, the Constitutional Court considers individual petitions against gaps in normative legal acts, and/or conflicts between certain norms of the act, which have been filed with the Constitutional Court in the exercise of the constitutional right to address personal or collective petitions to state bodies. These petitions are not constitutional complaints and do not entail the Constitutional Court review a normative legal act's constitutionality.

99. The Venice Commission warns against overburdening constitutional courts by transferring to them the competence of protecting not only against infringements of constitutional rights but also against mistakes in interpretation and application of norms which do not amount to violations of the constitution.

I.3. Protected rights

100. All constitutions considered here contain some fundamental rights or refer to a catalogue of fundamental rights that are given constitutional, or at least supra-legislative, status. However, not all these rights serve as review standards in all cases[104]. Parts of the rights catalogues are of a programmatic nature, which means that individuals are not given a remedy against the violation of such programmatic norms or national objectives. This is the case for social rights in some countries.

101. International Human Rights treaties[105], and in particular the European Convention on Human Rights for member states of the Council of Europe, have different

[103] This can cause conflicts with the Parliament as the Constitutional Court imposes that and in which margin gaps be filled. In Portugal, individual complaints against omissions are excluded, even if the Constitutional Court has the power to conduct abstract review on omissions (see Article 283 Portuguese Constitution). The detailed General Report of the XIVth Conference of European Constitutional Courts dedicated to this topic has been published in a Special Bulletin on Constitutional Case-Law by the Venice Commission (2008) and can be found on http://www.lrkt.lt/conference/Pranesimai/XIV%20Congress%20General%20Report_LT.doc.

[104] For example, according to Article 110 of the Constitution of "the Former Yugoslav Republic of Macedonia", the jurisdiction of the Constitutional Court covers "the freedoms and rights of the individual and citizen relating to the freedom of conviction, conscience, thought and public expression of thought, political association and activity as well as to the prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political affiliation".

[105] Article 16(2) of the Portuguese Constitution reads: "The provisions of this Constitution and of legal precepts concerning fundamental rights shall be interpreted and completed in accordance with the Universal Declaration of Human Rights" . The status of an interpretative standard in matters concerning fundamental rights is therefore attributed to the Universal Declaration of Human Rights and not the European Convention on Human Rights. Unlike the latter, the Universal Declaration of Human Rights is not an international treaty,. In Portugal the position taken by both doctrine and jurisprudence is that fundamental rights must be interpreted in accordance with the various international human rights instruments, on condition that the preference accorded to the rules set out in the latter results in the primacy of rules which enshrine a superior level of protection for the fundamental rights.

legal ranks in the states included in this study. For instance, in Austria, the European Convention on Human Rights has constitutional value. Likewise, in the Netherlands, Acts of Parliament (as opposed to other acts of legislation), which cannot be reviewed as far as their constitutionality is concerned, can be reviewed in the light of international treaties including the Convention. In Bosnia and Herzegovina, the European Convention on Human Rights "shall prevail over all laws"[106], which could mean that it stands above the Constitution[107]. So far, the Bosnian Constitutional Court has not finally determined this question[108]. The UK's Human Rights Act 1998 and Malta's European Convention Act transposed the international treaty into domestic law to enable individuals to directly invoke these rights. In France, Italy[109], Liechtenstein, Slovenia and "The Former Yugoslav Republic of Macedonia"[110], the European Convention has infra-constitutional, but supra-legislative rank. In Germany, the European Convention and its protocols have the status of federal German statutes (*Gesetzesrang*). German courts must observe and apply the Convention in interpreting national law. On the level of constitutional law, the text of the Convention and the case-law of the ECtHR serve as interpreting aids in determining the contents and scope of fundamental rights and fundamental constitutional principles of the Basic Law, to the extent that this does not restrict or reduce the protection of the individual's fundamental rights under the Basic Law (BVerfGE 111, 307). The openness of most Latin American constitutions to international laws and to human rights treaties, such as the American Convention on Human Rights, sometimes lead to consider that international treaties are above their constitutions (see, for example, Colombia or Venezuela).

102. Protected rights are not necessarily inscribed in the Constitution[111] or designed to be enforceable, but can be a product of jurisprudential creativity. The fundamental importance of a provision can be "discovered" by jurisprudence. Here, the approach of the French Constitutional Council is particularly noteworthy: it enlarged the circle of protected rights by attributing constitutional value to texts that had been merely declaratory before, the Declaration of the Rights of Man and of the Citizen of 1789 and the preamble to the 1946 Constitution.

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[106] Article II.2 Constitution

[107] See J. Marko, "Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance", *European Diversity and Autonomy Papers-EDAP* (2004), 7, in:http://www.eurac.edu/documents/edap/2004_edap07.pdf, accessed 3 June 2009.

[108] CDL-AD(2008)027 Amicus curiae brief in the cases of *Sejdić and Finci v. Bosnia and Herzegovina* (Applications no. 27996/06 and 34836/06) pending before the European Court of Human Rights.

[109] See decisions no. 348 and 349/2007 of the Italian Constitutional Court, after the 2001 amendment to art. 117 of the Italian Constitution.

[110] See I. Spirovski, "Constitutional Validity of Human Rights Treaties in the Republic of Macedonia: The Norms and the Courts", *Report for the World Conference on Constitutional Justice*, in: http://www.venice.coe.int/WCCJ/Papers/MKD_ Spirovski_ E.pdf, accessed 3 June 2009.

[111] In a number of countries, the catalogues of human rights is not exclusive but open ended., e.g. according to Article 42 of the Constitution of Armenia, the fundamental human and civil rights and freedoms set forth in the Constitution shall not exclude the other rights and freedoms, prescribed by laws and international treaties. According to Article 55 of the Russian Constitution, the list of fundamental rights and freedoms in the Constitution shall not be interpreted as a denial of or derogation from other universally recognized human and civil rights and freedoms.

PARTIAL CONCLUSIONS OF CHAPTER I

103. Among the member and observer states of the Venice Commission, very few countries do not provide at least some type of individual access to question the constitutionality of a norm or individual act. These are Algeria, Tunisia and Morocco (France can no longer be classified in this group after its recent constitutional reform and the introduction of the priority preliminary ruling). Insofar as the rest of the countries are concerned, the constitutional review system can be classified according to the types of access. It is possible to distinguish between direct individual access, in which individuals are given the possibility to challenge the constitutionality of a given norm or act directly and indirect individual access, in which the constitutionality can be challenged only through state bodies. Many countries have a mixed system, with both direct and indirect means of access to constitutional justice.

104. In the framework of indirect individual access, several bodies are entitled to challenge the constitutionality of a norm. Among them, the most common are the ordinary courts through preliminary proceedings, ombudspersons and other constitutional bodies, such as deputies and senators.

105. The first main group of bodies which can challenge constitutionality are ordinary courts, introducing requests for preliminary procedures before the constitutional court or equivalent body. This type of procedures constitutes one of the most common methods of indirect individual access. There is a big variety of models. This type of control is quite unusual in systems with diffuse control of constitutionality, as ordinary courts are entitled to conduct the control themselves. There are a group of countries in which individuals request the ordinary court submit a preliminary question to the constitutional court. There are also countries in which, once an individual raises the exception of unconstitutionality, the ordinary judge has to consider it and give a reasoned decision why any refusal to refer a question to the constitutional court is made (e.g. Albania, Brazil, Chile, France, Hungary, Italy, Luxembourg, Malta and Spain). Other countries make it a mandatory requirement to submit a question in such circumstances (e.g., Belgium, Czech Republic, “The Former Yugoslav Republic of Macedonia, Romania and Slovenia).

106. Most of the countries of the Venice Commission do not grant judicial standing rights to ombudspersons. However, among those countries which provide for this possibility, the ombudsperson is entitled to act either before ordinary courts (e.g., Finland) or directly before the constitutional court (e.g., Armenia, Austria, Azerbaijan, Brazil, Croatia, Czech Republic, Estonia, Hungary, Portugal, Spain, Moldova, Montenegro, Slovenia, Slovakia, Bosnia and Herzegovina, Latvia, Poland, Russian Federation, “The Former Yugoslav Republic of Macedonia”, Peru, Ukraine, Romania and South Africa). It is also important to note that, when the ombudsperson has standing before the constitutional court, the scope of its power can be limited to challenging a norm in the framework of a specific case in which it is acting. However, an ombudsperson is sometimes entitled to challenge a norm in the abstract; as is the case in Azerbaijan, Estonia, Peru and Ukraine.

In these systems, ombudspersons provide possible ways of access to individual justice, albeit indirectly. The Venice Commission considers that ombudspersons are elements of a democratic society that secure respect for individual human rights. Therefore, where ombudspersons exist, it may be advisable to give them the possibility to initiate constitutional review of normative acts on behalf of or triggered by individuals.

107. Finally, other bodies, such as the Prosecutor's office (eg. Armenia, Azerbaijan, Bulgaria, Moldova, Portugal, Poland, Russia, Slovakia), or members of Parliament who can challenge the constitutionality of norms are able to ensure the compatibility of the legal system with the constitution.

108. Indirect access to individual justice is therefore a very important tool to ensure respect for individual human rights at the constitutional level. The existing choices are very broad and many possibilities coexist, but there is a common positive element: the more mechanisms that are open to ensure constitutional access to justice, the greater is the chance to better protect fundamental rights. An advantage of indirect individual access is that the bodies filing complaints are usually well-informed and have the required legal skills to formulate a valid request. They can also serve as filters to avoid overburdening constitutional courts, selecting applications in order to leave aside abusive or repetitive requests. Finally, indirect access plays a vital role in the prevention of unnecessarily prolonging rather obvious unconstitutional situations. However, indirect access has a clear disadvantage, as its effectiveness is heavily reliant on the capacity of these bodies to identify potentially unconstitutional normative acts and their willingness to submit applications before the constitutional court or equivalent bodies. Therefore, the Venice Commission sees an advantage in combining indirect access with a form of direct access, balancing the different existing mechanisms.

109. Insofar as direct individual access is concerned, there are also several possibilities and models in the countries under review: first, the *actio popularis*, in which anyone is entitled to take action against a norm after its enactment, although there is no personal interest in it; secondly, there is individual suggestion, in which an applicant can suggest to the constitutional court that it take action to control a norm's constitutionality, while leaving the court with a margin of discretion whether to do so or not; thirdly, the quasi *actio popularis*, in which an applicant does not need to be directly affected, but has to challenge the norm within the framework of a specific case; and finally, direct individual complaint; a mechanism that exists in various forms. Among these mechanisms, the *actio popularis* creates the most evident risk of overburdening constitutional court. In the Council of Europe states, some constitutional courts offer a full direct individual complaint mechanism against individual acts. In those countries it has acted as a filter limiting the number of cases brought before the European Court of Human Rights[112]. A parallel system can be found in the Latin American countries concerning the Inter-American Court of Human Rights. It is also apparent that in those countries in which a full constitutional individual complaint mechanism exists, the number of European Convention on Human

[112] See in this respect A. STONESWEET, H. HELLER, *A Europe of rights: The impact of the ECHR on National legal Systems,* Oxford, OUP, 2008, mainly chapter 10.

Rights' complaints concerning individual human rights violations are less important than in the others. This therefore avoids overburdening the European Court of Human Rights. Hence, the introduction of the possibility for lodging individual complaints before a constitutional court and effective constitutional remedies should exist. Moreover, the constitutional or equivalent court should be able to provide a quick remedy and to speed up lengthy procedures, as well as provide compensation in cases where proceedings are of an excessive length.

II. REVIEW PROCEEDINGS

II.1. Conditions for opening proceedings ("filters")

110. Constitutional or legal provisions dealing with the various types of access as well as with constitutional proceedings include, as a general rule, procedural prerequisites or conditions which need to be met by any applicant or application. While this serves to alleviate the constitutional court's caseload, there is also the risk that these hurdles overly reduce access to the constitutional court.

111. According to the type of request made to the constitutional court, there are different procedural admissibility conditions. However, some requirements in many cases seem to be: time-limits and the possible obligation to be legally represented.

II.1.1. Time-limits for applications

See 1.1.2 Table: Time-limits for applications

112. There is a broad variety of time-limits for the different types of applications. Time-limits serve the purpose of legal certainty, as they ensure that, after a certain period of time, an act's validity becomes unassailable. While these **time limits should not be too long, they must be reasonable in order to enable the preparation of any complaint by an individual personally, or to enable a lawyer to be instructed to prosecute the complaint and defend the individual's rights** (as in some countries, legal representation is obligatory for individual complaints). **The Venice Commission recommends that with regard to individual acts the court should be able to extend the deadlines** in cases where an applicant is unable to comply with a time-limit due to reasons not related to either their or their lawyer's fault or, where there are other compelling reasons[113].

II.1.2. Obligation to be legally represented

See 1.1.3 Table: Obligation to be legally represented

113. Legal representation is intended to help the applicant and to raise the quality

[113] E.g. Germany, Law on the Federal Constitutional Court, Article 93(2); Slovenia, Constitutional Court Act Article 52(3).

of complaints. However, legal representation has strong financial implications. Therefore, especially if legal representation is mandatory, the denial of financial assistance or free legal aid could amount to the denial of effective access to a court[114]. Therefore, **free legal aid should be provided to applicants if their material situation so requires in order to ensure their access to constitutional justice.**

114. Legal representation is mandatory in Andorra, Austria, Azerbaijan, Brazil, Czech Republic, France[115], Italy, Luxemburg, Monaco, Poland, Portugal, Slovakia, Spain and Switzerland (if the individual is "clearly unable" to represent him or herself).

115. No obligation exists in Albania, Armenia, Belgium, Croatia, Estonia, Georgia, Hungary, Latvia, Liechtenstein, Poland, Romania, Russia, Slovenia, South Africa[116], Sweden, Switzerland, "The Former Yugoslav Republic of Macedonia" and Ukraine.

II.1.3. Court fees

116. Court fees for proceedings before the constitutional court are exceptional amongst the states under consideration in this study. However, in the U.S.[117], there is a fee of $300 for lodging a petition to grant a writ of *certiorari* before the Supreme Court; in Russia, the fee amounts to one minimum wage, in Armenia to five, and in Switzerland a minimum of 200 CHF and a maximum of 5,000 CHF[118] and in Austria, the fee presently amounts to 220 Euros. In Israel, there is a fee of approximately $400 to file a petition with the Supreme Court, sitting as the High Court of Justice, but the petitioner is entitled to file a request, supported by special circumstances, to receive a waiver or reduction of fees.

117. The Venice Commission recommends that **in view of increasingly more comprehensive human rights protection, court fees for individuals ought to be relatively low and that it should be possible to reduce them in accordance with the financial situation of the applicant. Their primary aim should be to deter obvious abuse[119].**

II.1.4. Reopening cases

118. In principle, a constitutional court's decision of constitutionality is final. Hence

[114] CDL-JU(2008)012 The use of international instruments for protecting individual rights, freedoms and legitimate interests through national legislation and the right to legal defence in Belarus: challenges and outlook.

[115] Lawyers are compulsory in order to plead before the Constitutional Council. However, within the framework of the priority preliminary ruling, the obligation of legal representation depends on the type of proceedings. If the party is allowed to act before the ordinary judge without a lawyer, then the party can raise the priority preliminary request.

[116] In South Africa, there is no obligation to be legally represented. In terms of Rule 4(11) of the Rules of the Constitutional Court, if it appears to the Registrar of the Court that a party is unrepresented, he or she shall refer the litigant to a body or institution that may be willing and in a position to assist the litigant.

[117] U.S. Supreme Court Rule 38.

[118] The Supreme Court can also refrain from imposing fees (Article 66 para. 1 of the Supreme Court Act). This is even the general rule if the Confederation, a canton, a commune, an organisation entrusted with public law tasks, or an individual act as complainant, and if the dispute submitted to the Federal Supreme Court is of no financial interest and relates to the official activity of the concerned public entity (Article 66 para. 4 of the Supreme Court Act).

[119] CDL(2008)065, Opinion on the draft laws amending and supplementing (1) the law on constitutional proceedings of Kyrgyzstan and (2) the law on the Constitutional Court of Kyrgyzstan, 2008.

complaints on the same issue will not be accepted again. Typical situations for reopening cases are, however, when new facts appear of which the parties could not have been aware[120], to correct errors made by the constitutional court[121], if the constitution has changed[122] or, under certain conditions, where the European Court of Human Rights has decided that there has been a breach of the ECHR and this also implies a violation of the Constitution.

II.1.5. Abuse of the right to appeal to the constitutional court

119. Parties are under a duty to exercise their procedural rights in a *bona fide*[123] manner. When an applicant abuses this obligation, the effectiveness of constitutional justice is distorted. Although the individual complaint procedure is very important for the protection of human rights, such abuse is prejudicial to the constitutional order protected by the constitutional courts. For example, according to §9.4 of the Rules of Procedure of the Russian Constitutional Court, if the applicant repeats an application on an issue on which the Constitutional Court has already rendered a decision, a copy of the decision is sent to the applicant once again, informing them that correspondence with them on this issue is terminated. Further complaints by the same individual on the same issue will remain unanswered. Other states have included the possibility of fining abusive applicants[124].

II.1.6. Exhaustion of remedies

See 1.1.4 Table: Exhaustion of remedies and exceptions

120. The exhaustion of remedies can have different meanings according to the specific context; some procedural codes do not, for instance, permit systematic access to ordinary supreme courts. It is a typical condition for bringing a full or normative constitutional complaint to the constitutional court, as it underlines the complaint's subsidiary

[120] See, for instance, Article 34 Austrian Law on the Constitutional Court. Contrary to "nova reperta" (newly discovered facts), "nova producta" -where parties bring forward arguments only after closure of (first instance) proceedings even if they could have been aware of these points-is generally excluded.

[121] See U.S. Supreme Court Rule 44. Rehearing: "1. Any petition for the rehearing of any judgment or decision of the Court on the merits shall be filed within 25 days after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time." And Article 121 Swiss Federal Supreme Court Act: *La révision d'un arrêt du Tribunal fédéral peut être demandée: a. si les dispositions concernant la composition du tribunal ou la récusation n'ont pas été observées; b. si le tribunal a accordé à une partie soit plus ou, sans que la loi ne le permette, autre chose que ce qu'elle a demandé, soit moins que ce que la partie adverse a reconnu devoir; c. si le tribunal n'a pas statué sur certaines conclusions; d. si, par inadvertance, le tribunal n'a pas pris en considération des faits pertinents qui ressortent du dossier.*

[122] Article 68(14) of the Law on the Const. Court of Armenia: Constitutional Court may reconsider any of its decisions mentioned in paragraph 1 of this Article within 7 years after ruling on the substance of the case on the basis of an appeal brought by procedure prescribed in this Law if: a) the provision of the Constitution applied for the case is changed, b) a new understanding of the provision of the Constitution applied for the case has emerged, which may be a basis for a differing decision on the same case and if the issue has a principle importance for Const. Law.)

[123] E.g. Armenia: Article 48 of the Law on the Constitutional Court, Kazakhstan: Article 21 of the Law on the Constitutional Council.

[124] For example, Article 34.2 of the Law on the Federal Constitutional Court of Germany, fine of up to 2600 euros if the lodging of a constitutional complaint or of a complaint in proceedings involving the scrutiny of elections constitutes an abuse or if an application for the issuing of a temporary injunction is made in an abusive manner.

character (e.g. Albania, Andorra, Armenia, Austria, Azerbaijan, Brazil, Croatia, Czech Republic, Estonia, Germany, Hungary, Republic of Korea, Latvia, Liechtenstein, Malta, Montenegro, Poland, Portugal, Slovakia, Slovenia, Spain, Switzerland, and "The Former Yugoslav Republic of Macedonia").

121. In states with diffuse review, there is no such precondition. An individual may challenge an individual or normative act on the grounds of a violation of the constitution at any stage of proceedings.

122. In cases where adhering to this rule could cause an irreparable damage to the individual, exhaustion of remedies is usually not required (e.g. Azerbaijan, Croatia, the Czech Republic, Germany, Latvia, Montenegro, Slovakia, Slovenia and Switzerland).

II.1.7. Applicant directly and currently affected by the violation

123. This requirement exists in all states which permit review in relation to specific cases. If the individual is not currently and directly aggrieved by an act, their application initiates an abstract review. However, these requirements can be qualified in two ways. First, insofar as "direct" victimhood is concerned, some laws on constitutional proceedings (e.g. the South African standing provisions) authorise anyone to act in the name of the aggrieved person. This means that while an action is still related to a concrete case, the applicant is not directly a victim. Also, legal representatives (relatives, tutors, but also public institutions[125]) may act on behalf of a person who lacks legal capacity. Secondly, some laws contain details of the nature of the violation. In most states, breach of a fundamental right must constitute a disadvantage to the applicant, thus adversely affecting them. Furthermore, some national laws require that the harm be sufficiently important (e.g. Slovenia[126]).

II.1.8. Applicant as a proper means to repair the complainant's grief

124. If the constitutional review proceeding will not substantially change the applicant's situation, an application can be refused (e.g. Germany[127], South Africa[128] or France[129]). This evaluation is sometimes difficult to conduct during preliminary proceedings; therefore, it should **only lead to the denial of a review in cases where it is manifest that the constitutional court's decision will be ineffective as a means to provide effective access to constitutional justice.**

II.1.9. Written form

125. Applications to the constitutional court must be made in writing, and sometimes follow very strict rules (as is the case in the United States, where in the Supreme Court

[125] See for instance Article 59 Law on the Constitutional Court of Montenegro and Article 38 of the South African Constitution.
[126] Article 55a Law on the Constitutional Court.
[127] A case can be dismissed, if a successful application would not alter the applicant's situation. However, generally this requirement (the so called *Rechtsschutzbedürfnis*) is assumed to be fulfilled.
[128] See Decision CCT 86/06 of 02/10/2007, in CODICES.
[129] Such a decision can not be appealed.

the length of the application in terms of pages and even the colour of the document's cover are determined by court rules). These rules pursue the goals of transparency and traceability. However, **an applicant needs to be given the possibility to correct or complete a document within a certain time limit (see above) and only under specific conditions. This is especially important when formal requirements are very strict. It is even more important where legal representation is not obligatory** (such as it is the case in Croatia[130], Estonia[131], Slovenia[132], "The Former Yugoslav Republic of Macedonia"). This prevents the possibility of a review being refused for formal reasons despite the fact that the grievance continues to exist.

II.1.10. Filters in preliminary ruling procedures

See 1.1.5 Table: Preliminary ruling procedures

126. Preliminary questions are brought to the constitutional court by an ordinary court. Specific regulations concerning a question's admissibility exist in many of the Venice Commission's member and observer states. For example, in Andorra, Azerbaijan, Belarus, the Czech Republic, Georgia and Moldova, the constitutional court can reject a preliminary request on the grounds of procedural errors or lack of competence of the constitutional court. Whereas in Albania, Estonia[133], Hungary, Lithuania and "The Former Yugoslav Republic of Macedonia", the constitutional court must retransmit the request to the ordinary court in order to give the latter an opportunity to reformulate its question[134]. In other states, like Germany, this is not allowed. Many constitutional courts will reject a preliminary question if the the resolution of the specific case does not depend on the constitutional court's answer (e.g. Germany, Poland). In this respect, the constitutional court also looks at the specific case at hand. **The constitutional court should not be overburdened and if ordinary courts can initiate preliminary proceedings, they should be able to formulate a valid question.**

II.2. Intervention and joinder of similar cases

See 1.1.6 Table: Joinder of similar cases

127. In Armenia, Austria, Belgium, the Czech Republic, Lithuania[135], Portugal[136],

[130] See article 19.2 of the Constitutional Act on the Constitutional Court of the Republic of Croatia.
[131] §20 Constitutional Review Court Procedure Act.
[132] Only when filing a constitutional complaint. See Article 55(1) of the Constitutional Court Act.
[133] In Estonia. There is no clear cut "preliminary ruling system" as such. The ordinary courts are not allowed to submit a preliminary request before the Constitutional Review Chamber of the Supreme Court (ruling of the <Const. Rev. Chamber of the Supreme Court of 1 April 2004, No. 3-4-1-2-04, www.nc.ee/?id=407<http://www.nc.ee/?id=407>), but they have to decide on the constitutionality themselves, referring to the case-law of the Supreme Court on constitutional matters.
[134] See *General Report,* XIIth Congress of the Conference of European Constitutional Courts, (A. Alen, M. Melchior), Brussels, 2002, p.7, in: http://www.confcoconsteu.org/en/common/home.html, accessed 23 February 2009.
[135] Article 41, Law on the Constitutional Court: "Upon establishing that there are two or more petitions concerning the compliance of the same legal act with the Constitution or laws, the Constitutional Court may join them into one case before beginning the judicial consideration".
[136] Concerning applications by the Ombudsperson and constitutional revision.

Russia, Slovakia, Slovenia, South Africa[137], "The Former Yugoslav Republic of Macedonia" and the United States, for example, applications relating to the same question can or must be dealt with in one single proceeding. In Israel, few petitions relating to the same question can be filed in one proceeding; petitioners can ask the Court to join their petition with a different one – addressing similar claims. The Court is also authorized to instruct, upon request, the joinder of relevant parties.

128. In Belgium, France, Greece and Spain, any person having a lawful interest in the question may be joined to the proceedings.

129. **For reasons of procedural economy, persons who have a lawful interest in the question may be entitled to intervene in a pending case[138]. If there is a large quantity of quasi-identical cases, the court should be able to decide one or more paradigmatic cases and to simplify the procedure for similar claims both concerning inadmissibility and concerning the legal justification.**

II.3. Further relevant procedural rules

II.3.1. Adversarial systems

See 1.1.7 Table: Adversary systems

130. Various laws on constitutional courts (including those of Armenia, Azerbaijan, Czech Republic, Georgia, Russia and San Marino) provide that its proceedings are adversarial. Contrary to the position in civil and criminal proceedings, it is not always evident who are the parties to this form of proceedings. An applicant challenges the constitutionality of an act (general or individual). Where a general act forms the subject matter in the proceedings the act's author could be seen as the defendant. Where an individual act forms the subject matter of the proceedings, the original author of the act could be the defendant. Equally, if the act comes before the constitutional court via ordinary proceedings, the defendant in those proceedings could be the defendant before the constitutional court.

131. The advantage of using an adversarial system in constitutional proceedings is that the court can take note of different viewpoints and consider conflicting argument; yet, this is also possible in other forms, e.g., if the parties of the original conflict as well as representatives of interest groups, experts and representatives of the executive and the legislature are given the opportunity to present their views. It should be ascertained whether the constitutional court may investigate on its own motion to determine the truth so as to have the tools that allow it to go beyond the arguments put forward by the parties[139].

132. It is important that an applicant[140] or an initiator of non-adversarial proceed-

[137] See Decision CCT 24/08; CCT 52/08 of 21/01/2009, in CODICES
[138] See for example decision CCD -751 of 15.04.2008 of the Constitutional Court of Armenia, pursuant to which the natural and legal persons affected by a law are entitled to challenge it before the Court.
[139] CDL-AD (2001)005 , Opinion on the Draft Law on the Constitutional Court of Azerbaijan.
[140] CDL(1997)018rev Opinion on the Law on the Constitutional Court of Ukraine, adopted at the 31st plenary meeting of the Commission.

ings[141] should be given the possibility to address the constitutional court. **The Venice Commission is in favour of German[142] and Spanish provisions, according to which in cases where the constitutional complaint is directed against a court decision, the court should give the party in whose favour the decision was taken an opportunity to make a statement[143].** Courts, on the other hand, do not need to be heard if their decision is being reviewed, as their judgment reflects their position, but they are sometimes parties in preliminary ruling proceedings (e.g. Austria, Poland, Slovakia, Slovenia).

133. Adversariality does not necessarily require there to be an oral proceeding. Proceedings most commonly take place in written form, with each party submitting its arguments[144].

II.3.2. Procedural publicity.

See 1.1.8 Table: Public proceedings and exceptions

134. Oral proceedings are usually public. Even then the constitutional court may weigh publicity against other legitimate public and party interests (e.g. Albania, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Czech Republic, Denmark, Georgia, Israel, Italy, Liechtenstein, Lithuania, Moldova, Russia, Serbia, Slovenia, South Africa, Switzerland, “The Former Yugoslav Republic of Macedonia”).

135. **From the perspective of human rights’ protection, public proceedings are preferable at least in cases involving individual rights**. The European Court of Human Rights has repeatedly stated that the examination of a case before the constitutional court falls under Article 6.1 of the European Convention on Human Rights if they are to provide an effective remedy. A margin of appreciation only exists insofar as concerns the scope and measures of the implementation of this principle. Consequently, **oral proceedings before the constitutional court should be public, subject to restrictions only in narrowly defined cases.**

II.3.3. Conduct of oral proceedings

See 1.1.9 Table: Oral proceedings and exceptions

136. The advantage of oral proceedings is again the more direct confrontation of viewpoints and the fact that it is sometimes easier for a person to express his or her po-

[141] H. Steinberger, op.cit.

[142] Article 94 (3) Law on the Federal Constitutional Court: “If the constitutional complaint of unconstitutionality is directed against a court decision, the Federal Constitutional Court shall also give the party in whose favour the decision was taken an opportunity to make a statement.”

[143] CDL-AD(2008)030 Opinion on the Draft Law on the Constitutional Court of the Republic of Montenegro; Also in Albania, Andorra, Austria, Belarus, Belgium, Cyprus, Germany, Italy, Latvia, Romania and “the Former Yugoslav Republic of Macedonia”, the parties in the ordinary proceeding can become parties in the review proceeding. See *General Report, XIIth Congress of the Conference of European Constitutional Courts*, (A. Alen, M. Melchior), Brussels, 2002, p.7, in:http://www.confcoconsteu.org/en/common/home.html, accessed 23 February 2009., p. 26

[144] CDL-AD(2004)035 Opinion on the Draft Federal Constitutional Law “On Modifications and Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation”.

sition orally, without having to comply with strict formal rules applicable to written proceedings. On the other hand, as it is important that in oral proceedings that the parties are given an effective possibility to expose their viewpoints, oral proceedings are very time-consuming. Following these considerations, three models exist in the states of this study: i) proceedings are entirely oral; or, ii) are entirely paper-based i.e., written; or, iii) are partially oral and partially written. In Albania, Austria, Azerbaijan, Czech Republic, Israel, Italy, Germany, Liechtenstein, Netherlands, Slovenia, Ukraine, "The Former Yugoslav Republic of Macedonia" and the United States, proceedings are oral, unless decided otherwise, which means that both oral and written procedures can be applied if deemed more adequate given the circumstances of the case. In South Africa, the Constitutional Court may decide an application on the basis of written submissions only and directions will be issued if oral argument is required. In practice, constitutional courts often dispense with oral proceedings (e.g. Germany[145] and Slovenia). In Hungary and Portugal, there are written proceedings only[146]. Oral proceedings are the exception in Switzerland; the review is usually based on the written arguments set forth by the parties.

137. In states with diffuse constitutional review, it is not surprising that proceedings are often oral, as ordinary procedural rules apply (e.g. Denmark). In Sweden, proceedings before the Supreme Court can be oral, but are mostly written.

138. **The Venice Commission notes that it is widely accepted that it should be possible for a constitutional court to suspend or limit oral proceedings if this is necessary to safeguard the parties' or the public interests such as procedural efficiency (time and costs of proceedings)[147].**

II.4. Interim measures

II.4.1. Suspension of implementation

See 1.1.10 Table: Suspension of implementation

139. Suspending implementation of a challenged, normative and/or individual act is a necessary extension of the principle of ensuring that individuals are protected from suffering irreparable damage. It is the constitutional court which must decide whether to impose such a suspension (e.g. Austria, Albania, Armenia Belgium, Bosnia-Herzegovina, Croatia, Estonia, France[148], Georgia, Germany, Israel, Liechtenstein, Poland, Serbia, Slovakia, Slovenia, Spain, Switzerland, "The Former Yugoslav Republic of Macedonia", Turkey and the United States). Some states, however, for the sake of legal security, do

[145] R. Jaeger, S. Broß, *"Die Beziehungen zwischen den Verfassungsgerichtshöfen und den übrigen einzelstaatlichen Rechtsprechungsorganen, einschließlich der diesbezüglichen Interferenz des Handelns der europäischen Rechtsprechungsorgane",* report for the XIIth Conference of European Constitutional Courts, p. 22.

[146] In Portugal there is only one exception to this rule for cases when the Constitutional Court is asked to declare that an organisation carries on a fascist ideology: if the organization is abolished, a trial hearing must be held.

[147] CDL-AD(2004)035 Opinion on the draft federal constitutional law "on modifications and amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation".

[148] In France, a legislative act can be considered void (*a priori* review) or can be abrogated (*a posteriori* review) with *erga omnes* effect.

not allow the implementation of an act to be stayed or suspended (e.g. Algeria, Andorra, Azerbaijan, Belarus, Bulgaria, Cyprus, Czech Republic, France, Hungary, Latvia, Luxembourg, Moldova, Montenegro, Portugal, Romania[149], Russia, Sweden and Ukraine). In Russia, by way of contrast, the Constitutional Court may suggest to the relevant bodies that they suspend the implementation of a challenged act. In states with diffuse constitutional review, it is uncommon to suspend implementation (e.g. Denmark). In South Africa, when deciding a constitutional matter, a court may make any order that is just and equitable including making a temporary order. This may, where appropriate, include suspending the implementation of a normative act (statute). In Lithuania the challenged act may be suspended only in cases where the Constitutional Court receives a submission from the President of the Republic to investigate whether an act of the Government is in compliance with the Constitution and the laws, or when it receives a resolution of Parliament wherein it is requested to investigate whether a law of the Republic of Lithuania or other act adopted by Parliament is in compliance with the Constitution, whether a decree of the President of the Republic, an act of the Government is in compliance with the Constitution and laws (Article 26, Law on the Constitutional Court), but it is not the case when the ordinary court addresses a preliminary request to the Constitutional Court.

140. **The Venice Commission is in favour of a power to suspend the implementation of a challenged individual and/or normative act, if the implementation could result in further damages or violations which cannot be repaired once the unconstitutionality of the act challenged is established[150]. The conditions for suspension should not be too strict[151]. However, especially for normative, the extent to which non-implementation itself would result in damages and violations that cannot be repaired must be taken into account.**

II.4.2. Stay of ordinary proceedings

See 1.1.11 Table: Stay of ordinary proceedings

141. Ordinary proceedings may be stayed where preliminary ruling procedures are initiated. In Andorra, Austria, Armenia, Belgium, Belarus, Chile, Cyprus, Croatia, Czech Republic, France, Hungary, Latvia, Liechtenstein, Lithuania, Luxembourg, Poland, Russia, Slovenia, Slovakia, Turkey[152], "The Former Yugoslav Republic of Macedonia" and

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[149] Pursuant to a very recent amendment of Law on the organisation and functioning of the Constitutional Court (by Law no.177 of 2010), ordinary proceedings shall no longer be suspended if the submitting court refers the exception of unconstitutionality to the Constitutional Court.

[150] See, for instance, CDL-AD(2004)024 Opinion on the draft constitutional amendments with regard to the Constitutional Court of Turkey.

[151] CDL-AD(2007)039 Comments on the Draft Law on the Constitutional Court of the Republic of Serbia.

[152] In the case of Turkey, Article 152 of the Constituton reads that "If a court which is trying a case, finds that the law or the decree having the force of law to be applied is unconstitutional, or if it is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it shall postpone the consideration of the case until the Constitutional Court decides on the issue. If the court is not convinced of the seriousness of the claim of unconstitutionality, such a claim together with the main judgment shall be decided upon by the competent authority of appeal. The Constitutional Court shall decide on the matter and make public its judgment **within five months** of receiving the contention. If no decision is reached within this period, the trial court shall conclude the case under existing legal provisions. However, if the decision on the merits of the case becomes final, the trial court is obliged to comply with it".

Ukraine, the submitting court stays its proceedings in any case. In Austria, the suspension concerns "only such action (…) which cannot be affected by the decision of the CC or does not finally settle the issue and cannot be delayed until the decision of the CC (Section 62.3. Constitutional Court Act)"[153]. In Slovenia, the ordinary court is obliged to stay ordinary proceedings when the issue of constitutionality concerns a law, but in case of by-laws ordinary courts can use the *exception illegalis*. The Croatian regulation follow the same reasoning: if the ordinary court has doubts about a law it is about to apply, it must stay the proceedings; if doubts concern an administrative regulation, the court applies the law directly on which the regulation is based and refers the regulation to the Constitutional Court. Thus, the proceedings are not interrupted if this is not absolutely necessary to resolve the case at hand. The ordinary court in Spain may submit the question only after the end of the proceeding and before deliberating on the judgment; therefore, the judgment is subject to a decision by the Constitutional Court, even if ordinary proceedings continued if there were already doubts as to the constitutionality of a provision. In Andorra, the proceedings continue, but the possibility of rendering a judgment is limited: it must be established that the Constitutional Tribunal's decision will not have an effect on the ordinary court's judgment.

142. **Ordinary proceedings should be stayed, when preliminary questions in this case are raised to the constitutional court. This can take place either *ipso iure* or by decision of the competent court. Anyway it must be ensured, that the ordinary judge does not have to apply a law, he holds to be unconstitutional and whose constitutionality is to be decided by the constitutional court with regard to the same case.**

II.4.3. Injunctive measures

See 1.1.12 Table: Injunctive measures

143. The constitutional court can, in some states, order public authorities to take positive action to ensure that no further harm is done to the applicant (e.g. Germany, Malta, Liechtenstein, South Africa, Switzerland).

II.5. Discontinuation of the proceedings

*II.5.1. **Discontinuation if the petition is withdrawn***

144. In the case of normative reviews, the constitutional court does not necessarily stop proceedings if an application is withdrawn. **Following an application's withdrawal, the court should be able to continue to examine the case if this is in the public interest.** This is an expression of the autonomy of constitutional courts and their function as guardians of the constitution, even if the applicant is no longer party to the proceedings.

[153] *General Report, XIIth Congress of the Conference of European Constitutional Courts*, (A. Alen, M. Melchior), Brussels, 2002, p.7, in: http://www.confcoconsteu.org/en/common/home.html, accessed 23 February 2009., p. 37.

145. The same is possible in relation to review following a full constitutional complaint. If the constitutional court has the power to initiate a review of the normative act that underlies an individual decision or act, even if the individual complaint is being withdrawn, the constitutional court can have the possibility to continue its review of the normative act. For normative acts, some laws on the constitutional court impose a cessation of proceedings if the petition is withdrawn (e.g. Andorra, Austria[154], Czech Republic, Poland, Hungary, Russia, Serbia, Switzerland, "The Former Yugoslav Republic of Macedonia", Ukraine).

146. For individual acts, proceedings usually require that an applicant continues their petition for the court to have jurisdiction (e.g. Austria, Montenegro, Slovenia). However, the Constitutional Court of Slovakia has the power to refuse to permit a full constitutional complaint to be withdrawn. In Portugal, the view is that once a petition has been submitted, the petitioner no longer has the power to withdraw it, and therefore a petition cannot be withdrawn.

II.5.2. Discontinuation if the challenged act loses validity

147. There is no shared view on whether a constitutional court can continue review proceedings when the act under consideration ceases to be valid. In some states, the court terminates its review immediately (e.g. Andorra, Austria, Czech Republic[155], Belarus, France Montenegro[156], Portugal, Slovakia[157], Switzerland, "The Former Yugoslav Republic of Macedonia", Ukraine). In other states, it continues its control and declares the act unconstitutional; such control may be entirely at the court's discretion (e.g. Liechtenstein, Serbia).or it may be limited to certain circumstances only (e.g. Poland and Russia, where continuing review is permitted where it this is necessary to prevent human rights violations). In Lithuania, the annulment of a disputed legal act shall be grounds to adopt a decision to dismiss the instituted legal proceedings (Article 69.4 of the Law on the Constitutional Court), but according to the jurisprudence of the Court, in such cases, when an ordinary court investigating a case applies to the Constitutional Court after it has doubts concerning the compliance of a law or other legal act applicable in the case with the Constitution (other legal act of higher power), the Constitutional Court has a duty to investigate the request of the court regardless of the fact of whether or not the disputed law or other legal text is valid (see, for instance, Decision of 27 March 2009, part I of the Court's reasoning, point 8).

148. **The mere discontinuation of a case can be an insufficient means to secure human rights protection in cases of concrete review or individual complaints. It is however controversial if the constitutional court should be enabled to award itself**

[154] However, pursuant to Article 139.2 and 140.2 Federal Constitution Act, norm review proceeding initiated ex officio by the CC on the occasion of other proceedings pending before it shall nevertheless be continued, even if the party of the proceedings that gave cause for the norm has received satisfaction".

[155] Article 67 Constitutional Court Act.

[156] Article 65 Law on the Constitutional Court.

[157] The Constitutional Court of Slovakia has recently admitted for the first time and contrary to its previous practice in this concern the possibility for ordinary courts to challenge a normative act which is no longer valid part of the legal order, but still has to be applied to a specific case.

pecuniary compensation for the violation of a right in order to redress the breach to the individual's human rights.

II.6. Time limits for taking the decision

149. **Time limits for the adoption of decisions, if they are established, should not be too short to provide the constitutional court with the opportunity to examine the case fully and should not be so long to prevent the effectiveness of the protection of human rights via constitutional justice.** From the perspective of the effectiveness of constitutional justice, time limits are often impossible to preview, so the constitutional court should be able to extend the mentioned time limits in exceptional cases[158].

PARTIAL CONCLUSIONS OF CHAPTER II

150. Constitutional review proceedings typically respect several conditions. First, in order to open the proceedings, there are often time limits for lodging applications as a filter to avoid overburdening the court. They should be reasonable and permit the preparation of the complaint by the individual or to provide sufficient time for a lawyer to be instructed. The constitutional court should also be able to extend deadlines in exceptional cases. Second, free legal aid should be provided when necessary. Third, the Venice Commission recommends that court fees should not be excessive and should only used to deter abusive applications. The financial situation of the applicant should be taken into account when fixing fees. Fourth, decisions issued by the constitutional court are final and should only be reopened in exceptional circumstances (e.g., condemnation by the European Court of Human Rights). Fifth, in order to ensure the effectiveness of individual access to constitutional justice, parties have to act in a bona fide manner, avoiding abusive applications and acting only after they have exhausted other possible remedies. The exhaustion of remedies is necessary in countries with concentrated control of constitutionality to avoid overburdening the constitutional court. Sixth, it should be ensured that the remedy available is appropriate to cure the applicant's grievance. Among the procedural principles applicable to constitutional review, there are adversarial systems, in which parties to the former proceedings are given the opportunity to present their views. The constitutional court should also be able to adopt its decision in a timely fashion and without undue delay; respecting correct time limits should not be allowed to jeopardize the effectiveness of the proceedings.

151. Where interim measures are concerned, the Venice Commission is in favour of a power to suspend the implementation of a challenged individual and/or normative act, if implementation could result in further damages or violations which cannot be repaired if the unconstitutionality of a provision is established.

[158] E.g. Armenia: the Law on the Constitutional Court, in both the cases of abstract and concrete review, the Constitutional Court adopts the decision not later than 6 months after registration of the appeal and by a reasoned decision, the Constitutional Court can extend the time limit for case examination, but no longer than for three months.

152. Finally, the constitutional court should be able to continue to analyse a petition, even if it is withdrawn, in order to protect the public interest. However, in cases where the challenged act loses its validity, there is no general consensus on whether the constitutional court should or should not be able to continue its analysis. It is important to note, nevertheless, that merely discontinuing a case may not be sufficient to ensure effective human rights protection in cases of concrete review or individual complaints and that mechanisms of compensation are necessary.

III. DECISION

153. When Constitutional Courts decide on matters brought before them by individuals, courts, ombudspersons or other bodies acting in relation to a concrete case, their decisions certainly affect individuals' legal positions either directly or, in the case of the abstract *actio popularis*, potentially. In fact, the question is not only whether the constitutional court decides in favour of the applicant or not; the scope of the decision's effect as well as the possible retroactivity of a decision determines whether the grievance the individual is confronted with can be effectively removed (III.1.).

154. The decision can have different consequences. It can have effects on a specific circle of persons or on everybody (see below). The decision can have an immediate effect or can have retroactive effects (see below). Furthermore, the constitutional court or equivalent body can have the power to annul or derogate from the challenged provision, but the latter may also stay its effect and may provide that it is only interpreted in a specific manner (see III.4. below).

III.1. Scope of review

155. Once the constitutional court has admitted a petition (all or in part), there is no possibility to reduce the scope of review. The constitutional court must in any case reply to all questions submitted and declared admissible[159]. It cannot refuse or omit to reply. However, can it go beyond the application itself? What reasoning justifies such an extension?

156. In some states, the constitutional court's review is limited to the original petition (review *ultra petitur* is excluded), as is the case in Andorra[160], Belgium[161], Czech Republic, France in the context of *a posteriori* review, Georgia[162], Hungary,

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[159] *General Report, XIIth Congress of the Conference of European Constitutional Courts*, (A. Alen, M. Melchior), Brussels, 2002, p.7, in: http://www.confcoconsteu.org/en/common/home.html, accessed 23 February 2009.

[160] Article 7 Qualified Law on the Constitutional Court: "3. The decision or judgment determining a case, which has been declared admissible, may not contain considerations different from those submitted by the parties in their respective claims".

[161] C.A. n°12/86 du 25 mars 1986, 3.B.1

[162] Art.26 Organic Law on the Constitutional Court: "The Constitutional Court shall not be authorized to discuss conformity of the whole law or other normative act with the Constitution, if the claimant or author of the submission demands only recognition of a particular provision of the law or other normative act as unconstitutional".

Luxembourg, Montenegro[163], Poland[164], Russia and Switzerland[165]. The constitutional court can invalidate an act only insofar as this has been petitioned and with reference to the constitutional provision or principle that was mentioned in the referral. This is often problematic as inexpertly filed petitions do not clearly set out the basis on which an act is contested, or the challenged act itself, and thus have little chance of succeeding[166].

157. It follows that there are two possibilities for a constitutional court to extend its review beyond the explicit terms of the request: it can, on the one hand, review other related provisions concerning their constitutionality and, on the other hand, it can extend the circle of constitutional or other higher-ranking provisions that serve as review standards. The more restrictive approach would be to limit control to issues of substance; a broader approach would be to include the possibility of reviewing the procedure as well.

III.1.1. Extension of norms under review

See 1.1.13 Table: Extension of norms under review

158. In relation to requests to review normative acts, the constitutional court can decide to review the constitutionality not only of a challenged provision, but under certain conditions of a whole law or act, and it may decide to review other related normative acts (e.g. Algeria, Austria[167], Belarus, Brazil, Croatia, Czech Republic, Estonia[168], France in the context of *a priori* review, Hungary, Liechtenstein, Lithuania[169], Serbia, Slovakia, Slovenia, South Africa, "The Former Yugoslav Republic of Macedonia" and Turkey, and, to a lesser

[163] Article 55 of the Law on the Constitutional Court: *"The Constitutional Court shall decide only on the violation of human right or freedom cited in the constitutional complaint"*.

[164] Article 66 of the Constitutional Tribunal Act: "The Tribunal shall, while adjudicating, be bound by the limits of the application, question of law or complaint".

[165] Article 107 Federal Judicature Act: Le Tribunal fédéral ne peut aller au-delà des conclusions des parties.

[166] For instance, United States Supreme Court interprets the terms of a petition and conducts review not only on the explicit questions stated, but also on those implied in the petition: "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." In Portugal, to avoid problems arising from inexpertly filed petitions, the Rapporteur has the power to invite a petitioner who has not yet done so, to specify the decision he is filing an appeal against, which constitutional rule or principle he considers to have been breached (even if this does not limit the Court, see 4.1.1.3.), and to identify the document in the case file in which he originally raised the question of unconstitutionality or illegality.

[167] Article 140.3 Federal Constitution Act.

[168] E.g. Supreme Court judgement No 3-4-1-7-08, available http://www.nc.ee/?id=1037

[169] The Court hold that "The Constitutional Court, having established that the provisions of a law the compliance with the Constitution of which is not disputed by the petitioner but by which the social relations regulated by the disputed law are interfered with conflict with the Constitution, must state so" (Rulings of 9 November 2001, 14 January 2002, 19 June 2002, 27 June 2007, 3 March 2009, 2 September 2009).

extent, in Germany[170], Italy[171], Moldova, Romania, Spain and Ukraine). Thereby, the court combines the subjective and the objective function of constitutional review: the court takes the original application as an occasion for a more general review leading to clearing up the constitutional order, and, potentially, to a removal of more provisions violating subjective fundamental rights. The solution provided by Article 87 of the Russian Law on the Constitutional Court is worth mentioning, according to which a decision that a provision is unconstitutional is the basis for the annulment of all other norms, which are based upon, reproduce or contain the same provisions as the unconstitutional provision.

159. If construed narrowly, the question is even more pressing where full constitutional complaints against individual acts are concerned. The constitutional court might only have the power to invalidate the individual act; it might be forbidden to remove the normative act that served as basis for the individual act, even if this act is unconstitutional and the violation challenged in the full constitutional complaint resulted from the correct application of an unconstitutional normative act. The normative act thus remains valid, exposing other individuals to violations of their fundamental rights[172].

160. However, this situation is the exception (e.g. Switzerland, where the applicant[173] cannot lead to the opening of normative review proceedings).

161. In Estonia, Liechtenstein and Lithuania, the constitutional court must annul the normative act in the same proceeding; in Germany the constitutional court can annul the normative act; in Austria[174], the Czech Republic and in Spain, the constitutional court is obliged to open a second proceeding for constitutional review, in Croatia, Slovenia and "The Former Yugoslav Republic of Macedonia"[175], this is facultative. It is important to

[170] The Court may do so on the basis of Article 78 sentence 2 of the Law on the Federal Constitutional Court, which applies to the abstract review of statutes.

[171] In Italy, the CC has developed a wide range of the so called "interpretative decisions", very often rejecting claims which challenged a legal norm or act as unconstitutional, doing so on the basis of the incorrect interpretation of the law adopted by the judge a quo. The Constitutional Court established then that a different interpretation of the lñegal provision made it constitutional (these are the "sentenze interpretative di rigetto"). Interpretative decisions arte formally binding only on the judge a quo, but not for the rest of the courts and judges. Judges who do not want to follow the interpretation estyablished by the Constitutional Court, can not apply, however, the same interpretation which the Constitutional Court already considered unconstitutional. They must submit a new preliminary request to the Constitutional Court, explaining their different interpretation of the same norm. The CC must in these cases decide whether this new interpretation proposed by the judge a quo is valid and constitutional and if it is, it delivers a "sentehnze interpretative di accoglimento" (an interpretative decision accepting the different interpretation as in conformity with the Constitution). When the CC rejects the interpretation proposed by the judge a quo, it issues a warning decision addressed to the Parliament, so the legislator can have some guidance and suggestions in order to render the legislation in a clear conformity with the Constitution (and exclude possible unconstitutional interpretations). If the Court considers that the judge a quo was right and that the legal provision submitted is unconstitutional, the provision is no longer valid. The CC can then "fill in" the lacuna itself (sentenze additive) or provide with a general principle the judge a quo must apply to the specific case (sentenze additive di principio).

[172] The opposite situation is critical as well, i.e. when in the framework of the normative constitutional complaint, the Constitutional Court does not have the possibility to address the constitutionality of the individual act adopted on the basis of that norm.

[173] The complaint can only be directed against cantonal laws.

[174] In Austria, the Constitutional Court opens itself a new review proceeding of the normative act and stays the proceeding following the constitutional complaint. After having decided in the abstract proceeding, it takes up the concrete case again.

[175] See Article 56 and 14 Rules of Procedure of the Constitutional Court.

notice that in Austria, the law may only be invalidated in its entirety if this does not run counter to the applicant's interests.

III.1.2. Extension of the circle of grievances

162. Often, individual applicants have difficulties setting out the precise grounds on which they bring their application. In view of admitting a greater number of applications despite these errors, the constitutional court may issue decisions on another constitutional basis than that mentioned in the request[176] (e.g., Albania, Austria, Belgium, Bulgaria, the Czech Republic, Estonia[177], Portugal, Russia, Slovenia and Spain). On the other hand, the applicant is not obliged to name the exact provision of the Basic Law, but the violated norm must be identifiable from his/her complaint. This requirement is wielded stricter with regard to legally advised complaints than to those brought by laymen.

163. In order to reach its decision, the constitutional court must identify the contents of an impugned provision. Here, two possibilities can be envisaged: either the constitutional court defers to the interpretation of ordinary courts or it gives its own interpretation.

164. Following a preliminary request, none of the constitutional courts considered in this study is "strictly bound by the interpretation of the reviewed regulation given by the referring court"[178] (see, for instance, Estonia[179]), with the exception of Portugal, where the Constitutional Court has consistently stated that in concrete reviews of constitutionality, its review is limited by the referring court's interpretation of the rule under consideration. The Austrian, Belgian and Spanish constitutional courts will, in principle, apply the interpretation contained in a referral by a court, except if another interpretation could be in line with the Constitution. With regard to the interpretation and application of potentially non constitutional legal norms the German Federal Constitutional Court is bound to follow the decisions of the ordinary courts unless there are errors on the face of the decisions which – apart from the prohibition of arbitrariness – are based on a fundamentally erroneous view of the meaning and scope of a fundamental right[180]. Besides this, the German Constitutional Court is entitled to ask the highest federal and regional courts to submit information on the way they use to interpret the relevant norm and on the reasons given for their interpretations[181].

165. In fact, the technique of *"réserve d'interprétation"* or *"verfassungskonforme Auslegung"* ("power to ensure constitutionality through a specific interpretation"),

[176] See *General Report, XIIth Congress of the Conference of European Constitutional Courts,* (A. Alen, M. Melchior), Brussels, 2002, p.7, in: http://www.confcoconsteu.org/en/common/home.html, accessed 23 February 2009.
[177] E.g Supreme Court judgement No 3-4-1-11-08, available http://www.nc.ee/?id=455.
[178] A. Alen, M. Melchior, *General Report, XIIth Congress of the Conference of European Constitutional Courts*, Brussels, 2002, p.7, in: http://www.confcoconsteu.org/en/common/home.html, accessed 23 February 2009
[179] §14 Constitutional Review Court Procedure Act: "(1) Upon hearing a matter the Supreme Court shall not be bound by the reasoning of a request, court judgment or ruling".
[180] BVerfG, 1 BvR 1804/03 of 12/07/2004, § 50.
[181] Article 82 Law on the Federal Constitutional Court. According to Article 82.4 sentence 1, this applies not only to the federal supreme courts but also to the supreme courts of the *Länder.*

through which the constitutional court imposes on all other state organs to apply a normative act only in a specific interpretation which the constitutional court has found to be constitutional, helps to preserve normative acts even if one or several unconstitutional interpretations would be possible[182], but is ineffective if the ordinary courts and administrative bodies do not follow this interpretation[183]. **An explicit legislative – or even better constitutional – provision obliging all other state organs, including the courts, to follow the constitutional interpretation provided by the constitutional court provides an important element of clarity in the relations between the constitutional court and ordinary courts and can serve as a basis for individuals to claim their rights before the courts.**

166. In order to overcome the problem of non-application of the constitutional court's decision, the Italian Constitutional Court took the opposite approach and developed the concept of *"diritto vivente"* (living law). The constitutional judge interprets a contested legal provision as it is "usually" interpreted by ordinary courts and decides on the unconstitutionality of the law in the basis of this common interpretation, even if the provision could also be interpreted in a constitutional manner. Thus, a law that has consistently been interpreted in an unconstitutional manner is annulled and Parliament is called upon to adopt a new law which (hopefully) cannot be, or is less likely to be, interpreted in an unconstitutional manner. The Constitutional Court of the Republic of Armenia also declares a challenged norm unconstitutional on the basis of the interpretation commonly given to the law in its application.

III.2. Effects *ratione personae*

167. A typical attribute of constitutional courts, following the European model, is the *erga omnes* effect of their decisions. *Erga omnes* effect of decisions means that they bind everyone, as opposed to decisions which have effect only between the parties of the concrete legal dispute (effect *inter partes*). While decisions following a complaint against an individual act usually have *inter partes* effect, the legal reasoning used can also have an impact in other cases. In Germany, for example, these reasons (and not purely *obiter dicta*) are binding in all state organs including courts. The scope of decisions when a normative act has been challenged can vary and depends mostly on the legislator's preference.

See 1.1.14 Table: *Erga omnes* effect

168. Decisions can also take different effects depending on whether the constitutional court finds a provision constitutional or unconstitutional. See 1.1.15 Table: Confirmation of constitutionality

III.2.1. Review of normative acts

169. The most obvious example of *erga omnes* effect is if the constitutional court

[182] See CCT 1/00 in CODICES.
[183] See X. Samuel, "Les réserves d'interprétation émises par le Conseil constitutionnel", in: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/pdf/ Conseil/reserves.pdf, accessed 4 June 2009.

declares a normative act to be unconstitutional or if it invalidates it. In the latter case, it is then removed from the legal order and can no longer be applied by anyone. If a (Constitutional) court considers a normative act to be unconstitutional, several possibilities come into play: it can be obliged to invalidate the act with *erga omnes* effect; it can also declare the act unconstitutional, leave it unapplied, but refrain from (or be incompetent to) removing it from the legal order. In most of the countries examined in this study, the review of a normative act could lead to a decision which is binding on everyone.

170. A nuanced view is necessary when considering preliminary ruling procedures. First, exceptions of unconstitutionality and preliminary questions initiate review of a normative act. It is uncontested that a decision following an exception of unconstitutionality has a binding effect between the parties and that the ordinary court is obliged to apply the constitutional court's decision in the concrete case[184]. In many states, the constitutional court's decision goes beyond this finding of unconstitutionality *inter partes* and lifts the challenged normative act. Thereby, the legislator combined the idea of protection of subjective fundamental rights and that of objective constitutional review. This is the case for example in Albania, Andorra, Bulgaria, Greece, Italy, Lithuania, Romania, San Marino, "The Former Yugoslav Republic of Macedonia" or South Africa[185]. In common law states, the binding effect of the Supreme Court's decision is inherent in the system of precedents.

171. In Belgium, Luxembourg and Cyprus however, the effect of a decision of the constitutional court is expressly limited to the concrete case. In Turkey, the submitting court must only await the Constitutional Court's decision and apply it if its decision is made within five months. Otherwise, the submitting court must apply the challenged law. In Portugal, even if the law on the Constitutional Court provides that decisions' effects are limited to the submitting case, the Constitutional Court, if it has issued three decisions on the same matter, can decide to open abstract review proceedings of the challenged normative act and possibly invalidate it[186].

[184] See, for instance, Article 57 Andorran Qualified Law on the Constitutional Court: "2. The decision of the Constitutional Court is binding on the court which referred the matter to it. […]".

[185] In South Africa, if a normative act (statute) is found by a court to be inconsistent with the Constitution it is declared invalid to that extent and, once this declaration of invalidity is confirmed by the Constitutional Court, the normative act (statute) no longer applies to any person.

[186] In Portugal the existence of three Constitutional Court's decisions issued in concrete review of constitutionality, in which a given rule was held unconstitutional, is a mere precondition for the initiation of an autonomous review – this time of an abstract type – of the constitutionality of the rule in question. Inasmuch as the new review is autonomous, nothing prevents the new decision, now taken by the thirteen-justices Plenary, from being different from the earlier decisions, issued by five-justices panels within individual Sections of the Constitutional Court. See Ruling no. 221/2009 of 5 May 2009, in which the representative of the Public Prosecutors' Office at the Constitutional Court asked the Court to declare, with generally binding force, the unconstitutionality of a rule contained in an Executive Law on charging the amount due for the provision of healthcare at an establishment or service belonging to the National Health Service, when the interested party had not displayed an NHS user card and had not, within the deadline laid down by the Executive Law, provided evidence that he either held such a card, or had asked the competent department to issue one. The Constitutional Court had already held the prevailing interpretation of this rule materially unconstitutional in three concrete review cases. However, in Ruling no. 221/2009 the Plenary decided not to declare its unconstitutionality. It is worth adding that the Public Prosecutors' Office possesses the competence to request this process of rendering jurisprudence uniform, but that the process can also be initiated by any of the individual Justices of the Constitutional Court itself. The request cannot be made by a private individual.

172. Where a decision of unconstitutionality has been made following a normative constitutional complaint or a full constitutional complaint attacking a normative act it has *erga omnes* effect (e.g Algeria, Armenia, Austria, Azerbaijan, Bosnia and Herzegovina, Czech Republic, Estonia[187], France, Germany, Hungary, Latvia, Liechtenstein, Poland, Slovenia, Switzerland, Romania, Russia, South Africa, Spain, "The Former Yugoslav Republic of Macedonia").

173. In states with diffuse or mixed review systems, there are two diametrically opposed positions. On the one hand, decisions can have real *erga omnes* effect or a similarly broad scope. *Erga omnes* effect exists in Brazil and Mexico[188], where the constitutional court may declare a law unconstitutional after five consecutive decisions concerning the same general act. Also, the institute of precedents in common law systems renders constitutional court decisions binding on lower courts. Hence, the declaration of inapplicability of a law due to its unconstitutionality, for instance, will be applied by all lower courts, unless they "distinguish" future cases by explaining why the present case is different from the precedent (e.g. Canada[189], USA[190], Peru or Mexico). In Iceland, *stare decisis* is not inscribed in the Constitution, but is a constitutional custom. In Brazil, not only does the system of precedents create a certain general effect of decisions, but the courts may also suggest legislative changes.

174. On the other hand, in Argentina, Chile, Denmark, Finland, Japan, Norway and Sweden, the constitutional or supreme court limits itself to declaring the inapplicability of a normative act in the concrete case. There is no formal guarantee of unity of legal practice by the courts. Therefore, there needs to be a strong informal coherence within the court system, especially through the provision of information and a willingness to follow certain guidelines in order to avoid legal uncertainty through inconsistent decisions being made.

175. Another group of decisions on normative acts that do not necessarily have *erga omnes* effect are declarations of unconstitutionality (see below "Continuing validity of a challenged act").

176. Even the rejection of an application which has *inter partes* effect can have a wide impact in practice, as potential future applicants (especially ordinary courts) follow the constitutional court's decision and can already foresee whether their application will be successful or not[191].

177. The same happens with decisions confirming constitutionality (see 1.1.15 Table: Confirmation of constitutionality). Indeed, the scope of effects of decisions in

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[187] Only if the decision has been taken by the Supreme Court. If ordinary courts decide that a norm is unconstitutional, it has biding effect only *inter partes*, although, in those cases, an automatic procedure before the Supreme Court takes place (and has *erga omnes* effect).

[188] T. Ginsberg, "Comparative Constitutional Review", United States Institute for Peace Projects, http://www.usip.org/ruleoflaw/projects/tg_memo_on_constitutional_review.pdf, accessed 02 March 2009.

[189] http://www.er.uqam.ca/nobel/r31400/jur2515/ndecours/jur2515chap7-2007.pdf, accessed 2 March 2009.

[190] See "The Court and Constitutional Interpretation", in: http://www.supremecourtus.gov/about/constitutional.pdf, accessed 04 May 2009.

[191] R. Jaeger, S. Broß, op. cit., p. 26 f.

which the constitutional court confirms the constitutionality, that is, where it refuses to invalidate a normative or individual act, varies. There are two opposing rationales: first, in Austria, Romania, Spain and Switzerland, for example, the constitutional court will not accept any future applications regarding the same statute with respect to the same provision by the same person. The decision thus prevents only the same applicant from bringing the same case again, as other applicants could bring their case before the constitutional court. In this sense, the decision only has *inter partes* effect[192]. On the other hand, decisions confirming the compatibility with the constitution can have *erga omnes* effect. The ordinary judge in Peru must not consider questions of unconstitutionality put forward by a party if they concern a norm whose constitutionality has been affirmed by the Constitutional Tribunal in a previous decision. Likewise, in Andorra, Armenia, Belgium, the Czech Republic, Germany[193], Moldova, Serbia and Lithuania, decisions of constitutionality cannot be challenged. This means that the question may no longer be raised or at least not for a certain period of time, as is the case in Armenia and Turkey. The same happens in France since the 2008 reform, but some cases could be reopened in case of evolution of the factual or legal circumstances of the case (so the *erga omnes* effect could be weakened).

178. The rules applicable in Slovenia and "The Former Yugoslav Republic of Macedonia"[194] take an intermediary position, as the Constitutional Court will not take up a question again if there are no reasons to believe that it will rule differently this time. A contrario, if there are reasonable doubts, it will admit an application.

179. Finally, *stare decisis* exists in systems where there is no concentrated review. Cyprus[195], Mexico, Peru[196], South Africa and the US apply the doctrine of precedent, which ensures a large degree of coherence of the courts' decisions and comes close to the *erga omnes* effect in civil law systems. A lower court may sometimes refuse to apply

[192] G. Kucsko-Stadlmayer, "Die Beziehungen zwischen den Verfassungsgerichtshöfen und den übrigen einzelstaatlichen Rechtsprechungsorganen, einschließlich der diesbezüglichen Interferenz des Handelns der europäischen Rechtsprechungsorgane", report for the XIIth Conference of European Constitutional Courts, 2002, p. 23.

[193] However, the question of constitutionality of a statute can be raised again before the Federal Constitutional Court if there has been a substantial change of the factual or legal situations since the first decision.

[194] See Art. 28 Rules of Procedure of the Constitutional Court.

[195] The ratio decidendi of a case deriving of judgements of the Supreme court in the exercise of its appellate jurisdiction or its original jurisdiction (exercised by the plenum of court) is binding on hierarchically subordinated courts.

[196] Article VI Code of Constitutional Procedure (p.t.): "The judges interpret and apply the law or any norm with force of law and the regulations following the constitutional precepts and principles, in conformity with the interpretation of the latter undertaken in the resolutions passed by the Constitutional Tribunal. (Los Jueces interpretan y aplican las leyes o toda norma con rango de ley y los reglamentos según los preceptos y principios constitucionales, conforme a la interpretación de los mismos que resulte de las resoluciones dictadas por el Tribunal Constitucional.) Article VII: "The judgments of the Constitutional Tribunal which obtain the authority of *res iudicata* become a binding precedent if the judgment so states, specifying the extent of its normative effect. If the Constitutional Court decides to deviate from the precedent, it must enunciate the factual and legal basis that underlies the judgment and the reasons why the Tribunal deviates from the precedent. (Las sentencias del Tribunal Constitucional que adquieren la autoridad de cosa juzgada constituyen precedente vinculante cuando así lo exprese la sentencia, precisando el extremo de su efecto normativo. Cuando el Tribunal Constitucional resuelva apartándose del precedente, debe expresar los fundamentos de hecho y de derecho que sustentan la sentencia y las razones por las cuales se aparta del precedente).

the *ratio decidendi* (reasoning) of the higher court's decision, but has to explain why the current case differs from the precedent case in order to justify its new decision. Notwithstanding the principle of *stare decisis*, the highest courts of common law countries, such as the U.S. and the United Kingdom (since 1966), can overrule their own decision by a majority of the judges and with adequate reasoning. In some states with concentrated review[197], the constitutional court is bound by its own precedents, but may overrule them by a reasoned decision of a certain majority of its members (e.g. Andorra[198]).

III.2.2. Review of individual acts

180. Usually, the decision following a full constitutional complaint challenging an individual act affects only the case or situation on the basis of which the proceedings were initiated[199]. The question of the scope of a decision by the constitutional court raises fundamental problems concerning the role and effectiveness of constitutional complaints. It only binds the applicant, and the judicial or administrative body whose act was impugned, and possibly also the public bodies concerned with the concrete question also for the future, as long as the concrete situation at the origin of the case has not changed (e.g. Austria). In Germany, even decisions on individual acts are binding for all state organs[200]).

181. Three cases can be distinguished. Either the constitutional court decides on the substance, or it quashes an individual act, or it only orders a proceeding to be reopened, or a change of the administrative act, without annulling the act.

182. The constitutional court can rule on the substance of the case in Armenia, Brazil, Canada, Cyprus[201], Estonia , Iceland, Ireland, Japan, Slovenia, Switzerland, South

[197] In Lithuania, which is a concentrated review system, there are nevertheless certain particularities concerning the *stare decisis* principle. According to the jurisprudence of the Constitutional Court, the latter is bound by its precedents and by the constitutional doctrine which it has formulated and which substantiates these precedents[197]. It may be possible to deviate from the Constitutional Court precedents created while adopting decisions in cases of constitutional justice and new precedents may be created only in cases where it is unavoidable and objectively necessary, constitutionally grounded and reasoned. The said necessity to reinterpret certain official constitutional doctrinal provisions so that the official constitutional doctrine would be corrected may be determined only by the circumstances as the necessity to increase possibilities for implementing the innate and acquired rights of persons and their legitimate interests, the necessity to better defend and protect the values enshrined in the Constitution, Constitutional Court ruling of 24 October 2007.

[198] Article 3 Qualified Law on the Constitutional Court: "1. The Constitutional Court is subject only to the Constitution and to this Law. The precedents laid down by the Constitutional Court bind the Court in its subsequent interpretation of the Constitution; however, they may be amended by a reasoned decision taken by an absolute majority of its members. 2. For the purposes of the preceding paragraph, a precedent is presumed to exist where at least two identical cases have been resolved with the same decision and are based on the same doctrine".

[199] *General Report, XIIth Congress of the Conference of European Constitutional Courts*, (A. Alen, M. Melchior), Brussels, 2002, p.7, in: http://www.confcoconsteu.org/en/common/home.html, accessed 23 February 2009., p. 45.

[200] R.Jaeger, S. Broß, op. Cit., p. 27.

[201] In the exercise of its administrative authority, the Supreme Court may confirm an administrative decision or declare it as null and void. It is not within its authority to amend or modify the decision of the administrative organ. The Court is not empowered to reconsider the merits of administrative decisions and substitute those with their own decisions. Such an act would violate the strict separation of powers safeguarded by the Constitution. Decision making in the field of administration rests entirely within the province of the executive branch of the government. The review is intended to scrutinize the legality of acts or omissions of the administration and not to evaluate their correctness from the judicial point of view.

Africa, Spain, “The Former Yugoslav Republic of Macedonia, and the United States. However, in most of these states, this is not the rule, and the constitutional court can decide to send the case back to a lower court for a decision on the substance[202].

183. If the constitutional court annuls a final court decision, it usually orders the case in hand to be reopened (e.g. Andorra, Bosnia and Herzegovina, Croatia, Czech Republic, Germany, Hungary, Latvia, Liechtenstein, Portugal, Russia, Slovakia, Slovenia, Switzerland, Republic of Korea). Likewise, if the court lifts an individual administrative act, the absence of an administrative act often puts the administrative bodies under an obligation to pass a new act.

184. If the constitutional court only sends a case back to the highest ordinary courts in order to reopen proceedings without actually quashing the unconstitutional decision (e.g. Azerbaijan), the delicate question arises whether the highest ordinary court will follow the orders passed by the constitutional court. Also, the strength of the Serbian[203] regulation where the Constitutional Court suspends its proceedings to give the administrative or legislative body time to rectify a potentially unconstitutional situation depends greatly on the body’s willingness to follow such instructions.

185. While some of the constitutional courts can really give orders as to how the relevant body must act in order to be in conformity with the constitution and to execute correctly the decision at hand (e.g. Czech Republic[204], Germany, Malta, Slovakia[205], Slovenia, Spain[206], Ukraine[207]), in other countries, no such power to indicate or to command positive actions exists. Although the separation of powers is more clearly respected in the latter case, it may result in a lack of effectiveness of the constitutional court’s decision.

186. As noted above, the constitutional court may be able to extend its review by either opening a new proceeding or deciding the question of constitutionality of a normative act on which the challenged individual act was based in the same proceeding; this (second) decision will then have *erga omnes* effect. But also the decision on an individual act can have an effect that is not limited to the submitting case: in Montenegro, when the constitutional court decides on an individual act through which several persons’ rights were violated, but only one or some of them complained to the constitutional court, the decision extends to all aggrieved persons. Also, in some states, the constitutional court may announce that future administrative or judicial acts comparable to the one annulled by the constitutional court will be unconstitutional in the future. Hence, even when deciding in an individual case, the constitutional court gives general directions how courts or administrative organs or bodies may behave in order to act within the constitution.

[202] CDL-INF(2001)009 Decisions of constitutional courts and equivalent bodies and their execution.
[203] Article 55 Law on the Constitutional Court.
[204] Article 82b) Constitutional Court Act.
[205] Article 127 (2) Constitution.
[206] Article 55 1 c Organic Law on the Constitutional Court.
[207] Article 70 Law on the Constitutional Court separation of powers is more clearly respected in the latter case, it may result in a lack of effectiveness of the constitutional court’s decision.
[208] The Albanian and Russian regulations are remarkable in that they state explicitly that the Constitutional Court may order an immediate effect of its decision even before publication if this is necessary to protect the individual’s constitutional rights.

III.3. Effects *ratione temporis*

III.3.1. Ex tunc or ex nunc invalidation of an act

See 1.1.16 Table: *Ex nunc* or *ex tunc* effect of the Constitutional Court's decision.

187. Decisions concerning the unconstitutionality of a normative act can have different temporal effects. The doctrine of nullity (*"Nichtigkeitslehre"*) opposes itself to the doctrine of "invalidity" (*"Vernichtbarkeitslehre"*). This creates a dilemma; requiring a choice to be made between dogmatic coherence (if the unconstitutional act is considered as never having been part of the legal order) and legal security (with continuing validity of acts based on the derogated act prior to the entry into force of the constitutional court's decision)[208]. No country under review in this study has opted for the former solution without leaving a certain room to manoeuvre for the constitutional court, because the annulment of an important normative act on which many individual acts are based could have vast consequences. The choice between annulment and derogation also has effects on the individuals' readiness to file a complaint against a normative act. If the court invalidates the norm with prospective effect, the applicant's case will not be solved by the removal of the unconstitutional general norm. Therefore, to provide an incentive for individuals to complain against normative acts, some states envisage a retroactive effect of the decision applying uniquely to the applicant's case (the so-called "premium for the catcher"[209]). For example, in Hungary, the decision of the Court, albeit its merely derogatory effect, is applied to the individual applicant's case.

188. Only relatively few countries introduced *ex tunc* effect of constitutional court decisions, such as Andorra, Belgium, Germany (with the power to decide whether the effect should be *ex tunc* or *ex nunc*), Hungary, Italy, Poland, Portugal, Russia, Slovenia and "The Former Yugoslav Republic of Macedonia".

189. Amongst these countries, only Andorra, Armenia, Belgium, Latvia, Russia, Slovenia[210], Switzerland, and Spain provide for a vast *ex tunc* effect with only few exceptions which need to be specified by the constitutional court, whereas all other states (e.g. Germany[211], Italy, Portugal) restrict the declaration of pre-existing nullity to acts other than final court decisions.

190. *Ex nunc* effect has been introduced in Albania, Algeria, Armenia, Austria, Belarus, Brazil, Chile, Croatia, Czech Republic[212], France, Estonia, Georgia, Hungary, South

[209] Term exists in Austrian doctrine (*"Ergreiferprämie"*), for the translation see CDL(2008)065, Opinion on the draft laws amending and supplementing (1) the law on constitutional proceedings of Kyrgyzstan and (2) the law on the Constitutional Court of Kyrgyzstan, 2008.

[210] When the Constitutional Court annuls an unconstitutional or unlawful regulation or general act issued for the exercise of public authority. In Slovenia annulment has *ex tunc* effect. Art. 45(2) of the Constitutional Court Act.

[211] According to Article 79.1 and 79.2 Law on the Federal Constitutional Court, final decisions which are based on a statute that has been declared null and void remain unaffected even if a provision or a law is declared null and void *ex tunc*. Only in the case of a final conviction may new proceedings be instituted in accordance with the provisions of the Code of Criminal Procedure.

[212] In the case of the Czech Republic, the CC has never established *ex tunc* effects, but the legal cinstitutional scholars do not exclude that the law can permit this possibility, see Wagnerová, E., Dostál, M., Langášek, T., Pospíšil, I.: Zákon o Ústavním soudu s komentářem [The Act on the Constitutional Court with Commentary], ASPI, Praha 2007, p. 206.

Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Moldova, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia[213], "The Former Yugoslav Republic of Macedonia", Mexico, Ukraine.

191. Here again, most states can to a certain degree take steps to attenuate the derogatory effect.

III.3.2. Attenuation of the invalidations and their temporal effects

192. Both *ex tunc* and *ex nunc* decisions are sometimes found to need attenuation. One possibility is to enable the constitutional court to decide when its decision enters into force (either in the past, as a middle course between nullity and derogation, or at some moment in the future, or both). The other possibility is to resort to techniques of (authoritative) interpretation that combine adequate protection of the constitution and coherence of the legal order in that not all provisions are removed immediately from the legal order. In South Africa, a court declaring a normative act (statute) invalid on the ground of inconsistency with the Constitution may make an order relating to the extent of its retrospective effect.

193. *Ex tunc* decisions do not affect final court decisions. Legal certainty concerning final court decisions has been given the priority in the majority of states with retroactive constitutional court decisions (e.g. Italy, Portugal).

194. *Ex tunc* effect for criminal cases. Reopening criminal lawsuits is very common, even in countries whose constitutional court decisions have a derogatory effect, if this would lead to a more favourable penalty (e.g. Albania, Czech Republic, Hungary, Italy, South Korea, Moldova, Portugal, Romania, Slovenia, Spain, South Africa, Mexico and Uruguay). In South Africa, a new ground for review of sentencing was established when such sentencing was conducted in accordance with an unconstitutional normative act (statute)[214]. In Portugal, the Constitutional Court's decisions can have retroactive effect when the rule declared unconstitutional or illegal concerns criminal matters, disciplinary matters, or administrative offences, when its content is less favourable to the accused[215]. In the Czech Republic, reopening criminal proceeding is possible only if a judgment has not yet been enforced[216], whereas in Slovenia, criminal proceedings can be reopened even after a final judgment, if the statute on which the conviction was based has been annulled or abrogated.

195. Specific delay of invalidation. Almost all states have specific regulations regarding the entry into force and the possible retroactive effect of the constitutional court's

[213] When the Constitutional Court abrogates either an unconstitutional law or an unconstitutional or illegal regulation or general act issued as exercise of public authority. Abrogation has *ex nunc* effect. Arts. 43 and 45(3) of the Constitutional Court Act.

[214] See RSA-2009-2-009, CCT 98/08; 15/07/2009 in CODICES.

[215] One example of this is provided by Ruling no. 232/2004 of 31 March 2004, in which, with generally binding force, the Court declared the unconstitutionality of rules concerning accessory penalties involving the deportation of foreign citizens who are responsible for underage children who hold Portuguese nationality and reside in Portuguese territory. However, the Court determined the effects of the unconstitutionality of these rules in such a way as not to exclude cases in which sentences including accessory penalties of deportation had already been handed down, but had not yet been executed when Ruling no. 232/2004 was published.

[216] Section 71 of the ACC.

decisions. In Albania decisions enter into force on the day of proclamation if this is necessary to protect the fundamental rights of the individual. Some states that apply the principle of derogatory effect provide for retroactivity in order to repair or prevent damage (e.g. Armenia, Azerbaijan, Slovenia). Serbia and "The Former Yugoslav Republic of Macedonia" have provisions according to which individuals can request proceedings are reopened in all cases where a final decision was based on an invalidated normative act. In a more restricted manner, the "premium for the catcher" (retroactive effect only in the submitting case) has been introduced in Armenia[217], Austria, Hungary and, with moderations, in Liechtenstein. In Israel, a decision is entered into force on the day it is given by the Supreme Court, yet the Court can suspend the declaration of unconstitutionality if it finds necessary. This practice is often to cases where the Court wishes to allow the legislator or the executive time to amend the statute or the governmental practice at question.

196. Where the continuing validity of a provision is concerned, several cases must be distinguished. In states with diffuse constitutional review, a challenged normative act cannot be invalidated but becomes inapplicable (e.g. Denmark, Finland, Iceland, Malta, Norway, Sweden). In Malta, for instance, the Constitutional Court submits its decision to the legislator who is free to change legislation in accordance with the Court's decision or not[218].

197. In states with concentrated control, such as, for example, Andorra, France, Germany, Poland, Portugal, Slovenia and South Africa, constitutional courts have the ability to declare a law incompatible with the constitution. The provision is then usually inapplicable, but not void, and the legislator must change it to bring it in line with the constitution within a specified period of time. In Germany, this option is chosen in particular in cases related to the principle of equality. The Constitutional Court sometimes gives concrete directives on the application of the law during the transitory period accorded to the legislator to change the law[219].

198. The same result is achieved in states whose constitutional courts adopt decisions with *ex nunc* effect if the court can suspend its entry into force (e.g. Austria, Azerbaijan, Hungary, Latvia, Liechtenstein[220], Lithuania[221], Poland, Slovenia, South Africa[222] and Switzerland[223]).

III.4. Effects *ratione materiae*: reparation and damages

See 1.1.17. Table: Capacity of constitutional courts to attribute damages

199. Most of the constitutional courts under consideration here do not have the capacity to award damages to an individual whose rights have been violated either through an individual or a normative act. However, very often, the constitutional court's decision

[217] CDL-AD(2006)017 Opinion on Amendments to the Law on the Constitutional Court of Armenia.
[18] Article 242 Code of Organisation and Civil Procedure.
[219] R. Jaeger, S. Broß, op. cit., p. 26.
[220] See H. Wille, National report for the XIVth Conference of European Constitutional Courts, p.17, in: http://www.lrkt.lt/conference/Pranesimai/Q_Liechtenstein_D.doc#_Toc198870236
[221] CC decision of 19 January 2005.
[222] See RSA-2008-2-007, CCT 19/07, 02/06/2008, in CODICES.
[223] Concerning cantonal laws and decrees.

will lead to an individual case being reopened (if an individual act was attacked or in the case of "rewards for the catcher" in relation to normative complaints), and a lower ordinary court or tribunal may then decide to award damages according to the applicable procedural rules (e.g. Cyprus[224]).

200. In common law states, damages are a part of the law on torts; if a public authority infringes individual rights, the individual is entitled to satisfaction.

201. In states with diffuse review, in ordinary proceedings the individual may, under certain conditions, bring a claim for compensation against a state authority whose action violated the individual's rights. In South Africa, the award of "constitutional damages", based solely on the infringement of a constitutional right, was held by the Constitutional Court to be competent under the court's jurisdiction to grant "appropriate relief"[225].

PARTIAL CONCLUSIONS OF CHAPTER III

202. Insofar as the decisions of constitutional court's are concerned, it should be noted that these courts, in most of the systems under study, have a certain margin of appreciation regarding how they conduct reviews. They can sometimes extend the number of norms whose constitutionality is to be evaluated, or even apply a wide number of norms as review standards in the framework of their control of constitutionality. This is particularly common in countries which provide for full individual complaints. In most of these countries, the constitutional court is considered to be better placed to clearly identify the constitutionality block which has to be examined in order to decide the constitutionality of a norm or specific act. An explicit legislative or even constitutional provision, which would render the constitutional court's interpretation binding on all other state organs, including lower courts, provides an important element of clarity in the relations between the constitutional court and ordinary courts.

203. The effects of decisions issued by the constitutional court are also quite varied. The decision can affect a different number of people depending on the *inter partes* or *erga omnes* effect (effect) or can have different temporal effects (*ratione temporis* effect) or even resolve different type of issues (*ratione materiae* effect).

204. According to its *ratione personae* effects, the decision can have effects only *inter partes* or have *erga omnes* effect, resulting in the invalidation of a normative act or making it inapplicable. In most states, when the constitutionality of a norm is challenged, the constitutional court is entitled to remove it from the legal order. However, in some states, the con-

[224] When the Court quashes a decision taken by a public authority, this takes effect retroactively. Article 146.5 of the Constitution imposes a specific duty upon authorities of the State to comply with judgments and orders of the Court in the exercise of their administrative activity. The constitutional duty under Article 146.5 is an obligation by the administrative authority to restore the situation which existed prior to a judicially annulled decision. To sustain though a civil action claiming damages under the provisions of paragraph 6 of Article 146 damage must result from the voided act, decision or omission notwithstanding the restoration of legality.

[225] See RSA-1997-2-006, CCT14/96, 05/06/1997, in CODICES.

stitutional (or ordinary courts in the case of Scandinavian countries) court's powers are more limited and the decision only has binding effect for the parties to the case (e.g., Andorra, Argentina, Chile, Belgium, Cyprus[226], Denmark, Finland, Japan, Luxembourg, Norway, Sweden or Portugal). In common law countries, with diffuse constitutional review, *stare decisis* also has a strong influence and does so beyond the individual case, as precedents issued by the supreme court (or equivalent) bind lower courts (e.g., US, Mexico, South Africa or UK). However, precedents can be overruled where necessary, with adequate reasoning.

205. Decisions concerning the unconstitutionality of a normative act can have different temporary effects, either *ex nunc*, when the invalidity takes place from the moment in which the decision is issued, or *ex tunc*, in which the act is declared void from the very moment of its adoption, which has important consequences for individual cases. Only relatively few countries have introduced *ex tunc* effect to constitutional court's decisions (e.g., Armenia, Andorra, Belgium, Estonia, Hungary, Latvia, Italy, Poland, Portugal or Slovenia, Switzerland, South Africa, Spain, "The Former Yugoslav Republic of Macedonia") and have attenuated effects.

206. A decision issued by a constitutional court must also have, in order to be considered an effective remedy according to the European Court of Human Rights' case-law, the capacity to redress a violation of individual human rights. However, very often the constitutional court's decision will lead to an individual case being reopened by ordinary courts rather than to award damages by the Constitutional Court itself[227].

IV. OTHER QUESTIONS

IV.1. Delimitation of jurisdiction between constitutional courts and ordinary courts

207. In the case of a violation of individual fundamental rights, redress should be accessible as quickly as possible. In this respect, the question of the relationship between

[226] A Court decision confirming an act or decision of administration operates in personam, rendering its subject matter *res judicata* between the pursuer and the administration. A judgment of the Court annulling an administrative act or decision operates *erga omnes*. When an administrative measure has been held to be null and void the administration is under an obligation to reconsider the matter in the light of the judgment of the Supreme Court and reach a new decision. This new decision itself can be the subject of judicial review on recourse before the Supreme Court.

[227] As stated by the *ECtHR in the Cochiarella v. Italy* judgment (ECtHR, GC, 29 March 2006), *"It is also clear that for countries where length-of-proceedings violations already exist, a remedy designed only to expedite the proceedings – although desirable for the future – may not be adequate to redress a situation in which the proceedings have clearly already been excessively long. Different types of remedy may redress the violation appropriately. The Court has already affirmed this in respect of criminal proceedings, where it was satisfied that the length of proceedings had been taken into account when reducing the sentence in an express and measurable manner (see Beck v. Norway, no. 26390/95, § 27, 26 June 2001). Moreover, some States, such as Austria, Croatia, Spain, Poland and Slovakia, have understood the situation perfectly by choosing to combine two types of remedy, one designed to expedite the proceedings and the other to afford compensation (see, for example, Holzinger (no. 1), cited above, § 22; Slaviček v. Croatia (dec.), no. 20862/02, ECHR 2002-VII; Fernández-Molina González and Others v. Spain (dec.), no. 64359/01, ECHR 2002-IX; Michalak v. Poland (dec.), no. 24549/03, 1 March 2005; and Andrášik and Others v. Slovakia (dec.), nos. 57984/00, 60237/00, 60242/00, 60679/00, 60680/00, 68563/01 and 60226/00, ECHR 2002-IX)"* (paras 76-77).

ordinary courts and the constitutional court is relevant. First of all, it is the ordinary courts that are at the frontline, applying ordinary (and constitutional) laws. Their role in ensuring the primacy of the constitution cannot be underestimated. The ordinary courts are the first ones to detect if the application of a law poses a constitutional problem. Their understanding of the content of constitutional provisions will determine the overall quality of protection afforded to the constitutional order. This is where the question becomes relevant for the individual, in the protection of fundamental rights. There are different modalities concerning the allocation of competences and the social valuation of the constitutional court and the ordinary courts, which have repercussions on the courts' relations. Also, the competence and willingness of ordinary courts to examine questions of constitutionality is important for the aggrieved individual as violations can be addressed more quickly either in the ordinary proceeding (in diffuse or special type systems) or through a preliminary question.

208. There are several sets of problems concerning the relationship between ordinary courts and the constitutional court. First, the question of competence: to what extent do constitutional courts interfere in the ordinary courts' jurisdiction? Second, the question of interpretation, which is twofold: does the constitutional court refer to ordinary courts' interpretations and do ordinary courts apply the constitutional court's decisions and their reasoning?

IV.1.1. Review competences

209. "Systems that divide legal authority between a constitutional court and a supreme court face co-ordination problems when allocating jurisdiction and resolving inconsistencies in decision"[228]. As L. Garlicki points out, tensions between constitutional courts and supreme courts are inevitable in a system of concentrated constitutional jurisdiction: specialised constitutional courts that are usually placed outside the ordinary judicial system must interpret the vague terms used in the constitution, as the competent body to precise constitutional principles. The fact that a constitutional court is competent to review not only on an abstract, but also on an incidental basis, and that its interpretations touch almost every legal branch, infringes on the traditional role of ordinary courts to interpret "their" laws and limits their scope of action when applying a provision. When constitutional courts interfere in concrete cases they evaluate the application and interpretation of statutes by ordinary courts.

210. Theoretically, at least, the relation between the constitutional court and ordinary courts is less conflict-ridden with normative constitutional complaints than with full individual ones[229], as the constitutional court does not directly review the application of a normative act by the ordinary court. However, even in states with normative constitutional complaints, frictions can arise. In Hungary, the Constitutional Court can, to a certain degree, express itself on the application of a normative act using the *diritto vivente*

[228] T. Ginsberg, "Economic Analysis and the Design of Constitutional Courts", *Theoretical Inquiries in Law* 3 (2007), cit. in: Sadurski, *op. cit.*, p.19.
[229] See W. Sadurski, op.cit., p.7ff.

technique (see above) to interpret the statute at hand. Thus, if it finds the statute unconstitutional, this can be due to an unconstitutional constant interpretation by ordinary courts[230] and the Constitutional Court "appear[s] as a fourth level of jurisdiction … overseeing the decisions of the ordinary jurisdictions"[231].

211. As the Venice Commission puts it, "some constitutional courts having implemented the review of constitutional complaints faced the problem of interference with ordinary courts. The possibility to review the decisions of ordinary courts may create tensions, and even conflict between ordinary courts and the Constitutional Court. Therefore **it seems necessary to avoid a solution that would envisage the Constitutional Court as a "super-Supreme Court"**. Its relation to "ordinary" high courts (Court of Cassation) has to be determined in clear terms"[232]. **The constitutional court should only look into "constitutional matters", leaving the interpretation of ordinary law to the general courts. The identification of constitutional matters can, however, be difficult in relation to the right to fair trial, where any procedural violation by the ordinary courts could be seen a violation of the right to a fair trial. Some restraint by the constitutional court seems appropriate, not least in order to avoid its own overburdening, but also out of respect of the jurisdiction of ordinary courts.**

IV.1.2. Binding force of the judgment's reasoning

212. The reasoning part of a judgment is where the court gives shape to its decision, where not only the "reasons" are reflected, but where indications for the future position of a court on a specific question are also given ("*obiter dicta*"). Often, constitutional courts give interpretations of constitutional and legal provisions in the reasoning part. In states where supreme courts informally accept the constitutional court's interpretation of constitutional provisions, which is more and more the case (institutional loyalty between constitutional bodies[233]), uniformity of application is guaranteed. However, the question of the formal binding force of a constitutional court's decisions' *ratio decidendi* on ordinary courts arose[234] in several countries. In the Czech Republic, the constitutional court is in favour of a generally binding force, and argued that a decision's justification actually contained the constitutionally required interpretation of the Constitution, and must thus be applied by ordinary courts in the future. However, ordinary courts frequently "refuse to decide in con-

[230] H. Schwartz, The *Struggle for Constitutional Justice in Post-Communist* Europe, Chicago University Press, Chicago, 2000.

[231] L. Favoreu cit. in: H. Schwartz, op.cit., p. 25.

[232] CDL-AD(2004)024 Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey.

[233] CDL-JU(2009)001, S. BROSS, "Reflections on the Execution of Constitutional Court Decisions in a Democratic State under the Rule of Law on the Basis of the Constitutional Law Situation in the Federal Republic of Germany", Baku, 2008.

[234] L. Garlicki, "Constitutional courts versus supreme courts", *International Journal of Constitutional Law* 2007 5(1), Oxford University Press, Oxford, in: http://icon.oxfordjournals.org/cgi/content/full/5/1/44#FN59#FN59, accessed 11 February 2009. See also A. ALEN and M. MELCHIOR, *The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European Courts, General Report, Conference of European Constitutional Courts, XIIth Congress,* Brussels, Egmont Palace, 14-16 May 2002, p. 48, available in http://www.confcoconsteu.org/en/common/home.html, last accessed on 21 September 2010.

formity"[235] with the Constitutional Court's interpretation. This is today, nevertheless, generally overcome, as ordinary courts have come to respect the Constitutional Court's decisions. In Hungary, one problem which arises is the constitutional review of the Supreme Court's normative decisions; these decisions are issued to secure the unity of judicial statutory interpretation. This competence of the Constitutional Court – after years of hesitation – was pronounced by the Court itself in 2005"[236]. In Austria court decisions cannot be challenged before the Constitutional Court[237]. Similar conflicts arise in Poland[238].

213. In common law systems, the operative part (the *ratio decidendi*) is the only part of the judgment that can constitute a binding precedent, whereas the reasoning part (*obiter dicta*) only has persuasive power[239].

IV.1.3. Obligation to put a preliminary request

214. If the question is not clearly regulated in the constitution, the constitutional courts often struggle to impose a mandatory referral on ordinary courts concerning the constitutionality of a normative act that should be applied in a pending case, as this strengthens their unifying role[240]. Amongst those states where preliminary questions can be submitted, two groups can be distinguished:

215. First, states in which ordinary courts have no discretion. As soon as they detect issues that could create doubts concerning the constitutionality of a provision they need to apply in a given case, the courts would be obliged to introduce a preliminary request before the constitutional court (Albania, Austria, Belgium, Bosnia-Herzegovina, Latvia Lithuania, Moldova, "The Former Yugoslav Republic of Macedonia" and Romania). Also, in Austria, a broad interpretation is given to the circle of laws that "could be applied" in a concrete case: the Constitutional Court will only reject a preliminary question if it is unthinkable that the provision could be necessary to the resolution of the proceeding at hand[241].

216. In Bulgaria, the Czech Republic, Germany, Hungary, Italy[242], Luxembourg, Malta, Russia, Slovakia, Slovenia or Turkey, ordinary judges can refer a preliminary question to the constitutional court only if they are convinced of a normative act's unconstitutionality and of the inexistence of an interpretation that would permit a constitutional application of the law. This is particularly the case when parties to proceedings raise an exception of unconstitutionality. However, the Venice Commission notes that,

[235] P. Holländer, "The Role of the Czech Constitutional Court: Application of the Constitution in Case Decisions of Ordinary Courts", *Parker Sch. J.E.Eur*. L 4 (1997), cit. in: W. Sadurski, op.cit., p.22 f.
[236] CDL-JU(2008)040, P. Paczolay, "The Jurisdiction of the Hungarian Constitutional Court", report for the seminar "Models of constitutional jurisdiction", Ramallah, 2008.
[237] G. Kucksko-Stadlmayer, Beziehungen, op.cit., p.27.
[238] See resolution of the Polish Supreme Court of 17 December 2009, IIIPZP 2/09.
[239] See for the U.S. Central Green Co. V. United States (99-859) 531 U.S. 425, in: http://www.law.cornell.edu/supct/html/99-859.ZS.html, accessed 04 May 2009.
[240] General Report, XIIth Congress of the Conference of European Constitutional Courts, (A. Alen, M. Melchior), Brussels, 2002, p.7, in: http://www.confcoconsteu.org/en/common/home.html, accessed 23 February 2009.
[241] G. Kucsko-Stadlmayer, Beziehungen, op. cit., p. 25 and following.
[242] See L. Garlicki, *op. cit*., and W. Sadurski, op.cit.

when there is no direct individual access to constitutional courts, it would be too high a threshold condition to limit preliminary questions to circumstances where an ordinary judge is convinced of the unconstitutionality of a provision; serious doubt should suffice[243]. Concerning Estonia, according to Article 9 paragraph 1 of the Constitutional Review Court Procedure Act, "If the court of first instance or the court of appeal has not applied, upon adjudication of a matter, any relevant legislation of general application or international agreement declaring it to be in conflict with the Constitution or if the court of first instance or the court of appeal has declared, upon adjudication of a matter, the refusal to issue an instrument of legislation of general application to be in conflict with the Constitution it shall forward the corresponding judgment or ruling to the Supreme Court".

217. Another question concerns the courts' discretionary power to decide whether or not an exception of unconstitutionality raised by one of the parties to an ordinary process must be referred to the constitutional court. In Algeria, Andorra[244], Armenia, Belgium, Belarus, France, Hungary, Italy, Luxemburg, Malta, Poland, Slovakia, Spain, Romania, Turkey and Ukraine the ordinary judge's decision not to pose a preliminary question after a request by a litigant to do so underlines the former's autonomy in that the refusal must be reasoned, but cannot be appealed (unless for the lack of reasoning or other formal mistake[245]). However, the refusal does not necessarily impede the petitioner's right to demand a referral of the preliminary question at every instance (the San Marinese law expresses this clearly). In Uruguay, on the other hand, there is a complaint against the refusal of the court, and in Romania, the ordinary judge is obliged to put a preliminary question before the constitutional court upon request by one of the parties. In France, since the reform of the priority preliminary ruling came into force in 2010, ordinary judges refer the preliminary question to the Constitutional Council only f he/she has serious doubts about the constitutionality of the norm. In case the issue is urgent, the ordinary judge can rule on the case even if the CC has not yet given answer to the preliminary request submitted.

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[243] CDL-INF(2001)28 Interim Opinion on the Draft Law on the Constitutional Court of the Republic of Azerbaijan.

[244] Article 2 of the Law on Transitory Judicial Proceedings establishes an adversarial accelerated procedure previous to the decision issued by the ordinary court concerning the submission of the preliminary request to the Constitutional Tribunal. When it is the Constitutional Tribunal itself the one referring the preliminary question *propio motu*, or when it receives the request from one of the parties to the process, the Tribunal must follow article 53.3 of the Law on the Constitutional Tribunal and article 2 of the Law on Transitory Judicial Proceedings. According to these two provisions, the ordinary tribunal issues a decision containing the legal reasoning and the context of the preliminary request to be submitted to the Constitutional Tribunal. The parties to th proceedings nd the Public Prosecutor can send their considerations and then the ordinary court decides either not to submit the preliminary request or to submit it as it was announced in its first decision, or to submit it with modifications.

[245] In Turkey, however, if during a hearing an ordinary court is not convinced of the seriousness of the claim of unconstitutionality of the applied norm, such a claim together with the final judgment can be appealed by the parties of the case. According to article 152 of the Turkish Constitution reads that *"If a court which is trying a case, finds that the law or the decree having the force of law to be applied is unconstitutional, or if it is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it shall postpone the consideration of the case until the Constitutional Court decides on the issue. If the court is not convinced of the seriousness of the claim of unconstitutionality, such a claim together with the main judgment shall be decided upon by the competent authority of appeal"*.

IV.2. Problem of direct individual access and overburdening of the constitutional court

218. The dilemma between overburdening of the constitutional court and providing an efficient human rights protection system has been addressed in various ways: some states opted against the introduction of individual complaint from the outset, others defined filters to sift requests that are deemed unserious or "manifestly" or "most probably" unsuccessful.

219. All filters described above serve the purpose of reducing the constitutional court's case load. In addition, organisational changes as well as greater selectivity can serve the alleviation of the court's caseload.

IV.2.1. Writs of certiorari and selection of cases by constitutional courts

220. Although jurisdiction over constitutional questions in the lower federal courts and state courts in the United States ordinarily is not discretionary, the United States Supreme Court[246] is not obliged to review all the cases brought before it, but may choose the questions it deems relevant for protecting the constitutional order or for development of the case-law. Whilst the workload is diminished according to the Supreme Court's degree of selectivity, its discretion in selecting cases eliminates systematic individual protection. On the other hand, the absence of *certiorari* or an equivalent together with an unmanageable workload will necessarily lead to the creation of similar mechanisms (e.g. a very extensive handling of the requirements of admissibility) as an act of "self-defence" by the constitutional court itself. The use of such mechanisms will usually be clandestine and will be denied by the users. Hence, if the workload becomes unbearable, a way to select those cases which deserve a thorough analysis by a constitutional court could be provided for. The introduction of *certiorari* is for instance currently under discussion in the Slovenian Parliament. In other countries – for instance Germany - the discussion goes on whether some kind of discretion should be used by the Constitutional Court. The question needs further deliberation. The question of the effectiveness of the legal remedy (with a view to the filtering function of the constitutional complaint vis-à-vis the European Court of Human Rights) should be taken into account.

221. In any case, constitutional courts must be given the tools to prevent unserious, abusive or repetitive complaints.

222. For example, the German[247], Hungarian[248], Slovenian[249] and Spanish[250] Laws on the constitutional court allow for a preliminary control of the full constitutional com-

[246] Rule 10 U.S. Supreme Court Rules: "Review on a writ of *certiorari* is not a matter of right, but of judicial discretion. A petition for a writ of *certiorari* will be granted only for compelling reasons".

[247] Article 93a of the Law on the Federal Constitutional Court (acceptance procedure for constitutional complaints).

[248] See, for instance, Article 23 Act on the Constitutional Court: "1. The President of the Constitutional Court shall forward the motion submitted by a party not entitled to submit such a motion to the organ entitled to submit it, while an obviously groundless motion shall be denied by the President of the Constitutional Court".

[249] Article 55b Law on the Constitutional Court
(2) The constitutional complaint is accepted for consideration: − if there is a violation of human rights or fundamental freedoms which had serious consequences for the complainant; or − if it concerns an important constitutional question which exceeds the importance of the concrete case.

[250] See the amended Constitutional Court Act of 2007.

plaint. A complaint will be dismissed if it does not contain questions that are significant in terms of constitutionality. In South Africa, the Constitutional Court will hear a direct access application or an appeal if it raises a constitutional issue and it would be in the interests of justice for the Court to hear it. In Israel, a panel of three Justices may dispose of a petition if it finds that it is without merit or groundless on its face[251]. Enquiring into the interests of justice involves a number of sub-enquiries, including: the prospects of success; the interest of the public in the matter; and whether the Supreme Court of Appeal has had an opportunity to pronounce its views on the matter[252].

223. Very often, a smaller body of judges is selected to examine applications and to deny review if the application has no prospect of success (e.g. Austria, Germany, Slovenia). This leads to an immediate reduction in the constitutional court's workload and the proceedings require a lesser degree of formality[253]. In this respect, the German practice is remarkable: applications that are at first sight not identified as constitutional complaints are put into a "general register", and not directly into the proceedings register. The applicant is then contacted through an informal letter informing them of the possibility of requesting that the application be further dealt with by the Constitutional Court. If the applicant insists in a decision by the Court, the request will be put in the proceedings register, if not, it remains in the general register[254]. As a consequence, many applications can be dealt with without actually rejecting the complaints and without the need of involving a judge at this stage of the proceedings. Besides this the individual complaints require acceptance by the chamber of three judges (or by the Senate) under § 93 a of the Federal Constitutional Court Law. The chamber is entitled to decide on the case according to § 93 c (1), if it is clearly justified and the constitutional issue determining the case has already in principle been decided upon by one of the Senates.

IV.2.2. Organisation of the constitutional court

IV.2.2.1. More staff

224. **The Venice Commission recommends that judges are supported by qualified assistants; their number should be determined in relation to the court's caseload**[255]. "Depending on the number and qualification of the staff, the secretariat of the court may perform a first preliminary examination in order to weed out manifestly inadmissible complaints as far as possible. However, as the judicial power cannot be delegated to the secretariat, its opinion can only be advisory"[256]. In fact, permanent or long

[251] Article 5 of the High Court of Justice Procedural Regulations.

[252] Section 167(3) of the Constitution provides that the Constitutional Court may decide only constitutional matters and issues connected with decisions on constitutional matters. The Court itself makes the final decision whether a matter is a constitutional matter.

[253] See, for instance, Article 93d.1 Law on the German Federal Constitutional Court: "1. The decision in accordance with Articles 93 b and c above shall be taken without oral proceedings. This decision cannot be challenged. The refusal to accept the constitutional complaint does not require reasons".

[254] Merkblatt über die Verfassungsbeschwerde zum Bundesverfassungsgericht, in: http://www.bundesverfassungsgericht.de/organisation/vb_merkblatt.html, accessed 8 June 2009.

[255] CDL-AD(2008)030 Opinion on the Draft Law on the Constitutional Court of Montenegro.

[256] CDL-STD(1995)015 The Protection of fundamental rights by the Constitutional Court, Science and Technique of Democracy no. 15, 1995, see however the German practice presented above.

serving staff allow for the construction of an institutional memory conducive to greater consistency and continuity of the court's case-law; an issue more pertinent to civilian systems than common law systems.

IV.2.2.2. Smaller chambers

225. **A useful method for alleviating the court's case-load can be the creation of smaller panels of judges when deciding matters initiated by one of the types of individual access, where the plenary only acts if new or important questions need to be decided. It is important that the law establishing the constitutional court provides for the possibility of a decision by the plenary if there are conflicting decisions by the chambers;** otherwise, the unity of the constitutional court's jurisprudence is endangered[257]. There needs to be clear rules to avoid any possibility of bias in the allocation of cases to the chambers or in the composition of panels. Here, only the relevant bodies (plenary, panels, chambers) which decide matters related to individual access are being described. The constitutional court decides matters related to individual access in the plenary in Albania, Armenia, Cyprus, Greece, Latvia, Liechtenstein, Romania, Slovenia, "The Former Yugoslav Republic of Macedonia" and Ukraine. 8 to 11 judges sit in Germany[258], Russia and South Africa, 3 or 6 judges in Croatia[259] and Spain, 5 judges in Austria, Bosnia and Herzegovina, Denmark, Estonia, Luxemburg, Monaco, Norway, Poland and Switzerland. 3 or 4 judges sit in Georgia[260], Czech Republic, Hungary, Malta, Slovakia and Switzerland. In Portugal, when the Constitutional Court is not sitting in plenary, its chambers are composed of 1, 3 or 5 Justices. In Israel, the Supreme Court usually sits in panels of 3 justices, unless the President of the Supreme Court or the Deputy President finds it necessary, prior to the oral argument, to expand the panel to any uneven number of justices. In addition, each panel has the power to decide to expand its size.

[257] CDL-AD(2004)024, Opinion on the draft constitutional amendments with regard to the Constitutional Court of Turkey.

[258] The Federal Constitutional Court consists of two autonomous panels of equal rank with eight members each (Article 2.1 and 2.2 Law on the Federal Constitutional Court). Each of the two panels by itself represents "the Federal Constitutional Court". In constitutional-court proceedings, the Plenum, i.e. all 16 judges, only decides if in a point of law, a panel intends to deviate from the legal opinion contained in a decision by the other panel (Article 16). In each panel, there are several chambers with three members each (Article 15a.1), which adjudicate in constitutional complaint proceedings and in proceedings involving the concrete review of statutes.

[259] The chambers decide on constitutional cases unanimously; the Constitutional Court also decides in plenary session in abstract control cases and if it did not reach a decision on the constitutional complaint unanimously).

[260] In the case of Georgia, 4 judges sit in the boards of the Constitutional Court.

PARTIAL CONCLUSIONS OF CHAPTER IV

226. The constitutional court's competence, and the effects of its decisions, raises issues concerning the relationship between constitutional courts and ordinary courts, as the latter are in charge of the application of laws and at the same time of respecting the primacy of the constitution. Also, the competence and willingness of ordinary courts to examine questions of constitutionality is important for the aggrieved individual as violations can be addressed more rapidly either in the ordinary proceeding (in diffuse or special type systems) or through a preliminary question. Some tensions between constitutional courts and supreme courts seem inevitable in a system of concentrated constitutional jurisdiction. It also seems that the relationship between the constitutional court and ordinary courts is less conflict ridden with normative constitutional complaints than with full individual ones. In order to avoid tensions and conflicts of competences, the Venice Commission recommends avoiding a solution in which the constitutional court would act as a "super-Supreme Court" interfering in the regular application of the law by ordinary courts and that it should only look into constitutional matters, restraining its scope *ratione materiae* and avoiding also its own overburdening. However, the risk of overburdening the court must be balanced against the need to ensure effective individual access to constitutional justice. Human rights protection requires that every ordinary court should have access to constitutional proceedings, rather than reducing effective remedies through a too strict selection of applications raising constitutional matters. Therefore, ordinary courts should have a certain degree of discretion. When they are convinced of the unconstitutionality of a provision, they should be able to request preliminary decisions to challenge the norm in question before the constitutional court. If no direct individual access exists, serious doubts should be sufficient for a preliminary control procedure before the constitutional court.

227. In order to ensure an adequate balance between the interest of individual access to constitutional justice and the limited competences of the constitutional court and the risk that it will become overburdened, the Venice Commission recommends that constitutional judges are supported by qualified assistants and that their number should be determined in relation to the court's case-load. The correct working of the court must also be ensured through an appropriate distribution of judges in chambers, which is a useful method for alleviating the Court's case-load but a mechanism should exist to preserve the unity of the constitutional court's jurisprudence.

Tables

1.1.1 Table 1 summarising the types of access

Countries	Type of constitutional review (if individual access)	Ombudsperson (in relation to case)	Preliminary request	Exception/objection of unconstitutionality	*Actio popularis*	*Quasi actio popularis* / legal interest	Individual suggestion	Normative constitutional complaint	Russian individual complaint	Constitutional petition	Constitutional revision	Full constitutional complaint
Albania	Concentrated		Y	Y							Y	
Algeria	No individual access											
Andorra	Concentrated		Y	Y				Y				Y
Argentina	Special				Y			Y				
Armenia	Concentrated	Y	Y	Y								
Austria	Concentrated	Y	Y									Y[261]
Azerbaijan	Concentrated	Y	Y									Y
Belarus	No		Y									
Belgium	Concentrated		Y	Y				Y				Y
Bosnia and Herzegovina	Concentrated		Y								Y	
Bulgaria	Concentrated	Y	Y									
Canada	Special											
Chile	Special		Y	Y	Y							
Croatia	Concentrated		Y		Y							
Cyprus	Special		Y	Y								Y[262]
Czech Republic	Concentrated		Y	Y								Y
Denmark	Diffuse											
Estonia	Special	Y	Y[263]	Y								
Finland	Diffuse											
France	Concentrated			Y				Y				
Georgia	Concentrated		Y		Y[264]			Y				
Germany	Concentrated		Y									Y
Greece	Special		Y	Y		Y						

[261] Only against individual administrative acts.
[262] This control takes place in the framework of an administrative process.
[263] After having decided, ordinary courts may submit decisions to the Supreme Court.
[264] Only concerning a violation of fundamental rights through the normative act; see Article 89 Constitution.

Countries	Type of constitutional review (if individual access)	Ombudsperson (in relation to case)	Preliminary request	Exception/objection of unconstitutionality	*Actio popularis*	*Quasi actio popularis* / legal interest	Individual suggestion	Normative constitutional complaint	Russian individual complaint	Constitutional petition	Constitutional revision	Full constitutional complaint
						[265]						
Hungary	Concentrated		Y	Y	Y			Y				
Iceland	Diffuse											
Ireland	Special											
Israel	Special											
Italy	Concentrated		Y	Y								
Japan	Special											
Kazakhstan			Y									
Korea, Republic	Concentrated		Y									Y
Latvia				Y				Y				
Liechtenstein	Concentrated	Y	Y					Y				
Lithuania	Concentrated		Y									
Luxembourg	Concentrated		Y	Y				Y				
Malta	Concentrated		Y	Y								
Mexico	Concentrated		Y	Y	Y						Y	
Moldova	Special			Y								
Monaco	Concentrated		Y									
Montenegro	Special							Y[266]				
Morocco	No											
Netherlands	No individual access											
Norway	Special											
Palestinian National Authority	Diffuse											
Peru												
Poland	Concentrated		Y	Y				Y				
Portugal	Concentrated	Y						Y				
Romania	Special	Y	Y	Y				Y				
Russian Federation	Concentrated	Y	Y	Y								

[265] Article 48 Law establishing a Special Highest Court is narrow: Conflicting interpretations of all three high courts are a condition.
[266] Only concerning laws; administrative regulations and individual acts can be attacked at the Tribunal Suprême in its administrative formation concerning their illegality.

San Marino	Concentrated	Y	Y						Y			
Serbia	Concentrated		Y	Y								
Slovakia	Concentrated	Y[267]	Y	Y								Y
Slovenia	Concentrated		Y									Y
South Africa	Concentrated					Y						Y
Spain	Diffuse[268]	Y	Y	Y								Y
Sweden	Diffuse											
Switzerland	Diffuse											Y
"The Former Yugoslav Republic of Macedonia"	Concentrated	Y	Y		Y							Y[269]
Tunisia	No											Y
Turkey	Concentrat[270]											
Ukraine	Concentrated		Y	Y								
United Kingdom	Concentrated	[271]	Y							Y		
Uruguay	Special											

1.1.2 Table: Time-limits for applications

Time limit	State	Relevant constitutional or legal provision
8 days	Malta (constitutional revision)	Article 4 Legal Notice 35 of 1993 entitled Regulations Regarding Practices and Procedures of the Court The application to appeal (in the Constitutional Court) shall be made within eight working days from the date of the decision appealed from
10 days	Estonia (normative constitutional complaint)	§. 19. Constitutional Review Court Procedure Act A complaint against a resolution of the Riigikogu, the Board of the Riigikogu or a decision of the President of the Republic may be filed with the Supreme Court within 10 days after the date of entering into force of the resolution or decision.

[267] The application by the Ombudsperson in Slovakia may not necessarily be related to a specific case. Article 130.f of the Constitution states that the law may be challenged by the Ombudsperson only if further application of it could represent a threat to fundamental rights and freedoms or human rights and fundamental freedoms.

[268] All courts are able to hear matters concerning constitutional issues but the Constitutional Court is the highest Court on matters involving constitutional issues and is the only court able to issue a declaration of the constitutional invalidity of a Statute or norm with the force of a law and to assess the constitutionality of a Bill or Act referred to the Court by the President or the legislature respectively.

[269] Only concerning some fundamental rights.

[270] According to the new constitutional reform package adopted in 2010, the mechanism of constyitutional individual complaint has been introduced. However, the precise modalities are to be developed yet by legislation. In this respect, an Ombudsman has been introduced, but he/she will not have the power to bring cases before the Constitutional Court.

[271] The Parliamentary Commissioner for Administration, which is the formal title of the UK Ombudsman, is very effective in many ways, often as an alternative to judicial review in administrative law, but it is difficult to classify him/her as a form of constitutional review.

Time limit	State	Relevant constitutional or legal provision
15 days	Andorra (amparo)	Article 88 (1) Qualified Law on the Constitutional Court The appeal for protection is introduced by a document within 15 working days of the date of service of the decision appealed against. Article 82.1 Qualified Law on the Constitutional Court 1. Where a natural or legal person files a claim based on the existence of an individual subjective right with one of the aforementioned bodies and that body declines jurisdiction because it considers that jurisdiction belongs to another body, the person concerned submits the same claim to the latter body within no more than 15 working days from the date of notification of the decision. Where the second body declares that it does not have jurisdiction the applicant may introduce a negative dispute over jurisdiction before the Constitutional Court. Article 95. Qualified Law on the Constitutional Court 1. Provisions, resolutions and measures of the General Council without statutory force which infringe the rights described in Article 85 of this Law may be challenged by the persons concerned by an appeal for protection. 2. The document challenging the rule in question and the appeal for protection must be produced within 15 working days of the date of notification or, where applicable, publication of the provision, resolution or measure, in accordance with the general requirements of Article 36 of this Law.
	South Africa (appeal against decision of an ordinary court)	Rule 19(2) Rules of the Constitutional Court A litigant who is aggrieved by the decision of [an ordinary] court and who wishes to appeal against it directly to the [Constitutional] Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought…lodge with the Registrar an application for leave to appeal.
3 months /30 days or 20 days depending on the act	Spain (full constitutional complaint)	Articles 42 to 44 Organic Law on the Constitutional Court The time-limit for lodging a writ of amparo will be: - 3 months for any decisions or non legal acts taken by the *Cortes Generales* or Assemblies of the *Comunidades Autonomas* - 30 days for the acts or omission of a judicial organ - twenty days from the date of notification of the ruling given in the judicial proceedings for any legal act, omissions or any other activity taken by the Government or its bodies or the civil servants.
4 weeks	Liechtenstein (full constitutional complaint)	Art. 15 4) Constitutional Court Act The complaint may be lodged within four weeks of service of the decision or order in the last instance or of effectiveness of the immediate violation (paragraph 3).
30 days	Croatia (full constitutional complaint)	Article 64 Constitutional Act on the Constitutional Court The constitutional complaint may be submitted during the term of 30 days from the day the decision was received". Article 66: "(1) The ConstitutionalCourt shall permit restitution into the previous state to the person who for the justified reasons has omitted the term for submission of the constitutional complaint, if during the term of 15 days after the cessation of the reason which has caused the omission he submits the proposal for restitution into the previous state and at the same time submits the constitutional complaint (2) After the expiration of three months from the day of omission, the restitution into the previous state may not be sought.
	Montenegro	Draft Law on the Constitutional Court Article 60 Constitutional complaint may be submitted within 30 days from the date on which an individual act violating human right or freedom guaranteed by the Constitution was delivered.
	Switzerland	Article 100 Federal Judicature Act 1 Le recours contre une décision doit être déposé devant le Tribunal fédéral dans les 30 jours qui suivent la notification de l'expédition complète.

Time limit	State	Relevant constitutional or legal provision
		Article 101 Le recours contre un acte normatif doit être déposé devant le Tribunal fédéral dans les 30 jours qui suivent sa publication selon le droit cantonal. Le recours contre un acte normatif doit être déposé devant le Tribunal fédéral dans les 30 jours qui suivent sa publication selon le droit cantonal.
1 month	Germany (full constitutional complaint)	Article 93 Law on the Federal Constitutional Court: 1. A complaint of unconstitutionality shall be lodged and substantiated within one month. This time-limit shall commence with the service or informal notification of the complete decision, if this is to be effected ex officio in accordance with the relevant procedural provisions. In other instances, the time-limit shall commence when the decision is proclaimed or, if it is not to be proclaimed, when it is otherwise communicated to the complainant; if the complainant does not receive a copy of the complete decision, the time-limit pursuant to the first sentence above shall be suspended by the complainant requesting, either in writing or by making a statement recorded at the court office, a copy of the complete decision. The suspension shall continue until the complete decision is served on the complainant by the court or ex officio or by a party to the proceedings.
6 weeks	Austria (full constitutional complaint)	Article 82 Federal Law on the Constitutional Court 1. A complaint against an administrative decree in pursuance of Article 144, subparagraph 1 of the B-VG can be lodged only after all administrative remedies have been exhausted, within six weeks following service of the decree delivered at last instance.
60 days	Bosnia & Herzegovina	Article 16 of the Rules of Constitutional Court of Bosnia and Herzegovina 1. The Court shall examine an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last effective remedy used by the appellant was served on him/her.
	Czech Republic (full constitutional complaint)	Art. 72 Constitutional Court Act (3) A constitutional complaint may be submitted within 60 days of the delivery of the decision in the final procedure provided by law to the complainant for the protection of his rights; "procedures" are understood to mean ordinary remedial procedures, extraordinary remedial procedures, with the exception \ of a petition for rehearing, and other procedures for the protection of rights with the assertion of which is associated the institution of a judicial, administrative, or other legal proceeding.
	Hungary (normative constitutional complaint)	Article 48 Act on the Constitutional Court 2. The constitutional complaint may be submitted within sixty days after the receipt of the final decision.
	Poland (Ombudsperson)	Article 51 Constitutional Tribunal Act 1. The Tribunal shall inform the Commissioner for Citizens' Rights about the institution of proceedings. Provisions of Article 33 shall apply accordingly. 2. The Commissioner for Citizens' Rights may, within the period of 60 days from the receipt of information, give notice of his/her participation in the proceedings.
2 months	Slovenia (full constitutional complaint)	Article 52 Constitutional Court Act (1) A constitutional complaint is lodged within 60 days of the day the individual act against which a constitutional complaint is admissible is served. (3) In especially well founded cases the Constitutional Court may exceptionally decide on a constitutional complaint which has been lodged after the expiry of the time limit referred to in the first paragraph of this article.
2 months	Slovakia	Article 53 Law on the Organisation of the Constitutional Court 3. A complaint may be filed within a period of two months from the day on which

Time limit	State	Relevant constitutional or legal provision
		the decision becomes final or from the day when the measure is announced or other encroachment is communicated. In the case of a measure or other encroachment, this period shall be counted from the day when the complainant could have learned of the measure or other encroachment.
	"The Former Yugoslav Republic of Macedonia" (full constitutional complaint)	Article 51 Rules of Procedure of the Constitutional Court Any citizen considering that an individual act or action has infringed his or her right or freedom, as provided in Article 110.3 of the Constitution of the Republic of Macedonia, he or she may lodge an application for protection of human rights and freedoms by the Constitutional Court within 2 months from the date of notification of the final or legally binding individual act, or from the date on which he or she became aware of the activity undertaken creating such an infringement, but not later than 5 years from the date of the activity's being undertaken.
75 days	Cyprus (constitutional revision)	Article 146 Constitution 3. Such a recourse shall be made within seventy-five days of the date when the d ecision or act was published or, if not published and in the case of an omission, when it came to the knowledge of the person making the recourse.
3 month	United States (writ of certiorari)	The time limit for presenting a constitutional claim in the United States in the first instance varies depending on the form of the claim and the court in which it is brought (federal court versus state court). Ordinarily, a petition for certiorari to the U.S. Supreme Court is to be filed within 3 months. U.S. Supreme Court Rule 13. Review on Certiorari: Time for Petitioning 1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.
	Azerbaijan (against denial of access to courts)	Article 34.4 Law on the Constitutional Court Complaints can be submitted to Constitutional Court in following cases: 34.4.2. Within three months from the moment of violation of complainant's right to apply to court
6 months	Poland (normative constitutional complaint)	Article 46 Constitutional Tribunal Act 1. Constitutional claim, further referred to as the "claim" can be submitted after trying all legal means, if such means is allowed, within 3 months from delivering the legally valid decision to the plaintiff, the final decision or other final judgment.
	Albania (constitutional revision)	Article 30 Law on the Organisation and Functioning of the Constitutional Court If the law provides that the applicant may address another authority, he/she may present the application to the Constitutional Court after all the other legal means in protection of such rights have been exhausted. Under such a case, the deadline for lodging the application is 6 (six) months from the date on which the decision of the relevant authority is announced.
	Azerbaijan (full constitutional complaint)	Article 34.4 Law on the Constitutional Court Complaints can be submitted to Constitutional Court in following cases:34.4.1. After exhaustion of all remedies within six months from the moment of entrance of the decision of the court of last instance into force;
	Armenia (normative constitutional complaint)	Article 69 Law on the Constitutional Court: "5. In cases de termined in this Article the appeals can be submitted to the Constitutional Court by the natural and legal persons no later than six months after the exhaustion of the opportunities of appeal of the judicial act ruled against those".

Time limit	State	Relevant constitutional or legal provision
	Belgium (Normative constitutional complaint)	Article 3 Special Law on the Court 1. Without prejudice to paragraph 2 and to Article 4, an action for annulment, in full or in part, of a statute, decree or rule referred to in Article 134 of the Constitution shall not be admissible unless it is brought within six months of the publication of the statute, decree or rule referred to in Article 134 of the Constitution.
1 year	Latvia (normative constitutional complaint)	Article 19.2 Law on the Constitutional Court 4. A constitutional claim may be submitted to the Constitutional Court within six months from the date of the decision of the last institution becoming effective
2 years	Germany (against normative acts)	Article 93 Law on the Federal Constitutional Court 3. If the constitutional complaint is directed against a law or some sovereign act against which legal action is not admissible, the constitutional complaint may be lodged only within one year of the law entering into force or the sovereign act being announced.
5 years	Albania (if no legal remedy is provided)	Article 30 Law on the Organisation and Functioning of the Constitutional Court 2.The application of persons regarding the violation of a constitutional right is to be presented no later than 2 (two) years from the time at which evidence of the violation becomes available to them.
	Peru (actio popularis)	Article 87 Code of Constitutional Procedure (p.t.) The delay for lodging the actio popularis is five years from the day following the publication of the norm. (El plazo para interponer la demanda de acción popular prescribe a los cinco años contados desde el día siguiente de publicación de la norma).

1.1.3 Table: Obligation to be legally represented

State	Relevant constitutional or legal provision
Albania	Article 24 Law on the Organisation and Functioning of the Constitutional Court: Parties to the constitutional case may represent themselves or may appoint a person to represent them as provided by this Law.
Andorra	Article 35.1 Qualified Law of the Constitutional Tribunal 1. The proceedings set forth in Article 6 of this Law are always introduced upon application by a party. Unless the applicant is the Attorney General's Department or a court it shall be represented and defended by a lawyer who is a member of the Andorran Bar. The interests of the Andorran State are represented and defended before the Constitutional Court by the Andorran lawyers attached to the Government Legal Service, without prejudice the Government' s right, where necessary, to secure the services of other lawyers.
Armenia	Article 46 Law on the Constitutional Court: 1. Parties may appear before the Constitutional Court personally as well as through their representatives.
Austria	Article 17 Federal Law on the Constitutional Court: 2. Actions in accordance with Article 37, applications in accordance with Articles 46, 48, 50, 57, 62 and 66 and complaints which are not covered by Article 24, subparagraph 1 shall be submitted by a duly authorised lawyer.
Azerbai-jan	Article 35.1. Law on the Constitutional Court: The following documents shall be enclosed to petition, application or complaint submitted to Constitutional Court: 35.1.2. Letter of attorney or other document, confirming the authorities of the representative except the cases when representation is implemented ex officio as well as copies of documents confirming the right of a person to speak at Constitutional Court as a representative;

State	Relevant constitutional or legal provision
Belgium	Art. 5 of the Special Law on the Court Actions for annulment shall be instituted before the Court by means of a petition which, as the case may be, is signed by the Prime Minister, by a member of the Government designated by that Government, by the president of a legislative assembly, or by a party with a justifiable interest or its lawyer; Art. 75 The Court may appoint a lawyer ex officio. This appointment shall be considered null and void if the party concerned chooses its own legal adviser.
Croatia	Article 24 Constitutional Act on the Constitutional Court (1) Participants may undertake actions in the proceedings in person or through a representative.
Czech Republic	Article 30 Constitutional Court Act: (1) A natural or a legal person who is a party or a secondary party to a proceeding before the Court must be represented by an attorney to the extent provided for in special statutes and enactments.
Georgia	Article 30 Organic Law on the Constitutional Court 1.The parties shall have the right to entrust the protection of their interests to a lawyer or other person having a high level of legal education at every stage of the proceedings.
Ger-many	Article 22 Law on the Federal Constitutional Court: 1. The parties may be represented at any stage of the proceedings by an attorney registered with a German court or a lecturer of law at a German institution of higher education; in the oral pleadings before the Federal Constitutional Court they must be represented in this manner.
Hungary	Article 19 Act on the Constitutional Court: Unless otherwise provided by this Act or the Rules of the Constitutional Court, the provisions of the Civil Procedure Code shall be applied in issues concerning legal assistance, the ensuring of the use of the native-tongue during the proceedings and the exclusion of judges.
Italy	Section 20 Law on the composition and procedures of the Constitutional Court At all hearings before the Constitutional Court the parties may only be represented by lawyers authorised to appear before the Court of Cassation.
Latvia	Article 23 Law on the Constitutional Court 1. Participant in the case − the applicant as well as the institution or official who issued the disputable act − may perform procedural actions at the Constitutional Court himself/herself or be represented by his/her respective representative.
Liechten-stein	Article 41 Constitutional Court Act 1) The parties may lodge individual complaints (article 15) themselves and participate in the hearings, or they may choose to be represented by lawyers who are listed in the Register of Lawyers or who are otherwise admitted to practice in the Principality of Liechtenstein by law or by authorisation of the Government.
Luxem-burg	Article 11 Law on the Constitutional Court The parties shall be allowed to make submissions to and plead before the Constitutional Court through any lawyer registered on List I of the roll of lawyers drawn up each year by the Bar Councils.
Monaco	Article 29 Ordonnance sur l'organisation et le fonctionnement du Tribunal suprême: Les parties se présentent à l'audience par le ministère d'un avocat-défenseur.
Poland	Article 48 Constitutional Tribunal Act 1. The complaint or claim on the judgment refusing further consideration of the complaint shall be drawn up by an advocate or legal counsel unless the person making the complaint is a judge, prosecutor, notary public, professor or doctor habilitated of legal science.
Portugal	Article 83 Law on the Constitutional Court 1. In appeals made to the Constitutional Court, the appointment of a lawyer is obligatory, without prejudicing the ruling in n.º 3.

State	Relevant constitutional or legal provision
Romania	Article 30 Law on the Organisation and Functioning of the Constitutional Court 5. The parties may be represented by lawyers having the right to plead before the High Court of Cassation and Justice
Russian Federation	Article 53 Federal Constitutional Law on the Constitutional Court The parties may also be represented by lawyers or persons with an academic degree in law, whose powers are confirmed by relevant documents.
Slovakia	Article 20 Law on the Organisation of the Constitutional Court (1) An application must be signed by the applicant (applicants) or his/her (their) representative. (2) An application on commencing proceedings shall be supported by an empowerment enabling the applicant to be represented by an advocate, unless otherwise provided by this law. This empowerment shall expressly state that it was issued for the purpose of representation before the Constitutional Court.
Slovenia	Article 24.a Constitutional Court Act (1) If a participant in proceedings before the Constitutional Court is represented by an authorised representative, he must submit an authorisation which is provided especially for proceedings before the Constitutional Court. (2) An authorised representative who is not a lawyer must have a special authorisation to transfer the authorisation in proceedings before the Constitutional Court to another person. Article 50 (3) If a complainant in a constitutional complaint procedure is represented by an authorised representative, he must submit an authorisation which is given especially for the constitutional complaint procedure. The authorisation must be given after the individual act against which the constitutional complaint is lodged has been served. The second paragraph of Article 24a of this Act applies regarding the transfer of such authorisation.
Spain	Article 49 Organic Law on the Constitutional Court 2. The application shall be accompanied by: a. The document mandating the representative of the applicant for protection;
South Africa	Rule 11 Rules of the Constitutional Court (a) If it appears to the Registrar [of the Constitutional Court] that a party is unrepresented, he or she shall refer such party to [an] appropriate body or institution that may be willing and in a position to assist such party.
Switzerland	Article 41 Federal Judicature Act 5. When a party is clearly unable to act for himself, the Court may ask him to appoint a representative.

1.1.4 Table: Exhaustion of remedies and exceptions

State	Exhaustion of remedies − relevant constitutional or legal provisions	Exception to the precondition of exhaustion of remedies − relevant constitutional or legal provisions
Albania	Article 131 Constitution The Constitutional Court decides on: f. the final adjudication of the complaints of individuals for the violation of their constitutional rights to due process of law, after all legal remedies for the protection of those rights have been exhausted.	
Andorra	Article 94 Qualified Law on the Constitutional Court 2. When no further appeal can be lodged nor is there any further means in defending the constitutional right infringed, the person who has suffered the infringement of the constitutional right to jurisdiction may lodge an appeal for protection before the Constitutional Court within fifteen working days of	

State	Exhaustion of remedies – relevant constitutional or legal provisions	Exception to the precondition of exhaustion of remedies – relevant constitutional or legal provisions
	the day after notification of the last resolution of refusal or of the date on which he had knowledge of the judicial decision which violated the constitutional right to jurisdiction.	
Armenia	Article 69 Law on the Constitutional Court 1. The appeals on the cases described in this Article (hereinafter individual appeals) can be brought by those natural and legal persons who were participants at the courts of general jurisdiction and in specialised courts, in relation of who the law was implemented by a judicial act, who exhausted all the remedies of judicial protection and who believe that the provision of the Law applied for the particular case contradicts the Constitution.	
Austria	Article 144 Constitution The complaint can only be filed after all other stages of legal remedy have been exhausted.	
Azerbai-jan	Article 34.4 Law on the Constitutional Court Complaints can be submitted to Constitutional Court in following cases: 34.4.1. After exhaustion of all remedies within six months from the moment of entrance of the decision of the court of last instance into force;	Article 34.5. Law on the Constitutional Court If the legal protection of constitutional rights by means of courts of general jurisdiction cannot prevent the imposing of serious and irreplaceable damage to complainant then application can be submitted directly to Constitutional Court.
Croatia	Article 62 Constitutional Act on the Constitutional Court: (2) If some other legal remedy is provided against violation of the constitutional rights, the constitutional complaint may be lodged only after this remedy has been exhausted. (3)"In matters in which an administrative dispute is provided, respective a revision in civil or extra-litigation procedure, remedies are exhausted after the decision has been rendered upon these legal remedies".	Article 63 Constitutional Act on the Constitutional Court: (1) The Constitutional Court shall initiate proceedings in response to a constitutional complaint even before all legal remedies have been exhausted in cases when the court of justice did not decide within a reasonable time about the rights and obligations of the party, or about the suspicion or accusation for a criminal offence, or in cases when the disputed individual act grossly violates constitutional rights and it is completely clear that grave and irreparable consequences may arise for the applicant if Constitutional Court proceedings are not initiated. (2) If the decision is passed to adopt the constitutional complaint for not deciding in a reasonable time in paragraph 1 of this Article, the Constitutional Court shall determine a deadline for the competent court of justice within which that court shall pass the actmeritoriously deciding about the applicant's rights and obligations, or the suspicions or accusation of a criminal offence. Such deadline for passing the act shall begin to run on the day following the date when the Constitutional Court decision is published in the Official Gazette Narodne novine.

State	Exhaustion of remedies − relevant constitutional or legal provisions	Exception to the precondition of exhaustion of remedies − relevant constitutional or legal provisions
Czech Republic	Article 75 Constitutional Court Act: (1) A constitutional complaint is inadmissible if the complainant failed to exhaust all procedures afforded him by law for the protection of his rights (§ 72 para. 3); that does not apply to extraordinary remedial procedures which the body that decides thereupon has discretionary authority to reject as inadmissible (§ 72 para. 4).	Article 75 Constitutional Court Act: (1) A constitutional complaint is inadmissible if the complainant failed to exhaust all procedures afforded him by law for the protection of his rights (§ 72 para. 3); that does not apply to extraordinary remedial procedures which the body that decides thereupon has discretionary authority to reject as inadmissible (§ 72 para. 4). (2) The Constitutional Court shall not reject a constitutional complaint, even though it does not satisfy the condition stated in the preceding paragraph, if: a) the significance of the complaint extends substantially beyond the personal interests of the complainant, so long as it was submitted within one year of the day when the events which are the subject of the constitutional complaint took place, or b) the proceeding in an already filed remedial procedure under paragraph 1 is being considerably delayed, which delay gives rise to or may give rise to serious and unavoidable detriment to the complainant.
Germany	Law on the Federal Constitutional Court, Article 90.2 1st phrase: If legal action against the violation is admissible, the constitutional complaint may not be lodged until all remedies have been exhausted.	Law on the Federal Constitutional Court Article 90.2 2nd phrase: However, the Federal Constitutional Court may decide immediately on a com plaint of unconstitutionality lodged before all remedies have been exhausted if it is of general relevance or if recourse to other courts first would entail a serious and unavoidable disadvantage for the complainant.
Hungary	Article 48 Act on the Constitutional Court 1. Anybody aggrieved by the application of an unconstitutional legal rule who has exhausted all other legal remedies or has no other remedy available, may submit a constitutional complaint to the Constitutional Court because of the violation of his/her constitutional rights.	
Korea, Republic	Article 68 Constitutional Court Act (1) Any person who claims that his basic right which is guaranteed by the Constitution has been violated by an exercise or non-exercise of governmental power may file a constitutional complaint, except the judgments of the ordinary courts, with the Constitutional Court:Provided, that if any relief process is provided by other laws, no one may file a constitutional complaint without having exhausted all such processes.	

State	Exhaustion of remedies – relevant constitutional or legal provisions	Exception to the precondition of exhaustion of remedies – relevant constitutional or legal provisions
Latvia	Article 19.2 Law on the Constitutional Court 2. The constitutional claim shall be submitted only after exhausting the ordinary legal remedies (a claim to a higher institution or official, a claim or application to a court of general jurisdiction etc.) or if there are no other means	Article 19.2 Law on the Constitutional Court 3. If the review of the constitutional claim is of general importance or if legal protection of the rights with general legal means cannot avert material injury to the applicant of the claim, the Constitutional Court may reach a decision to review the claim (application) before all the other legal means have been exhausted.
Liechtenstein	Article 15 Constitutional Court Act 1) The Constitutional Court shall decide on complaints to the extent that the complainant claims a violation, by a final decision or order in the last instance issued by a public authority, of one of his constitutionally guaranteed rights or of one of his rights guaranteed by international conventions for which the lawmaking power has explicitly recognised an individual right of complaint.	
Malta	Article 4 European Convention Act Provided that the Court may, if it considers it desirable so to do, decline to exercise its powers under this subsection in any case where it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other ordinary law.	
Montenegro	Article 58 Draft Law on the Constitutional Court Constitutional complaints may be lodged against an individual act of state authority, local self-government authority or organisation vested with public powers, for the reason of violation of human rights and freedoms guaranteed by the Constitution, after all effective legal remedies have been exhausted.	Article 58 Draft Law on the Constitutional Court All effective legal remedies referred to in paragraph 1 above shall be deemed exhausted within the meaning of this Law, if the complainant in the dispute exhausted all ordinary and extraordinary legal remedies prescribed by law.
Poland	Article 47 Constitutional Tribunal Act 1. The complaint shall, apart from the requirements referring to the procedural letters, include the following: 1) a precise identification of the statute or another normative act on the basis of which a court or another organ of public administration has given ultimate decision in respect of freedoms or rights or obligations determined in the Constitution and which is challenged by the person making the complaint for the confirmation of non-conformity to the Constitution.	
Portugal	Article 70 Law on the Constitutional Court 5. Decisions subject to obligatory ordinary appeal, according to the terms of the respective procedural law, may not be admitted for appeal to the Constitutional Court.	
Slovakia	Article 53 Law on the Organisation of the Constitutional Court 1. The complaint shall not be admissible until the complainant has exhausted all remedies or other legal means which are effectively provided by the law to protect his/ her fundamental rights or freedoms and for the application of which the complainant is entitled to apply under specific regulations.	Article 53 Law on the Organisation of the Constitutional Court 2. The Constitutional Court shall not reject a complaint even if the condition under subsection 1 has not been met, so long as the complainant can prove she has failed to satisfy the aforesaid condition due to reasons worthy of special consideration..

State	Exhaustion of remedies − relevant constitutional or legal provisions	Exception to the precondition of exhaustion of remedies − relevant constitutional or legal provisions
Slovenia	Article 51 Constitutional Court Act (1) A constitutional complaint may be lodged only after all legal remedies have been exhausted.	Article 51 Constitutional Court Act (2) Before all extraordinary legal remedies have been exhausted, the Constitutional Court may exceptionally decide on a constitutional complaint if the alleged violation is manifestly obvious and if irreparable consequences for the complainant would result from the implementation of the individual act.
Spain	Organic Law on the Constitutional Court Art. 43.1 *"Las violaciones de los derechos y libertades antes referidos originados por disposiciones, actos, jurídicos, omisiones o simples vías de hecho del Gobierno o de sus autoridades o funcionarios, o de los órganos ejecutivos colegiados de las Comunidades Autónomas o de sus autoridades o funcionarios o agentes, podrán dar lugar al recurso de amparo una vez que se haya agotado la vía judicial procedente!* Article 44 *1. Las violaciones de los derechos y libertades susceptibles de amparo constitucional, que tuvieran su origen inmediato y directo en un acto u omisión de un órgano judicial, podrán dar lugar a este recurso iempre que se cumplan los requisitos siguientes:* *a) Que se hayan agotado todos los medios de impugnación previstos por las normas procesales para el caso concreto dentro de la vía judicial.*	
Switzerland	Article 86 Federal Judicature Act 1. Le recours est directement recevable contre les actes normatifs cantonaux qui ne peuvent faire l'objet d'un recours cantonal. 2. Lorsque le droit cantonal prévoit un recours contre les actes normatifs, l'art. 86 est applicable.	Article 94 Federal Judicature Act Le recours est recevable si, sans en avoir le droit, la juridiction saisie s'abstient de rendre une décision sujette à recours ou tarde à le faire.
"The Former Yugoslav Republic of Macedonia"	Article 51 Rules of Procedure of the Constitutional Court Any citizen considering that an individual act or action has infringed his or her right or freedom, as provided in Article 110.3 of the Constitution of the Republic of Macedonia, he or she may lodge an application for protection of human rights and freedoms by the Constitutional Court within 2 months from the date of notification of the final or legally binding individual act […]	
Turkey	Article 148 of the Constitution (as amended in 2010) Constitutional complaints shall be deemed inadmissible if the complainants have not exhausted regular legal remedies (means ofredress) afforded by the law for the protection of their rights.	

1.1.5 Table: Preliminary ruling procedures

State	Relevant constitutional or legal provisions
Albania	Article 69 Law on the Organisation and Functioning of the Constitutional Court 1. When the Constitutional Court concludes that the file referred to it is not complete and in conformity with the above provision, it shall send it back to the original court. The latter should complete the file within one month from the date on which it receives the file.
Andorra	Article 100 (2) Constitution The Tribunal Constitucional may not admit the transaction of the request without further appeal. If the request is admitted judgment shall be passed within the maximum period of two months. Article 52 Qualified Law on the Constitutional Tribunal In the exercise of their judicial functions, the Batlles (judges of first instance), the Court of Batlles, the Tribunal de Corts (criminal court) and the Higher Court of Andorra are entitled to apply for interlocutory proceedings to be opened in respect of laws, legislative decrees and regulations having statutory force on the ground that they are unconstitutional, irrespective of the date on which they entered into force. Article 53 1. An application for judicial review by the Constitutional Court of the constitutionality of such a law or regulation is admissible where, at any stage in ordinary judicial proceedings, the court hearing the proceedings considers on its own initiative or on the initiative of one of the parties that one of the laws and regulations mentioned in the preceding Article which the court must apply in resolving the principal case or any step whatsoever taken therein is contrary to the Constitution. 2. This view that the law or regulation in question is unconstitutional must be based on the following factors: it must be impossible to interpret the law and regulation in question in a way which is consistent with the Constitution; the court must provide a reasoned explanation of the need to apply the law or regulation in resolving the main case or the step in question; and the law or regulation must not have been declared constitutional in any resolution or decision taken by the Constitutional Court, as provided for in Article 44.3 of this Law. 3. Before filing the document introducing the action provided for in the first paragraph of this Article with the Constitutional Court the court in question must consult the parties and the Attorney General's Department where it is represented in the proceedings. When the parties have been heard the court, on its sole responsibility, issues a decree containing its decision whether or not to lodge the application. No appeal may be made against the decision taken in that decree; where the decision is negative, however, the application may where appropriate be renewed during subsequent stages of the proceedings. Article 54 Where the applicable law or regulation regarded as contrary to the Constitution entered into force prior to the Constitution the court may choose between bringing the matter before the Constitutional Court and declaring at the appropriate point in the proceedings that the laws or regulations are repealed. In any event a declaration that the law or regulation is repealed does not mean that the law or regulation enacted prior to the Constitution is null and void, but simply states that it is without force and the reasons why this is so. Article 55 1. Once the court has agreed to refer the matter to the Constitutional Court as provided for in the preceding provisions it must draw up a separate certificate setting out the steps taken for that purpose and submit to the Constitutional Court a document to which are attached that first document and a statement of the reasons for its doubts as to the con stitutionality of the law or regulation in question and also the constitutional provisions which it considers have been infringed, like the formalities required by Article 36 of this Law. 2. The main case or interlocutory matter, as appropriate, follows its course until the judgment or resolution stage, at which point the procedure is frozen until the Constitutional Court has pronounced the decree resolving the matter or decision. If the step which led to the proceedings being brought before the Constitutional Court concerns the setting aside of actions, no decision on the principal cause may be taken until the Constitutional Court has taken its decision. Article 56 1. Upon receiving the document and the separate certificate provided for in the preceding Article, the Constitutional Court issues a reasoned decree declaring the action on the ground of unconstitutionality admissible or inadmissible. The action by way of petition (súplica) mentioned in Article 39.2 of this Law is available against a decree declaring the action inadmissible.

State	Relevant constitutional or legal provisions
	2. When the action has been declared admissible and the proceedings have commenced, the parties thereto are the court which brought the action, the body which laid down the law or regulation referred to the Constitutional Court and the Attorney General's Department. The parties to the judicial proceedings in question may appear as joint assistants. 3. Where the challenge concerns laws and regulations which predate the Constitution the General Council shall be a party to the proceedings irrespective of which body enacted the laws. Article 57 1. The investigation of the interlocutory proceedings until a decision is taken follows the same procedures as those provided for in connection with a direct action on the grounds of unconstitutionality. 2. The decision of the Constitutional Court is binding on the court which referred the matter to it. In this case, however, the principle laid down in Article 8.2 of this Law that a decision dismissing an action challenging the constitutionality of a provision is temporarily inapplicable, which is binding on the court, is precluded, so that the court can hear and determine the main case. Article 58 1. Decisions dismissing the alleged unconstitutionality produce the same effects as those produced by decisions issued in direct actions. 2. Decisions declaring the law or regulation referred to the Constitutional Court unconstitutional in whole or in part take effect on the date on which they are published in the Official Gazette of the Principality of Andorra. Save in cases of favourable retroactive application, the existing effects produced by this law or regulation before they were declared null and void endure until new laws and regulations have been created to regulate the preexisting legal situations.
Belgium	Art. 100 of the Special Law on the Court The Constitutional Court in full session may join actions for annulment or preliminary questions relating to one and the same regulation to be ruled on in one and the same judgment. In this circumstance, the cases will be investigated by the bench that was seized of the first case. The registrar shall notify the parties of the decision to join cases. Where two or more cases are joined, the judges-rapporteurs shall be those who in accordance with Article 68 were appointed to the case of which the Court was first seized.
Estonia	§63 Constitutional Review Court Procedure Act (1) If a request is not in compliance with the requirements of this Act, the Supreme Court shall set a term for elimination of deficiencies. If the person filing the request fails to eliminate the deficiencies within a specified term, the Supreme Court shall return the request without a hearing.
France	Constitution Article 61-1. *If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the* Conseil d'État *or by the* Cour de Cassation *to the Constitutional Council, within a determined period. An Institutional Act shall determine the conditions for the application of the present article.* Article 62. A provision declared unconstitutional on the basis of article 61 shall be neither promulgated nor implemented. A provision declared unconstitutional on the basis of article 61-1 shall be repealed as of the publication of the said decision of the Constitutional Council or as of a subsequent date determined by said decision. The Constitutional Council shall determine the conditions and the limits according to which the effects produced by the provision shall be liable to challenge. No appeal shall lie from the decisions of the Constitutional Council. They shall be binding on public authorities and on all administrative authorities and all courts.
Lithuania	Article 69 Law on the Constitutional Court 1. By a decision, the Constitutional Court shall refuse to consider petitions to investigate the compliance of a legal act with the Constitution; if: 1) The petition was filed by an institution or person who does not have the right to apply to the Constitutional Court; 2) The consideration of the petition does not fall under the jurisdiction of the Constitutional Court; 3) the compliance of the legal act with the Constitution specified in the petition has already been

State	Relevant constitutional or legal provisions
	investigated by the Constitutional Court and the ruling on this issue adopted by the Constitutional Court is still in force; 4) the constitutional Court has already commenced the investigation of a case concerning the same issue; 5) The petition is grounded on non-legal reasoning. Article 70 Law on the Constitutional Court In the case that a petition or appendices thereof fail to comply with the provisions set forth in Articles 66 and 67, the Chairperson of the Constitutional Court shall return the petition to the petitioner on his own initiative or on the initiative of a judge. The return of a petition shall not take away the right to appeal to the Constitutional Court according to the general procedure after abolishing reasons thereof.
Georgia	Article 17 Law on the Constitutional Legal Proceedings 1. An authorized employee of the Constitutional Court shall register a constitutional claim or a constitutional submission lodged with the Constitutional Court, after having examined the formal (and not substantive) aspects of the case materials. If an inessential formal inaccuracy is revealed, a constitutional claim or a constitutional submission shall be registered with the consent of the Secretary to the Constitutional Court and the claimant, author of the constitutional submission or their representatives shall be given fifteen days to redeem the inaccuracy. If within of this term inaccuracy was not corrected, a registration of a claim and a submission shall be invalidated. In case of the refusal to register, the claimant, author of the constitutional submission or their representatives shall be entitled to apply to the Secretary of the Constitutional Court, the latter being authorized to reach a final decision. (29.12.2006 N4216)
"The Former Yugoslav Republic of Macedonia"	Article 17 of the Law on the Courts 1) The court submits an initiative for commencing a procedure on assessing the compliance of the Law with the Constitution, when during procedure their accordance turns out to be questionable, for which it notifies the court of higher instance and the Supreme Court of Republic of Macedonia. (2) When the court finds that the Law that is to be applied in the specific case is not in accordance with the Constitution, and the constitutional provisions cannot be directly applied, will stay the procedure until the Constitutional Court delivers a decision. (3) The party has a right to an appeal against the decision for stay of the procedure. The procedure upon the appeal is urgent.

1.1.6 Table: Joinder of similar cases

State	Relevant constitutional or legal provisions
Andorra	Article 34.3 Qualified Law on the Constitutional Tribunal 3. Without prejudice to the first paragraph of this article, the Court may decide at any stage of the proceedings to join a number of cases on the ground that the subject matter is the same or similar. Where this occurs the judge to whom the case was first allocated acts as reporter.
Armenia	Article 39 Law on the Constitutional Court Before the start of the case review only the cases referring to the same issue can be combined by the decision of the Constitutional Court.
Czech Republic	Article 63 Constitutional Court Act Where an issue is not covered by this Statute, in proceedings before it the Court shall apply the relevant provisions of the Code of Civil Procedure, as well as other enactments issued for the implementation thereof. Section 112 of the Act 99/1963 Coll., Civil Procedure Code, The court can join cases to joint proceedings in the interest of proceedings´ effectiveness, provided the proceedings were initiated and relate to the same matter or to the same participants. Art. 35 Constitutional Court Act (2) A petition shall also be inadmissible in instances when the Court has already taken some action in the same matter; if one is submitted by an authorised petitioner, he has the right to take part, as a secondary party, in the proceeding concerning the earlier submitted petition". Article 76: "(1) The complainant and the state body or other public authority, against the encroachment of which the constitutional complaint is directed, shall be parties to the proceeding on the constitutional complaint. (2) Other parties to a prior proceeding, the contested decision of which gives rise to the complaint, shall be secondary parties. If the complaint concerns a criminal proceeding, the parties to that proceeding shall be secondary parties. (3) The Court may grant the status of a secondary party to other persons who demonstrate a legal interest in the outcome of the proceeding.

State	Relevant constitutional or legal provision
Germany	Article 66 Law on the Federal Constitutional Court The Federal Constitutional Court may combine independent proceedings and separate combined ones.
Greece	Article 13 Law establishing a Special Highest Court 1. Any person wishing to intervene and having a lawful interest in the case may be joined to the proceedings before the Court.
Lithuania	Article 41 Law on the Constitutional Court Upon establishing that there are two or more petitions concerning the compliance of the same legal act with the Constitution or laws, the Constitutional Court may join them into one case before beginning the judicial consideration. In this case the Constitutional Court shalladopt a reasoned decision.
Portugal	Article 64 Law on the Constitutional Court 1. When a request has been admitted, any others with the same object that are also admitted are included in the file concerning the first. Article 74 – (Extension of appeal) 1. The appeal filed by the Public Prosecutor's Office has an effect on all those who have legitimacy to appeal. 2. The appeal filed by an interested party in the cases envisaged in sub-paragraphs a), c), d), e), g), h) and i) in n.º1 of article 70 can be used by all other interested parties. 3. The appeal filed by an interested party, in the cases envisaged in subparagraphs b) and f) of n.º1 of article 70 can be used by others according to the terms and limits established in the law regulating the case in which the decision has been made. 4. There can be no subordinate appeal nor may any other party adhere to the appeal already made to the Constitutional Court.
Russian Federation	Article 48 Federal Constitutional Law on the Constitutional Court The consideration of each case shall be the subject of a special session. The Constitutional Court of the Russian Federation may merge in one proceeding petitions pertaining to one and the same subject.
Slovakia	Article 31.a Law on the Organisation of the Constitutional Court If this Law does not stipulate otherwise and if the nature of the subject-matter does not exclude it, the provisions of the Code of Civil Procedure or Code of Criminal Procedure shall be used as appropriate for proceedings before the Constitutional Court. Article 112 of the Act 99/1963 Coll., Civil Procedure Code, The court can join cases into joint proceedings in the interest of efficiency of proceedings, provided the proceedings have been initiated and relate to the same matter or to the same participants.
Slovenia	Article 48 The Rules of Procedure of the Constitutional Court If in their applications more than one applicant requests the review of the constitutionality or legality of the same provisions or provisions related in terms of content of a law, regulation, or general act issued for the exercise of pubic authority, the Constitutional Court may, upon the proposal of the judge rapporteur, decide by an order to join all applications for joint consideration and deciding on their constitutionality or legality.
South Africa	Rule 29 of the Rules of the Constitutional Court makes rule 6(14) of the Uniform Rules of Court applicable, which in turn provides for the application of Rule 11 of the Uniform Rules of Court. Rule (11): Where separate actions have been instituted and it appears to the court convenient to do so, it may upon the application of any party thereto and after notice to all interested parties, make an order consolidating such actions…
Spain	Article 47 Organic Law on the Constitutional Court: 1. Persons who benefited by the decision, act or circumstance that led to the appeal or persons with a legitimate interest therein may appear in the proceedings for constitutional protection as a defendant or additional party.
"The Former Yugoslav Republic of Macedonia"	Article 21 Rules of Procedure of the Constitutional Court If during the course of the proceedings, it is found that a number of participants with separate petitions have requested the assessment of the constitutionality of the same provisions of the same law, other regulation or general act, all petitions will be attached to the first petition submitted, and for all of them a single procedure is conducted and a single decision is made. If there are a number of files in the Court for several separate petitions for the assessment of the constitutionality of the same law or the constitutionality and legality of the same regulation or general act, all files created later may be attached to the first file created, a single procedure may be carried out for all of them and a single decision made.

State	Relevant constitutional or legal provision
United States of America	The federal rules of civil procedure provide for the joinder of claims and parties in the federal courts, including in cases raising constitutional questions. Rule 12 U.S. Supreme Court Rules 4. Parties interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join in a petition. A party not shown on the petition as joined therein at the time the petition is filed may not later join in that petition. When two or more judgments are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the judgments suffices.

1.1.7 Table: Adversary systems

State	Relevant constitutional or legal provisions
Andorra	Article 87 Qualified law on the Constitutional Court 2. The respondents and assistants in the appeal for protection are the defendants and assistants in the earlier proceedings. Article 56.2 Qualified law on the Constitutional Court When the action has been declared admissible and the proceedings have commenced, the parties thereto are the court which brought the action, the body which laid down the law or regulation referred to the Constitutional Court and the Attorney General's Department. The parties to the judicial proceedings in question may appear as joint assistants.
Belgium	Art. 76 Special Law on the Court § 1. The registrar shall notify actions for annulment instituted by the Council of Ministers to the governments of the Communities and Regions and to the presidents of the legislative assemblies. § 2. The registrar shall notify actions for annulment instituted by the government of a Community or Region to the Council of Ministers, to the other governments, and to the presidents of the legislative assemblies. § 3. The registrar shall notify actions for annulment instituted by the president of a legislative assembly to the Council of Ministers, to the governments of the Communities and Regions, and to the presidents of the other legislative assemblies. § 4. The registrar shall notify actions for annulment instituted by an individual interested party to the Council of Ministers, to the governments of the Communities and Regions, and to the presidents of the legislative assemblies. Art. 77 The registrar shall notify referral decisions to the Council of Ministers, to the governments of the Communities and Regions, to the presidents of the legislative assemblies, and to the parties in the lawsuit before the court of law that took the referral decision. Art. 85 Within 45 days after receipt of the notifications sent by the registrar by virtue of Articles 76, 77 and 78, the Council of Ministers, the Governments, the presidents of the legislative assemblies and the persons to whom said notifications are addressed may make a written submission to the Court. Where the case involves an action for annulment, those submissions may contain new grounds. After that, the parties shall no longer be able to adduce new grounds.
Armenia	Article 19 Law on the Constitutional Court The Constitutional Court clarifies all the circumstances of the case in ex-officio without limiting itself with the motions, suggestions, evidences and other materials of the case brought by the participant of the Constitutional Court trial.
Azerbaijan	Article 28.1. Law on the Constitutional Court: "Constitutional proceedings shall be held on the basis of principles of legal equality of parties and adversary".
Czech Republic	Article 28 Constitutional Court Act: "(1) The petitioner and those specified by this Statute shall be parties to a proceeding".
Cyprus	Article 146 of the Constitution Under paragraph 1 of this Article the Supreme Constitutional Court (now the Supreme Court) *"shall have exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or Administrative authority is contrary to any of the provisions of this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person".*

State	Relevant constitutional or legal provision
France	Article 23-10 de la Loi organique n°2009-1523 du 10 décembre 2009 relative à l'applic ation de l'article 61-1 de la Constitution. *«Le Conseil constitutionnel statue dans un délai de trois mois à compter de sa saisine. Les parties sont mises à même de présenter contradictoirement leurs observations. L'audience est publique, sauf dans les cas exceptionnels définis par le règlement intérieur du Conseil constitutionnel».*
Georgia	Article 2 Organic Law on the Constitutional Court 1. The Constitutional Court shall perform its activity based on the principles of legality, collegiality, publicity, equality of parties and adversarial nature of the proceedings, independence, immunity and irrevocability of the members of the Constitutional Court for the whole term of their office. Article 1, Law on the Constitutional Legal Proceedings 1. The constitutional legal proceedings shall be conducted on the basis of equality of parties before the Constitution and the Court and adversarial nature of the proceedings.
Ger-many	Even though the principle of judicial investigation applies, Articles 26 and 94 of the Law on the Federal Constitutional Court are relevant: Articles 26 Law on the Federal Constitutional Court 1. The Federal Constitutional Court shall take evidence as needed to establish the truth. It may charge a member of the court with this outside the oral pleadings or ask another court to do so with regard to specific facts and persons. … Article 94 Law on the Federal Constitutional Court 1. The Federal Constitutional Court shall give the federal or Land constitutional organ whose act or omission is complained of in the constitutional complaint an opportunity to make a statement within a specified period. 2. If the act or omission was committed by a minister or a federal or Land authority, the competent minister shall be given an opportunity to make a statement. 3. If the constitutional complaint of unconstitutionality is directed against a court decision, the Federal Constitutional Court shall also give the party in whose favour the decision was taken an opportunity to make a statement. 4. If the constitutional complaint is lodged directly or indirectly against a law, Article 77 above shall apply mutatis mutandis. 5. The constitutional organs named in paragraphs 1, 2 and 4 above may join the proceedings. The Federal Constitutional Court may dispense with oral pleadings if they are not expected to advance the proceedings any further and if the constitutional organs which are entitled to make a statement and have joined the proceedings waive oral proceedings.
Greece	Article 49 Law establishing a Special Highest Court: "1. With the exception of the applicants, the parties to the proceedings before the Special Court shall be all the parties in the case which prompted the referral to the Special Court for a preliminary ruling to resolve the dispute".
Liech-tenstein	Article 18 Constitutional Court Act 3) In the proceedings, the Government shall be given the opportunity to give a statement within a period to be determined.
Lithua-nia	Article 31 Law on the Constitutional Court The following persons shall be considered parties to the case: the petitioner-the State institution[272], the group of Members of the Seimas who are granted by law the right to apply to the Constitutional Court with a petition to investigate the compliance of a legal act with the Constitution or laws or to present a conclusion, and their representatives; the party concerned-the State institution which has adopted the legal act whose compliance with the Constitution and laws is under investigation and its representative; the Member of the Seimas or other State official, the compliance of whose actions with the Constitution must be investigated due to impeachment proceedings which have been instituted against them in the Seimas and his representative; the President of the Republic, when a conclusion is presented concerning his state of health and his representative.

[272] inter alia the ordinary court

State	Relevant constitutional or legal provision
	The parties to the case shall have equal procedural rights. They shall have the right to get familiar with the material of the case, make extractions, duplicates, and copies from it, declare removals, provide evidence, participate in the investigation of evidence, give questions to other parties to the case, as well as to witnesses and experts, make requests, give explanations, provide their own arguments and reasoning, object to requests, arguments and reasoning of other persons participating in the case.
Luxembourg	Article 11 Law on the Constitutional Court The parties shall be allowed to make submissions to and plead before the Constitutional Court through any lawyer registered on List I of the roll of lawyers drawn up each year by the Bar Councils.
Poland	Article 27 Constitutional Tribunal Act The participants in the proceedings before the Tribunal shall be: 1) a subject who submitted an application or complaint concerning constitutional infringement; 2) an organ which issued an act included in the application or complaint concerning constitutional infringement; 2a) the court, which has presented a question of law to the Constitutional Tribunal, provided that it has notified participation in proceedings initiated as the result of that legal question and has appointed amongst the judges of that court its authorised representative.
Romania	Article 29 Law on the Organisation and Functioning of the Constitutional Court 4. The case shall be referred to the Constitutional Court by the court before which the exception of unconstitutionality has been raised through an interlocutory judgment which shall include the parties viewpoints concerning the exception, and the opinion of the Instance on the exception, and shall be accompanied by the evidence provided by the parties. In case the exception has been raised by the court, *ex officio*, the interlocutory judgment shall be motivated, and shall also mention the parties' arguments as well as the necessary evidence. Together with the interlocutory judgment, the court shall communicate to the Constitutional Court the names of the parties involved in the court proceedings including the data which are necessary to be summoned. Article 16 1. In case a submission has been made by one of the Presidents of the two Chambers of Parliament, by the Members of Parliament, by the Government, by the High Court of Cassation and Justice, or by the Advocate of the People, the Court shall communicate the act on the case thus received to the President of Romania, on the day of its registration. 2. If the submission has been made by the President of Romania, by the Members of Parliament, by the High Court of Cassation and Justice, or by the Ombudsman, the Constitutional Court shall communicate such to the Presidents of the two Chambers of Parliament and the Government within twenty-four hours from the registration, also specifying the date when the debates are to take place. 3. If the submission has been made by one of the Presidents of the two Chambers of Parliament, the Constitutional Court shall communicate such to the President of the other Chamber and to the Government, as well as to the Advocate of the People, and if the submission has been made by the Government, the Court shall communicate it to the Presidents of the two Chambers of Parliament, as well as to the Advocate of the People, the provisions under paragraph 2 above being applied accordingly. Article 17 1. The Presidents of the two Chambers of Parliament, the Government and the Advocate of the People can present their point of view in writing, by the date of the debates. 2. The Government's point of view shall be presented under the signature of the Prime-Minister only. Article 24 1. The Constitutional Court shall decide on the constitutionality of the treaties or other international agreements before their ratification by Parliament, when a case is submitted to the Court by one of the Presidents of the two Chambers, by a number of at least fifty Deputies or at least twenty-five Senators. 2. If the submission is made by one of the Presidents of the two Chambers of Parliament, the Constitutional Court shall communicate the act on the respective case to the President of Romania, to the President of the other Chamber, and to the Government. 3. When a case is submitted to the Court by Members of Parliament, the act on the case shall be registered at the Senate or at the Chamber of Deputies, as the case may be, and sent to the Constitutional Court on the same day when it was received by the Secretary General of the respective Chamber. 4. The Constitutional Court shall communicate the act on the case to the President of Romania, to the Presidents of the two Chambers of Parliament, and to the Government.

State	Relevant constitutional or legal provision
	Article 25 The President of Romania, the Presidents of the two Chambers of Parliament and the Government may present their point of view in writing, by the date of the debates in the plenum of the Constitutional Court. Article 27 1. The Constitutional Court shall decide on the constitutionality of the standing orders of Parliament, when a case is submitted to the Court by one of the Presidents of the two Chambers, by a parliamentary group or by a number of at least fifty Deputies or at least twenty-five Senators. 2. In case the submission has been made by Members of Parliament, the act relating to it shall be sent to the Constitutional Court by the Secretary General of the Chamber to which they belong, on the same day when it was handed in, and the Constitutional Court shall inform the Presidents of the two Chambers of Parliament within twenty-four hours from the registration, specifying the date when the debate is to take place. 3. The Presidents of the two Chambers of Parliament can notify the viewpoints of the Standing Bureau, by the date of the debates.
Russia	Article 35 Federal Constitutional Law on the Constitutional Court of the Russian Federation The parties shall enjoy equal rights and opportunities while asserting their positions in the session of the Constitutional Court of the Russian Federation on the adversarial basis.
San Marino	Article 14 Qualified law on the organisation of the Collegio Garante: “ 1. The discussion is oral and respects the principle of adversariality. *(La discussione è orale e si svolge nel rispetto del principio del contraddittorio)”*, in: http://www.consigliograndeegenerale.sm/new/index.php3, viewed on: 20/02/2009
Serbia	Article 29 Law on the Constitutional Court Article 31 Participant in proceedings is entitled to present and explain his/her position and reasons during the procedure, as well as to answer the claims and reasons of other participants in the procedure.
Slova-kia	Article 21 Law on the Organisation of the Constitutional Court 1. The parties to the proceedings are the applicant, the entity against which the application is directed, as well as the persons specified by this Law.
Slovenia	Article 56 Constitutional Court Act (2) In the instances referred to in the preceding paragraph, the constitutional complaint is sent to the persons who participated in the proceedings in which the challenged individual act was issued by which their rights, obligations, or legal entitlements were decided, in order for them to make statements within a determined period of time.
South Africa	Rule 11 Rules of the Constitutional Court (3) Any person opposing the granting of an order sought in the notice of motion shall… notify the Registrar in writing of his or her intention to oppose the application [and] lodge his or her answering affidavit.
Spain	Article 51Organic Law on the Constitutional Court 1. Where an application for protection is admitted, the Division shall urgently request the body or authority with which the decision, act or circumstance originated or the judge orcourt that heard the previous proceedings, to provide it with the court records or the supporting documents within a period of not more than ten days. 2. The body, authority, judge or court shall immediately acknowledge receipt of the request, shall dispatch the documents within the prescribed period and shall notify the persons who were parties to the former proceedings so that they may appear in the constitutional proceedings within ten days.
Switzer-land	Article 56 Federal Judicature Act 1. Les parties ont le droit d’assister à l’administration des preuves et de prendre connaissance des pièces produites. 2. Si la sauvegarde d’intérêts publics ou privés prépondérants l’exige, le Tribunal fédéral prend connaissance d’un moyen de preuve hors de la présence des parties ou des parties adverses.

State	Relevant constitutional or legal provisions
"The Former Yugoslav Republic of Macedo-nia"	Article 13 Rules of Procedure of the Constitutional Court The petitioner and the body having enacted or issued the impugned act are participants in the proceedings before the Constitutional Court. Article 18 paragraph 4 of the Rules of Procedure of the Constitutional Court During the preliminary proceedings, the judge and the member of the legal staff may call any participant in the proceedings and other interested persons, to a consultative interview and ask them for the necessary information and explanations, and, if necessary, forward the petition to the body that issued the impugned act. Article 19 of the Rules of Procedure of the Constitutional Court The decision to initiate proceedings is notified to the entity that issued the impugned regulation or other common act and a time-limit for an answer is fixed, this being no longer than 30 days. Article 53 of the Rules Procedure of the Constitutional Court The application for the protection of freedoms and rights is communicated for a reply to the entity having issued the individual act, or the entity which has undertaken an action infringing rights and freedoms, within 3 days from the date on which the application is lodged. The time-limit for providing an answer is 15 days.
United States	Rule 8 of the Federal Rules of Civil Procedure provides that a claimant's complaint shall assert a "short and plain statement of the claim showing that the pleader is entitled to relief", and that the opposing party must "state in short and plain terms its defenses to each claim asserted against it" and "admit or deny the allegations asserted against it by an opposing party". U.S. Supreme Court Rule 15. Briefs in Opposition; Reply Briefs; Supplemental Briefs 1. A brief in opposition to a petition for a writ of certiorari may be filed by the respondent in any case, but is not mandatory except in a capital case, see Rule 14.1(a), or when ordered by the Court.

1.1.8 Table: Public proceedings and exceptions

State	Relevant constitutional or legal provision
Albania	Article 21 Law on the Organisation and Functioning of the Constitutional Court: " 1.Cases are heard at the Constitutional Court in open plenary. 2. The Constitutional Court may bar the public from attending all or part of a session, in order to protect public morals, public order, national security and the right to private life or personal rights".
Armenia	Article 22 Law on the Constitutional Court: "1. The court hearing is open for public with the exceptions provided in the Part 3 of this article. 3. By a majority vote, the Constitutional Court may decide to hold a session or part of a session in the absence of the media and the public for the interest of community morals, public order and state security, and for the privacy of the parties and the case".
Azerbai-jan	Article 27.1. Law on the Constitutional Court: "Proceedings of cases in Constitutional Court shall be public. The hearing of a case in camera shall be admissible only when Constitutional Court assumes that public sessions can become a reason of disclosure of the state, professional or commercial secret or when it reveals the necessity to protect private or family life of citizens".
Belgium	Article 104 Special Law on the Court The Court's hearings shall be public, unless a public hearing would jeopardise public order or morality; in such cases, the Court may so declare by a reasoned judgment.
Bosnia and Herze-govina	Article 11 Rules on the Constitutional Court: "1. The work of the Constitutional Court shall be public". Article 12 of the Rules of Constitutional Court of Bosnia and Herzegovina "1. The public shall be excluded from the working sessions of the Constitutional Court, including the deliberation and voting sessions. 2. The public may also be excluded when the Constitutional Court deliberates and takes decisions about issues deemed to be confidential in accordance with the law and when this is required by reasons related to the protection of morality, public order, national security, the right to privacy or personal rights. 3. The exclusion of the public referred to in paragraph 2 of this Article shall not apply to parties to the proceedings".
Croatia	Article 21 Constitutional Act on the Constitutional Court: "If there exist reasons to exclude the public from the proceedings, a judge of the Constitutional Court shall note it in his/her report".

State	Relevant constitutional or legal provision
Cyprus	Article 134 Constitution: "1. The sittings of the Supreme Constitutional Court for the hearing of all proceedings shall be public but the Court may hear any proceedings in the presence only of the parties, if any, and the officers of the Court if it considers that such a course will be in the interest of the orderly conduct of the proceedings or if the security of the Republic or public morals so require".
Czech Republic	Article 45 Constitutional Court Act: "(1) Oral hearings before the Court shall be public; the Court may limit attendance by the public or may exclude the public altogether only if such is required by important interests of the state or of the parties to the proceeding, or by morality".
Denmark	§65 Constitution: "(1) In the administration of justice all proceedings shall to the widest possible extent be public and oral".
Georgia	Article 27 Organic Law on the Constitutional Court 2. A sitting of the Constitutional Court or a part of it may be closed to the public on the initiative of the Court or by agreement of the parties for the protection of personal information or of professional, commercial or state secrets.
Germany	Article 17 Law on the Federal Constitutional Court Unless this Law contains provisions to the contrary, the provisions of Titles 14 to 16 of the Law on the Constitution of Courts shall apply mutatis mutandis with regard to admission of the public, police powers in court, the language of the court, deliberations and voting. [In its Article 169, the Law on the Constitution of Courts provides that the proceedings before the court of decision including the pronouncement of judgements and order are public].
Italy	Section 15 Law on the composition and procedure of the Constitutional Court Hearings of the Constitutional Court shall be held in public, but the President may order a hearing behind closed doors when a public hearing might threaten the security of the State, public order or morality, or when the conduct of the members of the public present in court is likely to interfere with the due process of law.
Latvia	Article 27 Law on the Constitutional Court 1. Sessions of the Constitutional Court shall be open except in cases when this is contrary to the interests of protecting state secrets, commercial secrets as well as protecting the inviolability of the private life of a person.
Liechtenstein	Article 47 Constitutional Court Act 1) Subject to the following provisions, the hearings before the Constitutional Court shall be public. 2) The public shall be excluded in cases in which they are excluded by the provisions of the Rules of Civil and Criminal Procedure or if the Court rules to exclude the public due to legitimate nterests of a party or in the interests of public security and order.
Lithuania	Article 18 Law on the Constitutional Court Constitutional Court sittings shall be open, and may be attended by persons who are of age as well as by representatives of the press and other public mass media. The Constitutional Court may announce closed sittings provided that this is necessary for the safeguarding of a State, professional, commercial or other secret which is protected by law, or the security of a citizen or public morality.
Moldova	Article 13 Code of constitutional jurisdiction 1) The hearings in the Constitutional Court are public, except the cases when the publicity will damage state security or public order.
Poland	Article 23 Constitutional Tribunal Act Hearings of the Tribunal shall be public unless particular provisions provide otherwise. The Presiding Judge of the bench in a given case may dispense with its public nature for reasons of security of the State or protection of State secrets. Article 59 2. The Tribunal may, at a sitting in camera, examine a complaint concerning constitutional infringements if, from the pleadings submitted by the participants in the proceedings in writing, it results without dispute that the normative act, on the basis of which a court or organ of public administration has made a final decision in respect of freedoms or rights or obligations of the person making the complaint, is in non-conformity to the Constitution. The decision given in this procedure shall be subject to publication.
Romania	Article 12 Law on the Organisation and Operation of the Constitutional Court 1. The sessions of judgment shall be public, unless, for good reason, the Court decides otherwise.
Russian Federation	Article 54 Federal Law on the Constitutional Court The sessions of the Constitutional Court of the Russian Federation shall be open except for the events stipulated by the present Federal Constitutional Law. Article 55 The Constitutional Court of the Russian Federation shall set a session in camera when it is necessary to preserve secrets protected by the law, to ensure safety of citizens, to protect social moral.

State	Relevant constitutional or legal provision
Serbia	Article 3 Law on the Constitutional Court The work of the Constitutional Court is public. Publicity is guaranteed by public hearings in procedures before the Constitutional Court, publication of its decisions, release of communiqués to the public information media and in other manner. The Constitutional Court may exclude the public, only for the purpose of protecting the interests of national security, public order and morality in a democratic society, as well as for the purpose of protecting the interests of juveniles and the privacy of participants in a procedure. Article 37 c) Public Hearing Constitutional Court shall hold a public hearing in the procedure for assessing constitutionality and legality, in the procedure for deciding on electoral disputes, as well as in proceedings for prohibition of work of a political party, trade union organisation, citizens' association or religious community. Constitutional court can decide not to hold a public hearing in procedure for assessing the constitutionality and legality: if it deems that the matter was sufficiently clarified in the course of procedure and that, on the basis of evidence collected, it can decide even without holding a public hearing; if it has already decided on the same matter and new evidence for making a different decision on the matter have not been provided, as well as if there are conditions for discontinuation of procedure.
Slovakia	Article 30 Law on the Organisation of the Constitutional Court 4. Oral hearings in matters in accordance with Articles 125, 126, 127a, 129.4 of the Constitution shall be held in public. Oral hearings in other matters shall also be held in public unless the Constitutional Court, because of important considerations, excludes the public from participating in the entire hearing or part thereof. 5. The public character of oral hearings shall be governed, mutatis mutandis, by the provisions of procedural codes (Code of Civil Procedure, Code of Criminal Procedure).
Slovenia	Article 35 Constitutional Court Act (1) The Constitutional Court considers a case at a closed session or a public hearing. A majority of all Constitutional Court judges must be present at the closed session or public hearing. Article 37 The Constitutional Court may exclude the public from a hearing or a part thereof when so required in order to protect morals, public order, national security, the right to privacy, or personality rights. Article 57 If a constitutional complaint is accepted, as a general rule it is considered by the Constitutional Court at a closed session, or a public hearing may be held.
South Africa	Article 34 Constitution of the Republic of South Africa Everyone has the right to have any dispute that can be resolved by the application of law decided on in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.
Switzer-land	Article 59 Federal Judicature Act 1 Les éventuels débats ainsi que les délibérations et votes en audience ont lieu en séance publique. 2 Le Tribunal fédéral peut ordonner le huis clos total ou partiel si la sécurité, l'ordre public ou les bonnes moeurs sont menacés, ou si l'intérêt d'une personne en cause le justifie. 3 Le Tribunal fédéral met le dispositif des arrêts qui n'ont pas été prononcés lors d'une séance publique à la disposition du public pendant 30 jours à compter de la notification.
"The Former Yugoslav Repub-lic of Mace-donia"	Article 85 Rules of Procedure of the Constitutional Court The public can be excluded from the public hearings, meetings and preparatory meetings of the Court, if this is required in the interests of country's security and defence, the protection of state, official or business secrets, for the protection of the public morality and in other justified cases defined by the Court.
Turkey	Article 148 and 149 of the Constitution The Constitutional Court; a) In principle, examines cases on the basis of documents in the case file. However, when it deems necessary, it may call on those concerned and those having knowledge relevant to the case, to present oral explanations. b) Several High Ranking Officials in Turkey are tried for offences relating to their functions by the Constitutional Court in its capacity as the "Supreme Court". During such trials, oral testimony

State	Relevant constitutional or legal provision
	and right to defence is recognized. c) In lawsuits on whether to permanently dissolve a political party or not, the Constitutional Court shall hear the defence of the chairman of the party whose dissolution is in process or of a proxy appointed by the chairman, after the Chief Public Prosecutor of the Republic.

1.1.9 Table: Oral proceedings and exceptions

State	Relevant constitutional or legal provision
Albania	Article 23 Law on the Organisation and Functioning of the Constitutional Court: "The case is presented orally at the plenary session, or through the relevant documents, according to the nature of the case".
Austria	Article 19 Federal Law on the Constitutional Court: " 1. Judgments of the Constitutional Court, apart from those delivered under Article 10 and Article 36c, shall be delivered after an oral hearing in public to which the applicant, the opposing party and any parties which may be interested in any respect shall be summoned. 3. Upon application by the reporting judge, the Court, sitting in private without a fuller procedure being necessary and without an oral hearing, may 1. refuse to examine a complaint as provided for in Article 144, subparagraph 2 of the BVG. 2. reject an application upon the following procedural grounds: a. the Constitutional Court clearly has no jurisdiction to deal with it, b. the statutory time-limit has not been observed, c. the defect is not covered by the formal requirements, d. the case has become definitive, and e. the applicant is no entitled to bring the application 3. discontinue the proceedings on the ground that the application has been withdrawn or that the claim has been satisfied (Article 86). 4. The Constitutional Court may dispense with an oral hearing where it is apparent from the written submissions of the parties to the constitutional proceedings and the documents submitted to the Constitutional Court that no further light can be expected to be shed on the dispute in an oral discussion. In addition, upon application by the reporting judge, the Court, sitting in private and without an oral hearing, may 1. dismiss a complaint where there has clearly been no breach of a constitutionally guaranteed right; 2. settle any dispute where the legal problem has been raised in sufficiently clear terms in a previous judgment of the ConstitutionalCourt; 3. allow a complaint which led to an judgment overruling an unlawful regulation, an unconstitutional law or an illegal treaty".
Azerbai-jan	Article 27.2. Law on the Constitutional Court: "Proceedings at Constitutional Court shall be oral. In case of consent by parties and interested subjects, Plenum of Constitutional Court can hold written proceedings via procedure provided for by Rules of Procedure of Constitutional Court".
Belgium	Article 106 Special Law on the Court Only those parties who have lodged an application or filed a memorial, and their lawyers, shall be admitted to the hearing and such persons shall be limited to oral statements.
Czech Repub-lic	Article 44 Constitutional Court Act: "(1) In matters dealt with by the Court under Article 87 para. 1 or 2 of the Constitution, if the petition was not rejected by preliminary ruling without an oral hearing and without the parties being present, an oral hearing shall be held. (2) Unless this Statute provides otherwise, with the consent of the parties, the Court may dispense with an oral hearing if further clarification of the matter cannot be expected from such a hearing".
Denmark	§65 Constitution: "(1) In the administration of justice all proceedings shall to the widest possible extent be public and oral".
Germany	Article 25 Law on the Federal Constitutional Court: "1. In the absence of provisions to the contrary, the Federal Constitutional Court shall decide on the basis of oral pleadings, unless all parties expressly waive them." Art.94: "5. The constitutional organs named in paragraphs 1, 2 and 4 above may join the proceedings. The Federal Constitutional Court may dispense with oral pleadings if they are not expected to advance the proceedings any further and if the constitutional organs which are entitled to make a statement and have joined the proceedings waive oral proceedings". Article 93d: ". The decision in accordance with Articles 93 b and c above shall be taken without oral proceedings. This decision cannot be challenged. The refusal to accept the constitutional complaint does not require reasons".
Georgia	Article 27 Organic Law on the Constitutional Court 1. The issue of admission a case for consideration on the merits shall be considered without oral hearing. The Constitutional Court shall be authorized to consider a case with oral hearing, if elucidation of the circumstances related to the adoption of a case for consideration of the merits is impossible otherwise. 2. The Constitutional Court shall be authorized to consider the merits of a case without oral hearing on the basis of a written demand of a claimant or/and a respondent.

State	Relevant constitutional or legal provision
Liech-tenstein	Article 46 Constitutional Court Act 2) All parties and defendant authorities shall be summoned to the hearings. Absences shall not stand in the way of hearings and decisions. Article 47 3) An oral final hearing shall be omitted if the case is to be ruled upon in a closed meeting or if the Court, upon receiving the report of the rapporteur, does not believe an oral hearing is necessary to hear the pleadings of the parties.
Lithua-nia	Article 44 Law on the Constitutional Court 1. A case shall be investigated in a Constitutional Court hearing only once the parties to the case have been notified of this. 2. Absence of the parties in a Court hearing shall not be an obstacle for consideration of the case, passing a ruling or conclusion, and adopting other decisions. 3. While considering a case, the Constitutional Court must directly investigate evidence: it must listen to the explanations of the parties to the case (…) 5. Only parties to the case, their representatives, witnesses, experts and invited specialists or officials may speak in the Court on the issue. 6. In cases where no party or their representatives who have been summoned come to the Court hearing, the judicial hearing shall be held in a free form.
Poland	Article 59 Constitutional Court Act 1. The Tribunal shall, at a hearing, examine applications in cases specified in Article 2.2. The Tribunal may, at a sitting in camera, examine a complaint concerning constitutional infringements if, from the pleadings submitted by the participants in the proceedings in writing, it results without dispute that the normative act, on the basis of which a court or organ of public adminis-tration has made a final decision in respect of freedoms or rights or obligations of the person making the complaint, is in non-conformity to the Constitution. The decision given in this procedure shall be subject to publication.
Russian Federa-tion	Article 62 Federal Constitutional Law on the Constitutional Court In conformity with the procedure established by the decision of the Constitutional Court of the Russian Federation the presiding Judge shall propose to the parties to give explanations on the merits of the question under consideration and to adduce legal arguments to prove their position.
Serbia	Article 31 Law on the Constitutional Court Participant in proceedings is entitled to present and explain his/her position and reasons during the procedure, as well as to answer the claims and reasons of other participants in the procedure Article 38 Law on the Constitutional Court All participants in proceedings are summoned to public hearing, in order to express their positions and provide necessary information.
Slovakia	Article 30 Law on the Organisation of the Constitutional Court 1. Matters examined by the Constitutional Court in accordance with Articles 125, 125a, 126, 127, 127a, 129.4 and 129.5 of the Constitution are conducted by oral hearing. 2. The Constitutional Court may, with the consent of the parties to proceedings, waive the oral hearing if there are reasonable grounds to believe that it would not bring any clarification of the examined case 3. The right to attend oral hearings applies to the parties to proceedings and their representatives.
Slovenia	Article 36 Constitutional Court Act (1) The Constitutional Court invites to public hearings the participants in proceedings, represen-tatives, and persons authorised by the participants in proceedings, as well as other persons whose presence at the public hearing is deemed necessary.
South Africa	Rule 11(4) Rules of the Constitutional Court When an applications is placed before the Chief Justice… he or she shall give directions as to how the application shall be dealt with and, in particular, as to whether it shall be set down forhearing or whether it shall be dealt with on the basis of written argument.
Spain	Article 52 Organic Law on the Constitutional Court 1. On receipt of the court records and on expiry of the notification period, the Division shall transmit the records to the originator of the appeal for protection, the parties who appeared in the proceedings, the Government Advocate in cases involving the public Administration, and the Office of the Public Prosecutor. The hearing shall take place within a period applicable to all parties of not more than twenty days during which pertinent arguments may be put forward. *2. Presentadas las alegaciones o transcurrido el plazo otorgado para efectuarlas, la Sala podrá*

State	Relevant constitutional or legal provision
	deferir la resolución del recurso, cuando para su resolución sea aplicable doctrina consolidada del Tribunal Constitucional, a una de sus Secciones o señalar día para la vista, en su caso, o deliberación y votación. *3. La Sala, o en su caso la Sección, pronunciará la sentencia que proceda en el plazo de 10 días a partir del día señalado para la vista o deliberación.*
Switzer-land	Article 57 Federal Judicature Act Le président de la cour peut ordonner des débats.
United States	U.S. Supreme Court Rule 28 1. Oral argument should emphasise and clarify the written arguments in the briefs on the merits. Counsel should assume that all Justices have read the briefs before oral argument. Oral argument read from a prepared text is not favoured. 2. The petitioner or appellant shall open and may conclude the argument. […] 3.Unless the Court directs otherwise, each side is allowed one-half hour for argument.

1.1.10 Table: Suspension of implementation

State	Relevant constitutional or legal provision
Albania	Article 45 Law on the Organisation and Functioning of the Constitutional Court 1. The Constitutional Court, of its own motion or at the request of either of the parties, when it considers that the implementation of the law or normative act at issue may have consequences on state, social or individual interests, upon the decision of the meeting of judges or at the plenary hearing, may decide to suspend the relevant law or normative act. The suspension lasts until the final decision of the Constitutional Court is enforced.
Andorra	Article 88 (1) Qualified Law on the Constitutional Court The appellant asks the Court to set the decision aside and also, where applicable, to suspend its effects, by reiterating the claim for judicial protection of the right in question, the breach of which shall be presented in the same terms as before the ordinary court. Article 4.2 Qualified Law on the Constitutional Court The jurisdiction of the Constitutional Court takes priority over that of the ordinary courts. A case which has been brought before the Constitutional Court cannot at the same time be examined by another court. Where the Constitutional Court declares admissible a case which has first been brought before an ordinary court that court ceases to deal with it.
Armenia	Article 34 of the Law "On the Constitutional Court" of the Republic of Armenia 1. By the initiative of the applicant or the Constitutional Court, after the case is admitted, the Constitutional Court shall suspend the application of the legal act, the constitutionality of which is challenged, if the absence of such decision on suspension can cause irretrievable or harmful consequences to the applicant or the society. 2. The decision on suspension of the arguable legal act gets into force after its publication. The public is immediately informed on that by the means of Mass Media and the Public Television and Radio release the relevant information.
Austria	Article 85 Federal Law on the Constitutional Court 1.The complaint shall not have suspensory effect. 2. Upon application by the appellant the Constitutional Court, by its decision, shall confer suspensory effect on the complaint, provided that there are no pressing reasons in the public interest why it should not do so and that, after all the conflicting legal interests concerned have been taken into consideration, the appellant would sustain disproportionate harm as a result of the implementation or exercise by a third party of the right conferred by the administrative decree. Where the conditions which determined the decision as to the suspensory effect of the complaint have fundamentally changed the Court will have to give a fresh decision upon application by the appellant, the administrative authority (Article 83, subparagraph 1) or any persons interested on any other basis.
Belgium	Article 19 Special Law on the Court At the request of the applicant, the Court may, by a reasoned decision, suspend in full or in part a statute, decree or rule referred to in Article 134 of the Constitution against which an action for annulment has been brought. Article 20 Without prejudice to Article 16 ter of the Special Law on Institutional Reforms of 8 August 1980 and Article 5 ter of the Special Law of 12 January 1989 on the Brussels institutions, the decision to suspend may be made only where:

State	Relevant constitutional or legal provision
	1. serious grounds are invoked and provided the immediate enforcement of the statute, decree or rule referred to in Article 134 of the Constitution against which the action has been brought is likely to occasion serious damage which is not readily redressable; 2. the action is brought against a provision which is identical or similar to a provision which has already been annulled by the Constitutional Court and which was enacted by the same legislator.
Croatia	Article 45 Constitutional Law on the Constitutional Court The Constitutional Court may, until the final decision, temporarily suspend the execution of the individual decisions or actions undertaken on the grounds of the law or the other regulation, the constitutionality respective the legality of which is being reviewed, if their execution might cause grave and irreparable consequences." Article 67 Constitutional Act on the Constitutional Court: " (1) The constitutional complaint, as a rule, does not prevent the application of the disputed act. (2) The Constitutional Court may, on the proposal of the applicant, postpone the execution of court of justice decision until the decision is made, if the execution would cause to the applicant such damage, which could hardly be repaired, and the postponement is not contrary to the public interest nor would the postponement cause to anyone greater damage.
Czech Repub-lic	Article 79 Constitutional Court Act (1) Constitutional complaints shall not have suspensive effect. A petition under Article 73 para. 1, appealing from a decision dissolving a political party or disallowing its activities, shall have suspenseful effect. (2) Upon a motion of the complainant, the Court may suspend the enforceability of a contested decision, if such would not be inconsistent with important public interests and so long as the complainant would suffer, due to the enforcement of the decision or the exercise of the right granted to a third person by the decision, a disproportionately greater detriment than that which other persons would suffer while enforceability is suspended". Article 80: "(1) If a constitutional complaint is directed at some encroachment of a public authority other than a decision by it, then in order to avert threatened serious harm or detriment, in order to forestall a threatened intervention by force, or from some other weighty public interest, the Court may enjoin the public authority from continuing in its actions ("provisional measures").
Denmark	§63 Constitution (1) The courts of justice shall be empowered to decide any question relating to the scope of the executive's authority; though any person wishing to question such authority shall not, by taking the case to the courts of justice, avoid temporary compliance with orders given by the executive authority.
Estonia	§12 Constitutional Review Court Act On the basis of a reasoned application of a participant of the proceedings or on its own motion the Supreme Court may suspend the entry into force of a contested legislation of general application or a provision thereof or of an international agreement, until the entry into force of the Supreme Court judgment.
France	Article 62 Constitution A provision declared unconstitutional on the basis of article 61 shall be neither promulgated nor implemented. A provision declared unconstitutional on the basis of article 61-1 shall be repealed as of the publication of the said decision of the Constitutional Council or as of a subsequent date determined by said decision. The Constitutional Council shall determine the conditions and the limits according to which the effects produced by the provision shall be liable to challenge. No appeal shall lie from the decisions of the Constitutional Council. They shall be binding on public authorities and on all administrative authorities and all courts.
Georgia	Article 25 Law on the Constitutional Court 5. If the Constitutional Court considers that the effects of the normative act are causing irreparable harm to one party it shall suspend the action of the disputed act before taking a final decision.
Germany	Article 93d Law on the Federal Constitutional Court 2. As long as and in so far as the panel has not decided on the acceptance of the complaint of unconstitutionality, the chamber may take all decisions involving the complaint proceedings. A temporary injunction wholly or partly suspending the application of a law may only be issued by the panel; Article 32 (7) above shall remain unaffected. The panel shall also decide in the cases described in Article 32 (3) above. Article 32 Law on the Federal Constitutional Court 1. In a dispute the Federal Constitutional Court may deal with a matter provisionally by means of a temporary injunction if this is urgently needed to avert serious detriment, to ward off imminent force or for any other important reason for the common weal.

State	Relevant constitutional or legal provision
	2. The temporary injunction may be issued without oral pleadings. In particularly urgent instances, the Federal Constitutional Court need not give the parties to the principal proceedings, the parties entitled to join them or the parties entitled to make a statement an opportunity to make a statement. 3. If the temporary injunction is issued or refused by an order, a protest may be lodged. This shall not apply to the complainant in proceedings on a complaint of unconstitutionality. The Federal Constitutional Court shall decide on the protest after oral pleadings. These must be held within two weeks of receiving the reasons for the protest. 4. A protest against a temporary injunction shall not have any suspensive effect. The Federal Constitutional Court may stay the execution of the tem porary injunction. 5. The Federal Constitutional Court may announce the decision on the tem porary injunction or the protest without giving reasons. In this case the reasons shall be transmitted separately to the parties involved. 6. The temporary injunction shall cease to have effect after six months. It may be renewed with a majority of two thirds of the votes. 7. If a panel does not have a quorum, a temporary injunction may be issued in particularly urgent cases if at least three judges are present and the decision is taken unanimously. It shall cease to have effect after one month. If it is confirmed by the panel, it shall cease to have effect six months after the date of issue.
Greece	Article 50 Law establishing a Special Highest Court 3. Any court which has pending before it a case requiring the application of the provisions of a law concerning which litigation is pending before the Special Court as provided in Article 48, shall, after learning of such litigation by any means whatsoever, of its own motion refrain from delivering a final judgment until the Special Court has ruled.
Latvia	Article 19.2 Law on the Constitutional Court 5. Submitting of the constitutional claim does not suspend the execution of the court decision, with an exception of cases when the Constitutional Court has ruled otherwise.
Liechten stein	Article 52 Constitutional Court Act 1) Petitions to the Constitutional Court shall not suspend the act complained of. 2) Upon application of the party, the chairman may rule that individual complaints (article 15) shall suspend the act complained of, unless compelling public interests countervail and if the execution would result in a disproportionate burden upon the complainant.
Lithua-nia	Article 106 paragraph 4 Constitution of the Republic of Lithuania The presentation by the President of the Republic for the Constitutional Court or the resolution of the Seimas asking for an investigation into the conformity of an act with the Constitution shall suspend the validity of the act.
Monte-negro	Article 63 Draft Law on the Constitutional Court Constitutional complaint shall not preclude implementation of the individual act against which it was lodged.
Poland	Article 50 Constitutional Tribunal Act 1. The Tribunal may issue a preliminary decision to suspend or stop the enforcement of the judgment in the case to which the complaint refers if the enforcement of the said judgment, decision or another ruling might result in irreversible consequences linked with great detriment to the person making the complaint or where a vital public interest or another vital interest of the person making the complaint speaks in favour thereof.
Russia	Article 42 Federal Constitutional Law on the Constitutional Court In the events of urgency the Constitutional Court of the Russian Federation may propose to the respective bodies and officials that they suspend the disputed act, the process of entry of the contested international treaty of the Russian Federation into force until the Constitutional Court of the Russian Federation has completed the consideration of the case.
Serbia	Article 56 Law on the Constitutional Court In the course of procedure, until the issuing of a final decision, the Constitutional Court may suspend the enforcement of an individual act or action taken on the basis of the general act whose constitutionality or legality are being assessed, where such enforcement could cause irreversible detrimental consequences.
Slovakia	Article 52 Law on the Organisation of the Constitutional Court 1. The filing of a complaint shall not have any suspensive effect. 2. The Constitutional Court may decide on an interim measure based on the complainant´s motion on interim measure and it may suspend the execution of the challenged final decision, measure or

State	Relevant constitutional or legal provision
	other encroachment so long as this does not conflict with important public interest, and so long as the execution of the challenged decision, measure or other encroachment entails the complainant greater damage than that which other persons might incur if the enforceability is suspended; in particular the Court shall impose on the authority which in the complainant´s opinion has violated his/her fundamental rights or freedoms the duty temporarily to desist from execution of the final decision, measure, or other encroachment, and the Constitutional Court shall impose the duty on third parties temporarily to desist from applying their rights, as recognized by means of a final decision, measure, or other encroachment. 3. The interim measure shall expire at the latest with the day when the decision on merit becomes final, unless the Constitutional Court decides to annul the interim measure earlier. 4. The interim measure may be quashed without any motion, should the reasons lapse for which it was imposed.
Slovenia	Article 39 Constitutional Court Act (1) Until a final decision, the Constitutional Court may suspend in whole or in part the implementation of a law, other regulation, or general act issued for the exercise of public authority if difficult to remedy harmful consequences could result from the implementation thereof. (3) If the Constitutional Court suspends the implementation of a regulation or general act issued for the exercise of public authority, it may at the same time decide in what manner the decision is to be implemented. Article 58 If a constitutional complaint is accepted, the panel or the Constitutional Court may suspend the implementation of the individual act which is challenged by the constitutional complaint at a closed session if difficult to remedy harmful consequences could result from the implementation thereof.
South Africa	Article 172(2)(b) Constitution of the Republic of South Africa A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief… Article 172(1)(b) Constitution of the Republic of South Africa When deciding on a constitutional matter within its power, a court may make any order that is just and equitable.
Spain	Article 56 Organic Law on the Constitutional Court *1. La interposición del recurso de amparo no suspenderá los efectos del acto o sentencia impugnados.* *2. Ello no obstante, cuando la ejecución del acto o sentencia impugnados produzca un perjuicio al recurrente que pudiera hacer perder al amparo su finalidad, la Sala, o la Sección en el supuesto del artículo 52.2, de oficio o a instancia del recurrente, podrá disponer la suspensión, total o parcial, de sus efectos, siempre y cuando la suspensión no ocasione perturbación grave a un interés constitucionalmente protegido, ni a los derechos fundamentales o libertades de otra persona.* *3. Asimismo, la Sala o la Sección podrá adoptar cualesquiera medidas cautelares y resoluciones provisionales previstas en el ordenamiento, que, por su naturaleza, puedan aplicarse en el proceso de amparo y tiendan a evitar que el recurso pierda su finalidad.* *4. La suspensión u otra medida cautelar podrá pedirse en cualquier tiempo, antes de haberse pronunciado la sentencia o decidirse el amparo de otro modo. El incidente de suspensión se sustanciará con audiencia de las partes y del Ministerio Fiscal, por un plazo común que no excederá de tres días y con el informe de las autoridades responsables de la ejecución, si la Sala o la Sección lo creyera necesario. La Sala o la Sección podrá condicionar la denegación de la suspensión en el caso de que pudiera seguirse perturbación grave de los derechos de un tercero, a la constitución de caución suficiente para responder de los daños o perjuicios que pudieran originarse.* *5. La Sala o la Sección podrá condicionar la suspensión de la ejecución y la adopción de las medidas cautelares a la satisfacción por el interesado de la oportuna fianza suficiente para responder de los daños y perjuicios que pudieren originarse. Su fijación y determinación podrá delegarse en el órgano jurisdiccional de instancia.* *6. En supuestos de urgencia excepcional, la adopción de la suspensión y de las medidas cautelares y provisionales podrá efectuarse en la resolución de la admisión a trámite.* *Dicha adopción podrá ser impugnada en el plazo de cinco días desde su notificación, por el Ministerio Fiscal y demás partes personadas. La Sala o la Sección resolverá el incidente mediante auto no susceptible de recurso alguno.*
Switzer-land	Article 103 Federal Judicature Act 1. En règle générale, le recours n’a pas d’effet suspensif. 3. Le juge instructeur peut, d’office ou sur requête d’une partie, statuer différemment sur l’effet suspensif.

State	Relevant constitutional or legal provision
"The Former Yugoslav Republic of Macedonia"	Article 57 Rules of Procedure of the Constitutional Court During the proceedings, the Constitutional Court may pass a resolution to suspend the execution of the individual act or action until a final judgment has been adopted. Article 27 Rules of Procedure of the Constitutional Court "The Constitutional Court may, during the procedure, until the adoption of a final decision, take a resolution ordering the suspension of the execution of certain acts or activities which are undertaken on the basis of a law, other regulation or a general act whose constitutionality or legality is being assessed, if the consequences arising from its execution could not be easily eliminated".
Turkey	There is no explicit legal regulation yet, but the Constitutional Court decided in 1993 that it may suspend the application of the challenged legal act if the absence of such suspension can cause irreparable and harmful consequences and if the act challenged seems manifestly unconstitutional. It could be considered that the Constitutional Court will extend this considerations to the newly created individual constitutional complaint.
United States	U.S. Supreme Court Rule 23 2. A party to a judgment sought to be reviewed may present to a Justice an application to stay the enforcement of that judgment.

1.1.11 Table: Stay of ordinary proceedings

State	Relevant constitutional or legal provision
Albania	Article 68 Law on the Organisation and Functioning of the ConstitutionalCourt 1.When a court of any instance or a trial judge considers during the trial ex officio or at the request of either party involved that a certain law is unconstitutional and if there is a direct link between the law and the solution of the case at hand, that particular law shall not be applied in the case at hand and after suspending the trial the judge shall refer the file to the Constitutional Court, which on its side should deliver its verdict as to the constitutionality of the said law.
Andorra	Article 4 Qualified Law on the Constitutional Court: "2. The jurisdiction of the Constitutional Court takes priority over that of the ordinary courts. A case which has been brought before the Constitutional Court cannot at the same time be examined by another court. Where the Constitutional Court declares admissible a case which has first been brought before an ordinary court that court ceases to deal with it". Article 55.2 Qualified Law on the Constitutional Court 2. The main case or interlocutory matter, as appropriate, follows its course until the judgment or resolution stage, at which point the procedure is frozen until the Constitutional Court has pronounced the decree resolving the matter or decision. If the step which led to the proceedings being brought before the Constitutional Court concerns the setting aside of actions, no decision on the principal cause may be taken until the Constitutional Court has taken its decision.
Armenia	Article 71 Law on the Constitutional Court: "2. Before applying to Constitutional Court the courts must and the Chief Prosecutor has the right to suspend the given case until the decision of the Constitutional Court gets into force".
Belgium	Art. 30 of the Special Law on the Court A decision to refer a question to the Constitutional Court for a preliminary ruling shall have the effect of suspending the proceedings and the time lim its for proceedings and limitation periods from the date of that decision until the date on which the ruling of the Constitutional Court is notified to the court of law that posed the preliminary question. A copy of the ruling shall be sent to the parties.
Chile	Article 94 Constitution [The Chamber] shall be competent to decide on the suspension of the proceeding in which the action of inapplicability due to unconstitutionality originated.
Croatia	Article 37 Constitutional Law on the Constitutional Court: "(1) If a court of justice in its proceedings determines that the law to be applied, or some of its provisions, are not in accordance with the Constitution, it shall stop the proceedings and present a request with the Constitutional Court to review the constitutionality of the law, or some of its provisions".
France	Article 23-3 de la Loi organique n°2009-1523 du 10 décembre 2009 relative à l'applic ation de l'article 61-1 de la Constitution. «Lorsque la question est transmise, la juridiction sursoit à statuer jusqu'à réception de la décision du Conseil d'État ou de la Cour de cassation ou, s'il a été saisi, du Conseil constitutionnel.

State	Relevant constitutional or legal provision
	Le cours de l'instruction n'est pas suspendu et la juridiction peut prendre les mesures provisoires ou conservatoires nécessaires. *Toutefois, il n'est sursis à statuer ni lorsqu'une personne est privée de liberté à raison de l'instance, ni lorsque l'instance a pour objet de mettre fin à une mesure privative de liberté. La juridiction peut également statuer sans attendre la décision relative à la question prioritaire de constitutionnalité si la loi ou le règlement prévoit qu'elle statue dans un délai déterminé ou en urgence. Si la juridiction de première instance statue sans attendre et s'il est formé appel de sa décision, la juridiction d'appel sursoit à statuer. Elle peut toutefois ne pas surseoir si elle est elle-même tenue de se prononcer dans un délai déterminé ou en urgence.* *En outre, lorsque le sursis à statuer risquerait d'entraîner des conséquences irrémédiables ou manifestement excessives pour les droits d'une partie, la juridiction qui décide de transmettre la question peut statuer sur les points qui doivent être immédiatement tranchés.Si un pourvoi en cassation a été introduit alors que les juges du fond se sont prononcés sans attendre la décision du Conseil d'État ou de la Cour de cassation ou, s'il a été saisi, celle du Conseil constitutionnel, il est sursis à toute décision sur le pourvoi tant qu'il n'a pas été statué sur la question prioritaire de constitutionnalité. Il en va autrement quand l'intéressé est privé de liberté à raison de l'instance et que la loi prévoit que la Cour de cassation statue dans un délai déterminé».*
Germany	Article 100 Constitution (1) Where a court considers that a law on whose validity its ruling depends is unconstitutional it shall stay the proceedings and, if it holds the constitution of a Land to be violated, seek a ruling from the Land court with jurisdiction for constitutional disputes or, where it holds this Basic Law to be violated, from the Federal Constitutional Court.
Georgia	Article 19 Organic Law of Georgia on the Constitutional Court 2. if, while considering a particular case, a court of general jurisdiction concludes, that there is a sufficient ground to deem the law or other normative act, applicable by the court while adjudicating upon the case, fully or partially incompatible with the Constitution, the court shall suspend the consideration of the case and apply to the Constitutional Court. The consideration of the case shall be resumed after a judgment on the issue is adopted by the Constitutional Court. (12.02.02 №1264)
Greece	Article 48 Law establishing a Special Highest Court […]The case shall furthermore remain pending before the court requesting the preliminary ruling which, upon delivery of the Special Court's ruling, shall try the case again at the request of one of the parties or of its own motion, it being compelled to abide by the ruling of the Special Court which shall be transmitted to it by the Registrar of the Special Court.
Hungary	Article 38 Act on the Constitutional Court 1. A judge shall initiate the proceedings of the Constitutional Court while suspending the judicial process if he/she in the course of any pending case, he/she considers unconstitutional the legal rule or other legal means of the State control which he/she needs to apply.
Italy	Section 23 Law on the composition and procedures of the Constitutional Court If the case cannot be tried without first resolving the question of constitutionality, or if the trial court does not consider that the question of constitutionality raised is groundless, it shall issue an order referring the matter immediately to the Constitutional Court, setting out the terms and the reasons for raising the question of constitutionality, and shall suspend trial proceedings.
Latvia	Article 19.2 Law on the Constitutional Court 3. […] Initiating a case at the Constitutional Court means the civil, criminal or administrative case shall not be reviewed at the court of general jurisdiction to the time of announcement of a Constitutional Court Judgment.
Liechten-stein	Article 18 1) Constitutional Court Act: "The Constitutional Court shall decide on the constitutionality of laws or individual legislative provisions: b) on application of a court, if and to the extent that the court has to apply a law or individual provisions thereof (on the basis of precedent) that it be lieves to be unconstitutional in a matter pending before it and the court has decided to interrupt the proceedings to request a ruling by the Constitutional Court".
Lithua-nia	Article 67 Law on the Constitutional Court of the Republic of Lithuania Provided that there are grounds to consider that a law or other legal act, which shall be applicable in a concrete case, fails to conform with the Constitution, the court (judge) shall suspend the examination of said case and, with regard to the competence of the Constitutional Court, shall appeal to it with a petition to decide whether the said law or other legal act is in conformity with the Constitution.

State	Relevant constitutional or legal provision
Luxem-burg	Article 7 Law on the Organisation of the Constitutional Court The decision to put a preliminary question to the Constitutional Court suspends the proceedings and all procedural time limits or limitation periods from the date of the decision up to the date on which the referring court receives the Constitutional Court's ruling on the preliminary question.
Russian Federa-tion	Article 98 Federal Law on the Constitutional Court The Constitutional Court of the Russian Federation having taken up the complaint on the violation by the law of the constitutional rights and freedoms of citizens for the consideration shall notify about that the court or other body which considers the case in which the appealed law has been applied or ought to be applied. Such notification does not entail the suspension of the proceedings on the case. The court or other body which considers the case in which the appealed law has been applied or ought to be applied may suspend the proceedings pending the passing of the judgment of the Constitutional Court of the Russian Federation. Article 103 Consequences of the Submission of Requests During the period from the time when the court hands down a decision to petition the Constitu-tional Court of the Russian Federation and until the adoption of a ruling by the Constitutional Court of the Russian Federation, proceedings on the case or the implementation of the decision handed down by the court on the case shall be suspended.
Slovenia	Article 156 Constitution If a court deciding some matter deems a law which it should apply to be unconstitutional, it must stay the proceedings and initiate proceedings before the Constitutional Court. The proceedings in the court may be continued after the Constitutional Court has issued its decision. Article 23 Constitutional Court Act (1) When in the process of deciding a court deems a law or part thereof which it should apply to be unconstitutional, it stays the proceedings and by a request initiates proceedings for the review of its constitutionality. (2) If the Supreme Court deems a law or part thereof which it should apply to be unconstitutional, it stays proceedings in all cases in which it should apply such law or part thereof in deciding on legal remedies and by a request initiates proceedings for the review of its constitutionality. (3) If by a request the Supreme Court initiates proceedings for the review of the constitutionality of a law or part thereof, a court which should apply such law or part thereof in deciding may stay proceedings until the final decision of the Constitutional Court without having to initiate proceedings for the review of the constitutionality of such law or part thereof by a separate request.
South Africa	Section 172(2)(b) Constitution of the Republic of South Africa A court which makes an order of constitutional invalidity … may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
Spain	Article 35 Organic Law on the Constitutional Court *2. El órgano judicial sólo podrá plantear la cuestión una vez concluso el procedimiento y dentro del plazo para dictar sentencia, o la resolución jurisdiccional que procediese, y deberá concretar la ley o norma con fuerza de ley cuya constitucionalidad se cuestiona, el precepto constitucional que se supone infringido y especificar o justificar en qué medida la decisión del proceso depende de la validez de la norma en cuestión. Antes de adoptar mediante auto su decisión definitiva, el órgano judicial oirá a las partes y al Ministerio Fiscal para que en el plazo común e improrrogable de 10 días puedan alegar lo que deseen sobre la pertinencia de plantear la cuestión de inconsti-tucionalidad, o sobre el fondo de esta; seguidamente y sin más trámite, el juez resolverá en el plazo de tres días. Dicho auto no será susceptible de recurso de ninguna clase. No obstante, la cuestión de in constitucionalidad podrá ser intentada de nuevo en las sucesivas instancias o grados en tanto no se llegue a sentencia firme.*
"The Former Yugoslav Repub-lic of Mace-donia"	Article 17 Law on the Courts When the court finds that the Law that is to be applied in the specific case is not in accordance with the Constitution, and the constitutional provisions cannot be directly applied, will stay the procedure until the Constitutional Court delivers a decision. The party has a right to an appeal against the decision for stay of the procedure
Ukraine	Article 83 Law on the Constitutional Court When, in the process of examination of cases under general court procedure, a dispute concerning the constitutionality of norms of a law which is being applied by the court arises, the examination of the case shall be suspended.

1.1.12 Table: Injunctive measures

State	Relevant constitutional or legal provision
Germany	Article 32 Law on the Federal Constitutional Court: "1.In a dispute the Federal Constitutional Court may deal with a matter provisionally by means of a temporary injunction if this is urgently needed to avert serious detriment, to ward off imminent force or for any other important reason for the common weal. 2. The temporary injunction may be issued without oral pleadings. In particularly urgent instances, the Federal Constitutional Court need not give the parties to the principal proceedings, the parties entitled to join them or the parties entitled to make a statement an opportunity to make a statement. 3. If the temporary injunction is issued or refused by an order, a protest may be lodged. This shall not apply to the complainant in proceedings on a complaint of unconstitutionality. The Federal Constitutional Court shall decide on the protest after oral pleadings. These must be held within two weeks of receiving the reasons for the protest. 4. A protest against a temporary injunction shall not have any suspensive effect. The Federal Constitutional Court may stay the execution of the temporary injunction".
Liechten-stein	Article 53 Constitutional Court Act 1) Upon the request of a party and subject to the conditions specified in article 52 paragraph 2, the chairman may order such preliminary measures for the duration of the proceedings as appear nec-essary to regulate an existing situation in the interim or to preserve endangered legal circumstances.
Malta	Article 4 European Convention Act 2. The Civil Court, First Hall, shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection 1 of this section, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement, of the Human Rights and Fundamental Freedoms to the enjoyment of which the person concerned is entitled.
South Africa	Section 172(2)(b) Constitution of the Republic of South Africa A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct. Article 172(1)(b) of the Constitution of the Republic of South Africa When deciding on a constitutional matter within its power, a court may make any order that is just and equitable.
Slovenia	Article 39 Constitutional Court Act (1) Until a final decision, the Constitutional Court may suspend in whole or in part the implemen-tation of a law, other regulation, or general act issued for the exercise of public authority if difficult to remedy harmful consequences could result from the implementation thereof. (2) If a participant in proceedings motions for a suspension referred to in the preceding paragraph, and the Constitutional Court deems the conditions for the suspension not to be fulfilled, it dismisses the motion by an order. If the Constitutional Court does not decide otherwise, the state-ment of reasons of the order by which the motion was dismissed includes only a statement of the legal basis for the adoption of the decision and the composition of the Constitutional Court. (3) If the Constitutional Court suspends the implementation of a regulation or general act issued for the exercise of public authority, it may at the same time decide in what manner the decision is to be implemented. (4) An order by which the implementation of a regulation or general act issued for the exercise of public authority is suspended must include a statement of reasons. (5) The order referred to in the preceding paragraph is published in the Official Gazette of the Republic of Slovenia as well as in the official publication in which the respective regulation or general act issued for the exercise of public authority was published. Such suspension takes effect the day following the publication of the order in the Official Gazette of the Republic of Slovenia, and in case of a public announcement of the order, the day of its announcement. Article 58 If a constitutional complaint is accepted, the panel or the Constitutional Court may suspend the implementation of the individual act which is challenged by the constitutional complaint at a closed session if difficult to remedy harmful consequences could result from the implementation thereof.
Switzer-land	Article 104 Federal Judicature Act Le juge instructeur peut, d'office ou sur requête d'une partie, ordonner les mesures provisionnelles nécessaires au maintien de l'état de fait ou à la sauvegarde d'intérêts menacés.

1.1.13 Table: Extension of norms under review

State	Relevant constitutional or legal provision
Armenia	Article 68 of the Law On the Constitutional Court of the Republic of Armenia 9. While determining the constitutionality of any general act mentioned in Paragraph 1 of Article 100 of the Constitution the Constitutional Court together with the challenged provision of the act finds out the constitutionality of any other provision of the act from the perspective of systematic interrelation of those. If the findings of the Court prove that other provisions of the act are interrelated with the challenged provisions and are not in conformity with the Constitution, the Constitutional Court can determine those provisions also invalid and unconstitutional.
Croatia	Article 38 of the Constitutional Act on the Constitutional Court : (2)"The Constitutional Court itself may decide to institute proceedings to review the constitutionality of the law and the review of constitutionality and legality of other regulations" Article 71 Constitutional Act on the Constitutional Court (1) The Chamber, respective the Session of the Constitutional Court shall examine only the violations of constitutional rights which are stated in the constitutional complaint." But: Article 74:"If ascertained that the constitutional right of the applicant has been violated not only by the disputed, but also by some other act brought in this matter, the Constitutional Court shall repeal by the decision, as a whole or in part, and this act as well.
Liechtenstein	Article 19 Constitutional Court Act 1) If the Constitutional Court finds that a law or individual provisions thereof are incompatible with the Constitution, it shall annul the law or the relevant provisions. If further provisions of the law that are directly connected therewith are incompatible with the Constitution for the same reasons, the Constitutional Court may also annul them ex officio without an application.
Moldova	Article 6 Code of constitutional jurisdiction 3) During the constitutional control of contested act Constitutional Court can adopt a decision concerning other normative acts which constitutionality depend fully or partially on constitutionality of the contested act.
Serbia	Article 54 Law on the Constitutional Court In the procedure of assessing constitutionality and legality, the Constitutional Court is not constrained by the request of the authorised propounder, or initiator.
Slovenia	Article 30 Constitutional Court Act In deciding on the constitutionality and legality of a regulation or general act issued for the exercise of public authority, the Constitutional Court is not bound by the proposal of a request or petition. The Constitutional Court may also review the constitutionality and legality of other provisions of the same or other regulation or general act issued for the exercise of public authority for which a review of constitutionality or legality has not been proposed, if such provisions are mutually related or if such is necessary to resolve the case. Article 59 (1) By a decision the Constitutional Court either dismisses a constitutional complaint as unfounded or grants such and in whole or in part annuls or abrogates the individual act, and remands the case to the authority competent to decide thereon. (2) If the Constitutional Court deems that the challenged individual act is based on a potentially unconstitutional or unlawful regulation or general act issued for the exercise of public authority, it initiates proceedings for the review of the constitutionality or legality of such regulation or general act issued for the exercise of public authority and decides by applying the provisions of Chapter IV of this Act.
"The Former Yugoslav Republic of Macedonia"	Article 14 Rules of Procedure of the Constitutional Court: During the examination of the constitutionality of a law or of the constitutionality and legality of a regulation or other common act, the Constitutional Court may also assess the constitutionality and legality of a regulation or other general act that is not challenged in the petition.
Turkey	Article 29 of the Law on the Organisation and Trial Proceedings of the Constitutional Court: The Constitutional Court may extend the scope of norms under review only in exceptional cases where the annulment of the originally challenged norms renders another norm and/or part of the norm meaningless or inapplicable; norms may also be omitted from the text with due reasoning.
Ukraine	Article 61 Law on the Constitutional Court: If consideration of the case arising from constitutional claim or constitutional petition reveals the non-conformity with the Constitution of Ukraine of legal acts (their separate parts) other than those for which an examination has been opened and which influences the adoption of a decision or the providing of an opinion in the case, the Constitutional Court of Ukraine recognises such legal acts (their separate parts) as unconstitutional.

1.1.14 Table: *Erga omnes* effect

State	Relevant constitutional or legal provision
Albania	Article 132 (1) Constitution: "The decisions of the Constitutional Court have general binding force and are final".
Argen-tina	No precedent; decisions concern only concrete case, even by Supreme Court; however, precedent is informally established in practice.
Armenia	Article 61 Law on the Constitutional Court 5. The decisions of the Constitutional Court on the substance of the case are mandatory for all the state and local self-government bodies, their officials as well as for the natural and legal persons in the whole territory of the Republic of Armenia. 6. The procedural decisions of the Constitutional Court are mandatory for all the participants of the case and other addressees of those. Article 69 Law on the Constitutional Court 12. In cases defined by this Article if the Constitutional Court decision finds the challenged provision unconstitutional and annuls it, the final judicial act shall be revisited in the order prescribed by Law.
Austria	Article 139 Constitution (6) If an ordinance has been rescinded on the score of illegality or if the Constitutional Court has pursuant to para. 4 above pronounced an ordinance to be contrary to law, all courts and administrative authorities are bound by the Court's decision, the ordinance shall however continue to apply to the circumstances effected before the rescission, the case in point excepted, unless the Court in its rescissory judgment decides otherwise. If the Court has in its rescissory judgment set a deadline pursuant to para. 5 above, the ordinance shall apply to all the circumstances effected, the case in point excepted, till the expiry of this deadline. Article 140 (7) If a law has been rescinded on the score of unconstitutionality or if the Constitutional Court has pursuant to para. 4 above pronounced a law to be unconstitutional, all courts and administrative authorities are bound by the Court's decision. The law shall however continue to apply to the circumstances effected before the rescission the case in point excepted, unless the Court in its rescissory judgment decides otherwise. If the Court has in its rescissory judgment set a deadline pursuant to para. 5 above, the law shall apply to all the circumstances effected, the case in point excepted till the expiry of this deadline.
Azerbai-jan	Article 66 Law on the Constitutional Court. Legal Force of Resolutions of Constitutional Court 66.1. According to Article 130.9 of the Constitution of Azerbaijan Republic, the resolutions of Constitutional Court shall have binding force through out the territory of Azerbaijan Republic.
Belgium	Article 9 Special Law on the Court 1. Judgments of annulment delivered by the Constitutional Court shall have force of res judicata commencing from their publication in the Moniteur belge. 2. Judgments delivered by the Constitutional Court which dismiss an action for annulment shall be binding on the courts in respect of questions of law settled by such judgments. Article 28 The court which raised the preliminary issue, and any other court called upon to rule on the same matter, shall, in settling the dispute which gave rise to the questions referred to in Article 26, comply with the ruling of the Constitutional Court.
Bosnia and Herze-govina	Article 63 Rules of the Constitutional Court 2. In a decision establishing incompatibility under Article VI.3 (a) and VI.3 (c), the Constitutional Court may quash the general act or some of its provisions, partially or entirely. Article 64 1. In a decision granting an appeal, the Constitutional Court shall quash the challenged decision and refer the case back to the court or to the body which took that decision, for renewed proceedings. If the law regulating the competence for acting in the respective legal matter was amended prior to taking of a decision by the Constitutional Court, the court or the body which took the quashed decision is obligated to refer the case to the competent court or body without delay.
Brazil	Article 52 Constitution It is exclusively the competence of the Federal Senate: X – to stop the application, in full or in part, of a law declared unconstitutional by final decision of the Supreme Federal Court. Article 103-A. The Supreme Federal Court shall have the power to, by own initiative or by provocation, by means of a decision taken by two thirds of their members, after reiterated decisions about constitutional matter, approve summary which, after publication in official gazette, shall have binding effect over the other bodies of the Judiciary Power and over the direct and indirect public administration, at federal, State and municipal levels, as well as proceed to their revision or cancelling, in the manner provided for in law.

State	Relevant constitutional or legal provision
Bulgaria	Article 22 Constitutional Court Act 1. With its decision the Court shall rule only on the motion as presented. It shall not be limited to the indicated grounds for non-conformity with the Constitution. 2. Acts which have been declared unconstitutional shall not be implemented. 3. When an act has been issued by an incompetent organ the Constitutional Court shall declare it null and void. 4. The legal effects which have occurred on the basis of the act set out in paragraph 2 shall be resolved by the organ which has issued it.
Canada	Section 52 of the Supreme Court Act. The Court shall have and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada, and the judgment of the Court is, in all cases, final and conclusive. Only decisions of Supreme Court have erga omnes effect; see http://www.er.uqam.ca/nobel/r31400/jur2515/ndecours/jur2515chap7-2007.pdf
Croatia	Constitutional Act on the Constitutional Court Article 31 (1) The decisions and the rulings of the Constitutional Court are obligatory and every individual or legal person shall obey them. (2) All bodies of the central government and the local and regional self-government shall, within their constitutional and legal jurisdiction, execute the decisions and the rulings of the Constitutional Court.
Czech Repub-lic	Article 89 Constitution. (2) Enforceable decisions of the Constitutional Court are binding on all authorities and persons. Constitutional Court Act Article 82 (3) If it grants the constitutional complaint of a natural or legal person under Article 87 para. 1, lit. d) of the Constitution, the Court shall: a) annul the contested decision of the public authority, or b) if a constitutionally guaranteed fundamental right or basic freedom was infringed as the result of an encroachment by a public authority other than a decision, enjoin the authority from continuing to infringe this right or freedom and order it, to the extent possible, to restore the situation that existed prior to the infringement.
France	Article 62. A provision declared unconstitutional on the basis of article 61 shall be neither promulgated nor implemented. A provision declared unconstitutional on the basis of article 61-1 shall be repealed as of the publication of the said decision of the Constitutional Council or as of a subsequent date determined by said decision. The Constitutional Council shall determine the conditions and the limits according to which the effects produced by the provision shall be liable to challenge. No appeal shall lie from the decisions of the Constitutional Council. They shall be binding on public authorities and on all administrative authorities and all courts.
Germany	Article 94 Constitution (2) The constitution and procedure of the Federal Constitutional Court shall be governed by a federal law which shall specify the cases in which its decisions have the force of law. Article 31 Law on the Federal Constitutional Court 1. The decisions of the Federal Constitutional Court shall be binding upon federal and Land constitutional organs as well as on all courts and authorities. 2. In cases pursuant to Article 13 (6), (11), (12) and (14) above decisions of the Federal Constitutional Court shall have the force of law. This shall also apply in cases pursuant to Article 13 (8a) [constitutional complaint] above if the Federal Constitutional Court declares a law to be compatible or incompatible with the Basic Law or to be null and void. If a law is declared to be compatible or incompatible with the Basic Law or other federal law or to be null and void, the decision shall be published in the Federal Law Gazette by the Federal Ministry of Justice. The above shall apply mutatis mutandis to decisions in cases pursuant to Article 13 (12) and (14) above. Article 79 Law on the Federal Constitutional Court 1. New proceedings may be instituted in accordance with the provisions of the Code of Criminal Procedure against a final conviction based on a rule which has been declared incompatible with the Basic Law or null and void in accordance with Article 78 above or on the interpretation of a rule which the Federal Constitutional Court has declared incompatible with the Basic Law. 2. In all other respects, subject to the provisions of Article 95 (2) below or a specific statutory provision, final decisions based on a rule declared null and void pursuant to Article 78 above shall remain unaffected. The execution of such decision shall not be admissible. Where enforcement is to be effected in accordance with the provisions of the Code of Civil Procedure the provisions

State	Relevant constitutional or legal provision
	of Article 767 of the Code shall apply mutatis mutandis. Claims on account of unjustified benefit shall be excluded. Article 95 Law on the Federal Constitutional Court 1. If the constitutional complaint is upheld, the decision shall state which provision of the Basic Law has been infringed and by which act or omission. The Federal Constitutional Court may at the same time declare that any repetition of the act or omission against which the complaint was directed will infringe the Basic Law. 2. If a constitutional complaint against a decision is upheld, the Federal Constitutional Court shall quash the decision and in cases pursuant to the first sentence of Article 90 (2) above it shall refer the matter back to a competent court. 3. If a constitutional complaint against a law is upheld, the law shall be declared null and void. The same shall apply if a constitutional complaint pursuant to paragraph 2 above is upheld because the quashed decision is based on an unconstitutional law.
Greece	Article 51 Law on the Special Highest Court 1. A decision by the Special Court resolving a dispute concerning assessment of the constitutionality of a law or its interpretation shall have force erga omnes as from its delivery in open court, subject to paragraph 4 of this article.
Hungary	Article 32A Constitution (2) The Constitutional Court shall annul the statutes and other legal norms that it finds to be unconstitutional. Article 27 Law on the Constitutional Court 1. The decision of the Constitutional Court may not be appealed. 2. The decisions of the Constitutional Court shall be binding on everybody.
Ireland	Article 34 (3) Constitution 6° The decision of the Supreme Court shall in all c ases be final and conclusive. 4° No law shall be enacted excepting from the appel late jurisdiction of the Supreme Court cases which involve questions as to the validity of any law having regard to the provisions of this Constitution.
Italy	Article 136 Constitution When the Court declares the constitutional illegitimacy of a law or enactment having the force of law, the law ceases to have effect from the day following the publication of the decision. Article 30, cl. 3 of the Law on the composition and procedures of the Constitutional Court (Law no. 87/1953): Laws declared unconstitutional cannot find application starting from the day following publication of the decision
Korea, Republic	Constitutional Court Act Article 47 (Effect of Decision of Unconstitutionality) (1) Any decision that statutes are unconstitutional shall bind the ordinary courts, other state agencies and local governments.
Liech-tenstein	Article 17 Law on the Constitutional Court 1) If the Constitutional Court finds a violation, by the decision or order of a public authority complained of, of one of the complainant's constitutionally guaranteed rights or of one of his rights guaranteed by international conventions for which the lawmaking power has explicitly recognised an individual right of complaint (article 15 paragraph 2), the Constitutional Court shall annul such decision or order and, if applicable, shall call upon the responsible authority to decide the matter anew. Article 19 Law on the State Court 1) If the Constitutional Court finds that a law or individual provisions thereof are incompatible with the Constitution, it shall annul the law or the relevant provisions. If further provisions of the law that are directly connected therewith are incompatible with the Constitution for the same reasons, the Constitutional Court may also annul them ex officio without an application. Article 54 The decisions of the Constitutional Court shall be binding upon all authorities of the country and of the municipalities as well as upon all courts. In cases according to articles 19, 21 and 23, the judgment of the Constitutional Court shall be universally binding.
Lithua-nia	Article 72 Law on the Constitutional Court Rulings adopted by the Constitutional Court shall have the power of law and shall be binding to all governmental institutions, companies, firms, and organisations as well as to officials and citizens.
Luxem-bourg	Article 15 Law on the organisation of the Constitutional Court: The referring court and any other court called on to deal with the same case shall abide by the Constitutional Court's ruling when determining the case.

State	Relevant constitutional or legal provision
Malta	Article 242 Code of Organisation and Civil Procedure When a court, by a judgment which has become res judicata, declares any provision of any law to run counter to any provision of the Constitution of Malta or to any human right or fundamental freedom set out in the First Schedule to the European Convention act, or to be ultra vires, the registrar shall send a copy of the said judgment to the Speaker of the House of Representatives, who shall during the first sitting of the House following the receipt of such judgment inform the House of such receipt and lay a copy of the judgment on the table of the House.
Moldova	There is no explicit provision on *erga omnes* effect, but according to Article 140 Constitution (1) Laws and other regulations or parts thereof become null and void from the moment that the Constitutional Court passes the appropriate decisions to that effect.
Monte-negro	Article 151 Constitution The decision of the Constitutional Court shall be generally binding and enforceable. Article 62 Draft Law on the Constitutional Court If a human right or freedom guaranteed by the Constitution of more persons was violated by an individual act, and only some of them lodged constitutional complaint, the decision of the Constitutional Court shall also relate to persons who did not lodge the constitutional complaint, provided that they are in the same legal situation.
Mexico	As for judgments by ordinary courts: Art.107 Constitution I. Judgment will always be such that it only will be concerned with particular parties, limited to relief and protection in special cases for those who are making the complaint, without making a general declaration with respect to the law or act that motivates the complaint. Article 192[273] The jurisprudence established by the Supreme Court of Justice, either sitting in plenary or in chambers, is obligatory for these in relation to what the plenary decrees, and also to the unitary and collegial circuit tribunals, the district courts, the military tribunals and courts under common authority of the States and the federal district, and local and federal administrative tribunals and labour tribunals. The resolutions shall constitute jurisprudence if what is declared in the resolutions is uphold in five consecutive enforceable sentences, that they are approved of by at least eight judges if it concerns the jurisprudence of the plenary and four judges in the case of jurisprudence of the chambers.
Peru	As for procedures before ordinary courts: Article 14 Organic Law on the Judicial Power[274] In all these cases the judges shall limit themselves to declaring the inapplicability of the legal norm due to unconstitutionality, for the concrete case, without affecting its legal force, which is controlled in the form established by the Constitution. Article 35 of Law no. 26.435[275] The sentences passed in unconstitutionality proceedings shall have authority of *res judicata*, shall bind all public powers and shall produce general effects from the day following their publication. Article VII Constitutional Procedure Code (p.t.)[276]

[273] Articulo 192.-la jurisprudencia que establezca la suprema corte de justicia, funcionando en pleno o en salas, es obligatoria para estas en tratandose de lasque decrete el pleno, y ademas para los tribunales unitarios y colegiados de circuito, los juzgados de distritos los tribunales militares y judiciales del orden comun de los estados y del distrito federal; y tribunales administrativos y del trabajo, locales o federales. Las resoluciones constituiran jurisprudencia, siempre que lo resuelto en ellas se sustenten en cinco sentencias ejecutorias ininterrumpidas por otra en contrario, que hayan sido aprobadas por lo menos por ocho ministros si se tratara de jurisprudencia del pleno, o por cuatro ministros, en los casos de jurisprudencia de las salas. Tambien constituyen jurisprudencia las resoluciones que diluciden las contradicciones de tesis de salas y de tribunales colegiados.
http://info4.juridicas.unam.mx/ijure/fed/19/80.htm?s=

[274] Ley orgánica del poder judicial Artículo 14 En todos estos casos los magistrados se limitan a declarar la inaplicación de la norma legal por incompatibilidad constitucional, para el caso concreto, sin afectar su vigencia, la que es controlada en la forma y modo que la Constitución establece.

[275] Artículo 35 de la ley n°26.435, las sentencias recaídas en los procesos de inconstitucionalidad tienen autoridad de cosa juzgada, vinculan a todos los poderes públicos y producen efectos generales desde el día siguiente a la fecha de su publicación.

[276] Las sentencias del Tribunal Constitucional que adquieren la autoridad de cosa juzgada constituyen precedente vinculante cuando así lo exprese la sentencia, precisando el extremo de su efecto normativo. Cuando el Tribunal Constitucional resuelva apartándose del precedente, debe expresar los fundamentos de hecho y de derecho que sustentan la sentencia y las razones por las cuales se aparta del precedente.

State	Relevant constitutional or legal provision
	The sentences of the Constitutional Tribunal which have authority of *resjudicata* shall constitute binding precedent if the sentence specifying the scope of its normative effects so states. If the Constitutional Tribunal decides to diverge from the precedent, it must specify the factual and legal bases that underlie the sentence and the reasons why it diverges from the precedent. Article 2[277] If the threat to or violation of acts that have their basis in the application of a directly applicable unconstitutional norm is invoked, the sentence declaring the request admissible shall declare in addition the inapplicability of the specified norm.
Poland	Article 190 Constitution: 1. Judgments of the Constitutional Tribunal shall be of universally binding application and shall be final. 4. A judgment of the Constitutional Tribunal on the nonconformity to the Constitution, an international agreement or statute, of a normative act on the basis of which a legally effective judgment of a court, a final administrative decision or settlement of other matters was issued, shall be a basis for re-opening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to the given proceedings. Article 71 Constitutional Tribunal Act 2. Where the Tribunal decides that the normative act ceases to have effect after the day of the publication of the judicial decision confirming its non-conformity to the Constitution, ratified international agreement or statutes, it shall, in the judicial decision, determine the date the act shall cease to have effect.
Portugal	Article 281 Constitution General review of constitutionality and legality: 3. The Constitutional Court also has jurisdiction to review and give generally binding rulings on the unconstitutionality or illegality of a legal rule, the application of which it has held to be unconstitutional or illegal in three appeals. Article 80 law on the Constitutional Court: 1. The decision on the appeal determines res judicata regarding the question of unconstitutionality or illegality. 2. Should the Constitutional Court judge the appeal to be founded, even if only partially, the proceedings drop back to the court from which they came, so that this same court, depending on the case, can change the decision or have it changed in agreement with the judgment on the question of unconstitutionality or illegality. 3. In the case of a judgment of unconstitutionality or legality on the rule applied in the decision appealed, or refused application, being founded on a particular interpretation of this same rule, this should be applied with the same interpretation in the case in question.
Romania	Article 147 Constitution (1) Any provisions of the laws and ordinances in force, as well as any of the regulations which are held as unconstitutional, shall cease their legal effects within 45 days from publication of the decision rendered by the Constitutional Court where Parliament or Government, as may be applicable, have failed, in the meantime, to bring these unconstitutional provisions into accord with those of the Constitution. For this limited length of time the provisions declared unconstitutional shall be suspended as of right. (2) In cases related to laws declared unconstitutional before their promulgation, Parliament must reconsider those provisions concerned in order to bring such into line with the decision rendered by the Constitutional Court. (3) If a treaty or international agreement has been declared constitutional according to Article 146 subparagraph b), such may no longer be demurred against via an objection of unconstitutionality. Any treaty or international agreement held as unconstitutional cannot be ratified. (4) Decisions of the Constitutional Court shall be published in the Official Gazette of Romania. As from their publication, decisions shall be generally binding and take effect only for the future. Article 29 (3) Law on the Organisation and Operation of the Constitutional Court Legal provisions whose constitutionality has been found by prior decision of the Constitutional Court cannot be challenged by an exception of unconstitutionality". Article 31 Law on the Organisation and Functioning of the Constitutional Court The decision by which the unconstitutionality of a law or of a Government ordinance which is in force, or of provisions thereof, is decided shall be final and binding" "decision dismissing the objection of unconstitutionality is not effective erga omnes, but only inter partes, which allows other legal subjects as

[277] Article 2 Codigo procesal constitucional: Cuando se invoque la amenaza o violación de actos que tienen como sustento la aplicación de una norma autoaplicativa incompatible con la Constitución, la sentencia que declare fundada la demanda dispondrá, además, la inaplicabilidad de la citada norma.

State	Relevant constitutional or legal provision
	well to raise an identical objection, in anticipation that the Constitutional Court may decide to change its jurisprudence and eventually admit the objection of unconstitutionality[278].
Russian Federation	Article 6 Federal Constitutional Law on the Constitutional Court The decisions of the Constitutional Court of the Russian Federation shall be obligatory throughout the territory of the Russian Federation for all representative, executive, and judicial organs of State Government, organs of local government, enterprises, agencies, organisations, officials, citizens and their associations. Art. 79 Legal Force of Decisions Decisions of the Constitutional Court of the Russian Federation shall be final, not subject to appeal and shall enter into force without delay after their announcement. Decisions of the Constitutional Court of the Russian Federation shall be directly effective and not require confirmation by other bodies or officials. The legal force of a decree of the Constitutional Court of the Russian Federation declaring an act unconstitutional may not be overcome by the repeat adoption of the same act. Acts or certain of their provisions declared unconstitutional shall lose force; international agreements of the Russian Federation which have not entered into force shall not be subject to introduction into force or application. Decisions of courts and other bodies based on acts declared unconstitutional shall not be enforced and must be reviewed where established by federal law. In the event that the declaration of a normative act as unconstitutional has created a gap in legal regulation, the Constitution of the Russian Federation shall be directly applied.
San Marino	Qualified law on the organisation of the *Collegio Garante* (p.t.) Article 13[279] The declaration of inadmissibility of the request by the judge a quo doesn't preclude to lodge again a request concerning the same question before other instances or in other proceedings. Article 14[280] 4. The decision of acceptance and of rejection are adopted with sentences. In the case of an acceptance, the *Collegio Garante* will declare the impugned provisions illegitimate. 6. Within five days after their deposit, the decisions following requests submitted incidentally are transmitted, with the restitution of the files, to the judicial authority before which the proceeding is pending.
Serbia	Article 7 Law on the Constitutional Court Decisions of the Constitutional Court are final, enforceable and universally binding.
Slovakia	Article 127(2) Constitution If the Constitutional Court grants a complaint, it shall hold in its decision that the rights or freedoms according to section 1 have been violated by a final decision, measure or other encroachment and it shall annul that decision, measure or other encroachment Article 56 Law on the Organisation of the Constitutional Court (1) Should the Constitutional Court grant the complaint, in its decision the Court shall state which fundamental right or freedom or which provision of the Constitution, constitutional law or international treaty has been violated, and also shall specify the final decision, measure or other encroachment due to which the fundamental right or freedom has been violated. (2) Should the fundamental right or freedom be violated by a decision or measure, the Constitutional Court shall annul that decision or measure. The Constitutional Court shall also annul any other encroachment that has violated a fundamental right or freedom, should the nature of the encroachment make annulling possible. (3) If the Constitutional Court grants the complaint, it may: a) order that the authority, violating the fundamental right or freedom through its inactivity, shall proceed further according to procedural codes,

278 CDL-JU(2004)021, I. Vida, "The obligatory force of decisions of the Constitutional Court for other courts as stabilising factor", report for the Conference on the "Role of the Constitutional Court in the Maintenance of the Stability and Development of the Constitution", Moscow, 2004.

279 5. La dichiarazione di inammissibilità dell'istanza da parte del giudice a quo non impedisce la riproposizione del medesimo negli altri gradi o in procedimenti diversi. http://www.consigliograndeegenerale.sm /new/ricercaleggi/vislegge.php3?action=visTestoLegge1&idlegge=6373&twid th=580&=

280 4. Le decisioni di accoglimento e di rigetto sono adottate con sentenza. In caso di accoglimento il Collegio Garante dichiara le disposizioni impugnate illegittime.
6. Entro cinque giorni dal deposito, le decisioni rese sui ricorsi presentati in via incidentale sono trasmesse, con la restituzione degli atti, all'autorità giudiziaria avanti alla quale pende il procedimento. http://www.consigliograndeegenerale.sm/new/ ricercaleggi/vislegge.php3?action=visTestoLegge1&idlegge=6373&twid th=580&=

State	Relevant constitutional or legal provision
	b) refer the case back for further proceedings, c) prohibit continued violation of the fundamental right or freedom or d) order the authority which has violated the fundamental right or freedom to restore the state of affair prior to the violation of the fundamental right or freedom. (4) The Constitutional Court may also afford just satisfaction to that party whose fundamental right or freedom has been violated. (5) Should the Constitutional Court decide to afford just satisfaction, the authority which has violated a fundamental right or freedom must render it to the complainant within two months from the day on which the decision of the Constitutional Court becomes final. (6) If the final decision, measure or other encroachment is annulled or if the case is referred back by the Constitutional Court for further proceedings, the authority who has issued the decision, decided on the measure or caused some other encroachment must rehear the case and to decide on the case again. In such proceedings or procedure the authority shall be bound by the Constitutional Court´s legal opinion. (7) The authority which has issued a decision in a case, decided on a measure or carried out some other encroachment, shall be bound by the decision under subsection 3 which is enforceable on its delivery.
Slovenia	Article 1 Constitutional Court Act (3) The decisions of the Constitutional Court are binding. Article 59 (1) By a decision the Constitutional Court either dismisses a constitutional complaint as unfounded or grants such and in whole or in part annuls or abrogates the individual act, and remands the case to the authority competent to decide thereon. (2) If the Constitutional Court deems that the challenged individual act is based on a potentially unconstitutional or unlawful regulation or general act issued for the exercise of public authority, it initiates proceedings for the review of the constitutionality or legality of such regulation or general act issued for the exercise of public authority and decides by applying the provisions of Chapter IV of this Act.
South Africa	Article 165(5) Constitution of the Republic of South Africa An order or decision issued by a court binds all persons to whom and all organs of state to which it applies.
Spain	Art. 164.1 of the Constitution Las sentencias del Tribunal Constitucional se publicarán en el Boletín Oficial del Estado con los votos particulares si los hubiere. Tienen el valor de cosa juzgada a partir del día Article 38 Organic Law on the Constitutional Court 1. Judgments handed down in unconstitutionality proceedings shall have the force of *res judicata*, shall be binding on all public authorities and shall have consequences of a general nature from the date of their publication in the "Official State Gazette". Article 55 1. A judgment granting protection shall contain one or more of the following pronouncements: c. Full restoration of the applicant's right or freedom and adoption, where ap propriate, of measures conducive to its preservation. *2. En el supuesto de que el recurso de amparo debiera ser estimado porque, a juicio de la Sala o, en su caso, la Sección, la ley aplicada lesione derechos fundamentales o libertades públicas, se elevará la cuestión al Pleno con suspensión del plazo para dictar sentencia, de conformidad con lo prevenido en los artículos 35 y siguientes.*
"The Former Yugoslav Republic of Macedonia"	Article 112 par. 3 Constitution Decisions of the Constitutional Court of the Republic of Macedonia are final and enforceable Article 86 Rules of Procedure of the Constitutional Court Decisions of the Constitutional Court are executed by the organ that passed the law, other regulation or general act that is annulled or repealed by a decision of the Court. Decisions upon petitions for protection of freedoms and rights guaranteed by the Constitution shall be executed by the organ or organisation that adopted the individual act annulled by the Court or by the organ or organisation that undertook the activity prohibited by the decision of the Constitutional Court.
Turkey	Article 153 in fine Constitution All annulment decisions are binding for all legal and naturaol persons. Therefore, there is an erga omnes effect.
United States of America	Decisions of the Supreme Court interpreting the U.S. Constitution bind all courts, and decisions of higher federal courts are binding upon lower courts in the same jurisdiction. Under the principle of stare decisis, prior decisions by the same court are generally given authoritative weight by that

State	Relevant constitutional or legal provision
	court, although courts may decide to diverge from their own prior decisions in light of, *inter alia,* changes in relevant circumstances or related areas of law. Courts may also "distinguish" a decision by a superior court or a prior decision of the same court by showing that the circumstances of the case differ from the precedent.
Uruguay	Article 259 Constitution (p.t.)[281] The judgment of the Supreme Court of Justice shall refer exclusively to the concrete case and shall only take effect in the proceedings in which it is being passed. General Code of Procedure Article 520 (p.t.)[282] Sentence. The sentence shall limit itself to the declaration of constitutionality or unconstitutionality of the impugned dispositions and shall only take effect in the concrete case in relation to which it is passed. There shall be no recourse against it.

1.1.15 Table: Confirmation of constitutionality

State	Relevant constitutional or legal provision
Andorra	Article 44 Qualified Law on the Constitutional Court: "3. Where these laws and regulations are declared compatible with the Constitution they cannot subsequently be challenged on the ground that they infringe the same constitutional provisions".
Armenia	Article 32 Law on the Constitutional Court 4) the issue raised in the appeal has been subject to a prior decision of the Constitutional Court in cases determined by Articles 76, 78-80 of this Law and any new factual circumstances (not known to the applicant before the adoption of the Constitutional Court Decision for some independent reasons or not appeared at the case hearing) regarding that issue are not presented in the application;
Belgium	Article 9 (2) Special Law on the Court Judgments delivered by the Constitutional Court which dismiss an action for annulment shall be binding on the courts in respect of questions of law settled by such judgments.
Czech Republic	Article 35 Constitutional Court Act: "(1) A petition instituting a proceeding is inadmissible if it relates to a matter upon which the Court has already passed judgment and in other instances provided for by this Statute. (2) A petition shall also be inadmissible in instances when the Court has already taken some action in the same matter; if one is submitted by an authorised petitioner, he has the right to take part, as a secondary party, in the proceeding concerning the earlier submitted petition".
Germany	Article 31 Law on the Federal Constitutional Court: "2. In cases pursuant to Article 13 (6), (11), (12) and (14) above decisions of the Federal Constitutional Court shall have the force of law. This shall also apply in cases pursuant to Article 13 (8a) above if the Federal Constitutional Court declares a law to be compatible or incompatible with the Basic Law or to be null and void".
Georgia	Article 18. A constitutional claim or a constitutional submission shall not be admitted for the consideration if: d. all the issues referred to in it, have already been adjudicated upon by the Constitutional Court, except the circumstances provided for in article 211 of the Organic Law of Georgia on the Constitutional Court of Georgia. Article 211. Organic Law on the Constitutional Court of Georgia 1. If the Board of the Constitutional Court is satisfied that its position is different from the practice of the constitutional court concerning a constitutional claim or a submission, the case should be referred to the Plenum of the Constitutional Court.
Lithua-nia	Article 69 Law on the Constitutional Court By a decision, the Constitutional Court shall refuse to consider petitions for the examination of the constitutionality of a legal act if: 4. the Constitutional Court has already initiated the examination of a case concerning the same issue
Luxem-burg	Article 6 Law on the Organisation of the Constitutional Court The court shall not be required to refer the matter to the Constitutional Court if, in its view: c. the Constitutional Court has already ruled on a question submitted to it concerning the same matter.

[281] Artículo 259 El fallo de la Suprema Corte de Justicia se referirá exclusivamente al caso concreto y sólo tendrá efecto en los procedimientos en que se haya pronunciado.

[282] Artículo 520 Sentencia.-La sentencia se limitará a declarar la constitucionalidad o inconstitucionalidad de las disposiciones impugnadas y solamente tendrá efecto en el caso concreto en que fuere planteada. Contra ella no se admitirá recurso alguno. http://www.parlamento.gub.uy/leyes/AccesoTextoLey.asp?Ley=15982&Anchor=

State	Relevant constitutional or legal provision
Peru	Article 6 Constitutional Procedure Code (p.t.)[283] The Judges cannot refrain from applying a norm whose constitutionality has been confirmed in a proceeding on unconstitutionality or an actio popularis proceeding.
Romania	Article 29(3) Law on the Organisation and Operation of the Constitutional Court Legal provisions whose constitutionality has been found by prior decision of the Constitutional Court cannot be challenged by an exception of unconstitutionality." "decision dismissing the objection of unconstitutionality is not effective erga omnes, but only inter partes, which allows other legal subjects as well to raise an identical objection, in anticipation that the Constitutional Court may decide to change its jurisprudence and eventually admit the objection of unconstitutionality[284]. Legal provisions whose unconstitutionality has been found by prior decision of the Constitutional Court cannot form the object of an exception.
Russian Federation	Article 43 Federal Constitutional Law on the Constitutional Court The Constitutional Court of the Russian Federation shall take decision to dismiss the petition in the events where: 3. the Constitutional Court of the Russian Federation has issued a ruling on the object of the petition, that ruling retaining its force.
Serbia	Article 53 Law on the Constitutional Court Where the Constitutional Court finds there are grounds to commence a procedure on the basis of an initiative, it shall commence the procedure by a ruling. Where the constitutionality and legality are being challenged by an initiative, except for the laws and statute of an autonomous province or local self-government unit, or individual provisions of that act regulating questions on which the Constitutional Court has already assumed a position or where during the preliminary procedure the legal situation has been determined in full and the data collected provide a reliable foundation for determination, the Constitutional Court determines the matter without issuing a ruling on commencement of procedure. Where the Constitutional Court finds there are no grounds to initiate on initiative, it will not accept the initiative.
Spain	Article 38 Organic Law on the Constitutional Court 2. Where judgments entailing dismissal of applications are handed down in actions of unconstitutionality, the question may not be raised subsequently through the same channels if it is based on infringement of an identical constitutional precept. Article 50 1. The appeal for constitutional protection is submitted to a decision of admissibility. The Section, by unanimous vote, shall agree the admission of the appeal in whole or in part by non-reasoned order (providencia), only where the following requirements concur: a) The application fulfils the requirements set on articles 41 to 46 and 49. b) That the case in appeal justifies a decision about the content by the Constitutional Court because of its special constitutional significance (especial transcendencia constitucional), which shall be seen in terms of its relevance for the interpretation and application of the Constitution, or for the effectiveness thereof, and for determining the content or scope of fundamental rights. 2. When the admissibility, even if majority was obtained, does not reach unanimity, the Section shall transfer the decision to the Chamber for its judgment. 3. Non-reasoned orders of rejection, taken by the Sections or the Chambers, shall specify the requirements breach and shall be notified to the appellant and the Public Prosecutor Office. These non-reasoned orders can be appealed only by the Public Prosecutor. Office within the term of tree days. This appeal shall be settled by a reasoned order (auto), which can not be contested. 4. When the application for constitutional protection contains one or more irregularities that may be corrected, the Court shall proceed as provided in article 49.4; if the irregularities are not corrected within the prescribed period, the Section shall reject the application through a non-reasoned order without appeal.
Turkey	Article 152 Constitution No allegation of unconstitutionality shall be made with regard to the same legal provision until ten years elapse after the publication in the Official Gazette of the decision of the Constitutional Court dismissing the application on its merits.

[283] Article 6 Código procesal constitucional Los Jueces no pueden dejar de aplicar una norma cuya constitucionalidad haya sido confirmada en un proceso de inconstitucionalidad o en un proceso de acción popular.

[284] CDL-JU(2004)021, I. Vida, "The obligatory force of decisions of the Constitutional Court for other courts as stabilising factor", report for the Conference on the "Role of the Constitutional Court in the Maintenance of the Stability and Development of the Constitution", Moscow, 2004.

1.1.16 Table: *Ex nunc* or *ex tunc* effect of the Constitutional Court's decision

State	Relevant constitutional or legal provision
Albania	Article 132 Constitution (2)The decisions of the Constitutional Court enter into force on the day of their publication in the Official Journal, unless the Constitutional Court has decided that the law or normative act be invalidated on another date". Article 26 Law on the Organisation and Functioning of the Constitutional Court 1. Decisions of the Constitutional Court are final. They are published in the Official Gazette and enter into force on the day of their publication. The Court may decide that its decision shall enter into force on the day of its proclamation when the decision concerns the protection of the constitutional rights of the person". Article 76 Legal effects of the decisions of the Constitutional Court 1. The decision of the Constitutional Court annulling a law or normative act as incompatible with the Constitution or international agreements will as a rule take legal effect from the date of its entry into force. 2. The decision may be retroactive only where: a. it concerns a criminal sentence which is being executed, if this is directly related to the implementation of the annulled law or normative act, b. it concerns a case under review by the courts, unless their decision is final, c. it concerns a law or normative act that has not been implemented.
Andorra	Article 8 Qualified Law on the Constitutional Court 1. Where the constitutionality of a general legal law or regulation in its entirety, or of certain provisions thereof, is challenged and the Court finds that there is only one interpretation which is compatible with the Constitution and one or more other interpretations which are incompatible therewith, it declares that the law or regulation in question is temporarily inapplicable until the organ which issued it has corrected the unconstitutional elements. The new law or regulation issued corrects the previous law or regulation although it remains subject to the general system of checking for constitutionality. Article 44 2. Any laws and regulations declared unconstitutional are null and void. Article 58.2 2. Decisions declaring the law or regulation referred to the Constitutional Court unconstitutional in whole or in part take effect on the date on which they are published in the Official Gazette of the Principality of Andorra. Save in cases of favourable retroactive application, the existing effects produced by this law or regulation before they were declared null and void endure until new laws and regulations have been created to regulate the pre-existing legal situations.
Armenia	Article 102 Constitution The decisions and conclusions of the Constitutional Court shall be final and shall come into force following the publication thereof. Article 68 Law on the Constitutional Court 10. In case of making a decision on determining the challenged act fully or partially invalid and unconstitutional the act is annulled after the Constitutional Court decision enters into force, except for the cases described in Parts 12 and 13 of this Article. 12. The Constitutional Court can decide to validate the influence of the decisions mentioned in Point 2 of Part 8 of this Article on the relations that started before those decisions got into force if the absence of such decision of the Court can cause irretrievable consequences for the state or the public The administrative and judicial acts that were adopted and implemented on the basis of the general acts that were annulled and found unconstitutional (together with those acts that were providing the implementation of the former) by the decision defined in the Paragraph 1 of this Article within three years before the Constitutional Court decision got into force shall be revisited by the administrative and judicial bodies that adopted those in the procedure stipulated by Law.
Austria	Article 140 Constitution: (5) The judgment by the Constitutional Court which rescinds a law as unconstitutional imposes on the Federal Chancellor or the competent Governor the obligation to publish the rescission without delay. This applies analogously in the case of a pronouncement pursuant to para. 4 above. The rescission enters into force on the day of publication if the Court does not set a deadline for the rescission. This deadline may not exceed eighteen months. (6) If a law is rescinded as unconstitutional by a judgment of the Constitutional Court, the legal provisions rescinded by the law which the Court has pronounced unconstitutional become effective

State	Relevant constitutional or legal provision
	again unless the judgment pronounces otherwise, on the day of entry into force of the rescission. The publication on the rescission of the law shall also announce whether and which legal provisions again enter into force. (7) If a law has been rescinded on the score of unconstitutionality or if the Constitutional Court has pursuant to para. 4 above pronounced a law to be unconstitutional, all courts and administrative authorities are bound by the Court's decision. The law shall however continue to apply to the circumstances effected before the rescission the case in point excepted, unless the Court in its rescissory judgment decides otherwise. If the Court has in its rescissory judgment set a deadline pursuant to para. 5 above, the law shall apply to all the circumstances effected, the case in point excepted till the expiry of this deadline.
Azer-baijan	Article 130 X Constitution: "Laws and other acts, individual provisions of these documents, intergovernmental agreements of the Azerbaijan Republic cease to be valid in term specified in the decision of Constitutional Court of the Azerbaijan Republic". Article 67 law on the Constitutional Court. 67.0 Resolutions of Constitutional Court shall enter into legal force at the following periods of time: 67.1 Resolution adopted on the matters specified by Articles 130.3.1-7, 130.5 and 130.7 of the Constitution of Azerbaijan Republic shall enter into force from the date specified in the resolution itself.
Belgium	Article 8 Special Law on the Court If the application is well-founded, the Constitutional Court shall annul, in full or in part, the statute, decree or rule referred to in Article 134 of the Constitution against which the action has been brought. If it deems necessary, the Court shall, by means of a general provision, stipulate those effects of the annulled provision which are to be regarded as definitive or maintained provisionally, for a period of time which it shall determine.
Bosnia and Herze-govina	Article 63 Rules of the Constitutional Court 1. The Constitutional Court shall, in the decision granting a request, decide on its legal effect (*ex tunc, ex nunc*). 3. The quashed general act or its quashed provisions shall cease to be in force on the first day following the date of publication of the decision in the Official Gazette of Bosnia and Herzegovina. 4. Exceptionally, the Constitutional Court may by its decision establishing the incompatibility under Article VI.3 (a) and VI. 3 (c) of the Constitution, grant a time-limit for harmonisation, which shall not exceed six months. 5. If the established incompatibility is not removed within the time-limit referred to in paragraph 4 of this Article, the Constitutional Court shall, by a further decision, declare that the incompatible provisions cease to be in force. 6. The incompatible provisions shall cease to be in force on the first day following the date of publication of the decision referred to in paragraph 4 of this article in the Official Gazette of Bosnia and Herzegovina.
Chile	Article 94 Constitution (p.t.)[285] There shall be no recourse against the resolutions of the Constitutional Tribunal, without prejudicing the Tribunal's possibility to rectify, in conformity with the law, the factual errors it has incurred. When dealing with a draft law or draft decree, the dispositions that the Tribunal declares unconstitutional cannot become a law. In the case of Article 93 no. 16, the impugned supreme decree will stay without effect in the sentence of the Tribunal which admits the claim. However, the precept that is declared unconstitutional in conformity with Article 93 no. 2, 4 or 7, will be derogated from the publication of the sentence in the in the Official Diary, without producing retroactive effect.
Croatia	Article 130 Constitution The Constitutional Court of Croatia shall repeal a law if it finds to be unconstitutional. The Constitutional Court of Croatia shall repeal or annul any other regulation if it finds it to be unconstitutional or illegal. Article 55 Constitutional Law on the Constitutional Court

[285] Artículo 94.Contra las resoluciones del Tribunal Constitucional no procederá recurso alguno, sin perjuicio de que puede, el mismo Tribunal, conforme a la ley, rectificar los errores de hecho en que hubiere incurrido. Las disposiciones que el Tribunal declare inconstitucionales no podrán convertirse en ley en el proyecto o decreto con fuerza de ley de que se trate. En el caso del no. 16º del artículo 93, el decreto supremo impugnado quedará sin efecto de pleno derecho, con el solo mérito de la sentencia del Tribunal que acoja el reclamo. No obstante, el precepto declarado inconstitucional en conformidad a lo dispuesto en los numerales 2, 4 ó 7 del artículo 93, se entenderá derogado desde la publicación en el Diario Oficial de la sentencia que acoja el reclamo, la que no producirá efecto retroactivo.
http://www.gobiernodechile.cl/viewEstado.aspx?idArticulo=24065

State	Relevant constitutional or legal provision
	(1) The Constitutional Court shall repeal a law, or some of its provisions, if it finds that it is not in accordance with the Constitution; or another regulation, or some of its provisions, if it finds that it is not in accordance with the Constitution and the law. (2) The repealed law or other regulation, or their repealed separate provisions, shall lose legal force on the day of publication of the Constitutional Court decision in the Official Gazette *Narodne novine*, unless the Constitutional Court sets another term. (3) The Constitutional Court may annul a regulation, or its separate provisions, taking into account all the circumstances important for the protection of constitutionality and legality, and especially bearing in mind how seriously it violates the Constitution or the law, and the interest of legal security: - if it violates the human rights and fundamental freedoms guaranteed by the Constitution, - if, without grounds, it places some individuals, groups or associations in a more or a less privileged position.
Czech Republic	Article 89(1) Constitution Decisions of the Constitutional Court are enforceable as soon as they are announced in the manner provided for by statute, unless the Constitutional Court decides otherwise concerning enforcement. Constitutional Court Act Article 58 Constitutional Court Act (1) Judgments under Article 57 para. 1, lit. a) are enforceable on the day they are published in the Collection of Laws, unless the Court decides otherwise. (3) Other judgments are enforceable upon the personal delivery of a copy of the final written version of it to each party. Article 70 (1) If, after holding a proceeding, the Court comes to the conclusion that a statute, or individual provisions thereof, conflict with a constitutional act, or that some other enactment, or individual provisions thereof, conflict with a constitutional act or a statute, it shall declare in its judgment that such statute or other type of enactment, or individual provisions thereof, shall be annulled on the day specified in the judgment. Article 71 (1) If, on the basis of a statute or some other enactment which the Court has annulled, a court in a criminal proceeding has passed a judgment which has acquired legal effect but has not yet been enforced, the invalidation of this statute or other enactment shall constitute grounds for reopening the proceeding in accordance with the provisions of the law on criminal judicial proceedings. (2) Other legally effective decisions issued on the basis of a statute, or some other enactment, which has been annulled remain unaffected; however, rights and duties arising from such decisions may not be enforced.
Estonia	Constitutional Review Court Procedure Act §15 (preliminary ruling procedure) (1)Upon adjudicating a matter the Supreme Court may: 2) declare legislation of general application or a provision thereof, which has entered into force, invalid; 3) declare an international agreement, which has entered into force or has not entered into force or a provision thereof, unconstitutional; §. 24. (normative constitutional complaint) (1) Upon adjudicating a matter the Supreme Court may: 1) repeal a resolution of the Riigikogu or the Board of the Riigikogu or a decision of the President of the Republic or a part thereof;
Georgia	Article 89(2) Constitution: “The judgment of the Constitutional Court shall be final. A normative act or a part thereof recognised as unconstitutional shall cease to have legal effect from the moment of the promulgation of the respective judgment of the Constitutional Court”. Article 23 Law on the Constitutional Court If a petition or application concerning the issues envisaged in Article 19 points a and e and Article 20 of the present Law is allowed this shall cause the normative act or part of it to be abrogated as unconstitutional from the moment the corresponding judgment of the Constitutional Court is published. Article 20. Organic Law on the Constitutional Court of Georgia Recognition of a law or other normative act as unconstitutional shall not imply annulment of the sentences and decisions as adopted earlier by the court on the basis of the act in question, it shall cause only the suspension of their enforcement in accordance with the procedure established by procedural legislation. Article 23. Organic Law on the Constitutional Court of Georgia 1. Upholding a constitutional claim concerning the issues provided for by sub paragraphs “a” and “e” of the first paragraph of Article 19 of the present Law, as well as ascertainment of unconstitutionality of a normative act or a part thereof in the case, provided for by the second paragraph of the same Article, shall result in recognition of invalidation of the normative act or the part thereof from the moment of the promulgation of the respective judgment of the Constitutional Court.Article 23 Law on the Constitutional Court.

State	Relevant constitutional or legal provision
Germany	Article 31 Law on the Federal Constitutional Court 2. In cases pursuant to Article 13 (6), (11), (12) and (14) above decisions of the Federal Constitutional Court shall have the force of law. This shall also apply in cases pursuant to Article 13 (8a) above if the Federal Constitutional Court declares a law to be compatible or incompatible with the Basic Law or to be null and void. If a law is declared to be compatible or incompatible with the Basic Law or other federal law or to be null and void, the decision shall be published in the Federal Law Gazette by the Federal Ministry of Justice. The above shall apply mutatis mutandis to decisions in cases pursuant to Article 13 (12) and (14) above. Article 95 Law on the Federal Constitutional Court 3. If a constitutional complaint against a law is upheld, the law shall be declared null and void. The same shall apply if a constitutional complaint pursuant to paragraph 2 above is upheld because the quashed decision is based on an unconstitutional law.
Greece	Article 100 (4) Constitution […] Provisions of a statute declared unconstitutional shall be invalid as of the date of publication of the respective judgment, or as of the date specified by the ruling. Article 51 Law on the Special Highest Court 1. A decision by the Special Court resolving a dispute concerning assessment of the constitutionality of a law or its interpretation shall have force *erga omnes* as from its delivery in open court, subject to paragraph 4 of this article. 4. The Special Court may decide, by reasoned decision with effect erga omnes, that the provisions held unconstitutional are invalid even in respect of the period up to the publication of the decision. 5. Where a decision retroactively declaring a law unconstitutional is taken in accordance with paragraph 4 above, an application for review may be made in respect of any irrevocable judicial decision taken during that period and founded on provisions held unconstitutional. Such application may be made by any party within six months as from the publication of the Special Court's decision. For the remainder, the ordinary procedure before the court in question shall be upheld, and it shall disregard the provision declared unconstitutional. 6. The revocation of administrative acts which are founded on statutory provisions held unconstitutional and which have been performed during the period of retroactivity of the Special Court's decision shall be mandatory within six months following publication of the decision.
Hungary	Article 42 Act on the Constitutional Court 1. In the case provided in Article 40, the legal rule or its provisions and the other legal means of State control or its provision shall be considered as repealed, on the day of the publication of the decision. Article 43 1. Any legal rule or other legal means of State control which has been annulled by the decision of the Constitutional Court shall not be applied from the day of the publication of the relevant decision in the Official Gazette. 2. The annulment of a legal rule or other legal means of State control shall − except for the case provided in section 3 − affect neither the legal relationships which have developed prior to the publication of the decision nor the rights and duties which derived from them. 3. The Constitutional Court shall order the revision of any criminal proceedings concluded by a final decision (without appeal) on the basis of an unconstitutional legal rule or other legal means of State control, if the convict has not yet been relieved of the detrimental consequences, and the nullity of the provision applied in the proceedings would result in the reduction or the putting aside of the punishment or measure, or in the release from, or the limitation of responsibility. 4. The Constitutional Court may determine the date of the abrogation of the unconstitutional legal rule or its applicability in the given case differently from the provision of Article 42, section 1 and Article 43, sections 1 et 2, if justified by a particularly important interest of legal security or of the person who initiated the procedure.
Italy	Article 136 Constitution When the Court declares the constitutional illegitimacy of a law or enactment having the force of law, the law ceases to have effect from the day following the publication of the decision. Article 30, cl. 3 of the Law on the composition and procedures of the Constitutional Court (Law no. 87/1953): Laws declared unconstitutional cannot find application starting from the day following publication of the decision.
Korea, Repub- lic	Constitutional Court Act Article 47 (2) Any statute or provision thereof decided as unconstitutional shall lose its effect from the day on which the decision is made: Provided, That the statutes or provisions thereof relating to criminal penalties shall lose their effect retroactively.

State	Relevant constitutional or legal provision
	(3) In case referred to in the proviso of paragraph (2), the retrial may be allowed with respect to a conviction based on the statutes or provisions thereof decided as unconstitutional.
Latvia	Article 32 Law on the Constitutional Court 3. Any legal norm (act) which the Constitutional Court has determined as incompatible with the legal norm of higher force shall be considered invalid as of the date of publishing the judgment of the Constitutional Court, unless the Constitutional Court has ruled otherwise.
Liech-tenstein	Article 19 Constitutional Court Act 3) The judgment on annulment and determination of unconstitutionality shall be published by the Government in the Liechtenstein Legal Gazette without delay. The annulment shall take effect with this publication, unless the Constitutional Court specifies a deadline of at most one year for this purpose; this shall not apply to the case being adjudicated.
Lithua-nia	Article 107.1 of the Constitution A law (of a part thereof) of the Republic of Lithuania or other act (or a part thereof) of the Seimas, act of the President of the Republic, act (of a part thereof) of the Government may not be applied from the day of official promulgation of the decision of the Constitutional Court that the act in question (or a part thereof) is in conflict with the Constitution of the Republic of Lithuania. Article 72 Law on the Constitutional Court 3. All State institutions as well as their officials must revoke substatutory acts or provisions thereof which they have adopted and which are based on an act which has been recognised as unconstitutional. 4. Decisions based on legal acts which have been recognised as being in conflict with the Constitution or laws must not be executed if they had not been executed prior to the appropriate Constitutional Court ruling went into effect.
Mexico	Art.107 Constitution Concerning rulings by the Supreme Court The declaration of invalidity of the resolutions to which sections I and II refer will not have retroactive effects, except in penal matters, in which the general principles and legal dispositions that are applicable in these matters will rule.
Moldova	Article 140 Constitution (1) Laws and other regulations or parts thereof become null and void from the moment that the Constitutional Court passes the appropriate decisions to that effect.
Monte-negro	Art. 152 Constitution When the Constitutional Court establishes that the law is not in conformity with the Constitution and confirmed and published international agreements, that is, that other regulation is not in conformity with the Constitution and the law, that law and other regulation shall cease to be valid on the date of publication of the decision of the Constitutional Court. The law or other regulation, i.e. their individual provisions that were found inconsistent with the Constitution or the law by the decision of the Constitutional Court, shall not be applied to the relations that have occurred prior to the publication of the Constitutional Court decision, if they have not been solved by an absolute ruling by that date.
Peru	Article 204 Constitution (p.t.)[286] The sentence of the Tribunal that declares the unconstitutionality of a norm shall be published in the Official Diary. The day following publication, the norm shall lose effect. The sentence of the Tribunal declaring total or partial unconstitutionality shall not have retroactive effect. Article 35 of Law N°26.435 The sentences passed in unconstitutionality proceedings shall have authority of *res judicata*, shall bind all public powers and shall produce general effects from the day following their publication.
Poland	Article 190(3) Constitution A judgment of the Constitutional Tribunal shall take effect from the day of its publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. Where a judgment has financial consequences not provided for in the Budget, the Constitutional Tribunal shall specify date for the end of the binding force of the

[286] Artículo 204°. La sentencia del Tribunal que decla ra la inconstitucionalidad de una norma se publica en el diario oficial. Al día siguiente de la publicación, dicha norma queda sin efecto. No tiene efecto retroactivo la sentencia del Tribunal que declara inconstitucional, en todo o en parte, una norma legal.

State	Relevant constitutional or legal provision
	normative act concerned, after seeking the opinion of the Council of Ministers. 4. A judgment of the Constitutional Tribunal on the nonconformity to the Constitution, an international agreement or statute, of a normative act on the basis of which a legally effective judgment of a court, a final administrative decision or settlement of other matters was issued, shall be a basis for re-opening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to the given proceedings. Article 71(2) Constitutional Tribunal Act Where the Tribunal decides that the normative act ceases to have effect after the day of the publication of the judicial decision confirming its non-conformity to the Constitution, ratified international agreement or statutes, it shall, in the judicial decision, determine the date the act shall cease to have effect.
Portugal	Article 282 Constitution 1. A generally binding ruling of unconstitutionality or illegality shall be given effect from the date when the provision ruled unconstitutional or illegal came into force and shall require that any provisions that may have been revoked shall be reinstated, with retroactive effect. 2. However, where unconstitutionality or illegality derives from contravention of a constitutional or legal provision that has been subsequently made, the ruling shall be given effect only from the date when that provision came into force. 3. Cases already decided shall hold good, except if the Constitutional Court rules otherwise in respect of a legal rule relating to penal or disciplinary matters or an illegal act under a regulatory ordinance or a provision that is disadvantageous to the accused. 4. When required in the interests of legal certainty, or for reasons of equity or public interest of exceptional importance, which shall be justified if requested, the Constitutional Court may prescribe effects of unconstitutionality or illegality that are more restrictive than those specified in paragraphs 1 and 2.
Romania	Article 147 Constitution (1) The provisions of the laws and ordinances in force, as well as those of the standing orders, which are found to be unconstitutional, shall cease their legal effects within forty-five days of the publication of the decision of the Constitutional Court if, in the meantime, the Parliament or the Government, as the case may be, cannot bring into line the unconstitutional provisions with the provisions of the Constitution. For this limited length of time the provisions found to be unconstitutional shall be suspended de jure. (4) Decisions of the Constitutional Court shall be published in the Official Gazette of Romania. As from their publication, decisions shall be generally binding and effective only for the future. Article 322 (10) of the Civil Procedure Code The revision of a definitive court decision can be requested in the following situations: {…] 10. when, after the court decision had become definitive, the Constituional Court decided upon the exception of unconstitutionality raised within that case, stating the unconstitutionality of the law, Government ordinance or a certain provision thereof which has been the subject matter of that exception, or the unconstitutionality of other provisions from the challenged normative act, which, necessarily and obviously, cannot be dissociated from the provisions mentioned in the submission of unconstitutionality". Article 4082 (1) (2) of the Criminal Procedure Code: (1)The definitive decisions rendered in the cases where the Constitutional Court admitted an exception of unconstitutionality can be revised, if the decision rendered in the court case was grounded on the legal provision which has been stated as unconstitutional or on other legal provisions of the challenged normative act, which, necessarily and obviously, cannot be dissociated from the provisions mentioned in the submission of unconstitutionality. (2) The revision request can be filed within 3 months from the day when the decision of the Constitutional Court was published in the Official Monitor of Romania, Part I.
Russian Federation	Article 75 Federal Constitutional Law on the Constitutional Court of the Russian Federation The decision of the Constitutional Court of the Russian Federation, stated in an individual document, shall, depending on the nature of the question under consideration, contain the following data: 11. statement on the final and binding nature of the decision; 12. procedure for the entry into force of the decision, as well as the procedure, dates and specifics of its execution and promulgation. Article 79 The decision of the Constitutional Court of the Russian Federation shall be final, may not be appealed and shall come into force immediately upon announcement.
Serbia	Article 168 Constitution The Law or other general acts which is not in compliance with the Constitution or the Law shall cease to be effective on the day of publication of the Constitutional Court decision in the official journal. Article 58 Law on the Constitutional Court

State	Relevant constitutional or legal provision
	When the Constitutional Court establishes that a law, statute of an autonomous province or local self-government unit, other general act or collective contract do not comply with the Constitution, generally accepted rules of international law and ratified international agreement, such law, statute of autonomous province or local self-government unit, other general act or collective contract shall cease to be valid on the day the Constitutional Court decision is published in the "Official Gazette of the Republic of Serbia". Article 59 When the Constitutional Court determines the manner of rectifying the consequences which arose due to the implementation of a general act which is not in compliance with the Constitution or law, the decision of the Constitutional Court has legal effect from the date of its publication in the Official Gazette of the Republic of Serbia. Article 60 Laws and other acts for which it has been established by a Constitutional Court decision that they do not comply with the Constitution, generally accepted rules of international law, ratified international agreements or law, cannot apply to relations that arose before the day of publication of the Constitutional Court decisions, if they were not finally resolved by that date. General act passed for the purpose of enforcement of laws and other general acts for which it is established, by a Constitutional Court decision, that they are not in compliance with the Constitution, generally accepted rules of international law, ratified international agreements or law, shall not apply from the day of publication of the Constitutional Court decision, if the decision implies that these general acts are incompatible with the Constitution, generally accepted rules of international law, ratified international agreements or law. Enforcement of finally binding individual acts passed on the basis of regulations that can no longer apply, cannot be allowed or implemented, and if the enforcement is initiated, it shall be discontinued. Article 61 Everyone whose right has been violated by a final or legally-binding individual act adopted on the basis of a law or other general act determined by a decision of the Constitutional Court not to be in compliance with the Constitution, generally accepted rules of international law, ratified international agreements or law is entitled to demand from the competent authority a revision of that individual act Proposals for revision of a final or legally-binding individual act adopted on the basis of a law or other general act determined by a decision of the Constitutional Court not to be in compliance with the Constitution, generally accepted rules of international law, ratified international agreements or law may be submitted within six months from the date of the publication of the decision in the Official Gazette of the Republic of Serbia, unless more than two years have passed between the delivery of the individual act and the submittal of the proposal or initiative for initiating a procedure.
Slovakia	Article 125 Constitution of Slovak Republic (3) If the Constitutional Court holds by its decision that there is inconformity between the legal regulations stated in section 1, the respective regulations, their parts or some of their provisions shall lose force. The authorities which issued these legal regulations shall be obliged, six months from the promulgation of the decision of the Constitutional Court, to harmonize them with theConstitution, with the constitutional laws and with international treaties promulgated in the manner laid down by law, and if this regards regulations stated in section 1.b and 1.c also with other laws, and if this regards regulations stated in paragraph 1 letter d) also with government regulations and with generally binding legal regulations of Ministries and other central state administration authorities. If they fail to do so, these regulations, their parts or their provisions shall lose validity after six months following the promulgation of the decision. (6) A decision of the Constitutional Court issued pursuant to sections 1, 2 and 5 shall be promulgated in the manner laid down for the promulgation of laws. The final decision of the Constitutional Court is generally binding. Article 41b Law on the Organisation of the Constitutional Court (1) If a court has issued a judgement in criminal proceedings on the basis of a legal regulation which later lost its force under Article 125 of the Constitution, and though that judgement has become final, but it has not been executed, than the loss of force of that legal regulation or part thereof or some of its provisions, becomes a reason for a re-trial according to the provisions of the Code of Criminal Procedure. (2) Other final decisions, issued in civil or administrative proceedings on the basis of a legal regulation which lost its force in full, in part or in certain provisions remain unaffected; obligations imposed by these decisions cannot be subject to enforcement.
Slovenia	Article 43 Constitutional Court Act The Constitutional Court may in whole or in part abrogate a law which is not in conformity with the Constitution. Such abrogation takes effect the day following the publication of the decision on the abrogation, or upon the expiry of a period of time determined by the Constitutional Court.

State	Relevant constitutional or legal provision
	Article 44 The abrogation of a law or a part thereof by the Constitutional Court applies to relations that had been established before the day such abrogation took effect, if by that day such relations had not been finally decided. Article 45 (1) The Constitutional Court annuls or abrogates regulations or general acts issued for the exercise of public authority that are unconstitutional or unlawful. (2) The Constitutional Court annuls regulations or general acts issued for the exercise of public authority that are unconstitutional or unlawful when it determines that it is necessary to remedy harmful consequences arising from such unconstitutionality or unlawfulness. Annulment has retroactive effect. (3) In other instances, the Constitutional Court abrogates regulations or general acts issued for the exercise of public authority that are unconstitutional or unlawful. Abrogation takes effect the day following the publication of the Constitutional Court decision on the abrogation, or upon the expiry of a period of time determined by the Constitutional Court. In instances of abrogation, Article 44 of this Act is applied mutatis mutandis. Article 59 (1) By a decision the Constitutional Court either dismisses a constitutional complaint as unfounded or grants such and in whole or in part annuls or abrogates the individual act, and remands the case to the authority competent to decide thereon. (2) If the Constitutional Court deems that the challenged individual act is based on a potentially unconstitutional or unlawful regulation or general act issued for the exercise of public authority, it initiates proceedings for the review of the constitutionality or legality of such regulation or general act issued for the exercise of public authority and decides by applying the provisions of Chapter IV of this Act.
South Africa	Article 172(1)(b) Constitution of the Republic of South Africa When deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency and may make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity.
Spain	Article 161 Constitution The Constitutional Court has jurisdiction over the whole of Spanish territory and is competent to hear: a) appeals against the alleged unconstitutionality of laws and regulations having the force of law. A declaration of unconstitutionality of a legal provision with the force of law, interpreted by jurisprudence, shall also affect the latter, although the sentence or sentences handed down shall not lose their status of *res judicata.* Article 40 Organic Law on the Constitutional Court 1. Judgements that declare the unconstitutionality of laws, regulations or enactments having the force of law shall not provide grounds for review of proceedings concluded by means of a judgement having force of res judicata in which unconstitutional laws, regulations or enactments were applied, save in the case of criminal proceedings or administrative litigation concerning a sanction procedure where the invalidity of the rule applied would entail a reduction of the penalty or sanction or exclusion, exemption or limitation of liability.
"The Former Yugoslav Republic of Macedonia"	Article 56 Rules of Procedure of the Constitutional Court In its judgment regarding the application for protection of freedoms and rights, the Constitutional Court shall determine whether there is an infringement and in consequence, it will annul the individual act, prohibit the action causing the infringement or dismiss the application. Article 79 The judgment of the Constitutional Court of the Republic of Macedonia revoking or repealing a law, regulation or other common act produces legal effects from the day of its publication in the Official Gazette of the Republic of Macedonia. Article 80 The execution of legally binding individual acts passed on the basis of a law, regulation or other common act that is revoked by a judgment of the Court cannot be allowed, nor implemented, and if such execution has commenced, it will be cancelled. Article 81 Anyone whose rights have been infringed by a final or legally binding individual act adopted on the basis of a law, regulation or other common act which has been revoked by a judgment of the Constitutional Court has the right to request the competent organ to revoke that individual act, within 6 months from the date of publication of the judgment of the Court in the Official Gazette of the Republic of Macedonia.
Turkey	Article 153 Laws, decrees having the force of law or the Rules of Procedure of the Turkish Grand National

State	Relevant constitutional or legal provision
	Assembly or provisions thereof, shall cease to have effect from the date of the publication in the official Gazette of the annulment decision shall come into effect. That date shall not be more than one year from the date of publication of the decision in the Official Gazette of the annulment decision. Where necessary, the Constitutional Court may also decide on the date on which the annulment decision shall come into effect. That date shall not be more than one year from the date of publication of the decision in the Official Gazette. Annulment decisions cannot be applied retroactively.
Uruguay	General Code of Procedure (p.t.)[287] Article 521 The declaration of unconstitutionality leaves the legal norm affected by the declaration inapplicable in the proceedings in which the unconstitutionality has been pronounced. If it has been demanded through an action or in main proceedings, the sentence shall be effective to hinder the application of the norms declared unconstitutional against the person who had promoted the declaration and obtained the sentence. This person may invoke the decision in any judicial proceeding including the proceeding for annulment before the Tribunal of administrative disputes.

1.1.17 Table: Capacity of constitutional courts to attribute damages

State	Relevant constitutional or legal provision
Andorra	Article 92.2 Qualified Law on the Constitutional Tribunal Where the appeal is allowed in whole the judgment appealed against and all its effects are set aside and the Court declares that there has been a breach of a constitutional right and takes the measures necessary to restore the right to the appellant. Where the breach is materially irreparable the Court determines the nature of the liability incurred by the person responsible forthe breach so that damages can be claimed before an ordinary court[288].
Chile	Autonomous rule of the Supreme Court of 24 June 1992 (p.t.)[289] 11. The Court of Appeals as well as the Supreme Court may, if they deem it appropriate, impose a condemnation for damages. Croatia Article 31 of the Constitutional Act on the Constitutional Court: (5)"The Constitutional Court may determine the manner in which its decision, respective its ruling shall be executed". Article 63 Constitutional Act on the Constitutional Court (3) In the decision in paragraph 2 of this Article, the Constitutional Court shall determine appropriate compensation for the applicant for the violation of his/her constitutional right committed by the court of justice by not deciding within a reasonable time about his/her rights and obligations, or about the suspicions or accusations of a criminal offence. The compensation shall be paid from the state budget within a term of three months from the date when the applicant lodged a request for its payment.
Croatia	Article 31 of the Constitutional Act on the Constitutional Court: (5)"The Constitutional Court may determine the manner in which its decision, respective its ruling shall be executed." Article 63 Constitutional Act on the Constitutional Court (3) In the decision in paragraph 2 of this Article, the Constitutional Court shall determine appropriate compensation for the applicant for the violation of his/her constitutional right committed by the court of justice by not deciding within a reasonable time about his/her rights and obligations, or about the suspicions or accusations of a criminal offence. The compensation shall be paid from the state budget within a term of three months from the date when the applicant lodged a request for its payment.

[287]Artículo 521 Efectos del fallo.-La declaración de inconstitucionalidad hace inaplicable la norma legal afectada por ella, en los procedimientos en que se haya pronunciado. Si hubiere sido solicitada por vía de acción o principal, la sentencia tendrá eficacia para impedir la aplicación de las normas declaradas inconstitucionales contra quien hubiere promovido la declaración y obtenido la sentencia, pudiendo hacerla valer como excepción en cualquier procedimiento jurisdiccional, inclusive el anulatorio ante el Tribunal de lo Contencioso Administrativo: http://200.40.229.134/leyes/AccesoTextoLey.asp?Ley=15982&Anchor=

[288] The Constitutional Tribunal has recently granted a compensation of some thousands of Euros in a case of excessive length of proceedings.

[289] Auto acordado de la Corte Suprema, de 24 de junio de 1992, sobre tramitacion del recurso de proteccion de garantias constitucionales 11. Tanto la Corte de Apelaciones como la Corte Suprema, cuando lo estimen procedente, podrán imponer la condenación en costas.

State	Relevant constitutional or legal provision
Latvia	Law on the Constitutional Court Article 26 − The procedure for reviewing cases 1. The procedure for reviewing cases is provided for by this Law and the Rules of Procedure of the Constitutional Court. Envisaging of procedural terms and procedural sanctions- fines- shall be carried out in accordance with the rules of the Civil Procedure.
Monaco	Ordonnance no. 2.984 du 16/04/1963 sur l'organisation et le fonctionnement du Tribuna Suprême Article 35 .- Lorsque le recours en annulation prévu au paragraphe B, chiffre 1, de l'article 90 de la Constitution comporte une demande en indemnité, le Tribunal Suprême, s'il prononce l'annultion statue, dans la même décision sur le sort de ladite demande, sous réserve de la possibilité d'ordonner toutes les mesures d'instruction utiles prévues à l'article 32.
Poland	Article 77 Constitution 1. Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law.
Slovakia	Article 127(3) Constitution The Constitutional Court may, by the decision by which it grants a complaint, afford just satisfaction to a person whose rights have been violated according to section 1.
Slovenia	Article 46 Constitutional Court Act (1) Any person who suffers harmful consequences due to a regulation or general act issued for the exercise of public authority which has been annulled, is entitled to request that such consequences be remedied. If such consequences occurred as a result of an individual act adopted on the basis of the annulled regulation or general act issued for the exercise of public authority, entitled persons have the right to request that the authority which decided in the first instance change or annul such individual act. (2) Entitled persons may request a change or annulment of the individual act referred to in the preceding paragraph within three months of the day of the publication of the Constitutional Court decision, provided no more than one year elapsed from the service of the individual act to the lodging of the petition or request. (3) If the consequences occurred directly on the basis of a regulation or other general act issued for the exercise of public authority which was annulled by the Constitutional Court, the authority which issued such regulation or general act issued for the exercise of public authority is required to remedy such consequences. The entitled person lodges a request within the periods of time referred to in the preceding paragraph of this article. (4) If such consequences cannot be remedied in accordance with the preceding paragraphs, the entitled person may claim compensation in a court of law.
South Africa	Article 172(1) Constitution of the Republic of South Africa When deciding a constitutional matter within its power, a court … may make any order that is just and equitable… Article 38 Constitution of the Republic of South Africa Anyone has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief…
Spain	Article 58 Organic Law on the Constitutional Court 1. Jurisdiction to rule on claims for damages consequent on the granting or refusal of a stay shall lie with the judges or courts, with which the sureties shall be deposited. 2. Claims for damages settled arising as a result of interlocutory matters shall be submitted within a year following the date of publication of the judgment of the Constitutional Court.
"The former Yugoslav Repub-lic of-Macedo nia"	Article 81 Rules of Procedure of the Constitutional Court If the consequences of applying the law, regulation or the common act revoked by a judgment of the Constitutional Court cannot be eliminated by changing the individual act with respect to paragraph 1 of this article, the Court may determine the consequences to be eliminated by a return to the previous conditions, through compensation for damage or other means.
United States	U.S. Supreme Court Rule 42. Interest and Damages 1. If a judgment for money in a civil case is affirmed, any interest allowed by law is payable from thedate the judgment under review was entered. If a judgment is modified or reversed with a direction that a judgment for money be entered below, the mandate will contain instructions with respect to the allowance of interest. Interest in cases arising in a state court is allowed at the same rate that similar judgments bear interest in the courts of the State in which judgment is directed to be entered. Interest in cases arising in a court of the United States is allowed at the interest rate authorised by law. 2. When a petition for a writ of certiorari, an appeal, or an application for other relief is frivolous, the Court may award the respondent or appellee just damages, and single or double costs under Rule 43. Damages or costs may be awarded against the petitioner, appellant, or applicant, against the party's counsel, or against both party and counsel.

1.1.18 Table: Authorisation to put a preliminary request

State	Relevant constitutional or legal provision
Andorra	Article 53 Qualified Law on the Constitutional Tribunal 1. An application for judicial review by the Constitutional Court of the constitutionality of such a law or regulation is admissible where, at any stage in ordinary judicial proceedings, the court hearing the proceedings considers on its own initiative or on the initiative of one of the parties that one of the laws and regulations mentioned in the preceding Article which the court must apply in resolving the principal case or any step whatsoever taken therein is contrary to the Constitution. 2. This view that the law or regulation in question is unconstitutional must be based on the following factors: it must be impossible to interpret the law and regulation in question in a way which is consistent with the Constitution; the court must provide a reasoned explanation of the need to apply the law or regulation in resolving the main case or the step in question; and the law or regulation must not have been declared constitutional in any resolution or decision taken by the Constitutional Court, as provided for in Article 44.3 of this Law. 3. Before filing the document introducing the action provided for in the first paragraph of this Article with the Constitutional Court the court in question must consult the parties and the Attorney General's Department where it is represented in the proceedings. When the parties have been heard the court, on its sole responsibility, issues a decree containing its decision whether or not to lodge the application. No appeal may be made against the decision taken in that decree; where the decision is negative, however, the application may where appropriate be renewed during subsequent stages of the proceedings. Article 54 Qualified Law on the Constitutional Tribunal Where the applicable law or regulation regarded as contrary to the Constitution entered into force prior to the Constitution the court may choose between bringing the matter before the Constitutional Court and declaring at the appropriate point in the proceedings that the laws or regulations are repealed. In any event a declaration that the law or regulation is repealed doesnot mean that the law or regulation enacted prior to the Constitution is null and void, but simply states that it is without force and the reasons why this is so. Article 36 Qualified Law on the Constitutional Tribunal 1. Constitutional proceedings are filed at the seat of the Constitutional Court within the time limits prescribed by this Law and are introduced by a document of claim containing: c. The legal basis for the claim. Article 37 Qualified Law on the Constitutional Tribunal 1. Where one of the formalities specified in the preceding Article is not observed the application is declared inadmissible, without prejudice to the Court's right to require the applicant to remedy the formal defect within not more than six days. 2. The inadmissibility of the claim also occurs through manifest non competence of the Constitutional Tribunal, through dealing with a case which has acquired the character of a device and through the manifest lack of constitutional content of the infraction denounced.
Armenia	Article 71 of the Law On the Constitutional Court of the Republic of Armenia 1. In cases determined by this Article the Courts and the Chief Prosecutor appeal to the Constitutional Court if they find that the legal acts of general nature (or its provision(s)), which are under the jurisdiction of the Constitutional Court according to Paragraph 1 of Article 100 of the Constitution and which shall be implemented for the case under their review, contradict the Constitution. 2. Before applying to the Constitutional Court the courts must and the Chief Prosecutor has the right to suspend the given case until the decision of the Constitutional Court gets into force. 3. The Courts may apply to the Constitutional Court after taking the case under its review before making a decision on the substance of the given case and the Chief Prosecutor can apply after taking the case under its review before sending it to the relevant Court by the procedure prescribed by Law. 4. In case of suspension of the case review the Courts and the Chief Prosecutor can submit the appeals for the cases determined by this Article within three days after such suspension. The appeal to the Constitutional Court is formulated in a relevant decision of the Court or the Chief Prosecutor. 5. In the applications prescribed by Paragraph 1 of this Article the Court and the Chief Prosecutor shall justify their statements on the unconstitutionality of the provisions of the challenged general act as well as the fact that solution of the given case may be possible only by the implementation of the challenged provision.
Austria	Article 89 Constitution (2) Should a court have scruples against the application of an ordinance on the ground of it being contrary to law, it shall file an application with the Constitutional Court for rescission of this ordinance.

State	Relevant constitutional or legal provision
	Should the Supreme Court or a court of second instance competent to give judgment have scruples against the application of a law on the ground of its being unconstitutional, it shall file an application with the Constitutional Court for rescission of this law. Article 139 (1) The Constitutional Court pronounces on application by a court or an independent administrative tribunal whether ordinances issued by a Federal or Land authority are contrary to law, but ex officio in so far as the Court would have to apply such an ordinance in a pending suit. Article 140 (1)The Constitutional Court pronounces on application by the Administrative Court, the Supreme Court, a competent appellate court or an independent administrative tribunal whether a Federal or Land law is unconstitutional, but ex officio in so far as the Court would have to apply such a law in apending suit. "The Constitutional Court pronounces on application of the Supreme Court, a competent appelate court, an independent administrative tribunal, the Asylum Court, the Administrative Court or the Federal Tender Office whether a Federal or a Land law is unconstitutional, but ex officio in so far as the Court would have to apply such a law in a pending suit".
Belgium	Article 26 Special Law on the Court 2. Where such a question is raised before a court, it shall refer the matter to the Constitutional Court for a ruling. 1. where it cannot hear the case on grounds of lack of jurisdiction or inadmissibility, except where those grounds are derived from provisions which are themselves the subject of the request for a preliminary ruling; 2. where the Constitutional Court has already ruled on a question or an application having the same subject matter.
Bulgaria	Art. 150 (2) Constitution
Croatia	Article 37 of the Constitutional Act on the Constitutional Court "(1) If a court of justice in its proceedings determines that the law to be applied, or some of its provisions, are not in accordance with the Constitution, it shall stop the proceedings and present a request with the Constitutional Court to review the constitutionality of the law, or some of its provisions".
Cyprus	1964, Attorney General of the Republic vs. Mustafa Ibrahim et al: Only courts having jurisdiction in family issues can refer preliminary questions.
France	Article 23-1 de la loi organique n°2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution. *«Devant les juridictions relevant du Conseil d'État ou de la Cour de cassation, le moyen tiré de ce qu'une disposition législative porte atteinte aux droits et libertés garantis par la Constitution est, à peine d'irrecevabilité, présenté dans un écrit distinct et motivé. Un tel moyen peut être soulevé pour la première fois en cause d'appel. Il ne peut être relevé d'office.* Devant une juridiction relevant de la Cour de cassation, lorsque le ministère public n'est pas partie à l'instance, l'affaire lui est communiquée dès que le moyen est soulevé afin qu'il puisse faire connaître son avis. *Si le moyen est soulevé au cours de l'instruction pénale, la juridiction d'instruction du second degré en est saisie.* Le moyen ne peut être soulevé devant la cour d'assises. En cas d'appel d'un arrêt rendu par la cour d'assises en premier ressort, il peut être soulevé dans un écrit accompagnant la déclaration d'appel. Cet écrit est immédiatement transmis à la Cour de cassation».
Ger-many	Article 100 of the Basic Law - Compatibility of legislation and constitutional law (1) Where a court considers that a law on whose validity its ruling depends is unconstitutional it shall stay the proceedings and, if it holds the constitution of a Land to be violated, seek a ruling from the Land court with jurisdiction for constitutional disputes or, where it holds this Basic Law to be violated, from the Federal Constitutional Court. This shall also apply where this Basic Law is held to be violated by Land law or where a Land law is held to be incompatible with a federal law.
Georgia	Article 19 Organic Law of Georgia on the Constitutional Court of Georgia 2. if, while considering a particular case, a court of general jurisdiction concludes, that there is a sufficient ground to deem the law or other normative act, applicable by the court while adjudicating upon the case, fully or partially incompatible with the Constitution, the court shall suspend the consideration of the case and apply to the Constitutional Court. The consideration of the case shall be resumed after a judgment on the issue is adopted by the Constitutional Court. (12.02.02 №1264).
Greece	Article 100 Constitution 5. When a chamber or department of the Supreme Administrative Court or of the Supreme Civil and

State	Relevant constitutional or legal provision
Andorra	Criminal Court or of the Court of Auditors judges a provision of a statute enacted by Parliament to be contrary to the Constitution, it shall compulsorily refer the question to the respective plenum, unless this has been judged by a previous decision of the plenum or of the Special Highest Court of the present article. The plenum shall be assembled into judicial formation and shall decide definitively, as specified by law. This regulation shall apply analogously also in the elaboration of regulatory decrees by the Supreme Administrative Court.
Hungary	Article 38 Constitutional Court Act 1. A judge shall initiate the proceedings of the Constitutional Court while suspending the judicial process if he/she in the course of any pending case, he/she considers unconstitutional the legal rule or other legal means of the State control which he/she needs to apply. 2. In a petition, anybody considering a legal rule to be applied in his/her pending process unconstitutional, may initiate the action of the judge provided in section 1.
Lithua-nia	Article 106 of Constitution The Government, not less than 1/5 of all the Members of the Seimas, and the courts, shall have the right to apply to the Constitutional Court concerning the acts specified in the First Paragraph of Article 105. Not less than 1/5 of all the Members of the Seimas and the courts shall have the right to apply to the Constitutional Court concerning the conformity of acts of the President of the Republic with the Constitution and the laws. Not less than 1/5 of all the Members of the Seimas, the courts, as well as the President of the Republic, shall have the right to apply to the Constitutional Court concerning the conformity of acts of the Government with the Constitution and the laws. Article 67 Law on the Constitutional Court 2. The Supreme Court of Lithuania, the Court of Appeals of Lithuania, and district and area courts shall appeal to the Constitutional Court pursuant to a decision <...>
Luxem-burg	Article 6 Law on the organisation of the Constitutional Court If a court considers that an issue concerning a law's conformity with the Constitution arises and that a ruling on the matter is necessary for it to deliver its judgment, it must raise the matter of its own motion after asking the parties to submit any observations.
Malta	Article 46 Constitution (3) If in any proceedings in any court other than the Civil Court, First Hall, or the Constitutional Court any question arises as to the contravention of any of the provisions of the said sections 33 to 45 (inclusive), that court shall refer the question to the Civil Court, First Hall, unless in its opinion the raising of the question is merely frivolous or vexatious
Moldova	Article 135 Constitution (1) The Constitutional Court shall: g) solve the pleas of unconstitutionality of legal acts, as claimed by the Supreme Court of Justice.
Poland	Article 193 Constitution Article 3 Constitutional Tribunal Act Any court may refer a question of law to the Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or a statute if the answer to this question of law determines the matter pending before the court.
Romania	Article 148 Constitution (1) Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators. (2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act. (3) The provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to the acts revising the constituent treaties of the European Union. (4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented. (5) The Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the European Union institutions for approval.
Russia	Article 125 Constitution 1. The Constitutional Court of the Russian Federation shall consist of 19 members.

State	Relevant constitutional or legal provision
	2. The Constitutional Court of the Russian Federation, on the request of the President of the Russian Federation, the Council of the Federation, the State Duma, one fifth of the deputies of a chamber of the Federal Assembly, the Government of the Russian Federation, the Supreme Court of the Russian Federation and the Higher Court of Arbitration of the Russian Federation, legislative and executive bodies of the subjects of the Russian Federation, shall adjudicate in cases concerning the compatibility with the Constitution of the Russian Federation of: […] Article 101 Federal Constitutional Law on the Constitutional Court of the Russian Federation The court while considering the case in any instance, having arrived at the conclusion about nonconformity with the Constitution of the Russian Federation of the law which has been applied or ought to be applied in a specific case, shall petition the Constitutional Court of the Russian Federation with an inquiry to verify the constitutionality of the aforementioned law.
Slovakia	Article 130 Constitution (1) The Constitutional Court shall commence proceedings upon an application submitted by: d) any court
Slovenia	Article 156 Constitution If a court deciding some matter deems a law which it should apply to be unconstitutional, it must stay the proceedings and initiate proceedings before the Constitutional Court. The proceedings in the court may be continued after the Constitutional Court has issued its decision. Article 23 Constitutional Court Act (1) When in the process of deciding a court deems a law or part thereof which it should apply to be unconstitutional, it stays the proceedings and by a request initiates proceedings for the review of its constitutionality. (2) If the Supreme Court deems a law or part thereof which it should apply to be unconstitutional, it stays proceedings in all cases in which it should apply such law or part thereof in deciding on legal remedies and by a request initiates proceedings for the review of its constitutionality. (3) If by a request the Supreme Court initiates proceedings for the review of the constitutionality of a law or part thereof, a court which should apply such law or part thereof in deciding may stay proceedings until the final decision of the Constitutional Court without having to initiate proceedings for the review of the constitutionality of such law or part thereof by a separate request.
Spain	Article 163 Constitution If a judicial body considers, in some action, that a regulation with the status of law which is applicable thereto and upon the validity of which the judgment depends, may be contrary to the Constitution, it may bring the matter before the Constitutional Court in the circumstances, manner and subject to the consequences to be laid down by law, which shall in no case be suspensive. Article 35 Law on the Constitutional Court 1. Where a judge or a court, proprio motu or at the request of a party, considers that an enactment having the force of law which is applicable to a case and on which the validity of the ruling depends may be contrary to the Constitution, the judge or court shall raise the question before the Constitutional Court in accordance with the provisions of this Law.
Turkey	Article 152 Constitution If a court which is trying a case, finds that the law or the decree having the force of law to be applied is unconstitutional, or if it is convinced of the seri ousness of a claim of unconstitutionality submitted by one of the parties, it shall postpone the consideration of the case until the Constitutional Court decides on the issue. If the court is not convinced of the seriousness of the claim of unconstitutionality, such a claim together with the main judgment shall be decided upon by the competent authority of appeal. The Constitutional Court shall decide on the matter and make public its judgment within five months of receiving the contention. If no decision is reached within this period, the trial court shall conclude the case under existing legal provisions. However, if the decision on the merits of the case becomes final, the trial court is obliged to comply with it. Law on the Organisation and Trial Proceedings of the Constitutional Court Article 28 If a court which is trying a case: 1. finds that provisions of a law or law-amending ordinance to be applied in this case are unconstitutional, this decision together with its reasons, or 2. is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, a decision explaining the claims and defences of the parties concerned in relation to this subjectmatter and its own views which led to this conviction, the contents of the file together with certified copies of documents relating to this case are sent by the court concerned to the presidency of the Constitutional Court.
Ukraine	Article 40 Law on the Constitutional Court Subjects of the right to a constitutional claim for adopting a decision by the Constitutional Court of Ukraine in cases provided for by subsection one, Article 13 of this Law are: […] the Supreme Court of Ukraine […]

State	Relevant constitutional or legal provision
	Article 83 When, in the process of examination of cases under general court procedure, a dispute develops concerning the constitutionality of norms of a law which is being applied by the court, the examination of the case is suspended. Under such circumstances, a constitutional examination of the case is opened and the case is considered by the Constitutional Court of Ukraine immediately.

Constitutional and legal bases for indirect and direct individual access

1.1.19 Table: Indirect access: Ombudsperson

State	Relevant constitutional or legal provision
Albania	Law on the Organisation and Functioning of the Constitutional Court Article 49 1. A case before the Constitutional Court on the review of the compatibility of laws or other normative acts with the Constitution or international agreements may be initiated by an application of the President of the Republic, the Prime Minister, not less than one fifth of the deputies of the Assembly or the Chairman of the High State Control. 2. This right extends, when it is demonstrated that the case concerns their interests, to the People's Advocate, local authorities, religious institutions, political parties and other organisations.
Algeria	No individual access
Argen-tina	Constitution Section 86 The Ombudsman is an independent body created within the sphere of the National Congress operating with full autonomy without receiving instructions from any authority. The mission of the Ombudsman is the defence and protection of human rights and other rights, guarantees and interests sheltered under this Constitution and the laws, in the face of deeds, acts or omissions of the Administration; as well as the control of public administrative functions. The Ombudsman has capacity to be a party in a lawsuit. He is appointed and removed by Congress with the vote of two-thirds of the members present of each House. He has the immunities and privileges of legislators. He shall hold office for the term of five years and may only be re-appointed on one occasion. The organisation and operation of this body shall be ruled by a special law. Law 24.379 (p.t.) Article 14[290] The Public Defender can initiate and continue, ex officio or at the request of an interested person, investigations conducting to the elucidation of the acts, deeds and omissions by the national public administration and its agents that, through the illegitimate, faulty, irregular, abusive, arbitrary, discriminatory, negligent, strongly unfavourable or inopportune exercise of their functions, including those acts, deeds and omissions that could affect diffuse or collective interests. Article 18[291] Every natural or juristic person that considers itself affected by the acts, deeds and omissions provided for in article 14 may petition to the Public Defender.
Armenia	Constitution Article 100 The Constitutional Court shall, in conformity with the procedure defined by law: 1) determine the compliance of the laws, resolutions of the National Assembly, decrees and orders of the President of the Republic, decisions of the Prime Minister and bodies of the local self-government with the Constitution; Article 101 In conformity with the procedure set forth in the Constitution and the law on the Constitutional Court the application to the Constitutional Court may be filed by:

[290] Articulo 14.-Actuación. Forma y alcance. El Defensor del Pueblo puede iniciar y proseguir de oficio o a petición del interesado cualquier investigación conducente al esclarecimiento de los actos, hechos u omisiones de la administración pública nacional y sus agentes, que impliquen el ejercicio ilegítimo, defectuoso, irregular, abusivo, arbitrario, discriminatorio, negligente, gravemente inconveniente o inoportuno de sus funciones, incluyendo aquellos capaces de afectar los intereses difusos o colectivos.
http://www.defensor.gov.ar/institucion/ley-sp.htm

[291] Articulo 18 Legitimación. Puede dirigirse al Defensor del Pueblo toda persona física o jurídica que se considere afectada por los actos, hechos u omisiones previstos en el artículo 14.
http://www.defensor.gov.ar/institucion/ley-sp.htm

State	Relevant constitutional or legal provision
	8) the Human Rights' Defender – on the issue of compliance of normative acts listed in clause 1 of Article 100 of the Constitution with the provisions of Chapter 2 of the Constitution; Article 68 Law on the Constitutional Court 1. In regard to cases determined by Point 1 of Article 100 of the Constitution the constitutionality of the general acts as well as individual acts mentioned in that Point can be challenged, except for the cases of the appeals brought by the Ombudsmen. The Ombudsmen can challenge only the constitutionality of general acts.
Austria	Constitution Article 148e On application by the ombudsman board the Constitutional Court pronounces on the illegality of ordinances by a Federal authority.
Azer-baijan	Constitution Article 130 VII. Ombudsman of Azerbaijan Republic in accordance with the procedure provided for by the laws of the Republic of Azerbaijan for solving the matters indicated in items 1-7, para III of the given Article shall apply to the Constitutional Court of the Republic of Azerbaijan in cases where the rights and freedoms of a person had been violated by legislative acts in force, normative acts of executive power, municipalities as well as the court decisions. Law on the Constitutional Court Article 32. Petitions 32.1. Petition can be submitted to Constitutional Court by […] Ombudsman of Azerbaijan Republic on the matters provided for by Article 130.7 of the Constitution of Azerbaijan Republic. 32.2. Petitions by Ombudsman of Azerbaijan Republic on the matter provided for by Article 130.3.4 of the Constitution of Azerbaijan Republic can be examined by Constitutional Court in following cases: 32.2.1. If the normative legal act which should have been applied was not applied by a court; 32.2.2. If normative legal act which should not have been applied was applied by a court; 32.2.3. If normative legal act was not properly interpreted by a court; 32.3. Petition envisaged in Article 32.2. of the present law can be submitted within 6 months from the moment of entrance of the relevant court act into legal force.
Belarus	No Ombudsperson
Belgium	The Ombudsperson has no power to apply to the Constitutional Court
Bosnia and Herze-govina	The Ombudsperson has no power to apply to the Constitutional Court
Brazil	
Bulgaria	Law on the Ombudsman Article 19 (1) The Ombudsman shall: 1. receive and consider complaints and signals regarding violations of rights and freedoms by the state and municipal authorities and their administrations as well as by persons assigned with the provision of public services; 2. make examinations upon the complaints and signals received; 3. reply in writing to the person, who has lodged the complaint or signal, within one month; if the case requires a more thorough examination, this term shall be three months; 4. make proposals and recommendations for reinstatement of the violated rights and freedoms before the respective authorities, their administrations, and persons under item 1; 5. mediate between the administrative authorities and the persons concerned for overcoming the violations admitted and shall reconcile their positions; 6. make proposals and recommendations for eliminating the reasons and conditions, which create prerequisites for violation of rights and freedoms; 7. notify the authorities, listed under article 150 of the Constitution, for approaching the Constitutional Court, when he/she is of the opinion that it is necessary the Constitution to be interpreted or a law to be declared unconstitutional;
Canada	The Ombudsperson has no power to apply to the Supreme Court
Chile	No Ombudsperson
Croatia	Constitutional Act on the Constitutional Court Article 35 The request by which the proceedings before the Constitutional Court are instituted may be presented by: - the People's Ombudsman in proceedings provided by Article 92 of the Constitution of the Republic of Croatia.

State	Relevant constitutional or legal provision
Cyprus	The Ombudsperson has no power to apply to the Supreme Constitutional Court
Czech Repub-lic	Constitutional Court Act Article 64 (2) A petition, under Article 87 para. 1, lit. b) of the Constitution, proposing the annulment of some other enactment, or individual provisions thereof, may be submitted by: f) the Public Protector of Rights ["Ombudsman"];
Denmark	Ombudsperson has no power to appeal to the Supreme Court
Estonia	Article 142 Constitution If the Legal Chancellor considers that a legal act issued by the state legislature or executive or by a local government is in conflict with the Constitution or a law, he or she shall propose to the body which has adopted that act to bring the act into accordance with the Constitution or law within twenty days. If the act is not brought into accordance with the Constitution or law within twenty days, the Legal Chancellor shall apply to the National Court to declare the act null and void. Chancellor of Justice Act[292] §15 Everyone has the right of recourse to the Chancellor of Justice to review the conformity of an Act or other legislation of general application with the Constitution or the law. §18 (1) If a body which passed legislation of general application has not brought the legislation or a provision thereof into conformity with the Constitution or the law within twenty days after the date of receipt of a proposal of the Chancellor of Justice, the Chancellor of Justice shall propose to the Supreme Court that the legislation of general application or a provision thereof be repealed. §19 (1) Everyone has the right of recourse to the Chancellor of Justice in order to have his or her rights protected by way of filing a petition to request verification whether or not a state agency, local government agency or body, legal person in public law, natural person or legal persons in private law performing public duties (hereinafter agency under supervision) adheres to the principles of observance of the fundamental rights and freedoms and to the principles of sound administration. §35(15) (1) If conciliation proceedings are terminated or the Chancellor of Justice has stated failure to reach an agreement, the petitioner has, within thirty days as of the receipt of the notice, the right of recourse to a court or to an authority conducting pre-trial proceedings as provided by law for the protection of his or her rights. Constitutional Review Court Procedure Act §. 4 (1) The Supreme Court shall review the constitutionality of legislation of general application or international treaties on the basis of a reasoned request, court judgment or court ruling. (2) A request may be filed with the Supreme Court by the President of the Republic, the Legal Chancellor and a local government council. (3) A court shall initiate proceedings by delivering its judgment or ruling to the Supreme Court. §. 6. (1) The Legal Chancellor may file a request to the Supreme Court that it 1) declare legislation of general application or a provision thereof passed by the legislative or executive power or a local government, which has entered into force, invalid; 2) to declare an Act, which has been proclaimed but has not yet entered into force, unconstitutional; 3) to declare legislation of general application passed by the executive or a local government body, which has not entered into force, unconstitutional; 4) to declare an international agreement entered into by the Republic of Estonia or a provision thereof unconstitutional; 5) to repeal a resolution of the Riigikogu concerning submission of a draft Act or other national issue to a referendum, if the draft Act to be submitted to a referendum, except draft Acts amending the Constitution, or other national issues are in conflict with the Constitution or if upon deciding to hold a referendum the Riigikogu has materially violated the prescribed procedure. (2) The Legal Chancellor shall file a request referred to in clause 5 of subsection (1) within 14 days as of the receipt of pertinent resolution of the Riigikogu.
Finland	The Ombudsperson has no power to apply to the courts
France	The Ombudsperson has no power to apply to the Constitutional Council

[292] See http://www.legaltext.ee/text/en/X30041K6.htm

State	Relevant constitutional or legal provision
Georgia	Organic Law on the Public Defender of Georgia Article 21 Following the results of the examination, the Public Defender of Georgia shall be authorised: to bring out a suit at the Constitutional Court of Georgia in a case where a referendum is not held, despite the request of the electorate; if he considers that the holding of a referendum contradicts the provisions of paragraph 2 of Article 74 of the Constitution of Georgia, or in the case where any legal act or any provision of this act violates human rights and fundamental freedoms recognised by Chapter 2 of the Constitution of Georgia; Organic Law on the Constitutional Court Article 36 1. The following shall have the right to lodge a constitutional claim to the Constitutional Court concerning constitutionality of holding a referendum: b. the Public Defender of Georgia, if notwithstanding the electors' request a referendum is not called; c. not less than one fifth of the members of the Parliament of Georgia, the Public Defender of Georgia, if they believe that the holding a referendum contradicts the requirements of Article 74.2 of the Constitution of Georgia. Article 39 1. The following shall have the right to lodge a constitutional claim on constitutionality of a normative act or a particular provisions thereof: b) The Public Defender of Georgia, if he/she believes that human rights and freedoms, recognised by Chapter Two of the Constitution of Georgia, are infringed upon.
Germany	No Ombudsperson at federal level
Greece	Law 3094/2003[293] The Ombudsperson has no power to apply to the Special Highest Court
Hungary	Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights, article 22 The Parliamentary Commissioner for Civil Rights may make a motion to the Constitutional Court for: a)The ex post facts examination of the unconstitutionality of a statutory instrument r any other legal means of government control; b)The examination of whether a statutory instrument or any other legal means of government control conflicts with an international agreement; c) (repealed) d) the termination of unconstitutionality manifesting itself in an omission; e) the interpretation of the provisions of the Constitution.
Iceland	The Ombudsperson has no power to apply to the Constitutional Court
Ireland	The Ombudsperson has no power to apply to the Constitutional Court
Italy	No Ombudsperson at national level
Japan	The Ombudsperson has no power to apply to the Supreme Court
Kazakh-stan	The Ombudsperson has no power to apply to the Constitutional Court
Korea	Republic The Ombudsperson has no power to apply to the Constitutional Court
Latvia	Ombudsman Law Section 13 In the performance of the functions and tasks specified by this Law, the Ombudsman has the right: 8) to submit an application regarding the initiation of proceedings in the Constitutional Court if an institution that has issued the disputable act has not rectified the established deficiencies within the time limit specified by the Ombudsman; 9) upon termination of a verification procedure and establishment of a violation, to defend the rights and interests of a private individual in court, if that is necessary in the public interest; 10) upon termination of a verification procedure and establishment of a violation, to apply to a court in such civil cases, where the nature of the action is related to a violation of the prohibition of dif ferential treatment;
Liech-tenstein	The Council and Complaints Office has no power to accede to the Constitutional Court
Lithua-nia	Law on the Seimas Ombudsmen Article 19. Rights of the Seimas Ombudsman 1. When performing his duties, the Seimas Ombudsman shall have the right to: 11) propose to the Seimas to apply to the Constitutional Court regarding the conformity of legal acts with the Constitution and laws of the Republic of Lithuania;

[293] http://www.synigoros.gr/en_law.htm

State	Relevant constitutional or legal provision
Luxembourg	The Ombudsperson has no power to apply to the Constitutional Court
Malta	The Ombudsperson has no power to apply to the Constitutional Court
Mexico	
Moldova	Constitutional Jurisdiction Act[294] Article 38 1. The Constitutional Court shall exercise the constitutional jurisdiction upon appeal of the following subjects: i. Ombudsman; These limitations concern other subjects and only for cases expressly mentioned in the law.
Monaco	No Ombudsman
France	The Ombudsperson has no power to apply to the Constitutional Council
Montenegro	Constitution Article 81 The protector of human rights and liberties of Montenegro shall be independent and autonomous authority that takes measures to protect human rights and liberties. The protector of human rights and liberties shall exercise duties on the basis of the Constitution, the law and the confirmed international agreements, observing also the principles of justice and fairness. The protector of human rights and liberties shall be appointed for the period of six years and can be dismissed in cases envisaged by the law. Law on the Protector of Human Rights and Freedoms Article 26 The Protector may propose the initiation of proceedings before the Constitutional Court of the Republic of Montenegro for the purpose of assessing the constitutionality and legality of the legislation and general enactment relating to human rights and freedoms.
Morocco	The Ombudsperson has no power to apply to the Constitutional Court
Netherlands	The Ombudsperson has no power to apply to any Court
Norway	The Ombudsperson has no power to apply to the Constitutional Court
Poland	Constitution Article 80 In accordance with principles specified by statute, everyone shall have the right to apply to the Commissioner for Citizens' Rights for assistance in protection of his freedoms or rights infringed by organs of public authority. Constitutional Tribunal Act Article 27 The participants in the proceedings before the Tribunal shall be: 8) the Commissioner for Citizens' Rights where he/she has given notice of his/her participation in the proceedings in relation to complaints concerning constitutional infringements. Article 51 1. The Tribunal shall inform the Commissioner for Citizens' Rights about the institution of proceedings. Provisions of Article 33 shall apply accordingly. 2. The Commissioner for Citizens' Rights may, within the period of 60 days
Peru	Public Defender has no power to apply to the Constitutional Court from the receipt of information, give notice of his/her participation in the proceedings. Article 52 1. The participants in the proceedings before the Tribunal shall be: the person making the complaint, the organ which promulgated the challenged normative act and the Public Prosecutor-General; the Commissioner of the Citizens' Rights shall also be the participant in the proceedings when he/she has given notice of his/her participation therein. Act of 15 July 1987 on the Commissioner for Civil Rights Protection Article 16. 1. In connection with the cases examined, the Commissioner can present to the relevant agencies, organisations and institutions opinions and conclusions aimed at ensuring efficient protection of the liberties and rights of a human and a citizen and facilitating the procedures such cases may involve. 2. The Commissioner may also:

[294] http://www.constcourt.md/index_en.html

State	Relevant constitutional or legal provision
	1) approach the relevant agencies with proposals for legislative initiative, or for issuing or amending other legal acts concerning the liberties and rights of a human and a citizen, 2) approach the Constitutional Tribunal with motions mentioned in Art. 188 of the Constitution, 3) report participation in the proceedings before the Constitutional Tribunal in the cases of constitutional complaints and take part in those proceedings, 4) request the Supreme Court to issue a resolution aimed at explaining legal provisions that raise doubts in practice, or application of has resulted in conflicting judicial decisions.
Portugal	Constitution Article 281 General review of constitutionality and legality 2. The following persons are entitled to request the Constitutional Court to make generally binding rulings on questions of unconstitutionality and illegality: d. The Ombudsman; Law n.º 9/91 Statute of the Ombudsman Article 20 3 – The Ombudsman may request the Constitutional Court to declare the unconstitutionality or illegality of any legal provisions, in accordance with article 281, paragraph 1 and paragraph 2, sub-paragraph (d), of the Constitution. 4 – The Ombudsman may request the Constitutional Court to rule on cases of unconstitutionality due to a legislative omission, in accordance with article 283, paragraph 1, of the Constitution.
Roma-nia	Constitution Article 144 The Constitutional Court shall have the following powers: […] d) to decide on objections as to the unconstitutionality of laws and ordinances, brought up before courts of law or of commercial arbitration; the objection as to the unconstitutionality may also be brought up directly by the Advocate of the People; Law on the Advocate of the People[295] Article 13 Law no. 35/1997 on Ombudsman The Advocate of the People shall have the following duties: b) receives and distributes complaints lodged by persons aggrieved by public administration authorities through violations of their civic rights and freedoms, and decides on these complaints; d) submits points of view, at the request of the Constitutional Court; e) can file submission to the Constitutional Court on the unconstitutionality of laws, before their promulgation; f) submits directly to the Constitutional Court exception of unconstitutionality of laws and ordinances; Article 14 (1) The Ombudsman exe rcises his duties ex officio or upon complaints lodged by aggrieved persons as provided under Article 13 (b).
Russian Federa-tion	Federal Constitutional Law "On the Representative under human rights in the Russian Federation" Article 29 1. By results of consideration of the complaint the Representative has the right: 5) to address in the Constitutional Court of the Russian Federation with the complaint to infringement of constitutional laws and freedom of citizens the law which is applied or subject to application in a concrete case.
San Marino	No Ombudsman as yet, but plans to introduce one.
Serbia	Draft Law on Ombudsman[296] Article 16 The Ombudsman shall have the power to initiate proceedings before the Constitutional Court for the assessment of legality and constitutionality of laws, other regulations and general acts which govern issues related to the freedoms and rights of citizens.
Slova-kia	Constitution Article130.1.f The Constitutional Court shall commence the proceedings upon an application submitted by the Public Defender of Rights in matter of conformity of legal regulations according to Article 125.1 of the Constitution of the Slovak Republic, if further application of the regulation could represent a threat to fundamental rights and freedoms or human rights and fundamental freedoms, as arise from an international treaty that has been ratified by the Slovak Republic and published in the way specified by law Article 151a

[295] http://www.avp.ro/indexen.html
[296] http://www.venice.coe.int/docs/2004/CDL(2004)113-e.pdf

State	Relevant constitutional or legal provision
	(1) The Public Defender of Rights is an independent body which in the scope and in manner laid down by law shall protect the fundamental rights and freedoms of natural persons and legal persons in proceedings before public administrative and other bodies, if their proceedings, decision-making or inactivity is inconsistent with the legal order.
Slovenia	Article 23.a Constitutional Court Act (1) The procedure for the review of the constitutionality or legality of regulations or general acts issued for the exercise of public authority can be initiated by a request submitted by: - the ombudsman for human rights if he deems that a regulation or general act issued for the exercise of public authority inadmissibly interferes with human rights or fundamental freedoms. Article 50 (2) The ombudsman for human rights may, under the conditions determined by this Act, lodge a constitutional complaint in connection with an individual case that he is dealing with. Article 52 (2) The ombudsman for human rights lodges a constitutional complaint with the consent of the person whose human rights or fundamental freedoms he is protecting in the individual case.
South Africa	Constitution of the Republic of South Africa Art. 182: Functions of Public Protector (1) The Public Protector has the power, as regulated by national legislation(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; (b) to report on that conduct; and (c) to take appropriate remedial action. (2) The Public Protector has the additional powers and functions prescribed by national legislation. (3) The Public Protector may not investigate court decisions. (4) The Public Protector must be accessible to all persons and communities. (5) An report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential. Art. 183: Tenure The Public Protector is appointed for a non-renewable period of seven years. Public Protector Act , no. 23 of 1994 Public Protector may apply to the Constitutional Court or any other court.
Spain	Constitution Article 162 1. The following are eligible to: a) lodge an appeal against unconstitutionality: the President of the Government, the Defender of the People, fifty Deputies, fifty Senators, the executive corporate bodies of the Autonomous Communities and, when applicable, their Assemblies; b) lodge an individual appeal for protection ("recurso de amparo"): any individual or corporate body with a legitimate interest, as well as the Defender of the People and the Office of the Public Prosecutor. 2. In all other cases, the organic law shall determine which persons and agencies are eligible. Organic Law on the Constitutional Court Article 32 1. The following have standing to bring an action of unconstitutionality against Statutes of Autonomy and other State laws, organic or of any character whatsoever, against regulations and enactments of the State or Autonomous Communities having the force of law, and against international treaties and the Rules of Procedure of the Houses and the Cortes Generales: b. the Defender of the People (Defensor del Pueblo); Article 46 1. The following shall have standing to lodge an appeal for constitutional protection: a. In the case of Articles 42 and 45, the person directly affected, the Defender of the People and the Office of the Public Prosecutor; b. In the case of Articles 43 and 44, the parties to the corresponding judicial proceedings, the Defender of the People and the Office of the Public Prosecutor. 2. Where the appeal is brought by the Defender of the People or the Office of the Public Prosecutor, the Division of the Court with authority to hear the case for constitutional protection shall inform any potentially injured persons of whom it has knowledge and shall order publication of the notice of appeal in the "Official State Gazette" so that other interested parties may come forward. Such publication shall have preferential status.
Sweden	The Ombudsperson has no power to apply to the courts
Switzerland	No Ombudsperson at federal level
Tunisia	Ombudsperson has no power to apply to the Constitutional Court

State	Relevant constitutional or legal provision
"The Former Yugoslav Republic of Macedonia"	Law on the Ombudsman[297] Article 13 The procedure for protection of the constitutional and legal rights of citizens before the Ombudsman shall be initiated by putting forward a submission. Anyone may put forward a submission to the Ombudsman when he assesses that his constitutional and legal freedoms and rights have been infringed or when the principle of nondiscrimination and adequate and equitable representation of community members in the bodies set out in Article 2 of this Law has been breached. The Ombudsman may initiate a procedure on his own initiative if he assesses that the constitutional and legal rights of citizens, stipulated in Article 2 of this Law, have been infringed. Article 30 The Ombudsman may submit a proposal to the Constitutional Court of the Republic of Macedonia for evaluation of the constitutionality of the laws and the constitutionality and legality of the other regulations or general acts.
Turkey	According to the 2010 constitutional reform package, an Ombudsperson will be created. However, he/she will not have the power to bring a case before the Constitutional Court.
Ukraine	Article 150 Constitution The authority of the Constitutional Court of Ukraine comprises: 1) deciding on issues of conformity with the Constitution of Ukraine (constitutionality) of the following: laws and other legal acts of the Verkhovna Rada of Ukraine; acts of the President of Ukraine; acts of the Cabinet of Ministers of Ukraine; legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea. These issues are considered on the appeals of: the Authorised Human Rights Representative of the Verkhovna Rada of Ukraine; Law of Ukraine on the Constitutional Court of Ukraine Article 13 The Constitutional Court of Ukraine adopts decisions and provides conclusions in cases concerning: 1. constitutionality of laws and the other legal acts of the Verkhovna Rada of Ukraine, acts of the President of Ukraine, acts of the Cabinet of Ministers of Ukraine, legal acts of the Supreme Rada of the Autonomous Republic of Crimea; 4. official interpretation of the Constitution and laws of Ukraine. Article 40 Subjects of the right to a constitutional claim for adopting a decision by the Constitutional Court of Ukraine in cases provided for by subsection one, Article 13 of this Law are: the President of Ukraine, no fewer than forty-five National Deputies of Ukraine (a National Deputy's signature may not be recalled), the Supreme Court of Ukraine, the Authorised Representative of the Verkhovna Rada of Ukraine on Human Rights and the Supreme Rada of the Autonomous Republic of Crimea. Article 41 Subjects of the right to a constitutional claim for providing opinions by the Constitutional Court of Ukraine in the cases provided for by subsections two, three and four of Article 13 of this Law are: - under subsection four, the President of Ukraine, no fewer than forty-five National Deputies of Ukraine (a National Deputy's signature may not be recalled), the Authorised Representative of the Verkhovna Rada of Ukraine on Human Rights, the Supreme Court of Ukraine, the Cabinet of Ministers of Ukraine, the other State power authorities, the Supreme Rada of the Autonomous Republic of Crimea and local self-government authorities. Article 82 The grounds for raising the issue of opening the examination of a case concerning the conformity of current legislative norms to the principles and norms of the Constitution of Ukraine as to the rights and freedoms of individuals and citizens are: 1. the existence of disputable questions concerning the constitutionality of laws and other legal acts adopted and promulgated in the prescribed order; 2. the development of disputable questions concerning the constitutionality of legal acts revealed in the process of general court procedure; 3. the development of disputable questions concerning the constitutionality of legal acts revealed by executive power authorities in process of their implementation and by the Authorised Representative of the Verkhovna Rada of Ukraine on Human Rights in the process of his/her activity.

[297] http://www.unhcr.org/refworld/type,LEGISLATION,,MKD,3fcb36dc4,0.html

State	Relevant constitutional or legal provision
United Kingdom	Parliamentary Commissioner Act 1967[298] Article 6 (1)A complaint under this Act may be made by any individual, or by any body of persons whether incorporated or not, not being— (a)a local authority or other authority or body constituted for purposes of the public service or of local government or for the purposes of carrying on under national ownership any industry or undertaking or part of an industry or undertaking; Article 10 (3)If, after conducting an investigation under this Act, it appears to the Commissioner that injustice has been caused to the person aggrieved in consequence of maladministration and that the injustice has not been, or will not be, remedied, he may, if he thinks fit, lay before each House of Parliament a special report upon the case. Te Parliamentary Commissioner for Administration has no power to apply to the courts.
United States	No Ombudsperson.
Uruguay	No Ombudsperson

1.1.20 Table: Indirect individual access: Preliminary requests

State	Relevant constitutional or legal provision
Albania	Law on the Organisation and Functioning of the Constitutional Court Article 68 1. When a court of any instance or a trial judge considers during the trial ex officio or at the request of either party involved that a certain law is unconstitutional and if there is a direct link between the law and the solution of the case at hand, that particular law shall not be applied in the case at hand and after suspending the trial the judge shall refer the file to the Constitutional Court, which on its side should deliver its verdict as to the constitutionality of the said law.
Algeria	No preliminary ruling procedure
Andorra	Constitution Article 98 The Tribunal Constitucional tries: a) Appeals of unconstitutionality against laws, executive regulations and the Rules of Procedure of the Consell General. Article 100 1. If, in the course of litigation, a court has reasoned and founded doubts about the constitutionality of a law or a legislative decree, the application of which is rel evant to its decision, it shall request in writing the decision of the Tribunal Constitucional about the validity of the rule affected. Qualified law on the Constitutional Court Article 43 1. In the case of actions where unconstitutionality is alleged, the Constitutional Court reviews the compatibility with the Constitution of the laws, legislative decrees and Rules of Procedure of the General Council or the individual provisions thereof. 2. These proceedings are introduced by a direct action submitted by one fifth of the ex officio members of the General Council, by the Head of the Government or by three Comuns, or by an interlocutory application in writing from an ordinary court. Article 52 In the exercise of their judicial functions, the Batlles (judges of first instance), the Court of Batlles, the Tribunal de Corts (criminal court) and the Higher Court of Andorra are entitled to apply for interlocutory proceedings to be opened in respect of laws, legislative decrees and regulations having statutory force on the ground that they are unconstitutional, irrespective of the date on which they entered into force. Article 53 1. An application for judicial review by the Constitutional Court of the constitutionality of such a law or regulation is admissible where, at any stage in ordinary judicial proceedings, the court hearing the proceedings considers on its own initiative or on the initiative of one of the parties that one of the laws and regulations mentioned in the preceding Article which the court must apply in resolving the principal case or any step whatsoever taken therein is contrary to the Constitution. 2. This view that the law or regulation in question is unconstitutional must be based on the following factors: it must be impossible to interpret the law and regulation in question in a way which is

[298] http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1967/cukpga_19670013_en_1

State	Relevant constitutional or legal provision
	consistent with the Constitution; the court must provide a reasoned explanation of the need to apply the law or regulation in resolving the main case or the step in question; and the law or regulation must not have been declared constitutional in any resolution or decision taken by the Constitutional Court, as provided for in Article 44.3 of this Law. 3. Before filing the document introducing the action provided for in the first paragraph of this Article with the Constitutional Court the court in question must consult the parties and the Attorney General's Department where it is represented in the proceedings. When the parties have been heard the court, on its sole responsibility, issues a decree containing its decision whether or not to lodge the application. No appeal may be made against the decision taken in that decree; where the decision is negative, however, the application may where appropriate be renewed during subsequent stages of the proceedings. Article 54 Where the applicable law or regulation regarded as contrary to the Constitution entered into force prior to the Constitution the court may choose between bringing the matter before the Constitutional Court and declaring at the appropriate point in the proceedings that the laws or regulations are repealed. In any event a declaration that the law or regulation is repealed does not mean that the law or regulation enacted prior to the Constitution is null and void, but simply states that it is without force and the reasons why this is so.
Argen-tina	No preliminary ruling procedure
Arme-nia	Constitution Article 101 In conformity with the procedure set forth in the Constitution and the law on the Constitutional Court the application to the Constitutional Court may be filed by: 7) courts and the Prosecutor General on the issue of constitutionality of provisions of normative acts related to specific cases within their proceedings; Law on the Constitutional Court Article 71 1. In cases determined by this Article the Courts and the Chief Prosecutor appeal to the Constitutional Court if they find that the legal acts of general nature (or its provision(s)), which are under the jurisdiction of the Constitutional Court according to Point 1 of Article 100 of the Constitution and which shall be implemented for the case under their review, contradict the Constitution.
Austria	Constitution Article 139 (1)The Constitutional Court pronounces on application by a court or an independent administrative tribunal whether ordinances issued by a Federal or Land authority are contrary to law, but ex officio in so far as the Court would have to apply such an ordinance in a pending suit. Article 140 "The Constitutional Court pronounces on application of the Supreme Court, a competent appelate court, an independent administrative tribunal, the Asylum Court, the Administrative Court or the Federal Tender Office whether a Federal or a Land law is unconstitutional, but ex officio in so far as the Court would have to apply such a law in a pending suit".
Azer-baijan	Constitution Article 130 VI. In accordance with the procedure provided for by the laws of Azerbaijan Republic the courts may file the Constitutional Court of Azerbaijan Republic a request on interpretation of the Constitution and the laws of Azerbaijan Republic as regards the matters concerning the implementation of human rights and freedoms. Law on the Constitutional Court Article 33 33.1. Applications can be submitted to Constitutional Court by the Milli Majlis of Azerbaijan Republic on the matters provided for by Article 104.3 of the Constitution of Azerbaijan Republic and by courts of Azerbaijan Republic on the matters provided for by Article 130.6 of the Constitution of Azerbaijan Republic.
Belarus	Constitution Article 112. If, during the hearing of a specific case, a court concludes that an enforceable enactment is contrary to the Constitution, it shall make a ruling in accordance with the Constitution and raise, under the established procedure, the issue of whether the enforceable enactment in question should be deemed unconstitutional.
Belgium	Constitution Article 142 There is for all Belgium a Constitutional Court, the composition, competences and functioning of which are established by the law. This Court rules by means of judgments on: 1° those conflicts referred to in Article 141;

State	Relevant constitutional or legal provision
	2° the violation of Articles 10, 11 and 24 by a law, a federate law or a rule as referred to in Article 134; 3° the violation of constitutional articles that th e law determines by a law, a federate law or by a rule as referred to in Article 134. A matter may be referred to the Court by any authority designated by the law, by any person that can prove an interest or, pre-judicially, by any court.
Bosnia and Herze-govina	Constitution Article VI: Constitutional Court 3 Jurisdiction. c The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.
Brazil	No preliminary ruling procedure
Bul-garia	Constitution Article 150 2. Should it find a discrepancy between a law and the Constitution, the Supreme Court of Cassation or the Supreme Administrative Court shall suspend the proceedings on a case and shall refer the matter to the Constitutional Court. Any portion of a law which is not ruled unconstitutional shall remain in force.
Canada	No preliminary ruling procedure
Chile	No preliminary ruling procedure
Croatia	Article 37 Constitutional Act on the Constitutional Court (1) If a court of justice in its proceedings determines that the law to be applied, or some of its provisions, are not in accordance with the Constitution, it shall stop the proceedings and present a request with the Constitutional Court to review the constitutionality of the law, or some of its provisions.
Czech Republic	Constitution Article 95 (1) In making their decisions, judges are bound by statutes and treaties which form a part of the legal order; they are authorised to judge whether enactments other than statutes are in conformity with statutes or with such treaties. (2) Should a court come to the conclusion that a statute which should be applied in the resolution of a matter is in conflict with the constitutional order, it shall submit the matter to the Constitutional Court.
Denmark	No preliminary ruling procedure
Estonia	Constitutional Review Court Procedure Act §. 4. (1) The Supreme Court shall review the constitutionality of legislation of general application or international treaties on the basis of a reasoned request, court judgment or court ruling. (3) A court shall initiate proceedings by delivering its judgment or ruling to the Supreme Court. §. 9. Constitutional review on the basis of court judgment or ruling (1) If a court of first or second instance has, upon adjudication of a case, not applied a pertinent legislation of general application or an international agreement, declaring it unconstitutional, it shall deliver the judgment or ruling to the Supreme Court. (2) The court shall append to its judgment or ruling to be delivered to the Supreme Court the text of the legislation of general application or international agreement or pertinent extracts thereof, which it has declared unconstitutional in the conclusion of the judgment or ruling.
Finland	No preliminary ruling procedure
France	Article 61-1 Constitution *If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d'État or by the Cour de Cassation to the Constitutional Council, within a determined period. An Institutional Act shall determine the conditions for the application of the present article.* Loi organique n°2009-1523 du 10 décembre 2009 relat ive à l'application de l'article 61-1 de la Constitution. *«Toute juridiction relevant du Conseil d'État ou de la Cour de cassation peut être saisie d'une question prioritaire de constitutionnalité. Seule la cour d'assises ne peut en être saisie.* *Toutefois, en matière criminelle, la question peut être posée soit avant, devant le juge d'instruction, soit après, à l'occasion d'un appel ou d'un pourvoi en cassation.* *La question prioritaire de constitutionnalité doit être soulevée par écrit. L'écrit doit être motivé. Il doit toujours être distinct des autres conclusions qui sont produites dans l'instance.*

State	Relevant constitutional or legal provision
	Les critères pour que le Conseil constitutionnel soit saisi de la question prioritaire de constitutionnalité sont détaillés par la loi organique du 10 décembre 2009 relative à l'article 61-1 de la Constitution. Ils sont au nombre de trois: *- la disposition législative critiquée est applicable au litige ou à la procédure, ou constitue le fondement des poursuites;* *- la disposition législative critiquée n'a pas déjà été déclarée conforme à la Constitution par le Conseil constitutionnel;* *- la question est nouvelle ou présente un caractère sérieux».*
Georgia	Organic Law on the Constitutional Court Article 19 2. if, while considering a particular case, a court of general jurisdiction concludes, that there is a sufficient ground to deem the law or other normative act, applicable by the court while adjudicating upon the case, fully or partially incompatible with the Constitution, the court shall suspend the consideration of the case and apply to the Constitutional Court. The consideration of the case shall be resumed after a judgment on the issue is adopted by the Constitutional Court. (12.02.02 №1264) Law on the Constitutional Court form a part of the legal order; they are authorised to judge whether enactments other than statutes are in conformity with statutes or with such treaties. (2) Should a court come to the conclusion that a statute which should be applied in the resolution of a matter is in conflict with the constitutional order, it shall submit the matter to the Constitutional Court.
Germany	Constitution Article 100 (1) Where a court considers that a law on whose validity its ruling depends is unconstitutional it shall stay the proceedings and, if it holds the constitution of a Land to be violated, seek a ruling from the Land court with jurisdiction for constitutional disputes or, where it holds this Basic Law to be violated, from the Federal Constitutional Court. This shall also apply where this Basic Law is held to be violated by Land law or where a Land law is held to be incompatible with a federal law. (2) Where in the course of litigation doubt exists whether a rule of international law is an integral part of federal law and whether such rule directly establishes rights and obligations for the individual (Article 25), the court shall seek a ruling from the Federal Constitutional Court.
Greece	Constitution Article 100 5. When a chamber or department of the Supreme Administrative Court or of the Supreme Civil and Criminal Court or of the Court of Auditors judges a provision of a statute enacted by Parliament to be contrary to the Constitution, it shall compulsorily refer the question to the respective plenum, unless this has been judged by a previous decision of the plenum or of the Special Highest Court of the present article. The plenum shall be assembled into judicial formation and shall decide definitively, as specified by law. This regulation shall apply analogously also in the elaboration of regulatory decrees by the Supreme Administrative Court. Law no. 345 establishing the Special Highest Court Article 7 Cases within the jurisdiction of the Special Court shall be brought: b. by another court's reference of a preliminary question.
Hun-gary	Act no. XXXII on the Constitutional Court Article 38 1. A judge shall initiate the proceedings of the Constitutional Court while suspending the judicial process if he/she in the course of any pending case, he/she considers unconstitutional the legal rule or other legal means of the State control which he/she needs to apply.
Iceland	No preliminary ruling procedure
Ireland	No preliminary ruling procedure
Israel	No preliminary ruling procedure
Italy	Provisions governing the review of constitutionality and guaranteeing the independence of the Constitutional Court Section 1 Questions of constitutionality regarding an Act of Parliament or a central government statutory measure having the force of law raised by a court or by a party to judicial proceedings or not deemed by a court of law to be manifestly groundless, shall be referred to the Constitutional Court for a decision. Law on the composition and procedures of the Constitutional Court Section 23 If the case cannot be tried without first resolving the question of constitutionality, or if the trial court does not consider that the question of constitutionality raised is groundless, it shall issue an order referring the matter immediately to the Constitutional Court, setting out the terms and the reasons for raising the question of constitutionality, and shall suspend trial proceedings.

State	Relevant constitutional or legal provision
	A court before which a case is being tried may also refer a question of constitutionality *ex officio* by means of a court order setting out the information required under a) and b) above, and the measures referred to in the subsection above. Supplementary Provisions Governing Constitutional Court Proceedings 7 October 2008 as subsequently amended (Official Gazette No. 261 of 7 November 2008) Section 1 The order with which a judge sitting alone or jointly, before which the case is pending decision, refers a matter to the Constitutional Court for a ruling shall be filed with the Court together with all the documents from the case-file and evidence of service as provided by Section 23 of Law No. 87 of 11 March 1953.
Japan	No preliminary ruling procedure
Kazakh-stan	Article 78 Constitution 1. The courts shall have no right to apply laws and other regulatory legal acts infringing on the rights and liberties of an individual and a citizen established by the Constitution. If a court finds that a law or other regulatory legal act subject to application infringes on the rights and liberties of an individual and a citizen it shall suspend legal proceedings and address the Constitutional Council with a proposal to declare that law unconstitutional.
Korea	Constitutional Court Act Article 2 (Jurisdiction) The Constitutional Court shall have jurisdiction over the following issues 1.Constitutionality of statutes upon the request of the ordinary courts; Article 41 (Request for Adjudication on the Constitutionality of Statutes) (1) When the issue of whether or not statutes are constitutional is relevant to the judgment of the original case, the ordinary court(including the military court; hereinafter the same shall apply) shall request to the Constitutional Court, *ex of ficio* or by decision upon a motion by the party, an adjudication on the constitutionality of statutes.
Latvia	Law on the Constitutional Court Article 17 The following shall have the right to submit an application to initiate a case regarding compliance of laws and international agreements signed or entered into by Latvia -even before the Saeima has confirmed the agreement- with the Constitution, compliance of other normative acts or their parts with the legal norms (acts) of higher legal force (Clauses 1-3 of Article 16), as well as compliance of national legal norms of Latvia with the international agreements entered into by Latvia, which are not contrary to the Constitution (Clause 6 of Article 16): 9. a court, when reviewing an administrative, civil or criminal case;
Liech-tenstein	Constitutional Court Act Article 18 1) The Constitutional Court shall decide on the constitutionality of laws or individual legislative provisions: b) on application of a court, if and to the extent that the court has to apply a law or individual provisions thereof (on the basis of precedent) that it believes to be unconstitutional in a matter pending before it and the court has decided to interrupt the proceedings to request a ruling by the Constitutional Court; Article 20 1) The Constitutional Court shall decide on the compliance of ordinances or individual provisions thereof with the Constitution, laws, and international treaties: a) on application of a court or of a municipal authority, if and to the extent that the court or municipal authority has to apply an ordinance or individual provisions thereof (on the basis of precedent) that it believes to be incompatible with the Constitution, a law, or an international treaty in a matter pending before it and the court or municipal authority has decided to interrupt the proceedings to request a ruling by the Constitutional Court; Article 22 1) The Constitutional Court shall decide on the constitutionality of international treaties or individual provisions thereof: a) on application of a court or an administrative authority, if and to the extent that the court or administrative authority has to apply an international treaty or individual provisions thereof (on the basis of precedent) that it believes to be unconstitutional in a matter pending before it and the court or administrative authority has decided to interrupt the proceedings to request a ruling by the Constitutional Court;
Lithua-nia	Constitution Article 106 The Government, no less than one-fifth of the members of the Seimas, and the courts shall have the

State	Relevant constitutional or legal provision
	right to address the Constitutional Court concerning legal acts specified in part 1 of Article 105. Law on the Constitutional Court of the Republic of Lithuania Article 67 Provided that there are grounds to consider that a law or other legal act, which shall be applicable in a concrete case, fails to conform with the Constitution, the court (judge) shall suspend the examination of said case and, with regard to the competence of the Constitutional Court, shall appeal to it with a petition to decide whether the said law or other legal act is in conformity with the Constitution. The Supreme Court of Lithuania, the Court of Appeals of Lithuania, and district and area courts shall appeal to the Constitutional Court pursuant to a decision.
Luxembourg	Law on the Organisation of the Constitutional Court Article 6 If a court considers that an issue concerning a law's conformity with the Constitution arises and that a ruling on the matter is necessary for it to deliver its judgment, it must raise the matter of its own motion after asking the parties to submit any observations.
Malta	Constitution Article 95 (2) One of the Superior Courts, composed of such three judges as could, in accordance with any law for the time being in force in Malta, compose the Court of Appeal, shall be known as the Constitutional Court and shall have jurisdiction to hear and determine – (d) appeals from decisions of any court of original jurisdiction in Malta as to the interpretation of this Constitution other than those which may fall under section 46 of this Constitution; (e) appeals from decisions of any court of original jurisdiction in Malta on questions as to the validity of laws other than those which may fall under section 46 of this Constitution; European Convention Act Article 4 3. If any proceedings in any court other than the Civil Court, First Hall, or the Constitutional Court any question arises as to the contravention of any of the Human Rights and Fundamental Freedoms, that court shall refer the question to the Civil Court, First Hall, unless in its opinion the raising of the question is merely frivolous or vexatious; and that court shall give its decision on any question referred to it under this subsection and, subject to the provisions of subsection 4 of this section, the court in which the question arose shall dispose of the question in accordance with that decision.
Mexico	Article 105 Constitution The Supreme Court of Justice of the Nation will get to know, in the terms that the regulating law specifies, about the following affairs: III. By itself or by petition of the appropriate unitary circuit tribunal, or the Attorney General of the Republic, it may get to know about cases of appeal of sentences of district judges in those cases in which the Federation took part, and in which their interest and importance merit its participation.
Moldova	Constitution Article 135 (1) The Constitutional Court shall: g) solve the pleas of unconstitutionality of legal acts, as claimed by the Supreme Court of Justice; Code constitutional jurisdiction This Code provides also the right of the Economical Court to request a control of constitutionality, but in article 4 of the same act exception of unconstitutionality can be introduced only by the Supreme Court. Theoretically the Economic court will have formally the possibility to challenge the constitutionality directly but this do not happened in practice.
Monaco	No preliminary ruling procedure
Montenegro	Constitution Article 150 The procedure before the Constitutional Court for the assessment of constitutionality and legality may be initiated by the court, other state authority, local self-government authority and five Members of the Parliament. Draft law on the Constitutional Court[299] Article 43 Proceedings for review of constitutionality and legality of general acts shall be initiated by a petition submitted by the petitioner referred to in Article 150 paragraph 2 of the Constitution and when the Constitutional Court institutes proceedings on the basis of an initiative submitted or on its own by an order.
Morocco	No preliminary ruling procedure

[299] CDL(2008)073 Draft Law on the Constitutional Court of Montenegro

State	Relevant constitutional or legal provision
Nether-lands	No preliminary ruling procedure
Norway	No preliminary ruling procedure
Peru	No preliminary ruling procedure
Poland	Constitution Article 193 Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court. Constitutional Tribunal Act Article 3 Any court may refer a question of law to the Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or a statute if the answer to this question of law determines the matter pending before the court.
Portugal	No preliminary ruling procedure
Romania	Law on the Organisation and Operation of the Constitutional Court Article 29 (1) The Constitutional Court shall decide upon the exceptions raised before the courts of law or of commercial arbitration referring to the unconstitutionality of laws and ordinances which are in force, or any provision thereof, where such is in connection with the judgment of the case at any stage of trial proceedings and regardless of its object. 2. The exception can be raised at the request of either party or ex officio, by the court of law or of commercial arbitration hearing the case. Likewise, the prosecutor is entitled to raise this exception before the court in cases where he participates in trial proceedings.
Russian Federa-tion	Constitution Article 125 4. The Constitutional Court of the Russian Federation, upon complaints about violations of the constitutional rights and freedoms of citizens and upon requests of the courts, shall verify the conformity with the Constitution of any law which is applied or shall be applied in a concrete case in a way established by federal law. Federal Constitutional Law on the Constitutional Court of the Russian Federation Article 101 The court while considering the case in any instance, having arrived at the conclusion about non-conformity with the Constitution of the Russian Federation of the law which has been applied or ought to be applied in a specific case, shall petition the Constitutional Court of the Russian Federation with an inquiry to verify the constitutionality of the aforementioned law.
San Marino	Qualified Law of 25 April 2003 Article 13(5) (p.t.)[300] The declaration of inadmissibility of the request by the judge doesn't forestall new requests concerning the same question before other instances or in other proceedings.
Serbia	No preliminary ruling procedure
Slova-kia	Constitution Article 130 (1) The Constitutional Court shall commence the proceedings upon an application submitted by: d) any court; Article 144 Constitution (2) If a court is of the opinion that an other generally-binding legal regulation, its part, or its particular 'provision which concerns the pending case, is not in conformity with the Constitution, constitutional law, international treaty pursuant to Article 7.5 or an ordinary law, it shall suspend the proceedings and shall submit a an application for commencement of proceedings according to Article 125.1. The legal opinion of the Constitutional Court of the Slovak Republic contained in the decision shall be binding for that court. 300 La dichiarazione di inammissibilità dell'istanza da parte del giudice a quo non impedisce la riproposizione del medesimo negli altri gradi o in procedimenti diversi. Article 18 Law on the Organisation of the Constitutional Court 1. The Constitutional Court shall open proceedings on a petition that has been filed by: d. a court, in a matter if its jurisdiction ; Article 37 Law on the Organisation of the Constitutional Court 1.If the persons specified in Article 18, paragraph 1, letters a to f come to the conclusion that a regulation of lower legal force is in conflict with a regulation of higher legal force or international treaty they may file a petition with the Constitutional Court to proceedings.

[300] La dichiarazione di inammissibilità dell'istanza da parte del giudice a quo non impedisce la riproposizione del medesimo negli altri gradi o in procedimenti diversi.

State	Relevant constitutional or legal provision
	(1) The Constitutional Court shall commence proceedings upon an application submitted by: d) any court in relation to its decision-making.
Slovenia	Article 156 Constitution If a court deciding some matter deems a law which it should apply to be unconstitutional, it must stay the proceedings and initiate proceedings before the Constitutional Court. The proceedings in the court may be continued after the Constitutional Court has issued its decision. Article 23.a Constitutional Court Act (1) The procedure for the review of the constitutionality or legality of regulations or general acts issued for the exercise of public authority can be initiated by a request submitted by: - the National Assembly; - one third of the deputies; - the National Council; - the Government; - the ombudsman for human rights if he deems that a regulation or general act issued for the exercise of public authority inadmissibly interferes with human rights or fundamental freedoms; - the information commissioner, provided that a question of constitutionality or legality arises in connection with a procedure he is conducting; - the Bank of Slovenia or the Court of Audit, provided that a question of constitutionality or legality arises in connection with a procedure they are conducting; - the State Attorney General, provided that a question of constitutionality arises in connection with a case the State Prosecutor's Office is conducting; - representative bodies of local communities, provided that the constitutional position or constitutional rights of a local community are interfered with; - representative associations of local communities, provided that the rights of local communities are threatened; - national representative trade unions for an individual activity or profession, provided that the rights of workers are threatened. Article 23 (1) When in the process of deciding a court deems a law or part thereof which it should apply to be unconstitutional, it stays the proceedings and by a request initiates proceedings for the review of its constitutionality. (2) If the Supreme Court deems a law or part thereof which it should apply to be unconstitutional, it stays proceedings in all cases in which it should apply such law or part thereof in deciding on legal remedies and by a request initiates proceedings for the review of its constitutionality.
South Africa	No preliminary request procedure
Spain	Constitution Article 163 If a judicial body considers, in some action, that a regulation with the status of law which is applicable thereto and upon the validity of which the judgment de pends, may be contrary to the Constitution, it may bring the matter before the Constitutional Court in the circumstances, manner and subject to the conse quences to be laid down by law, which shall in no case be suspensive. Organic Law on the Constitutional Court Article 35 1. Where a judge or a court, proprio motu or at the request of a party, considers that an enactment having the force of law which is applicable to a case and on which the validity of the ruling depends may be contrary to the Constitution, the judge or court shall raise the question before the Constitutional Court in accordance with the provisions of this Law. Article 46 1. The following shall have standing to lodge an appeal for constitutional protection: a. In the case of Articles 42 and 45, the person directly affected, the Defender of the People and the Office of the Public Prosecutor; b. In the case of Articles 43 and 44, the parties to the corresponding judicial proceedings, the Defender of the People and the Office of the Public Prosecutor. 2. Where the appeal is brought by the Defender of the People or the Office of the Public Prosecutor, the Division of the Court with authority to hear the case for constitutional protection shall inform any potentially injured persons of whom it has knowledge and shall order publication of the notice of appeal in the "Official State Gazette" so that other interested parties may come forward. Such publication shall have preferential status.
Sweden	No preliminary ruling procedure
Switzerland	No preliminary ruling procedure

State	Relevant constitutional or legal provision
"The Former Yugoslav Republic of Macedonia"	Article 17 of the Law on the Courts 1) The court submits an initiative for commencing a procedure on assessing the compliance of the Law with the Constitution, when during procedure their accordance turns out to be questionable, for which it notifies the court of higher instance and the Supreme Court of Republic of Macedonia. (2) When the court finds that the Law that is to be applied in the specific case is not in accordance with the Constitution, and the constitutional provisions cannot be directly applied, will stay the procedure until the Constitutional Court delivers a decision. (3) The party has a right to an appeal against the decision for stay of the procedure. The procedure upon the appeal is urgent.
Tunisia	No preliminary ruling procedure
Turkey	Constitution Article 152 If a court which is trying a case finds that the law or the decree having force of law to be applied is unconstitutional, or if it is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it shall postpone the consideration of the case until the Constitutional Court decides on this issue. If the court is not convinced of the seriousness of the claim of unconstitutionality, such a claim together with the main judgement shall be decided upon by the competent authority of appeal. Law on the Organisation and Trial Proceedings of the Constitutional Court Article 28 If a court which is trying a case: 1. finds that provisions of a law or law-amending ordinance to be applied in this case are unconstitutional, this decision together with its reasons, or 2. is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, a decision explaining the claims and defences of the parties concerned in relation to this subject-matter and its own views which led to this conviction, the contents of the file together with certified copies of documents relating to this case are sent by the court concerned to the presidency of the Constitutional Court.
Ukraine	Law on the Constitutional Court Article 83 When, in the process of examination of cases under general court procedure, a dispute develops concerning the constitutionality of norms of a law which is being applied by the court, the examination of the case is suspended. Under such circumstances, a constitutional examination of the case is opened and the case is considered by the Constitutional Court of Ukraine immediately.
United Kingdom	No preliminary ruling procedure
United States of America	§1254 US Code[301] Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. U.S. Supreme Court Rules Rule 11. Certiorari to a United States Court of Appeals Before Judgment A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court. See 28 U. S. C. § 2101(e). Rule 19. Procedure on a Certified Question 1. A United States court of appeals may certify to this Court a question or proposition of law State Relevant constitutional and legal provisions on which it seeks instruction for the proper decision of a case. The certificate shall contain a statement of the nature of the case and the facts on which the question or proposition of law arises. Only questions or propositions of law may be certified, and they shall be stated separately and with precision. The certificate shall be repaired as required by Rule 33.2 and shall be signed by the clerk of the court of appeals. 2. When a question is certified by a United States court of appeals, this Court, on its own motion or that of a party, may consider and decide the entire matter in controversy. See 28 U. S. C. § 1254(2).

[301] http://www4.law.cornell.edu/uscode/28/1254.html

State	Relevant constitutional or legal provision
Uruguay	Article 258[302] (p.t.) The Judge or Tribunal that cognises in any ordinary judicial proceeding, or the Tribunal of Administrative Disputes, within their jurisdiction and before administering justice, may request *ex officio* the declaration of unconstitutionality and inapplicability of a law. In this case and in the case of number 2, the proceedings are suspended and the proceeding is elevated to the Supreme Court of Justice. General Code of Proceedings (p.t.)[303] Article 262 The complaint can be lodged against the resolution that denies recourse of cassation, an appeal or the exception of unconstitutionality so that the competent superior confirms or revokes the denying resolution.

1.1.21 Table: Direct individual access: Constitutional and legal bases

State	Constitution	Laws
Albania	Article 131 The Constitutional Court decides on: f. the final adjudication of the com plaints of individuals for the violation of their constitutional rights to due process of law, after all legal remedies for the protection of those rights have been exhausted. Article 134 1. The Constitutional Court initiates a proceeding only on the request of: g. individuals. 2. The subjects contemplated insubparagraphs dh, e, ë, f and g of paragraph 1of this article may make a request only for issues related to their interests.	Law on the Organisation and Functioning of the Constitutional Court Article 30 2. The application of persons regarding the violation of a constitutional right are to be presented no later than 2 (two) years from the time at which evidence of the violation becomes available to them. If the law provides that the applicant may address another authority, he/she may present the application to the Constitutional Court after all the other legal means in protection of such rights have been exhausted. Article 68 1. When a court of any instance or a trial judge considers during the trial ex officio or at the request of either party involved that a certain law is unconstitutional and if there is a direct link between the law and the solution of the case at hand, that particular law shall not be applied in the case at hand and after suspending the trial the judge shall refer the file to the Constitutional Court, which on its side should deliver its verdict as to the constitutionality of the said law.
Algeria	No direct individual access	No direct individual access
Andorra	Constitution Article 10 1. All persons shall have the right to jurisdiction and to have a ruling founded in the law, and to a due trial before an impartial tribunal established by law. Article 41 1. The rights and freedoms recognised in Chapters 111 and IV are protected by regular courts through urgent and preferent proceedings regulated by law, which in any case shall be transacted in two instances.	Qualified Law on the Constitutional Court Article 86 Except in the situations described in articles 95 and 96 of this Law, the appeal for protection shall be brought against decisions of the final instance of the ordinary courts dismissing applications during the urgent priority procedure provided for in article 41.1 of the Constitution. Article 87

[302] Artículo 258.-La declaración de inconstitucionalidad de una ley y la inaplicabilidad de las disposiciones afectadas por aquélla, podrán solicitarse por todo aquel que se considere lesionado en su interés directo, personal y legítimo: 1°Por vía de acción, que deberá entablar ante la S uprema Corte de Justicia. 2°Por vía de excepción, que podrá oponer en cualqu ier procedimiento judicial. El Juez o Tribunal que entendiere en cualquier procedimiento judicial, o el Tribunal de lo Contencioso Administrativo, en su caso, también podrá solicitar de oficio la declaración de inconstitucionalidad de una ley y su inaplicabilidad, antes de dictar resolución. En este caso y en el previsto por el numeral 2º), se suspenderán los procedimientos, elevándose las actuaciones a la Suprema Corte de Justicia. http://www.parlamento.gub.uy/constituciones/const004.htm

[303] El recurso de queja procede contra las resoluciones que denieguen un recurso de casación, de apelación o la excepción de inconstitucionalidad a fin que el superior que corresponda confirme o revoque la resolución denegatoria. http://www.parlamento.gub.uy/leyes/AccesoTextoLey.asp?Ley=15982&Anchor=

State	Constitution	Laws
	2. A law shall create an exceptional Procedure of Appeal before the Tribunal Constitutional against the acts of the public authorities which may violate the essential contents of the rights mentioned in the paragraph above, with the exception of the case provided for in article 22. Article 100 1. If, in the course of litigation, a court has reasoned and founded doubts about the constitutionality of a law or a legislative decree, the application of which is relevant to its decision, it shall request in writing the decision of the Tribunal Constitucional about the validity of the rule affected. 2. The Tribunal Constitucional may not admit the transaction of the request with out further appeal. If the request is admitted judgment shall be passed within the maximum period of two months. See articles 52 to 58 of the Qualified Law on the Constitutional Court already cited above. Article 85 By the appeal for protection the Constitutional Court, in its capacity as supreme judicial authority, guarantees the rights recognized in Chapters III and IV of Title II of the Constitution other than the right laid down in article 22. Article 86 Except in the situations described in articles 95 and 96 of this Law, the appeal for protection shall be brought against decisions of the final instance of the ordinary courts dismissing applications during the urgent priority procedure provided for in article 41.1 of the Constitution. There two proceedings: Through the "ampara" remedy (articles 85 and 86 of the Law cited) and in the case of a conflict of competences: (Article 69.2, 78 and 82 of the Law)	1. The respondents or assistants in the proceedings mentioned in the preceding article have locus standi to bring an appeal for protection. Article 94 2. When no further appeal can be lodged nor is there any further means in defending the constitutional right infringed, the person who has suffered the infringement of the constitutional right to jurisdiction may lodge an appeal for protection before the Constitutional Court within fifteen working days of the day after notification of the last resolution of refusal or of the date on which he had knowledge of the judicial decision which violated the constitutional right to jurisdiction.
Argen-tina	Section 116 The Supreme Court and the lower courts of the Nation are empowered to hear and decide all cases arising under the Constitution and the laws of the Nation, with the exception made in Section 75, subsection 12, and under the treaties made with foreign nations; all cases concerning ambassadors, public ministers and foreign consuls; cases related to admiralty and maritime jurisdiction; matters in which the Nation shall be a party; actions arising between two or more provinces, between one province and the inhabitants of another province, between the inhabitants of different provinces, and between one province or the inhabitants thereof against a foreign state or citizen.	Law on The Organisation of the National Judiciary[304] (p.t.) Article 20[305] The Section Courts shall sit in first instance concerning all cases provided for in article 100 of the Constitution [=section 116 today], without including the exceptions mentioned in article 101 of the Constitution [=Section 117] […] Article 21[306] As established by the Constitution and the national laws, it [The Section Court] may sit as appeals court concerning the judgements and resolutions of the inferior Provincial Courts, except if the affected person prefers to petition the Superior Provincial Court or Tribunal.

[304] http://www.infoleg.gov.ar/infolegInternet/anexos/115000-119999/116333/norma.htm.

[305] Article 20. – Los Juzgados de Sección conocen en primera instancia, de todas las causas que se expresan en el artículo 100 [= Section 116 today] de la Constitución, sin incluir en ellas las exceptuadas en el artículo 101 de la misma Constitución, de las contenciosas administrativas y demás que interesen al Fisco Nacional, mas en las de contrabando, lo harán, por ahora, tanto en el territorio de la Provincia de Buenos Aires, cuanto en el resto de la República, ajustándose a las respectivas leyes y disposiciones dictadas y vigente en ellas. http://www.infoleg.gov.ar/infolegInternet/anexos/115000-119999/116333/norma.htm

[306] Article 21. – Puede conocer en grado de apelación de los fallos y resoluciones de los Juzgados inferiores de Provincia, en los casos regidos por la Constitución y Leyes Nacionales, siempre que el agraviado no prefiera concurrir al Juzgado o Tribunal Superior de la Provincia. http://www.infoleg.gov.ar/infolegInternet/anexos/115000-119999/116333/norma.htm

State	Constitution	Laws
	Section 117 In the aforementioned cases the Supreme Court shall have appellate jurisdiction, with such regulations and exceptions as Congress may prescribe; but in all matters concerning foreign ambassadors, ministers and consuls, and in those in which a province shall be a party, the Court shall have original and exclusive jurisdiction.	Article 22[307] In all matters mentioned in the two previous articles, the ordinary appeal or plea of nullity to the Supreme Court are open.
Arme-nia	Article 101 In conformity with the procedure set forth in the Constitution and the law on the Constitutional Court the application to the Constitutional Court may be filed by: 6) every person in a specific case when the final judicial act has been adopted, when the possibilities of judicial protection have been exhausted and when the constitutionality of a law provision applied by the act in question is being challenged;	Law on the Constitutional Court Article 25 The bodies and persons determined by Article 101 of the Constitution can appeal to the Constitutional Court in the order prescribed by the Constitution and this Law. Moreover, in cases determined in the Point 6 of Article 101 legal persons are also eligible to appeal to the Constitutional Court according to the Article 42.1 of the Constitution. Article 69 1. The appeals on the cases described in this Article (hereinafter individual appeals) can be brought by those natural and legal persons who were participants at the courts of general jurisdiction and in specialised courts, in relation of who the law was implemented by a judicial act, who exhausted all the remedies of judicial protection and who believe that the provision of the Law applied for the particular case contradicts the Constitution. 2. The individual appeals can be submitted regarding the constitutionality of provisions of Laws adopted by the National Assembly and on referendum.
Austria	Article 139. (1) The Constitutional Court pronounces on application by a court or an independent administrative tribunal whether ordinances issued by a Federal or Land authority are contrary to law, but ex officio in so far as the Court would have to apply such an ordinance in a pending suit. It also pronounces on application by the Federal Government whether ordinances issued by a Land authority are contrary to law and likewise on application by the municipality concerned whether ordinances issued by a municipal affairs supervisory authority in accordance with Article 119a para. 6 are contrary to law. It pronounces furthermore whether ordinances are contrary to law when an application alleges direct infringement of personal rights through such illegality in so far as the ordinance has become operative for the applicant without the delivery of a judicial decision or the issue of a ruling; Art. 89 para. 3 applies analogously to such applications. Article 140 "The Constitutional Court pronounces on application of the Supreme Court, a competent appellate court, an independent administrative tribunal, the Asylum Court, the Administrative Court or the Federal Tender Office whether a Federal or a Land law is unconstitutional, but ex officio in	Federal Law on the Constitutional Court Article 82 1. A complaint against an administrative decree in pursuance of Article 144, subparagraph 1 of the B-VG can be lodged only after all administrative remedies have been exhausted, within six weeks following service of the decree delivered at last instance.

[307] Art. 22. – En todas las causas mencionadas en los dos artículos precedentes, habrá los ordinarios recursos de apelación o nulidad para ante la Corte Suprema. http://www.infoleg.gov.ar/infolegInternet/anexos/115000-119999/116333/norma.htm

State	Constitution	Laws
	so far as the Court would have to apply such a law in a pending suit. It pronounces also on applications by the Federal Government whether Land laws are unconstitutional and likewise on applications by a Land Government, by one third of the National Council's members, or by one third of the Federal Council's members whether Federal laws are unconstitutional. A Land constitutional law can provide that such a right of application as regards the unconstitutionality of Land laws lies with one third of the Diet's members. The Court pronounces furthermore whether laws are unconstitutional when an application alleges direct infringement of personal rights through such unconstitutionality in so far as the law has become operative for the applicant without the delivery of a judicial decision or the issue of a(n administrative) ruling; Art. 89.3. applies analogously to such applications". Article 144. (1) The Constitutional Court pronounces on rulings by administrative authorities including the independent administrative tribunals in so far as the appellant alleges an infringement by the ruling of a constitutionally guaranteed right or the infringement of personal rights on the score of an illegal ordinance, an unconstitutional law, or an unlawful treaty. The complaint can only be filed after all other stages of legal remedy have been exhausted.	
Azerbaijan	Article 130. II. Constitutional Court of the Azerbaijan Republic based on inquiry of the President of the Azerbaijan Republic, Milli Majlis of the Azerbaijan Republic, Cabinet of Ministers of the Azerbaijan Republic, Supreme Court of the Azerbaijan Republic, Procurator's Office of the Azerbaijan Republic, Ali Majlis of Nakhichevan Autonomous Republic takes decisions regarding the following: 1. correspondence of laws of the Azerbaijan Republic, decrees and orders of the President of the Azerbaijan Republic, decrees of Milli Majlis of the Azerbaijan Republic, decrees and orders of Cabinet of Ministers of the Azerbaijan Republic, normative-legal acts of central bodies of executive power to Constitution of the Azerbaijan Republic; 2. correspondence of decrees of the President of the Azerbaijan Republic, decrees of Cabinet of Ministers of the Azerbaijan Republic, normative-legal acts of central bodies of executive power to the laws of the Azerbaijan Republic; 3. correspondence of decrees of Cabinet of Ministers of the Azerbaijan Republic and normative-legal acts of central bodies of executive power to decrees of the President of the Azerbaijan Republic; 4. in cases envisaged by law, correspondence of decisions of Supreme Court of the Azerbaijan Republic to Constitution and laws of the Azerbaijan Republic; 5. correspondence of acts of municipalities to Constitution of the Azerbaijan Republic, laws of the Azerbaijan Republic, decrees of the President of the Azerbaijan Republic, decrees of Cabinet of Ministers of the Azerbaijan Republic (in Nakhichevan Autonomous Republic – also to Constitution and laws of Nakhichevan Autonomous Republic and decrees of Cabinet of Ministers of Nakhichevan Autonomous Republic); 6. correspondence of interstate agreements of the Azerbaijan Republic, which have not yet become valid, to Constitution of the Azerbaijan Republic; correspondence of intergovernmental agreements of the Azerbaijan Republic to Constitution and laws of the Azerbaijan Republic; 7. correspondence of Constitution and laws of Nakhichevan Autonomous Republic, decrees of Ali Majlis of Nakhichevan Autonomous Republic, decrees of Cabinet of Ministers of	Law on the Constitutional Court Article 34. Complaints 34.1. Any person who alleges that his/her rights and freedoms have been violated by the normative legal act of the Legislative and Executive, act of municipality and courts may submit complaint to Constitutional Court to resolve matters provided for by Article 130.3.1-7 of the Constitution of Azerbaijan Republic in order to restore his/her human rights and freedoms. 34.2.Complaints on the matters provided for by Article 130.3.4 of the Constitution of Azerbaijan Republic can be examined by Constitutional Court in following cases: 34.2.1. If the normative legal act which should have been applied was not applied by a court; 34.2.2. If normative legal act which should not have been applied was applied by a court; 34.2.3. If normative legal act was not properly interpreted by a court; 34.3. In cases provided for by Article 34.2 of the present law the examination of facts of the case examined by the Supreme Court of Azerbaijan Republic shall be inadmissible.

State	Constitution	Laws
	Nakhichevan Autonomous Republic to Constitution of the Azerbaijan Republic; correspondence of laws of Nakhichevan Autonomous Republic, decrees of Cabinet of Ministers of Nakhichevan Autonomous Republic to laws of the Azerbaijan Republic; correspondence of decrees of Cabinet of Ministers of Nakhichevan Autonomous Republic to decrees of the President of the Azerbaijan Republic and decrees of Cabinet of Ministers of the Azerbaijan Republic; V. Everyone claiming to be the victim of a violation of his/her rights and freedoms by the decisions of legislative, executive and judiciary, municipal acts set forth in the items 1-7 of the Para III of this Article may appeal, in accordance with the procedure provided for by law, to the Constitutional Court of the Republic of Azerbaijan with the view of the restoration of violated human rights and freedoms.	
Belgium	Article 142 There is for all Belgium a Constitutional Court, the composition, competences and functioning of which are established by the law. This Court rules by means of judgments on: 1° those conflicts referred to in Article 141; 2° the violation of Articles 10, 11 and 24 by a law, a federate law or a rule as referred to in Article 134; 3° the violation of constitutional articles that the law determines by a law, a federate law or by a rule as referred to in Article 134. A matter may be referred to the Court by any authority designated by the law, by any person that can prove an interest or, prejudicially, by any court.	Special Law on the Court Article 2 The actions referred to in Article 1 may be brought: 1. by the Council of Ministers, by the government of a Community or a Region; 2. by any natural or legal person who has a justifiable interest; or 3. by the presidents of the legislative assemblies, at the request of two-thirds of the membership.
Bosnia and Herzegovina	VI.3 Jurisdiction. … b The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.	Rules of the Constitutional Court Article 15 1. The participants to the proceedings shall be as follows: b. the parties to the proceedings that ended in a judgment/decision challenged and the court or body that rendered the challenged judgment/decision (Article VI.3 (b) of the Constitution);
Brazil	Article 5[308] LXVIII − *habeas corpus* shall be granted whenever a person suffers or is in danger of suffering violence or coercion against his freedom of locomotion, on account of illegal actions or abuse of power; LXIX − a writ of *mandamus* shall be issued to protect a clear and perfect right, not covered by habeas corpus or habeas data, whenever the party responsible for the illegal actions or abuse of power is a public official or an agent of a corporate legal entity exercising duties of the Government; LXX − a collective writ of *mandamus* may be filed by: a) a political party represented in the National Congress; b) a union, a professional association or an association legally constituted and in operation for at least one year, to defend the interests of its members or associates; LXXI − a writ of injunction shall be granted whenever the absence of a regulatory provision disables the exercise of constitutional rights and liberties, as well as the prerogatives inherent to nationality, sovereignty and citizenship; LXXII − *habeas* data shall be granted: a)to ensure the knowledge of information related to the person of the petitioner, contained in records or databanks of government agencies or of agencies of a public character;	Law no. 10,259 of 2001 allowed extraordinary appeals to decisions issued by judges at special higher courts to be forwarded to the Supreme Court

[308] http://www.v-brazil.com/government/laws/

State	Constitution	Laws
	b) for the correction of data, when the petitioner does not prefer to do so through a confidential process, either judicial or administrative; LXXIII − any citizen is a legitimate party to file a people's legal action with a view to nullifying an act injurious to the public property or to the property of an entity in which the State participates, to the administrative morality, to the environment and to the historic and cultural heritage, and the author shall, save in the case of proven bad faith, be exempt from judicial costs and from the burden of defeat; Article 102. The Supreme Federal Court is responsible, essentially, for safeguarding the Constitution, and it is within its competence: I − to institute legal proceeding and trial, in the first instance, of: a) direct actions of unconstitutionality of a federal or state law or normative act, and declaratory actions of constitutionality of a federal law or normative act; Text in purple added by CA 3, 17 March 1993. This CA created the declaratory actions of constitutionality. b) in common criminal offenses, the President of the Republic, the Vice-President, the members of the National Congress, its own Justices and the Attorney-General of the Republic; c) in common criminal offenses and crimes of malversation, the Ministers of State, except as provided in Article 52, I, the Commanders of Navy, Army and Air Force and the members of the Superior Courts, those of the Federal Court of Accounts and the heads of permanent diplomatic missions; Text in purple added by CA 23, September 2nd 1999, which created the positions of Commanders of Navy, Army and Air Force. See comments to Article 84, XIII. d) *habeas corpus*, when the petitioner is any one of the persons referred to in the preceding subitems; the writ of mandamus and habeas data against acts of the President of the Republic, of the Directing Boards of the Chamber of Deputies and of the Federal Senate, of the Federal Court of Accounts, of the Attorney-General of the Republic and of the Supreme Federal Court itself; i) *habeas corpus*, when the constraining party is a Superior Court or the petitioner is a court, authority or employee whose acts are directly subject to the jurisdiction of the Supreme Federal Court, or in the case of a crime, subject to the same jurisdiction in one sole instance; p) petitions of provisional remedy in direct actions of unconstitutionality; II − to judge on ordinary appeal: a) *habeas corpus*, writs of mandamus, habeas data and writs of injunction decided in a sole instance by the Superior Courts, in the event of a denial; b) political crimes; III − to judge, on extraordinary appeal, cases decided in a sole or last instance, when the decision appealed: a) is contrary to a provision of this Constitution; b) declares a treaty or a federal law unconstitutional; c) considers valid a law or act of a local government contested in the light of this Constitution. d) considers valid local law contested in the light of federal law. Amendment no. 45 of 2004: instrument of general repercussion was confirmed, setting forth that "in the extraordinary appeal the appellant must demonstrate the general repercussion of the constitutional issue discussed in the case, in accordance with the law, so that the court may decide whether to accept the appeal, being only able to reject it though an unfavorable opinion of two thirds of its members." binding precedent Article 5, LXXI Article 102, I, q.	

State	Constitution	Laws
Bulgaria	No direct individual access	No direct individual access
Canada	24. Enforcement of guaranteed rights and freedoms (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. 52. Primacy of Constitution of Canada (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.	Supreme Court Act Section 37.1 An appeal lies to the [Supreme] Court from a decision of the Federal Court of Appeal in the case of a controversy between Canada and a province or between two or more provinces. Section 36 An appeal lies to the [Supreme] Court from an opinion pronounced by the highest court of final resort in a province on any matter referred to it for hearing and consideration by the lieutenant governor in council of that province whenever it has been by the statutes of that province declared that such opinion is to be deemed a judgment of the highest court of final resort and that an appeal lies therefrom as from a judgment in an action. Section 37 Subject to sections 39 and 42, an appeal to the Supreme Court lies with leave of the highest court of final resort in a province from a final judgment of that court where, in the opinion of that court, the question involved in the appeal is one that ought to be submitted to the Supreme Court for decision. Section 37.1 Subject to sections 39 and 42, an appeal to the Court lies with leave of the Federal Court of Appeal from a final judgment of the Federal Court of Appeal where, in its opinion, the question involved in the appeal is one that ought to be submitted to the Court for decision. Section 38 Subject to sections 39 and 42, an appeal to the Supreme Court lies on a question of law alone with leave of that Court, from a final judgment of the Federal Court or of a court of a province other than the highest court of final resort therein, the judges of which are appointed by the Governor General, pronounced in a judicial proceeding where an appeal lies to the Federal Court of Appeal or to that highest court of final resort, if the consent in writing of the parties or their solicitors, verified by affidavit, is filed with the Registrar of the Supreme Court and with the registrar, clerk or prothonotary of the court from which the appeal is to be taken. Section 39 No appeal to the Court lies under section 37, 37.1 or 38 from a judgment in a criminal cause, in proceedings for or on: a) a writ of habeas corpus, certiorari or prohibition arising out of a criminal charge; or b) a writ of habeas corpus arising out of a claim for extradition made under a treaty. Section 40 1. Subject to subsection 3, an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court. 3. No appeal to the Court lies under this section from the judgment of any court acquitting or convicting or setting aside or

State	Constitution	Laws
		affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence. 4. Whenever the Court has granted leave to appeal, the Court or a judge may, notwithstanding anything in this Act, extend the time within which the appeal may be allowed. Section 41 Notwithstanding anything in this Act, the Court has jurisdiction as provided in any other Act conferring jurisdiction. Section 42 1. No appeal lies to the Court from a judgment or order made in the exercise of judicial discretion except in proceedings in the nature of a suit or proceeding in equity originating elsewhere than in the Province of Quebec and except in mandamus proceedings. 2. This section does not apply to an appeal under section 40. Section 52 The Court shall have and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada, and the judgment of the Court is, in all cases, final and conclusive.
Chile	Article 19 (p.t.)[309] The Constitution protects the right of every person: 21º.To perform any economic activity that is not contrary to morality, public order or national security and respects the legal norms which regulate it.[310] Article 20[311] Anyone who through arbitrary or illegal acts or omissions suffers deprivation, perturbance in or threats to the legitimate exercise of his rights and guarantees established in the articles 19 No. 1º, 2º, 3º fourth indent, 4º, 5º, 6º, 9º final indent, 11º,12º, 13º, 15º, 16º as concerns the right to free labour and the right to be freely elected and employed, and as concerns what has been established in the fourth indent, 19º, 21º, 22º, 23º, 24°, y 25º, may approach the Court of Appeals in his own name or through a third person; the Court of Appeals shall immediately adopt measures it deems necessary to reestablish	Autonomous rule of the Supreme Court on the implementation of the recurso de protección[314] (p.t.) 1. The recourse or action of protection can be lodged at the Appeals Court within whose jurisdiction the act or the arbitrary or illegal omission causing deprivation, perturbance in or threats to the legitimate exercise of the respective constitutional guarantees, within an unsuspensible respite of thirty days after the execution of the act or the occurrence of the omission, or, according to the nature of these, after notice or certain knowledge of the act or omission, which will be determined in the provisional procedure. 2. The recourse may be lodged on paper or even by telegraph or telefax by the affected person or by another person having legal capacity in his name even if that person does not have a special mandate. The Tribunal will examine if the recourse has been lodged within the respites and if facts are being brought forward that could constitute a violation of the guarantees indicated in article 20 of the Political Constitution of the Republic. If the recourse is extemporaneous or if no facts are being brought forward that could constitute a violation of the guarantees mentioned in the indicated constitutional provision, the Tribunal will declare the recourse inadmissible in the place of giving a reasoned resolution; against the declaration of inadmissibility only a recourse of reposition can be lodged before the same tribunal within three days. 5. For greater exactitude of the judgement, the Tribunal may take all measures it deems necessary. The Court will appreciate with sanity and reason the previous facts of the case and the ones that add to it during the proceedings.

[309] https://www.presidencia.cl/documentos/Constituci%F3n%20Pol%EDtica.pdf

[310] La Constitución asegura a todas las personas: El derecho a desarrollar cualquiera actividad económica que no sea contraria a la moral, al orden público o a la seguridad nacional, respetando las normas legales que la regulen.

[311] El que por causa de actos u omisiones arbitrarios o ilegales sufra privación, perturbación o amenaza en el legítimo ejercicio de los derechos y garantías establecidos en el artículo 19, números 1º, 2º, 3º inciso cuarto, 4º, 5º, 6º, 9º inciso final, 11º,12º, 13º, 15º, 16º en lo relativo a la libertad de trabajo y al derecho a su libre elección y libre contratación, y a lo establecido en el inciso cuarto, 19º, 21º, 22º, 23º, 24°, y 25º podrá ocurrir por sí o por cualquiera a su nombre, a la Corte de Apelaciones respectiva, la que adoptará de inmediato las providencias que juzgue necesarias para restablecer el imperio del derecho y asegurar la debida protección del afectado, sin perjuicio de los demás derechos que pueda hacer valer ante la autoridad o los tribunales correspondientes. Procederá, también, el recurso de protección en el caso del Nº 8º del artículo 19, cuando el derecho a vivir en un medio ambiente libre de contaminación sea afectado por un acto u omisión ilegal imputable a una autoridad o persona determinada.

State	Constitution	Laws
	the rule of law and to ensure the due protection of the person concerned, without prejudice to the additional rights he might claim before the relevant authority or tribunal. The request for protection applies also in the case of no. 8 of Article19 when the right to live in an environment free of contamination has been affected by an arbitrary or unlawful action imputable to an authority or a specific person. Article 21.[312] Every individual who is under arrest, detention or imprisonment in breach of the laws or the Constitution may approach the administrative body indicated by the law so that the latter may order that the legal formalities be complied with and may immediately adopt the measures deemed necessary to reinstate the rule of law and ensure due protection of the affected individual. Article 93.[313]	–The subsequent decision, may it accept or repeal the recourse or declare it inadmissible, can be appealed at the Supreme Court. Law Nº 18.971[315] Any person can bring a charge against infractions against article 19 number 21 of the Political Constitution of Chile.

312 Todo individuo que se hallare arrestado, detenido o preso con infracción de lo dispuesto en la Constitución o en las leyes, podrá ocurrir por sí, o por cualquiera a su nombre, a la magistratura que señale la ley, a fin de que ésta ordene se guarden las formalidades legales y adopte de inmediato las providencias que juzgue necesarias para restablecer el imperio del derecho y asegurar la debida protección del afectado.

313 Artículo 93.Son atribuciones del Tribunal Constitucional: 1º Ejercer el control de constitucionalidad de las leyes que interpreten algún precepto de la Constitución, de las leyes orgánicas constitucionales y de las normas de un tratado que versen sobre materias propias de estas últimas, antes de su promulgación; 2º Resolver sobre las cuestiones de constitucionalidad de los autos acordados dictados por la Corte Suprema, las Cortes de Apelaciones y el Tribunal Calificador de Elecciones;

6° Resolver, por la mayoría de sus miembros en ejer cicio, la inaplicabilidad de un precepto legal cuya aplicación en cualquier gestión que se siga ante un tribunal ordinario o especial, resulte contraria a la Constitución;

7º Resolver por la mayoría de los cuatro quintos de sus integrantes en ejercicio, la inconstitucionalidad de un precepto legal declarado inaplicable en conformidad a lo dispuesto en el numeral anterior; En el caso del número 2º, el Tribunal podrá conocer de la materia a requerimiento del Presidente de la República, de cualquiera de las Cámaras o de diez de sus miembros. Asimismo, podrá requerir al Tribunal toda persona que sea parte en juicio o gestión pendiente ante un tribunal ordinario o especial, o desde la primera actuación del procedimiento penal, cuando sea afectada en el ejercicio de sus derechos fundamentales por lo dispuesto en el respectivo auto acordado.

En el caso del número 6º, la cuestión podrá ser planteada por cualquiera de las partes o por el juez que conoce del asunto. Corresponderá a cualquiera de las salas del Tribunal declarar, sin ulterior recurso, la admisibilidad de la cuestión siempre que verifique la existencia de una gestión pendiente ante el tribunal ordinario o especial, que la aplicación del precepto legal impugnado pueda resultar decisivo en la resolución de un asunto, que la impugnación esté fundada razonablemente y se cumplan los demás requisitos que establezca la ley. A esta misma sala le corresponderá resolver la suspensión del procedimiento en que se ha originado la acción de inaplicabilidad por inconstitucionalidad.

En el caso del número 7°, una vez resuelta en sente ncia previa la declaración de inaplicabilidad de un precepto legal, conforme al número 6° de este artículo, habrá acció n pública para requerir al Tribunal la declaración de inconstitucionalidad, sin perjuicio de la facultad de éste para declararla de oficio. Corresponderá a la ley orgánica constitucional respectiva establecer los requisitos de admisibilidad, en el caso de que se ejerza la acción pública, como asimismo regular el procedimiento que deberá seguirse para actuar de oficio.

314 1. El recurso o acción de protección se interpondrá ante la Corte de Apelaciones en cuya jurisdicción se hubiere cometido el acto o incurrido en la omisión arbitraria o ilegal que ocasionen privación, perturbación o amenaza en el legítimo ejercicio de las garantías constitucionales respectivas, dentro del plazo fatal de treinta días corridos contados desde la ejecución del acto o la ocurrencia de la omisión o, según la naturaleza de éstos, desde que se haya tenido noticias o conocimiento cierto de los mismos, lo que se hará constar en autos.

2. El recurso se interpondrá por el afectado o por cualquiera otra persona en su nombre, capaz de parecer en juicio, aunque no tenga para ello mandato especial, por escrito en papel simple y aún por telégrafo o télex. Presentado el recurso, el Tribunal examinará en cuenta si ha sido interpuesto en tiempo y si se mencionan hechos que puedan constituir la vulneración de garantías de las indicadas en el artículo 20 de la Constitución Política de la República. Si su presentación es extemporánea o no se señalan hechos que puedan constituir vulneración a garantías de las mencionadas en la referida disposición constitucional, lo declarará inadmisible desde luego por resolución fundada, la que sólo será susceptible del recurso de reposición ante el mismo tribunal, el que deberá interponerse dentro de tercero día.

5. Para mejor acierto del fallo se podrán decretar todas las diligencias que el Tribunal estime necesarias. La Corte apreciará de acuerdo con las reglas de la sana crítica los antecedentes que se acompañen al recurso y los demás que se agreguen durante su tramitación.- La sentencia que se dicte, ya sea que lo acoja, rechace o declare inadmisible el recurso, será apelable ante la Corte Suprema.

http://www.justicia.cl/documentos/docs_auto1.html, http://www.minsal.cl/juridico/CIRCULAR_35_07.doc

315 Cualquier persona podrá denunciar las infracciones al artículo 19 número 21 de la Constitución Política de la República de Chile.http://www.cecoch.cl/htm/revista/docs/estudiosconst/5n_2_5_2007/7_el_recurso_economico.pdf

State	Constitution	Laws
Croatia	Article 128 The Constitutional Court of the Republic of Croatia shall: *- decide on the conformity of laws with the Constitution;* *- decide on the conformity of other regulations with the Constitution and laws;* *- may decide on constitutionality of laws and constitutionality of laws and other regulations which have lost their legal force, provided that from the moment of losing the legal force until the submission of a request or a proposal to institute the proceedings not more than one year has passed;* *- decide on constitutional complaints against the individual decisions of governmental bodies, bodies of local and regional self-government and legal entities with public authority, when these decisions violate human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by the Constitution of the Republic of Croatia; (...)"* Article 131 *The procedure and conditions for the election of judges of the Constitutional Court of the Republic of Croatia and the termination of their office, conditions and time-limits for instituting proceedings for the assessment of the constitutionality and legality, procedure and legal effects of its decisions, protection of human rights and fundamental freedoms guaranteed by the Constitution, and other issues important for the performance of duties and work of the Constitutional Court of the Republic of Croatia, shall be regulated by the Constitutional Act.*	Constitutional Act on the Constitutional Court Article 38 (1) Every individual or legal person has the right to propose the institution of proceedings to review the constitutionality of the law and the legality and constitutionality of other regulations. Article 40 (1) The proposal to institute proceedings to review the constitutionality of the law or the constitutionality and legality of other regulations contains, as a rule, the same as the request. (2) The Constitutional Court shall institute proceedings within a term of one year after the proposal has been lodged. Article 62 (1) Everyone may lodge a constitutional complaint with the Constitutional Court if he deems that the individual act of a state body, a body of local and regional self-government, or a legal person with public authority, which decided about his/her rights and obligations, or about suspicion or accusation for a criminal act, has violated his/her human rights or fundamental freedoms guaranteed by the Constitution, or his/her right to local and regional selfgovernment guaranteed by the Constitution (hereinafter: constitutional right).
Cyprus	Article 146 1. The Supreme Constitutional Court shall have exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority is contrary to any of the provisions of this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person. 2. Such a recourse may be made by a person whose any existing legitimate interest, which he has either as a person or by virtue of being a member of a Community, is adversely and directly affected by such decision or act or omission.	
Czech Repub-lic	Article 87 (1) The Constitutional Court has jurisdiction: a) to annul statutes or individual provisions thereof if they are in conflicts with the constitutional order; b) to annul other legal enactments or individual provisions thereof if they are in conflict with the constitutional order, a statute; d) over constitutional complaints against final decisions or other actions by public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms;	Constitutional Court Act Article 64 (1)A petition, under Article 87 para. 1, lit. a) of the Constitution, proposing the annulment of a statute, or individual provisions thereof, may be submitted by: e) anyone who submits a constitutional complaint under the conditions stated in § 74 of this Statute or who submits a petition for rehearing under the conditions stated in § 119 para. 4 of this Statute. (2) A petition, under Article 87 para. 1, lit. b) of the Constitution, proposing the annulment of some other enactment, or individual provisions thereof, may be submitted by: d) anyone who submits a constitutional complaint under the conditions stated in § 74 of this Statute or who submits a petition for

State	Constitution	Laws
		rehearing under the conditions stated in § 119 para. 4 of this Statute; Article 72 (1) A constitutional complaint may be submitted: a) pursuant to Article 87 para. 1, lit. d) of the Constitution, by a natural or legal person, if she alleges that her fundamental rights and basic freedoms guaranteed in the constitutional order (hereinafter "constitutionally guaranteed fundamental rights and basic freedoms") have been infringed as a result of the final decision in a proceeding to which she was a party, of a measure, or of some other encroachment by a public authority (hereinafter "action by a public authority"). Article 74 A complainant may submit, together with his constitutional complaint, a petition proposing the annulment of a statute or some other enactment, or individual provisions thereof, the application of which resulted in the situation which is the subject of the constitutional complaint, if the complainant alleges it to be in conflict with a constitutional act, or with a statute, where the complaint concerns some other enactment. [to be combined with Art. 78]
Den-mark	§60. (1). The High Court of the Realm shall try such actions as may be brought by the King or the Folketing against Ministers. (2) With the consent of the Folketing, the King may also cause other persons to be tried before the High Court of the Realm for crimes which he may deem to be particularly dangerous to the State.	Administration of Justice Act Section 371 1. Appeals may not be lodged against judgments pronounced by a High Court as court of second instance. The Board of Appeal may, however, permit an examination in a court of third instance if the case concerns a fundamental principle. 2. An application for the permission referred to in the second sentence of subsection (1) above must be submitted to the Board of Appeal within 8 weeks of pronouncement of the judgment concerned. The Board of Appeal may, however, exceptionally, grant such permission if the application is submitted later, provided it is within one year of pronouncement of the judgment.
Estonia	Article 152 If any law or another legal act is in conflict with the Constitution, it shall not be applied by the Court in trying a case. If any law or other legal act is in conflict with the provisions and spirit of the Constitution, it shall be declared null and void by the National Court.	Constitutional Review Court Procedure Act §. 16. A person who finds that a resolution of the Riigikogu violates his or her rights may file with the Supreme Court a request for the repeal of the resolution of the Riigikogu. §. 18. A person who finds that a decision of the President of the Republic concerning appointment to or release from office of an official violates his or her rights, may file with to the Supreme Court a request for the repeal of the decision of the President of the Republic.
Finland	Section 106 If, in a matter being tried by a court of law, the application of an Act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution.	Supreme Court Act Article 3 The Supreme Court shall examine and decide as the final instance 1. all litigation which according to law or special decrees may have been brought before the judicial department of the Senate of Finland; 2. appeals against the decisions and actions of authorities, which until now have been subject to appeal to the judicial department of the Senate;

State	Constitution	Laws
		3. appeals against the judgments and decisions of the Land Court; 4. charges for misconduct in office committed by the President or a member of a court of appeal in the performance of his duties; and 5. applications for the restoration of lapsed time and for the annulment of a final judgement.
France		
Georgia	Article 89 1. The Constitutional Court of Georgia on the basis of a constitutional claim or a submission of the President of Georgia, the Government, not less than one fifth of the members of the Parliament, a court, the higher representative bodies the Autonomous Republic of Abkhazia and the Autonomous Republic of Ajara, the Public Defender or a citizen in accordance with a procedure established by the Organic Law shall: a. adjudicate upon the constitutionality of a Constitutional Agreement, law, normative acts of the President and the Government, the normative acts of the higher state bodies of the Autonomous Republic Abkhazia and the Autonomous Republic of Ajara (changes are added by the Constitutional Laws of Georgia of 20 April 2000 and 30 March 2001); f. consider on the basis of a constitutional claim of a citizen constitutionality of normative acts in terms of the issues of Chapter Two of the Constitution;	Law on the Constitutional Legal Proceedings Chapter One Principles of constitutional proceedings Article 1 1. Constitutional proceedings before the Court shall be conducted in conformity with the equality of the parties and the adversarial principle. 2. Individuals and bodies listed in paragraph 1 of Articles 33, 34, 35, 36, 37, 38, 39, 40 and 41 and in Article 42 of Georgia's Organic Law on the Constitutional Court of Georgia shall have equal rights to address the Constitutional Court directly. Organic Law on the Constitutional Court Article 39 1. The following shall have the right to lodge a constitutional claim on constitutionality of a normative act or a particular provisions thereof: a) Citizens of Georgia, other individuals residing in Georgia and legal entities of Georgia, if they believe that their rights and freedoms recognised by Chapter Two of the Constitution of Georgia are infringed or may be directly infringed upon;
Germany	Article 93 (1) The Federal Constitutional Court shall rule: 4a. on constitutional complaints which may be filed by anybody claiming that one of their basic rights or one of their rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103 or 104 has been violated by public authority; Article 94 (2) The constitution and procedure of the Federal Constitutional Court shall be governed by a federal law which shall specify the cases in which its decisions have the force of law. Such law may make a complaint of unconstitutionality conditional upon the exhaustion of all other legal remedies and provide for a special admissibility procedure.	Law on the Federal Constitutional Court Article 13 The Federal Constitutional Court shall decide in the cases determined by the Basic Law, to wit 8a. on constitutional complaints (Article 93 (1) (4a) and (4 b) of the Basic Law), Article 90 1. Any person who claims that one of his basic rights or one of his rights under paragraph 4 of Article 20, Articles 33, 38, 101, 103 and 104 of the Basic Law has been violated by public authority may lodge a constitutional complaint with the Federal Constitutional Court. Article 95 Law on the Federal Constitutional Court 1. If the constitutional complaint is upheld, the decision shall state which provision of the Basic Law has been infringed and by which act or omission. The Federal Constitutional Court may at the same time declare that any repetition of the act or omission against which the complaint was directed will infringe the Basic Law. 2. If a constitutional complaint against a decision is upheld, the Federal Constitutional Court shall quash the decision and in cases pursuant to the first sentence of Article 90 (2) above it shall refer the matter back to a competent court. 3. If a constitutional complaint against a law is upheld, the law shall be declared null and void. The same shall apply if a constitutional complaint pursuant to paragraph 2 above is upheld because the quashed decision is based on an unconstitutional law.

State	Constitution	Laws
Greece	Article 100 1. A Special Highest Court shall be established, the jurisdiction of which shall comprise: d) Settlement of any conflict between the courts and the administrative authorities, or between the Supreme Administrative Court and the ordinary administrative courts on one hand and the civil and criminal courts on the other, or between the Court of Auditors and any other court. e) Settlement of controversies on whether the content of a statute enacted by Parliament is contrary to the Constitution, or on the interpretation of provisions of such statute when conflicting judgments have been pronounced by the Supreme Administrative Court, the Supreme Civil and Criminal Court or the Court of Auditors.	Law no. 345 establishing the Special Highest Court Article 48 Disputes concerning assessment of the constitutionality of a law or its interpretation 1. Where conflicting judgments have been delivered by the Council of State, the Supreme Court or the Comptrollers Council as to the assessment of the constitutionality of a law or its interpretation, the Special Court shall resolve the conflict at the request of: b. any person having a lawful interest. 2. Should the Council of State, the Supreme Court or the Comptrollers Council wish to deliver a decision concerning assessment of the constitutionality of a law or its interpretation and conflicting with a previous decision of another of these authorities which has been invoked by one of the parties or is known to the authority so wishing, it shall refer to the Special Court by preliminary ruling.
Hungary	Article 32/A. (1) The Constitutional Court shall review the constitutionality of laws and perform the tasks assigned to its jurisdiction by statute. (2) The Constitutional Court shall annul the statutes and other legal norms that it finds to be unconstitutional. (3) Everyone has the right to initiate proceedings of the Constitutional Court in the cases specified by statute.	Act no. XXXII on the Constitutional Court Article 1 The competence of the Constitutional Court shall comprise the following: b. the examination of the unconstitutionality of legal rules as well as other legal means of State control; d. the adjudication of constitutional complaints submitted because of alleged violations of constitutional rights; e. the elimination of unconstitutionality manifesting itself in omission; Article 21 2. The procedure provided in Article 1, point b may be initiated by anyone. 4. The procedure provided in Article 1, points d and e may be initiated by anyone. Article 38 1. A judge shall initiate the proceedings of the Constitutional Court while suspending the judicial process if he/she in the course of any pending case, he/she considers unconstitutional the legal rule or other legal means of the State control which he/she needs to apply. 2. In a petition, anybody considering a legal rule to be applied in his/her pending process unconstitutional, may initiate the action of the judge provided in section 1. Article 48 1. Anybody aggrieved by the application of an unconstitutional legal rule who has exhausted all other legal remedies or has no other remedy available, may submit a constitutional complaint to the Constitutional Court because of the violation of his/her constitutional rights.
Iceland		Law No. 91/1991 on Procedure in Civil Cases as amended by Law No. 38/1994 Article 143 3. Anyone who considers that a district court judge, in his capacity as such, has performed a breach against him has the right to present an accusation against him by complaint appeal to the Supreme Court, who may issue an admonition to the judge or impose on him by judgement the penalty of a fine to the State.

State	Constitution	Laws
		Part XXV Appeals to a higher court Article 151 [1. Parties are permitted to make an appeal to the Supreme Court against a district court judgement, subject to the limitations following from other provisions of this Law. In an appeal, a reconsideration of decrees and decisions made in a district court may be sought. 3. A judgement can be appealed against so that it will be materially changed or confirmed, it will be quashed and the case sent to the district court or dismissed from the district court. 4. Both or all parties are permitted to appeal against a judgement. The case shall then be heard in unison before the Supreme Court. 5. The right to appeal a case may not be assigned, either verbally or silently, until a judgement has been rendered in the district court.]1 1 Law No. 38/1994, Article 5
Ireland	Article 15 4. 2° Every law enacted by the Oireachtas which is in any respect repugnant to this Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid. Article 34 3. 2° Save as otherwise provided by this Article, the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution, and no such question shall be raised (whether by pleading, argument or otherwise) in any Court established under this or any other Article of this Constitution other than the High Court or the Supreme Court. 3° The Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law. 4° No law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases which involve questions as to the validity of any law having regard to the provisions of this Constitution.	VF LO reply: Order 84, Rule 20(4) of the Rules of the Superior Courts provides that leave to apply for judicial review shall not be granted unless the applicant has sufficient interest in the matter to which the application relates. It is submitted by Hogan and Morgan that this formulation of locus standi applies to all remedies, including challenges to the validity of a law on the basis of unconstitutionality[316].
Israel		Basic Law: The Judiciary[317] Article 15 (b) The Supreme Court shall hear appeals against judgments and other decisions of the District Courts. (d) Without prejudice to the generality of the provisions of subsection (c), the Supreme Court sitting as a High Court of Justice shall be competent – (2) to order State and local authorities and the officials and bodies thereof, and other persons carrying out public functions under law, to do or

316 Hogan, Gerard & Morgan, David Gwynn, Administration Law in Ireland, 3rd Ed., Roundhall, Sweet & Maxwell, Dublin, 1998, p. 740

317 http://www.knesset.gov.il/laws/special/eng/basic8_eng.htm

State	Constitution	Laws
		refrain from doing any act in the lawful exercise of their functions or, if they were improperly elected or appointed, to refrain from acting; (3) to order courts (batei mishpat and batei din) and bodies and persons having judicial or quasijudicial powers under law, other than courts dealt with by this Law and other than religious courts (batei din), to hear, refrain from hearing, or continue hearing a particular matter or to void a proceeding improperly taken or a decision improperly given; (4) to order religious courts (batei din) to hear a particular matter within their jurisdiction or to refrain from hearing or continue hearing a particular matter not within their jurisdiction, provided that the court shall not entertain an application under this paragraph is the applicant did not raise the question of jurisdiction at the earliest opportunity; and if he had no measurable opportunity to raise the question of jurisdiction until a decision had been given by a religious court (beit din), the court may quash a proceeding taken or a decision given by the religious court (beit din) without authority.
Italy	Article 24 Everyone can take judicial action to protect individual rights and legitimate interests. The right to defence is inviolable at every stage and moment of the proceedings. The indigent are assured, through appropriate institutions, the means for action and defence before all levels of jurisdiction. The law determines the conditions and the means for the reparation for judicial errors. Constitutional Law No. 1 of 9 February 1948 Section 1 Questions of constitutionality regarding an Act of Parliament or a central government statutory measure having the force of law raised by a court or by a party to judicial proceedings or not deemed by a court of law to be manifestly groundless, shall be referred to the Constitutional Court for a decision.	Provisions governing the review ofconstitutionality and guaranteeing the independence of the Constitutional Court Section 1 Questions of constitutionality regarding an Act of Parliament or a central government statutory measure having the force of law raised by a court or by a party to judicial proceedings or not deemed by a court of law to be manifestly groundless, shall be referred to the Constitutional Court for a decision. Law on the composition and procedures of the Constitutional Court Section 23 In the course of a judicial proceeding, any party to the case or the Public Prosecutor (Pubblico Ministero) may raise the issue of unconstitutionality in the appropriate form, indicating: a. the provisions of the central or regional government Act or statutory measure deemed to be unconstitutional; b. the provisions of the Constitution or the constitutional laws allegedly infringed thereby. If the case cannot be tried without first resolving the question of constitutionality, or if the trial court does not consider that the question of constitutionality raised is groundless, it shall issue an order referring the matter immediately to the Constitutional Court, setting out the terms and the reasons for raising the question of constitutionality, and shall suspend trial proceedings. Section 24 A court order rejecting the claim of unconstitutionality as being manifestly irrelevant or groundless must include adequate reasons. The same claim may be filed again at the beginning of proceedings at each subsequent instance.
Japan	Article 81 The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.	

State	Constitution	Laws
Kazakh-stan	No direct individual access	No direct individual access
Korea, Repub-lic	Article 111 The Constitutional Court shall have jurisdiction over the following matters: 5. Constitutional complaint as prescribed by Act.	Constitutional Court Act Article 2 (Jurisdiction) The Constitutional Court shall have jurisdiction over the following issues: 5. Constitutional complaint. Article 41 (Request for Adjudication on the Constitutionality of Statutes) (1) When the issue of whether or not statutes are constitutional is relevant to the judgment of the original case, the ordinary court(including the military court; hereinafter the same shall apply) shall request to the Constitutional Court, ex officio or by decision upon a motion by the party, an adjudication on the constitutionality of statutes. Article 68 (Causes for Request) (1) Any person who claims that his basic right which is guaranteed by the Constitution has been violated by an exercise or non-exercise of governmental power may file a constitutional complaint, except the judgments of the ordinary courts, with the Constitutional Court: Provided, That if any relief process is provided by other laws, no one may file a constitutional complaint without having exhausted all such processes. (2) If the motion made under Article 41 (1) for adjudication on constitutionality of statutes is rejected, the party may file a constitutional complaint with the Constitutional Court. In this case, the party may not repeatedly move to request for adjudication on the constitutionality of statutes for the same reason in the procedure of the case concerned.
Latvia	Article 85 In Latvia, there shall be a Constitutional Court, which, within its jurisdiction as provided for by law, shall review cases concerning the compliance of laws with the Constitution, as well as other matters regarding which juris-diction is conferred upon it by law. The Con-stitutional Court shall have the right to declare laws or other enactments or parts thereof invalid.	Law on the Constitutional Court Article 19.2 1. Any person, who holds that his/her fundamental rights, established by the Constitution, have been violated by applying a normative act, which is not in compliance with the legal norm of higher legal force, may submit a claim (an application) to the Constitutional Court.
Liech-tenstein	Article 43 The right of complaint is guaranteed. Any citizen shall be entitled to lodge a complaint regarding any action or procedure on the part of a public authority which is contrary to the Constitution, the law or the official regulations and detrimental to his rights or interests. Such complaint shall be addressed to that authority which is immediately superior to the authority concerned and may, if necessary, be pursued to the highest authority, except when the right of recourse may be barred by a legal restriction. If a complaint thus submitted is rejected by the superior authority, the latter shall be bound to declare to the complaining party the reasons for its decision. Article 104 1) A State Court shall be established by a special law as a court of public law to protect rights accorded by the Constitution, to decide in conflicts of jurisdiction between the law	Constitutional Court Act Article 15 1) The Constitutional Court shall decide on complaints to the extent that the complainant claims a violation, by a final decision or order in the last instance issued by a public authority, of one of his constitutionally guaranteed rights or of one of his rights guaranteed by international conventions for which the lawmaking power has explicitly recognised an individual right of complaint 3) Moreover, the Constitutional Court shall decide on complaints to the extent that the complainant claims an immediate violation, by a law, an ordinance, or an international treaty, of one of his constitutionally guaranteed rights or of one of his rights guaranteed by international conventions for which the lawmaking power has explicitly recognised an individual right of complaint (paragraph 2), and the legal provision in question has become effective for the complainant without a decision or order having been issued by a public authority.

State	Constitution	Laws
	courts and the administrative authorities and to act as a disciplinary court for members of the Government.	Article 20 1) The Constitutional Court shall decide on the compliance of ordinances or individual provisions thereof with the Constitution, laws, and international treaties: c) on application of at least 100 citizens eligible to vote, if such application is submitted with one month after publication of the ordinance in the Liechtenstein Legal Gazette.
Lithua-nia	No direct individual access	No direct individual access
Luxem-bourg	Article 95ter (1) The Constitutional Court decides, by way of arrêt, on the conformity of the laws with the Constitution. (2) The Constitutional Court is seized, in a prejudicial manner, pursuant to the modalities to be determined by the law, by any court to decide on the conformity of the laws, save the laws approving treaties, to the Constitution.	Law on the Organisation of the Constitutional Court Article 6 When a party raises a question concerning a law's conformity with the Constitution before an ordinary court or an administrative court, that court shall refer the matter to the Constitutional Court. The court shall not be required to refer the matter to the Constitutional Court if, in its view: a. a decision on the matter raised is not necessary for it to deliver its judgment; b. the constitutionality issue is without foundation; c. the Constitutional Court has already ruled on a question submitted to it concerning the same matter.
Malta	46. (1) Subject to the provisions of subsections (6) and (7) of this section, any person who alleges that any of the provisions of sections 33 to 45 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, or such other person as the Civil Court, First Hall, in Malta may appoint at the instance of any person who so alleges, may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the Civil Court, First Hall, for redress. (2) The Civil Court, First Hall, shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 33 to 45 (inclusive) to the protection of which the person concerned is entitled: Provided that the Court may, if it considers it desirable so to do, decline to exercise its powers under this subsection in any case where it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law. (3) If in any proceedings in any court other than the Civil Court, First Hall, or the Constitutional Court any question arises as to the contravention of any of the provisions of the said sections 33 to 45 (inclusive), that court shall refer the question to the Civil Court, First Hall, unless in its opinion the	European Convention Act Article 4 1. Any person who alleges that any of the Human Rights and Fundamental Freedoms, has been, is being or is likely to be contravened in relation to him, or such other person as the Civil Court, First Hall, in Malta may appoint at the instance of any person who so alleges, may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the Civil Court, First Hall, for redress. 2. The Civil Court, First Hall, shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection 1 of this section, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement, of the Human Rights and Fundamental Freedoms to the enjoyment of which the person concerned is entitled

State	Constitution	Laws
	raising of the question is merely frivolous or vexatious; and that court shall give its decision on any question referred to it under this subsection and, subject to the provisions of subsection (4) of this section, the court in which the question arose shall dispose of the question in accordance with that decision. (4) Any party to proceedings brought in the Civil Court, First Hall, in pursuance of this section shall have a right of appeal to the Constitutional Court. (5) No appeal shall lie from any determination under this section that any application or the raising of any question is merely frivolous or vexatious. Article 95 (2) One of the Superior Courts, composed of such three judges as could, in accordance with any law for the time being in force in Malta, compose the Court of Appeal, shall be known as the Constitutional Court and shall have jurisdiction to hear and determine – (c) appeals from decisions of the Civil Court, First Hall, under section 46 of this Constitution; (d) appeals from decisions of any court of original jurisdiction in Malta as to the interpretation of this Constitution other than those which may fall under section 46 of this Constitution; (e) appeals from decisions of any court of original jurisdiction in Malta on questions as to the validity of laws other than those which may fall under section 46 of this Constitution; and (f) any question decided by a court of original jurisdiction in Malta together with any of the questions referred to in the foregoing paragraphs of this subsection on which an appeal has been made to the Constitutional Court: Provided that nothing in this paragraph shall preclude an appeal being brought separately before the Court of Appeal in accordance with any law for the time being in force in Malta. (3) Notwithstanding the provisions of subsection (2) of this section, if any such question as is referred to in paragraph (d) or (e) of that subsection arises for the first time in proceedings in a court of appellate jurisdiction, that court shall refer the question to the court which gave the original decision, unless in its opinion the raising of the question is merely frivolous or vexatious, and that court shall give its decision on any such question and, subject to any appeal in accordance with the provisions of subsection (2) of this section, the court in which the question arose shall dispose of the question in accordance with that decision. Article 116 A right of action for a declaration that any law is invalid on any grounds other than inconsistency with the provisions of Sections 33 to 45 of this Constitution shall appertain to all persons without distinction and a person bringing such an action shall not be required to show any personal interest in support of his action.	
Mexico	Article 103 The courts of the Federation will resolve all questions that arise: I. About laws or acts of authority that violate individual guarantees.	Organic Law on the Judicial Power of the Federation (p.t.) Article 10[318]

[318] Artículo 10. La Suprema Corte de Justicia conocerá funcionando en Pleno: II. Del recurso de revisión contra sentencias pronunciadas en la audiencia constitucional por los jueces de distrito o los tribunales unitarios de circuito, en los siguientes casos:
a) Cuando subsista en el recurso el problema de constitucionalidad de normas generales, si en la demanda de amparo se hubiese impugnado una ley federal, local, del Distrito Federal, o un tratado internacional, por estimarlos directamente violatorios de un precepto de la Constitución Política de los Estados Unidos Mexicanos;
b) Cuando se ejercite la facultad de atracción contenida en el segundo párrafo del inciso b) de la fracción VIII del artículo 107 de la Constitución Política de los Estados Unidos Mexicanos, para conocer de un amparo en revisión que por su interés y trascendencia así lo amerite, y III. Del recurso de revisión contra sentencias que en amparo directo pronuncien los tribunales colegiados de circuito, cuando habiéndose impugnado la inconstitucionalidad de una ley federal, local, del Distrito Federal o de un tratado internacional, o cuando en los conceptos de violación se haya planteado la interpretación directa de un precepto de la Constitución Política de los Estados Unidos Mexicanos, dichas sentencias decidan u omitan decidir sobre tales materias, debiendo limitarse en estos casos la materia del recurso a la decisión de las cuestiones propiamente constitucionales.
http://www.scjn.gob.mx/NR/exeres/6CAFC6D1-5EF0-4069-9EFD-82342B9084F6,frameless.htm

State	Constitution	Laws
	Article 105 The Supreme Court of Justice of the Nation will get to know, in the terms that the regulating law specifies, about the following affairs: III. By itself or by petition of the appropriate unitary circuit tribunal, or the Attorney General of the Republic, it may get to know about cases of appeal of sentences of district judges in those cases in which the Federation took part, and in which their interest and importance merit its participation. Article 107 All questions that Article 103 discusses will be subject to the proceedings and forms of judicial order, that the law determines, according to the following bases: I. Judicial relief always will follow to the aggrieved party. II. Judgment will always be such that it only will be concerned with particular parties, limited to relief and protection in special cases for those who are making the complaint, without making a general declaration with respect to the law or act that motivates the complaint. VIII. Against judgments that district judges or Unitary Circuit Tribunals pronounce in cases of relief, there will be review. Of these, the Supreme Court of Justice will hear: a) When the petition for relief has been challenged, because it directly violates this Constitution, federal, states, or local laws, international treaties, regulations dispatched by the President of the Republic in accordance with section I of Article 89 of this Constitution and regulations of state and local law made by the governors of the States or by the Federal District where the problem of constitutionality remains; b) In the cases understood to be under Sections II and III of Article 103 of this Constitution. The Supreme Court of Justice, upon its initiative or upon petition may be by the corresponding Collected Circuit Tribunal, or the Attorney General of the Republic may hear cases of relief in review of which their interest and implications for future legal action merit. In the cases not foreseen in the previous paragraphs, the cases of relief will come before Collected Circuit Tribunals, and their judgments will have no recourse. IX. The resolutions that the Collected Circuit Tribunals give in cases of direct judicial relief have no appeal, unless they decide about the unconstitutionality of a law or establish a direct interpretation of a precept of the Constitution. Such resolutions, will be brought before the Supreme Court of Justice, and conform to general standards, that may establish criteria of importance and precedent. Only on these bases will they be reviewed by the Supreme Court of Justice, which will limit the matters of appeal exclusively to decision on the questions that are properly constitutional.	The Supreme Court of Justice will decide in the Plenary: II. On the appeal of revision against sentences passed in the constitutional hearing by district judges or unitary circuit courts in the following cases: a. If the problem of unconstitutionality of general norms subsists in the appeal of revision, if in the writ of amparo a federal or local law or a law of a federal district or an international treaty was impugned because they were deemed to directly violate the Political Constitution of the United Mexican States; b. If it makes use of its right to seize pending cases in view of deciding on a writ of amparo that it deems particularly interesting and having important implications for future legal action, as provided for in article 107 fraction VIII indent b) of the Political Constitution of the United Mexican States. III. On the claim of revision against decisions following a writ of direct amparo challenging the constitutionality of a federal, local, or district law or of an international treaty issued by a collegial circuit tribunal, or if the decision on the violation required a direct interpretation of a precept of the Political Constitution of the United Mexican States, the revision will limit itself to the questions that are properly constitutional.
Moldova	No direct individual access	No direct individual access

State	Constitution	Laws
Monaco	Article 90[319] A. − En matière constitutionnelle, le Tribunal Suprême statue souverainement: l°) sur la conformité du règlement intérieur du Conseil National aux dispositions constitutionnelles et, le cas échéant,législatives, dans les conditions prévues à l'article 61; 2°) sur les recours en annulation, en appréciation de validité et en indemnité ayant pour objet une atteinte aux libertés et droits consacrés par le Titre III de la Constitution, et qui ne sont pas visés au paragraphe B du présent article. B.- En matière administrative, le Tribunal Suprême statue souverainement: l°) sur les recours en annulation pour excès de pouvoir formés contre les décisions des diverses autorités administratives et les ordonnances souveraines prises pour l'exécution des lois, ainsi que sur l'octroi des indemnités qui en résultent; 2°) sur les recours en cassation formés contre les décisions des juridictions administratives statuant en dernier ressort; 3°) sur les recours en interprétation et les recours en appréciation de validité des décisions des diverses autorités administratives et des ordonnances souveraines prises pour l'exécution des lois.	Decree n; 2.984 on the organisation and functioning of the Supreme Tribunal[320] Le tribunal peut être saisi par toute personne, physique ou morale ayant qualité et justifiant d'un intérêt, en matière administrative comme en matière constitutionnelle. Ainsi notamment, toute loi peut être annulée, pour inconstitutionnalité, à l'initiative d'un justiciable, personne physique ou morale, monégasque ou étranger.
Montenegro	Article 149 The Constitutional Court shall decide on the following: 3) Constitutional appeal due to the violation of human rights and liberties granted by the Constitution, after all other efficient legal remedies have been exhausted Article 150 Any person may file an initiative to start the procedure for the assessment of constitutionality and legality.	Draft law on the Constitutional Court[321] Article 58 Constitutional complaints may be lodged against an individual act of state authority, local selfgovernment authority or organisation vested with public powers, for the reason of violation of human rights and freedoms guaranteed by the Constitution, after all effective legal remedies have been exhausted. Article 59 Constitutional complaints may be lodged by anyone who believes that his human right and freedom guaranteed by the Constitution was violated by an individual act of state authority, local self-government authority or organisation vested with public powers. Constitutional complaint may also be lodged by another natural person or a state authority or organisation in charge of the monitoring and realisation of human rights and freedoms on behalf of the person referred to in paragraph 1 above on the basis of his authorisation.
Morocco	No direct individual access	No direct individual access
Netherlands	Article 94 Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions. Article 120 The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.	Judiciary Organisation Act Article 95 1. The Court of Cassation shall take cognisance of appeals in cassation against the procedures of the courts of appeal and the district and subdistrict courts and against their judgements, whether lodged by the parties concerned or by the procurator general at the Supreme Court "in the interests of the law".

[319] http://www.conseil-national.mc/constitution.php
[320] http://www.legimonaco.mc/305//legismc.nsf
[321] CDL(2008)073 Draft Law on the Constitutional Court of Montenegro

State	Constitution	Laws
		Article 99 1. The Court of Cassation shall quash procedures and judgements: 2. where they violate the law, with the exception of the law of other States. Council of State Act Article 30b The Administrative Jurisdiction Division is charged with trying the disputes referred to it by law.
Norway	Article 88 The Supreme Court pronounces judgment in the final instance. Nevertheless, limitations on the right to bring a case before the Supreme Court may be prescribed by law.	Civil Procedure Act § 355 The court decisions which can be made subject of an independent appeal are judgments and such orders, for which it is specifically provided that they may be the subject of appeal. In connection with an appeal against a judgment or order a party may also appeal against preceding orders relating to the handling of the case. Criminal Procedure Act § 306 Appeals against judgments of the District Court (herredsretten) or the City Court (byretten) or the High Court (lagmannsretten) may be brought by the parties to court of appeal indicated in Sections 6 to 8.
Peru	Article 138[322] (p.t.) The power to administer justice emanates from the people and is exercised by the Judicial Power through its hierarchical organs and in conformity with the Constitution and the laws. If, in any proceeding, there is incompatibility between a constitutional norm and a legal norm, the judges shall give priority to the first. Likewise, they shall give priority to the legal norm over all other norms of inferior value. Article 144[323] The Plenary of the Supreme Court is the highest deliberating organ of the Judicial Power. Article 200[324] The Constitution guarantees the exercise of:	Organic law on the judicial power(p.t.) Article 14 – Supremacy of the constitutional norm and diffuse control of the Constitution326 In conformity with art. 236 of the Constitution, when the competent magistrates, when deciding on the merits of the question, find in their interpretation that there is an incompatibility of a constitutional provision and one with force of a law, they shall resolve the case in conformity with the constitutional provision. These judgements shall be referred to the Constitutional and Social Chamber of the Supreme Court for consultation, if they are not being impugned. Likewise, judgements at second instance in which the same precept is being applied shall be

[322] La potestad de administrar justicia emana del pueblo y se ejerce por el Poder Judicial a través de sus órganosjerárquicos con arreglo a la Constitución y a las leyes.
En todo proceso, de existir incompatibilidad entre una norma constitucional y una norma legal, los jueces prefieren la primera. Igualmente, prefieren la norma legal sobre toda otra norma de rango inferior.
http://www.tc.gob.pe/legconperu/constitucion.html

[323] La Sala Plena de la Corte Suprema es el órgano máximo de deliberación del Poder Judicial.

[324] Son garantías constitucionales:
1.La Acción de Hábeas Corpus, que procede ante el hecho u omisión, por parte de cualquier autoridad, funcionario o persona, que vulnera o amenaza la libertad individual o los derechos constitucionales conexos.
2.La Acción de Amparo, que procede contra el hecho u omisión, por parte de cualquier autoridad, funcionario o persona, que vulnera o amenaza los demás derechos reconocidos por la Constitución, con excepción de los señalados en el inciso siguiente. No procede contra normas legales ni contra Resoluciones Judiciales emanadas de procedimiento regular.
La Acción de Hábeas Data, que procede contra el hecho u omisión, por parte de cualquier autoridad, funcionario o persona, que vulnera o amenaza los derechos a que se refiere el Artículo 2º, incisos 5) y 6) de la Constitución.
5.La Acción Popular, que procede, por infracción de la Constitución y de la ley, contra los reglamentos, normas administrativas y resoluciones y decretos de carácter general, cualquiera sea la autoridad de la que emanen.
6.La Acción de Cumplimiento, que procede contra cualquier autoridad o funcionario renuente a acatar una norma legal o un acto administrativo, sin perjuicio de las responsabilidades de ley.
Una ley orgánica regula el ejercicio de estas garantías y los efectos de la declaración de inconstitucionalidad o ilegalidad de las normas.

State	Constitution	Laws
	1. The claim of *habeas corpus*, which can be lodged in relation to an action or omission by any authority, civil servant or person, which violates or threatens individual liberty or the associated constitutional rights. 2.The writ of *amparo,* which can be lodged against the action or omission by any authority, civil servant or person, which violates or threatens the other rights provided for in the Constitution, with the exception of those indicated in the following indent. The writ may not be lodged against legal norms or judicial resolutions that respected the regular procedure. The claim of *habeas* data which can be lodged against the action or omission by any authority, civil servant or person, which violates or threatens the rights provided for in Article 2 indents 5) and 6) of the Constitution. 5. The popular action, which can be lodged in view of an infraction of the Constitution or the law, against regulations, administrative norms and resolutions and decrees of general character, no matter which authority these acts or omissions emanate from. 6. The claim of performance of duty, which may be lodged against any authority or civil servant refusing to attack a legal norm or an administrative act, without prejudice to the legal responsibilities. An organic law shall regulate the exercise of these guarantees and the effect of the declaration of unconstitutionality or illegality of the norm. The right to lodge writs of *habeas corpus* or of *amparo* cannot be suspended during the effectiveness of exceptional regimes as referred to in Article 137 of the Constitution. When claims of this nature are being lodged against restricted rights, the competent jurisdictional organ shall examine the reasonability and the proportionality of the restricting act. The judge shall not be entitled to question the declaration of state of emergency or if state of siege. Article 202[325]	referred to the Chamber, even if against these judgements no appeal for cassation may be lodged. In all those cases the magistrates only declare the inapplicability due to unconstitutionality of the legal norm in the concrete case, without affecting its validity, which is controlled according to the form and procedure established by the Constitution. Concerning norms of lower rank, the same principle applies, but without necessity of referral for consultation, without prejudice to the procedure applying for popular action. Organic Law on the Constitutional Tribunal Article 5[327] The Tribunal shall be constituted of two Chambers of three members each to cognise, in last instance, concerning resolutions denying habeas corpus, amparo, habeas data and claim of performance of duty, initiated before the respective judges. The resolutions require three conform votes. Code of constitutional procedure Article VI.- Diffuse control and constitutional interpretation[328] When there is an incompatibility between a constitutional norm and another norm of lower rank, the judge must give priority to the former if this is necessary to resolve the controversy and if it is not possible to interpret the lower norm in conformity with the Constitution. The judges cannot refrain from applying a norm whose constitutionality has been confirmed in a proceeding on unconstitutionality or in a proceeding following a popular action. Article 75.-Finality The aim of the proceeding following a popular action and of the proceeding on unconstitutionality is the protection of the Constitution against infractions against its normative hierarchy or rank. This infraction can be direct or indirect, total or partial, and touch formal or material aspects.

El ejercicio de las acciones de *hábeas corpus* y de amparo no se suspende durante la vigencia de los regímenes de excepción a que se refiere el artículo 137º de la Constitución.
Cuando se interponen acciones de esta naturaleza en relación con derechos restringidos o suspendidos, el órgano jurisdiccional competente examina la razonabilidad y la proporcionalidad del acto restrictivo. No corresponde al juez cuestionar la declaración del estado de emergencia ni de sitio.

[325] Corresponde al Tribunal Constitucional: 1.Conocer, en última y definitiva instancia, las resoluciones denegatorias de *hábeas corpus, amparo, hábeas* data, y acción de cumplimiento.

[326] Ley organica del poder judicial Artículo 14.- Supremacía de la norma constitucional y control difuso de la Constitución.
De conformidad con el Article 236 de la Constitución, cuando los Magistrados al momento de fallar el fondo de la cuestión de su competencia, en cualquier clase de proceso o especialidad, encuentren que hay incompatibilidad en su interpretación, de una disposición constitucional y una con rango de ley, resuelven la causa con arreglo a la primera.(*)
Las sentencias así expedidas son elevadas en consulta a la Sala Constitucional y Social de la Corte Suprema, si no fueran impugnadas. Lo son igualmente las sentencias en segunda instancia en las que se aplique este mismo precepto, aun cuando contra éstas no quepa recurso de casación.
En todos estos casos los magistrados se limitan a declarar la inaplicación de la norma legal por incompatibilidad constitucional, para el caso concreto, sin afectar su vigencia, la que es controlada en la forma y modo que la Constitución establece.
Cuando se trata de normas de inferior jerarquía, rige el mismo principio, no requiriéndose la elevación en consulta, sin perjuicio del proceso por acción popular.

State	Constitution	Laws
	The Constitutional Tribunal is entitled to: To cognise, in first and last instance, on claims of unconstitutionality. To cognise, in last instance, concerning resolutions denying *habeas corpus, amparo, habeas* data and claim of performance of duty.	Article 76. Admissibility of the popular action[329] Popular action can be initiated against regulations, administrative norms and resolutions of general character, no matter which authority they emanate from, if they infringe the Constitution or the law, or if they have not been enacted or published as prescribed by the Constitution or the law applicable. Article 84.- Legitimation[330] The popular action can be filed by any person. Law 23506 on *amparo* and *habeas corpus* Article 3[331] The claims can be lodged even if the violation or threat emanates from a norm which is incompatible with the Constitution. In this case, the inapplicability of the norm shall be pronounced in the same proceeding. Article 4[332] If the claim is being lodged because of the violation of a constitutional right through omission where an action was due, the judgement will order the immediate and unconditional fulfilment of the act. Article 5[333] The claims are also admissible if a judicial authority passes a resolution or any other act of disposal outside of a proceeding in its competence, that violates a constitutional right.
Poland	Article 79 1. In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis	Constitutional Tribunal Act Article 27 The participants in the proceedings before the Tribunal shall be: 1) a subject who submitted an application or complaint concerning constitutional infringement;

[327] Para conocer, en última y definitiva instancia, las resoluciones denegatorias de los procesos de amparo, hábeas corpus, hábeas data y de cumplimiento, iniciadas ante los jueces respectivos, el Tribunal está constituido por dos Salas, con tres miembros cada una. Las resoluciones requieren tres votos conformes.

[328] Codigo procesal constitucional Artículo VI.- Control Difuso e Interpretación Constitucional Cuando exista incompatibilidad entre una norma constitucional y otra de inferior jerarquía, el Juez debe preferir la primera, siempre que ello sea relevante para resolver la controversia y no sea posible obtener una interpretación conforme a la Constitución.
Los Jueces no pueden dejar de aplicar una norma cuya constitucionalidad haya sido confirmada en un proceso de inconstitucionalidad o en un proceso de acción popular.
Artículo 75.- Finalidad
Los procesos de acción popular y de inconstitucionalidad tienen por finalidad la defensa de la Constitución frente a infracciones contra su jerarquía normativa. Esta infracción puede ser, directa o indirecta, de carácter total o parcial, y tanto por la forma como por el fondo. http://www.tc.gob.pe//Codigo_Procesal.pdf

[329] Procedencia de la demanda de acción popular
La demanda de acción popular procede contra los reglamentos, normas administrativas y resoluciones de carácter general, cualquiera que sea la autoridad de la que emanen, siempre que infrinjan la Constitución o la ley, o cuando no hayan sido expedidas o publicadas en la forma prescrita por la Constitución o la ley, según el caso.

[330] La demanda de acción popular puede ser interpuesta por cualquier persona.

[331] Las acciones de garantía proceden aun en el caso que la violación o amenaza se base en una norma que sea incompatible con la Constitución. En este supuesto, la inaplicación de la norma se apreciará en el mismo procedimiento.http://turan.uc3m.es/uc3m/inst/MGP/JCI/02-peru-leyhabeascorpusyamparo.htm

[332] Si se ejerce la acción a causa de la violación de un derecho constitucional por omisión de un acto debido, el fallo ordenará el cumplimiento incondicional e inmediato de dicho acto.

[333] Las acciones de garantía también son pertinentes si una autoridad judicial, fuera de un procedimiento que es de su competencia, emite una resolución o cualquier disposición que lesione un derecho constitucional.

State	Constitution	Laws
	a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution. 2. The provisions of para. 1 above shall not relate to the rights specified in Article 56.	Article 46 1. Constitutional claim, further referred to as the "claim" can be submitted after trying all legal means, if such means is allowed, within 3 months from delivering the legally valid decision to the plaintiff, the final decision or other final judgement. 2. The Tribunal shall consider a complaint on the principles and in accordance with the procedure provided for the consideration of a application for the confirmation of conformity of statutes to the Constitution and of other normative acts to the Constitutions and statutes.
Portugal	Article 20 Access to law and effective judicial protection 1. Everyone is guaranteed access to law and to the courts in order to defend his or her rights and legally protected interests; justice shall not be denied to a person for lack of financial resources. Article 280 1. The Constitutional Court has jurisdiction to hear appeals against any of the following court decisions: a. Decisions refusing to apply a legal rule on the ground of unconstitutionality; b. Decisions applying a legal rule, the constitutionality of which was challenged during the proceedings. 2. The Constitutional Court also has jurisdiction to hear appeals against any of the following court decisions: a. Decisions refusing to apply a legislative provision on the ground of illegality arising from contravention of some superior law; b. Decisions refusing to apply a provision of a regional legislative instrument on the ground of illegality arising from contravention of the statute of an autonomous region or the general law of the Republic; c. Decisions refusing to apply a provision of an instrument made by an organ with supreme authority on the ground of illegality arising from contravention of the statute of an autonomous region; d. Decisions applying a provision, the legality of which was challenged during the proceedings on any of the grounds specified in sub-paragraphs (a), (b) or (c). 3. Where a court refuses to apply a provision of an international convention, any legislation or a regulatory decree, any appeal under paragraph 1(a) or 2(a) must be brought by the Public Prosecution. 4. An appeal under paragraph (1)(b) or (2)(d) may be brought only by the party who raised the question of unconstitutionality or illegality; the law shall prescribe the requirements and procedure with respect to the bringing of these appeals.	Law on the Constitutional Court Article 70 – (Decisions that may be appealed) 1. An appeal may be made to the Constitutional Court, in section, regarding the following court decisions: a) Those rejecting the application of a rule on the grounds of unconstitutionality; b) Those applying a rule the unconstitutionality of which has been raised during the proceedings. c) Those rejecting the application of a rule which is included in a legislative act based on the grounds of its illegality in violating a law of reinforced value; d) Those rejecting the application of a rule appearing in regional legislation based on grounds of its illegality in violating the statute of an autonomous region or the general law of the Republic; e) Those rejecting the application of a rule issued by an organ of supreme national authority with grounds based on its illegality in violating the statute of an autonomous region; f) Those rejecting the application of a rule the illegality of which has been raised during the proceedings based on any of the grounds mentioned in sub-paragraphs c), d) and e); g) Those rejecting the application of a rule which has previously been judged unconstitutional or illegal by the actual Constitutional Court; h) Those rejecting the application of a rule which has previously been judged unconstitutional by the Constitutional Committee according to the exact terms in which it has been submitted for examination by the Constitutional Court; i) Those rejecting the application of a rule appearing in a legislative act on the grounds that it contradicts an international convention, or that apply it contrary to what has been previously decided on the matter by the Constitutional Court. Article 72 – (Legitimacy to appeal) 1. The following may appeal to the Constitutional Court: a) The Public Prosecutor's Office; b) Persons who, in agreement with the law regulating the case in which the decision was passed, have legitimacy to file an appeal. 2. The appeals envisaged in sub-paragraphs b) and f) of n.º 1 of article 70 may only be filed by the party that has raised the question of unconstitutionality or illegality in a way that is

State	Constitution	Laws
		procedurally appropriate before the court that gave the decision appealed against in terms of the latter being obliged to know it. 3. The appeal is obligatory for the Public Prosecutor's Office when the rule that was refused application, due to unconstitutionality or illegality, appears in an international convention, legislative act or regulamentary decree, or when the cases envisaged in sub-paragraphs g), h) and i) of no. 1 of Article 70 are verified, with the exception of the ruling in the following number. 4. The Public Prosecutor's Office may abstain from filing an appeal on decisions taken, within the guidelines already established, for the issue in question in the case law of the Constitutional Court.
Romania	Article 144 The Constitutional Court shall have the following powers: d) to decide on exceptions of unconstitutionality of laws and Government ordinances which are raised before the courts of law or commercial arbitration; a plea of unconstitutionality may also be brought up directly by the Ombusdman.	Law on the Organisation and Operation of the Constitutional Court Article 23 1. The Constitutional Court shall pronounce upon the exceptions raised before Instances referring to the unconstitutionality of laws and statutory orders. 2. If, in the course of a judgement, the Instance finds, ex officio, or one of the parties pleads the unconstitutionality of a provision under a law or statutory order on which the judgment of the cause depends, the exception raised shall be sent to the Constitutional Court, in order to pronounce upon the constitutionality of that provision.
Russian Federa-tion	Article 125 4. The Constitutional Court of the Russian Federation, upon complaints about violations of the constitutional rights and freedoms of citizens and upon requests of the courts, shall verify the conformity with the Constitution of any law which is applied or shall be applied in a concrete case in a way established by federal law.	Federal Constitutional Law on the Constitutional Court Article 3 To protect the foundations of the constitutional system and the basic rights and freedoms of individuals and citizens, and to ensure the supremacy and direct action of the Constitution of the Russian Federation on the entire territory of the Russian Federation, the Constitutional Court of the Russian Federation: 3. shall, at complaints on the violation of constitutional rights and freedoms of citizens and at inquiries of courts, verify the constitutionality of a law that has been applied or ought to be applied in a specific case; Article 96 The right to petition the Constitutional Court with the individual or collective complaint on the violation of the constitutional rights and freedoms shall be vested in the citizens, whose rights and freedoms have been violated by the law that has been applied or ought to be applied in a specific case, and in the associations of citizens, as well as in other bodies and persons, envisaged in the federal law. Enclosed with the complaint, apart from the documents listed in Article 38 of the present Federal Constitutional Law shall be the copy of the official document confirming the application or the possibility of the application of the appealed law in the decision of the specific case. The official or the body that considered the case shall produce the copy of the aforementioned document to the petitioner at his request.

State	Constitution	Laws
San Marino	Declaration of Citizens' Rights and of the fundamental principles of the San Marinese legal order[334] (p.t.) Article 16 The Collegio Garante: a. Verifies, upon direct request of as least twenty Councillors, of the Congress of State, of five communities, of a number of citizens entitled to vote representing a minimum of 1,5% of the electorate as arises from the last and definitive annual revision of the electoral lists, as well as concerning cases pending before Tribunals of the Republic, upon request by the judges or by the parties to the case, the compatibility of laws and normative acts having the force of law with the fundamental principles of the present law or with the ones recalled by the present law.	Qualified Law of 25 April 2003 (p.t.)[335] Article 11 The constitutional review as provided for by article 16 of the Declaration of Rights may be direct or incidental in cases pending before the judicial organs. Article 13 Constitutional review can be requested incidentally in relation to cases pending before the jurisdictional organs of the Republic by the parties or by the [Public Prosecutor in administrative matters]. The request must be lodged in written form, or, if the Judge acts ex officio, through a motivated ordinance.
Serbia	Article 168 A proceeding of assessing the constitutionality may be instituted by state bodies, bodies of territorial autonomy or local self-government, as well as at least 25 deputies. The procedure may also be instituted by the Constitutional Court. Any legal or natural person shall have the right to an initiative to institute a proceedings of assessing the constitutionality and legality. The Constitutional Court may assess the compliance of the Law and other general acts with the Constitution, compliance of general acts with the Law, even when they ceased to be effective, if the proceedings of assessing the constitutionality has been instituted within no more than six months since they ceased to be effective. Article 168 A proceedings of assessing the constitutionality may be instituted by state bodies, bodies of territorial autonomy or local self-government, as well as at least 25 deputies. The procedure may also be instituted by the Constitutional Court. Any legal or natural person shall have the right to an initiative to institute a proceedings of assessing the constitutionality and legality. Article 170 A constitutional appeal may be lodged against individual general acts or actions performed by state bodies or organisations exercising delegated public powers which violate or deny human or	(Draft) Law on the Constitutional Court Article 57 Constitutional complaints may be uttered against individual acts or actions of state authorities or organisations vested with public authority whereby are breached or denied human and minority rights and liberties guaranteed by the Constitution, when other legalm remedies have been exhausted or are not prescribed or where the right to their judicial protection has been excluded by law. Constitutional complaints may also be uttered where all legal remedies have not been exhausted, in cases where the complainant's right to a trial in a reasonable time was breached. Article 58 Constitutional complaints may be uttered by all persons who believe that their human or minority rights and liberties guaranteed by the Constitution have been breached or denied by an individual act or action of a state authority or organisation vested with public authority. Constitutional complaints may on behalf of the persons referred to in § 1 of this Article and on the basis of their written authorisation also be uttered by natural or legal persons authorised by them in writing, as well as state and other authorities in charge of the overseeing and exercise of human and minority rights and liberties.

[334] Il Collegio Garante: a.verifica, su richiesta diretta di almeno venti Consiglieri, del Congresso di Stato, di cinque Giunte di Castello, di un numero di cittadini elettori rappresentanti almeno l'1,5% del corpo elettorale quale risultante dall'ultima e definitiva revisione annuale delle liste elettorali, nonché nell'ambito di giudizi pendenti presso i Tribunali della Repubblica, su richiesta dei giudici o delle parti in causa, la rispondenza delle leggi, degli atti aventi forza di legge a contenuto normativo, nonché delle norme anche consuetudinarie aventi forza di legge, ai principi fondamentali dell'ordinamento di cui alla presente legge o da questa richiamati; http://www.consigliograndeegenerale.sm/new/ricercaleggi/vislegge.php3?action=visTestoLegge1&idlegge=6175&twidth=580&

[335] 1. La verifica di legittimità costituzionale di cui all'articolo 16 della Dichiarazione dei Diritti può avvenire in via diretta ovvero incidentale nell'ambito dei giudizi pendenti avanti agli organi giudiziari.
1. La verifica di legittimità costituzionale può essere richiesta in via incidentale, nell'ambito di giudizi pendenti presso gli organi giurisdizionali della Repubblica, dalle parti o dal Procuratore del Fisco, con apposita istanza scritta, ovvero d'ufficio dal Giudice, mediante ordinanza motivata.
http://www.consigliograndeegenerale.sm/new/index.php3

State	Constitution	Laws
	minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have already been applied or not specified.	
Slovakia	Article 127 Constitution The Constitutional Court shall decide on complaints of natural persons or legal persons if they claim the violation of their fundamental rights or freedoms, or human rights and fundamental freedoms set forth in an international treaty which has been ratified by the Slovak Republic and promulgated in the manner laid down by law, unless another court decides on the protection of these rights and freedoms. Article 130 Constitution 1) The Constitutional Court shall commence the proceedings upon an application submitted by: h) any person whose rights shall be adjudicated as defined in Article 127 and Article 127a.	Law on the Organisation of the Constitutional Court Article 18 1. The Constitutional Court shall commence proceedings upon an application submitted by g) any person whose rights shall be adjudicated as defined in Article 127 and Article 127a.. Article 49 A constitutional complaint may be filed by a natural person or a legal person (hereinafter "the complainant") claiming that their fundamental rights and freedoms have been violated by a final decision, measure or by other encroachment, unless another court decides on the protection of these rights and freedoms.
Slovenia	Article 160 of the Constitution The Constitutional Court decides: […] on constitutional complaints stemming from the violation of human rights and fundamental freedoms by individual acts; […] Article 162 (Proceedings before the Constitutional Court) Proceedings before the Constitutional Court shall be regulated by law. The law determines who may require the initiation of proceedings before the Constitutional Court. Anyone who demonstrates legal interest may request the initiation of proceedings before the Constitutional Court. The Constitutional Court decides by a majority vote of all its judges unless otherwise provided for individual cases by the Constitution or law. The Constitutional Court may decide whether to initiate proceedings following a constitutional complaint with fewer judges as provided by law.	Constitutional Court Act Article 24 (1) Anyone who demonstrates legal interest may lodge a petition that the procedure for the review of the constitutionality or legality of regulations or general acts issued for the exercise of public authority be initiated. (2) Legal interest is deemed to be demonstrated if a regulation or general act issued for the exercise of public authority whose review has been requested by the petitioner directly interferes with his rights, legal interests, or legal position. Article 50 (1) Due to a violation of human rights or fundamental freedoms, a constitutional complaint may, under the conditions determined by this Act, be lodged against individual acts by which state authorities, local community authorities, or bearers of public authority decided the rights, obligations, or legal entitlements of individuals or legal entities.
South Africa	Article 167 (3) The Constitutional Court (a) is the highest court in all constitutional matters; (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter. (6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court- (a) to bring a matter directly to the Constitutional Court; or (b) to appeal directly to the Constitutional Court from any other court. Article 172 (1) When deciding a constitutional matter within its power, a court-	Rules of the Court 18 Direct access 1. An application for direct access as contemplated in section 167 (6) (a) of the Constitution shall be brought on notice of motion, which shall be supported by an affidavit, which shall set forth the facts upon which the applicant relies for relief. 19 Appeals 1. The procedure set out in this rule shall be followed in an application for leave to appeal to the Court where a decision on a constitutional matter, other than an order of constitutional invalidity under Section 172 (2) (a) of the Constitution, has been given by any court including the Supreme Court of Appeal, and irrespective of whether the President has refused leave or special leave to appeal.

State	Constitution	Laws
	(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable, including- (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect. (2) (a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.	
Spain	Article 53 1. The rights and liberties recognised in Chapter Two of the present Title are binding on all public authorities. The exercise of such rights and liberties, which shall be protected in accordance with the provisions of Article 161, 1a), may be regulated only by law which shall, in any case, respect their essential content. 2. Any citizen may assert his claim to the protection of the liberties and rights recognised in Article 14 and in Section 1 of Chapter Two, by means of -a preferential and summary procedure in the Ordinary Courts and, when appropriate, by submitting an individual appeal for protection ("recurso de amparo") to the Constitutional Court. This latter procedure shall be applicable to conscientious objection as recognised in Article 30. 3. The substantive legislation, judicial practice and actions of the public authorities shall be based on the acknowledgment, respect and protection of the principles recognised in Chapter Three. The latter may only be invoked in the Ordinary Courts in the context of the legal provisions by which they are developed. Article 161 The Constitutional Court has jurisdiction over the whole of Spanish territory and is competent to hear: a) appeals against the alleged unconstitutionality of laws and regulations having the force of law. A declaration of unconstitutionality of a legal provision with the force of law, interpreted by jurisprudence, shall also affect the latter, although the sentence or sentences handed down shall not lose their status of *res judicata.* b) individual appeals for protection (*"recursos de amparo"*) against violation of the rights and liberties contained in Article 53,2 of the Constitution, in the circumstances and manner to be laid down by law; Article 162 1. The following are eligible to: b) lodge an individual appeal for protection (*"recurso de amparo"*): any individual or corporate body with a legitimate interest, as well as the Defender of the People and the Office of the Public Prosecutor.	Organic Law on the Constitutional Court Article 35 1. Where a judge or a court, proprio motu or at the request of a party, considers that an enactment having the force of law which is applicable to a case and on which the validity of the ruling depends may be contrary to the Constitution, the judge or court shall raise the question before the Constitutional Court in accordance with the provisions of this Law. Article 41 1. The rights and freedoms recognised in Articles 14 to 29 of the Constitution shall be secured by constitutional protection (amparo constitucional) in the circumstances and form laid down by this Law, without prejudice to the general guardianship thereof entrusted to the courts of law. The same protection shall be accorded to conscientious objection as recognised in Article 30 of the Constitution. 2. The appeal for constitutional protection shall be available to all citizens, in accordance with the provisions of this Law, against violations of the rights and freedoms referred to in the previous paragraph resulting from provisions, legal enactments or common assault by the public authorities of the State, the Autonomous Communities and other territorial, corporate or institutional public bodies, as well as by their officials or agents. 3. For the purposes of constitutional protection, no claims may be asserted other than those designed to restore or preserve the rights or freedoms for which the action has been brought. Article 42 Decisions or enactments without the force of law taken by the Cortès or any of its organs or by the legislative assemblies of the Autonomous Communities or their organs, which violate the rights and freedoms protected by the Constitution, may be the subject of legal action within a period of three months following the time when, in accordance with the rules of procedure of the Houses or the assemblies, they shall be without appeal.

State	Constitution	Laws
	2. In all other cases, the organic law shall determine which persons and agencies are eligible.	Article 43 1. The above-mentioned violations of rights and freedoms resulting from provisions, legal enactments or common assault by the Government, its authorities, or its officials or by the collegiate executive bodies of the Autonomous Communities or their authorities, officials or agents, may provide grounds for an appeal for protection when the relevant judicial remedy has been exhausted, in accordance with Article 53.2 of the Constitution. 3. Such an appeal may be based solely on an infringement, by a non-appealable decision, of the constitutional precepts recognising protected rights and freedoms. Article 44 1. Violations of constitutionally protected rights and freedoms that are the immediate and direct result of an act or omission by a judicial body may give grounds for such an appeal provided that the following conditions are met: […] Article 46 1. The following shall have standing to lodge an appeal for constitutional protection: a. In the case of Articles 42 and 45, the person directly affected, the Defender of the People and the Office of the Public Prosecutor; b. In the case of Articles 43 and 44, the parties to the corresponding judicial proceedings, the Defender of the People and the Office of the Public Prosecutor. 2. Where the appeal is brought by the Defender of the People or the Office of the Public Prosecutor, the Division of the Court with authority to hear the case for constitutional protection shall inform any potentially injured persons of whom it has knowledge and shall order publication of the notice of appeal in the "Official State Gazette" so that other interested parties may come forward. Such publication shall have preferential status. Article 47 1. Persons who benefited by the decision, act or circumstance that led to the appeal or persons with a legitimate interest therein may appear in the proceedings for constitutional protection as a defendant or additional party. 2. The Office of the Public Prosecutor shall intervene in all protection proceedings in defence of legality, citizens' rights and the public interest under the custodianship of the law.
Sweden	Chapter 11 Article 14 Constitution (according to the new wording to be in force since 2011) If a court or other public body finds that a provision conflicts with a rule of fundamental law or other superior statute, or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision may not be applied. In the event of judicial review particular account should be taken of the circumstances that Parliament is the principal representative of the people and that constitutional law takes precedence over ordinary law."	

State	Constitution	Laws
	Chapter 12, Article 10 of the Constitution establishes an analogue provision applicable to other public bodies concerning the same obligation to perform "judicial review" in their decision making in administrative cases.	
Switzer-land	Article 189 Constitutional Jurisdiction 1 The Federal Supreme Court shall have jurisdiction over: a. Complaints about violations of constitutional rights; 2 For the decision of certain disputes, the statute may attribute jurisdiction to other federal authorities.	Federal Judicature Act[336] Article 82 Le Tribunal fédéral connaît des recours: a. contre les décisions rendues dans des causes de droit public; b. contre les actes normatifs cantonaux; c. qui concernent le droit de vote des citoyens ainsi que les élections et votations populaires. Article 86 1. Le recours est recevable contre les décisions: a. du Tribunal administratif fédéral; b. du Tribunal pénal fédéral; c. de l'Autorité indépendante d'examen des plaintes en matière de radio-télévision; d. des autorités cantonales de dernière instance, pour autant que le recours devant le Tribunal administratif fédéral ne soit pas ouvert. 2. Les cantons instituent des tribunaux supérieurs qui statuent comme autorités précédant immédiatement le Tribunal fédéral, sauf dans les cas où une autre loi fédérale prévoit qu'une décision d'une autre autorité judiciaire peut faire l'objet d'un recours devant le Tribunal fédéral. Article 113 Le Tribunal fédéral connaît des recours constitutionnels contre les décisions des autorités cantonales de dernière instance qui ne peuvent faire l'objet d'aucun recours selon les articles 72 à 89. Article 115 A qualité pour former un recours constitutionnel quiconque: a. a pris part à la procédure devant l'autorité précédente ou a été privé de la possibilité de le faire et b. a un intérêt juridique à l'annulation ou à la modification de la décision attaquée. Article 116 Le recours constitutionnel peut être formé pour violation des droits constitutionnels.
"The Former Yu-goslav Repub-lic of Macedo-nia"	Article 110 The Constitutional Court of the Republic of Macedonia: […] - protects the freedoms and rights of the individual and citizen relating to the freedom of conviction, conscience, thought and public expression of thought, political association and activity as well as to the prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political affiliation; […]	Rules of Procedure Article 11 Proceedings for assessing the constitutionality of a law and the constitutionality and legality of a regulation or other common act are initiated by a decision of the Constitutional Court upon the submission of a petition to the Court. Article 12 Anyone can submit a petition for initiating proceedings for assessing the constitutionality of law or the constitutionality and legality of a regulation or other common act. Article 28 The Constitutional Court will refuse the petition: - if it is not competent to decide upon the request;

[336] http://www.admin.ch/ch/d/sr/1/173.110.de.pdf

State	Constitution	Laws
		- if it has already dealt with the same matter, and there are no grounds for reaching a different judgment; and - if there are other procedural obstacles to deciding on the petition. Article 51 Any citizen considering that an individual act or action has infringed his or her right or freedom, as provided in Article 110.3 of the Constitution of the Republic of Macedonia, he or she may lodge an application for protection by the Constitutional Court within 2 months from the date of notification of the final or legally binding individual act, or from the date on which he or she became aware of the activity undertaken creating such an infringement, but not later than 5 years from the date of the activity's being undertaken.
Tunisia	No direct individual access	No direct individual access
Turkey	Article 148 of the Constitution (as amended in 2010) Everybody has the right to make an individual complaint to the Constitutional Court in case of an infringement, by the public power, of one of his/her fundamental rights or freedoms which are also covered by the European Convention on the Protection of Human Rights.	No direct individual access
Ukraine	Article 55 Human and citizens' rights and freedoms are protected by the court. Everyone is guaranteed the right to challenge in court the decisions, actions or omission of bodies of state power, bodies of local self-government, officials and officers. Everyone has the right to appeal for the protection of his or her rights to the Authorised Human Rights Representative of the Verkhovna Rada of Ukraine. After exhausting all domestic legal remedies, everyone has the right to appeal for the protection of his or her rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organisations of which Ukraine is a member or participant. Everyone has the right to protect his or her rights and freedoms from violations and illegal encroachments by any means not prohibited by law. Article 150 The authority of the Constitutional Court of Ukraine comprises: 2) the official interpretation of the Constitution of Ukraine and the laws of Ukraine; interpretation of the statements of the Constitution of Ukraine or the laws of Ukraine;[…]	Law on the Constitutional Court of Ukraine Article 13 The Constitutional Court of Ukraine adopts decisions and provides conclusions in cases concerning: 4. official interpretation of the Constitution and laws of Ukraine. Article 42 The constitutional petition is a written petition to the Constitutional Court of Ukraine on the necessity of an official interpretation of the Constitution of Ukraine and the laws of Ukraine in order to secure implementation or protecting the constitutional rights and freedoms of the individual and citizen as well as the rights of a legal entity. The constitutional petition sets forth: 3. articles (their separate provisions) of the Constitution of Ukraine or the Law of Ukraine, the interpretation of which will be made by the Constitutional Court of Ukraine; 4. rationale of the necessity of an official Article 43 Subjects of the right to a constitutional petition for providing opinion by the Constitutional Court of Ukraine in the cases foreseen by subsection 4 of Article 13 of this Law are the citizens of Ukraine, aliens, stateless persons and legal entities.
United King-dom		Human Rights Act 1998[337] 4 Declaration of incompatibility (1) Subsection (2) applies in any proceedings in which a court determines whether a provision of

[337] http://www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1#pb2-l1g3

State	Constitution	Laws
		primary legislation is compatible with a Convention right. (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility. (3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right. (4) If the court is satisfied— (a) that the provision is incompatible with a Convention right, and (b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility, it may make a declaration of that incompatibility. (6) A declaration under this section ("a declaration of incompatibility")— (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made. 6 Acts of public authorities (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right. 7 Proceedings (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may— (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act. (2) In subsection (1)(a) "appropriate court or tribunal" means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding. (3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act. 8 Judicial remedies (1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.
United States of America	Art. 3, Sec. 2: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, Art. 6: This Constitution...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.	§ 1251 U.S. Code (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. §1254 US Code[338] Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which

[338] http://www4.law.cornell.edu/uscode/28/1254.html

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		instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. U.S. Supreme Court Rules[339] Rule 10. Considerations Governing Review on *Certiorari* Review on a writ of *certiorari* is not a matter of right, but of judicial discretion. A petition for a writ of *certiorari* will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. A petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Rule 18. Appeal from a United States District Court 1. When a direct appeal from a decision of a United States district court is authorised by law, the appeal is commenced by filing a notice of appeal with the clerk of the district court within the time provided by law after entry of the judgment sought to be reviewed. Rule 20. Procedure on a Petition for an Extraordinary Writ 1. Issuance by the Court of an extraordinary writ authorised by 28 U. S. C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. *** Concerning constitutional challenges to federal actions for equitable relief may be implied directly under the U.S. Constitution or brought under **5 U.S.C. §§ 701-706**, which provide in relevant part as follows: "§ 702. Right of review. A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." § 705. Relief pending review When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may

[339] http://www.supremecourtus.gov/ctrules/2007rulesofthecourt.pdf

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		be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings. § 706. Scope of review. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall— (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be— (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;[or] (B) contrary to constitutional right, power, privilege, or immunity; … In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error". Damages actions alleging violations of certain constitutional protections by federal government agents may be brought under the implied cause of action recognized by the Supreme Court in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Constitutional challenges to the actions of *state* officials for equitable relief, or for damages in certain circumstances, may be brought under **42 U.S.C. § 1983**, which provides: "Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia".
Uruguay	Article 258[340] (p.t.)	General Code of Procedure (p.t.)[341]

[340] Artículo 258.- La declaración de inconstitucionalidad de una ley y la inaplicabilidad de las disposiciones afectadas por aquélla, podrán solicitarse por todo aquel que se considere lesionado en su interés directo, personal y legítimo:
1° Por vía de acción, que deberá entablar ante la S uprema Corte de Justicia.
2° Por vía de excepción, que podrá oponer en cualqu ier procedimiento judicial.
El Juez o Tribunal que entendiere en cualquier procedimiento judicial, o el Tribunal de lo Contencioso Administrativo, en su caso, también podrá solicitar de oficio la declaración de inconstitucionalidad de una ley y su inaplicabilidad, antes de dictar resolución.
En este caso y en el previsto por el numeral 2º), se suspenderán los procedimientos, elevándose las actuaciones a la Suprema Corte de Justicia.
http://www.parlamento.gub.uy/Portadas/SitioConcursosCSS/downloads/Constitucion_2004.pdf

[341] Artículo 509. Titulares de la solicitud. La declaración de inconstitucionalidad y la inaplicabilidad de las disposiciones afectadas por aquélla, podrán ser solicitadas. 1° Por todo aquél que se considere lesionado en su interés directo, personal y legítimo. 2° De oficio, por el tribunal que entendi ere en cualquier procedimiento jurisdiccional.La Suprema Corte de Justicia, en los asuntos que se tramiten ante ellas, se pronunciará en la sentencia sobre la cuestión de inconstitucionalidad.
Artículo 510. Cuando la declaración de inconstitucionalidad se solicitare por las personas a que se refiere el numeral 1° del artículo anterior podrá ser promovida: 1° Por vía de acción, cuando no existiere procedimiento jurisdiccional pendiente. En este caso, deberá interponerse directamente ante la Suprema Corte de Justicia. 2° Por vía de excepción o defensa, que deberá oponerse ante el tribunal que estuviere conociendo en dicho procedimiento. http://www.parlamento.gub.uy/leyes/AccesoTextoLey.asp?Ley=15982&Anchor=

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	The declaration of unconstitutionality of a law and of the inapplicability of the acts affected by the law can be requested by every person who considers that his direct, personal and legitimate interest has been violated: 1. By entering an action before the Supreme Court of Justice. 2. Through an exception of unconstitutionality, which can be filed in any ordinary judicial proceeding. The Judge or Tribunal that cognises in any ordinary judicial proceeding, or the Tribunal of Administrative Disputes, within their jurisdiction and before administering justice, may request ex officio the declaration of unconstitutionality and inapplicability of a law. In this case and in the case of number 2, the proceedings are suspended and the proceeding is elevated to the Supreme Court of Justice.	Article 509 The declaration of unconstitutionality and the inapplicability of the provisions affected by the former may be requested 1° By everyone who considers that his personal, legitimate and direct interest has been violated. 2° Ex officio, by the tribunal that decides in any jurisdictional proceeding. The Supreme Court of Justice, in the matters brought before it, shall pronounce itself in its decision on the question of unconstitutionality. Article 510 If the declaration of unconstitutionality is requested by the persons referred to in number 1 of the previous article, it can be put 1. Through an action, if there is no pending proceeding. In this case, it shall be lodged directly with the Supreme Court of Justice. 2. As an exception which shall be lodged before the tribunal that decides on the matter.

ИССЛЕДОВАНИЕ

О ПРЯМОМ ДОСТУПЕ К КОНСТИТУЦИОННОМУ ПРАВОСУДИЮ

Принято на 85-ом пленарном заседании
Венецианской комиссии
(Венеция, 17-18 декабря 2010 года)

На основании комментариев
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[1] Перевод на русский язык выполнен Помощником Председателя Конституционного Суда Республики Армения Анаит Манасян.

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Пояснительная записка

1. Только несколько государств из числа государств-членов Венецианской комиссии и государств, имеющих статус наблюдателей при Венецианской комиссии, не предусматривают один из видов индивидуального доступа для оспаривания конституционности нормы или индивидуального акта. Такими государствами являются Алжир, Тунис, Марокко и Нидерланды (Франция больше не относится к данной группе после последней конституционной реформы). Различают прямой индивидуальный доступ, когда лицо может непосредственно оспаривать конституционность нормы или акта, и косвенный индивидуальный доступ, когда конституционность оспаривается только посредством государственных органов. Многие государства имеют смешанную систему, включающую как прямой, так и косвенный доступ к конституционному правосудию.

2. Что касается косвенного индивидуального доступа, конституционность нормы могут оспаривать определенные органы. Наиболее распространенными среди них являются обычные суды, действующие посредством представления предварительных запросов, а также члены Парламента, когда они действуют на основании индивидуальной петиции. Во многих государствах, рассматриваемых в данном исследовании, в Конституционный Суд или аналогичный орган могут обращаться омбудсмены. Венецианская комиссия считает омбудсменов (если предусмотрен данный институт) важным элементом демократического общества, защищающим права человека. Следовательно, омбудсмену (если предусмотрен данный институт) необходимо предоставить возможность инициировать конституционный контроль нормативных актов в интересах или по инициативе человека.

3. Индивидуальный доступ к конституционному правосудию является важным средством обеспечения соблюдения индивидуальных прав человека на конституционном уровне. Относительно этого существует множество моделей и возможностей. Преимуществом косвенного индивидуального доступа является то, что органы, представляющие жалобы, хорошо осведомлены и имеют соответствующие юридические знания для формулирования обоснованного заявления. Они могут также служить фильтром для предотвращения перегрузки конституционных судов путем осуществления отбора заявлений, так как в данном случае не будут рассматриваться злоупотребляющие или повторяющиеся жалобы. Тем не менее косвенный доступ имеет определенные недостатки, так как его эффективность в большей степени зависит от полномочий данных органов по установлению потенциально неконституционных нормативных актов и их желания обращаться с предварительным запросом в Конституционный Суд и аналогичные органы. Следовательно, Венецианская комиссия считает преимущественным сопоставление косвенного доступа с прямым доступом, так как это будет способствовать балансированию существующих различных механизмов.

4. Что касается прямого индивидуального доступа, следует отметить, что в рассматриваемых государствах существуют различные модели: *actio popularis*, когда каждый может представить жалобу относительно нормы после ее обнародования, даже не имея личный интерес; индивидуальное предложение, когда заявитель может только обратиться в Конституционный Суд с предложением о рассмотрении конституционности нормы, оставляя вопрос о рассмотрении данного вопроса на усмотрение суда; quasi *actio popularis*, когда не обязательно, чтобы заявителю непосредственно был нанесен вред, но он может оспорить норму в связи с конкретным делом; прямая индивидуальная жалоба, которая имеет различные модели. Из данных механизмов *actio popularis* создает очевидные условия для перегрузки Конституционного Суда.

5. Европейский суд по правам человека в зависимости от определенных условий и последствий может считать индивидуальную жалобу в Конституционный Суд или аналогичный орган, предусмотренную в некоторых государствах-членах Совета Европы, эффективным средством правовой защиты от нарушений Европейской конвенции по правам человека, которая, следовательно, может быть фильтром до представления дел в Страсбургский суд. Статистика Суда показывает, что в государствах, в которых предусмотрен упомянутый механизм полной прямой конституционной жалобы, число жалоб в Суд (пропорционально числу населения) меньше, чем в государствах, в которых не предусмотрен данный механизм. Следовательно, такие механизмы содействуют предотвращению перегрузки Европейского суда по правам человека.

6. Относительно видов норм, которые могут рассматриваться в порядке конституционного контроля, Венецианская комиссия считает, что Конституционный Суд должен рассматривать конституционность только нормативных актов, а контроль нижестоящих актов, как правило, должны осуществлять обычные суды, что способствует предотвращению перегрузки Конституционного Суда.

7. Конституционное судопроизводство, как правило, включает некоторые формальные требования и фильтры с целью облегчения нагрузки суда, а также во избежание злоупотреблений средствами правовой защиты, предусмотренными до обращения в суд. 1. Для начала судопроизводства обычно предусматриваются сроки для подачи заявлений. Однако вышеуказанные сроки должны быть разумными, чтобы лицо имело возможность подготовить жалобу или найти юриста. Конституционный Суд должен также иметь возможность продлить сроки только в исключительных случаях. 2. В случае необходимости должна предоставляться бесплатная юридическая помощь. 3. Относительно судебных расходов следует отметить, что Венецианская комиссия рекомендует, чтобы они не были чрезмерно высокими и их целью должно быть недопущение злоупотребляющих заявлений, а при их установлении должно быть принято во внимание финансовое положение заявителя. 4. Решения Конституционного Суда являются окончательными, и должна быть возможность возобновления производства по делу только при исключительных обстоятельствах (таких как наличие осуждающего решения Европей-

ского суда по правам человека). 5. В государствах с централизованным конституционным контролем исчерпание средств правовой защиты является необходимым условием для предупреждения перегрузки Конституционного Суда. 6. Доступное средство правовой защиты должно обеспечивать восстановление нарушенных прав заявителя (например, упрощенное судопроизводство в случаях чрезмерной длительности судопроизводства).

8. В число процессуальных принципов, применяемых в ходе конституционного контроля, входит принцип, согласно которому Конституционный Суд должен принимать решения в течение соответствующего срока, соблюдая право доступа к конституционному правосудию. В состязательной системе судопроизводства сторонам обычного судопроизводства должна предоставляться возможность представлять свою точку зрения на конституционном уровне.

9. Что касается временных мер, то Венецианская комиссия высказывается в пользу наличия полномочия по приостановлению действия оспариваемого индивидуального и/или нормативного акта при установлении его неконституционности, если действие соответствующего акта в дальнейшем может нанести вред или стать причиной нарушений, которые не могут быть возмещены или восстановлены. Особенно относительно нормативных актов необходимо принять во внимание также и то, какой вред может нанести или причиной каких нарушений, которые не могут быть возмещены или восстановлены, может стать неприменение акта. Следует также отметить, что обычный судья, как правило, должен быть обязан приостановить производство по делу, когда он обращается в Конституционный Суд с запросом о проверке конституционности закона, подлежащего применению в данном деле. В случае необратимого вреда правам человека приостановление производства по делу является обязательным.

10. Конституционный Суд должен иметь возможность продолжить рассмотрение обращения даже в случае его отзыва для защиты общественных интересов. Нет единого мнения относительно возможности Конституционного Суда продолжить рассмотрение дела в случаях, когда оспариваемый акт утратил силу. Одно прекращение производства по делу может быть недостаточным для обеспечения защиты прав человека в случаях конкретного контроля или индивидуальных жалоб. Тем не менее спорным является вопрос о том, должен ли Конституционный Суд иметь возможность назначить денежную компенсацию или инициировать дело о ее присуждении за нарушение права с целью компенсирования за упомянутое нарушение.

11. Для обеспечения соответствующего баланса между интересами индивидуального доступа к конституционному правосудию и риском перегрузки Конституционного Суда Венецианская комиссия рекомендует, чтобы судьям помогали квалифицированные помощники; их число должно определяться в соответствии с нагрузкой суда. Перегрузку Конституционного Суда можно также предотвратить путем правильного распределения дел между палатами. Однако должны существо-

вать механизмы для обеспечения последовательности судебной практики Конституционного Суда.

12. Есть разные модели действия решений конституционных судов. Решение может распространяться только на стороны или на всех лиц, в зависимости от действия решения *inter partes* или *erga omnes* (действие *ratione personae*), или оно может иметь разное действие во времени (действие *ratione temporis*).

13. Что касается действия *ratione personae*, решение может иметь действие *inter partes* или *erga omnes*; результатом последнего является утрата актом юридической силы или признание его неприменимым к дальнейшим делам. В большинстве рассматриваемых государств в случае оспаривания конституционности нормы Конституционный Суд может лишить ее юридической силы или, по крайней мере, принять решение относительно ее неконституционности, а решение о принятии нового закона принимает законодатель. Тем не менее в некоторых государствах полномочия Конституционного Суда более ограничены, и решение распространяется только на стороны. В государствах общего права, применяющих децентрализованный контроль, институт *stare decisis* имеет важное значение и выходит за рамки конкретного дела, так как прецеденты, принятые Верховным Судом (или аналогичным органом), являются обязательными для нижестоящих судов, за исключением случаев, когда они “отклоняются” от прецедента или преодолевают его с соответствующим обоснованием.

14. Действие решений о неконституционности нормативного акта во времени может быть различным. Оно может быть *ex nunc*, когда утрата актом юридической силы распространяется на отношения, возникшие с момента принятия решения, или *ex tunc*, когда акт признается недействительным с момента его принятия, что имеет значительные последствия для конкретных дел. Только несколько государств внедрили модель действия *ex tunc* решений Конституционного Суда, и большинство из них имеет ограниченное действие для обеспечения действительности окончательных решений судов.

Введение

15. Постоянный представитель Германии при Совете Европы г-н Эберхард Келш в письме от 21 апреля 2009 года от имени немецкого правительства предложил подготовить исследование относительно индивидуального доступа к конституционному правосудию. Он отметил, что "такое исследование может стать ценным вкладом в развитие внутригосударственных средств правовой защиты от нарушений прав человека и, следовательно, может оказать существенное содействие в гарантировании длительной эффективности Европейского суда по правам человека". Комиссия предложила г-ну Арутюняну, г-же Нуссбергер и г-ну Пацолаю выступить в качестве докладчиков по данному делу. Данное Исследование было подготовлено при их содействии и содействии официальных представителей при конституционных судах и аналогичных органах государств-членов Венецианской комиссии и государств, имеющих статус наблюдателей при Венецианской комиссии, а также при содействии членов, которым было предложено проверить достоверность информации относительно их правовых систем.

16. Первый проект данного Исследования (CDL (2010) 004) был обсужден на 9-ом заседании Совместного совета по конституционному правосудию Венецианской комиссии (Венеция, 1-2 июня 2010 года). Комиссия попросила официальных представителей представить комментарии относительно данного текста и ответить на поставленные вопросы до конца сентября 2010 года. Венецианская комиссия выражает благодарность официальным представителям за содействие.

17. *Данное Исследование принято Комиссией на ее* 85-ом пленарном заседании (Венеция, 17-18 декабря 2010 года).

Основные комментарии

18. В Европе и за ее пределами значение конституционной защиты прав человека за последние 60 лет существенно изменилось. В настоящее время соблюдение прав человека является основой любого демократического общества[2]. Следовательно, механизмы, дающие человеку возможность прямо или косвенно защищать предоставленные ему права, приобретают все более и более важное значение.

19. Данный проект исследования обеспечивает обзор таких механизмов, существующих в государствах-членах Венецианской комиссии и в государствах, имеющих статус наблюдателей при Венецианской комиссии. Целью этого является способствование лучшему представлению о найденных разнообразных решениях, а также анализ преимуществ различных систем[3].

[2] CDL-STD(1995)015, The protection of fundamental rights by constitutional courts, Science and Technique of Democracy, no. 15.

[3] Данное Исследование не относится к вопросам иерархии между законодательством Европейского союза и внутригосударственным правом государств-членов, даже в условиях, когда особенности некоторых элементов контроля, осуществляемого Судом правосудия Европейского союза, аналогичны особенностям контроля, осуществляемого конституционными судами.

20. В основе проекта исследования лежат конституции и законодательные тексты из базы данных CODICES Венецианской комиссии[4]. Венецианская комиссия выражает благодарность официальным представителям и всем членам за их содействие в разработке Бюллетеня конституционного прецедентного права, базы данных и данного Исследования.

21. В Исследовании использованы следующие понятия[5]:

(i) "Конституционная юрисдикция" означает судебные органы и процессы, соответственно учрежденные и осуществляемые с целью обеспечения соблюдения конституционного строя государства[6].

(ii) Под "конституционным контролем" следует понимать компетенцию суда по рассмотрению соответствия законодательного или нижестоящего акта Конституции[7] и по признанию акта недействительным[8] или неприменимым в случае несоответствия.

(iii) "Индивидуальный доступ к конституционному правосудию" означает различные механизмы, позволяющие обращаться в Конституционный Суд или в аналогичные органы с индивидуальной или коллективной жалобой в случаях нарушений конституционно охраняемых прав. Различают два вида индивидуального доступа: косвенный и прямой. Косвенный доступ означает, что индивидуальная жалоба представляется в Конституционный Суд посредством другого органа. Прямой доступ охватывает все юридические средства, предоставленные лицу для непосредственной подачи жалобы в Конституционный Суд без посредничества иных органов.

(iv) Понятие "Конституционный Суд" относится к конституционным судам, трибуналам, советам, и, если не предусмотрено иное, к другим верховным судам, выполняющим функции конституционных судов[9].

22. По мнению многих авторов, наличие писаной Конституции является первой

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[4] CODICES можно заказать на CD-ROM или найти на сайте www.codices.coe.int. Однако некоторые тексты не опубликованы в CODICES. В случае Сан-Марино использована пересмотренная версия Декларации прав граждан. Акты Чили, Перу, Аргентины, Сан-Марино, Уругвая были переведены Секретариатом. Законы Люксембурга и Монако были использованы в их оригинальных французских версиях. Ссылки на все использованные законодательные тексты, которые не из базы данных CODICES, можно найти в библиографии.

[5] Эти понятия служат только руководством для определения содержания данного Исследования и не имеют целью дать судебный ответ на некоторые сложные терминологические вопросы.

[6] CDL-STD(1993)002, H. Steinberger, *Models of constitutional jurisdiction, Science and Technique of Democracy*, no. 2.

[7] CDL-INF(2001)009 Decisions of constitutional courts and equivalent bodies and their execution. Следует отметить, что право сообществ как критерий контроля не было принято во внимание в данном Исследовании, так как оно относится только к половине рассматриваемых государств.

[8] A. Cavari, *"Between Law and Politics: Constitutional Review of Legislation" Paper presented at the annual meeting of The Law and Society Association, Renaissance Hotel, Chicago, Illinois,* May 27, 2004, в:http://www.allacademic.com/one/www/www/index.php?cmd=www_search&offset=0&limit=5&multi_search_search_mode=publication&multi_search_publication_fulltext_mod=fulltext&textfield_submit=true&search_module=multi_search&search=Search&search_field=title_idx&fulltext_search=Between+Law+and+Politics%3A++Constitutional+Review+of+Legislation, проверено 4 мая 2009.

[9] CDL-INF(2001)009 Decisions of constitutional courts and equivalent bodies and their execution.

предпосылкой конституционного контроля[10]. В рамках рассмотрения индивидуального доступа к конституционному правосудию это означает, что если никакой писаный текст не имеет особый статус (верховенство), никакой орган (будь то Парламент или суды) не имеет необходимости, а также возможности проводить различие между законодательными и конституционными вопросами и таким образом осуществлять контроль первого, используя последний как критерий контроля, в результате чего часто имеет место отмена обычного закона. Тем не менее некоторые страны в дополнение к писаной Конституции имеют неписаное или обычное конституционное право[11] или принципы[12], которые могут служить критериями контроля в дополнение к международным договорам и международному обычному праву. Из государств-членов Венецианской комиссии и государств, имеющих статус наблюдателей при Венецианской комиссии, только Великобритания не имеет формальную Конституцию, занимающую особое место в иерархической системе[13]. Результатом этого является то, что не может рассматриваться соответствие обычных законов писаной Конституции. Но это не означает, что в Великобритании нет конституционного контроля. Он осуществляется двумя путями: 1) относительно права Европейского союза, так как суды Соединенного Королевства должны рассматривать соответствие законодательства Соединенного Королевства праву Европейского союза и в случае несоответствия не применять законы Соединенного Королевства; 2) Закон “О правах человека” 1998 года внедрил полномочие по контролю, в соответствии с которым высшие суды могут рассматривать соответствие законодательства Соединенного Королевства[14] правам человека, защищаемым Европейской конвенцией 1950 года[15]. В последнем случае

[10] См., например, J.-F. Flauss, “Human Rights Act 1998: Kaléidoscope”, в: Revue française de droit constitutionnel No 48 2001/4, P.U.F., Paris, стр. 695 f., или P. Pernthaler, *Allgemeine Staatslehre und Verfassungslehre,* 2nd rev. ed., Springer Verlag, Vienna, 1996, стр. 174.

[11] Korea: Constitutional Court, “Relocation of the Capital Case”, no. 2004, Hun-Ma554•566 of 21.10.2004, CODICES: KOR-2004-3-003.

[12] Австрия: основные принципы, изменение которых влечет за собой полный пересмотр Конституции (статья 44.3 Конституции) и которые используются Конституционным Судом как критерий материального контроля за конституционными поправками, см. решение от 11.10.2001, VfSlg. G12/00, CODICES: AUT-2001-3-005. Статья 10.2 Конституции Испании и ее значение с точки зрения выдачи приказа ампаро в случаях нарушения основных прав.

[13] Д. Маус считает, что не вполне правильно характеризовать Великобританию как государство, не имеющее писаную Конституцию. На самом деле данное государство имеет некоторые писаные конституционные нормы. Обстоятельство, что в Великобритании нету Конституционного Суда, тоже в некоторой степени изменилось с учреждением Верховного Суда и принятием Акта “О конституционной реформе” в 2005 году, D. MAUS, “Le recours aux précedants étrangers et le dialogue des cours constitutionnelles”, 24 janvier 2009, *World conference on Constitutional Justice*, Cape Town, доступно на сайте http://www.venice.coe.int/WCCJ/Papers/AND_Maus_F.pdf , стр. 6, проверено в августе 2010 года.

[14] Контроль законодательства на основании Закона “О правах человека” распространяется на законодательные органы Шотландии, Уэльса и Северной Ирландии. В случае данных законодательных органов законодательство, не соответствующее конвенционному праву, может быть признано ultra vires, вне компетенции соответствующего законодательного органа.

[15] Тем не менее Закон “О правах человека” от 1998 года в некотором смысле имеет высшую юридическую силу, так как суды определяют соответствие оспариваемых положений Европейской конвенции по правам человека и признают их несоответствующими последней (см. Статью 4 Закона “О правах человека” от 1998 года в:
http://www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1#pb2-l1g3, проверено 11 февраля 2009). Судебная защита основных прав приобретает важное значение в Великобритании, и признание несоответствия судом может иметь убеждающую силу для Парламента, формальному суверенитету которого не бросается вызов посредством этой системы. Кроме того, контроль за законностью (контроль за соответствием индивидуальных и общих административных актов с актами Парламента, в том числе с основными правами) приобретает все более и более важное значение с 1940-ых годов, и в системе общего права есть множество принципов, некоторые из которых могут быть рассмотрены как часть “неписаного конституционного права”.

ограниченная, вторичная форма конституционного контроля, предусмотренная Законом 1998 года, предоставляет судам возможность признавать обычные законы Соединенного Королевства несоответствующими защищаемым правам человека; несмотря на это, они остаются в силе, и Парламент Соединенного Королевства принимает решение о том, внести поправки или отменить соответствующий закон[16]. В Соединенном Королевстве также существует развитая система административного права, которая относится ко всем видам решений исполнительных органов, включая вторичное законодательство, и данная система в настоящее время включает в себя осуществление обязанности по защите конвенционных прав.

23. Правовые системы всех других государств-членов Венецианской комиссии и государств, имеющих статус наблюдателей при Венецианской комиссии[17], основаны на писаной Конституции или, как в случае Израиля, на Основных законах или иных документах, имеющих полуконституционный статус[18], которые считаются “высшим законом государства”, вершиной в иерархии норм. Это верховенство формально проявляется также в предусмотренных для их принятия особых правилах, таких, как установленная более высокая квота, и/или материально в том, что конституционные нормы должны содержать положения, имеющие особое значение для функционирования государства и защиты человека. Такой писаный документ должен охраняться, в противном случае он утратит верховенство: недостаточно просто предусмотреть, что все внутригосударственные нормативные акты, в первую очередь законы, должны соответствовать Конституции. Неспособность или нежелание законодательной или исполнительной власти выполнять это обязательство должно повлечь ответственность, а точнее, должен быть контроль над их актами, которые должны утрачивать юридическую силу в случае неконституционности. Следует отметить, что разные факторы влияют на значительные различия уровня защиты и методов, используемых для охраны верховенства Конституции, в государствах, рассматриваемых в данном исследовании. Некоторые из них отражают историческое развитие государства и конституционного строя

[16] D. Fontana, “Secondary Constitutional Review: American Lessons from the New British System of Constitutional Review”, in: http://www.allacademic.com/meta/p178285_index.html ; A. Kavanagh, Constitutional Review Under The UK Human Rights Act, Cambridge University Press, Cambridge, 2009.

[17] После поправок к Декларации прав граждан и основных принципов государственного устройства Сан-Марино от 2002 года можно считать, что Сан-Марино тоже имеет писаную Конституцию. Прежде, Декларацию вместе со Статутом от 1600 года едва можно было назвать Конституцией, но именно они послужили началом для определенного контроля за соответствием нормативных актов с принципами: обычные суды должны были направлять вопросы соответствия Большому Генеральному совету (статья 16 Декларации прав граждан и основных принципов государственного устройства Сан-Марино от 2002 года). Поправки 2002 года, кажется, более четко установили высшую юридическую силу Декларации, так как для ее пересмотра не только требуется специальная квота, но и учреждается “Collegio Garante” для рассмотрения "конституционности" (использование данного термина иной раз указывает на качество данного юридического документа) норм. “Collegio Garante” рассматривает конституционность законов и других актов, имеющих силу закона, по обращению определенных государственных органов, а также по обращению обычных судов или участников процесса. См. http://www.consigliograndeegenerale.sm/new/ricercaleggi/vislegge.php3?action=visTestoLegge1&idlegge=6175&twidth=580&=, проверено 20 февраля 2009). Судьи Collegio также могут выносить окончательные решения по гражданским, административным и уголовным делам как единоличные судьи (см. http://www.consigliograndeegenerale.sm/new/index.php3, Статья 26).

[18] См. http://www.knesset.gov.il/laws/special/eng/basic8_eng.htm.

иногда с длительным периодом авторитарного или тоталитарного режима, период принятия новой Конституции или юридические традиции государства, относящегося к системе континентального или общего права.

24. Конституционный контроль исключительно или, по крайней мере, главным образом сосредотачивается на вопросах относительно прав человека постольку, поскольку касается индивидуального доступа к конституционному правосудию. Следовательно, как предусматривает французская Конституция 1791 года, для обеспечения индивидуального доступа конституционные тексты должны обязательно содержать определенные права человека или как часть текста, или в виде приложения.

25. Для разъяснения общей системы сравнительного анализа рассмотрены некоторые вопросы относительно исторических предпосылок и развития конституционного контроля, а также относительно видов конституционного контроля (децентрализованный контроль против централизованного контроля, превентивный контроль против последующего контроля, абстрактный контроль против конкретного контроля) и полномочий конституционных судов.

26. Несмотря на то, что данное Исследование охватывает все государства-члены Венецианской комиссии и государства, имеющие статус наблюдателей при Венецианской комиссии, оно концентрируется на специализированных системах конституционного контроля, и отдельные рекомендации относятся только к данным системам.

1. Исторические предпосылки

27. Многие авторы пытаются создать идеальные виды конституционного правосудия, классифицируя правовые системы согласно наличию Конституционного Суда, его компетенциям, виду и времени осуществления контроля правовых актов. Обычно “американская модель” противопоставляется "европейской" или "австрийской" модели, которая в свою очередь отличается от "французской" модели превентивного контроля. Однако в данном Исследовании мы не будем делать акцент на такие идеальные модели, принимая во внимание то, что современные конституции часто сопоставляют элементы различных моделей, а сравним элементы внутригосударственных решений относительно индивидуального доступа.

28. В начале 18-ого века идея конституционного контроля связывалась с деятельностью Тайного Совета Великобритании, который лишал акты законодательных органов колоний юридической силы в случае противоречия законам, принятым британским Парламентом для этих колоний, или общему праву. Первым государством, внедрившим конституционный контроль (и употребившим понятие “конституционный суд”), были Соединенные Штаты благодаря знаменитому решению от 1803 года по делу Марбери против Мэдисона, который открыл доступ для граждан к конституционному контролю. В постколониальных Соединенных Штатах были своевременными понятие естественного права (и, таким образом, правовой иерархии) и идея

общественного договора, когда гражданин может требовать выполнения правительством своих обязательств. Что касается более институциональных вопросов, следует отметить, что угроза предстоящих институциональных конфликтов и отклонений в системе вертикального разделения властей сделала очевидным необходимость создания соответствующей структуры во избежание таких конфликтов. Отнесение американской правовой системы к правовой семье общего права, а также наследие британского колониального прошлого, объясняют внедрение децентрализованной системы контроля (см. ниже) даже в условиях расширения американским Верховным Судом своих полномочий посредством правовой практики, в результате чего в настоящее время он занимает важное место в системе сдержек и противовесов.

29. Что касается Европы, следует отметить немецкую Конституцию 1849 года ("Paulskirchenverfassung"), впервые недвусмысленно предусмотревшую индивидуальную конституционную жалобу в § 126 lit. g[19], которая, однако, не вступила в силу. Во Франции, Бельгии и Швейцарии обсуждались аналогичные модели, которые также не были применены. В Австрии в 1867 году статья 3 lit. b *Staatsgrundgesetz* über die Einrichtung eines Reichgerichtes признала Reichsgericht (имперский суд) компетентным рассматривать жалобы граждан на нарушения их конституционно охраняемых прав. В 1866 году Верховный Суд Норвегии признал себя компетентным рассматривать конституционность законов[20], а наследие дела Марбери против Мэдисона было внедрено Кассационным Судом Румынии в 1912 году[21].

30. В 20-ом веке кельзенская модель централизованного контроля наделила отдельный суд полномочием отменять неконституционные акты только по обращению уполномоченных конституционных органов.

31. Конституционные установки, особенно практика конституционных судов после второй мировой войны, отражают смену парадигмы в сторону осуществления защиты индивидуальных прав человека одним из конституционных органов власти (судами или отдельным Конституционным Судом).

32. Почти во всех странах европейской правовой системы компетенция по конституционному контролю предоставлена специальному суду, который или является высшей судебной инстанцией, или не является органом обычной судебной системы. Очевидно, что это бросает вызов власти Парламента и может привести к "правлению судей": Конституционный Суд может лишать акты Парламента юридической

[19] "Zur Zuständigkeit des REichsgerichts gehören … Klagen deutscher Staatsbürger wegen Verletzung der durch умирают Reichsverfassung ihnen gewährten Rechte."

[20] D. MAUS, указанная работа, стр. 2. См. также E. HOLMØYVIK, "Why did the Norwegian Constitution of 1814 Become a Part of Positive Law in the Nineteenth Century ?", blogit.helsinki.fi/reuna/Holmoyvik-paper-Tartu.doc ; K. M. BRUZELIUS, "Judicial Review within a Unified Country", http://www.venice.coe.int/WCCJ/Papers/NOR_Bruzelius_E.pdf, проверено в сентябре 2010 года.

[21] См. G. CONAC, « Une antériorité roumaine: le contrôle juridictionnel de la constitutionnalité des lois», *Mélanges Slobodan Milacic, Démocratie et liberté : tension, dialogue, confrontation*, Bruylant, Belgique, 2007.w.consigliograndeegenerale.sm/new/ricercaleggi/vislegge.php3?action=visTestoLegge1&idlegge=6175&twidth=580&=, проверено 20 февраля 2009). Судьи Collegio также могут выносить окончательные решения по гражданским, административным и уголовным делам как единоличные судьи (см. http://www.consigliograndeegenerale.sm/new/index.php3, Статья 26).

силы, не будучи непосредственно избранным и ответственным перед избирателями. Тем не менее в некоторых неевропейских государствах встречаются исключения из этого общего принципа: в соответствии со статьей 79 Конституции Японии назначение судей Верховного Суда подлежит пересмотру народом при проведении первых после данного назначения всеобщих выборов в Палату представителей. Если в вышеупомянутых случаях большинство избирателей высказывается за смещение какого-либо судьи, этот судья смещается. Великобритания, Нидерланды и Франция традиционно были не склонны к внедрению конституционного контроля[22]. В Великобритании действует принцип верховенства Парламента. Согласно последнему, Парламент является высшей законодательной властью, которая может создавать и прекращать действие любого закона. Как правило, суды не могут отменять принятые последним акты, а также действующий Парламент не может принять закон, который будущий Парламент не может изменить[23]. В Нидерландах, которые относятся к странам континентальной правовой системы, конституционный контроль актов Парламента судебными органами запрещен (статья 120 Конституции). Тем не менее статья 120 в настоящее время находится на рассмотрении. Кроме этого, следует отметить, что в ходе судопроизводства можно непосредственно ссылаться на положения прямого действия международных договоров и решений международных организаций, в каком случае суды обязаны осуществлять контроль внутригосударственного законодательства, в том числе актов Парламента, относительно их соответствия данным положениям международного права и не применять в конкретном деле акт или иное положение внутригосударственного законодательства, которое противоречит международному праву. Тем не менее, так как многие такие положения международного права имеют аналоги в нидерландском конституционном праве, в этом смысле Нидерланды можно считать государством, имеющим систему конституционного контроля в материальном смысле. Аналогично вышесказанному Франция внедрила также *последующий* контроль конституционности законов и таким образом изменила свое традиционное отношение к твердому принципу разделения властей[24].

33. В случае большинства латиноамериканских государств заметно сильное влияние американской модели конституционного контроля с сильным Верховным Судом (например, в Бразилии, Мексике). Некоторые выбрали специализированный Конституционный Суд (например, Перу, Чили). Большинство государств Магриба последовало французской модели, существующей до реформы 2008 года.

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[22] Тем не менее во Франции до проведения реформы, внедрившей институт рассмотрения дел по предварительным запросам судов в 2008 году, обычные судьи, даже при том, что не были уполномочены осуществлять “конституционный контроль”, могли осуществлять “конвенционный контроль”, т.е. они рассматривали соответствие национального законодательства международным договорам, например Европейской конвенции по правам человека, обеспечивая защиту прав человека.

[23] http://www.parliament.uk/about/how/sovereignty/. Тем не менее Закон “О правах человека” от 1998 года предсуматривает, что суды рассматривают соответствие законодательных актов правам, установленным в ЕКПЧ, и могут признать их несоответствующими, чему может последовать процесс по внесению изменений в законодательство. Тем не менее Парламент решает, какие изменения внести в законодательство. См. ниже, а также Закон “О правах человека” от 1998 года, Статья 4.

[24] См. Французский конституционный закон от 23 июля 2008 года.

2. Децентрализованный контроль против централизованного контроля

34. Первой моделью конституционного контроля является американская. Она характеризуется децентрализованным, инцидентным порядком рассмотрения дел и обеспечивает прямой доступ к конституционному правосудию для граждан, так как они могут поднимать вопросы относительно неконституционности в судах. Обычные суды могут рассматривать конституционность правовой нормы или индивидуального акта. Судьи таких судов могут не применять норму или акт, который считают неконституционным. Преимущество этой модели в том, что заявитель не должен, как в случае другой модели, дожидаться окончания длительного процесса в Конституционном Суде. Однако это преимущество должно противопоставляться возможности рассмотрения одних и тех же конституционных вопросов и вопросов относительно законов разными обычными судами одновременно и неудобству, которое может иметь место в данном случае. Это может привести к принятию противоречивых решений: к противоречиям и неопределенности в законе, так как разные суды могут давать разные толкования относительно конституционности одной и той же нормы. В результате это приведет к длительным, дорогостоящим апелляционным процессам, если решения будут обжалованы в Верховном Суде. Если не будут представлены такие жалобы, останется неопределенность в законе, так как будет отсутствовать конкретное решение, дающее недвусмысленное толкование Конституции[25]. Тем не менее децентрализованный контроль остается вполне действенным видом конституционного правосудия[26].

35. Несмотря на то, что Г. Кельзен даже отвергал идею внедрения защиты прав человека в судебном порядке как таковую[27], он разработал альтернативу децентрализованному контролю. В австрийской Конституции 1920 года он разработал модель централизованного контроля[28]. Эта модель имела исключительный успех в странах, находящихся в периоде перехода к демократии[29]. Например, после второй мировой войны она была внедрена в Германии и Италии, в конце 1970-ых - в Испании[30] и Португалии и фактически во всех государствах Центральной и Вос-

[25] M. Kau, Bundesverfassungsgericht und US Supreme Court: Die Bedeutung des United States Supreme Court für die *Errichtung und Fortentwicklung des Bundesverfassungsgerichts*, Springer, Berlin/Heidelberg, 2007, стр.304 f. Монако и Норвегия вскоре последовали примеру дела Марбери против Мэдисона.

[26] CDL(1998)059, Opinion on the reform of Constitutional Justice in Estonia.

[27] Kelsen, Hans, *La garantie juridictionnelle de la Constitution, Revue de.Droit.Public,* 1928, vol. 44, стр. 197-257. Статья 144 первой версии Австрийской Федеральной Конституции Act (B-VG), BGBl. 1/1920 уже предусматривала индивидуальный доступ в Конституционный Суд Австрии по административным делам. Такое полномочие уже имел предшественник КС, *Reichsgericht*. Тем не менее, прямой индивидуальный доступ для оспаривания законов и иных нормативных актов в Конституционном Суде был внедрен в 1975 году поправками к статьям 140 и 139 BVG (статья 1.8 BVG BGBl. 302/1975).

[28] Первый Конституционный Суд, однако, был создан не в Австрии, а в Чехословакии в феврале 1920 года (Constitutional Act no. 21/1920 Coll.). Австрийский Суд был создан несколько месяцев спустя, в октябре 1920 года.

[29] По утверждению Л. Гарлицкого, “после периода авторитарного режима существовшие суды не имели достаточных гарантий структурной независимости и свободы в формировании своих позиций” (См. L. Garlicki, “Constitutional courts versus supreme courts”, *International Journal of Constitutional Law* 2007 5(1), Oxford University Press, Oxford, в: http://icon.oxfordjournals.org/cgi/content/full/5/1/44#FN59#FN59, проверено 11 февраля 2009).

[30] Несмотря на то, что в Испании существовал суд до 1978 года, учрежденный в 1931 году.

точной Европы, что стало особенно очевидным после распада Советского Союза. В централизованной модели специальный суд, как правило, не находящийся в системе обычных судов, уполномочивается рассматривать конституционность нормативных актов. В случае данной модели конституционный контроль осуществляется Конституционным Судом или Верховным Судом, который, в дополнение к своей обычной апелляционной юрисдикции, компетентен осуществлять конституционный контроль. Данный контроль осуществляется в форме как косвенного, так и прямого доступа. Первый имеет место в обычном судопроизводстве. Судья (обычный судья), рассматривающий упомянутые дела, приостанавливает[31] производство по делу в случае возникновения вопроса относительно неконституционности и обращается с предварительным запросом в Конституционный Суд для рассмотрения данного вопроса. Во втором случае представляется индивидуальная жалоба в Конституционный Суд, обычно после исчерпания всех иных средств правовой защиты. Двумя главными преимуществами централизованной модели являются: 1) большее единство судебной практики и 2) правовая безопасность, так как данная модель не допускает наличия расходящихся решений по вопросам неконституционности, что может привести к нечеткости в применении закона.

36. Трудно классифицировать систему на децентрализованную и централизованную. Сущность системы определяют Суд или материальные компетенции Суда, которые определяют, есть ли один единственный орган, уполномоченный рассматривать конституционные вопросы. Соответственно в данном Исследовании правовые системы государств-членов Венецианской комиссии подразделяются на три системы: 1) имеющие децентрализованную модель конституционной юрисдикции; 2) имеющие централизованную модель и 3) имеющие специальный вид конституционной юрисдикции[32].

37. Странами, в полном объеме применяющими децентрализованный конституционный контроль, являются Дания, Финляндия, Исландия, Норвегия и Швеция.

38. Централизованный контроль существует в Албании, Алжире, Андорре, Армении, Австрии, Азербайджане, Бельгии, Белоруссии, Хорватии, Чешской Республике, Франции, Грузии, Германии, Венгрии, Италии, Южной Корее, Латвии, Лихтенштейне, Литве, Люксембурге, Черногории, Молдове, Польше, Румынии, России[33], Сербии, Словакии, Словении, Испании, “Бывшей Югославской Республике Македония”, Турции и Украине. Конституционные советы Алжира, Франции, Марокко, Туниса также являются органами, специализированными в осуществле-

[31] Обычный судья может быть обязан сделать это по ходатайству сторон (например, в Бельгии) или может сделать это только в случае, когда он разделяет сомнения стороны или сам сомневается в конституционности положения, подлежащего применению в данном деле.

[32] CDL-JU (2001)22, G. Brunner, *“Der Zugang des Einzelnen zur Verfassungsgerichtsbarkeit im europäischen Raum”,* report for the CoCoSem seminar in Zakopane, Poland, October 2001, стр. 35f.

[33] Все ссылки на Федеральный конституционный закон "О Конституционном Суде Российской Федерации” основаны на действующем в настоящее время тексте. Однако в Закон были внесены важные изменения, которые вступают в силу с 11 февраля 2011 года. Таким образом, будут изменены некоторые статьи, которые упоминаются в данном Исследовании, и часть информации, заключенной в Исследовании, может быть изменена.

нии конституционного контроля, даже если суть их деятельности отличается от сути деятельности вышеупомянутых конституционных судов.

39. "Специальная конституционная юрисдикция" существует во многих государствах-членах Венецианской комиссии и в государствах, имеющих статус наблюдателей при Венецианской комиссии. В этих государствах в определенной степени осуществляется децентрализованный конституционный контроль, но, несмотря на это, существует и Верховный Суд (или даже "Конституционный Суд"[34]), который имеет полномочие лишать нормативные акты юридической силы или разрешать дела (иногда даже по существу) по обращению судов нижестоящих инстанций. В Бразилии, например, предусмотрена смешанная система конституционного контроля. Андорра, Чили и Перу[35] имеют конституционные суды или трибуналы с обширными полномочиями.

40. Аргентина, Бразилия, Канада, Кипр[36], Эстония, Греция, Ирландия[37], Израиль, Япония[38], Мальта, Мексика, Монако, Португалия, Сан-Марино, Южная Африка[39], Швейцария[40] и США внедрили децентрализованный контроль, несмотря на то, что

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[34] Как в случае Андорры. В Португалии Конституционный Суд имеет отдельную юрисдикцию с определенными полномочиями, но существует также общая система децентрализованного конституционного контроля, осуществляемого обычными судами. В Эстонии при Верховном Суде существует Коллегия по рассмотрению конституционных жалоб (несмотря на то, что обычные суды также могут рассматривать конституционность), а в Перу и Чили существуют конституционные трибуналы.

[35] H. Nogueira Alcala, *"El recurso de proteccion en Chile", Anuario iberoamericano de justicia constitucional,* no. 3, 1999 , Madrid, 1999, в: http://dialnet.unirioja.es/servlet/articulo?codigo=1976169, проверено 25 февраля 2009.

[36] Согласно действующей Конституции 1960 года были созданы два Верховных суда: а) Верховный Конституционный Суд и б) Высший Суд. Вследствие обстоятельств, возникших в 1963 году и повлекших несостоятельность судебной власти, был создан Верховный Суд Кипра Законом (33/64) "Об осуществлении правосудия". Два Верховных суда были соединены в действующий Верховный Суд Кипра, который имел полномочия и юрисдикцию двух судов согласно Закону "Об осуществлении правосудия" от 1964 года. Таким образом, Верховный Суд Кипра является также Верховным Конституционным Судом, рассматривающим конституционность представленных законодательных актов по запросу Президента Республики, споры относительно полномочий между органами или властями Республики, конституционность действующих законов. Он также является Административным судом с исключительными контрольными полномочиями. В качестве Административного Суда Верховный Суд, заседающий в составе одного судьи, имеет юрисдикцию суда первой инстанции и имеет апелляционную и окончательную юрисдикцию, заседая в составе пяти судей.

[37] Верховный Суд и Высокий Суд могут признать нормативный или индивидуальный акт неконституционным и принять решение о возмещении убытков заявителю; см. http://www.supremecourt.ie/supremecourt/sclibrary3.nsf/pagecurrent/9034466B2045E5EC8025743200511625?opendocument&l=en, проверено 9 апреля 2009.

[38] H. Hyun Lee, Rapporteur, Report for the Asian Constitutional Courts, в: http://www.venice.coe.int/WCCJ/Papers/KOR_Kong%20Hyun%20Lee3_E.pdf, проверено 10 марта 2009.

[39] Несмотря на то, что обычные суды рассматривают дела, касающиеся также конституционных вопросов, высшим судом по конституционным вопросам является Конституционный Суд Южной Африки. В Конституционный Суд можно обратиться непосредственно или посредством обжалования решений судов нижестоящих инстанций. Конституционный суд обладает исключительной юрисдикцией в решении многих вопросов, в том числе в вопросах подтверждения решений обычных судов о признании нормативного акта (статута) неконституционным.

[40] Следует отметить следующую особенность конституционного контроля Швейцарии: согласно статье 190 Конституции Швейцарской Конфедерации "Федеральный Верховный Суд и иные судебные органы применяют федеральные акты и международные договоры". Это означает, что Федеральный Верховный Суд может не применять неконституционные кантональные и межкантональные законы, федеральные постановления, решения Федерального собрания, Федерального совета и федеральной администрации. Однако что касается федеральных актов и международных договоров, Федеральный Верховный Суд может поднять вопрос относительно их неконституционности, но формально не может осуществлять контроль относительно этого.

предоставляют специальные контрольные полномочия Верховному или Конституционному Суду (как в случае Португалии и Южной Африки, где существует Конституционный Суд). Судопроизводство и контрольная деятельность вышеупомянутых верховных судов также будут рассмотрены в данном Исследовании. В Нидерландах существует даже более децентрализованная система. Не предусмотрен как специальный суд, так и верховный суд со специальными контрольными полномочиями. Все суды Нидерландов имеют полномочие (и обязанность) осуществлять контроль внутригосударственного законодательства с точки зрения конвенций о правах человека и других непосредственно действующих международных договоров.

41. Следует отметить, что децентрализованные и централизованные системы редко существуют в чистом виде. Институт *stare decisis*, например, внедрил элемент единообразного толкования в децентрализованных системах. В централизованных системах Конституционный Суд далеко не единодушно признается единственным органом, компетентным рассматривать и давать толкование законов относительно их конституционности.

42. В португальской системе сочетаются системы централизованного и децентрализованного контроля. Обычные суды могут отказаться применять закон, который считают неконституционным, но неприменение действует только относительно конкретного дела, а закон как таковой остается в силе. Тем не менее, если обычные суды три раза признают закон неконституционным, прокуратура может обратиться в Конституционный Суд для принятия решения с общеобязательной силой об отмене закона.

3. Абстрактный контроль против контроля в связи с конкретным делом[41]

43. Осуществляя абстрактный контроль, Конституционный Суд рассматривает закон или постановление, имеющее силу закона, вне связи с конкретным делом или производством по делу. Из вышесказанного о децентрализованном контроле и контроле в связи с конкретным делом следует, что децентрализованный нормативный контроль обязательно связан с конкретным делом. Централизованный контроль может быть как абстрактным, так и в связи с конкретным делом[42].

[41] Такая формулировка была выбрана преднамеренно во избежание терминологических различий, связанных со значениями терминов “абстрактный-конкретный контроль” в разных языках или правовых культурах. В одном случае их различают по тому признаку, кто является инициатором контроля (абстрактный - вне связи с конкретным делом, конкретный, потому что был нанесен вред правовому положению лица). В другом случае, в частности в немецкой юридической терминологии, конституционный контроль считается конкретным, если он осуществляется по предварительным запросам судов, а конституционная жалоба считается третьим, отдельным видом контроля, осуществляемым Конституционным Судом, который не называется "конкретным".

[42] В. Садурски утверждает, что даже если контроль связан с конкретным делом, континентально-европейские конституционные суды делают абстрактные рассуждения при рассмотрении закона. В отличие, например, от американского Верховного Суда, европейские механизмы контроля основаны на кельзенской идее “очищения” правопорядка. Следовательно, согласно данному автору, конституционные суды не должны разрешать индивидуальные дела по существу. См. особенно W. Sadurski, *Constitutional Justice East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective, Kluwer, 2002 and Rights Before Courts: a Study of Constitutional Courts in Post-Communist States of Eastern and Central Europe*, Springer, 2005.

4. Превентивный контроль против последующего контроля

44. Контроль может осуществляться до или после обнародования нормативного акта. Абстрактный контроль может осуществляться как до, так и после обнародования. Контроль в связи с конкретным делом может осуществляется только после обнародования общего акта[43].

45. Часто абстрактный контроль и возможность осуществлять контроль после принятия, но до обнародования закона отождествляются с французской моделью контроля. В отличие от нее, американская модель является последующей и инцидентной, связанной с конкретным делом[44].

46. Превентивный контроль могут инициировать только специальные органы, предусмотренные в Конституции или в законе, предусматривающем учреждение Конституционного Суда, и наделенные таким правом. Он не может быть инициирован физическими и юридическими лицами. В Южной Африке, например, Президент может обратиться в Конституционный Суд с запросом о рассмотрении конституционности законопроекта до его принятия Парламентом. Суд рассматривает его конституционность. Другими государствами, применяющими данный подход, являются Франция (после голосования относительно закона, но до его обнародования) и Канада.

47. В условиях возрастающей значимости основных прав и их защиты национальным законодателям следует решить, какую роль должны играть Конституция и, следовательно, конституционные суды: должны ли они просто защищать существующий конституционный строй (который включает в себя также защиту основных прав в том смысле, что они являются частью существующего конституционного строя)? Или должны ли быть особые гарантии основных субъективных прав, предоставленных человеку Конституцией? Следует отметить, что есть очевидная тенденция к внедрению механизмов защиты индивидуальных основных прав Конституционным Судом, в частности, посредством индивидуального доступа. Конституционный строй также нуждается в охране, и конкретные дела часто служат средствами для установления недостатков и обеспечения применения Конституции.

В отличие от первоначальной кельзенской модели, где только конституционные органы были уполномочены обращаться в Конституционный Суд, существует модель, предоставляющая возможность физическим и юридическим лицам оспаривать конституционность нормативного или индивидуального акта, возможно, затрагивающего их интересы.

48. Заявитель может выразить свое сомнение по поводу конституционности нормативного или индивидуального акта в ходе судопроизводства. В системах с

[43] Если нормативный акт по существу не является индивидуальным актом.

[44] Абстрактный *превентивный контроль* превращает Конституционный Суд в арбитра между исполнительной и законодательной властью или парламентским меньшинством, обратившимся в Конституционный Суд и обычно считающимся политически чувствительным. См. Rosenfeld, “Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts”, report prepared for the UniDem Seminar 2003, в: CDL-STD(2003)037 Science and Technique of Democracy no. 37 (2003), T. Ginsburg, Comparative Constitutional Review, 2008.

децентрализованным контролем именно обычный судья решает вопрос конституционности или неконституционности положения, относительно которого существует несколько вариантов. Если судья признает закон неконституционным, он не применяется.

49. Основным вопросом данного Исследования являются конституционные жалобы и конституционный контроль, которые могут быть прямо или косвенно инициированы не только конституционными органами, но и физическими или юридическими лицами. Тем не менее следует отметить, что в случае превентивного и последующего контроля, инициированного конституционными органами, главной целью которого является защита конституционного строя, могут возникнуть вопросы, касающиеся основных прав, и, следовательно, они также являются важным средством защиты этих прав.

50. Данное Исследование состоит из четырех частей. В Главе I рассматривается доступ к конституционному контролю, а также лица и органы, которые могут инициировать конституционное судопроизводство, то есть физические и юридические лица посредством прямого доступа или иные органы в случае косвенного доступа. В Главе II рассматриваются сущность судопроизводства, требования и процессуальные правила. В Главе III рассматривается значение конституционного контроля для оспариваемых нормативных актов. В Главе IV рассматриваются иные вопросы, связанные с конституционным контролем.

I. Доступ к конституционному контролю

51. Исторически первый вид конституционного контроля осуществлялся обычными судьями посредством конкретного контроля в системах децентрализованного контроля.

Конкретный контроль осуществляется на любой стадии обычного судопроизводства обычным судьей. В отличие от особых видов конституционных жалоб, конституционность норм может оспариваться посредством конкретного контроля в ходе любого судопроизводства. Доступ к конституционному контролю, следовательно, открыт для любой стороны обычного судопроизводства. Эффективность данного вида контроля зависит как от знаний людей о своих правах, так и от полномочий и готовности обычных судей рассматривать нарушения основных прав[45]. Эти условия являются не совсем очевидными. Эта система хорошо функционирует там, где она укоренилась в правовой культуре, например в Соединенных Штатах, Канаде и Скандинавских государствах.

52. Только в некоторых государствах не предусмотрены средства для оспаривания конституционности общих или индивидуальных норм физическими и юри-

[45] См. X. Philippe, “Le contrôle de constitutionnalité des droits fondamentaux dans les pays européens”, *Actes du colloque international " L’effectivité des droits fondamentaux dans les pays de la communauté francophone"*, Port-Louis (Île Maurice), 29-30 septembre, 1er octobre 1993, стр. 412.

дическими лицами, в том числе косвенно, посредством рассмотрения дел по предварительным запросам судов. Такими государствами являются Алжир, Тунис, Марокко и Нидерланды. Франция тоже входила в группу данных государств, несмотря на то, что Государственный совет (*Conseil d'Etat*) мог рассматривать конституционность любого акта, имеющего более низкую юридическую силу, чем законодательный акт. Однако последняя конституционная реформа изменила позицию Франции по этому поводу. Новая статья 61-1 Конституции, которая была включена в Конституцию в 2008 году, внедрила институт "предварительных запросов относительно неконституционности". Реформа предоставляет возможность лицам оспорить законодательный акт, возможно ограничивающий гарантируемые Конституцией права и свободы, в обычном суде. Судья решает вопрос о том, направить ли вопрос в Государственный Совет или в Кассационный Суд, которые соответственно принимают решение о представлении вопроса в Конституционный Совет.

53. Так как индивидуальный доступ осуществляет главным образом функцию защиты основных прав человека и так как эти права, за исключением политических (например избирательное право), а иногда и социальных прав (например право на социальное обеспечение), обычно предоставляются гражданам и негражданам без каких-либо различий, положения относительно индивидуального доступа касаются всех членов общества[46]. Тем не менее защита иностранцев может быть не такой всеобъемлющей, как защита граждан.

54. В Конституционный Суд могут обращаться различные органы или физические и юридические лица. Согласно простой классификации различают обращения государственных или конституционных органов, в том числе судов[47], и жалобы физических или юридических лиц. В некоторых государствах, таких как Албания, Австрия, Хорватия, Венгрия, Молдова[48] или "Бывшая Югославская Республика Македония", Конституционный Суд может начать судопроизводство по собственной инициативе. Однако такая система классификации не является достаточной. Причиной этого является то, что превентивный контроль доступен для определенных конституционных органов, а не для физических и юридических лиц, тогда как последующий контроль, если он существует, могут инициировать как физические и юридические лица, так и конституционные органы. Как было отмечено выше, в данном Исследовании различаются **прямой** и **косвенный** доступ.

[46] Согласно статье 125 Конституции России в Конституционный суд могут обращаться "граждане", но Конституционный Суд дал расширительное толкование этому понятию, включая в него также иностранных граждан и лиц без гражданства.

[47] Системный Тезаурус Венецианской комиссии, в числе прочего, перечисляет главу государства, законодательные органы, исполнительные органы, органы федеральной или региональной власти, органы регионального управления, органы местного самоуправления, прокурора, Омбудсмена. Кроме того, есть систематическое различие между обращениями судов (особенно в случае предварительных запросов) и индивидуальными жалобами или обращениями государственных органов. См. CDL-JU(2008)031 Systematic Thesaurus.

[48] Статья 135 Конституции предусматривает, что Конституционный Суд осуществляет контроль только по запросу. Однако статья 72 Кодекса конституционной юрисдикции устанавливает, что Суд может пересмотреть свое решение по своей инициативе, но пока еще не существует практики по пересмотру своих решений в данном порядке.

Косвенный доступ означает, что индивидуальный вопрос представляется в Конституционный Суд посредством другого органа, тогда как прямой доступ охватывает все предоставленные человеку юридические средства для непосредственной подачи жалобы в Конституционный Суд без посредничества иных органов.

<table>
<tr><th colspan="3">Косвенный</th><th colspan="9">Прямой</th></tr>
<tr><td colspan="3">В связи с конкретным делом</td><td colspan="3" rowspan="2">Абстрактный</td><td colspan="6">Индивидуальная жалоба / в связи с конкретным делом</td></tr>
<tr><td></td><td colspan="2">Рассмотрение дел на основании предварительных запросов судов</td><td colspan="3">Против нормативных актов</td><td colspan="3">Против индивидуальных актов</td></tr>
<tr><td>Омбудсмен</td><td>Предварительный запрос</td><td>Исключение/протест относительно неконституционности</td><td>Actio popularis</td><td>Quasi actio popularis / юридический интерес</td><td>Индивидуальное предложение</td><td>Нормативная конституционная жалоба</td><td>Россия: Индивидуальная жалоба</td><td>Украина: Конституционное обращение/ представление</td><td>Amparo</td><td>Конституционный пересмотр</td><td>Полная конституционная жалоба</td></tr>
</table>

55. Данная классификация способствует рассмотрению двух вопросов: 1) органы, инициирующие косвенный доступ к конституционному контролю; 2) прямой доступ физических и юридических лиц к конституционному контролю. Объекты контроля рассматриваются в связи с защищаемыми правами.

I.1. Виды доступа

I.1.1. Косвенный доступ

I.1.1.1. Обычные суды, представляющие предварительные запросы

См. Таб. 1.1.20: Косвенный индивидуальный доступ: Предварительные запросы [49].

56. Рассмотрение дел по предварительным запросам судов является одним из самых распространенных видов индивидуального доступа. Если обычный суд имеет сомнения относительно того, что нормативный акт, подлежащий применению в конкретном деле, нарушает Конституцию, он обращается с предварительным запросом в Конституционный Суд. Эффективность данного механизма заключается в том, что обычные суды хорошо осведомлены и могут составить обоснованный запрос. Обычные суды являются первым фильтром и могут способствовать сокращению числа злоупотребляющих или повторяющихся заявлений. Кроме того, рассмотрение дел по предварительным запросам судов является дополнительным средством абстрактного контроля, так как в данном случае возможен контроль в связи с конкретным делом, в котором положение было применено или подлежит применению[50]. Это преимущество может также иметь недостатки в

[49] Таблицы см. в английском тексте Исследования.
[50] CDL-INF (1996) 010 Opinion on the draft law on the Constitutional Court of the Republic of Azerbaijan.

некоторых судебных системах. Во-первых, эффективность судопроизводства по предварительным запросам судов в большей степени зависит от полномочий и желания обычных судей по установлению потенциально неконституционных нормативных актов и по обращению с предварительным запросом в Конституционный Суд. Во-вторых, она частично зависит от использования данной возможности физическими и юридическими лицами. Судопроизводство на основании предварительных запросов судов осуществляется во многих государствах, рассматривающихся в данном Исследовании, за исключением Португалии и Швейцарии[51]. В Литве предварительный запрос является единственным видом индивидуального доступа в Конституционный Суд. В Белоруссии в ходе рассмотрения дела предварительный запрос является единственным видом индивидуального доступа в Конституционный Суд, кроме обращений в различные государственные органы. Однако в государствах с децентрализованным конституционным контролем предварительный запрос встречается довольно редко, поскольку обычные суды уполномочены рассматривать конституционность подлежащего применению акта.

57. Во многих государствах (например в Албании, Алжире, Андорре, Армении, Бельгии, Болгарии, Хорватии, Чешской Республике, Франции, Венгрии, Литве, Молдове, Польше, Словакии, Испании, Турции и Украине) стороны обычного судопроизводства могут представить предложение относительно обращения с предварительным запросом в Конституционный Суд. Тем не менее такие предложения, которые могут быть приняты или отклонены, не являются препятствием для усмотрения судьи относительно представления или непредставления предварительного запроса.

58. Положение сторон, которые могут представлять такие предложения в ходе обычного судопроизводства, может быть значительно усилено. Стороны такого судопроизводства могут воспользоваться процессуальным средством "исключения неконституционности", если имеют сомнения относительно конституционности закона, подлежащего применению в данном деле. Такое ходатайство можно представить обычному судье. В данном случае судья обязан рассмотреть его и мотивировать отказ направления вопроса в Конституционный Суд. Отказ, однако, может быть принят только по определенным основаниям (например жалоба явно необоснована и т.д.[52]). Даже при том, что решение обычного судьи окончательно, есть процессуальные ограничения его независимости и независимости суда. Этот вид доступа существует в Албании, Чили, Греции, Венгрии, Италии, Люксембурге, Мальте, Португалии, Сан-Марино. В Южной Африке "разрешение на обращение" в Конституционный Суд дает только Конституционный Суд, несмотря на то, что признание закона недействительным должно быть подтверждено Конституцион-

[51] См., *Bericht des Schweizerischen Bundesgericht für die VII. Konferenz der europäischen Verfassungsgerichte* стр. 17, в: http://www.confcoconsteu.org/reports/Zwitserland-DE.pdf, проверено 2 июня 2009.

[52] Во Франции, например, для представления предварительного запроса должны быть соблюдены некоторые требования: вопрос должен быть серьезным, должен быть новым (вопрос, к которому Конституционный Совет еще не обращался) и должен подлежать применению в конкретном деле.

ным Судом и, следовательно, оно обязательно направляется в данный Суд. В других случаях лицо может представить жалобу в данный Суд, только если предоставлено разрешение на обращение или если предоставлена возможность прямого доступа.

59. "Исключение неконституционности" можно считать весьма эффективным средством индивидуального доступа, если обычный суд обязан представить предварительный запрос, как в случаях Румынии или Словении.

60. В Албании, Андорре, Армении, Австрии[53], Бельгии, Белоруссии, Боснии и Герцеговине, Хорватии, Чешской Республике, Грузии, Венгрии, Италии, Лихтенштейне, Литве, Люксембурге, Мальте, Польше, Словакии, Словении, Румынии, России, Испании, Турции, Украине и "Бывшей Югославской Республике Македония" все обычные суды могут представить предварительный запрос в Конституционный Суд.

61. Ограничения относительно представления предварительных запросов уместны с целью повышения качества заявлений. В Австрии (относительно законов), Азербайджане, Белоруссии, Болгарии, Греции, Молдове и Латвии только высшие суды могут представить предварительный запрос. В Кипре предварительный запрос могут представить только суды, которым подсудны семейные дела. В России и Белоруссии высшие суды могут также инициировать абстрактный контроль. Во Франции предусмотрена двухстепенная система фильтров для представления предварительных запросов: сначала обычный судья только по ходатайству сторон по делу может представить предварительный запрос в высший суд, после чего высший суд представляет вопрос в Конституционный Совет.

62. В то время как вышеуказанное является эффективным средством сокращения числа предварительных запросов и согласуется с логикой исчерпания средств правовой защиты (физические лица должны соблюдать очередность судов), это оставляет стороны судопроизводства в потенциально неконституционной ситуации в течение длительного времени, если нижестоящие суды обязаны применять закон, даже если они имеют серьезные сомнения относительно его конституционности. **С точки зрения защиты прав человека, более целесообразно и эффективно предоставить судам всех инстанций доступ в Конституционный Суд**. Следует отметить, что есть и другие альтернативные решения. В Германии, например, все суды должны принимать во внимание вопросы относительно конституционного права и обязаны обращаться в Конституционный Суд, если убеждены, что конкретная норма является неконституционной - одних сомнений недостаточно. Это содействует сокращению числа предварительных запросов, излишне не затягивая очевидные неконституционные ситуации.

[53] За исключением судов первой инстанции.

I.1.1.2. Омбудсмен

См. Таб. 1.1.19: Косвенный доступ: Омбудсмен

63. Большинство государств-членов Венецианской комиссии и государств, имеющих статус наблюдателей при Венецианской комиссии, имеет институт Омбудсмена (Посредник, Парламентский уполномоченный и т.д.), обычно назначаемого национальными парламентами[54]. Обмудсмены независимы и беспристрастны. Во многих государствах они являются защитниками прав человека (Народный Защитник и т.д.), находящими эффективные решения в случае нарушения прав человека.

64. С точки зрения защиты прав человека Венецианская комиссия рекомендует **"предоставить Омбудсмену или Защитнику прав человека возможность обращения в Конституционный Суд страны для принятия решения по абстрактному контролю по вопросам конституционности законов и постановлений или общих административных актов, которые поднимают вопросы, затрагивающие права и свободы человека.** Омбудсмен должен иметь возможность сделать это по собственной инициативе или в результате жалобы, поданной в данное учреждение"[55]. Обеспечение средств против противозаконных актов является основной задачей обычных судов. Тем не менее, когда Конституционный Суд осуществляет контроль также за конституционностью индивидуальных актов, представляется логичным предоставить Омбудсмену право обращаться в Суд и по конкретным делам. В любом случае, поскольку доступ к Конституционному Суду посредством Омбудсмена является лишь косвенным, этот механизм не может заменить прямой доступ и должен считаться дополнительным средством. Выбор между различными механизмами или установление своих аналогичных моделей зависит от правовой культуры страны.

65. Во многих государствах Омбудсмен не уполномочен обращаться в Конституционный Суд и может только представлять доклады Парламенту, предлагая обратиться в КС относительно конституционности определенных правовых норм и содействуя разрешению конфликтов между государственной администрацией и людьми (например в Греции, Литве или в Республике Корея)[56]. В таких государствах, как Франция или Великобритания, даже в условиях, что омбудсмены имеют прямую компетенцию в обеспечении защиты прав человека, они не могут обращаться в обычные суды. Во Франции Омбудсмен *(Médiateur de la République)* может дать распоряжение "административным органам", даже судам (для получения документов и т.п.).

66. В системах с децентрализованным контролем Омбудсмен, уполномоченный инициировать судопроизводство, должен сделать это в компетентном обычном

[54] Согласно "Парижским принципам" относительно национальных учреждений по правам человека, Резолюция 48/134 Генеральной Ассамблеи ООН от 20.12.1993.

[55] CDL-AD (2007) 020, Opinion on the possible reform of the Ombudsman institution in Kazhakstan, 2007.

[56] G. Kucsko-Stadlmayer, "The Competences of European Ombudspersons – Description and Analysis of the Status Quo", в: http://www.ioi-europe.org/index2.html.

суде, а не в Верховном суде (например специализированный омбудсмен в Финляндии). Бразилия, которая не имеет строгую систему децентрализованного контроля, внесла поправки в законодательство в 2009 году, и в настоящее время Омбудсмен может инициировать судопроизводство для защиты конституционных прав.

67. В системах с централизованным контролем Омбудсмен может инициировать конституционный контроль. Например в Хорватии, Эстонии, Черногории, Португалии, Словении, Испании и "Бывшей Югославской Республике Македония" Омбудсмен уполномочен инициировать конституционный контроль для защиты основных прав и вне связи с конкретным делом.

68. Омбудсмены Азербайджана, Перу и Украины могут инициировать контроль нормативного акта в связи с конкретным делом, рассматриваемым Омбудсменом. Подобное полномочие предусмотрено в Австрии, но оно ограничено рассмотрением только общих административных актов. В Азербайджане Омбудсмен может инициировать контроль в случае неконституционных судебных решений, в связи с которыми к нему обратились. В Южной Африке Общественный Защитник может обратиться в Конституционный Суд или другие суды для выполнения своих полномочий по защите общества от незаконных действий государственных органов, но не может рассматривать судебные решения.

69. В таких случаях полномочие Омбудсменов инициировать конституционное судопроизводство дает физическим и юридическим лицам возможность обращаться в Конституционный Суд, хотя и косвенно, в ситуации, когда люди не имеют другой возможности доступа в данный суд. Следовательно, Омбудсмен предоставляет новые возможности для доступа.

70. Иногда Омбудсмен вступает в процесс в делах, по которым физическое или юридическое лицо имеет возможность сделать это самостоятельно, только потому, что он в силу своих юридических знаний способствует улучшению качества обращений (например в Боснии и Герцеговине, Латвии[57], Российской Федерации, Словении[58]). Омбудсмен Испании может обратиться с жалобой в порядке процедуры ампаро относительно всех актов государственной власти в интересах всех людей, которым, по его сведению, был нанесен вред оспариваемым актом, для того, чтобы они тоже участвовали в процессе. В этих случаях права Омбудсмена в принципе не превышают индивидуальные права. В отличие от этого Омбудсмен Словакии только указывает случаи, когда заявитель имеет возможность представить конституционную жалобу, но не инициирует судопроизводство[59].

[57] Закон "Об Омбудсмене", статья 13: При выполнении предусмотренных настоящим Законом функций и задач, Омбудсмен вправе: 8) подать заявление о возбуждении дела в Конституционный Суд, если учреждение, издавшее оспариваемый акт, в указанный Омбудсменом срок не устранило констатированные недостатки;

[58] Согласно статье 50 (2) Закона Словении "О Конституционном Суде" уполномоченный по правам человека при условиях, определенных этим Законом, может представить конституционную жалобу в связи с рассматриваемым им конкретным делом. А статья 52 (2) Закона "О Конституционном Суде" предусматривает, что уполномоченный по правам человека представляет конституционную жалобу с согласия лица, права или основные свободы которого он защищает в конкретном деле.

[59] Article 14 Law on the Ombudsman, в: http://www.vop.gov.sk/act-on-the-public-defender-of-rights, проверено 28 апреля 2009.

71. Чили, который является одним из двух латиноамериканских государств, где нет Омбудсмена (Уругвай является вторым), в настоящее время рассматривает проект о включении трех новых статей в Конституцию для создания института *“Defensor del Pueblo”*[60]. В Израиле нет Омбудсмена, но любое физическое или юридическое лицо может поднять конституционные вопросы в Верховном Суде.

I.1.1.3. Другие органы

72. В некоторых государствах прокуратура может обращаться в Конституционный Суд (например статья 101 Конституции Армении, статья 130 Конституции Азербайджана, статья 150 Конституции Болгарии), что может рассматриваться как вид косвенного доступа в данном Исследовании.

73. В некоторых государствах (например в Албании, Андорре, Армении, Австрии, Бельгии[61], Хорватии, Чешской Республике, Франции, Португалии, Польше, Латвии, Испании, Молдове, Румынии, России, Турции, Украине и т.п.) соответствующее число членов Парламента или некоторые другие органы (такие, как Президент, Премьер-министр и др.) могут оспаривать нормативные акты в Конституционном Суде. В Белоруссии нет Омбудсмена. Там люди, которые не могут непосредственно обращаться в Конституционный Суд, имеют косвенный доступ в Конституционный Суд. Они направляют свое предложение о рассмотрении конституционности акта уполномоченным органам и лицам, наделенным правом представлять запрос в Конституционный Суд (Президент Республики Беларусь, палаты Парламента – Палата представителей и Совет Республики, Верховный Суд Республики Беларусь, Высший Хозяйственный Суд Республики Беларусь и Совет Министров Республики Беларусь).

I.1.2. Прямой доступ

См. Таб. 1.1.21: Прямой индивидуальный доступ: Конституционные и законодательные основы

I.1.2.1. Абстрактный контроль (контроль вне связи с конкретным делом)

I.1.2.1.1. *Actio popularis*

74. *Actio popularis* подразумевает право каждого представить жалобу на нормативный акт после его обнародования, не будучи обязанным доказать, что соответствующая норма непосредственно и в настоящее время затрагивает его права и свободы. Кельзен определял *actio popularis* как основную гарантию всеобъемлющего конституционного контроля, так как каждый может обратиться в Конститу-

[60] См., в частности, Segunde informe de las comisiones unidas de constitucion, legislacion y justicia y de derechos humanos, nacionalidad y ciudadania recaido en el proyecto de reforma constitucional que crea el Defensor del Ciudadano, в: http://www.ombudsman.cl/pdf/informe2-ddhh.pdf, и другие документы Iniciativa chilena para establecer al Defensor del Pueblo.

[61] Председатель Парламента может оспорить нормативный акт в Конституционном Суде по запросу, принятому двумя третями голосов членов (статья 2, 3º Закона “О Конституционном Суде”).

ционный Суд. В данном случае гражданин просто выполняет свою обязанность по защите Конституции. Не обязательно, чтобы основные права заявителя были нарушены[62]. *Actio popularis* играет незначительную роль в Лихтенштейне, где необходимо выполнить несколько условий для подачи *actio popularis*, Мальте[63], Перу и Чили. В Венгрии[64], "Бывшей Югославской Республике Македония"[65], Хорватии и Грузии он также способствует развитию правопорядка. В Южной Африке физическое или юридическое лицо может обратиться в суд для защиты общественных интересов. Тем не менее Кельзен пришел к выводу, что *actio popularis* не является эффективным средством конституционного контроля, поскольку в данном случае неизбежны злоупотребляющие заявления[66]. А в Хорватии ***actio popularis*** **привел к перегрузке Конституционного Суда, проблеме, о которой Венецианская комиссия также высказывается критически[67]**. Следовательно, большинство государств не предусмотрело *actio popularis* как средство для оспаривания нормативных актов в Конституционном Суде. В Израиле в Верховный Суд, заседающий в качестве Высшего Суда справедливости, могут обращаться лица относительно нарушений их конституционных прав. Кроме этого, различные правозащитные и иные организации могут представлять обращения в качестве "общественных заявителей" для защиты общественных интересов. Они не обязаны обосновать личный интерес в обращении, несмотря на то, что могут обращаться также в интересах конкретных заявителей, права которых были непосредственно нарушены правительственным или нормативным актом.

I.1.2.1.2. Индивидуальное предложение[68]

75. Индивидуальное предложение является одним из видов абстрактного контроля, в представлении которого участвует физическое или юридическое лицо и которое оставляет большую возможность усмотрения Конституционному Суду. Физическое или юридическое лицо может непосредственно обратиться в Конституционный Суд с предложением о рассмотрении конституционности нормативного

[62] A. van Aaken, "Making International Human Rights Protection More Effective: A Rational-Choice Approach to the Effectiveness of Ius Standi Provisions", Preprints of the Max Planck Institute for Research on Collective Goods Bonn 2005/16, Bonn, 2005, стр. 14, в: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=802424#, проверено 23 февраля 2009.

[63] CDL-JU (2001) 22, G. Brunner, *"Der Zugang des Einzelnen zur Verfassungsgerichtsbarkeit im europäischen Raum"*, report for the CoCoSem seminar in Zakopane, Poland, October 2001, стр. 35f.

[64] Например, относительно вопросов, касающихся смертной казни. См. W. Sadurski; *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Springer Netherlands, Dordrecht, 2005, стр.6.

[65] CDL-JU (2001) 22, G. Brunner, *"Der Zugang des Einzelnen zur Verfassungsgerichtsbarkeit im europäischen Raum"*, report for the CoCoSem seminar in Zakopane, Poland, October 2001.

[66] H.Kelsen, цитата из R. Ben Achour, *"Le contrôle de la constitutionnalité des lois: quelle procédure ?", Actes du colloque international " L'effectivité des droits fondamentaux dans les pays de la communauté francophone "*, Port-Louis (Île Maurice), 29-30 septembre, 1er octobre 1993, стр.401, в: http://www.bibliotheque.refer.org/livre59/l5905.pdf, проверено 7 февраля 2009.

[67] CDL-AD (2008) 030 Opinion on the Draft Law on the Constitutional Court of Montenegro.

[68] Г. Бруннер использует термин "Anregung" (стимул). Следует отметить, что по этому поводу нет общего названия в различных государствах, и можно встретить такие термины, как "suggestion" и "proposal".

акта. Однако оно не может требовать, чтобы Конституционный Суд начал судопроизводство. Фактически, в данном случае физическое или юридическое лицо может “способствовать” тому, чтобы суд действовал по своей инициативе *(proprio motu)*, что является довольно редкой возможностью. Тем не менее в некоторых государствах, в таких, как Албания, Венгрия и Польша, в определенных случаях предусмотрена такая возможность. В Черногории и Сербии до отказа в осуществлении контроля должно быть предварительное рассмотрение и отказ должен быть мотивирован.

I.1.2.1.3. Quasi *actio popularis* (необходимость доказать законный интерес)

76. Институт quasi *actio popularis* занимает среднее место между абстрактным *actio popularis* и нормативной конституционной жалобой. Правила, регулирующие порядок представления жалоб quasi *actio popularis*, более ограничительные, что устраняет некоторые проблемы, связанные с *actio popularis*, так как заявителю необходимо доказать, что он имеет определенный законный интерес в применении общей нормы. Нормы, устанавливающие право представления данной жалобы, аналогичны нормам, регулирующим вопросы относительно нормативной конституционной жалобы, за исключением того, что необязательно, чтобы заявителю непосредственно был нанесен вред[69]. Заявителю просто необходимо доказать, что правовая норма влияет на его права, законные интересы или правовое положение[70]. Данный вид доступа в Конституционный Суд существует, например, в Греции.

I.1.2.2. Рассмотрение конкретного дела: индивидуальная жалоба[71]

I.1.2.2.1. Только на нормативные акты

I.1.2.2.1.1. Нормативная конституционная жалоба

77. Физическое или юридическое лицо может представить жалобу на нарушение его основных субъективных прав индивидуальным актом, принятым на основании нормативного акта. Таким образом, в данном случае инициатива по осуществлению контроля связана с конкретным делом. Однако в системах, предусматривающих только нормативную конституционную жалобу, индивидуальный акт, применяющий нормативный акт, не может оспариваться, и контроль, осуществляемый Конституционным Судом, не касается применения нормативного акта. В данном случае вопрос относительно эффективной защиты основных индивидуальных прав может возникнуть только, если применение конституционного закона или равноценного акта нарушает такие права. Нормативная жалоба (обычно с иными формами жалоб) существует, например, в Армении, Австрии, Бельгии[72],

[69] См. В. Садурски, указанная работа, стр. 6f.

[70] Статья 24 (2) Закона “ О Конституционном Суде”.

[71] Термин, используемый на немецком языке: *Unechte Grundrechtsbeschwerde*, см. CDL-AD(2005)005; para. 22, S. R. Dürr, “Individual Access to Constitutional Court in European Transitional Countries”, в: B. Fort (ed.), *Democratising Access to Justice in Transitional Countries. Proceedings of the Workshop “Comparing Access to Justice in Asian and European Transitional Countries”*, Sang Choy International, Jakarta, 2006, стр. 59

[72] CDL-JU (2008) 032 M.-Fr. Rigaux, “Introduction of a Constitutional Review of Laws: Benefit, Purpose and Modalities”, *Report for the seminar on constitutional jurisdiction*, Ramallah, 2008.

Грузии, Венгрии, Польше, Латвии, Люксембурге, России и Румынии. Ограниченная форма была внедрена в Эстонии, где могут оспариваться некоторые решения Парламента и решения Президента. Согласно статье 96 Федерального конституционного закона Российской Федерации “О Конституционном Суде” граждане, "чьи права и свободы нарушаются законом, примененным или подлежащим применению в конкретном деле”, могут непосредственно обратиться в Конституционный Суд. На этом основании возможно только рассмотрение конституционности закона, на основании которого был принят индивидуальный акт, но не конкретного применения закона в конкретном деле. Следовательно, российская индивидуальная жалоба является специальным видом конкретного нормоконтроля[73]. Нынешняя французская система близка к нормативной конституционной жалобе, так как Конституционный Совет может осуществлять контроль законодательных актов, и это является абстрактным контролем; если акт признается неконституционным, он утрачивает юридическую силу.

I.1.2.2.1.2. Конституционное обращение

78. В Украине лицо может обратиться в Конституционный Суд с запросом об обязательном толковании, если утверждает, что противоречия в применении закона могут привести или привели к нарушению его конституционных прав. В данном случае вопрос касается не индивидуального акта, а толкования нормативного акта. Таким образом, конституционное обращение, по существу, выполняет функцию нормативной конституционной жалобы[74].

I.1.2.2.2. На индивидуальные акты: полная конституционная жалоба

79. В условиях возрастающего значения защиты прав человека очевидна тенденция к осуществлению конституционного контроля индивидуальных административных актов и решений судов на основании индивидуальных жалоб[75], так как нарушения прав человека часто являются результатом неконституционных индивидуальных актов, основанных на конституционных нормативных актах[76].

Венецианская комиссия высказывается в пользу института полной конституционной жалобы не только потому, что он обеспечивает всеобъемлющую защиту конституционных прав, но также с точки зрения субсидиарного характера средства правовой защиты в Европейском суде по правам человека и желания разрешать проблемы по правам человека на национальном уровне.

[73] См. Brunner, Der Zugang des Einzelnen zur Verfassungsgerichtsbarkeit im europäischen Raum, Jahrbuch für Öffentliches Recht 2002, стр. 226.

[74] V. Skomorocha, Konstytucijnyj Sud Ukrajiny: dosvid i problemy, Pravo Ukrajiny no. 1/1999, cit. in: CDL-JU (2001)22, G. Brunner, “*Der Zugang des Einzelnen zur Verfassungsgerichtsbarkeit im europäischen Raum”*, report for the CoCoSem seminar in Zakopane, Poland, October 2001, стр. 34.

[75] CDL-AD (2004) 24 Opinion on the draft constitutional amendments with regard to the Constitutional Court of Turkey.

[76] CDL-AD (2008) 029 Opinion on the draft laws amending and supplementing 1) the Law on Constitutional Proceedings and 2) the Law on the Constitutional Court of Kyrgyzstan.

I.1.2.2.2.1. Значение полной конституционной жалобы

80. Полная конституционная жалоба, несомненно, дает возможность для самого всеобъемлющего индивидуального доступа к конституционному правосудию и, следовательно, для полной защиты индивидуальных прав. Лицо может обжаловать любой акт государственной власти, который непосредственно и в настоящее время нарушает его основные права, в субсидиарном порядке[77]. Точнее говоря, лицо может оспорить общий акт, если последний подлежит непосредственному применению в его деле, или индивидуальный акт, адресованный ему. Эта возможность существует, например, в Албании, Андорре, Армении, Австрии, Азербайджане, Бельгии, Боснии и Герцеговине, Грузии, Германии, Латвии, Мальте, Польше, Испании[78], Хорватии, Кипре[79], Чешской Республике, Лихтенштейне, Словении, Черногории, Сербии, Южной Африке, Швейцарии, в " Бывшей Югославской Республике Македония" и Словакии[80]. Существуют различные условия и формы конституционных жалоб. Основной из вышеуказанных является "конституционный пересмотр", когда человеку предоставляется средство правовой защиты против окончательных решений обычных судов, но не против индивидуальных административных актов. Данный вид встречается в Чили[81], Боснии и Герцеговине, Мальте[82] и Албании. В отличие от этого в Австрии могут рассматриваться только индивидуальные административные акты и решения Суда по делам о предоставлении убежища, а не решения по гражданским или уголовным делам[83].

81. В случае рассмотрения дела на основании полной конституционной жалобы Конституционный Суд обычно не принимает решения по существу. Он рас-

[77] Субсидиарность означает, что все другие средства правовой защиты должны быть исчерпаны.

[78] Отметим, что жалобу в порядке процедуры ампаро в Испании следует считать полной конституционной жалобой. Она является последним средством правовой защиты в Конституционном Суде. Однако ее не надо путать с recurso de amparo, которая существует во многих латиноамериканских государствах (такие, как Чили, Перу, Аргентина и Мексика) и является специальным видом конституционной жалобы, которая предоставляет лицу возможность представить специальное обращение для защиты своих прав в обычные суды. Следует также отметить изменения, внесенные в 2007 году в Испании, которые предусмотрели новое условие допустимости по вопросам выдачи приказа ампаро, в соответствии с которым поднятый вопрос по делу должен быть "конституционно значимым".

[79] Согласно статье 146(2) оспаривающее лицо должно указать, что административным актом или бездействием был нарушен законный интерес, который он имеет лично или как член общества. Понятие "интерес" не аналогичен данному понятию, используемому в гражданском праве. Он должен иметь финансовую или моральную природу. Для предоставления средства правовой защиты должно быть *legitimatio ad causum* в отличие от общей жалобы относительно ненадлежащего осуществления администрирования.

[80] Конституционный Суд Белоруссии, в отличие от предыдущей практики, распространенной на основании части 4 статьи 122 Конституции (см. решение D-184/05 от 2 марта 2005 года), больше не принимает индивидуальные жалобы.

[81] На некоторые виды решений вышестоящих судов (auto acordados).

[82] Следует отметить, что конституционную жалобу можно представить также на возможные нарушения основных прав.

[83] Тем не менее можно оспорить индивидуальные административные акты и одновременно обратиться в Высший Административный Суд: Сначала Конституционный Суд проверяет, были ли нарушены конституционные права, и в случае отрицательного решения направляет дело в Административный Суд, который проверяет, были ли нарушены обычные законы. В Австрии это рассматривается как пробел, который должен быть заполнен.

сматривает исключительно конституционные вопросы по делу (для дальнейшей информации см. ниже 206). Кроме того, Суд, как правило, не осуществляет контроль за соблюдением всей иерархии норм (например контроль за законностью индивидуального акта). Основной функцией полной конституционной жалобы является защита конституционно охраняемых прав человека.

I.1.2.2.2.2. Индивидуальная жалоба как национальный "фильтр" для дел, передаваемых в Европейский суд по правам человека

82. Важным аспектом при рассмотрении индивидуальной жалобы в Конституционный Суд на нарушения прав человека является вопрос, должно ли данное средство правовой защиты быть исчерпано согласно статье 35 (1) Европейской конвенции по правам человека для того, чтобы лицо могло обратиться в Европейский суд, как, например, в случае жалобы ампаро в Конституционный Суд Испании. Рассмотрение данного вопроса особенно важно с точки зрения загруженности Суда (приблизительно 120.000 дел в 2010 году) и необходимости разрешения связанных с правами человека проблем на национальном уровне, до их представления в Страсбургский Суд в соответствии с параграфом 4 Интерлакенской Декларации, который предусматривает субсидиарный характер конвенционных механизмов:

> “4. Конференция напоминает, что ответственность за обеспечение применения и реализации Конвенции в первую очередь лежит на государствах-участниках и, следовательно, призывает государства-участников принять на себя обязательство:
>
> …
>
> d) обеспечить, чтобы каждый, кто обоснованно заявляет, что его права и свободы, предусмотренные в Конвенции, были нарушены, пользовался эффективными средствами правовой защиты перед национальной властью, обеспечивающими при необходимости соответствующую компенсацию; при необходимости посредством внедрения новых средств правовой защиты, будь то средства особого характера или общие внутригосударственные средства правовой защиты …”[84].

83. В странах, где существует специализированный Конституционный Суд, индивидуальная жалоба в этот Суд представляется логичным выбором в качестве такого средства правовой защиты, поскольку такая жалоба тоже, как правило, является субсидиарной на национальном уровне и применяется только после исчерпания средств правовой защиты в обычных судах. Следовательно, это является последним возможным средством на национальном уровне, которое необходимо исчерпать до появления возможности обращения в Европейский суд по правам человека.

84. Очевидно, что некоторые другие виды индивидуального доступа в Конституционный Суд, рассмотренные в данном Исследовании, в этом смысле не

[84] *Конференция высокого уровня в Интерлакене* 18 и 19 февраля 2010 года по инициативе швейцарского председателя Комитета Министров Совета Европы, Интерлакен, 19 февраля 2010 года.

могут считаться эффективным “внутригосударственным средством”: например, *actio popularis* направлен на норму с абстрактной точки зрения и, как правило, не может быть соответствующим средством правовой защиты против конкретных нарушений прав человека. "Нормативная" индивидуальная жалоба, направленная только на нормативный акт, а не на его применение в конкретном случае, также не является соответствующим национальным "фильтром"[85], так как на практике нарушения прав человека чаще не являются результатом “технически правильного” применения неконституционного закона, который может оспариваться посредством данного вида жалобы, а результатом неконституционного индивидуального акта, который возможно, но не обязательно принят на основании соответствующего Конституции закона. Большое количество нарушений прав человека, таким образом, не подпадает в сферу действия нормативной жалобы и эффективность данного фильтра становится незначительной.

85. Интересным был пример попытки внедрить такое средство в Турции. Принимая во внимание большое количество дел против Турции в Страсбургском Суде, Конституционный Суд Турции в 2004 году предложил внедрить институт индивидуальной жалобы в данный Суд относительно конституционных прав, предусмотренных также в Европейской конвенции по правам человека. В пояснительной записке к этим поправкам установлено, что “в результате внедрения конституционной жалобы значительно уменьшится число обращений против Турции, направленных в Европейский суд по правам человека”. В сентябре 2010 года пакет конституционных реформ был принят на референдуме, который включает подобный вид индивидуальной жалобы в Конституционный Суд. Согласно новому тексту статьи 148 Конституции Турции каждый может представить индивидуальную жалобу в Конституционный Суд в связи с конституционными правами, предусмотренными также в Европейской конвенции по правам человека. Данная статья предусматривает, что процессуальные правила относительно порядка представления жалоб будут установлены в законе, который должен быть принят в течение двух последующих лет.

86. В своем мнении относительно проекта этих поправок Венецианская комиссия указала, что проект поправок является “обоснованным и соответствует решениям, найденным в других европейских государствах, и европейским стандартам”[86]. Комиссия, таким образом, признала, что эффективная индивиду-

[85] Как, например, в случае Венгрии, где не существует механизма полной индивидуальной жалобы, а существует только нормативная конституционная жалоба. Европейский суд по правам человека установил, что, следовательно, не обязательно обратиться в КС до обращения в Европейский суд. ECtHR, *Weller v. Hungary*, judgment of 31 march 2009.

[86] CDL-AD (2004) 024, Opinion on the Draft Constitutional Amendments with Regard to the Constitutional Court of Turkey. Тем не менее Венецианская комиссия поставила вопрос о том, должна ли индивидуальная жалоба ограничиваться конституционными правами, предусмотренными в Конвенции. Целью этого ограничения было исключение социальных прав из сферы действия индивидуальной жалобы. Проблема социальных прав является также причиной невключения полного "перечня прав" в Австрийскую Конституцию и ратификации Конвенции в качестве конституционного закона и, таким образом, создания возможности для представления индивидуальных жалоб в Австрийский Конституционный Суд относительно прав, содержавшихся в Конвенции и ее Протоколах.

альная жалоба в Конституционный Суд может стать национальным фильтром до направления дел в Европейский суд по правам человека[87]. Эта позиция была подтверждена также во многих исследованиях и научных работах относительно данного вопроса, которые объясняют, например, почему число жалоб против Соединенного Королевства до принятия Закона "О правах человека" от 1998 года было намного больше, чем против других государств, или сравнивают жалобы, представленные в Страсбургский Суд против Франции, с жалобами против Германии или Испании[88].

87. Чтобы стать таким фильтром и обязательным средством правовой защиты, которое необходимо исчерпать по смыслу статьи 35 (1) Конвенции, национальное средство должно быть эффективным согласно статье 13 Конвенции. Тем не менее вопрос о том, какой должна быть индивидуальная жалоба, чтобы считаться эффективной, является комплексным.

88. Ответ может быть разным в различных государствах. Даже в одной стране конституционная жалоба может быть эффективным средством для определенных нарушений Конвенции и неэффективным для других согласно прецедентному праву Страсбургского Суда. В частности, необходимо проводить различие между делами об утверждаемой чрезмерной длительности судопроизводства и делами о нарушениях "других" прав человека.

89. Для того чтобы определить, является ли средство эффективным по смыслу статьи 13, во внимание принимаются различные факторы. Когда лицо имеет обоснованную жалобу на нарушение его конвенционных прав, у него должно быть средство правовой защиты перед национальной властью, которая не обязательно должна быть судебной, но должна обладать соответствующими полномочиями по принятию решения по жалобе и обеспечению компенсации[89]. Договаривающиеся государства сами выбирают предоставляемое средство правовой защиты, а иногда и совокупность нескольких таких средств[90].

90. В случае индивидуальной жалобы в Конституционный Суд не рассматривается вопрос о том, что национальная власть должна быть судебной. Тем не менее можно обсудить вопрос о том, во всех ли случаях Конституционный Суд имеет соответствующие полномочия. В данном случае следует отметить, что Суд должен иметь возможность восстановить права на основании обязательного решения по делу. Простое декларативное решение относительно не-

[87] Такие индивидуальные жалобы были включены в пакет конституционных реформ, принятых на референдуме 12 сентября 2010 года.

[88] См., в числе прочих, A. STONESWEET, H. KELLER, *A Europe of Rights*, Oxford University Press, 2008; see also SZYMCZAK, *La Convention européenne des droits de l'homme et le juge constitutionnel national*, Bruylant, Bruxelles, 2007; D. AGNANOSTOU.

[89] Лицо также должно обращаться с жалобой на нарушение конвенционного права на национальном уровне. Отсутствие этого приведет к признанию факта неисчерпания внутригосударственных средств правовой защиты Европейским судом по правам человека, см., например, Debono v. Malta, no. 34539/02, decision of 10 June 2004.

[90] См. Silver v. UK, judgment of 25 March 1983.

конституционности не является достаточным средством правовой защиты, и жалоба должна быть "эффективной" как с правовой, так и с практической точек зрения[91]. Если нарушение конвенционных прав, а также Конституции, касается положительного обязательства, Суд должен иметь возможность дать указание государственным органам предпринять действие, которое они не предприняли в данном деле. Суд должен быть обязан рассмотреть дело или, по крайней мере, представленные жалобы. Суд должен также быть доступным; в случае необоснованных требований, касающихся, например, издержек или представительства, жалоба является "неэффективным средством правовой защиты". Кроме того, когда последствия действий являются необратимыми, Конституционный Суд должен иметь возможность предотвратить выполнение таких действий[92].

91. В рамках своего Доклада относительно эффективности внутригосударственных средств правовой защиты в контексте вопроса о чрезмерной продолжительности судопроизводства[93] Венецианская комиссия рассмотрела эффективность конституционной жалобы как средства правовой защиты. На основании прецедентного права Европейского суда по правам человека[94] Комиссия установила, что "обязательство организовать свою судебную систему в соответствии с требованиями статьи 6 § 1 Конвенции относится также к Конституционному Суду"[95]. Это означает, что если государство намеревается внедрить институт индивидуальной жалобы в Конституционный Суд, это должно быть сделано так, чтобы чрезмерно не продлить общую продолжительность судопроизводства. Следовательно, Суд должен иметь возможность и ресурсы, чтобы эффективно справиться с дополнительной нагрузкой[96].

92. Главным вопросом в рамках рассмотрения средств против чрезмерной длительности судопроизводства являются различия между превентивными, то есть имеющими положительное значение для прекращения производства по рассматриваемому делу (ускоряющие), и компенсационными средствами. Относительно этого Комиссия считает, что "с точки зрения прецедентного права Суда [Страсбургского] это является обязательством для достижения определенных целей, предусмотренных в статье 13. Даже когда ни одно из доступных средств правовой защиты, взятое в отдельности, не соответствует требованиям статьи 13, совокупность средств, предусмотренных по внутригосударственному праву, можно считать 'эффективной' с точки зрения данной статьи"[97]. Комиссия считает, что средство

[91] См. lhan v. Turkey, judgment of 27 June 2000, para. 58.
[92] См. Čonka v. Belgium, judgment of 5 February 2002, para. 79.
[93] CDL-AD (2006) 036rev, принятый Венецианской Комиссией на своем 69-ом Пленарном Заседании (Венеция, 15-16 декабря 2006 года).
[94] См. *Gast and Popp v. Germany,* judgment of 25 February 2005, para. 75.
[95] CDL-AD(2006)036rev, параграф 33.
[96] Относительно сомнений о разрешении индивидуальной жалобы в разумный срок, см. Belinger v. Slovenia, no. 42320/98, decision of 2 October 2001.
[97] Параграф 137.

правовой защиты может быть эффективным, если сочетает элементы как превентивных[98], так и компенсационных средств[99]:

> "182. В случаях, когда национальная правовая система не предусматривает превентивные средства правовой защиты (как в случае большинства внутригосударственных правовых систем), внутригосударственные власти не предоставляют человеку равноценную компенсацию по сравнению с тем, что он может получить в Страсбурге; в данном случае отсутствует принцип субсидиарности. При таких обстоятельствах человек может оспорить тот факт, что он больше не является жертвой, даже после получения (всего лишь) денежной компенсации на внутригосударственном уровне, а также то, что он обязан исчерпать рассматриваемое внутригосударственное средство.
>
> 183. В заключение Венецианская комиссия отмечает, что для полного соответствия требованиям статьи 13 Конвенции относительно требования разумного срока, предусмотренного в статье 6 §1 Конвенции, государства-члены Совета Европы в первую очередь должны обеспечить превентивные средства правовой защиты для предотвращения любых (дальнейших) неуместных задержек, пока судопроизводство не будет прекращено.

184. Кроме того, они должны обеспечить компенсационные средства правовой защиты за нарушения требования разумного срока, которые могут иметь место в ходе судопроизводства (до внедрения эффективных превентивных средств)".

93. Следовательно, **если государство намерено внедрить индивидуальную жалобу в Конституционный Суд с целью обеспечения национального средства правовой защиты или фильтра для дел, которые иначе будут направлены в Страсбургский суд, то есть с целью предусмотрения эффективного средства по смыслу статьи 13 Конвенции, и требовать его исчерпания в соответствии со статьей 35 (1), в результате данной процедуры должно обеспечиваться восста-**

[98] См. Slavicek v. Croatia, no. 20862/02, decision of 4 July 2002: *"Согласно новому закону каждый, кто считает, что разбирательство по определению его гражданских прав и обязанностей или при предъявлении ему любого уголовного обвинения не было завершено в разумный срок, может подать конституционную жалобу. Конституционный Суд должен рассмотреть такую жалобу и, если находит ее обоснованной, он должен установить срок для разрешения дела по существу, а также присудить компенсацию за чрезмерную длительность судопроизводства. Суд считает, что это средство правовой защиты, которое должно быть исчерпано заявителем для удовлетворения требований статьи 35 § 1 Конвенции.* "См. также Debono v. Malta, no. 34539/02, decision of 10 June 2004; Andrásik v. Slovakia, no. 57984/00, decision of 22 October 2002 and Fernandez-Molina Gonzalez and others v. Spain, no. 64359/01, decision of 8 October 2002.

[99] Компенсация должна быть равноценной тому, что заявитель мог получить в Страсбургском суде, см. Dubjakova v. Slovakia, no. 67299/01, decision of 10 October 2004: *"Тем не менее вопрос о том, является ли предоставленная компенсация разумной, должен быть установлен в свете всех обстоятельств дела. Они относятся не только к длительности судопроизводства в конкретном деле, но и к размеру компенсации, присужденной в соответствии с уровнем жизни в заинтересованном государстве, и к факту, что в национальной системе компенсация, как правило, присуждается и предоставляется быстрее, чем в случае разрешения дела [Страсбургским] Судом согласно статье 41 Конвенции".*

новление прав на основании обязательного решения по делу. Кроме того, Суд должен быть обязан рассмотреть дело, и не должно быть никаких необоснованных требований относительно судебных расходов или представительства.

94. **В ходе рассмотрения индивидуальной жалобы в Конституционном Суде последний должен иметь возможность дать эффективное указание о немедленном возобновлении и прекращении производства по делу в обычном суде или самому рассмотреть дело по существу при наличии жалобы о чрезмерной длительности судопроизводства. При данном виде доступа Конституционный Суд должен иметь возможность обеспечить компенсацию[100], равноценную той, которую заявитель может получить в Страсбургском суде.**

I.2. Рассматриваемые акты

95. Возможно рассмотрение соответствия различных видов правовых актов различным вышестоящим правовым нормам. В качестве объектов контроля выступают индивидуальные и нормативные правовые акты. В данном контексте под индивидуальными актами следует понимать административные акты, когда административный орган[101] принимает решение по конкретному делу, а также (окончательные) судебные решения. Нормативными актами являются международные договоры[102], законы и решения, имеющие силу закона, декреты и постановления исполнительной власти, акты органов местного самоуправления[103], имеющие общеобязательную силу, то есть не имеющие определенных или различимых адресатов.

96. В государствах с централизованным контролем обычно предусматривается конституционный контроль законов или актов, имеющих силу закона[104]. Это соответствует одной из традиционных целей внедрения централизованной конституционной юрисдикции, а именно защите конституционного строя. Контроль индивидуальных актов также становится все более и более распространенным, так как все больше государств внедряет институт полной конституционной жалобы.

97. В системах с децентрализованным контролем можно оспорить любой акт, относящийся к конкретному делу, будь то нормативный или индивидуальный. Сле-

[100] См., например, *Cocchiarella* judgment (ECtHR, GC, *Cocchiarella v. Italy*, 29 March 2006, параграфы 76-80 и 93- 97).

[101] Можно принять во внимание все виды административных органов, конституционно уполномоченных принимать такие акты, включая региональные или местные административные органы, даже при том, что в некоторых федеративных государствах есть федеральные конституционные суды, которые рассматривают акты, принятые федеральными властями, с точки зрения их соответствия Федеральной Конституции, например в Германии.

[102] Если они имеют подконституционный характер.

[103] Например, согласно статье 100.1 Конституции Армении решения органов местного самоуправления являются объектом конституционного контроля.

[104] *General Report, XIIth Congress of the Conference of European Constitutional Courts*, (A. Alen, M. Melchior), Brussels, 2002, стр.7, в: http://www.confcoconsteu.org/en/common/home.html, проверено 23 февраля 2009. Тем не менее следует отметить, что в Швейцарии Федеральный Верховный Суд рассматривает только соответствие кантональных законов федеральной Конституции.

довательно, лицо может оспорить конституционность любого закона, подлежащего применению в конкретном деле, любое постановление нижестоящего суда и любой административный акт в соответствии с применимым процессуальным законом. В Южной Африке обычный суд может признать нормативный акт (закон) неконституционным, но до вступления в силу это должно быть одобрено Конституционным Судом.

98. В некоторых государствах (в Венгрии, Белоруссии, Бельгии, Бразилии, Чили, Германии, Лихтенштейне, Перу, Польше, Словении, Южной Африке, "Бывшей Югославской Республике Македония") на основании индивидуальной жалобы Конституционный Суд может рассматривать нарушения, возникшие в результате пробела[105]. В Белоруссии Конституционный Суд рассматривает индивидуальные ходатайства на пробелы в нормативных правовых актах и (или) коллизии некоторых норм акта, поданные в Конституционный Суд во исполнение конституционного права обращаться с индивидуальным или коллективным ходатайством в государственные органы. Эти ходатайства не являются конституционной жалобой и не влекут рассмотрение конституционности нормативного правового акта Конституционным Судом.

99. **Венецианская комиссия предупреждает, что результатом предоставления Конституционному Суду полномочия по защите не только от нарушений конституционных прав, но также и от ошибок в толковании и применении норм, не являющихся нарушениями Конституции, станет перегрузка данного суда.**

I.3. Защищаемые права

100. Все рассматриваемые нами конституции предусматривают некоторые основные права или ссылаются на перечень основных прав, которые имеют конституционную или, по крайней мере, надзаконодательную силу. Однако не все эти права служат критериями контроля во всех случаях[106]: некоторые права имеют программный характер, что означает, что лицо не имеет средство правовой защиты против нарушений таких программных норм или национальных целей. Например, в случае социальных прав в некоторых государствах.

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[105] Это может стать поводом для конфликта с Парламентом, так как Конституционный Суд устанавливает, что пробел должен быть восполнен и указывает как. В Португалии не предусмотрен институт индивидуальной жалобы относительно пробелов, несмотря на то, что Конституционный Суд имеет полномочие осуществлять абстрактный контроль относительно пробелов (см. статью 283 Конституции Португалии). Подробный общий Доклад XIV Конференции Европейских конституционных судов, посвященный этой теме, опубликован Венецианской комиссией в Специальном бюллетене конституционного прецедентного права (2008), который можно найти на сайте http://www.lrkt.lt/conference/Pranesimai/XIV%20Congress%20General%20Report_LT.doc.

[106] Например, согласно статье 110 Конституции "Бывшей Югославской Республики Македония" в юрисдикцию Конституционного Суда входят "права и свободы человека и гражданина, касающиеся свободы убеждений, совести, мнений и публичного выражения мысли, создания и деятельности политических организаций и дискриминации граждан на основании пола, расовой, религиозной, национальной, социальной и политической принадлежности".

101. Международные договоры по правам человека[107], в частности Европейская конвенция по правам человека для государств-участников Совета Европы, имеют различную юридическую силу в государствах, рассматриваемых в данном Исследовании. Например, в Австрии ЕКПЧ имеет конституционную силу. Аналогично этому в Нидерландах относительно актов Парламента (в отличие от иных актов), конституционность которых не рассматривается, возможен контроль с точки зрения соответствия международным договорам, в том числе Конвенции. В Боснии и Герцоговине ЕКПЧ "обладает верховенством над другими законами"[108], из чего можно предположить, что она имеет надконституционную силу[109]. Но Конституционный Суд Боснии пока не дал окончательного ответа на этот вопрос[110]. Британский закон "О правах человека" от 1998 года и Закон Мальты "О Европейской конвенции" включают международные договоры во внутригосударственную правовую систему, предоставляя людям возможность непосредственно ссылаться на эти права. Во Франции, Италии[111], Лихтенштейне, Словении и "Бывшей Югославской Республике Македония"[112] Европейская конвенция обладает верховенством над законами, но имеет подконституционный характер. В Германии Европейская конвенция и ее протоколы имеют статус немецкого федерального закона (Gesetzesrang). Немецкие суды должны соблюдать и применять Конвенцию в ходе толкования национальных законов. На уровне конституционного права текст Конвенции и практика ЕСПЧ являются средствами толкования при установлении содержания и объема основных прав и основных конституционных принципов Основного закона, но это не ограничивает или не сокращает защиту основных прав человека согласно Основному закону (BVerfGE 111, 307). Следует отметить, что открытость большинства латиноамериканских конституций в отношении международного права и договоров относительно прав человека, таких как Американская конвенция "О правах человека", иногда даже подразумевает надконституционный характер международных договоров (например Колумбия и Венесуэла).

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[107] Статья 16 (2) Конституции Португалии предусматривает: "Предписания, содержащиеся в Конституции и законах и касающиеся основных прав, должны толковаться и находиться в полном соответствии со Всеобщей декларацией прав человека". Следовательно, критерием толкования в делах относительно основных прав является Всеобщая декларация прав человека, а не Европейская конвенция по правам человека. В отличие от последнего, Всеобщая декларация прав человека не является международным договором. В Португалии и в доктрине, и в судебной практике признано, что основные права должны толковаться в соответствии с различными международными механизмами по правам человека, при условии, что результатом превосходства норм, предусмотренных последними, является превосходство норм, устанавливающих высший уровень защиты основных прав.

[108] Статья II.2 Конституции.

[109] См. J. Marko, "Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance", *European Diversity and Autonomy Papers- EDAP* (2004), 7, в: http://www.eurac.edu/documents/edap/2004_edap07.pdf, проверено 3 июня 2009.

[110] CDL-AD(2008)027 Amicus curiae brief in the cases of *Sejdić and Finci v. Bosnia and Herzegovina* (Applications no. 27996/06 and 34836/06) pending before the European Court of Human Rights.

[111] См. решение no. 348 и 349/2007 Конституционного Суда Италии, после поправок от 2001 года к статье 117 Конституции Италии.

[112] См. I. Spirovski, "Constitutional Validity of Human Rights Treaties in the Republic of Macedonia: The Norms and the Courts", *Report for the World Conference on Constitutional Justice*, в: http://www.venice.coe.int/WCCJ/Papers/MKD_Spirovski_E.pdf, проверено 3 июня 2009.

102. Необязательно, чтобы защищаемые права были предусмотрены в Конституции[113] или были обеспечены правовой санкцией, они могут быть результатом судебного правотворчества. Основное значение нормы может быть "обнаружено" в судебной практике. В этом смысле особенно примечателен подход французского Конституционного Совета. Последний расширил круг защищаемых прав, предоставляя конституционный статус текстам, которые прежде были просто декларативными - Декларация прав человека и гражданина 1789 года и преамбула Конституции 1946 года.

Частичные заключения относительно Главы I

103. Только несколько государств из числа государств-членов Венецианской комиссии и государств, имеющих статус наблюдателей при Венецианской комиссии, не предусматривают один из видов индивидуального доступа для оспаривания конституционности нормы или индивидуального акта. Такими государствами являются Алжир, Тунис и Марокко (Франция больше не относится к данной группе после последней конституционной реформы). Относительно остальных государств система конституционного контроля может классифицироваться в соответствии с видом доступа. Различают прямой индивидуальный доступ, когда лицо может непосредственно оспаривать конституционность нормы или акта, и косвенный индивидуальный доступ, когда конституционность оспаривается только посредством государственных органов. Многие государства имеют смешанную систему, включающую как прямой, так и косвенный доступ к конституционному правосудию.

104. В рамках косвенного индивидуального доступа конституционность нормы могут оспаривать определенные органы. В их числе наиболее распространенными являются обычные суды посредством представления предварительных запросов, омбудсмены и другие конституционные органы, такие как депутаты и сенаторы.

105. Первой основной группой органов, которые могут оспаривать конституционность, являются обычные суды, представляющие предварительные запросы в конституционные суды или аналогичные органы. Данный вид является одним из самых распространенных методов косвенного индивидуального доступа. Относительно этого существует множество моделей. Данный вид контроля является довольно редким в системах с децентрализованным конституционным контролем, так как обычные суды сами осуществляют контроль. В некоторых государствах физические и юридические лица ходатайствуют перед обычным судом относительно представления предварительного запроса в Конституционный Суд. Есть го-

[113] Во многих государствах перечень прав человека неисчерпывающий и может изменяться, например согласно статье 42 Конституции Армении основные права и свободы человека и гражданина, закрепленные в Конституции, не исключают других прав и свобод, установленных законами и международными договорами. Согласно статье 55 Конституции России перечисление в Конституции Российской Федерации основных прав и свобод не должно толковаться как отрицание или умаление других общепризнанных прав и свобод человека и гражданина.

сударства, в которых, если лицо представляет ходатайство относительно "исключения неконституционности", обычный судья обязан рассмотреть его и мотивировать отказ направления вопроса в Конституционный Суд (например в Албании, Бразилии, Чили, Франции, Венгрии, Италии, Люксембурге, Мальте и Испании). В других государствах в данном случае представление запроса является обязательным (в Бельгии, Чешской Республике, "Бывшей Югославской Республике Македония", Румынии и Словении).

106. В большинстве государств Венецианской комиссии не предусмотрено право омбудсменов на обращение в суд. Тем не менее в государствах, предусматривающих такую возможность, омбудсмен может обратиться в обычный суд (например в Финляндии) или непосредственно в Конституционный Суд (например в Армении, Австрии, Азербайджане, Бразилии, Хорватии, Чешской Республике, Эстонии, Венгрии, Португалии, Испании, Молдове, Черногории, Словакии, Словении, Боснии и Герцеговине, Латвии, Польше, Российской Федерации, "Бывшей Югославской Республике Македония", Перу, Украине, Румынии и Южной Африке). Следует также отметить, что когда Омбудсмен может обратиться в Конституционный Суд, в рамках его полномочий находится оспаривание норм в связи с конкретным делом, рассматриваемым им. Тем не менее в некоторых государствах Омбудсмен может оспаривать норму в абстрактном порядке, как в случаях Азербайджана, Эстонии, Перу и Украины.

В таких системах Омбудсмен предоставляет возможность индивидуального доступа, хотя и косвенного. Венецианская комиссия считает омбудсменов элементом демократического общества, которые обеспечивают соблюдение прав человека. Следовательно, если существует институт Омбудсмена, рекомендуется предоставить последнему возможность инициировать конституционный контроль нормативных актов в интересах или по инициативе человека.

107. Другие органы, такие как Прокуратура (например в Армении, Азербайджане, Болгарии, Молдове, Португалии, Польше, России, Словакии) или члены Парламента, которые могут оспаривать конституционность нормы, могут обеспечить соответствие правовой системы Конституции.

108. Следовательно, индивидуальный доступ к конституционному правосудию является важным средством обеспечения соблюдения индивидуальных прав человека на конституционном уровне. Существует множество моделей и возможностей, но в них есть один общий позитивный элемент: большее число механизмов для предоставления возможности доступа к конституционному правосудию обеспечивает большую возможность эффективной защиты основных прав. Преимуществом косвенного индивидуального доступа является то, что органы, представляющие жалобы, хорошо осведомлены и имеют соответствующие юридические знания для формулирования обоснованного заявления. Они могут также служить фильтром для предотвращения перегрузки конституционных судов путем осуществления отбора заявлений, так как в данном случае не будут рассматриваться злоупотребляю-

щие или повторяющиеся жалобы. Кроме того, косвенный доступ играет существенную роль в предотвращении излишнего затягивания очевидных неконституционных ситуаций. Тем не менее косвенный доступ имеет определенные недостатки, так как его эффективность в большей степени зависит от полномочий данных органов по установлению потенциально неконституционных нормативных актов и их желания обращаться с предварительным запросом в Конституционный Суд или аналогичные органы. Следовательно, Венецианская комиссия считает преимущественным сопоставление косвенного доступа с одним из видов прямого доступа, так как это будет способствовать балансированию существующих различных механизмов.

109. Что касается прямого индивидуального доступа, следует отметить, что в рассматриваемых государствах существуют различные возможности и модели: 1) *actio popularis*, в случае которого каждый может представить жалобу относительно нормы после ее обнародования, не имея личный интерес в этом; 2) индивидуальное предложение, в случае которого заявитель может обратиться в Конституционный Суд с предложением о рассмотрении конституционности нормы, оставляя вопрос о рассмотрении данного вопроса на усмотрение суда; 3) quasi *actio popularis*, в случае которого необязательно, чтобы заявителю непосредственно был нанесен вред, но он может оспорить норму в связи с конкретным делом; 4) прямая индивидуальная жалоба, которая имеет различные модели. Из данных механизмов *actio popularis* создает самые очевидные условия для перегрузки Конституционного Суда. В государствах Совета Европы некоторые конституционные суды предоставляют возможность для применения механизмов полной прямой индивидуальной жалобы на индивидуальные акты. В данных государствах это является фильтром, сокращающим число дел, представляемых в Европейский суд по правам человека[114]. Аналогичная система встречается в латиноамериканских государствах в случае Межамериканского суда по правам человека. Очевидно, что в государствах, в которых предусмотрены механизмы полной прямой индивидуальной жалобы, число жалоб, предусмотренных в Европейской конвенции по правам человека относительно нарушений индивидуальных прав человека, меньше, чем в других государствах. Это предотвращает перегрузку Европейского суда по правам человека. Следовательно, должны существовать возможность представления индивидуальной жалобы в Конституционный Суд и эффективные конституционные средства. Кроме того, Конституционный или аналогичный суд должен быть быстрым средством правовой защиты, ускорять длительные процессы, а также предоставлять компенсацию в случаях чрезмерной длительности судопроизводства.

[114] См. A. STONESWEET, H. HELLER, *A Europe of rights: The impact of the ECHR on National legal Systems,* Oxford, OUP, 2008, часть 10.

II. Конституционное судопроизводство

II.1. Условия начала рассмотрения дела ("фильтры")

110. Конституционные или законодательные нормы относительно различных видов доступа и конституционного судопроизводства, как правило, включают процессуальные предпосылки или условия, которые заявитель должен соблюдать в заявлении. Несмотря на то, что целью вышеуказанного является облегчение нагрузки Конституционного Суда, в данном случае есть также угроза чрезмерного уменьшения возможности доступа в Суд.

111. В зависимости от вида обращения в Конституционный Суд, есть различные процессуальные условия допустимости. Тем не менее некоторые требования предъявляются к большему количеству дел: сроки, возможное обязательство быть юридически представленным.

II.1.1. Срок подачи заявлений

См. Таб. 1.1.2: Сроки для подачи заявлений

112. Встречаются разные сроки подачи заявлений. Целью предусмотрения сроков является правовая определенность, чтобы после определенного промежутка времени акт невозможно было оспорить. **Вышеуказанные сроки не должны быть слишком длительными и должны быть разумными, чтобы лицо имело возможность подготовить жалобу или чтобы юрист имел возможность ознакомиться с материалами дела для подготовки жалобы и осуществления защиты прав лица** (так как в некоторых государствах юридическое представительство является обязательным условием для представления индивидуальной жалобы). **Венецианская комиссия рекомендует, чтобы относительно индивидуальных актов Суд имел возможность продлить сроки** в случаях, когда заявитель не может их соблюдать не по своей вине или вине своего юриста или по другим непреодолимым причинам[115].

II.1.2.Обязательство быть юридически представленным

См. Обязательство быть юридически представленным

113. Предусмотрение юридического представительства имеет целью оказать помощь заявителю и повысить качество жалоб. Тем не менее юридическое представительство может иметь значительные финансовые последствия. Следовательно, отказ в оказании финансовой помощи или бесплатной юридической помощи равнозначен отказу в эффективном доступе в суд, особенно если юриди-

[115] Например, Германия, Закон “О Федеральном Конституционном Суде”, статья 93 (2); Словения, Закон “О Конституционном Суде”, статья 52 (3).

ческое представительство является обязательным[116]. Это означает, что **заявителям должна предоставляться бесплатная юридическая помощь, если это требуется вследствие их материального положения, для обеспечения их доступа к конституционному правосудию.**

114. Юридическое представительство обязательно в Андорре, Монако, Австрии, Азербайджане, Бразилии, Чешской Республике, Франции[117], Италии, Люксембурге, Польше, Португалии, Словакии, Испании, Швейцарии (если очевидно, что лицо "не может" самостоятельно представлять себя).

115. Это обязательство не предусмотрено в Албании, Армении, Бельгии, Хорватии, Эстонии, Грузии, Венгрии, Латвии, Лихтенштейне, Польше, Румынии, России, Словении, Южной Африке[118], Швеции, Швейцарии, "Бывшей Югославской Республике Македония" и Украине.

II.1.3. Судебные расходы

116. Судебные расходы на осуществление конституционного судопроизводства редко встречаются среди государств, рассматривающихся в данном Исследовании. Тем не менее в США[119] предусмотрена пошлина в размере 300 $ для представления иска *certiorari* в Верховный Суд, в России пошлина составляет однократный размер минимальной заработной платы, в Армении - пятикратный, в Швейцарии - минимум 200 и максимум 5000 швейцарских франков[120], а в Австрии - 220 евро. В Израиле пошлина, предусмотренная для представления заявления в Верховный Суд, составляет приблизительно 400 $, но при определенных условиях заявитель может представить ходатайство об освобождении от пошлины или о ее сокращении.

117. Венецианская комиссия рекомендует, чтобы с **точки зрения более всесторонней защиты прав человека судебные расходы были относительно невысокими и была возможность их сокращения в соответствии с финансовым**

[116] CDL-JU(2008)012 The use of international instruments for protecting individual rights, freedoms and legitimate interests through national legislation and the right to legal defence in Belarus: challenges and outlook.

[117] Юридическое представительство обязательно для того, чтобы юристы осуществляли представительство в суде. Тем не менее в рамках вопроса относительно предварительных запросов, обязательное юридическое представительство зависит от вида судопроизводства. Если сторона может выступать перед судьей без юриста, тогда она может представить предварительный запрос.

[118] В Южной Африке не предусмотрено обязательство быть юридически представленным. Согласно статье 4 (11) Регламента Конституционного Суда, если секретарь Суда обнаруживает, что сторона не имеет представителя, он должен направить сторону в орган или в учреждение, которые готовы и имеют возможность помочь стороне.

[119] Правило 38 Верховного Суда США.

[120] Верховный Суд может также воздержаться от наложения пошлины (статья 66, параграф 1 Закона "О Верховном Суде"). Такое случается, если заявителем является Конфедерация, кантон, коммуна, организация, осуществляющая публичные функции, или физическое или юридическое лицо, и если вопрос, представленный в Федеральный Верховный Суд, не является финансовым и относится к официальной деятельности соответствующей государственной организации (статья 66, параграф 4 Закона "О Верховном Суде").

положением заявителя. Их основной целью должно быть недопущение очевидных злоупотреблений[121].

II.1.4. Возобновление производства по делу

118. Решение Конституционного Суда относительно конституционности является окончательным. Следовательно, жалобы относительно одного и того же вопроса не принимаются к рассмотрению. Как правило, производство по делу возобновляется, когда раскрываются новые фактические обстоятельства, которые не могли быть известны сторонам[122], для исправления ошибок Конституционного Суда[123], в случае изменения Конституции[124] или при определенных условиях, когда Европейский суд по правам человека устанавливает, что имело место нарушение ЕКПЧ, которое также подразумевает нарушение Конституции.

II.1.5. Злоупотребление правом обращаться в Конституционный Суд

119. Стороны обязаны добросовестно пользоваться своими процессуальными правами[125]. Когда заявитель злоупотребляет этой обязанностью, искажается эффективность конституционного правосудия. И несмотря на то, что институт индивидуальной жалобы имеет важное значение для защиты прав человека, такое злоупотребление наносит ущерб конституционному строю, защищаемому конституционными судами. Согласно §9(4) Регламента Конституционного Суда России в случае повторного обращения заявителя в Конституционный Суд по вопросу, по

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[121] CDL(2008)065, Opinion on the draft laws amending and supplementing (1) the law on constitutional proceedings of Kyrgyzstan and (2) the law on the Constitutional Court of Kyrgyzstan, 2008.

[122] См., например, статью 34 Австрийского Закона “О Конституционном Суде”. В отличие от *“nova reperta” (вновь открывшиеся обстоятельства), “nova producta”, когда стороны представляют доказательства только после завершения судопроизводства (в первой инстанции), даже если они могли знать о них, как правило, исключается.*

[123] См. Правило 44 Верховного Суда США. Повторное слушание дела: “1. Ходатайство о пересмотре при-говора или решения Суда по существу подается в течение 25 дней со дня принятия приговора или решения, если Суд не сокращает или не продлевает этот срок.” А согласно статье 121 Закона Швейцарии “О Федеральном Верховном Суде”: *La révision d’un arrêt du Tribunal fédéral peut être demandée: a. si les dispositions concernant la composition du tribunal ou la récusation n’ont pas été observées; b. si le tribunal a accordé à une partie soit plus ou, sans que la loi ne le permette, autre chose que ce qu’elle a demandé, soit moins que ce que la partie adverse a reconnu devoir; c. si le tribunal n’a pas statué sur certaines conclusions; d. si, par inadvertance, le tribunal n’a pas pris en considération des faits pertinents qui ressortent du dossier.*

[124] Статья 68 (14) Закона “О Конституционном Суде” Армении гласит, что Конституционный Суд как минимум через 7 лет после принятия по какому-либо указанному в части 1 настоящей статьи делу постановления по существу в установленном настоящим Законом порядке, на основании представленного соответствующего обращения может пересмотреть свое упомянутое постановление, если: 1) изменилось положение Конституции, примененное по данному делу; 2) выявилось такое новое восприятие положения Конституции, примененного по данному делу, при наличии которого относительно одного и того же вопроса может быть принято иное постановление Конституционного Суда, и если данный вопрос имеет принципиальное конституционно-правовое значение.

[125] Например, Армения: статья 48 Закона “О Конституционном Суде”, Казахстан: статья 21 Закона “О Конституционном Совете”.

которому ранее было принято решение Конституционного Суда, заявителю вторично высылается копия соответствующего решения Конституционного Суда с одновременным уведомлением заявителя о том, что в дальнейшем переписка с ним по данному вопросу прекращается. Дальнейшие заявления одних и тех же лиц по одному и тому же вопросу оставляются без ответа. В других государствах предусмотрен штраф за представление злоупотребляющих жалоб[126].

II.1.6. Исчерпание средств правовой защиты

См. Таб. 1.1.4: Исчерпание средств правовой защиты и исключения.

120. Содержание понятия исчерпания средств правовой защиты может быть различным в соответствии с нормами, регулирующими данный институт; например, некоторые процессуальные кодексы не предусматривают систематический доступ в обычные верховные суды. Это типичное условие для представления полной или нормативной конституционной жалобы в Конституционный Суд, так как оно подчеркивает субсидиарный характер жалобы (например в Албании, Андорре, Армении, Австрии, Азербайджане, Бразилии, Хорватии, Чешской Республике, Эстонии, Германии, Венгрии, Республике Корея, Латвии, Лихтенштейне, Мальте, Черногории, Польше, Португалии, Словакии, Словении, Испании, Швейцарии и “Бывшей Югославской Республике Македония”).

121. В государствах с децентрализованным контролем нет такого предварительного условия. Индивидуальный или нормативный акт можно оспорить на основании нарушения Конституции на любой стадии судопроизводства.

122. В случаях, когда соблюдение этой нормы может причинить необратимый вред человеку, обычно не требуется исчерпание средств правовой защиты (например в Азербайджане, Хорватии, Чешской Республике, Германии, Латвии, Черногории, Словакии, Словении и Швейцарии).

II.1.7. Нарушение непосредственно и в настоящее время нарушает права и свободы заявителя

123. Это требование существует во всех государствах, где предусмотрен контроль в связи с конкретным делом. Если акт непосредственно и в настоящее время не нарушает права и свободы заявителя, то в результате его жалобы осуществляется абстрактный контроль. Тем не менее есть два исключения из этого требования. 1. Относительно условия быть "непосредственной" жертвой: некоторые законы о конституционном судопроизводстве (например предусмотрен-

[126] Например, согласно статье 34.2 Закона “О Федеральном Конституционном Суде Германии” последний может наложить штраф до 2600 евро, если представление конституционной жалобы или жалобы относительно результатов выборов или заявления о принятии временного распоряжения является злоупотреблением.

ные в Южной Африке нормы относительно права обращаться в Суд) уполномочивают любого действовать от имени пострадавшего. Это означает, что заявление и в данном случае связано с конкретным делом, но заявитель не является непосредственной жертвой. Кроме того, юридические представители (родственники, опекуны, а также государственные учреждения[127]) могут действовать от имени лица, которое само не имеет юридической возможности. 2. Некоторые законы содержат детали о природе нарушения. В большинстве государств нарушение основного права должно причинить вред заявителю, таким образом, отрицательно влияя на него. Кроме того, в некоторых внутригосударственных законах требуется, чтобы вред был достаточно значительным (например в Словении[128]).

II.1.8 Жалоба как надлежащее средство восстановления нарушенных прав и свобод заявителя

124. Если конституционное судопроизводство существенно не изменит положение заявителя, в рассмотрении обращения может быть отказано (например в Германии[129], Южной Африке[130] или Франции[131]). Это иногда трудно определить в ходе предварительного изучения обращения, **следовательно, отказ в рассмотрении дела возможен только в случаях, когда отсутствие эффективности решения Конституционного Суда как средства для обеспечения эффективного доступа к конституционному правосудию является очевидным.**

II.1.9. Письменная форма

125. Обращения в Конституционный Суд должны представляться в письменной форме, а иногда и соответствовать определенным правилам (как в случае Соединенных Штатов, где объем обращения в страницах и даже цвет папки документа предусмотрены правилами суда). Целями этих правил являются прозрачность и отслеживаемость. Тем не менее **заявителю должна быть предоставлена возможность исправить или завершить документ в течение определенного срока (см. ниже) и только при определенных условиях. Это особенно важно, когда формальные требования довольно строгие. Данное обстоятельство приобретает наибольшую важность, когда юридическое предста-**

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[127] См., например, статью 59 Закона “О Конституционном Суде Черногории” и статью 38 Конституции Южной Африки.

[128] Статья 55а Закона “О Конституционном Суде”.

[129] В удовлетворении обращения может быть отказано, если соответствующее заявление не будет иметь значения для изменения положения заявителя. Тем не менее данное требование (так называемый Rechtsschutzbedürfnis), как правило, считается выполненным.

[130] См. Решение CCT 86/06 от 10.02.2007, в CODICES.

[131] Такое решение не может быть обжаловано.

вительство не является обязательным (например в Хорватии[132], Эстонии[133], Словении[134], "Бывшей Югославской Республике Македония"). Это предупреждает отказ в рассмотрении дела по формальным причинам, несмотря на то, что нарушение еще имеет место.

II.1.10. Фильтры отбора дел по предварительным запросам судов для рассмотрения

См.Таб. 1.1.5: Рассмотрение дел по предварительным запросам судов

126. Предварительные запросы представляются в Конституционный Суд обычными судами. Специальные нормы относительно допустимости запроса существуют во многих государствах-членах Венецианской комиссии и в государствах, имеющих статус наблюдателей при Венецианской комиссии. Например, в Андорре, Азербайджане, Белоруссии, Чешской Республике, Грузии и Молдове Конституционный Суд может отказать в принятии предварительного запроса к рассмотрению по основаниям процессуальных ошибок или отсутствия соответствующих полномочий Конституционного Суда. Тем не менее в Албании, Эстонии[135], Венгрии, Литве и "Бывшей Югославской Республике Македония" Конституционный Суд в таком случае должен перенаправить запрос в обычный суд, предоставляя последнему возможность переформулировать вопрос[136]. В других государствах, например в Германии, это не предусмотрено. Многие конституционные суды отказывают в рассмотрении предварительного запроса, если решение по этому вопросу не будет иметь существенного значения для разрешения конкретного дела (например в Германии, Польше). В этом смысле Конституционный Суд рассматривает также соответствующее конкретное дело. **Следует, отметить, что Конституционный Суд не должен быть перегружен, и если обычные суды могут представлять предварительные запросы, они должны быть обоснованными.**

[132] См. статью 19.2 Конституционного закона "О Конституционном Суде Республики Хорватия".

[133] §20 Закона "О судопроизводстве в порядке конституционного надзора".

[134] *Только при представлении конституционной жалобы. См. статью 55 (1) Закона "О Конституционном Суде".*

[135] В Эстонии нет четкой "системы рассмотрения дел по предварительным запросам судов" как таковой. Обычные суды не уполномочены представлять предварительные запросы в Палату конституционного контроля Государственного суда (Решение Палаты конституционного контроля Государственного суда No. 3-4-1-2-04 от 1 апреля 2004 года, www.nc.ee/?id=407<http://www.nc.ee/?id=407>), а они сами принимают решение относительно конституционности, ссылаясь на практику Государственного суда по конституционным вопросам.

[136] См. *General Report, XIIth Congress of the Conference of European Constitutional Courts*, (A. Alen, M. Melchior), Brussels, 2002, стр.7, в: http://www.confcoconsteu.org/en/common/home.html, проверено 23 февраля 2009.

II.2. Вступление в процесс и соединение дел, касающихся одного и того же вопроса

См. Таб. 1.1.6: Соединение дел, касающихся одного и того же вопроса

127. В Армении, Австрии, Бельгии, Чешской Республике, Литве[137], Португалии[138], России, Словакии, Словении, Южной Африке[139], "Бывшей Югославской Республике Македония" и Соединенных Штатах, например, заявления, касающиеся одного и того же вопроса, могут или должны рассматриваться в одном производстве. В Израиле заявления, касающиеся одного и того же вопроса, могут быть представлены в ходе одного производства. Заявители могут ходатайствовать перед судом соединить их заявление с другим заявлением относительно одного и того же вопроса. Суд также может принять решение по ходатайству о вступлении соответствующих сторон в процесс.

128. В Бельгии, Франции, Греции и Испании каждый, кто имеет законный интерес в деле, может вступить в процесс.

129. Лица, имеющие законный интерес в деле, должны иметь возможность вступить в процесс[140]. Если есть много квазиидентичных дел, Суд должен иметь возможность принять решение по одному или нескольким образцовым делам и упростить производство по аналогичным жалобам с точки зрения недопустимости, а также правовых обоснований.

II.3. Иные существенные процессуальные правила

II.3.1. Состязательные системы

См. Таб. 1.1.7: Состязательные системы

130. Некоторые законы о Конституционном Суде (в том числе законы Армении, Азербайджана, Чешской Республики, Грузии, России и Сан-Марино) предусматривают состязательность конституционного судопроизводства. По сравнению с гражданским и уголовным процессом, в случае данного процесса не всегда очевидно, какую сторону представляют участники. Заявитель оспаривает конституционность акта (общего или индивидуального). Когда объектом контроля является общий акт, ответчиком может быть автор акта. Когда объектом контроля является индивидуальный акт, ответчиком может быть первый автор акта. Аналогично, если акт представляется в Конституционный Суд в ходе обычного судопроизводства, ответчик данного судопроизводства может быть ответчиком в Конституционном Суде.

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[137] Статья 41 Закона "О Конституционном Суде" гласит: "Если были представлены два или более заявлений относительно соответствия одного и того же правового акта Конституции или законам, Конституционный Суд может соединить их в одном производстве до начала судопроизводства".

[138] Относительно заявлений Омбудсмена и пересмотра Конституции.

[139] См. Решение CCT 24/08; CCT 52/08 от 21/01/2009, в CODICES.

[140] См., например, Постановление Конституционного Суда Армении от 15.04.2008 года ПКС-751, в соответствии с которым физические и юридические лица, права которых были нарушены законом, могут оспорить его в Суде.

131. Преимущество состязательности конституционного судопроизводства в том, что Суд может рассматривать различные точки зрения и оценивать обоснованность приведенных аргументов. Это возможно также при других формах, например, если стороны спора, а также представители заинтересованных групп, эксперты и представители исполнительной или законодательной власти имеют возможность представлять свои точки зрения. Следует отметить, что Конституционный Суд может по своей инициативе выяснять обстоятельства дела для установления правды, не ограничиваясь доказательствами, представленными сторонами[141].

132. Заявителю[142] или инициатору несостязательного процесса[143] необходимо предоставить возможность представить свою точку зрения в Конституционном Суде. **Венецианская комиссия одобряет регулирование, предусмотренное в Германии[144] и Испании, согласно которому в случаях, когда конституционная жалоба направлена на решение суда, Суд предоставляет возможность дать объяснения также и стороне, в пользу которой было принято решение[145].** Несмотря на это, не обязательно заслушивать объяснения суда, решение которого рассматривается, так как последнее уже отражает его позицию, но иногда суд также является стороной судопроизводства по предварительным запросам судов (например в Австрии, Польше, Словакии, Словении).

133. Состязательность не обязательно подразумевает устное судопроизводство. Рассмотрение дел обычно осуществляется по письменной процедуре, когда каждая сторона представляет свои доводы[146].

II.3.2. Гласность судопроизводства

См. Таб. 1.1.8: Открытые заседания и исключения

134. Устные заседания, как правило, проводятся открыто, но Конституционный Суд может рассмотреть дело в закрытом заседании из соображения других законных общественных интересов и интересов сторон (например в Албании, Армении,

[141] CDL-AD (2001)005, Opinion on the Draft Law on the Constitutional Court of Azerbaijan.

[142] CDL(1997)018rev Opinion on the law on the Constitutional Court of Ukraine, adopted at the 31st plenary meeting of the Commission.

[143] H. Steinberger, указанная работа.

[144] Статья 94 (3) Закона "О Федеральном Конституционном Суде" гласит: "Если конституционная жалоба относительно неконституционности направлена на решение суда, в Федеральном Конституционном Суде может выступить также сторона, в чью пользу было принято решение."

[145] CDL-AD(2008)030 Opinion on the Draft Law on the Constitutional Court of the Republic of Montenegro; Стороны обычного судопроизводства могут стать сторонами конституционного судопроизводства также в Албании, Андорре, Австрии, Белоруссии, Бельгии, Кипре, Германии, Италии, Латвии, Румынии и "Бывшей Югославской Республике Македония". См. *General Report, XIIth Congress of the Conference of European Constitutional Courts*, (A. Alen, M. Melchior), Brussels, 2002, стр.7, в: http://www.confcoconsteu.org/en/common/home.html, проверено 23 февраля 2009., стр.26.

[146] CDL-AD (2004) 035 Opinion on the Draft Federal Constitutional Law "On Modifications and Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation".

Азербайджане, Бельгии, Боснии и Герцеговине, Хорватии, Кипре, Чешской Республике, Дании, Грузии, Израиле, Италии, Лихтенштейне, Литве, Молдове, России, Сербии, Словении, Южной Африке, Швейцарии, “Бывшей Югославской Республике Македония“).

135. **С точки зрения защиты прав человека предпочтительно публичное судопроизводство, по крайней мере, по делам относительно индивидуальных прав.** Европейский суд по правам человека неоднократно констатировал, что рассмотрение дел в Конституционном Суде, если это является эффективным средством правовой защиты, подпадает под статью 6 (1) ЕКПЧ. Возможность выбора относится только к объему и способу реализации данного принципа. Следовательно, **конституционное судопроизводство должно проводиться открыто, за исключением только четко определенных случаев.**

II.3.3. Проведение устных разбирательств

См. Таб. 1.1.9: Устные разбирательства и исключения

136. Преимуществом устных разбирательств также являются возможность непосредственного сопоставления позиций и тот факт, что человеку иногда легче представить свою точку зрения устно, не будучи обязанным соблюдать строгие формальные правила, применяемые в письменных процедурах. С другой стороны, так как важно, чтобы в ходе устных разбирательств сторонам предоставлялась эффективная возможность представить свою точку зрения, рассмотрение дела в таком порядке требует довольно длительных сроков. Вышеуказанные обстоятельства стали поводом для существования трех моделей в государствах, рассматриваемых в данном Исследовании: i) модель, где существуют только устные разбирательства; ii) модель, где решения основываются только на письменных документах, то есть письменная; iii) модель, где осуществляются как письменные, так и устные разбирательства. В Албании, Австрии, Азербайджане, Чешской Республике, Израиле, Италии, Германии, Лихтенштейне, Нидерландах, Словении, Украине, “Бывшей Югославской Республике Македония” и Соединенных Штатах рассмотрение дела осуществляется по устной процедуре, если не принято иное решение, что означает, что рассмотрение дела может осуществляться как по устной, так и по письменной процедуре в зависимости от обстоятельств конкретного дела. В Южной Африке Конституционный Суд принимает решение только на основании письменных объяснений и в случае необходимости может давать указания об устном представлении доказательств. На практике конституционные суды редко рассматривают дела по устной процедуре (например в Германии[147] и Словении). В Венгрии и Португалии дела рассматриваются только по письменной

[147] R. Jaeger, S. Broß, *“Die Beziehungen zwischen den Verfassungsgerichtshöfen und den übrigen einzelstaatlichen Rechtsprechungsorganen, einschließlich der diesbezüglichen Interferenz des Handelns der europäischen Rechtsprechungsorgane”,* доклад на XII Конференции европейских конституционных судов, стр. 22.

процедуре[148]. А в Швейцарии дела рассматриваются по устной процедуре в исключительных случаях; контроль, как правило, осуществляется на основании письменных объяснений, представленных сторонами.

137. В государствах с децентрализованным контролем рассмотрение дела редко осуществляется по устной процедуре, поскольку в данном случае применяются обычные процессуальные нормы (например в Дании). В Швеции рассмотрение дела в Верховном Суде может осуществляться по устной процедуре, но обычно осуществляется по письменной процедуре.

138. **Венецианская комиссия отмечает, что широко признается наличие возможности у Конституционного Суда не рассматривать или ограничивать возможность рассмотрения дел по устной процедуре, если это необходимо для защиты общественных интересов или интересов сторон, таких как процессуальная эффективность (длительность и расходы судопроизводства)[149].**

II.4. Временные меры

II.4.1. Приостановление действия

См. Таб. 1.1.10: Приостановление действия

139. Приостановление действия оспариваемого нормативного и/или индивидуального акта является необходимым средством для обеспечения защиты человека от необратимых последствий. Именно Конституционный Суд должен принимать решение по данному вопросу (например в Австрии, Албании, Бельгии, Боснии и Герцеговине, Хорватии, Эстонии, Франции[150], Грузии, Германии, Израиле, Франции, Лихтенштейне, Польше, Сербии, Словении, Испании, Швейцарии, "Бывшей Югославской Республике Македония", Турции и Соединенных Штатах). Тем не менее некоторые государства не предусматривают возможность приостановления или прекращения действия акта из соображений правовой безопасности (например Алжир, Андорра, Азербайджан, Белоруссия, Болгария, Кипр, Чешская Республика, Франция, Венгрия, Латвия, Люксембург, Молдова, Черногория, Португалия, Румыния[151], Россия, Швеция и Украина), тогда как, например, в России Конституционный Суд может обратиться к соответствующим органам с предложением о приостановлении действия оспариваемого акта. В государствах с децентрализованным конституционным контролем приостановление действия акта

[148] В Португалии существует только одно исключение из этого правила в случае рассмотрения дел о признании осуществления организацией фашистской идеологии: в данном случае дело об упразднении организации рассматривается в судебном заседании.

[149] CDL-AD (2004) 035 Opinion on the Draft Federal Constitutional Law "On Modifications and Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation".

[150] Во Франции законодательный акт может быть признан недействительным (превентивный контроль) или утратившим юридическую силу (последующий контроль) с действием erga omnes.

[151] Согласно последним поправкам к Закону "Об организации и деятельности Конституционного Суда" (Законом no.177 от 2010 года) обычное судопроизводство больше не должно быть приостановлено, если суд представляет заявление относительно исключения неконституционности в Конституционный Суд.

встречается редко (например в Дании). В Южной Африке суд, рассматривая конституционный вопрос, может издать любой обоснованный и объективный приказ, в том числе временное распоряжение. Это в соответствующих случаях касается приостановления действия нормативного акта (закона). В Литве действие оспариваемого акта может быть приостановлено только в случаях, когда Президент Республики обращается в Конституционный Суд с запросом о рассмотрении соответствия актов Правительства Конституции и законам или когда Парламент обращается в Конституционный Суд с запросом о рассмотрении соответствия законов Литовской Республики или других актов, принятых Парламентом, Конституции, соответствия указов Президента Республики, актов Правительства Конституции и законам (статья 26 Закона "О Конституционном Суде"), но не в случаях, когда обычный суд обращается в Конституционный Суд с предварительным запросом.

140. **Венецианская комиссия одобряет наличие полномочия по приостановлению действия оспариваемого индивидуального и/или нормативного акта при установлении его неконституционности, если действие соответствующего акта в дальнейшем может нанести вред или стать причиной нарушения, которые не могут быть возмещены или восстановлены[152]. Условия для приостановления не должны быть слишком строгими[153]. Тем не менее особенно относительно нормативных актов необходимо принять во внимание неприменение акта постольку, поскольку применение может нанести вред или стать причиной нарушения, которые не могут быть возмещены или восстановлены.**

II.4.2. Приостановление производства по делу в обычных судах

См. Таб. 1.1.11: Приостановление производства по делу в обычных судах

141. Приостановление производства по делу в обычных судах может иметь место в случае представления предварительного запроса. В Андорре, Австрии, Армении, Бельгии, Белоруссии, Чили, Кипре, Хорватии, Чешской Республике, Латвии, Лихтенштейне, Литве, Люксембурге, Польше, России, Словении, Словакии, Турции[154], "Бывшей Югославской Республике Македония" и Украине обратив-

[152] См., например, CDL-AD(2004)024 Opinion on the draft constitutional amendments with regard to the Constitutional Court of Turkey.

[153] CDL-AD(2007)039 Comments on the Draft Law on the Constitutional Court of the Republic of Serbia.

[154] Согласно статье 152 Конституции Турции "если Суд, рассматривающий дело, считает, что закон или решение, имеющее силу закона, подлежащее применению в конкретном деле, является неконституционным, или если он убежден в обоснованности жалобы о неконституционности, представленной стороной, он приостанавливает производство по делу до принятия решения Конституционным Судом. Если суд не убежден в обоснованности жалобы о неконституционности, такая жалоба с основным решением рассматривается компетентным апелляционным органом. Конституционный Суд разрешает вопрос и оглашает решение **в течение 5 месяцев** со дня представления вопроса. Если решение не принимается в данный срок, суд разрешает дело на основании существующего правового регулирования. Тем не менее если решение по существу является окончательным, суд должен соблюдать его".

шийся суд приостанавливает производство по делу в любом случае. В Австрии приостановление связано со следующим: “Только такие меры…которые решение Конституционного Суда не может затронуть или которые окончательно не разрешают вопрос, и применение которых не может быть приостановлено до принятия решения Конституционного Суда” (статья 62.3 Закона “О Конституционном Суде”)[155]. В Словении обычный суд приостанавливает производство по делу, когда вопрос конституционности касается закона, но в случае подзаконных актов обычные суды могут использовать возможность исключения незаконности. Регулирование вопроса в Хорватии тоже основывается на вышеуказанной аргументации: если обычный суд имеет сомнения относительно закона, подлежащего применению, он приостанавливает производство по делу; если сомнение касается административного акта, суд непосредственно применяет закон, на котором основан акт и представляет акт в Конституционный Суд. Таким образом, производство по делу не приостанавливается, если нет полной необходимости разрешения рассматриваемого дела. В Испании обычный суд может представить запрос только после окончания слушания дела и до совещания по поводу принятия решения; следовательно, решение Конституционного Суда необходимо для принятия решения по делу, даже если производство в обычном суде продолжается, и даже при наличии сомнений относительно конституционности положения. В Андорре производство по делу продолжается, но возможность принятия решения ограничена: должно быть установлено, что решение Конституционного Трибунала не будет иметь значение для решения обычного суда.

142**. Обычное судопроизводство должно быть приостановлено в случае обращения с предварительным запросом в Конституционный Суд в связи с конкретным делом. Это может иметь место как *ipso iure*, так и по решению соответствующего суда. В любом случае обычный судья не должен быть обязан применять закон, который он считает неконституционным и решение о конституционности которого должно быть принято Конституционным Судом в связи с конкретным делом.**

II.4.3. Судебные предписания

См. Таб. 1.1.12: Судебные предписания

143. В некоторых государствах Конституционный Суд может дать приказ о том, что государственные органы должны предпринять положительные действия для обеспечения непричинения дальнейшего вреда заявителю (например в Германии, Мальте, Лихтенштейне, Южной Африке, Швейцарии).

[155] *General Report, XIIth Congress of the Conference of European Constitutional Courts,* (A. Alen, M. Melchior), Brussels, 2002, стр.7, в: http://www.confcoconsteu.org/en/common/home.html, проверено 23 февраля 2009., стр.37.

II. 5. Прекращение производства по делу

II.5.1. Прекращение производства по делу в случае отзыва обращения

144. В случае нормативного контроля необязательно, чтобы Конституционный Суд прекратил производство по делу в случае отзыва обращения. **В данном случае Суд должен иметь возможность продолжить рассмотрение дела, если это исходит из интересов общества или государства.** Вышеуказанное является выражением независимости конституционных судов и их функции по защите Конституции, даже если заявитель больше не является стороной судопроизводства.

145. То же самое возможно в случае контроля на основании полной конституционной жалобы, если Конституционный Суд может инициировать контроль нормативного акта, лежащего в основе индивидуального решения или акта; даже в случае отзыва индивидуальной жалобы Конституционный Суд может иметь возможность продолжить контроль нормативного акта. Несмотря на это, некоторые законы “О Конституционном Суде” предусматривают прекращение производства по делу относительно нормативных актов в случае отзыва обращения (например в Андорре, Австрии[156], Чешской Республике, Польше, Венгрии, России, Сербии, Швейцарии, “Бывшей Югославской Республике Македония”, Украине).

146. Что касается индивидуальных актов, для слушания дела, как правило, необходимо, чтобы заявитель поддержал свое ходатайство (например, в Австрии, Черногории, Словении). Тем не менее Конституционный Суд Словакии может отклонить отзыв полной конституционной жалобы. А в Португалии точка зрения такова, что если представляется жалоба, заявитель больше не может отозвать ее, следовательно, обращение не может быть отозвано.

II.5.2. Прекращение производства по делу в случае утраты силы оспариваемого акта

147. Нет общего мнения относительно возможности Конституционного Суда продолжить рассмотрение дела в данном случае. В некоторых государствах Суд немедленно прекращает производство по делу (например в Андорре, Австрии, Чешской Республике[157], Белоруссии, Франции, Черногории[158], Португалии, Словакии[159], Швейцарии, “Бывшей Югославской Республике Македония”, Украине). В других продолжает контроль и признает акт неконституционным; осуществление

[156] Тем не менее согласно статьям 139.2 и 140.2 Закона “О Федеральном Конституционном Суде” процесс по нормоконтролю, инициированный ex officio Конституционным Судом в ходе осуществляемого им иного судопроизводства, продолжится во всяком случае, даже если было принято решение в пользу соответствующей стороны судопроизводства.

[157] Статья 67 Закона “О Конституционном Суде”.

[158] Статья 65 Закона “О Конституционном Суде”.

[159] Относительно этого Конституционный Суд Словакии впервые, в отличие от своей предыдущей практики, признал возможность обычных судов оспаривать нормативные акты, которые являются недействительными, но еще подлежат применению в конкретнем деле.

такого контроля полностью находится в усмотрении суда (например в Лихтенштейне, Сербии) или могут быть ограничения относительно продолжения контроля только по некоторым основаниям (например в Польше и России, где возможно продолжить контроль, если это необходимо для предотвращения нарушений прав человека). В Литве признание оспариваемого правового акта недействительным является основанием для прекращения начатого судопроизводства (статья 69.4 Закона "О Конституционном Суде"), но в практике Суда в случаях, когда обычный суд, рассматривающий дело, обращается в Конституционный Суд относительно соответствия закона или другого правового акта, подлежащего применению в данном деле, Конституции (другому вышестоящему правовому акту), Конституционный Суд обязан рассмотреть запрос суда независимо от обстоятельства, остается ли оспариваемый закон или другой правовой акт в силе (см., например, Решение от 27 марта 2009 года, часть I, пункт 8 мотивировочной части решения Суда).

148. **Одного прекращения производства по делу может быть недостаточно для обеспечения защиты прав человека в случаях конкретного контроля или индивидуальных жалоб. Тем не менее является спорным вопрос о том, должен ли Конституционный Суд иметь возможность назначить денежную компенсацию за нарушение права с целью компенсирования за упомянутое нарушение.**

II.6. Сроки принятия решений

149. **Сроки принятия решений, если они предусмотрены, не должны быть слишком короткими, чтобы предоставить Конституционному Суду возможность полностью рассмотреть дело, и не должны быть слишком длительными, препятствуя эффективности защиты прав человека посредством конституционного правосудия.** С точки зрения эффективности конституционного правосудия сроки часто невозможно соблюсти, следовательно, Конституционный Суд должен иметь возможность в исключительных случаях продлить вышеуказанные сроки[160].

Частичные заключения относительно Главы II

150. Есть некоторые требования, которые, как правило, необходимо соблюдать в ходе конституционного судопроизводства. 1. Для начала производства по делу необходимо соблюдать сроки подачи заявлений, предусмотренные в качестве фильтра предотвращения перегрузки суда. Они должны быть разумными и дать возможность, чтобы лицо подготовило жалобу, или предоставить достаточное время, чтобы юрист смог ознакомиться с материалами дела. Конституционный Суд должен также иметь возможность продлить данные сроки в исключительных слу-

[160] Например в Армении, согласно Закону "О Конституционном Суде" в случае как абстрактного, так и конкретного контроля Конституционный Суд принимает решение не позднее чем через шесть месяцев после регистрации обращения, и мотивированным решением Конституционного Суда срок рассмотрения дела может быть продлен, но не более чем на три месяца.

чаях. 2. В случае необходимости должна предоставляться бесплатная юридическая помощь. 3. Венецианская комиссия рекомендует, чтобы судебные расходы были умеренными и их основной целью было недопущение злоупотребляющих заявлений. При их определении должно быть принято во внимание финансовое положение заявителя. 4. Решения Конституционного Суда окончательны, и слушание дела может возобновляться только при исключительных обстоятельствах (например наличие осуждающего решения Европейского суда по правам человека). 5. С целью обеспечения эффективности индивидуального доступа к конституционному правосудию стороны должны действовать добросовестно, не представлять злоупотребляющие заявления и обращаться только после исчерпания других возможных средств правовой защиты. Исчерпание средств правовой защиты является необходимым требованием в государствах с централизованным контролем, которое предусмотрено с целью предупреждения перегрузки Конституционного Суда. 6. Доступное средство правовой защиты должно быть достаточным для возмещения причиненного заявителю вреда. В число процессуальных принципов, применяющихся в ходе конституционного контроля, входит принцип состязательности, при котором сторонам предыдущего судопроизводства предоставляется возможность представлять свою точку зрения. Следует также отметить, что Конституционный Суд должен принимать решения в течение соответствующего срока и не допускать чрезмерное затягивание; соблюдение сроков необходимо для обеспечения эффективности судопроизводства.

151. Что касается временных мер, Венецианская комиссия высказывается в пользу наличия полномочия по приостановлению действия оспариваемого индивидуального и/или нормативного акта при установлении его неконституционности, если действие соответствующего акта в дальнейшем может нанести вред или стать причиной нарушения, которые не могут быть возмещены или восстановлены.

152. Конституционный Суд должен иметь возможность продолжить рассмотрение обращения даже в случае его отзыва для защиты общественных интересов. Не существует общего согласованного мнения относительно возможности Конституционного Суда продолжить рассмотрение дела в случаях, когда оспариваемый акт утратил силу. Однако следует отметить, что одного прекращения производства по делу может быть недостаточно для обеспечения защиты прав человека в случаях конкретного контроля или индивидуальных жалоб и что необходимы механизмы компенсации.

III. Решение

153. Когда Конституционный Суд разрешает дело по индивидуальной жалобе, по обращению судов, Омбудсмена или других органов в связи с конкретным делом, его решение непосредственно затрагивает правовое положение лица, а в случае представления абстрактного *actio popularis* оно может затронуть. Фактически, вопрос не только в том, принимает ли Конституционный Суд решение в пользу заявителя или нет; сфера действия решения, а также его возможная обратная сила определяют, можно ли эффективно устранить нарушение прав человека (III.1).

154. Решение может иметь различные последствия. Оно может распространяться на определенный круг лиц или на всех (см. ниже.). Решение Конституционного Суда может распространяться на отношения, возникшие после его принятия, или может иметь обратную силу (см. ниже.). Кроме того, Конституционный Суд или аналогичный орган может полностью или частично отменить или признать недействительным оспариваемое положение, но последнее может остаться в силе и просто толковаться определенным образом (см. ниже III.4.).

III.1. Пределы контроля

155. Если Конституционный Суд принимает обращение (полностью или частично) к рассмотрению, невозможно сократить пределы контроля. Суд должен в любом случае дать ответы на все поставленные и признанные допустимыми вопросы и не может отказаться от этого. Тем не менее возникают вопросы о том, может ли он выйти за пределы заявления и на каком основании.

156. В некоторых государствах контроль, осуществляемый Конституционным Судом, ограничивается представленным заявлением (исключается контроль *ultra petitur*), как в случаях Андорры[162], Бельгии[163], Чешской Республики, Франции относительно последующего контроля, Грузии[164], Венгрии, Люксембурга, Черногории[165], Польши[166], России и Швейцарии[167]. Конституционный Суд может лишить

[161] General Report, XIIth Congress of the Conference of European Constitutional Courts, (A. Alen, M. Melchior), Brussels, 2002, p.7, в: http://www.confcoconsteu.org/en/common/home.html, проверено 23 февраля 2009.

[162] Статья 7 Закона "О Конституционном Суде" гласит: "3. Решение или приговор, разрешающий дело, который был признан допустимым, не может выйти за пределы представленных сторонами соответствующих жалоб".

[163] C.A. n° 12/86 du 25 mars 1986, 3.B.1.

[164] Статья 26 Закона "О Конституционном Суде" гласит: " Конституционный Суд не рассматривает соответствие всего закона или другого нормативного акта Конституции, если истец или заявитель требует признать только определенное положение/положения закона или иного нормативного акта неконституционным".

[165] Статья 55 Закона "О Конституционном Суде" гласит: "Конституционный Суд принимает решение только относительно тех нарушений прав или свобод человека, которые были указаны в конституционной жалобе".

[166] Статья 66 Закона "О Конституционном Трибунале" гласит: "При принятии решения Трибунал не может выйти за пределы заявления, вопроса права или жалобы".

[167] Статья 107 Федерального Закона "Об организации судопроизводства" гласит: Le Tribunal fédéral ne peut aller au-delà des conclusions des parties.

акт юридической силы только в той части, относительно которой было представлено заявление, и ссылаясь на те конституционные положения или принципы, которые упоминались в заявлении. Это часто вызывает проблемы, так как в неквалифицированно представленных обращениях, как правило, четко не устанавливаются основания, по которым оспаривается акт, или сам оспариваемый акт, и следовательно, возможность удовлетворения заявления невелика[168].

157. Из этого следует, что Конституционный Суд может расширить пределы контроля, выходя за пределы заявления, в двух случаях: 1) Суд может рассмотреть конституционность других взаимосвязанных норм; 2) или расширить круг конституционных или других вышестоящих норм, которые служат критериями контроля. Более ограничительный подход требует ограничения контроля материальными вопросами, а более широкий подход требует также включения процессуальных вопросов в сферу контроля.

III.1.1. Расширение круга рассматриваемых норм

См. Таб. 1.1.13: Расширение круга рассматриваемых норм

158. В случае обращений о рассмотрении нормативных актов Конституционный Суд может рассмотреть конституционность не только оспариваемых норм, но при соответствующих условиях также и всего закона или акта или других взаимосвязанных нормативных актов (например в Алжире, Австрии[169], Белоруссии, Бразилии, Хорватии, Чешской Республике, Эстонии[170], Франции относительно предварительного контроля, Венгрии, Лихтенштейне, Литве[171], Сербии, Словакии, Словении, Южной Африке, "Бывшей Югославской Республике Македония" и Турции и, в меньшей степени, в Германии[172],

[168] Например, Верховный Суд Соединенных Штатов сам решает пределы заявления и осуществляет контроль не только относительно четко изложенных вопросов, но также относительно вопросов, подразумеваемых из заявления: "Суд рассматривает только вопросы, изложенные в заявлении, или подразумеваемые из них." В Португалии, во избежание проблем, возникающих в связи с неквалифицированно представленными обращениями, докладчик может пригласить заявителя для определения обжалуемого решения, конституционные нормы или принципы которого, по его мнению, были нарушены (даже если суд не ограничен ими, см. 4.1.1.3.), а также для указания документа из материалов дела, в котором он изначально поставил вопрос о неконституционности или незаконности, если это еще не было сделано.

[169] Статья 140.3 Закона "О Федеральном Конституционном Суде".

[170] Например, Решение Государственного суда No 3-4-1-7-08, http://www.nc.ee/?id=1037.

[171] Суд считает, что "Конституционный Суд, установив, что положения закона, соответствие которых Конституции не оспаривается заявителем, но которые влияют на конституционность общественных отношений, регулируемых оспариваемым законом, противоречат Конституции, должнен констатировать это" (Решения от 9 ноября 2001 года, 14 января 2002 года, 19 июня 2002 года, 27 июня 2007 года, 3 марта 2009 года, 2 сентября 2009 года).

[172] Суд может сделать это на основании части 2 статьи 78 Закона "О Федеральном Конституционном Суде", касающейся абстрактного контроля законов.

Италии[173], Молдове, Румынии, Испании и Украине). Таким образом, Суд сопоставляет субъективную и объективную функции конституционного контроля: заявление становится поводом для более общего контроля, приводящего к развитию конституционного строя, а иногда и к лишению большего числа положений, нарушающих основные субъективные права, юридической силы. В этом смысле внимания заслуживает регулирование, предусмотренное статьей 87 Закона Российской Федерации "О Конституционном Суде", согласно которому признание положений не соответствующими Конституции Российской Федерации является основанием для отмены других норм, основанных на признанных неконституционными положениях либо воспроизводящих их или содержащих такие же положения, какие были признаны неконституционными.

159. Вопрос является более безотлагательным в случае полной конституционной жалобы на индивидуальный акт. Конституционный Суд может только лишить индивидуальный акт юридической силы, но не может отменить нормативный акт, на основании которого он был принят, даже если этот акт является неконституционным, и нарушение, на которое представлена полная конституционная жалоба, является результатом правильного применения неконституционного нормативного акта. Таким образом, в данном случае нормативный акт сохраняет юридическую силу, и остается возможность нарушений основных прав других лиц[174].

160. Однако такое встречается довольно редко (например в Швейцарии, где в результате жалобы[175] невозможно начать нормативный контроль).

161. В Эстонии, Лихтенштейне и Литве Конституционный Суд отменяет нормативный акт в том же судопроизводстве, в Германии Конституционный Суд может

[173] В Конституционном Суде Италии распространена практика так называемых "толковательных решений", когда часто отклоняются обращения, в которых оспаривается конституционность нормы или акта на основании неправильного толкования закона, данного судьей. Конституционный Суд установил, что другое толкование правовой нормы делает ее конституционной (это "sentenze interpretative di rigetto"). Толковательные решения формально обязательны только для соответствующего судьи, но не для других судей или судов. Судьи, которые не желают соблюдать толкование, данное Конституционным Судом, не могут применять толкование, признанное Конституционным Судом неконституционным. Они должны представить новый предварительный запрос в Конституционный Суд, разъясняя свое иное толкование данной нормы. Конституционный Суд в данном случае решает, является ли данное новое толкование, предложенное судьей, обоснованным и конституционным, и если оно является таковым, он принимает "sentehnze interpretative di accoglimento" (толковательное решение, признающее иное толкование соответствующим Конституции). Если КС не признает толкование, предложенное судьей, он принимает предупредительное решение, адресованное Парламенту, чтобы у законодателя были конкретные указания и предложения для приведения законодательства в четкое соответствие с Конституцией (и исключает возможные неконституционные толкования). Если Суд считает, что судья прав и представленное положение является неконституционным, оно утрачивает силу. КС может сам "восполнить" пробел (sentenze additive) или установить общий принцип, который судья должен применить в конкретном деле (sentenze additive di principio).

[174] Противоположная ситуация тоже является критической, то есть когда в рамках нормативной конституционной жалобы Конституционный Суд не может рассмотреть конституционность индивидуального акта, принятого на основании данной нормы.

[175] Жалоба может быть направлена только на кантональные законы.

отменить нормативный акт, в Австрии[176], Чешской Республике и Испании Конституционный Суд должен начать второе конституционное судопроизводство, а в Хорватии, Словении и "Бывшей Югославской Республике Македония"[177] Суд имеет такое право. Следует отметить, что в Австрии закон можно отменить только полностью, если это не противоречит интересам заявителя.

III.1.2. Расширение круга критериев контроля

162. Как правило, в случае индивидуальных жалоб заявители затрудняются в определении конкретных оснований своего заявления. Следовательно, для принятия большего числа заявлений, несмотря на вышеуказанные ошибки, Конституционный Суд может принимать решения на основании отличающихся от упомянутых в заявлении конституционных положений[178] (например в Албании, Австрии, Бельгии, Болгарии, Чешской Республике, Эстонии[179], Португалии, России, Словении и Испании). Тем не менее заявитель не должен указывать конкретное положение Основного закона, но нарушенная норма должна быть видна из его жалобы. Это требование является более строгим в случае жалоб, составленных при наличии юридической консультации, чем жалоб, представленных непрофессионалами.

163. Для принятия решения Конституционный Суд должен определить содержание оспариваемого положения. Относительно этого возможны два случая: 1) когда Конституционный Суд придерживается толкования обычных судов; 2) или дает собственное толкование.

164. В случае предварительного запроса ни один из конституционных судов, рассматривающихся в данном Исследовании, "строго не связан толкованием рассматриваемого положения, данным обратившимся судом"[180] (см., например, регулирование в Эстонии[181]), за исключением Португалии, где Конституционный Суд неоднократно отмечал, что в случае конкретного контроля он ограничен толкованием обратившегося суда относительно рассматриваемого положения. Конституционные Суды Австрии, Бельгии и Испании в принципе применяют толкование, содержавщееся в запросе суда, за исключением случаев, когда Конституции соот-

[176] В Австрии Конституционный Суд сам начинает новое производство по контролю нормативного акта и приостанавливает производство по конституционной жалобе. После принятия решения в производстве по абстрактному контролю, производство по конкретному делу снова возобновляется.

[177] См. статьи 56 и 14 Регламента Конституционного Суда.

[178] *General Report, XIIth Congress of the Conference of European Constitutional Courts,* (A. Alen, M. Melchior), Brussels, 2002, стр.7, в: http://www.confcoconsteu.org/en/common/home.html, проверено 23 февраля 2009.

[179] Например, Решение Государственного суда No 3-4-1-11-08, http://www.nc.ee/?id=455.

[180] A. Alen, M. Melchior, *General Report, XIIth Congress of the Conference of European Constitutional Courts*, Brussels, 2002, стр.7, в: http://www.confcoconsteu.org/en/common/home.html, проверено 23 февраля 2009.

[181] §14 Закона "О судопроизводстве в порядке конституционного надзора" гласит: "(1) При рассмотрении вопроса Верховный Суд не ограничен обоснованием заявления, приговором или решением суда".

ветствует другое толкование. Относительно толкования и применения потенциально неконституционных правовых норм в Германии следует отметить, что Федеральный Конституционный Суд должен соблюдать решения обычных судов, за исключением случаев, когда в них есть очевидные ошибки, которые, кроме запрета произвола, основаны на принципиально ошибочном представлении о значении и объеме основных прав[182]. Кроме этого, Конституционный Суд Германии может потребовать от высших федеральных и местных судов предоставить информацию относительно того, как они обычно толкуют соответствующую норму, и относительно обоснований данного толкования[183].

165. Фактически, в результате техники “réserve d’interprétation” или “verfassungs-gemäße Auslegung” (“полномочие гарантировать конституционность посредством определенного толкования”), посредством которой Конституционный Суд обязывает все другие государственные органы применять нормативный акт только в определенном толковании, признанном Конституционным Судом конституционным, нормативные акты не лишаются юридической силы, даже если могут существовать их неконституционные толкования[184], но данная техника неэффективна, если обычные суды и административные органы не придерживаются вышеупомянутого толкования[185]. **Важным фактором четкости в отношениях между Конституционным Судом и обычными судами является определенное законодательное или лучше конституционное положение, обязывающее все другие государственные органы, в том числе суды, придерживаться данного Конституционным Судом конституционного толкования, что может служить основанием для требования защиты своих прав в суде.**

166. Для преодоления проблемы неприменения решений Конституционного Суда Конституционный Суд Италии пошел по противоположному пути и разработал понятие “*diritto vivente*” (живое право). Судья Конституционного Суда дает толкование оспариваемой правовой нормы, соответствующее "обычному" толкованию обычных судов, и принимает решение о неконституционности закона на основании данного распространенного толкования, даже если можно дать конституционное толкование нормы. Таким образом, закон, которому неоднократно давалось неконституционное толкование, отменяется, и Парламент обязуется принять новый закон, которому (надо надеяться) не может быть или, что менее вероятно, будет дано неконституционное толкование. Конституционный Суд Республики Армения признает оспариваемые нормы неконституционными на основании толкования, данного закону в правоприменительной практике.

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[182] BVerfG, 1 BvR 1804/03 of 12/07/2004, § 50.

[183] Статья 82 Закона “О Федеральном Конституционном Суде”. Согласно части 1 статьи 82.4 это относится не только к федеральным верховным судам, но и к верховным судам земель.

[184] См. CCT 1/00 в CODICES.

[185] См. X. Samuel, “Les réserves d’interprétation émises par le Conseil constitutionnel”, в: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/pdf/Conseil/reserves.pdf, проверено 4 июня 2009.

III.2. Действие ratione personae

167. Отличительным признаком конституционных судов европейской модели является действие *erga omnes* их решений. Действие *erga omnes* означает, что эти решения являются обязательными для каждого, в отличие от решений, действие которых распространяется только на стороны конкретного дела (действие *inter partes*). Тогда как решения по жалобам на индивидуальный акт обычно имеют действие *inter partes*, представленная мотивировка может распространяться и на другие дела. В Германии, например, обоснования (и не только *obiter dicta*) обязательны для всех государственных органов, в том числе судов. Сфера действия решений по делам об оспаривании нормативного акта может быть разной и, как правило, зависеть от выбора законодателя.

См. 1.1.14: Действие *erga omnes*

168. Кроме того, вид действия решений различается в зависимости от признания положения Конституционным Судом конституционным или неконституционным.

См. Таб. 1.1.15 :Подтверждение конституционности

III.2.1. Контроль нормативных актов

169. Очевидным примером действия *erga omnes* являются случаи признания нормативного акта Конституционным Судом неконституционным или недействительным. В последнем случае акт лишается юридической силы и больше не может применяться. В случаях признания нормативного акта (Конституционным) Судом неконституционным: 1) (Конституционный) Суд может быть обязан лишить акт юридической силы с действием *erga omnes*; 2) или может признать акт неконституционным, признать его неприменимым, но не лишить (или не иметь такого полномочия) его юридической силы. В большинстве государств, рассматриваемых в данном Исследовании, решение, принятое в результате контроля нормативного акта, является обязательным для всех.

170. В данном контексте детального рассмотрения требует судопроизводство по предварительным запросам судов. Во-первых, следует отметить, что на основании заявлений об исключении неконституционности и предварительных запросов начинается контроль нормативного акта. Неоспоримо, что решение по заявлению об исключении неконституционности является обязательным для сторон и что обычный суд обязан применить решение Конституционного Суда в конкретном деле[186]. Во многих государствах решение Конституционного Суда выходит за пределы признания неконституционности *inter partes* и отменяет оспариваемый нормативный акт. Таким образом, законодатель сопоставил идеи защиты основных субъективных прав и объективного конституционного контроля. Такое регулиро-

[186] Например статья 57 Закона Андорры “О Конституционном Суде” гласит: “2. Решение Конституционного Суда обязательно для суда, представившего запрос. […] ”.

вание встречается, например, в Албании, Андорре, Болгарии, Греции, Италии, Литве, Румынии, Сан-Марино, “Бывшей Югославской Республике Македония” и Южной Африке[187]. А в государствах общего права решения Верховного Суда являются обязательными в системе прецедентов.

171. Тем не менее в Бельгии, Люксембурге и Кипре действие решения Конституционного Суда распространяется только на конкретное дело. А в Турции обратившийся суд должен просто дождаться решения Конституционного Суда и руководствоваться им, если Конституционный Суд принял решение в течение пяти месяцев. В противном случае, обратившийся суд применяет оспариваемый закон. Закон Португалии “О Конституционном Суде” предусматривает, что действие решения распространяется на конкретное дело, но если Конституционный Суд принял три решения по одному и тому же вопросу, он может начать абстрактный контроль оспариваемого нормативного акта и при соответствующих условиях лишить его юридической силы[188].

172. Решение о неконституционности по нормативной или полной конституционной жалобе на нормативный акт имеет действие *erga omnes* (например в Алжире, Армении, Австрии, Азербайджане, Боснии и Герцеговине, Чешской Республике, Эстонии[189], Франции, Германии, Венгрии, Латвии, Лихтенштейне, Польше, Словении, Швейцарии, Румынии, России, Южной Африке, Испании, “Бывшей Югославской Республике Македония”).

173. В государствах с децентрализованным или смешанным контролем существуют две диаметрально противоположные системы. С одной стороны, решения

[187] В Южной Африке, если суд считает нормативный акт (закон) неконституционным, он признает его недействительным в этой части, и если признание недействительности подтверждается Конституционным Судом, нормативный акт (закон) больше ни к кому не применяется.

[188] В Португалии наличие трех решений Конституционного Суда, принятых в результате конкретного контроля, вследствие которых данная норма была признана неконституционной, является условием для инициирования отдельного контроля (на сей раз абстрактного) конституционности рассматриваемой нормы. Так как новый контроль не связан с предыдущими, в Пленарном заседании при участии тринадцати судей может быть принято новое решение, отличающееся от решений, принятых ранее коллегиями из пяти судей в отдельных палатах Конституционного Суда. См. Решение от 5 мая 2009 года Номер 221/2009, в котором представитель Генеральной Прокуратуры в Конституционном Суде попросил Суд признать норму, предусмотренную в Исполнительном Законе “Об установлении платежей за оказание медицинской помощи в учреждениях или службах Национальной службы здравоохранения”, неконституционной с общеобязательной силой, когда заинтересованная сторона не представила потребительскую карту НСЗ и в течение срока, установленного Исполнительным Законом, не представила доказательства относительно того, что имеет такую карту или не обратилась в компетентный орган для ее выдачи. Несмотря на то, что преобладающее толкование данной нормы по существу уже признавалось неконституционным в трех делах по конкретному контролю, в Решении Номер 221/2009, принятом в Пленарном заседании, Конституционный Суд не признал его неконституционным. Следует также отметить, что кроме Генеральной Прокуратуры, которая может обратиться с запросом об осуществлении данной процедуры для обеспечения единообразной судебной практики, она может быть также инициирована судьями Конституционного Суда. Физические лица не могут обращаться с данным запросом.

[189] Только если решение было принято Государственным судом. Если обычные суды принимают решение о неконституционности нормы, данное решение распространяется только на стороны, несмотря на то, что в данном случае автоматически осуществляется судопроизводство в Государственном суде (и имеет действие erga omnes).

могут фактически иметь действие *erga omnes* или подобную этому широкую сферу действия. Действием *erga omnes* обладают решения в Бразилии и Мексике[190], где Конституционный Суд может признать закон неконституционным после пяти последовательно принятых решений относительно одного и того же общего акта. Кроме того, институт прецедента в правовой семье общего права предусматривает обязательную силу решений Конституционного Суда для нижестоящих судов. Следовательно, решение о признании неприменимости закона из-за его неконституционности будет применяться всеми нижестоящими судами, за исключением случаев, когда они "отклоняются" от прецедента, объясняя, почему обстоятельства данного дела отличаются от обстоятельств дела, по которому было принято прецедентное решение (например в Канаде[191], США[192], Перу, Мексике). В Исландии *stare decisis* не предусмотрен в Конституции, но является конституционным обычаем. В Бразилии система прецедентов создает определенное общее действие решений, а суды могут делать предложения относительно законодательных изменений.

174. С другой стороны, в Аргентине, Чили, Дании, Финляндии, Японии, Норвегии и Швеции конституционные или верховные суды ограничиваются признанием неприменимости нормативного акта в конкретном деле. Нет никакой формальной гарантии единства судебной практики. Следовательно, в судебной системе должна быть сильная неофициальная согласованность, особенно посредством наличия информации и готовности соблюдать определенные руководящие принципы, во избежание правовой неопределенности посредством принятия различающихся решений.

175. Другой группой решений относительно нормативных актов, которые не обязательно имеют действие *erga omnes*, являются решения о признании неконституционности (см. ниже "Продление срока юридической силы оспариваемого акта").

176. Даже отказ в принятии обращения к рассмотрению, имеющий действие *inter partes*, имеет важное значение на практике, так как будущие потенциальные заявители (особенно обычные суды) руководствуются решениями Конституционного Суда и фактически могут предвидеть, будут ли их заявления иметь успех или нет[193].

177. То же самое относится к решениям, подтверждающим конституционность (См. Таб. 6.1.15: Подтверждение конституционности). Следует отметить, что сфера действия решений, посредством которых Конституционный Суд подтверждает конституционность, то есть, отказывает в отмене нормативного или индивидуального акта, может быть разной. По этому поводу существуют два противоположных обоснования: 1. В Австрии, Румынии, Испании и Швейцарии, например, Конститу-

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[190] T. Ginsberg, "Comparative Constitutional Review", United States Institute for Peace Projects, http://www.usip.org/ruleoflaw/projects/tg_memo_on_constitutional_review.pdf, проверено 2 марта 2009.

[191] http://www.er.uqam.ca/nobel/r31400/jur2515/ndecours/jur2515chap7-2007.pdf, проверено 2 марта 2009.

[192] См. "The Court and Constitutional Interpretation", в: http://www.supremecourtus.gov/about/constitutional.pdf, проверено 4 мая 2009.

[193] R. Jaeger, S. Broß, указанная работа, стр. 26 f.

ционный Суд не принимает новые заявления одних и тех же лиц относительно конституционности одного и того же положения одного и того же закона. Следовательно, данное решение препятствует представлению нового обращения по одному и тому же делу только одним и тем же заявителем, так как другие заявители могут представить свои обращения в Конституционный Суд. В этом смысле решение распространяется на стороны[194]. С другой стороны, решения, подтверждающие конституционность, могут иметь действие *erga omnes*. В Перу обычный судья не должен рассматривать представленные стороной вопросы неконституционности, если они касаются нормы, о признании конституционности которой ранее было принято решение Конститу- ционного Трибунала. Аналогично этому в Андорре, Армении, Бельгии, Чешской Республике, Германии[195], Молдове, Сербии и Литве решения о конституционности не могут быть обжалованы. Это означает, что вопрос больше никогда или в течении определенного промежутка времени не может быть поднят, как в Армении и Турции. То же самое относится и ко Франции после реформ 2008 года, но производство по некоторым делам может быть возобновлено в случае изменения фактических и правовых обстоятельств дела (таким образом, значение действия *erga omnes* может уменьшиться).

178. Нормы, применяемые в Словении и "Бывшей Югославской Республике Македония"[196], занимают среднее место в данной системе, так как Конституционный Суд снова не будет рассматривать дело, если нету оснований полагать, что на этот раз он примет другое решение. А если будут обоснованные сомнения, он примет обращение к рассмотрению.

179. Институт *stare decisis* применяется в системах, где не осуществляется централизованный контроль. В США, Кипре[197], Мексике, Южной Африке и Перу[198] существует система прецедентов, что обеспечивает высокую степень согласован-

[194] G. Kucsko-Stadlmayer, "Die Beziehungen zwischen den Verfassungsgerichtshöfen und den übrigen einzelstaatlichen Rechtsprechungsorganen, einschließlich der diesbezüglichen Interferenz des Handelns der europäischen Rechtsprechungsorgane", доклад на XII Конференции Европейских Конституционных Судов, 2002, стр. 23.

[195] Тем не менее вопрос конституционности закона можно снова представить в Федеральный Конституционный Суд, если после принятия первого решения существенно изменились фактические или правовые обстоятельства.

[196] См. Статью 28 Регламента Конституционного Суда.

[197] *Ratio decidendi решений Верховного Суда, принятых при осуществлении апелляционной юрисдикции или оригинальной юрисдикции (осуществляемой коллегией суда), является обязательным для нижестоящих судов.*

[198] Статья VI Кодекса о конституционном судопроизводстве гласит: "Судьи толкуют и применяют закон или норму, имеющую силу закона, и постановления в соответствии с конституционными предписаниями и принципами, соблюдая толкование последних, данное в решениях Конституционного Трибунала. (Los Jueces interpretan y aplican las leyes o toda norma con rango de ley y los reglamentos según los preceptos y principios constitucionales, conforme a la interpretación de los mismos que resulte de las resoluciones dictadas por el Tribunal Constitucional.) Статья VII гласит: "Решения Конституционного Трибунала, которые имеют силу res iudicata, становятся обязательным прецедентом, если это устанавливается в решении, которое определяет сферу его нормативного действия. Если Конституционный Суд решает отклониться от прецедента, он должен изложить фактические и правовые обоснования решения и причины отклонения. (Las sentencias del Tribunal Constitucional que adquieren la autoridad de cosa juzgada constituyen precedente vinculante cuando así lo exprese la sentencia, precisando el extremo de su efecto normativo. Cuando el Tribunal Constitucional resuelva apartándose del precedente, debe expresar los fundamentos de hecho y de derecho que sustentan la sentencia y las razones por las cuales se aparta del precedente.)

ности решений судов и является аналогичным действию *erga omnes* в романо-германской правовой системе. В определенных случаях нижестоящий суд может не применять *ratio decidendi* (обоснование) решения вышестоящего суда, но для обоснования нового решения он должен объяснить, чем обстоятельства данного дела отличаются от обстоятельств дела, по которому было принято прецедентное решение. Несмотря на принцип *stare decisis*, высшие суды стран общего права, как, например, в США и в Соединенном Королевстве (с 1966 года), могут преодолеть свои решения большинством голосов судей и с соответствующим обоснованием. В некоторых государствах с централизованным контролем[199] Конституционный Суд связан своими прецедентами, но может преодолеть их мотивированным решением, принятым (определенным) большинством голосов своих членов (например в Андорре[200]).

III.2.2. Контроль индивидуальных актов

180. Обычно решение по полной конституционной жалобе, оспаривающей индивидуальный акт, распространяется только на дело, в связи с которым было начато судопроизводство[201]. Вопрос относительно сферы действия решения Конституционного Суда непосредственно влияет на роль и эффективность конституционных жалоб. Решение является обязательным только для заявителя и судебного или административного органа, акт которого оспаривается, и, возможно, также для государственных органов, которые могут иметь дело с конкретным вопросом и в дальнейшем, пока конкретные обстоятельства дела не изменились (например в Австрии). В Германии даже решения относительно индивидуальных актов обязательны для всех государственных органов[202].

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[199] В Литве, где предусмотрен централизованный конституционный контроль, есть некоторые особенности относительно принципа stare decisis. Согласно практике Конституционного Суда, последний связан своими прецедентами и официальной конституционной доктриной, сформулированной Конституционным Судом и обосновывающей данные прецеденты . Несмотря на это, возможны случаи отклонений от прецедентных решений Конституционного Суда, принятых при осуществлении конституционного правосудия, но новые прецеденты могут быть созданы только в случаях, когда существует неизбежная и действительная необходимость, они конституционно обоснованы и аргументированы. Упомянутая необходимость нового толкования положений определенной официальной конституционной доктрины для ее корректировки может быть обусловлена только необходимостью расширения возможностей осуществления прирожденных и приобретенных прав и законных интересов человека, необходимостью лучшей защиты и охраны предусмотренных в Конституции ценностей[199], Решение Конституционного Суда от 24 октября 2007 года.

[200] Статья 3 Закона “О Конституционном Суде” гласит: “1. Конституционный Суд подчиняется только Конституции и настоящему Закону. Прецеденты, установленные Конституционным Судом, являются обязательными для Суда при дальнейшем толковании Конституции; тем не менее в них могут вноситься изменения обоснованным решением, принятым абсолютным большинством его членов. 2. В смысле предыдущей части, прецедент считается возникшим, если по крайней мере по двум одинаковым делам были приняты одинаковые решения на основании одной и той же доктрины”.

[201] *General Report, XIIth Congress of the Conference of European Constitutional Courts,* (A. Alen, M. Melchior), Brussels, 2002, стр.7, в: http://www.confcoconsteu.org/en/common/home.html, проверено 23 февраля 2009., стр.45.

[202] R.Jaeger, S. Broß, указанная работа, стр. 27.

181. С данной точки зрения следует различать три модели: 1) Конституционный Суд разрешает дело по существу; 2) отменяет индивидуальный акт; 3) только принимает решение о возобновлении производства по делу или об изменении административного акта, не отменяя его.

182. Конституционный Суд принимает решение по существу в Армении, Бразилии, Канаде, Кипре[203], Эстонии, Исландии, Ирландии, Японии, Словении, Швейцарии, Южной Африке, Испании, "Бывшей Югославской Республике Македония" и Соединенных Штатах. Однако в большинстве этих государств это не является обязательной практикой и Конституционный Суд может передать дело обратно в нижестоящий суд для принятия решения по существу[204].

183. Если Конституционный суд отменяет окончательное решение суда, он обычно требует пересмотреть конкретное дело (например в Андорре, Боснии и Герцеговине, Хорватии, Чешской Республике, Германии, Венгрии, Латвии, Лихтенштейне, Португалии, России, Словакии, Словении, Швейцарии, Республике Корея). Аналогично этому, если Суд отменяет индивидуальный административный акт, отсутствие административного акта в принципе создает обязанность для административных органов принять новый акт.

184. Когда Конституционный Суд просто передает дело обратно высшим обычным судам для возобновления производства по делу, фактически не отменяя неконституционное решение (например в Азербайджане), возникает вопрос о том, должен ли высший обычный суд следовать предписаниям Конституционного Суда. Следует отметить, что эффективность регулирования, предусмотренного в Сербии[205], где Конституционный Суд приостанавливает производство по делу, чтобы дать административным или законодательным органам время для исправления потенциально неконституционной ситуации, в значительной мере зависит от готовности органов соблюдать такие предписания.

185. Тогда как некоторые конституционные суды могут действительно давать указания относительно того, как соответствующие органы должны действовать, чтобы их действия соответствовали Конституции, и как они должны правильно исполнить конкретное решение (например в Чешской Республике[206], Германии, Мальте, Словакии[207], Словении, Испании[208], Украине[209]), в других государствах нет

[203] В ходе осуществления административных полномочий Верховный Суд может одобрить административное решение или признать его недействительным. Внесение поправок в решение административного органа не находится в его компетенции. Суд не уполномочен пересмотреть административное решение и заменить его своими решениями. Принятие такого акта может нарушить строгий принцип разделения властей, предусмотренный Конституцией. Решения в сфере управления принимаются только органами исполнительной власти.
Целью контроля является рассмотрение законности актов или бездействия исполнительной власти, а не рассмотрение их правильности с точки зрения судебной власти.
[204] CDL-INF(2001)009 Decisions of constitutional courts and equivalent bodies and their execution.
[205] Статья 55 Закона "О Конституционном Суде".
[206] Статья 82b) Закона "О Конституционном Суде".
[207] Статья 127 (2) Конституции.
[208] Статья 55 1 с Органического Закона "О Конституционном Суде".
[209] Статья 70 Закона "О Конституционном Суде".

такого полномочия указывать или выдавать приказы о выполнении положительных действий. Несмотря на то, что в последнем случае более очевидным является признание принципа разделения властей, это может привести к неэффективности решений Суда.

186. Как было отмечено выше, Конституционный Суд может расширить сферу контроля, начиная новое судопроизводство или принимая решение по вопросу конституционности нормативного акта, на основании которого был принят оспариваемый индивидуальный акт, в том же судопроизводстве; в этом случае это (второе) решение имеет действие *erga omnes*. Но действие решения относительно индивидуального акта также может распространяться не только на конкретное дело: в Черногории, когда Конституционный Суд принимает решение относительно индивидуального акта, нарушающего права нескольких лиц, только один или некоторые из которых обратились с жалобой в Конституционный Суд, решение распространяется на всех лиц, чьи права были нарушены. Кроме того, в некоторых государствах Конституционный Суд может установить, что новые административные или судебные акты, аналогичные признанным недействительными Конституционным Судом актам, в дальнейшем будут неконституционными. Следовательно, даже принимая решение по конкретному делу, Конституционный Суд дает общие указания относительно того, какими могут быть действия судов или административных органов для того, чтобы соответствовать Конституции.

III.3 Действие *ratione temporis*

III.3.1. Отмена акта с действием ex tunc или ex nunc

См. Таб. 1.1.16: Действие *ex tunc* или *ex nunc* решений Конституционного Суда

187. Действие решений о неконституционности нормативного акта во времени может быть различным. Доктрине ничтожности (“Nichtigkeitslehre”) противопоставляется доктрина лишения юридической силы (“Vernichtbarkeitslehre”). Это создает дилемму между доктринальной согласованностью (когда неконституционный акт рассматривают как акт, который никогда не был частью правовой системы) и правовой безопасностью (когда до вступления в силу решения Конституционного Суда продолжают действовать акты, основанные на отмененном акте[210]). Ни одно из государств, рассматриваемых в данном Исследовании, не выбрало первую модель, не оставляя возможности для маневрирования Конституционному Суду, так как отмена важного нормативного акта, на основании которого было принято много индивидуальных актов, может иметь значительные последствия. Следует отметить, что выбор между вышеуказанными моделями имеет значение также для наличия желания людей представлять жалобу на нормативный акт. Если признание нормы

[210] Следует отметить регулирование, предусмотренное в Албании и России, которое четко предусматривает, что Конституционный Суд может выдать приказ о немедленном вступлении своего решения в силу даже до опубликования, если это необходимо для защиты конституционных прав человека.

недействительной не имеет обратной силы, дело заявителя не разрешается посредством отмены неконституционной общей нормы. Следовательно, для того чтобы у людей был стимул для представления жалобы на нормативный акт, в некоторых государствах предусмотрена обратная сила решений, что применяется только в деле заявителя (так называемое "вознаграждение человеку, воспользовавшемуся правом"[211]). Например, в Венгрии решение Суда, несмотря на то, что имеет просто отменяющее действие, применяется в деле заявителя, который представил индивидуальную жалобу.

188. Только несколько государств внедрили модель действия *ex tunc* решений Конституционного Суда. Это Андорра, Бельгия, Германия (с полномочием устанавливать, каким будет действие решения - *ex tunc* или *ex nunc*), Венгрия, Италия, Польша, Португалия, Россия, Словения и "Бывшая Югославская Республика Македония".

189. Из этих государств только в Андорре, Армении, Бельгии, Латвии, России, Словении[212], Швейцарии и Испании предусмотрена широкая сфера действия *ex tunc* только с несколькими исключениями, которые определяет Конституционный Суд, тогда как все другие государства (например Германия[213], Италия, Португалия) ограничиваются признанием уже существующей недействительности актов, за исключением окончательных решений судов.

190. Модель действия *ex nunc* предусмотрена в Албании, Алжире, Армении, Австрии, Чили, Хорватии, Чешской Республике[214], Франции, Эстонии, Грузии, Венгрии, Южной Корее, Латвии, Лихтенштейне, Литве, Молдове, Румынии, России, Сан-Марино, Сербии, Словакии, Словении[215], "Бывшей Югославской Республике Македония", Мексике, Украине.

191. Следует еще раз отметить, что в большинстве государств предусмотрены определенные ограничения относительно отменительного действия.

[211] Это понятие существует в австрийской доктрине ("Ergreiferprämie"), для перевода см. CDL(2008)065, Opinion on the draft laws amending and supplementing (1) the law on constitutional proceedings of Kyrgyzstan and (2) the law on the Constitutional Court of Kyrgyzstan, 2008.

[212] Когда Конституционный Суд признает недействительным неконституционное или незаконное постановление или общий акт, принятый для осуществления государственной власти. В Словении решение о признании недействительным имеет действие ex tunc. Статья 45 (2) Закона "О Конституционном Суде".

[213] Согласно статьям 79.1 и 79.2 Закона "О Федеральном Конституционном Суде" окончательные решения, принятые на основании закона, признанного недействительным, не подлежат пересмотру, даже если положение или закон признается недействительным с действием ex tunc. Только в случае окончательного обвинительного приговора можно начать новое производство в соответствии с Уголовно-процессуальным кодексом.

[214] В случае Чешской Республики КС не устанавливал действие ex tunc, но ученые-конституционалисты не исключают наличие такой возможности, предусмотренной в законе. См. Wagnerová, E., Dostál, M., Langášek, T., Pospíšil, I.: Zákon o Ústavním soudu s komentářem [The Act on the Constitutional Court with Commentary], ASPI, Praha 2007, стр. 206.

[215] Когда Конституционный Суд признает недействительным неконституционный закон или неконституционное или незаконное постановление или общий акт, принятый при осуществлении государственной власти. Решение о признании недействительным имеет действие ex nunc. Статьи 43 и 45 (3) Закона "О Конституционном Суде".

III.3.2 Признание недействительности и его действие во времени

192. Существуют методы устранения недостатков решений как с действием *ex tunc*, так и *ex nunc*. Одним из таких методов является возможность Конституционного Суда устанавливать момент вступления в силу своего решения (или когда действие решения распространяется на отношения, возникшие в прошлом, что выступает в качестве средней точки между признанием недействительным и отменой, или когда решение вступает в силу в будущем, или сопоставление двух моделей). Вторым способом является применение методов (официального) толкования, в которых сочетаются надлежащая защита Конституции и устойчивость правопорядка, так как не все положения сразу же лишаются юридической силы. В Южной Африке Суд, признавая нормативный акт (закон) недействительным по причине несоответствия Конституции, может дать указание относительно сферы действия его обратной силы.

193. Решения с действием *ex tunc* не влияют на окончательные решения суда. Следовательно, правовая определенность с точки зрения окончательных решений суда пользуется преимуществом в большинстве государств, предусматривающих обратную силу решений Конституционного Суда (например в Италии, Португалии).

194. Действие *ex tunc* в уголовных делах. Возобновление судопроизводства по уголовным делам встречается довольно часто, даже в странах с отменяющим действием решений Конституционного Суда, если в результате этого наказание будет более благоприятным (например в Албании, Чешской Республике, Венгрии, Италии, Южной Корее, Молдове, Португалии, Румынии, Словении, Испании, Южной Африке, Мексике и Уругвае). В Южной Африке новым обстоятельством для пересмотра приговора является его вынесение на основании неконституционного нормативного акта (закона)[216]. В Португалии Конституционный Суд может придать решению обратную силу, когда признанная неконституционной или незаконной норма касается уголовных, дисциплинарных дел или административных правонарушений, и когда она является менее благоприятной для обвиняемого[217]. В Чешской Республике возобновление производства по уголовному делу возможно только в случаях, если решение еще не было исполнено[218], а в Словении возобновление судопроизводства по уголовному делу при наличии окончательного приговора возможно, если закон, на основании которого был вынесен приговор, был признан недействительным или отменен.

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[216] См. RSA-2009-2-009, CCT 98/08, 15/07/2009 в CODICES.

[217] Одним из таких решений является Решение от 31 марта 2004 года no. 232/2004, имеющее общеобязательную силу, в котором Суд признал неконституционными нормы относительно дополнительных наказаний, касающихся высылки иностранных граждан, несущих ответственность за несовершеннолетних граждан Португалии и проживающих на территории последней. Однако Суд установил, что действие неконституционности данных норм распространяется на дела, в которых приговоры, предусматривающие дополнительное наказание в виде высылки, уже опубликованы, но еще не исполнены в момент опубликования решения no. 232/2004.

[218] Статья 71 Закона “О Конституционном Суде”.

195. Отсрочивание утраты юридической силы. Почти все государства предусматривают нормы относительно вступления в силу и возможной обратной силы решений Конституционного Суда. В Албании решения вступают в силу в день провозглашения, если это необходимо для защиты основных прав. В некоторых государствах, в которых применяется принцип отменяющего действия решений Конституционного Суда, предусмотрена обратная сила решений для восстановления нарушенных прав или предотвращения нанесения вреда (например в Армении, Азербайджане, Словении). В Сербии и "Бывшей Югославской Республике Македония" предусмотрено, что лицо может ходатайствовать о возобновлении производства по делу во всех случаях, когда окончательное решение было принято на основании нормативного акта, лишенного юридической силы. Более ограниченная модель "вознаграждения человеку, воспользовавшемуся правом" (обратная сила только относительно конкретного дела), внедрена в Армении[219], Австрии, Венгрии и с некоторыми ограничениями в Лихтенштейне. В Израиле решение вступает в силу в день принятия Верховным Судом, но суд может отложить признание неконституционности, если считает это необходимым. Эта практика часто встречается в случаях, когда Суд хочет предоставить законодательному и исполнительному органам время для изменения рассматриваемого закона или правительственной практики.

196. В контексте вопроса относительно продления срока юридической силы нормы следует различать несколько моделей. В государствах с децентрализованным конституционным контролем оспариваемый нормативный акт не может быть лишен юридической силы, но он не подлежит применению (например в Дании, Финляндии, Исландии, Мальте, Норвегии, Швеции). В Мальте, например, Конституционный Суд представляет свое решение законодателю, который свободен в решении вопроса об изменении законодательства в соответствии с решением Суда[220].

197. В государствах с централизованным контролем, такие как Андорра, Франция, Германия, Польша, Португалия, Словения и Южная Африка, конституционные суды могут признать закон не соответствующим Конституции. В данном случае положение, как правило, является неприменимым, но не теряет юридическую силу, и в течение определенного срока законодатель должен внести в него изменения для того, чтобы привести его в соответствие с Конституцией. В Германии эта модель предусмотрена главным образом относительно дел, касающихся принципа равенства. Конституционный Суд иногда дает конкретные предписания по поводу применения закона в течение срока, предоставляемого законодателю для внесения изменений в закон[221].

198. Такой результат достигается в государствах, в которых решения Конституционного Суда имеют действие *ex nunc*, если Суд может отсрочить его вступле-

[219] CDL-AD(2006)017 Opinion on Amendments to the Law on the Constitutional Court of Armenia.
[220] Статья 242 Гражданского процессуального кодекса.
[221] R. Jaeger, S. Broß, указанная работа, стр. 26.

ние в силу (например в Австрии, Азербайджане, Венгрии, Латвии, Лихтенштейне[222], Литве[223], Польше, Словении, Южной Африке[224] и Швейцарии[225]).

III.4. Действие *ratione materiae*: возмещение убытков

См. Таб. 1.1.17: Полномочия Конституционного Суда по возмещению убытков

199. Большинство конституционных судов, рассматривающихся в данном Исследовании, не имеют полномочий по возмещению убытков лицам, чьи права были нарушены индивидуальным или нормативным актом. Однако часто в результате решения Конституционного Суда возобновляется производство по конкретному делу (если оспаривается индивидуальный акт или в случае "вознаграждения человеку, воспользовавшемуся правом" относительно нормативных жалоб), и нижестоящий обычный суд или трибунал могут принять решение о возмещении убытков согласно процессуальным нормам, подлежащим применению (например в Кипре[226]).

200. В странах общего права возмещение убытков является частью деликтного права; если государственная власть нарушает индивидуальные права, человек имеет право на возмещение.

201. В государствах с децентрализованным контролем в ходе обычного судопроизводства человек при соответствующих условиях может потребовать компенсацию от государственного органа, актом которого были нарушены его права. В Южной Африке Конституционный Суд выразил правовую позицию о том, что суд компетентен предоставить "соответствующую компенсацию" в случае возмещения "конституционных убытков", причиненых исключительно нарушением конституционного права[227].

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222 См. H. Wille, National report for the XIVth Conference of European Constitutional Courts, стр.17, в: http://www.lrkt.lt/conference/Pranesimai/Q_Liechtenstein_D.doc#_Toc198870236.

223 Решение КС от 19 января 2005 года.

224 См. RSA-2008-2-007, CCT 19/07, 02/06/2008 в CODICES.

225 Относительно кантональных законов и постановлений.

226 Отмена Судом решения государственного органа имеет обратную силу. Статья 146.5 Конституции предусматривает обязанность государственных органов соблюдать решения и предписания Суда при осуществлении административной деятельности. Конституционной обязанностью административных органов, предусмотренной в статье 146.5 Конституции, является восстановление положения, существовавшего до принятия отмененного решения. Для удовлетворения гражданского иска о предоставлении компенсации согласно части 6 статьи 146 вред должен быть нанесен вследствие отмененного акта, решения, несмотря на восстановление законности.

227 См. RSA-1997-2-006, CCT14/96, 05/06/1997 в CODICES.

Частичные заключения относительно Главы III

202. Относительно решений конституционных судов следует отметить, что в большинстве рассматриваемых систем данные суды сами выбирают порядок осуществления контроля. Иногда они могут расширить круг норм, конституционность которых рассматривается, или даже расширить круг норм, служащих критериями конституционного контроля. Это часто встречается в государствах, в которых предусмотрена полная индивидуальная жалоба. В большинстве упомянутых государств принято считать, что Конституционный Суд может четче устанавливать нормы, которые необходимо рассмотреть, для принятия решения относительно конституционности нормы или соответствующего акта. Определенное законодательное или, лучше, конституционное положение, обязывающее все другие государственные органы, в том числе нижестоящие суды, придерживаться данного Конституционным Судом конституционного толкования, является важным фактором четкости в отношениях между Конституционным Судом и обычными судами.

203. Есть разные модели действия решений конституционных судов. Круг лиц, на которых может распространяться решение, может быть разным, в зависимости от действия решения *inter partes* или *erga omnes* (действие *ratione personae*), или оно может иметь разное действие во времени (действие *ratione temporis*), или даже разрешать различные вопросы (действие *ratione materiae*).

204. Что касается действия *ratione personae*, решение может иметь действие *inter partes* или *erga omnes*, результатом чего является утрата нормативным актом юридической силы или признание его неприменимым. В большинстве государств в случае оспаривания конституционности нормы Конституционный Суд может лишить ее юридической силы. Тем не менее в некоторых государствах полномочия Конституционного Суда (обычных судов в случае Скандинавских государств) более ограничены, и решение распространяется только на стороны (например, в Андорре, Аргентине, Бельгии, Чили, Дании, Финляндии, Японии, Люксембурге, Кипре[228], Норвегии, Португалии и Швеции). В государствах общего права, применяющих децентрализованный контроль, институт *stare decisis* имеет важное значение и выходит за рамки конкретного дела, так как прецеденты, принятые Верховным (или аналогичным) Судом являются обязательными для нижестоящих судов (например в США, Мексике, Южной Африке и Великобритании). Тем не менее при необходимости прецеденты могут быть преодолены с соответствующим обоснованием.

205. Действие решений о неконституционности нормативного акта во времени может быть различным. Оно может быть *ex nunc*, когда утрата актом юридической силы распространяется на отношения, возникшие с момента принятия решения,

[228] Решение Суда о подтверждении акта или решения администрации действует in personam и res judicata в отношениях заявителя и администрации. Решение Суда о признании акта или решения недействительным имеет действие erga omnes. Когда действиие административных органов признается недействительным, администрация должна пересмотреть дело согласно решению Верховного Суда и принять новое решение. Новое решение может быть объектом судебного контроля в Верховном Суде.

или *ex tunc*, когда акт признается недействительным с момента его принятия, что имеет значительные последствия для конкретных дел. Только несколько государств внедрили модель действия *ex tunc* решений Конституционного Суда (например Армения, Андорра, Бельгия, Эстония, Венгрия, Латвия, Германия, Италия, Польша, Португалия, Словения, Швейцария, Южная Африка, Испания, “Бывшая Югославская Республика Македония”), и они имеют ограниченное действие.

206. Конституционный Суд должен также иметь полномочие по восстановлению нарушенных прав для того, чтобы быть эффективным средством правовой защиты согласно прецедентному праву Европейского суда по правам человека. Тем не менее часто результатом решения Конституционного Суда является возобновление производства по конкретному делу, а не возмещение убытков Конституционным Судом[229].

IV. Иные вопросы

IV.1. Разграничение юрисдикции между конституционными и обычными судами

207. В случае нарушений основных индивидуальных прав последние должны быть восстановлены как можно быстрее. В этом смысле важен вопрос отношений между обычными судами и Конституционным Судом. Прежде всего следует отметить, что именно обычные суды находятся “на передовой линии” применения обычных (и конституционных) законов. Следовательно, их роль в обеспечении верховенства Конституции не преувеличивается. Обычные суды являются первыми имеющими возможность обнаружить проблему применения закона с точки зрения конституционности. Их понимание содержания конституционных положений определяет качество защиты конституционного строя, а с точки зрения индивидуального доступа - качество защиты основных прав. Существуют различные методы распределения компетенций и социальной оценки роли Конституционного Суда и обыч-

[229] В деле Кочарелла против Италии (ECtHR, GC, 29 March 2006) ЕСПЧ установил: “Очевидно, что в государствах, в которых встречаются нарушения в сфере продолжительности судопроизводства, средство правовой защиты, предусмотренное только для ускорения судопроизводства, несмотря на то, что является благоприятным для будущего, не является достаточным для исправления ситуации, когда судопроизводство очевидно было чрезмерно длительным. Различные средства правовой защиты могут должным образом восстановить нарушенное право. Суд ранее заявлял об этом относительно уголовного судопроизводства, когда было установлено, что продолжительность судопроизводства была принята во внимание при сокращении наказания на определенную часть *(См. Beck v. Norway, no. 26390/95, § 27, 26 June 2001)*. Кроме того, некоторые государства, такие как Австрия, Хорватия, Испания, Польша и Словакия, сопоставляют два вида средств правовой защиты, один из которых предусмотрен для ускорения судопроизводства, а второй для предоставления компенсации *(См., например, Holzinger (no. 1), § 22; Slaviček v. Croatia (dec.), no. 20862/02, ECHR 2002-VII; Fernández-Molina González and Others v. Spain (dec.), no. 64359/01, ECHR 2002-IX; Michalak v. Poland (dec.), no. 24549/03, 1 March 2005; and Andrášik and Others v. Slovakia (dec.), nos. 57984/00, 60237/00, 60242/00, 60679/00, 60680/00, 68563/01 and 60226/00, ECHR 2002-IX)”* (параграфы 76-77)”.

ных судов, которые отражаются в отношениях последних. Кроме того, полномочия и готовность обычных судов рассматривать вопросы конституционности важны для лица, чьи права были нарушены, так как от этого зависит быстрое рассмотрение нарушений или в обычном судопроизводстве (в децентрализованных или специальных системах), или посредством представления предварительного запроса.

208. Есть несколько вопросов, касающихся отношений между обычными судами и Конституционным Судом. Первым является вопрос о компетенциях: в какой мере конституционные суды могут вмешиваться в юрисдикцию обычных судов? Вторым является вопрос толкования, который имеет два аспекта: ссылается ли Конституционный Суд на толкования обычных судов, и применяют ли обычные суды решения Конституционного Суда и их обоснование?

IV.1.1. Полномочия по контролю

209. “В системах, в которых судебную власть разделяют Конституционный и Верховный Суды, существуют проблемы согласованности при распределении юрисдикции и принятии решений о несоответствии”[230]. Согласно Л. Гарлицкому, конфликты между конституционными и верховными судами неизбежны в системе централизованной конституционной юрисдикции: специализированные конституционные суды, которые обычно не являются частью обычной судебной системы, дают толкование неопределенных понятий, предусмотренных в Конституции, таким образом, будучи уполномоченными уточнять конституционные принципы в качестве компетентного органа. Обстоятельство, что Конституционный Суд осуществляет не только абстрактный, но также и конкретный контроль, и что его толкования касаются почти всех ветвей права, посягает на традиционную роль обычных судов давать толкование "своих" законов и ограничивает возможности их действий при применении положения. Разрешая конкретные дела, конституционные суды оценивают не только заявления, но также и толкования законов, данные обычными судами.

210. Теоретически отношения между Конституционным Судом и обычными судами менее конфликтны в случае нормативной конституционной жалобы, чем полной[231], так как Конституционный Суд непосредственно не рассматривает применение нормативного акта обычным судом. Тем не менее даже в государствах, где существует нормативная конституционная жалоба, могут возникнуть разногласия. В Венгрии Конституционный Суд может выразить позицию относительно применения нормативного акта, используя метод *diritto vivente* (см. выше) для того, чтобы дать толкование конкретному закону. Таким образом, основанием для признания закона неконституционным может быть его неоднократное неконституционное толкование обычными судами[232], и Конституционный Суд “становится

[230] T. Ginsberg, “Economic Analysis and the Design of Constitutional Courts”, *Theoretical Inquiries in Law* 3 (200é), цитата из: Sadurski, указанная работа, стр.19.
[231] См. W. Sadurski, указанная работа, стр.7ff.
[232] H. Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, Chicago University Press, Chicago, 2000.

четвертым звеном юрисдикции … осуществляющим контроль за решениями обычных судов”[233].

211. Согласно Венецианской комиссии, ”некоторые конституционные суды, осуществляющие контроль по конституционным жалобам, сталкиваются с проблемой вмешательства в юрисдикцию обычных судов. Возможность рассматривать решения обычных судов может вызвать напряжение и даже конфликты в отношениях между обычными судами и Конституционным Судом. Следовательно, **необходимо избежать такого решения вопроса, когда Конституционному Суду предоставляется статус "вышестоящего Верховного Суда".** Отношения последнего с "обычными" высшими судами (Кассационный Суд) должны быть недвусмысленно определены"[234]. “**Конституционный Суд должен рассматривать только “конституционные вопросы”, оставляя компетенцию толкования обычных законов судам общей юрисдикции. Несмотря на это, следует отметить, что выявление конституционных вопросов может быть трудным относительно права на справедливое судебное разбирательство, в случае которого любое процессуальное нарушение обычными судами может считаться нарушением права на справедливое судебное разбирательство. Следовательно, некоторые ограничения со стороны Конституционного Суда кажутся уместными не только во избежание собственной перегрузки, но также и “из уважения” к юрисдикции верховных судов.**

IV.1.2. Обязательная сила мотивировок решения

212. Мотивировочной является та часть решения, в которой суд придает форму своему решению, и в которой не только отражаются "обоснования" решения, но также даются предписания относительно дальнейшей позиции суда по поводу определенного вопроса (“*obiter dicta*”). Как правило, конституционные суды дают толкование конституционных и законодательных положений в мотивировочной части решения. В государствах, где верховные суды неофициально признают толкование конституционных положений, данное Конституционным Судом, что в настоящее время встречается все чаще (институциональная лояльность между конституционными органами[235]), гарантируется единообразное применение вышеуказанных норм. Тем не менее в некоторых государствах возникает вопрос относительно формальной обязательной силы *ratio decidendi* решений Конституционного Суда для обычных судов[236]. В Чешской Республике Конституционный

[233] L. Favoreu цитата из: H. Schwartz, указанная работа, стр. 25.
[234] CDL-AD(2004)024 Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey.
[235] CDL-JU(2009)001, “Reflections on the Execution of Constitutional Court Decisions in a Democratic State under the Rule of Law on the Basis of the Constitutional Law Situation in the Federal Republic of Germany”, Baku, 2008.
[236] L. Garlicki, “Constitutional courts versus supreme courts”, *International Journal of Constitutional Law* 2007 5(1), Oxford University Press, Oxford, в: http://icon.oxfordjournals.org/cgi/content/full/5/1/44#FN59#FN59, проверено 11 февраля 2009. См. также A. ALEN and M. MELCHIOR, *The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European Courts, General Report, Conference of European Constitutional Courts, XIIth Congress*, Brussels, Egmont Palace, 14-16 May 2002, стр. 48, available in http://www.confcoconsteu.org/en/common/home.html, проверено 21 сентября 2010 года.

Суд, выражаясь в пользу обязательной силы, утверждает, что обоснование решения фактически содержит конституционно необходимое толкование Конституции, и таким образом, должно в дальнейшем применяться обычными судами. Однако обычные суды часто “не принимают решения в соответствии” с толкованием Конституционного Суда[237]. В Венгрии одной из проблем является конституционный контроль нормативных решений Верховного Суда: эти решения принимаются для обеспечения единообразного судебного толкования законов. Об этой компетенции Конституционного Суда после нескольких лет колебаний Суд сам выразил правовую позицию в 2005 году”[238]. В Австрии решения суда не могут быть обжалованы в Конституционном Суде[239]. Такие противоречия возникают и в Польше[240].

213. В правовых системах общего права только резолютивная часть решения (*ratio decidendi*) может стать обязательным прецедентом, тогда как мотивировочная часть (*obiter dicta*) имеет только убеждающую силу[241].

IV.1.3. Обязанность представить предварительный запрос

214. Если вопрос четко не регулируется в Конституции, конституционные суды часто стараются возложить на обычные суды обязанность представить запрос относительно конституционности нормативного акта, подлежащего применению в конкретном деле, так как это укрепляет унифицирующую роль Конституционного Суда[242]. Среди государств, в которых существует возможность представления предварительного запроса, различаются две группы:

215. 1. Государства, в которых обычные суды не имеют возможности усмотрения. Когда выявляются факты, которые могут стать поводом для сомнений относительно конституционности положения, подлежащего применению в конкретном деле, суды должны быть обязаны обратиться в Конституционный Суд с предварительным запросом (в Албании, Австрии, Бельгии, Боснии и Герцеговине, Латвии, Литве, Молдове, “Бывшей Югославской Республике Македония” и Румынии). А в Австрии законам, которые “могут применяться” в конкретном деле, дается расширительное толкование: Конституционный Суд может отказать в принятии предварительного запроса к рассмотрению, только если нет вероятности, что для принятия решения по конкретному делу необходимо применение положения[243].

[237] P. Holländer, “The Role of the Czech Constitutional Court: Application of the Constitution in Case Decisions of Ordinary Courts”, *Parker Sch. J.E.Eur.* L 4 (1997), цитата из: W. Sadurski, указанная работа, стр.22 f.
[238] CDL-JU(2008)040, P. Paczolay, “The Jurisdiction of the Hungarian Constitutional Court”, report for the seminar “Models of constitutional jurisdiction”, Ramallah, 2008.
[239] G. Kucksko-Stadlmayer, Beziehungen, указанная работа, стр. 27.
[240] См. Решение Верховного Суда Польши IIIPZP 2/09 от 17 декабря 2009 года.
[241] См. the U.S. Central Green Co. V. United States (99-859) 531 U.S. 425, в: http://www.law.cornell.edu/supct/html/99-859.ZS.html, проверено 4 мая 2009.
[242] *General Report, XIIth Congress of the Conference of European Constitutional Courts*, (A. Alen, M. Melchior), Brussels, 2002, стр.7, в: http://www.confcoconsteu.org/en/common/home.html, проверено 23 февраля 2009.
[243] G. Kucsko-Stadlmayer, Beziehungen, указанная работа, стр. 25 и следующие.

216. 2. В Болгарии, Чешской Республике, Германии, Венгрии, Италии[244], Люксембурге, Мальте, России, Словакии, Словении, Турции обычный судья представляет предварительный запрос в Конституционный Суд, только если убежден в неконституционности нормативного акта и отсутствии толкования, допускающего конституционное применение закона. Это происходит особенно в тех случаях, когда стороны судопроизводства поднимают вопрос об исключении неконституционности. Тем не менее Венецианская комиссия отмечает, что **если не предусмотрен прямой индивидуальный доступ к конституционному правосудию, должен быть довольно высокий порог для обуславливания предварительных запросов убеждением обычных судей о неконституционности положения; серьезных сомнений уже должно быть достаточно[245].** Относительно Эстонии следует отметить, что согласно части 1 статьи 9 Закона “О судопроизводстве в порядке конституционного надзора” в случае, если суд первой инстанции или Апелляционный Суд при принятии решения по делу не применяет соответствующие общеобязательные акты или международные соглашения и признает их неконституционными или отказывает в признании общеобязательных актов неконституционными, он направляет решение или постановление в Верховный Суд.

217. Следующий вопрос касается дискреционного полномочия судов в решении вопроса о том, должно ли заявление об исключении неконституционности, поданное стороной обычного судопроизводства, представляться в Конституционный Суд. В Алжире, Андорре[246], Армении, Бельгии, Белоруссии, Франции, Венгрии, Италии, Люксембурге, Мальте, Польше, Словакии, Испании, Румынии, Турции и Украине решение обычного судьи не представлять предварительный запрос на основании ходатайства стороны подчеркивает независимость первого, так как отказ должен быть мотивированным, но не может быть обжалован (за исключением случаев отсутствия обоснования или иных формальных ошибок[247]). Тем не менее отказ

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[244] См. L.Garlicki, указанная работа, и W. Sadurski, указанная работа.

[245] CDL-INF(2001)28 Interim Opinion on the Draft Law on the Constitutional Court of the Republic of Azerbaijan.

[246] Статья 2 Закона “О судебных процессах” устанавливает состязательный превентивный процесс до принятия решения обычного суда относительно представления предварительного запроса в Конституционный Трибунал. Когда Конституционный Трибунал представляет предварительный запрос по своему усмотрению или ходатайство представляют стороны судопроизводства, Трибунал действует согласно статье 53.3 Закона “О Конституционном Трибунале” и статье 2 Закона “О судебных процессах”. В соответствии с указанными положениями обычный трибунал принимает решение, в котором представляется обоснование и содержание предварительного запроса, который должен быть представлен в Конституционный Трибунал. Стороны судопроизводства и Генеральный прокурор могут представить свое мнение, после чего обычный суд решает, представить или нет предварительный запрос, как это было установлено в его первом решении, или представить его с изменениями.

[247] В Турции тем не менее, если в ходе судопроизводства обычный суд не убежден в серьезности жалобы о неконституционности примененной нормы, такая жалоба с окончательным решением может быть обжалована сторонами судопроизводства. Согласно статье 152 Конституции Турции “если Суд, рассматривающий дело, считает, что закон или решение, имеющее силу закона, подлежащее применению в конкретном деле, является неконституционным, или если он убежден в обоснованности жалобы о неконституционности, представленной стороной, он приостанавливает производство по делу до принятия решения Конституционным Судом. Если суд не убежден в обоснованности жалобы о неконституционности, такая жалоба с основным решением рассматривается компетентным апелляционным органом”.

не обязательно препятствует праву заявителя требовать представления предварительного запроса в каждой инстанции (это четко выражено в законе Сан-Марино). В Уругвае, с другой стороны, можно обжаловать отказ суда, а в Румынии обычный судья обязан представить предварительный запрос в Конституционный Суд по ходатайству одной из сторон. Во Франции после вступления в силу поправок относительно представления предварительных запросов в 2010 году обычные судьи представляют предварительные запросы в Конституционный Совет, только если они имеют серьезные сомнения относительно конституционности нормы. Если дело является безотлагательным, обычный судья может принять решение по делу, даже если Конституционный Суд еще не принял решение относительно представленного запроса.

IV.2. Прямой индивидуальный доступ и проблема перегрузки Конституционного Суда

218. Дилемма между загруженностью Конституционного Суда и обеспечением эффективной системы защиты прав человека решается различными методами: некоторые государства с самого начала не внедрили индивидуальную жалобу, другие предусмотрели фильтры для отсеивания запросов, которые являются несерьезными или "явно" или “по всей вероятности” не будут иметь успеха.

219. Все описанные выше фильтры служат цели сокращения нагрузки Конституционного Суда. Кроме того, облегчению нагрузки Суда могут служить организационные изменения, а также более высокая степень избирательности.

IV.2.1. Предписания certiorari и отбор дел судом

220. Несмотря на то, что юрисдикция нижестоящих федеральных судов и судов штатов США по конституционным вопросам, как правило, не является дискреционной, Верховный Суд Соединенных Штатов[248] не обязан рассматривать все представленные дела и может выбирать вопросы, которые, по его мнению, имеют существенное значение для защиты конституционного строя или для развития прецедентного права. Несмотря на то, что объем работы сокращается при такой степени избирательности Верховного Суда, такое усмотрение при отборе дел исключает систематическую индивидуальную защиту. С другой стороны, отсутствие предписания *certiorari* или аналогичного института при условии большой нагрузки обязательно приведет к внедрению подобных механизмов самим Конституционным Судом (например обширные требования относительно допустимости), что является актом “самообороны”. Использование таких механизмов обычно бывает скрытым и не признается пользователями. Следовательно, при наличии большой нагрузки институт отбора дел является необходимым, и он должен быть

[248] Правило 10 Верховного Суда США гласит: “Рассмотрение дела по предписанию certiorari не является вопросом права, а является вопросом судебного усмотрения. Ходатайства о выдаче предписания certiorari удовлетворяются, только если существуют непреодолимые обстоятельства”.

тщательно изучен Конституционным Судом. Внедрение предписания *certiorari* в настоящее время обсуждается в Парламенте Словении. В других государствах, например в Германии, обсуждается вопрос о наличии некоторого усмотрения Конституционного Суда. Вопрос требует дальнейшего обсуждения и рассмотрения. Следует принять во внимание вопрос эффективности средства правовой защиты (с точки зрения фильтрирующей функции конституционных жалоб для Европейского суда по правам человека).

221. Тем не менее конституционным судам должны предоставляться средства для предотвращения несерьезных, злоупотребляющих или повторяющихся жалоб.

222. Например законы о Конституционном Суде Германии[249], Венгрии[250], Словении[251] и Испании[252] предусматривают предварительный контроль полной конституционной жалобы. Жалоба будет отклонена, если не содержит вопросы, которые являются существенными с точки зрения конституционности. В Южной Африке Конституционный Суд рассматривает заявление или жалобу, представленную в порядке прямого доступа, если в нем поднимается конституционный вопрос, и в интересах конституционного правосудия рассмотреть его. В Израиле коллегия из трех судей может отклонить заявление, если считает, что оно с первого взгляда является необоснованным[253]. Интересы правосудия включают множество элементов, в том числе возможность успеха, общественные интересы в деле и вопрос о том, имел ли Высший Апелляционный Суд возможность выразить свою позицию относительно вопроса[254].

223. Часто для рассмотрения заявления и принятия решения об отказе в осуществлении контроля в случае, если заявление не будет иметь успеха, предусматривается орган, состоящий из меньшего числа судей (например в Австрии, Германии, Словении). Результатом этого является сокращение нагрузки Конституционного Суда, а процесс требует меньшей степени формальности[255]. В этом смысле следует отметить немецкую практику: заявления, которые с первого

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[249] Статья 93a Закона "О Федеральном Конституционном Суде (допустимость конституционных жалоб).

[250] См., например, статью 23 Закона "О Конституционном Суде", согласно которой: "1. Председатель Конституционного Суда направляет ходатайство, представленное стороной, не наделенной правом представить такое ходатайство, органу, наделенному правом представить его, а явно безосновательное ходатайство отклоняется Председателем Конституционного Суда."

[251] Статья 55b Закона "О Конституционном Суде".
(2) Конституционная жалоба принимается к рассмотрению: при наличии нарушений прав или основных свобод человека, имеющих серьезные последствия для заявителя; или, если это касается важного конституционного вопроса, превосходящего значение конкретного дела.

[252] См. Закон "О Конституционном Суде" от 2007 года (с поправками).

[253] Статья 5 Регламента Верховного Суда.

[254] Глава 167 (3) Конституции предусматривает, что Конституционный Суд разрешает только конституционные дела и вопросы, связанные с решениями по конституционным делам. Суд сам принимает окончательное решение о том, является ли вопрос конституционным.

[255] См., например, статью 93d.1 Закона "О Федеральном Конституционном Суде", согласно которой, "1. Решения, предусмотренные в статьях 93 b и c, принимаются по письменной процедуре. Эти решения не могут быть обжалованы. Отказ в принятии конституционной жалобы к рассмотрению не обязательно должен быть мотивированным".

взгляда не являются конституционными жалобами, направляются в “общий реестр”, а не прямо в реестр судопроизводств. В этом случае заявителю направляется неофициальное письмо, посредством которого ему сообщают о возможности представить ходатайство о дальнейшем рассмотрении заявления Конституционным Судом. Если заявитель настаивает на принятии решения судом, заявление направляется в реестр судопроизводств, в противном случае оно остается в общем реестре[256]. Таким образом, многие заявления могут рассматриваться фактически без отклонения жалобы и без необходимости вступления судьи в процесс рассмотрения дела на данной стадии. Кроме этого, индивидуальная жалоба должна быть принята коллегией из трех судей (или палатой) согласно § 93 а Закона “О Федеральном Конституционном Суде”. Коллегия принимает решение по делу в соответствии с § 93 с (1), если оно четко обосновано, и конституционный вопрос по делу был в принципе решен одной из палат.

IV.2.2. Организация Конституционного Суда

IV.2.2.1. Больше сотрудников

224. **Венецианская комиссия рекомендует, чтобы судьям помогали квалифицированные помощники; их число должно определяться в соответствии с нагрузкой Суда[257].** “В зависимости от числа и квалификации сотрудников, секретариат Суда может осуществлять начальное предварительное изучение обращения, чтобы по мере возможности исключить явно недопустимые жалобы. Тем не менее, поскольку судебная власть не может быть делегирована секретариату, мнение последнего может быть только консультативным“[258]. Фактически, постоянный аппарат или длительное время работающие сотрудники предоставляют возможность для формирования институциональной памяти, способствующей большей согласованности и последовательности прецедентного права суда; данный вопрос является более уместным относительно стран континентальной правовой системы, чем для стран системы общего права.

IV.2.2.2. Палаты с меньшим числом судей

225. **Целесообразным методом для сокращения нагрузки Суда может быть создание меньших судейских палат при разрешении дел, инициированных в результате одного из видов индивидуального доступа, решения по которым должны приниматься в пленарном заседании только при наличии новых или важных вопросов. Важно, чтобы закон о Конституционном Суде предусматривал возможность разрешения дел в пленарном заседании в случае проти-**

[256] Merkblatt über die Verfassungsbeschwerde zum Bundesverfassungsgericht, в: http://www.bundesverfassungsgericht.de/organisation/vb_merkblatt.html, проверено 8 июня 2009.
[257] CDL-AD(2008)030 Opinion on the Draft Law on the Constitutional Court of Montenegro.
[258] CDL-STD(1995)015 The Protection of fundamental rights by the Constitutional Court, Science and Technique of Democracy no. 15, 1995.

воречий в решениях палат; в противном случае, создается угроза единству практики Конституционного Суда[259]. Кроме того, должны быть недвусмысленные правила во избежание любой возможности проявления предвзятости при распределении дел между палатами или при определении состава последних. В данном контексте описываются только соответствующие органы (пленарное заседание, коллегии, палаты), принимающие решения по делам, касающимся индивидуального доступа. Конституционный Суд принимает решения по делам на основании индивидуального доступа в пленарном заседании в Албании, Армении, Кипре, Греции, Латвии, Лихтенштейне, Румынии, Словении, "Бывшей Югославской Республике Македония" и Украине. В Германии[260], России и Южной Африке решения принимают палаты из 8 - 11 судей, в Хорватии[261] и Испании - из 3 или 6, в Австрии, Боснии и Герцеговине, Дании, Эстонии, Люксембурге, Монако, Норвегии, Швейцарии и Польше - из 5, в Грузии[262], Чешской Республике, Венгрии, Мальте, Словакии и Швейцарии - из 3 или 4 судей. В Португалии, когда Конституционный Суд не принимает решение в пленарном заседании, его палаты состоят из 1, 3 или 5 судей. В Израиле Верховный Суд обычно заседает в коллегии из 3 судей, если до выступления в Суде Председатель или Заместитель Председателя не решает, что необходимо увеличить количество судей коллегии до любого нечетного числа судей. Кроме этого, коллегии могут решить увеличить число своих судей.

Частичные заключения относительно Главы IV

26. Полномочия Конституционного Суда и действие его решений предопределяют наличие проблем относительно отношений между Конституционным Судом и обычными судами, так как последние должны применять законы и одновременно соблюдать верховенство Конституции. Кроме того, для лица, чьи права были нарушены, важны полномочия и готовность обычных судов рассматривать вопросы конституционности, так как от этого зависит быстрое рассмотрение нарушений или в обычном судопроизводстве (в децентрализованных или специальных системах), или посредством представления предварительного запроса. Напряжение в отношениях между обычными судами и Конституционным Судом

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[259] CDL-AD(2004)024, Opinion on the draft constitutional amendments with regard to the Constitutional Court of Turkey.

[260] Федеральный Конституционный Суд состоит из двух отдельных и равных палат, включающих восемь членов (статьи 2.1 и 2.2 Закона "О Федеральном Конституционном Суде"). Каждая из них действует от имени " Федерального Конституционного Суда". В конституционном судопроизводстве только Пленум, то есть все 16 судей, принимает решение, если палата склоняется к принятию решения, не соответствующего правовой позиции другой палаты (статья 16). В каждой палате есть несколько коллегий, включающих трех членов (статья 15а.1), которые осуществляют судопроизводство по конституционным жалобам и по конкретному контролю законов.

[261] Палаты принимают решения по конституционным делам единогласно; КС также принимает решения в пленарном заседании по делам по абстрактному контролю и если не принял единогласного решения по конституционной жалобе.

[262] В коллегиях Конституционного Суда Грузии заседают 4 судей.

неизбежно в системе с централизованной конституционной юрисдикцией. Следует отметить, что отношения между Конституционным Судом и обычными судами менее конфликтны в случае нормативной конституционной жалобы, чем полной. Во избежание напряжения и конфликтов относительно полномочий Венецианская Комиссия рекомендует избежать такого решения вопроса, когда Конституционному Суду предоставляется статус "вышестоящего Верховного Суда", вмешивающегося в применение законов обычными судами, и следовательно, Конституционный Суд должен рассматривать только конституционные вопросы, ограничивая сферу контроля *ratione materiae*, а также предотвращая перегрузку Суда. Тем не менее проблема риска перегрузки Суда должна быть сбалансирована с необходимостью обеспечения эффективного индивидуального доступа к конституционному правосудию. Защита прав человека требует, чтобы все обычные суды имели доступ к конституционному правосудию, а не сокращалось число эффективных средств правовой защиты посредством чрезмерно строгого отбора заявлений, касающихся конституционных вопросов. Следовательно, обычные суды имеют некоторую степень свободы усмотрения. Если они уверены в неконституционности положения, они должны иметь возможность обращаться с предварительным запросом в Конституционный Суд для оспаривания рассматриваемой нормы. Если не предусмотрен прямой индивидуальный доступ, серьезные сомнения должны быть достаточны для осуществления предварительного контроля в Конституционном Суде.

227. Для обеспечения соответствующего баланса между интересами индивидуального доступа к конституционному правосудию и ограничениями в сфере полномочий Конституционного Суда и риском его перегрузки Венецианская комиссия рекомендует, чтобы судьям помогали квалифицированные помощники; их число должно определяться в соответствии с нагрузкой Суда. Надлежащая деятельность Суда должна обеспечиваться правильным распределением судей в палатах, что является эффективным методом сокращения нагрузки Суда, но вместе с этим должны существовать механизмы для обеспечения единства судебной практики Конституционного Суда.