

**Conference of European Constitutional Courts
XIIth Congress**

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

**Report of
the Constitutional Court
of Republic of Belarus**

I. The Constitutional Court, the other courts and the constitutional review

A. The judicial organization of the State

1. According to the Law of 13 January 1995 “On judicial system and status of judges in the Republic of Belarus” judicial power shall be carried out in the country by the courts of common law, economic courts and the other courts specified in the laws. The Supreme Court of the Republic of Belarus, courts of oblasts, Minsk city court, region (city) courts, as well as military courts shall be the courts of common law. The Supreme Economic Court of the Republic of Belarus, economic courts of oblasts and the courts equated with them, economic courts of cities and regions shall be economic courts.

In the system of the courts of common law and economic courts it is possible to form specialized boards. In instances specified in the laws in that system there may be formed specialized courts: juvenile, family, administrative, land, tax and other courts.

2. The Constitution of the Republic of Belarus of 1994 adopted with alterations and addenda at the republican referendum of 24 November 1996 shall refer the Constitutional Court to judicial authority. However, the Court has reserved its control function over the constitutionality of enforceable enactments in the State. The Court shall have no power to examine concrete judicial disputes and criminal cases.

B. The respective jurisdictions of the constitutional court and the other courts in the area of constitutionality review

3. The Constitutional Court on the recommendations of the President of the Republic of Belarus, the House of Representatives, the Council of the Republic, the Supreme Court of the Republic of Belarus, the Supreme Economic Court of the Republic of Belarus, the Council of Ministers of the Republic of Belarus shall produce a ruling on:

- the conformity of laws, decrees and edicts of the President, international agreements and other obligations of the Republic of Belarus to the Constitution and other instruments of international law ratified by the Republic of Belarus;
- the conformity of instruments of interstate formations of which the Republic of Belarus is part, edicts of the President of the Republic of Belarus which are issued to the execution of the law, the Constitution, the laws, decrees and instruments of international law ratified by the Republic of Belarus;
- the conformity of the ordinances of the Council of Ministers and orders of the Supreme Court, the Supreme Economic Court, Procurator-General to the Constitution, laws and instruments of international law ratified by the Republic of Belarus, laws, decrees and edicts;
- the conformity of enactments of any other state body to the Constitution, laws and decrees, as well as to the laws and instruments of international law ratified by the Republic of Belarus.

In instances specified by the Constitution, the Constitutional Court with regard to proposal of the President shall give its conclusion on the presence of instances of systematic or flagrant violation of the Constitution of the Republic of Belarus by the chambers of Parliament.

4. The competence of the Constitutional Court on specification of the constitutionality of enforceable enactments in the State shall be exclusive. However, the Constitution shall stipulate participation of the courts of common law, economic and specialized courts in administering constitutional justice (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.

5. In accordance with effective legislation, the review carried out by the Constitutional Court of the Republic of Belarus is a subsequent review. At present, the Constitutional Court raises question on introduction of a prior review as regards certain types of enforceable enactments.

6. The review carried out by the Constitutional Court of the country is a review of an abstract nature, since effective legislation shall specify no possibility to examine constitutional appeals and the Constitutional Court is not entitled to solve concrete judicial disputes (cases).

C. Referral to the Constitutional Court

7. From among different types (ways) of referral on the issue of the constitutionality of enforceable enactments (action for annulment, suit for unconstitutionality, constitutional appeal) as regards the Constitutional Court there are envisaged applications of the competent bodies and officials (stated above) with the proposal to give conclusion of the constitutionality of an enforceable enactment. Since formation of the Constitutional Court in 1994 as a result of those applications there have been brought 73 cases and 12 of them have been terminated.

Together with examination of the mentioned proposals the Constitutional Court under Article 40 of the Constitution, which shall stipulate that everyone shall have the right to address personal or collective appeals to state bodies, shall consider those appeals and in instances of necessity shall adopt rulings on elimination of contradictions or gaps in the legislation, adoption of necessary laws and other enforceable enactments. During last three years (1999 - 2001) there have been adopted 89 of those rulings (as on 1 September 2001).

8-9. The Constitution and the Law “On the Constitutional Court of the Republic of Belarus” shall not envisage direct recourse to the Constitutional Court with the action for annulment of the laws and other enforceable enactments.

10. The Constitutional Court is not empowered to suspend statutes or other regulations.

11. Point 3 specifies state bodies and officials who shall have the right to appeal to the Constitutional Court with the proposal to give conclusion on the constitutionality of an enforceable enactment. Other state bodies, public associations, as well as citizens shall put forward initiative before bodies and persons who enjoy the right to make proposals on verification of the constitutionality of an act.

As for the appeals to the Constitutional Court of the courts, according to Article 6 of the Law “On the Constitutional Court of the Republic of Belarus” 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, after a ruling of a court becomes valid, raises before the Supreme Court or the Supreme Economic Court of the Republic of Belarus

the issue on submitting by them of the proposal to the Constitutional Court of whether the enforceable enactment in question should be deemed unconstitutional.

12. The Supreme Court or the Supreme Economic Court of the Republic of Belarus shall be obliged within a month to make the proposal to the Constitutional Court on finding the enforceable enactment in question to be unconstitutional.

13. The effective legislation shall not envisage the possibility to oppose, by a procedure of objection, opposition or recourse, the submission of all or part of a case to the Constitutional Court by a ruling of referral.

14. Parties in the constitutional proceedings shall be initiators, who have appealed with the proposal on verification of the constitutionality of an act, as well as bodies, officials, who have signed or issued an enforceable enactment, concluded an international treaty, on the verification of which there shall be raised the question.

Proposal on verification of the constitutionality of an act should contain: information about initiator (initiators) of the proposal which shall confirm the competence of its submission to the Constitutional Court; name of an enforceable enactment or an international treaty which is subject to verification, information about the resources of its publication (receiving); grounds for consideration of the issue in the Constitutional Court; position of a party, its legal grounds with the reference to the relevant norms of the legislation; list of documents.

Parties and their representatives shall have the right to acquaint themselves with all materials obtained in the process of preparation of the sitting of the Constitutional Court on the issue under verification, to present written opinions, to propose expert candidatures by establishing expert examination, to petition for summons to the Court of witnesses, experts and specialists, to raise the question on suspension of consideration of a case, to petition for holding up the proceedings, to put questions to opposite party, witnesses, experts and specialists, to state their own position on a case, to make concluding remarks on the issue under verification, to petition for giving official interpretation of rulings of the Constitutional Court. A party or its representatives shall have the right before finishing study of the materials of a case in the building of the Court to call back its proposal on verification of the constitutionality of an act. In instance of recall of the proposal the proceedings shall be subject to termination.

15. The courts that put the question on the constitutionality of the enforceable enactment, as well as all the other specified in the law initiators of the cases of that kind, shall have the right to express and to ground upon their opinion on unconstitutionality of the relevant act.

16. According to Article 49 of the Law “On the Constitutional Court of the Republic of Belarus” the Constitutional Court shall refuse to consider the proposals if:

- the proposal is submitted by a body or a person who has no such a competence;
- the proposal in its content and form shall not meet the requirements set forth by the law;
- consideration of a proposal shall not fall within the competence of the Constitutional Court;
- the constitutionality of the specified in a proposal international treaties, enforceable enactments or their certain parts has been already verified by the Constitutional Court and, since that period of time, the Constitution or other enforceable enactments, which served as the basis for the adoption of the ruling, have not been changed;

- the issue dealt with an international treaty or other act under constitutional verification is not provided for in the Constitution and the way of its proper solution may not be derived from the general principles and meaning of the Constitution;
- a party has not remedied shortcomings in drawing up a proposal on verification the constitutionality of an enforceable enactment.

In the event of grounds for refusing to consider a proposal being established during a sitting of the Constitutional Court, there shall be adopted a ruling on discontinuance of consideration of the issue.

17. As it has been specified above the Supreme Court and the Supreme Economic Court of the Republic of Belarus shall have the right of direct appeal to the Constitutional Court with the proposal to determine the constitutionality of an enforceable enactment. Subordinated courts shall raise the relevant issues through the specified highest judicial instances. The Supreme Court has appealed to the Constitutional Court with that type of proposals only once (1997), and the Supreme Economic Court during last four years — 7 times.

The Constitutional Court shall have no right to ignore appeals of the highest judicial instances, but may refuse to consider them under the grounds specified in the law and listed in point 16.

The limits for the solution of issues raised for consideration before the Constitutional Court, including by the specified courts, shall be determined by the Constitutional Court itself. At the same time, the Constitutional Court shall not be bound by the arguments and opinions of the parties. The Court may also deliver a ruling as regards the acts based on the act under verification or the provisions reproducing its certain provisions, if they were not mentioned in the proposal. Moreover, the Constitutional Court while verifying the constitutionality of an act shall bear in mind both its literal meaning and the meaning attached to it by the practice.

18. The Constitutional Court should not consider all aspects, both in law and in fact, of the action pending before the court of common law and the court of special competence which has brought the case on verification of the constitutionality of an enforceable enactment regulating relevant relations.

19. The Constitutional Court shall have no right to dismiss the proposal on consideration of the constitutionality of an enforceable enactment made in the specified in the law procedure on that ground, that it is not useful to the settlement of the action brought before the court.

20. According to the legislation the Constitutional Court is submitted the proposal on giving judgement on the constitutionality of the definite enforceable enactment or its parts. Due to that, there is no necessity to formulate the submitting proposal in a different way in order to make it clearer and better. That is quite different that during consideration of a case the Presiding Officer in the hearing shall direct debates on the issue under consideration according to the procedure established by the Rules of Procedure of the Constitutional Court of the Republic of Belarus. In the process of consideration of the proposal the Constitutional Court shall have the right on their own initiative or under the application of the participants of the hearing to obtain on demand in addition texts of enforceable and other legal acts and materials which are necessary for proper settlement of the issues under consideration, to demand checking and expert examinations for establishment and specification of certain circumstances of a case, further summons of experts, specialists, witnesses.

After making statements by each of the parties, their representatives the Presiding Officer shall give the judges the possibility to put questions to the parties, their representatives for specification of the position of parties and of the arguments they adduce. The parties and their representatives may be put questions by those present in a hearing the President of the Republic of Belarus, Chairpersons of the chambers of the National Assembly of the Republic of Belarus, the Prime Minister of the Republic of Belarus, Chairpersons of the Supreme Court and the Supreme Economic Court of the Republic of Belarus, the Procurator-General, the Minister of Justice of the Republic of Belarus, as well as by the experts and specialists, but in the part where it is necessary for giving expert conclusion or statement of the opinion.

21. The Constitutional Court shall verify the constitutionality of an enforceable enactment with the name and with the wordings according to the official text of its publication.

22. If, after making in the specified in the law procedure proposal on consideration of the constitutionality of an enforceable enactment, but before the adoption by the Constitutional Court of the conclusion on the given case the text of the act under verification is subject to be amended, the Constitutional Court shall continue to verify the constitutionality of that act with valid amendments thereto taken into account.

23. The subjects of law, whose cases have been considered by the courts and whose rights and lawful interests were infringed thereupon by the applying enforceable enactment the constitutionality of which is challenged, can participate in the procedure before the Constitutional Court. That possibility is secured, first of all, by open nature of the proceedings before the Constitutional Court; secondly, the specified persons can participate in the proceedings as witnesses both proposed by the parties and invited on the initiative of the Constitutional Court.

Information of the procedure before the Constitutional Court the specified persons should obtain from the courts who initiated the proceedings on the constitutionality of the relevant enforceable enactment. Moreover, interested persons shall have the right to apply for the information directly to the Constitutional Court with the reference to the fact, that consideration of their case in the ordinary court may lead to the verification of the constitutionality of the relevant enforceable enactment.

24. The effective legislation shall not directly envisage participation of a counsel for the defence in the procedure on verification of the constitutionality of an enforceable enactment. However, counsels for the defence, other persons, whose powers are confirmed in written by the parties in the specified order, can participate in a hearing as representatives of parties.

There is no counsel for the prosecution with the control activities of the Constitutional Court, since the Constitutional Court is the unique state body which shall carry out control over the constitutionality of enforceable enactments in the state including acts of the Procurator-General of the country. At the same time, the Procurator-General shall have the right to take part in the sitting of the Constitutional Court and only to state his position on all the issues under consideration.

25. Since under Articles 112 and 116 of the Constitution of the Republic of Belarus and Article 6 of the Law “On the Constitutional Court of the Republic of Belarus” appeal of the courts of common law and of specialized competence on the verification of the

constitutionality of the enforceable enactments, which are subject to application and which, in their opinion, are at variance with the Constitution, shall be their obligation and shall be subject to obligatory consideration of the Constitutional Court, such a consideration may not depend on the withdrawal of suit before the court or the death of a party before the court of common law and the court of specialized competence.

D. The constitutional appeal

26-27. The effective legislation shall not envisage direct appeal of natural and legal persons, which are not directly specified in the law, to the Constitutional Court with the proposal to consider the constitutionality of the enforceable enactments restricting their constitutional rights. The Constitutional Court shall not be entitled also to examine facts of the concrete disputes that shall refer to the jurisdiction of the courts of common law and the courts of specialized competence.

28. The Constitutional Court of the Republic of Belarus has made the competent state bodies the proposals on admissibility in the legislative procedure of the constitutional appeal (granting the right citizens, legal entities, their associations to appeal directly to the Constitutional Court with the proposal on verification of the constitutionality of the enforceable enactments which, in their opinion, shall restrict their rights and freedoms while solving concrete legal cases). Legal solution of the issue is impeded by the fact that the Constitution contains exhaustive list of bodies and officials who shall be entitled to appeal to the Constitutional Court. Due to formulation of the question on introducing the constitutional appeal, it means that lodgement of such an appeal and its examination by the Constitutional Court should take place only after an interested person has exhausted all the other legislative legal remedies for the protection of one's rights, by the court of common law or the court of specialized competence included.

29. Due to the absence of legal regulation of relations concerning the constitutional appeal, there is no issues concerning the procedure of selection of those appeals for consideration, demurrers and examinations etc.

At the same time, however, it should be taken into account that the Constitutional Court is receiving big amount of complaints of citizens, their associations, legal entities (about 1000 in a year) which are subject to consideration in accordance with Article 40 of the Constitution and norms of the Law "On the appeals of citizens". Many of those appeals shall involve the issues of shortcomings in the effective legislation and even inconsistency of certain enforceable enactments with the Constitution. In instances of well-grounded nature of such appeals the Constitutional Court, based on the content of Article 7 of the Law "On the Constitutional Court of the Republic of Belarus" shall adopt rulings by means of which shall officially make proposals the President, the chambers of the Parliament, the Council of Ministers of the Republic of Belarus, as well as the state bodies according to their competence on the necessity of amending acts of effective legislation, adoption of new enforceable enactments. During last three years there have been adopted 50 those rulings (17 — in 1999, 10 — in 2000 and 23 — 2001).

30-31. Since the institute of the constitutional appeal is absent, there is also no issues concerning participation of the plaintiff and state bodies in the procedure before the

Constitutional Court. The same is concerned a counsel for defence and the counsel for the prosecution.

32. The Constitutional Court shall have no powers to circumscribe the respective jurisdictions of the other courts.

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

A. Forms of links

33-34. There is no organic, organizational and structural link between the Constitutional Court and the other national courts. As regards procedural links, i.e. links concerning appeals of the highest judicial instances with the proposals on consideration of the constitutionality of the enforceable enactments, they shall be specified in Article 112 of the Constitution, Article 6 of the Law “On the Constitutional Court of the Republic of Belarus”, as well as covered in points 11, 12 and 13 of the present report. The legislation shall stipulate no specification of the meeting between the Constitutional Court and the national courts in order to clarify or refine the submitting proposals, and there is also no such a meeting in practice.

35. Since the judgements of the Constitutional Court on the issues of the constitutionality of the enforceable enactments shall have normative legal nature, and the Constitutional Court itself shall not consider concrete cases (judicial disputes), its rulings are of no precedent importance, as it is possible in the system of the courts which are in subordination relations.

36-37. As it has been already emphasized above, the unique form of the constitutional control in the Republic of Belarus shall be determination of the constitutionality or unconstitutionality of an enforceable enactment as a whole or in its certain part. Enforceable enactments, which have been found by the Constitutional Court to be at variance with the Constitution or with the acts of more higher legal force, shall be considered to be void as a whole or in their certain part from the moment fixed by the Constitutional Court.

Finding an enforceable enactment or its certain provisions to be at variance with the Constitution or with the acts of more higher legal force shall be the ground for the annulment of the provisions of the other enforceable enactments which are based on that act or its certain provisions reproducing or containing the provisions in question. The provisions of those enforceable enactments may not be applied by the courts of law, by the other bodies and officials.

The ruling of the Constitutional Court may be re-examined by the Court itself in the instances strictly specified in the law:

- 1) if the constitutional norm, which was the basis for adoption of a ruling, has been amended;
- 2) if it has been exposed new circumstances which may effect essentially its nature.

38. There have been facts of direct non-execution of rulings (judgements) of the Constitutional Court in the first years of its activities, which were marked out by high level of politicisation connected with opposition of the legislative and the executive powers (1994 — 1996). At present, there is no fact of that kind. Though, there are instances where execution of

the rulings of the Constitutional Court on the necessity of making alterations and addenda into the legislation or the adoption of the required enforceable enactments is unduly delaying (for example, on adoption of the Law on alternative service). Those delays shall be explained by the necessity of refinement of the respective draft laws. In those instances the courts shall really face the difficulties with the execution of the rulings of the Constitutional Court, with application of the enforceable enactments which are contradictory to one another. About the facts of that kind and about the necessity of the removal therefrom the Constitutional Court shall inform the President of the Republic of Belarus, the chambers of the National Assembly of the Republic of Belarus in its annual messages on constitutional legality in the country.

At the same time, it should be taken into account that the Criminal Code of the Republic of Belarus enforced of 1 January 2001 shall contain Article 423 specifying responsibility for non-execution by an official of effective verdict, ruling or other act or prevention from their executing.

B. Interpretation of enforceable enactments by the Constitutional Court

39. The Constitutional Court shall not be empowered to give official normative interpretation of the enforceable enactments with the exception of its own rulings (judgements) which are of normative and legal meaning. The enforceable enactments in the Republic of Belarus shall be interpreted, as a rule, by those state bodies which have issued them (authentic interpretation). Thus, the laws shall be interpreted by the House of Representatives of the National Assembly, decrees of the President — by the President of the Republic of Belarus etc.

At the same time, while considering the constitutionality of the enforceable enactments, the Constitutional Court shall carry out their casual interpretation, on the grounds of which it shall adopt the rulings. And the Constitutional Court shall not be bound by the interpretation of the considering enforceable enactments which is given by the competent bodies and officials, including the highest judicial instances (the Supreme Court, the Supreme Economic Court).

40-42. Since casual interpretation of legal norms, i.e. interpretation, which is carrying out in the process of their study by the Constitutional Court while considering the concrete case, shall find its official statement in the judgement it shall adopt, that interpretation shall be binding on all the other state bodies, the judicial authorities included. It is quite naturally that the specified interpretation may differ from the interpretation which is giving by the “living law”, i.e. by the judicial practice.

Point 38 of the present report shall reveal the results of non-execution of the rulings of the Constitutional Court which, in fact, contain casual interpretation of enforceable enactments.

III. The interference of the European courts

A. The Constitutional Court and the other courts vis-a-vis the European Convention on Human Rights and the case law of the European Court of Human Rights

43. Since the Republic of Belarus is not still a Member of the Council of Europe and has not ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms, the jurisdiction of the European Court of Human Rights shall not extend over its territory. Nevertheless, the Constitutional Court in certain instances shall refer to both universal and regional European international legal acts on human rights, including the European Convention for the Protection of Human Rights and Fundamental Freedoms which is the guide for the activities of the European Court of Human Rights. Analysis of the provisions of the Convention and of other European international acts, as well as decisions of the European Court of Human Rights shall promote to draw out by the Constitutional Court of more precise legal position on the cases it considers. Thus, while considering the cases concerning the securing the rights of the citizens to appeal to the court of law for the protection of their rights and lawful interests the Constitutional Court has repeatedly based on Resolution (78) 8 of the Committee of Ministers of the Council of Europe on legal assistance and consultations adopted by it of 2 March 1978, on the European penitentiary rules adopted by the Committee of Ministers of the Council of Europe of 12 February 1987.

By adopting its rulings on the basis of the provisions of the Constitution and the universal international acts ratified by the Republic of Belarus, the Constitutional Court also deems, that interpretation of those provisions will be well-grounded and full when using international acts of the Council of Europe to which the republic is striving to join.

44. Since the Constitutional Court shall solve the issues of the constitutionality of the enforceable enactments based on the provisions of the Constitution, ratified universal international acts, as well as regional international acts of European interstate formations, where the Republic of Belarus is not a member, it should be deemed that the courts of common law and the specialized courts may not adopt the rulings on the concrete cases contrary to the rulings of the Constitutional Court with the reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

45. Under Article 35 of the European Convention for the Protection of Human Rights and Fundamental Freedoms the European Court of Human Rights may take the individual complaint for the consideration only after having tried all internal avenues of appeal. Article 61 of the Constitution of the Republic of Belarus shall also stipulated that everyone shall have the right in accordance with the international instruments ratified by the Republic of Belarus to appeal to international organizations to defend their rights and liberties provided all available interstate means of legal defence have been exhausted. Based on the specified provisions the Constitutional Court shall raise before the competent state bodies the issue on granting on the legislative level legal and natural persons the right to lodge individual complaints to the Constitutional Court with a view of exhaustion by them of all internal avenues for the protection of their rights and freedoms.

B. Relations of the Constitutional Court and the other courts vis-a-vis the case law of the Court of Justice of the European Communities

46. The Constitutional Court is not bound by the case law of the Court of Justice of the European Communities, since the Republic of Belarus is not a member of the communities to which its jurisdiction shall be covered, is not a member of the European Union. Nevertheless, for the Constitutional Court of the country preliminary decisions of the Court of Justice of the European Communities concerning the interpretation of the constituent treaties and the enforceable enactments adopting by the bodies of the European communities are of undoubted interest. The content of those decisions with the laps of time will exert more and more influence on the working out of the rulings of the Constitutional Court.

47. Until the present time according to the abovementioned reasons the Constitutional Court has not referred cases to the Court of Justice of the European Communities. Under the same reasons the Constitutional Court, as well as the other courts have not considered the cases connected with non-application of national regulations that are incompatible with Community law.

48. The effective legislation of the Republic of Belarus shall not envisage the possibility of a choice between referring cases to the Constitutional Court and to the Court of Justice of the European Communities. One should believe that after the admission of the Republic of Belarus to the European Union the possibility of the appeal to the Court of Justice of the European Communities on the issue of the conformity between the enforceable enactments of the Republic of Belarus and the acts of the communities will be conditioned by the preliminary consideration of such a conformity by the Constitutional Court of the country.