

**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 Czech Republic**

I. The constitutional court, the other courts and the constitutionality review

A. The judicial organization of the State

1. The judicial system

1. Please give a brief presentation, using diagrams if necessary, of the different courts that exist in your State and the organization of their powers. This concerns the ordinary courts as well as the administrative or other courts, the courts of the Federal State as well as the courts of the federated States.

As the Czech Republic is a unitary state, there are no federal divisions, hence only a centralized judiciary. According to Charter IV of the Constitution, the judicial power is divided into two separate components, “The Constitutional Court” and “Courts”, or the system of ordinary courts. The Constitutional Court will be discussed under # 2. Article 91 of the Constitution stipulates that the court system comprises the Supreme Court, the Supreme Administrative Court, superior, regional and district courts. Although the system of ordinary courts should contain both a Supreme Court and a Supreme Administrative Court, the latter has not yet been created, so that provisionally there is no special administrative court, and in place thereof ordinary courts perform single instance judicial review of administrative actions

The ordinary court system is composed of the Supreme Court, the “highest judicial body in matters that fall within the jurisdiction of courts” (Article 92 of the Constitution), two superior courts, eight regional courts, and 86 district courts. The organization and jurisdiction of these courts is provided for in the Act on Courts and Judges (hereinafter referred to as ACJ).

District courts act as first instance courts in all civil and criminal matters unless the law provides otherwise. Regional courts act as second instance courts in cases where district courts act as first instance courts and as first instance courts in most cases where district courts do not (e.g., the right of personhood, legality of strikes, criminal offences where a minimum sentence of five years is provided for). In addition, cases of judicial review of administrative decisions are also decided by regional courts, unless the law provides otherwise (in which case they are mostly heard by superior courts).

Superior courts act as a second instance in cases decided at first instance by regional courts, adopt positions on the interpretation of statutes and other enactments in relation to courts decided within their area of jurisdiction, and review the legality of decisions of other bodies as provided by law.

The Supreme Court decides extraordinary remedial procedures against decisions of regional or superior courts, adopts positions on the interpretation of statutes and other enactments, decides as the first instance in certain matters designated by law (e.g., the dissolution or suspension of political parties, electoral matters, etc.), and determines whether decisions of foreign courts are recognized in the Czech Republic.

The ACJ permits the establishment of district or regional courts specially devoted to resolving cases of a particular subject matter. An example of such courts were the regional commercial

courts set-up in Prague, Brno and Ostrava on 1 January 1992, which decided commercial matters in the first instance. However, these courts were abolished as of 1 January 2001. The ACJ also permits the Ministry of Justice to set up branches of either district or regional courts (e.g., a branch of the Regional Court- Ústí nad Labem has been set up in the city of Liberec).

2. The constitutional court

2. What is the place of the constitutional court in the judicial organization of the State? If it is part of the judiciary, what is its status within the judiciary?

As stated in # 1, the Constitutional Court is part of the judicial power, which Chapter IV of the Constitution divides into two parts, “The Constitutional Court” and “Courts”. The first two Articles of Chapter IV, Articles 81-82 (which lay down such requirements as judicial independence and impartiality), are common to both. In addition, Article 83 declares that the “Constitutional Court is the judicial body responsible for the protection of constitutionality”. Hence, it can be seen that the Constitutional Court is a judicial body bearing many similarities to ordinary courts. Despite this, Article 83 points out the great difference in that, unlike the ordinary courts, its role is the “protection of constitutionality”. Therefore, it is specialized on this matter, and issues of constitutional law are concentrated in it. This special role given to the Constitutional Court is mirrored in Article 92, which provides by implication that the Constitutional Court is the highest judicial body in matters pertaining to constitutionality, in contrast to the Supreme Court, which is the highest body in matters pertaining to ordinary law. The relation between them is further elaborated in Article 87.1.d, which gives the Constitutional Court cassational review over ordinary courts in matters affecting fundamental rights, hence showing that the Constitutional Court has the final word when their competences conflict.

The specific procedures before the Constitutional Court are governed by its procedural statute, the Act on the Constitutional Court (in Czech, zákon o Ústavním soudu, hereinafter referred to as ACC).

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

1. Review of laws and other acts

§ 1. Type of review

3. What acts (of domestic law and international law) are reviewed by the constitutional court in relation to the higher standards that are the Constitution, the principles of constitutional value and the provisions of international law?

The Constitutional Court is authorized to review numerous types of domestic (but not international) acts for their constitutionality, in other words, their conformity with the Constitution, other constitutional acts, and treaties concerning human rights and fundamental freedoms (which are given a special status in Czech domestic law by Article 10 of the Constitution, hence will be referred to hereinafter as „Article 10 Treaties“), and in certain

cases for their legality. Those it finds to be unconstitutional, or where appropriate, illegal, it annuls. Although that capacity constitutes its main and most significant power, it does not exhaust them. The acts in question can be most sensibly surveyed by grouping them according to their legal character and that of the body issuing them.

I. Acts of General Application

a. Acts of Nation-wide Scope

1. Parliamentary Acts

The Court reviews Acts of Parliament for their constitutionality. Acts of Parliament include statutes (adopted by the lower chamber, the Assembly of Deputies, in conjunction with limited right of suspensive veto by the upper chamber of Parliament, the Senate, and by the President) and statutory measures, which, pursuant to Article 33 of the Constitution, may be adopted by the Senate solely on the proposal of the government in periods when the Assembly of Deputies has been dissolved (as the Assembly of Deputies has not yet been dissolved, there has as yet been no occasion for the adoption of such measures). In contrast to statutes, there are certain subjects which statutory measures cannot concern (e.g., constitutional act, the state budget etc.).

2. Sub-Parliamentary Acts

The Constitutional Court reviews, for their constitutionality and legality, sub-statutory acts, which include governmental orders (Article 78 of the Constitution), ministerial regulations, and acts of other central administrative offices (Article 79.3 of the Constitution).

3. International Treaties

A. newly adopted constitutional amendment (Constitutional Act No. 395/2001 Coll., which was adopted on 18 October 2001 and will enter into effect on 1 June 2002) grants the Constitutional Court the power to make *a priori* review of international treaties for their constitutionality (see # 5).

b. Acts of General Application but Limited Geographic Scope

The Constitutional Court reviews regulations and ordinances issued by representative bodies of the various territorial autonomous entities that exist in the Czech Republic (regions, districts, municipalities, in descending order of size).

II. Specific Acts of Individual Application

a. Administrative Acts

The Constitutional Court reviews individual acts of an administrative nature for their constitutionality, whether they be decisions or other concrete intrusions into constitutionally guaranteed rights (consisting in acts or omissions of administrative officials). Generally, the Constitutional Court reviews such decisions only after an ordinary court has reviewed them,

but not in all cases. For example, the Civil Procedure Code provides that certain administrative decisions cannot be contested before an ordinary court, so their refusal to hear them is often brought before the Constitutional Court. Although Article 91 provides for a Supreme Administrative Court, as yet one has not been established. Once it is created, it will likely resolve many of the cases that are submitted to the Constitutional Court in the form of constitutional complaints, although they primarily concern administrative legality. Presumably this would lighten the load of the Constitutional Court's complaint agenda.

b. Judicial acts - The Constitutional Court reviews decisions of ordinary courts for their constitutionality, but in certain limited cases also for their legality.

Constitutionality - As intrusions upon most constitutionally protected rights may be complained of before an ordinary court (there are some exceptions, see below) and the Constitutional Court is meant to act subsidiarily, this means that most complaints of unconstitutional intrusion by state officials (brought in the context of a constitutional complaint proceeding) are against decisions of ordinary courts.

Legality - In certain limited but highly significant matters, the Constitutional Court reviews decisions of ordinary courts for their legality (in addition to their constitutionality). Two particular examples are cases concerning dissolution of a political party (or suspension of its activities), or contesting the election of an MP are decided initially by an ordinary court, the Supreme Court. An appeal from that decision can be brought to the Constitutional Court (under Article 87.1.j and Sec. 73 ACC, for political parties, and under Article 87.1.e and Secs. 85-91 ACC for MPs)

c. Other individual Acts – Jurisdictional Disputes. These are brought in relation to an issued decision if another body contests the competence of the issuing body to issue the decision.

III. Miscellaneous

The Constitutional Court has jurisdiction over other matters which do not consist in the review of acts of another body, but are rather like cases of original jurisdiction over matters. Hence, they have little relevance to the Court's relations to other courts. These include decisions concerning an MP's continued eligibility for office (initiated by the Chairperson of the pertinent chamber of Parliament), impeachment of the President (initiated by the Senate submitting a charge), and a joint resolution of the Assembly of Deputies and the Senate finding that the President is incapable of performing his duties, thus depriving him of his constitutional powers.

4. Is this competence exclusive? If not, which are the other competent courts in this area? How about the other acts and decisions?

As was stated about, the Czech Constitutional Court is a specialized and concentrated type of constitutional judiciary. This results particularly from two reasons. First, the Constitutional Court is the sole institution with authority to annul provisions of statutes (acts of Parliament) or sub-statutory enactments, hence it holds a monopoly on that power. This cannot be taken to mean, however, that the Constitutional Court's competence in the field of constitutional law is absolutely exclusive. Although Article 95.1 of the Constitution provides that ordinary

courts themselves are bound by statutes, that does not relieve them of the additional responsibility to adjudge a case in accordance with, and in the light of, the Constitution. The latter follows generally from the principle of a law based state (Article 1 of the Constitution) and the concept of constitutionality (Article 83 of the Constitution), which require that all state authorities must act in accordance with the Constitution. Hence, other courts are bound to, as well. This duty does not lead so far, however, as to permit them to annul or disregard acts of Parliament; it requires them they must apply the particular statutory provision, unless they come to the conclusion that the provision conflicts with the Constitution, in which case Article 95.2 of the Constitution requires that they refer the issue to the Constitutional Court for its determination. („Should a court come to the conclusion that a statute which should be applied in the resolution of a matter is inconsistent with a constitutional act, it shall submit the matter to the Constitutional Court.“) In light of this consideration, it is clear that, if one considers the power of constitutional review in its broader parameters (the authority to consider the constitutionality of an act of Parliament), the Constitutional Court does not have exclusive competence. Alone, the ordinary courts responsibility to refer issues to the Constitutional Court, by clear implication, places upon them the responsibility to assess all statutory provisions in light of the Constitution, that is, to give consideration to their constitutionality.

The second reason is that other constitutional provisions either explicitly or by implication place upon ordinary courts the duty to review the conformity of statutes with higher norms (which, in the Czech Republic, includes all constitutional acts and international treaties concerning human rights). Article 4 provides that the „fundamental rights and basic freedoms shall enjoy the protection of judicial bodies“. While a bit unclear in its brevity, it can be interpreted to mean that ordinary courts are bound to consider and apply fundamental rights, which are of higher legal force than statutes (whether found in the Constitution, Charter, or Article 10 treaties), hence, placing upon ordinary courts partial responsibility, and therefore the competence, to apply in their decision-making certain norms of constitutional force. Practice as yet has not entirely corresponded to this particular interpretation. Article 10 is, however, so explicit in this respect as to leave little room for doubt. It provides that „international treaties concerning human rights and fundamental freedoms . . . are directly applicable and take precedence over statutes“. This indicates that they do not require a domestic act in order to be invocable before a court and that courts (including ordinary courts) should apply them in precedence to conflicting statutes. This is a form of constitutional review that does not require the annulment of statutes, just their non-application (i.e., it is a conflict rule, similar to Article 55 of the French Constitution). In its proceedings, the Constitutional Court has on occasion criticized ordinary courts for failing to do this (Judgment of 6 June 1995, I ÚS 30/94, Vol. 3 of the Constitutional Court Reporter, Case No. 26).

5. Is the review carried out by the constitutional court a prior or subsequent review?

Currently, the Constitutional Court has the power only of subsequent review. This is clear from Article 87.1.a-b. of the Constitution, which grants the Constitutional Court authority to annul „statutes“ and „legal enactments“, meaning only already adopted and promulgated acts of Parliament or sub-statutory enactments. In addition, Sec. 66 of ACC provides that a petition for the review of a statute shall be inadmissible if the statute at issue has not yet been adopted in accordance with constitutional procedures, duly signed and promulgated. Accordingly, *a priori* review is not permitted.

A newly-adopted amendment to the Constitution (Constitutional Act No. 395/2001 Sb., which was adopted on 18 October 2001 and will enter into effect on 1 June 2002) introduces *a priori* review, but only in the limited field of international treaties. The new Article 87.2 of the Constitution will provide that treaties may be reviewed prior to ratification. It also states that a treaty shall not be ratified until the Constitutional Court makes its decision. Further, new Article 89.3 will provide that, should the Constitutional Court find a treaty to be in conflict with the constitutional order, that treaty may not be ratified until the conflict is removed.

This limited exception is explained by the special nature of international undertakings - once a treaty has entered into force for the Czech Republic, it is bound by thereby under international law, even if the Czech Constitutional Court subsequently finds it to be in conflict with the Czech Constitution.

6. Is the review carried out by the constitutional court an abstract or a concrete review?

The Constitutional Court is empowered to carry out both abstract and concrete constitutional review, although the exact contours of these categories may require clarification. In traditional theory, abstract review is designated „abstract“ because the object of review, a statute or sub-statutory norm, is abstract, that is, of a general character and application. Review is abstract when it concerns adjudication of the constitutionality of the norm as such, not that of its particular application, so that traditional theory holds abstract review to be that in cases where state officials have the authority to initiate a procedure *ex officio*, when they are not involved in an actual legal dispute. As understood in this sense, the Czech Constitutional Court carries out abstract review, and such review is possible both in relation to acts of Parliament and sub-parliamentary enactments.

In traditional doctrine, concrete control involves the review of a statute when that review is initiated in the context of an already existing concrete dispute and the resolution of the constitutional law issue is necessary in order to resolve that concrete dispute. This can also be called incidental review (constitutional review incidental to the resolution of a concrete case). The Czech Constitutional Court exercises concrete review in the traditional sense, but only in relation to statutes, not to other sub-statutory enactments. This is due to the fact that ordinary courts themselves have the authority to refuse to apply sub-statutory enactments, which is in contrast to their duty to apply statutes (Article 95.1 of the Constitution). The traditional type of proceeding is found in Article 95.2 of the Constitution and 64.4 ACC, which provide that ordinary courts may submit petitions proposing the annulment of particular statutory provisions if the application of that provision is necessary for the resolution of a specific case currently before that court, and if that court has come to the conclusion that the statutory provision is in conflict with the Constitution. This is similar to the German procedure, but differs from the more liberal approach which prevails in Italy.

The term, „concrete review“ can also be used to designate the review of the constitutionality of particular concrete actions of state authorities, that is, review of the decisions (individual acts) of state authorities in individual cases. This particular aspect is relevant for the constitutional complaint procedure, which will be discussed separately (see # 26 - 31). This distinction is somewhat clouded in the Czech Republic because, in addition to permitting concrete review of the classic sort (in the sense of incidental review), there is also a less traditional type of incidental review which occurs in connection with the resolution of a constitutional complaint proceeding.

Concrete review incidental to a constitutional complaint may be initiated by the person submitting the complaint, under the condition that the violation of a constitutionally protected basic right complained of in the complaint consists in the application to that complainant's detriment of a provision of a statute or sub-statutory norm, and the complainant alleges that provision is unconstitutional. Even if a complainant does not initiate such proceeding, such a concrete proceeding may also be initiated by the panel hearing his or her complaint (also by the Plenum, but only in exceptional circumstances which have not yet occurred), if it concludes that the above mentioned circumstances exist (Sec. 78 ACC).

§ 2. Referral to the constitutional court

a. Types of referral

7. How can the constitutional court be accessed (action for annulment, preliminary question, constitutional appeal, etc.)? How many cases have there been for each type of referral?

Article 87 enumerates the types of powers and procedures the Constitutional Court has at its disposal.

ARTICLE 87

(1) The Constitutional Court has jurisdiction:

- a) to annul statutes or individual provisions thereof if they are inconsistent with a constitutional act or an international treaty under Article 10;
- b) to annul other legal enactments or individual provisions thereof if they are inconsistent with a constitutional act, a statute, or an international treaty under Article 10;
- c) over constitutional complaints by the representative body of a self-governing region against an unlawful encroachment by the state;
- d) over constitutional complaints against final decisions or other actions by public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms;
- e) over remedial actions from decisions concerning the certification of the election of a Deputy or Senator;
- f) to resolve doubts concerning a Deputy or Senator's loss of eligibility to hold office or the incompatibility under Article 25 of some other position or activity with holding the office of Deputy or Senator;
- g) over a constitutional charge brought by the Senate against the President of the Republic pursuant to Article 65, paragraph 2;
- h) to decide on a petition by the President of the Republic seeking the revocation of a joint resolution of the Assembly of Deputies and the Senate pursuant to Article 66;
- i) to decide on the measures necessary to implement a decision of an international tribunal which is binding on the Czech Republic, in the event that it cannot be otherwise implemented;
- j) to determine whether a decision to dissolve a political party or other decisions relating to the activities of a political party is in conformity with constitutional acts or other laws;
- k) to decide jurisdictional disputes between state bodies and bodies of self-governing regions, unless that power is given by statute to another body.

Norm control is governed by Article 87.1.a-b of the Constitution and concerns all norms from Acts of Parliament to municipal ordinances. The numbers in Table 1 indicate the number of

submissions for review of a norm in a given year. Roughly it can be said that nearly half are requests for review of statutes and nearly half are requests for review of municipal ordinances.

As is seen from Table 1, constitutional complaints (under Article 87.1.c-d of the Constitution) make up the vast majority of submissions (of which, vast majority are complaints under Article 87.1.d of the Constitution). The Constitutional Court has received a full 13, 797 cases through the end of 2000.

Other than that, there have been seven conflict of competence cases (six reflected in Table 1, and another in June 2001), and one case where the validity of an election to Parliament was confirmed.

Table No. 1
The number of Submissions by Individual Year

| Year | total number of submissions | petitions to annul statute or other norm | constitutional complaints | other |
|------|-----------------------------|--|---------------------------|-------|
| 1993 | 523 | 49 | 474 | |
| 1994 | 862 | 33 | 829 | |
| 1995 | 1277 | 48 | 1228 | 1 |
| 1996 | 1511 | 41 | 1470 | |
| 1997 | 1024 | 46 | 1977 | 1 |
| 1998 | 2221 | 30 | 2190 | 1 |
| 1999 | 2576 | 24 | 2551 | 1 |
| 2000 | 3140 | 59 | 3078 | 3 |

b. Actions for annulment

8. *Does direct recourse exists to the constitutional court against statutes? And against other regulations and acts?*

9. *Who can bring such actions and within what time limit?*

[Joint answer to # 8 & 9]

In the Czech constitutional judiciary, direct recourse exists against statutes and substatory enactments, in the sense that certain public officials are entitled *ex officio* to initiate a case. Abstract review of statutes may be initiated by the President of the Republic or a group of MP's (either 41 Deputies or 17 Senators). A proceeding concerning a sub-statutory norm may be initiated by the Government, a group of MPs (either 25 Deputies or 10 Senators), the representative body of a region, or the ombudsman. In addition, certain other state officials may initiate review in regard to a limited categories of sub-statutory norm: the Minister of Interior, only in the limited circumstances that the norm proposed to be annulled is one issued by a region, by the City of Prague, or is an ordinance issued by a municipal office; and the head of a municipal office may submit for review ordinances issued by a municipality.

There are no fixed time limits for initiating such an action. Already the Constitutional Court has reviewed provisions from the early post-war era. The only time parameters consist in the

need to initiate an action during the period when an act is valid - only after it has been adopted and promulgated and before repeal.

10. Can the constitutional court suspend statutes or other regulations and acts?

Although the Constitutional Court has the authority to annul acts with *erga omnes* effect, the ACC gives it no comparable authority to suspend them. On the other hand, ACC empowers the Constitutional Court, when it decides to annul a statute, to take the opposite step, that is, to suspend for a time the invalidation of the statute (or to keep it in force for a time)

A certain limited exception, of a sort, can be seen in the area of constitutional complaints, where Sec. 79 ACC permits the Constitutional Court to suspend the effect of the contested decisions upon a motion of the complainant „if such would not be inconsistent with important public interests and the complainant would suffer . . . a disproportionately greater detriment than that which other persons would suffer while enforcement is suspended.“ Sec 80 ACC also permits the Court to adopt provisional measures, enjoining some public authority from continuing in an action. Such provisional measures may, however, be adopted only in relation to some action other than a decision, so that they would not typically be adopted in relation to an ordinary court.

c. Preliminary issues - plea of unconstitutionality

Who can refer cases to the constitutional court?

11. Which courts can refer cases to the constitutional court? If any court can put a preliminary question, does that mean that a broad or a restrictive interpretation is given to the notion of 'court'?

Article 95.1 of the Constitution provides that all judges are bound by statutes. Of course, this provision refers only to ordinary court judges, as a separate Article 88.2 of the Constitution governs Constitutional Court Justices and provides that they are bound only by constitutional acts, Article 10 treaties and the Act on the Constitutional Court. Article 95.2 of the Constitution represents an exception to Article 95.1 and provides that, in the case an ordinary court comes to the conclusion that a statutory provision violates the Constitution (or Article 10 treaties, as is made clear in Sec. 64.7 ACC, even though the Constitution itself does not explicitly mention them in this context), then ordinary court is obliged to refer the matter to the Constitutional Court. Referrals can be made only in regard to statutes, but not to sub-statutory norms (Article 95.1 of the Constitution specifically provides that ordinary courts can adjudge the legality of such norms).

Article 91 of the Constitution exhaustively defines the system of ordinary courts as consisting of the Supreme Court, the Supreme Administrative Court, superior courts, regional courts, and district courts (see # 1). At the present, however, a Supreme Administrative court, has not yet been established. This enumeration of ordinary courts is exhaustive, and no extraordinary courts are permitted. Hence, all of these courts are permitted to refer cases, and no other bodies or institutions are, whether they are designated as tribunals, arbitration courts, etc. Accordingly, the concept of court in this respect is defined relatively restrictively.

A Constitutional Court decision from January, 2001 suggests that both the empowerment to refer (and the Constitutional Court's power to hear) as well as the duty to refer, flow directly from Article 95.2 of the Constitution and do not depend on being defined in any statute (either the ACC or one regulating courts).

12. Are the courts obliged to put the question?

Article 95.2 provides that „should a court come to the conclusion that a statute which should be applied in the resolution of a matter is inconsistent with a constitutional act, it shall submit the matter to the Constitutional Court.“ According to the Constitutional Court case law, Article 95.2 must be understood as a general clause which lays down, without exception, the procedure to be followed by an ordinary court in such a situation. Accordingly, an ordinary court cannot make this determination itself, but must refer the matter to the Constitutional Court. Further, Article 95.2 requires the ordinary court to make the submission, but only if it itself comes to the conclusion that the provision is in conflict with the Constitution, which would seem to leave ordinary courts nearly unfettered discretion in deciding whether to make a reference. Nonetheless, in one of its decisions on a constitutional complaint, the Constitutional Court discussed the issue whether an ordinary court has the obligation to make a reference in the case of patently unconstitutional provisions. In that case, it decided that the ordinary court should have come to the conclusion that the statute it applied was unconstitutional, which suggests that the Constitutional Court does not consider ordinary courts to have absolute and untrammelled discretion on this issue, so that they can be criticized for abuse of discretion.

In interpreting statutes, ordinary courts should also respect the principle of the constitutionally conforming interpretation. Where a statute is susceptible of interpretation in two or more manners, one of which is in conformity therewith, it must interpret the statute in light of constitutional principles. In other words, in such cases it should not resort to the Article 95.2 procedure unless it is convinced that no possible interpretation of the provision would be in conformity with the Constitution.

13. Is it possible 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 decision of referral? If so, who can initiate this procedure and how does it proceed? What are the consequences?

Both the Civil Procedure Code and the Criminal Procedure Code authorize an ordinary court hearing a case to suspend proceedings and refer a statutory provision to the Constitutional Court. Sec. 109.1.c of the Civil Procedure Code provides that ordinary courts shall suspend proceedings if it comes to the conclusion that the provision is not in conformity with a constitutional act or an Article 10 Treaty. In addition, Sec. 202.1.j of the CPC provides that a refusal to make a reference is one of the rulings that are not subject to appeal. Sec. 224.5 of the Criminal Procedure Code is analogous to Sec. 109.1.c of the CPC. However, Criminal Procedure Code permits appeals only against judgments, not against rulings, hence decisions under Sec. 224.5, whether to refer or refusing to refer, are not subject to appeal. The authors of this report are not aware of any case where the decision to refer was appealed.

14. What is the procedure for referral to the constitutional court? What is the role of the parties in drawing up the preliminary question? Can the preliminary question be raised ex officio? In that case, are the discussion on the question reopened?

A party to a proceeding before an ordinary court may declare her view that the statute which the court must apply is unconstitutional and request the court to make use of its power to suspend the proceeding and refer the statute to the Constitutional Court. This decision to refer is, however, exclusively within the purview of the ordinary court, and in that sense can be raised *ex officio*. If a party disagrees with its decision not to refer, her redress is found in submitting a constitutional complaint, after having exhausted all remedies, and attaching to that complaint a petition proposing the annulment of the suspect statute.

15. Do the courts that put the question rule on the constitutionality or unconstitutionality of the regulation at issue?

As Article 95.2 of the Constitution, the constitutional provision authorizing ordinary courts to make references, requires that, in order to do so, they first come to the conclusion that the “statute which should be applied in the resolution of a matter is inconsistent with a constitutional act”. Unless it is itself persuaded the statutory provision is unconstitutional, it should not submit the matter to the Constitutional Court, but should itself apply the provision and resolve the case before it. Hence, in this sense, ordinary courts rule on the issue of a statute’s constitutionality. Nonetheless, the Constitutional Court has a monopoly on the power to annul statutes, so that it is only it which makes authoritative and binding rulings on this issue.

Screening

16. Is there a screening procedure which allows the constitutional court to limit the number of cases or to speed up the hearing of those cases (nonsuit, quick reply, demurrer, evident unfoundedness, identity or similarity of questions which the constitutional court has already answered)? What is the proportion of cases screened in this way?

There is no special screening procedure in that sense that the Constitutional Court or a group of Justices have the authority and discretion to choose which cases they feel are most worthy of their attention and summarily to reject the rest. On the other hand, when each case is submitted to the Court, it is assigned to a Justice Rapporteur whose first task is to ascertain whether all requirements for a proper submission, as laid down in the ACC, have been met. If they have not, the case can be dismissed for various procedural deficiencies. While some of these requirements are of a quite technical, hence non-discretionary, nature (e.g., failure to cure defects in the submission, submissions after the deadline, etc.), there are also grounds which, while legal and not open to free discretion, still involve discretionary elements. In particular, a submission might be rejected as “manifestly unfounded”. This initial check of submissions, especially as concerns the issue whether they are “manifestly unfounded”, have far greater impact in relation to constitutional complaint procedures. See # 29.

Scope of referral of the constitutional court

17. What is the import of the considerations of unconstitutionality given by the court that puts the question (court a quo)? Must the constitutional court take these considerations into account or can it ignore them? Can it raise, ex officio or at the request of the parties, the arguments of unconstitutionality not envisaged by the court a quo or is it restricted by the decision of referral? Can the constitutional court review regulations not intended by the preliminary question yet linked thereto?

[See # 20]

18. Are all aspects, both in law and in fact, of the action pending before the court referred to the constitutional court?

The court *a quo* sends the entire file of the case to the Constitutional Court, but the Court deals only with the specific constitutional issue, whether a particular statutory provision violates the Constitution. Once it resolves that matter, the case returns to the court *a quo*, which resumes the procedures and decides the case.

Relevance of the question

19. Can the constitutional court dismiss the question on the grounds that it is not useful to the settlement of the action brought before the court a quo?

The conditions laid down in Article 95.2 of the Constitution for making a reference require that the statutory provisions at issue is one “which should be applied in the resolution of a matter”. By implication, a court *a quo* is not authorized to refer a provision that is not relevant to the decision in a matter. Up till now, however, there has not been a tendency for the Constitutional Court to reject a referral on this grounds. On the contrary, there have been a paucity of such referrals, so that the Constitutional Court has had no reason to seek to limit the number of them.

While the Constitutional Court has not resolved this specific issue, it resolved a similar issue also relating to Article 95.2, in particular the issue as to whether the court *a quo* might in certain circumstances be obliged to make a reference. Article 95.2 provides that a court “shall submit the matter to the Constitutional Court”, but conditions this obligation to the situation where it “come[s] to the conclusion that [the] statute . . . is inconsistent with a constitutional act.” Although Article 95.2 of the Constitution appears to make the referral obligatory, it is so only in the situation where the court *a quo* makes a finding, and that finding is entirely within its own discretion. Nonetheless, the Constitutional Court decided in one case that although the court had not made a reference, it should have, as the statute in question was quite manifestly (on its face) unconstitutional, suggesting there are limits to the discretion.

Interpretation of the question

20. Can the constitutional court reformulate the question in order to make it clearer and to define the constitutional debate better? If so, what use is made of this option?

In contrast to referrals made, for example, under Article 234 (formerly 177) of the Treaty of Rome, an ordinary court may not request answers to certain interpretive questions, rather it can only refer statutory provisions which it concludes violate the Constitution and which it proposes the Constitutional Court should annul. According to its constant jurisprudence, the Constitutional Court is bound by the “petit”, the action the referring court proposes it to take (i.e., annul a particular provision) and cannot take any action apart from. Hence even if it feels that the court *a quo* did not include all the relevant provisions, it cannot expand the scope of the “petit”. Subject to these constraints, however, it can “cure” a poorly formulated petition in another sense. The petition submitted by the court *a quo* includes a statement of its

arguments as to which constitutional requirements the provision in question violates and its supporting arguments. The Constitutional Court is free to depart from the grounds given in this statement, to ignore them entirely, or to cite any other constitutional provision or argument it feels is appropriate to resolve the issue.

Interpretation of the reviewed regulation

21. Must the constitutional court adhere to the interpretation of the reviewed regulation given by the court a quo?

The Constitutional Court is not obliged to respect the interpretation of the reviewed norm that is made by the court *a quo*. At times the Constitutional Court finds the interpretation made by the ordinary court to be constitutionally unacceptable, and as stated above, it is part of the Constitutional Court constant jurisprudence that all norms must be interpreted in a constitutionally conforming manner.

Jus superveniens

22. What is the impact of a legislative amendment to the challenged regulation subsequent to the decision of referral?

In addition to the grounds of inadmissibility which apply generally to all proceedings before the Constitutional Court (*res judicata*, and *litispendens*), the ACC provides, as an additional grounds of inadmissibility, solely in relation to the abstract review of legal enactments, that the norms at issue are valid part of the legal order (though not necessarily in effect). Sec. 66 ACC provides that a petition is inadmissible if, prior to submission of the petition, the contested norm has not yet become valid (not yet adopted, signed, and promulgated). This ties into the fact that abstract review is strictly *a posteriori* (subsequent), so that no act before the Parliament or possible future legislation can be the subject of review by the Constitutional Court. In addition, Sec. 67 ACC provides that if, subsequent to the submission of a provision but prior to decision in the matter, the provision has lost validity (by repeal or being superseded), then the petition is inadmissible. As a technical matter, while lack of validity of a statute renders the submission inadmissible, a legislative amendment to the contested legislation, which occurs subsequent to submission of a petition contesting the constitutionality of the provision, can give grounds for dismissal of the petition.

The same applies to lack or subsequent loss of validity of the higher norm with which the contested statute or sub-statutory enactment is alleged to be in conflict. If a constitutional norm loses validity or an Article 10 Treaty ceases to be binding on the Czech Republic, then the petition is rejected as inadmissible (or dismissed).

The judgment of the Constitutional Court of 10 January 2001 concerned the application of Sec. 67 ACC and constituted a departure from the strict terms of that section. That case involved a statutory provision which was amended on 13 June 2000, the amendment coming into effect on 1 July 2000. In the meantime, it was referred to the Constitutional Court on 29 June 2000. It was argued that, according to the plain terms of Sec. 67 ACC, the referral should be dismissed as inadmissible because the statutory provision at issue had been superseded. Although it was well aware that the provision had been superseded, the ordinary

court referred it nonetheless because it was still required to apply the provision in a case which had arisen before the provision was superseded. The Constitutional Court agreed that, notwithstanding Sec. ACC, this provided grounds for it to hear and decide the case.

The Court reasoned its decision with reference to the fact that ordinary courts are bound to apply the law (including this already superseded provision), but are not themselves permitted to adjudge a statutory provision as unconstitutional and, as a consequence, to refuse to apply it. Article 95.2 requires that, in the situation where an ordinary court must apply a statutory provision to resolve a case but is convinced that provision is unconstitutional, then it is obliged to refer the matter to the Constitutional Court. If an ordinary court could not do so, it would be faced with a dilemma: either it would violate the Constitution by refusing to apply a statutory provision, or it would violate the Constitution by applying a provision that is in conflict with the Constitution. Accordingly, in this case the Constitutional Court determined that Article 95.2 provides a separate basis for its jurisdiction (although Article 87 contains the enumeration of the Constitutional Court's heads of jurisdiction, the Court reasoned that it was not an exhaustive enumeration).

Parties

23. Can the parties before the court or third parties (individuals, institutions, other courts, etc.) participate (voluntarily or compulsorily) in the procedure before the constitutional court? If so, in what way? How are they informed of the procedure before the constitutional court? Can one intervene before the constitutional court on the mere grounds of being a party before a court deciding on merits in an action similar to the one that led the court a quo to put the preliminary question?

The ACC provides that, in each case, the initiator of a proceeding before the Constitutional Court shall be a party to the proceeding, as are other persons or institutions to which the ACC accords that status. There also exists the status of a secondary party, but it differs in little from that of primary parties, as they both have the same procedural rights: they may give their views on the matter, examine the file (but not voting protocols), make submission to the Constitutional Court (relating to a proceeding), take part in oral hearings and proffer evidence.

A reference proceeding, being the constitutional review of a norm, is governed by the common provisions of ACC on the review of norms (abstract and concrete). The body submitting the petition (in the case of referrals, the court *a quo*) is a party to that proceeding, as is the body which issued the statute whose constitutionality is in issue. Accordingly, in a reference proceeding, the parties are the court *a quo* and the Parliament (either one chamber or both depending on the circumstances). Parties before the court *a quo* do not have the status as parties. They are, however, informed as to the referral because the proceeding before the court *a quo* is suspended by ruling.

The answer to the final part of the question (intervention by one who is a party to a similar proceeding) is no. Just as parties to the actual proceeding do not have the right to become a party, so there is no right of intervention by parties to a similar proceeding before another court. Paradoxically, however, in contrast to the parties before the court *a quo*, a party to another proceeding does have some chance of becoming a secondary party to the referral proceeding before the Constitutional Court. According to Sec. 35.2 ACC, an action submitted to the Constitutional Court by an authorized petitioner shall be inadmissible if the

Constitutional Court has already taken some action in the same matter, that is, a petition seeking the annulment of a provision is inadmissible if another party has already submitted a petition concerning the same provision. This applies in all cases where constitutional review of a legal provision is initiated (either by a group of MPs, an ordinary court, or an individual complainant), and then a petition concerning the same provision is subsequently submitted by another authorized petitioner (be it a groups of MPs, an ordinary court, or an individual complainant). The petition submitted later in time must be rejected as inadmissible, but the petitioner submitting it gains the status as a secondary party. For example, if an ordinary court initiates a reference procedure concerning a particular legal provision, and a losing party to another proceeding before a different ordinary court in which the same statutory provision was applied then submits a constitutional complaint and joins to it a petition to annul that same provision. Sec. 35.2 ACC requires that the petition to annul the provision (although not the constitutional complaint itself) be rejected as inadmissible because the Court is already considering the same statutory provision in the context of another proceeding. Nonetheless, although the petition is dismissed, the party who submitted it gains the status of a secondary party to the original reference proceeding considering the provision.

24. Is there a counsel for the defence? If so, in what form? Is there a counsel for the prosecution with the constitutional court?

[See # 31]

Points of law in the constitutional proceedings

25. Does the withdrawal of suit before the court a quo or the death of a party before the same court subsequent to the decision of referral have an impact on the progress of the constitutional action?

Proceedings on a petition to annul a statutory or sub-statutory provision are governed by the principle of officiality, in other words, that public interest in having the issue of a provision's constitutionality resolved outweighs the private interests of the petitioners who initiated the proceedings, or other considerations. This applies not just for referrals (concrete norm control, initiative), but all also for all such proceedings (abstract norm control, and norm control initiated in the context of a constitutional complaint), if the proceeding has been properly initiated by a person or body with standing, there are no formal defects in the petition, and it is admissible, then the Constitutional Court must decide the issue and no change circumstances can relieve the Court of this duty. For example, in the case of abstract control, the officials or institution initiating the proceeding cannot later withdraw it, whether due to a change of heart or to the fact that the person or persons have left office and the new personnel do not agree with the decision to submit the petition (e.g., newly-elected President or newly-formed government). In the case of members of Parliament, where a minimum number is required, an election where some of the original members of the petitioning group were not returned to office (thus causing the initiating group to fall under the required threshold) has no effect on an already-initiated abstract review proceeding.

The same principle applies to referral by an ordinary court (concrete norm control). Although a court may make a referral only under given circumstances (it is necessary to resolve the case before it, etc., see # 12, 19), once the referral has been made and the proceeding properly initiated, a change in those circumstances does not lead to dismissal of the case.

With some modification, the same applies to abstract norm control initiated in the context of a constitutional complaint. In the case it is initiated by a panel of the Constitutional Court, no withdrawal would come into question, but it does in the case where the petition is submitted by the complainant in conjunction with his constitutional complaint. Although they are technically separate proceedings, the accessory principle governs, which means that a § 74 petition shares the fate of the underlying complaint (at least until it submitted for review by the Plenum, see below), so that if the latter suffers a fatal defect (e.g., late submission, lack of representation by council, inadmissibility, manifestly unfounded, etc., see # 29), the petition in abstract review will be dismissed as well. Also, in contrast to abstract control, constitutional complaints are governed by the disposition principle, so that complainant is entitled to withdraw it up until the panel has its final conference. If the complainant does so, the petition is dismissed along with it. This accessory principle is meant, at least in part, to prevent the danger that Sec. 74 will be used as a means to submit an *actio popularis*. The accessory principle is seen in the fact that the panel first ensures all requirements for a constitutional complaint are met before suspending that proceeding (Sec. 78) and initiating a case in abstract review by submitting the matter to the Plenum. However, the accessory principle applies only until the petition is referred to the Plenum, at which point the petition in abstract review becomes a separate and independently sustainable proceeding to which the officiality principle applies, and any subsequent decision to withdraw the complaint has no effect on the petition.

d. The constitutional appeal (for example recours d’ampara, Verfassungsbeschwerde, etc.)

Object of the constitutional appeal

26. *What is the object of the constitutional appeal? Against which acts can such an appeal be lodged? Once a constitutional appeal has been referred to it, can the constitutional court examine the facts of the case?*

[See # 27]

Allowability of the appeal

27. *Who can refer an appeal to the constitutional court? How?*

[Joint answer to #s 26 & 27]

There are three types of constitutional complaints, and for each type different subjects is permitted to submit a complaint.

a. General Constitutional Complaints: these may be submitted by natural or legal person for the protection of their fundamental rights or basic freedoms guaranteed either by a constitutional act (especially the Charter of Fundamental Rights and Basic Freedoms) or an Article 10 Treaty. There is a wide range of state acts against which a complaint may be brought: any final and valid decision (formal act determining rights) in a proceeding to which the complainant was a party, measures or other intrusions by a public authority, which it is claimed violate these fundamental rights.

Complainants may append to their complaint a petition to annul a provision of a statute or sub-statutory enactment, if it was the application of that provision by a state body which constituted the infringement of the fundamental right complained of, and the complainant claims that the provision itself is unconstitutional.

b. Communal Constitutional Complaints: These may be submitted by the representative body of a territorial autonomous unit, either a region, district, or municipality. In each case, the complaint concerns the right of those public legal persons to self-government, as laid down in Articles 8, 99-105 of the Constitution. Such complaints are directed against unconstitutional or illegal intrusions of the state (central authorities) infringing that right to self-government. The infringement could consist in the violation of either a constitutional or a statutory provision.

c. Complaint of a Political Party: These may be submitted exclusively by political parties and the complaint protects their right to continuance as parties and functioning without state interference. Such complaints are directed against decisions dissolving a party or other decisions affecting their activities, if such decisions are unconstitutional or unlawful. The political party complaint affords heightened protection to political parties to ensure their continued existence and unhampered activity.

In addition, political parties are also among the subjects which may seek protection of their other constitutionally protected rights by means of a general constitutional complaint. Hence, the heightened protection afforded by the party complaint is in addition to, and not in place of, their general right of judicial protection of constitutional rights, as enjoyed by all private individuals and legal persons.

28. Is appeal to the constitutional court only possible once all other avenues of appeal have been tried?

The exhaustion of remedies is made a condition of the admissibility of constitutional complaints in order to ensure that the Constitutional Court functions subsidiarily to ordinary courts in the protection of individual rights. Accordingly, Sec. 75.1 ACC provides that a “constitutional complaint is inadmissible if the complainant failed to exhaust all remedial actions afforded him by law for the protection of his rights.” However, Sec. 75.2 ACC makes an exception to this rule in two cases: 1) where “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 2) “the proceeding in an already filed remedial procedure is being considerably delayed” and may lead to “to serious and unavoidable detriment” to the complainant.

Of course, these standards involve some element of discretion, so that persons foregoing their procedural rights before an ordinary court, in favour of submitting a constitutional complaint without delay, run the risk of losing both the opportunity to pursue the right before an ordinary court and of having their constitutional complaint dismissed as inadmissible. On the other hand, those who pursue remedies beyond those afforded by law for the protection of rights (inadmissible extraordinary remedies which are subject to discretionary choice, petitions to reopen a case, petitions for a minister to intervene, etc.) run the risk that they have pursued a fruitless avenue and lost the chance to submit a constitutional complaint (as

the deadline, which began running immediately after the earlier decision, will have passed). In cases of doubt, it is best to submit both simultaneously.

This problem arises particularly in relation to extraordinary remedies before ordinary courts, in cases when it is unclear whether they are admissible. If such a remedial action is admissible before the ordinary court, then it constitutes the final remedial action afforded by law and should be submitted before the constitutional complaint. If the party does not do so, he bypasses the opportunity to seek a remedy before the ordinary courts, and he runs the risk that the Constitutional Court will dismiss his complaint for non-exhaustion, in which he loses any chance of judicial protection. If such an action is inadmissible, but the person submits it anyway and fails, at the same time, to submit a constitutional complaint, that extraordinary action will be dismissed as inadmissible, and he will likely have already missed the deadline for filing a constitutional complaint. Again, he will lose any chance of judicial protection.

Screening

29. Is there a screening procedure which allows the constitutional court to limit the number of cases or to speed up the hearing of those cases (selection of cases, nonsuit, quick reply, demurrer, evident unfoundedness, etc.)? What is the proportion of cases screened in this way?

There is no special screening procedure which permits the Constitutional Court to limit the number of cases. The Court must, thus, give consideration to all cases submitted to it. However, there is an initial examination of whether all statutory requirements for a submission have been met, and it functions as something akin to a screening procedure, at least in relation to constitutional complaints. This is so, in part, because complaints have additional requirements that need to be met. In particular, complaints may be submitted only after the exhaustion of all other remedial actions and within 60 days of decision in the last such remedial action. Although the Constitutional Court has some discretion to excuse the exhaustion requirement (see # 28), the 60 day deadline is strict and cannot be excused or cured. In addition, unlike public officials who initiate abstract and concrete (incidental) norm control, individuals or legal persons submitting a constitutional complaint are required to be represented by an attorney. Failure to be represented or defects in the power-of-attorney constitute further grounds for dismissal (although only after a warning and failure to cure). Lastly, there is the requirement that "manifestly unfounded" complaints be dismissed.

Since complaints may be submitted by any natural or legal person, the group of possible complainants is unlimited, hence quite large in comparison to the group of subject (a limited number of state officials) who can initiate most other proceedings. Accordingly, it can be expected that a larger percentage of such submissions will suffer from defects and will concern manifestly unfounded claims, claims the submitting party is not entitled to submit, and claim not within the Constitutional Court jurisdiction. For these reasons, the vast majority of complaints are dismissed not on the merits in this initial examination but for non-compliance with the statutory requirements for complaints.

Parties

30. Does the plaintiff participate in the procedure before the constitutional court? If so, in what form? What about the other parties? Can or must certain public authorities intervene in the proceedings?

For general considerations concerning parties to proceedings before the Constitutional Court and their procedural rights, see # 23. In a constitutional complaint proceeding, the complainant is, of course, a party, and the state body (or bodies) to whose decisions or actions objection is made is also a party to the proceeding. Other parties to the proceeding before the state body gain the status as secondary parties to the constitutional complaint (e.g., criminal procedure includes the state attorney), and other persons who demonstrate an interest in the outcome of the case may also, in the constitutional Court's discretion, be accorded the status of a secondary party.

31. Is there a counsel for the defence? If so, in what form? Is there a counsel for the prosecution with the constitutional court?

No counsel for the defense or the prosecution exists at the Constitutional Court. Legal representation is the responsibility of the respective parties before the Constitutional Court and is in many cases mandatory. The ACC requires that natural and legal persons who are parties to proceedings before the Constitutional Court be represented by an attorney or (in certain circumstances) a notary. This is so even if the individual party is actually an attorney (he or she cannot represent him or herself). State bodies need not be represented by an attorney, as they may be represented by the person designated by law to act on the body's behalf. Although groups of Deputies or Senators (which Sec. 64 ACC empowers to initiate abstract review, see # 7) are not a state body, the Constitutional Court has concluded in practice that they are a subjects *sui generis* and that they need not be represented by an attorney. For those parties who are subject to mandatory legal representation, failure to be represented is grounds for dismissal in regards to constitutional complaints.

It is up to the parties themselves to obtain representation. The Constitutional Court does not appoint or provide legal counsel for parties, but individuals may request the Czech Bar Association to appoint an attorney. Although the Constitutional Court does not take an active role in this respect, the burden of the mandatory representation requirement is somewhat counterbalanced by the fact that the ACC provides for reimbursement of the costs of representation in certain circumstances, where justified by the individual complainant's personal and financial situation.

2. Settlement of conflicts between courts

32. Is it the task of the constitutional court to circumscribe the respective jurisdictions of the other courts? If so, how does it proceed?

The Constitutional Court is endowed with a general power to resolve conflicts of competence (See Article 87.1.k of the Constitution) in cases involving state bodies and those involving self governing regions. It was implemented in the ACC in a form that is not as broad as the general terms in the Constitution. The ACC specifies that this power concerns disputes over

competence to issue decisions, to take measures or other intrusions in regard to a particular matter.

The primary limitation is presented by the principle of subsidiarity, that the Constitutional Court decides such disputes only in cases where no other state body is endowed with the authority to so decide.

Procedural codes (e.g., codes of civil and criminal procedure) contain provisions concerning disputes between courts. They endow regional courts, Superior Courts and the Supreme Court with authority to resolve disputes between lower courts falling within their judicial district. This concerns mostly issues of venue, but conflicts between district and regional courts could, for example, concern delimitation of subject matter jurisdiction. Accordingly, essentially all conflicts of competence among ordinary courts falls within the subsidiarity principle. This leaves conflicts between ordinary courts as a whole and the Constitutional Court, that is the ordinary/constitutional law divide. The ACC does not, in terms, exclude such a case arising, but it seems highly unlikely (why would an ordinary court, feeling it has a conflict of competence with the Constitutional Court, ask the Constitutional Court to resolve the matter?). In any case, one might consider that the Constitutional Court's power to delimit competence of ordinary courts is, in regard to matters affecting fundamental rights really plays out through proceedings on constitutional complaints (just as its powers vis-a-vis the Parliament play out through abstract norm control). Presumably, the Constitutional Court is authorized to interpret in such a way as to decide the extent of its own competence, so that if its competence to decide in matters comes into conflict with that of ordinary courts, the Constitutional Court's decision, in effect, resolves the matter. After all, as a general matter, a court has competence to decide the extent of its jurisdiction over subjects over which it has cognizance, and Article 87.1.d of the Constitution gives the Constitutional Court cognizance over cases involving ordinary courts, at least to the extent they involve constitutionally guaranteed fundamental rights and basic freedoms.

A further possibility is represented by disputes between the Supreme Court and the Supreme Administrative Court. It is not yet a live possibility, as the latter does not yet exist, nonetheless as two highest courts having their respective spheres of competence, it would likely be necessary to have a separate body to decide conflicts of competence between them (e.g., France, where there is a special conflicts tribunal), and the Constitutional Court could fill this role. Of course, when the Supreme Administrative Court is created, it is possible that its organic statute will provide for the manner of resolving conflicts between it and the Supreme Court.

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

A. The organic link

33. What are the organic links between the constitutional court and the other national courts (conditions of admission, appointment procedure, etc.)?

There are no organic links between the Constitutional Court and ordinary courts. Constitutional Court justices are appointed by the President, subject to the consent of the Senate (the upper chamber of Parliament). The qualifications necessary for appointment as a Constitutional Court Justice are as follows: the candidate must be a citizen who has a character beyond reproach, is eligible for election to the Senate (i.e., has the right to vote and has reached the age of 40), has a university legal education, and has been active in the legal profession for a minimum of ten years. Accordingly, it is not required that the candidate have taken the judicial examination or have prior judicial experience. In particular there is no requirement for any number of Justices to be chosen by or from among the ranks of ordinary judges. The ordinary judiciary, then, has absolutely no formal influence on the selection of Justices (as is the case, e.g., in Italy).

Despite the lack of formal requirements, in practice many of the first 15 Justices (the initial group of 15 Justices appointed in 1993-94, and one further appointment in 2000 to replace a justice who resigned in 1999) had prior judicial experience or were sitting judges at the time of their elevation to the Constitutional Court (and hence have the right to return to their original judicial office upon completion of their term of office as a Justice). Four Justices had prior (albeit brief) experience in 1992 serving on the Constitutional Court of the Czechoslovak Federation (and of them, two had previously had experience as an ordinary court judge). Of the other 12, six had had prior judicial experience (one at the Supreme Court).

B. The procedural link

34. Are there procedural links between the constitutional court and the court referring the case to it or against which the appeal was lodged (for example, a judge-to-judge meeting in order to clarify or refine the question)? If so, what use is made of this option?

In terms of procedural links, ordinary courts do not have a special status in comparison to other persons or bodies interested in cases before the Constitutional Court. The ordinary court gains the status of a party to the proceeding: in the case of a reference it is the proposing party (the petitioner), and in the case of a constitutional complaint, it is the defending party. Sec. 32 ACC provides that all parties to a Constitutional Court proceeding have the same procedural rights, which include the following: they may give their views on the matter, examine the file (but not voting protocols), make submission to the Constitutional Court (relating to a proceeding), take part in oral hearings, and proffer evidence. Not even in the case that an ordinary court makes a reference is it possible for it to have a judge-to-judge meeting. As is the case for all parties, ordinary courts have the procedural right to submit their views on the matter.

If a court is a party, that means the panel of that court (with the panel's chairperson acting on its behalf) or a judge sitting as a single judge.

C. The functional link

§ 1. The review and its effects

35. Do the rulings of the constitutional court always constitute a binding precedent for the other courts?

There are no specific provisions in the procedural codes that govern this issue, so that it has been a subject of contention. Article 89.2 of the Constitution, however, speaks to it in a broad manner: "Enforceable decisions of the Constitutional Court are binding on all authorities and persons." This provision can be interpreted as meaning Constitutional Court decisions are binding precedents. Originally, the restrictive interpretation of this provision prevailed, but, gradually, a broader interpretation and precedential effects of Constitutional Court's decisions are being recognized more and more.

To consider this issue in greater details, one must draw clear distinctions between different parts of the decision: the statement of the judgment and the Court's reasoning. Some experts consider that only the former can be binding. At this point it is possible to say that the statement of a decision is unambiguously the most important one. Nevertheless, some parts of the reasoning are also binding, as they, contrary to others, pronounce legal opinion. In addition, it is necessary to distinguish the effects of decisions (or particular parts thereof) in further proceedings in the same matter from their effects in other, unrelated matters. However, here it is possible to comment that the more similar the cases are, the more binding are the effects of a particular decision of the Court.

When the Court is reviewing norms, if it annuls an enactment, then the statement of judgment is most significant, as it voids the provision, thus ending the "matter". Effects on further matters would flow from the influence of the reasoning of that judgment on a subsequently adopted enactment on the same or a related issue, essentially only in relation to Parliament. When the Court does not annul the statutory provision, then the statement of judgment has binding effects in relation to ordinary courts in that they must apply the provision, and further submissions of that provision to the Constitutional Court are inadmissible as *res iudicata*. In the situation that the Court gives a constitutionally conforming interpretation, its reasoning (its interpretation of constitutional rules and statutes) is also significant in that it indicates that ordinary courts may not adopt a certain interpretation.

With regard to constitutional complaints, the statement of judgment is binding on the parties, and so is the reasoning, in further proceedings in the same matter on remand (although even this has been denied, it is now generally accepted). In unrelated matters, the statement has no relevance (as its significance is limited to the parties to the case), but the reasoning could.

36. What are the review methods of the constitutional court (annulment, dismissal, declaration of constitutionality, declaration of unconstitutionality, interpretative decisions, interpretation reserves, annulment of a judicial decision, establishment of deficiencies,

establishment of limited validity, etc.)? If necessary, distinguish for the different types of referral (action for annulment, prejudicial question, constitutional appeal).

Unless it is assessing the legality of a particular enactment or decision (see # 3), decisions of the Constitutional Court inherently contain a finding either of constitutionality or unconstitutionality. However, it cannot make a mere finding of unconstitutionality (as was possible for the Czechoslovak Constitutional Court), rather it must in addition annul the enactment or the decision in question (in the former case, with the possibility to delay its effect). In some cases, the finding that an enactment is constitutional is conditioned on a certain interpretation (constitutionally conforming interpretation).

In the case of individual decisions, especially those reviewed in constitutional complaint proceedings, if the Constitutional Court finds a violation of a fundamental right, it annuls the decision.

37. What are the legal effects of the rulings of the constitutional court (ex nunc, ex tunc; erga omnes, inter partes; etc.), individually, on the original action and on all actions before common law courts, on other regulations, administrative acts - statutory or individual - or judicial decisions, etc. (for example, is there a re-examination procedure)? Can the constitutional court limit or sustain the effects in time?

In cases where the Constitutional Court is considering acts of general application (See # 3-I) the decision to annul that statute or other enactment has effects *erga omnes* and *ex nunc*. The *erga omnes* effects are called for in the Constitution itself (Article 89.2 of the Constitution declares: “*Enforceable decisions of the Constitutional Court are binding on all authorities and persons.*”). This effect is indisputably *erga omnes*, thus it has effects on all state bodies, including courts, which would otherwise have to apply the annulled provision in a proceeding before them. Due to the Constitutional Court’s decision, the provision no longer governs legal relations and may no longer be applied by state bodies. If the Constitutional Court has rejected the petition seeking annulment of an enactment, that decision also has *erga omnes* effects, in that the decision is *res judicata*, and a new petition concerning the very same issue should be rejected as inadmissible.

The fact that its decisions have effects *ex nunc* was determined only in Sec. 70.1 ACC, which directs the Court to declare in its judgment that the act “shall be annulled on the day specified” therein. Under Sec. 70.3 ACC, if a provision invalidated by the Court served as the basis for an issued sub-statutory regulation, the same “shall lose force and effect simultaneously with the statute”. Sec. 58.1 ACC lays down the Court’s authority to delay its judgment entering into effect: a judgment is enforceable on the day it is published, “unless the Court decides otherwise”.

In the context of reference procedures, following judgment, the court *a quo* continues the suspended proceeding and either resolves the case without statute (if the Court annulled it) or applies the statute (if the Constitutional Court did not annul it).

Rulings of the Constitutional Court in complaint proceedings have at least *inter partes* effects. It is binding on the parties, which include the court or other state body whose decision or action is being contested. If the complaint is granted, the case is remanded and the ordinary court must decide in conformity with the Constitutional Court's holding. Not only is the statement of decision binding on the parties, but so is the Court’s reasoning.

38. *Is the authority of the rulings of the constitutional court always respected? Does it sometimes meet with opposition from institutions or courts? Do the other courts sometimes experience difficulties in implementing the rulings of the constitutional court?*

The rulings of the Constitutional Court have not always been respected. In the past a few isolated cases occurred when the authority of the rulings of the Constitutional Court was not respected. This happened in the first years of the Constitutional Court's existence when it was still in process of establishing its authority, trying to make sure that its decisions are respected by lower courts, and clarifying the question to of the binding force of its decisions. There have been cases when the Constitutional Court passed a decision in a concrete case but the lower court subsequently adjudicated the same matter differently. This was, e.g., the case of people refusing to do military service (or its civilian service counterpart): while lower courts repeatedly decided that a continuous refusal to do national service is a reason for repeated punishments, the Constitutional Court repeatedly adjudicated that such rulings violated the constitutional rule *ne bis in idem*. The lower courts eventually accepted the opinion of the Constitutional Court. Nowadays, such cases do not occur any more

§ 2. Interpretation by the constitutional court

a. The case law of other courts accepted by the constitutional court in the exercise of its own jurisdiction

39. *Does the constitutional court consider itself bound by the interpretations of the challenged act given by the Supreme Court or other courts (theory of living law, for example)? Can the constitutional court, however, give another interpretation?*

This question must be answered in light of the differing functions of the Constitutional Court and the Supreme Court (or other ordinary courts below it). Article 92 of the Constitution provides: *The Supreme Court is the highest judicial body in matters that fall within the jurisdiction of courts, with the exception of matters that come under the jurisdiction of the Constitutional Court or the Supreme Administrative Court.* Accordingly, the Supreme Court (and ordinary courts below it) have residual jurisdiction; all judicial matters not falling within the jurisdiction of the Constitutional Court are within its jurisdiction (the Supreme Administrative Court does not enter into the equation at present, as it has not yet been created). The Constitutional Court jurisdiction includes the determination of the constitutionality of enactments (statutes or regulations) and of the violation of constitutionally protected rights by public authorities, including ordinary courts. Ordinary court jurisdiction includes the determination of the rights of citizens and the interpretation of ordinary legislation. As these functions are not entirely mutually exclusive, there is an overlap, so that it is not so easy to determine the boundaries. Ordinary courts make determinations of guilt or innocence in criminal matters, of the respective rights of the parties in civil matters, and the interpretation of applicable laws. The Constitutional Court, on the other hand, can intervene if, for example, in the civil action one party did not enjoy a fair trial, or if the criminal prosecution and finding of guilt are in violation of the Constitution, or if the interpretation made of a statute is one that would bring it into conflict with the Constitution.

Accordingly, while the Constitutional Court must respect the division of jurisdiction, the actual boundary is not entirely evident and somewhat fluid. While, the Constitutional Court

generally would not second guess a judicial decision or fail to accord respect to the interpretation of statutes reached by ordinary courts (especially if it is constant jurisprudence), it is not absolutely bound thereby. If ordinary court interpretive practice brings a statute into conflict with the Constitution, the Constitutional Court will apply the constitutionally conforming interpretation (see #s 12, 41) and declare that such interpretation is not permissible. Further, ordinary court interpretive practice sometimes comes into conflict with the Constitutional Court's views as expressed in constitutional complaints. Even if there is constant jurisprudence of ordinary courts, if that jurisprudence departs from the requirements of the Constitution, as determined by the Constitutional court, the Constitutional Court generally insists that ordinary courts change their interpretation to conform to the Constitution (and backs up that insistence by annulling non-conforming decisions). In other words, the Constitutional Court does not feel absolutely bound by all ordinary court interpretations of statutes and does not accept such interpretation as the "living law" when they conflict with the Constitution. Rather than annulling provisions that would conform to the constitution if interpreted differently, it gives preference to a constitutionally conforming interpretation, i.e., to requiring ordinary courts to change their interpretative practice.

b. The effects of the interpretation of the constitutional court and the acceptance of the case law of the constitutional court by the other courts in the exercise of their own jurisdiction

40. Is the interpretation of the constitutional rules and the legislative rules given by the constitutional court binding on the other courts? What happens in case of non-adherence to the interpretation of the constitutional court?

See generally # 35. The question of the effects of interpretation of the constitutional and legislative norms set by the Constitutional Court is not legally regulated. The interpretation of the constitutional and other regulations differs according to the various types of proceedings. The Constitutional Court acts as a negative legislator in case of petitions proposing to annul legal regulations. If the Constitutional court annuls a statute, other legal regulation or a provision thereof, the Parliament is bound by the legal opinion of the Constitutional Court and it should proceed according to it while preparing the new statute. Provided the Parliament does not do so, it is probable that a new petition to annul legal regulation will be submitted. As far as constitutional complaints are concerned, the legal opinion of the Constitutional Court is binding for further decision-making of ordinary courts. Nevertheless, in the past, cases occurred when the ordinary courts did not respect the interpretation given by the Constitutional Court. The refusal of the legal opinion of the Constitutional Court and a new contradictory decision in the same matter initiates repeated constitutional complaints identical to the original one, leading to the annulment of the original decision. In one such case, the Constitutional Court annulled the ordinary court decision even without considering the merits; as the matter had already been decided, it was *res judicata* and would not be reconsidered.

41. Can the constitutional court declare that a rule is constitutional only in the exact interpretation given by it? Can this interpretation deviate from that of "living law"? If so, what use is made of this option?

In a number of its decisions the Constitutional court has pronounced the principle of priority of the constitutionally conforming interpretation prior to the annulment of a statute, another legal regulation or its provision. It did so e.g. in its decision file no. Pl. US 48/95 in which it

stated: “In a situation when a certain provision of a legal regulation enables two various interpretations, and one of them is in accordance with constitutional acts and international treaties under Art. 10 and the other in conflict with them, there is no reason for the annulment of such provision. When applying this provision, the task of the courts is to interpret the given provision in a constitutionally conforming way.”

42. What are the effects for the other courts of a purely interpretative decision?

The decision of the Constitutional Court has not purely interpretative effects. In its judgment file no. Pl. US 58/2000 of 20 March, 2001, the Constitutional Court states among others that the very "petit" of the petition is exclusively decisive for the entitlement of the Constitutional Court to assess the given matter. The Constitutional Court, as a judicial organ for the protection of constitutionality, is bound only by this “petit”, as it was repeatedly explained in the Constitutional Court judiciary (pl. US 16/93, Pl. US 20/93). In the opinion of the Constitutional Court, the petition demanding a purely interpretative decision lodged by complainants can only be evaluated as a request for the abstract interpretation of the norm. Such entitlement, however, does not belong to the Constitutional Court, with regard to the jurisdiction entrusted to the Court by the Constitution.

III. The interference of the European courts

A. The constitutional court and the other courts vis-à-vis the European Convention on Human Rights and the case law of the European Court of Human Rights

43. Is the constitutional court bound by the case law of the European Court of Human Rights? If this case law is not binding, does it influence the course of action of the constitutional court?

Especially as case law is not generally recognized as a source of law in the Czech legal order, in the strict sense, there Constitutional Court is not bound by the case law of the European Court of Human Rights (ECHR).

Something of an exception might be found with regard to proceedings provided for under Article 87.1.i of the Constitution, under which the Court has jurisdiction „to decide on the measures necessary to implement a decision of an international tribunal which is binding on the Czech Republic, in the event that it cannot be otherwise implemented“. This provision is implemented in Secs. 117-19 of ACC, where „international tribunal“ is defined as „any international institution authorized to make decisions on complaints about the violation of human rights and fundamental freedoms, the decisions of which are binding in the Czech Republic“ pursuant to an Article 10 Treaty. In addition, Sec. 118 provides that where such „tribunal“ finds an infringement of a fundamental right which „was made on the basis of a statute or some other enactment in force“, the government shall submit to the Constitutional Court a petition to annul the same. Of course, this is the same sort of petition as with all other abstract and concrete norm control, so in fact the Constitutional Court is not technically required to annul the enactment as unconstitutional, so that it is not actually bound by the decision of the „tribunal“. Such a case has not yet occurred, so that it cannot yet be

determined if the Constitutional Court would lean toward a policy of following decisions of the ECHR in such cases.

The ECHR case-law certainly influences the Constitutional Court decisions. As the Constitutional Court is bound by the convention of which the ECHR is the authoritative and definitive interpreter, naturally the Court keeps abreast of recent case-law and looks to it for guidance when resolving similar cases. It is quite common for the Constitutional Court to cite ECHR cases in its reasoning.

44. Can the court base its decision on a provision of the European Convention and, in doing so, possibly deviate from the action of the constitutional court?

An ordinary court can base its decision on the European Convention. This much is clear from Article 10 of the Constitution, which provides: *International treaties concerning human rights and fundamental freedoms which have been duly ratified and promulgated and by which the Czech Republic is bound are directly applicable and take precedence over statutes.*

Accordingly, an ordinary court may directly apply such international treaties, among which number the European Convention. Nonetheless, it has not become standard practice for ordinary courts to base their decisions either on the European Convention or any other international treaty. The question whether they could deviate from actions of the Constitutional Court, thus, does not come into play, especially as ordinary courts do not generally consider themselves bound by Constitutional Court judgments in unrelated matters (a system of precedents does not exist).

45. Must a lawsuit have been brought before the constitutional court before an appeal can be made to the European Court of Human Rights (after having tried all internal avenues of appeal)?

This is a question for the jurisprudence of the ECHR, as it is that court which would determine whether a submission is inadmissible for failure to exhaust all domestic remedies. Nonetheless, this question could undoubtedly be answered in the affirmative, at least as a general matter. The ECHR requires the exhaustion of all domestic law remedies before submissions can be made to it, and submission of a constitutional complaint is one of the domestic remedies, and certainly the final, that are possible for the violation of right contained in the European Convention

B. The constitutional court and the other courts vis-à-vis the case law of the Court of Justice of the European Communities

46. Is the constitutional court bound by the case law of the Court of Justice of the European Communities? If this case law is not binding, does it influence the course of action of the constitutional court?

47. Has the constitutional court already referred, or could it refer, cases to the Court of Justice of the European Communities? What is the role of the constitutional court and the other courts in case of non-application of national regulations that are incompatible with Community law?

48. Do national courts have a choice between referring cases to the constitutional court and to the Court of Justice of the European Communities?

As the Czech Republic has not yet become a Member State of the European Union, questions # 46-48 are inapplicable.