

General report

presented by

KIMON M. CHALAZONITIS,
member of the Council of State of Greece

THE JUDICIAL REVIEW OF SECONDARY LEGISLATION BY THE ADMINISTRATIVE JUDGE

INTRODUCTION

1. GENERAL CONSIDERATIONS

a. The act embodying secondary legislation

- i. *Regulating act and individual act*
- ii. *Regulation and administrative guidance*

b. Types of secondary legislation

- ii. *According to the organ from which they emanate*
- ii. *Inherent power and delegated power*

2. ACCES TO JUDICIAL REVIEW

a. In case of direct challenge to secondary legislation

- i. *Standing of the applicant-actio popularis-affected right or legal interest*
- ii. *Time limits and other conditions of admissibility*

b. In case of exception of illegality

- i. *Quality of the person who raises the exception*
- ii. *Other conditions for the admissibility of the exception*

3. NATURE OF CONTROL

a. Direct control

- i. *By means an application for annulment*
- ii. *Through other forms of appeal*

b. Incident control

- i. *The exception of illegality*
 - aa. *General considerations*
 - bb. *Within the frame of the application for annulment*
 - cc. *Within the frame of the application for full jurisdiction*
 - dd. *In other cases*
- ii. *Incident control ex officio*

4. SCOPE OF JUDICIAL REVIEW

a. Control for conformity with legislation

- ii. *General considerations*
- ii. *Excess of authority statutorily dispensed*
- iii. *Violation or provision of legislative acts*
- iv. *Violation of provisions of other regulatory acts*

b. Control of conformity with the general principles of law or with common law

c. Control of conformity to the provisions of the Constitution

d. Control of conformity to international law

e. Control of conformity with the European Community Law

5. EFFECTS OF REVIEW

a. In the case of direct challenge

i. Annulment of the challenged regulation

aa. Scope of the annulment

bb. Annulment ex nunc and ex tunc

cc. Effects on acts resting on annulled secondary legislation

ii. Other effects

b. In the case of an incident challenge

6. CONCLUSION AND GENERAL REMARKS

INTRODUCTION

The judge's action — or rather what is called judicial function — consists in applying legal rules to particular cases; the outcome of this process is the «judicial decision», an act of individual character.

But before any such rule is applied, it should be ascertained. The judge must first of all know which is the applicable legal rule and for this he must seek an existing rule, contained in a legal act valid both formally and substantially. He is, therefore, obliged to ascertain the validity of both the act and the rule contained in it.

Checking on the validity of the rule is a prerequisite for its application and consequently it is an indispensable part of the judge's action.

However, what was said is accurate only to a certain extent; There are rules whose validity cannot be verified. This, in principle, is true concerning the rules contained in the constitution or in acts that have constitutional force. But in some legal systems, this also holds good for rules contained in formal laws, that is to say acts arising from legislative function. At this point a distinction must be made between the following systems:

1) Systems that exclude all kinds of judicial control of the law or, at least, exclude a control more or less generalized (United Kingdom, Belgium, Netherlands, Luxembourg), 2) Systems in which exercise of control has been assigned exclusively or in the main to a specialized judge, the constitutional judge, who is competent to examine the constitutional validity of the rules (Germany, Italy, Portugal), 3) Systems based on the control of constitutional validity of the laws exercised by all courts, or, at least, all higher courts, (Greece, Denmark, Ireland). The French constitutional law also excludes judicial control of the legislative act, since the control exercised by the Constitutional Council concerns exclusively the texts passed by the Parliament before their ratification, as is rightly noted in the French report.

Even though there is such a diversity in the legal systems of EEC countries in the field of judicial control of the validity of legislative acts, all these countries have adopted one or more forms of control of the validity of secondary legislation.

Competence of the executive to establish rules has, on the other hand, been recognised nowadays in all the legal systems of these countries. It is exercised by acts of the agencies of the Administration called 'regulating'. This regulating power of the administration, as we shall see later on, constitutes in most cases authority delegated by the law which also establishes the limits and the preconditions of its exercise. As a result, the provision contained in the regulating act has a character more or less secondary and complementary contrasted with the provision of the law. Moreover, even the autonomous regulating power of the Administration, where it is recognised, has in most cases no primary character.

However, these principles are not valid in the legal system of France. There, under the regime of the 1958 Constitution, as the French report observes, the regulating competence of the Administration is the rule, whereas the regulating competence of

the law-maker is an exceptional competence, defined by enumeration.

The scope reserved for the legislator by this enumeration is however broad and in any case of greater importance than the field in which the regulating competence of the administration is exercised.

Anyway even in the French legal system, the administrative act containing the regulation remains an act inferior to the legislative act.

The control of this act, and in particular the character and content of this control when exercised by the administrative judge, in other words, by the court hearing administrative matters, is the subject of this colloquium.

Yet, we must take into account the limits set by the Permanent Committee in treating the subject, which are defined by the questionnaire, and above all we must exclude from the scope of this study the investigation of the formal defects of the regulating act. This however, is clear since the subject under discussion, as agreed upon, does not refer to the validity of the regulating act, but of the rule contained in it.

It would be added that for technical reasons, due to the fact that the quite recent accession of Spain to the European Communities has not allowed us to receive on time a report from this country, the legal system of Spain will not be dealt with in this report.

1. GENERAL CONSIDERATIONS

a. The act embodying secondary legislation

i. Regulating act and individual act

Subordinate legislation is distinguished by its general and abstract character. The regulating administrative act, in which it is contained, creates or modifies legal situations in a general, impersonal and objective way. In other words, this act concerns, in principle, an indefinite number of situations that may arise as soon as it comes into effect and within a defined or indefinite period of time.

We must, therefore, distinguish this act, according to the classic doctrine, from the individual act, which creates a subjective legal situation, that is, one determined in a special way and individualized. The individual act exhausts itself by its application.

Even if we set aside the positivist doctrine, according to which every legal act carries regulating elements and elements of application of a rule of superior order, we should nevertheless remark that it is not always easy to draw a line between the regulating and individual acts.

Above all it is difficult to classify in one or the other category the so called «actes conditions», whose effect is to secure continued application of a preexisting legal regime. If most of them, as for instance the appointment of a public servant or the classification of a building in the category of protected historical monuments, are considered individual acts, there are always the «actes-conditions» of a general content, whose character is mostly regulating.

Furthermore, there are acts of a mixed character containing rules and at the same time implementation of the law in concrete cases.

According to a general rule that appears to be common to all EEC member-states, the regulating act must be couched in written form and published. Special forms are required for these or some of these acts by the law in force in some of the said countries.

ii. Regulations and administrative guidance

There are acts of a general character but without the force of law, unable to create or modify legal situations. These acts are known by several names, such as instructions, «directives», «circulars». They have an internal character because they concern the function of the service they issue from and aim at securing the internal order in this service. Some of them give instructions to inferior agents for the implementation of the law in particular cases. Others, of a more general character, such as circulars, interpret the provisions of the law or of a regulating act with a view to securing uniform application of these texts. There are again certain acts containing general principles or directives for the exercise of the discretionary power of the authority from which they emanate or its hierarchically inferior agents. All these acts do not bind citizens nor can they be enforced against them.

Even though this is a general principle, we cannot exclude the existence of acts published in the form of a circular or a directive and containing regulating orders.

Such cases are mentioned for instance in the German report, while the British report, talking of similar cases, observes that the demarcation line has not been strictly drawn between regulating acts (regulations) and directives. This observation is, for all we know, more or less valid, for the legal system of other countries.

Although these acts, as it has already been said, have no force of law, they are not devoid of all effect. Their violation by a hierarchically inferior agent may incur the disciplinary responsibility of this agent. Besides, the Administration must not infringe on an act containing the principles to be observed when it exercises its discretionary power and which it is normally expected to observe so long as it does not invoke a special reason.

b. Types of secondary legislation

i. According to the agent they emanate from

The regulating power is mainly exercised by acts of the Head of State. In the United Kingdom the «orders in council», in Netherlands «the regulations of public Administration», in Belgium and in Denmark the «royal» decrees and in Luxembourg the orders of the Grand Duke are published in the form of acts by the Queen, the King or the Grand Duke respectively. Similarly in Italy and Greece there are «presidential» regulations or decrees. In France, the President of the republic signs the orders and

decrees resolved upon by the Cabinet and issues regulating acts in the exercise of the exceptional powers granted to him by article 16 of the Constitution. Finally, in Portugal the decrees are promulgated by the President of the republic. Only the President of the Federal Republic of Germany and the President of Ireland have nothing to do with the procedure of issuing regulating acts.

If, however, we put aside the case of the exercise of exceptional powers by the President of the French Republic, the regulating acts mentioned above, which carry the signature of the Heads of State, are countersigned by the members or the member of the government that is politically responsible and in whom real power resides.

In all EEC countries, on the other hand, we come across regulating acts issued by ministers in the form of ministerial decisions. Such acts are not foreign to the practice followed by Luxembourg, although the Constitution of this country does not authorise either delegation of legislative power to organs of the executive or the delegation of regulating power by the Grand Duke to ministers or other lower administrative agents. The laws authorising ministers to issue regulating acts are unconstitutional, but such laws do exist and are in force, as it is set out in the national report of this country, because the existing legal system does not grant the courts the right to check on the constitutionality of legislative acts.

The legal systems of the EEC countries recognise in most cases, regulating acts emanating from the Cabinet or from lower political and administrative organs, such as Deputy ministers, General Secretaries, heads of Departments, Nomarchs, Police authorities etc. These last organs are authorised by law or sometimes are granted subdelegation (see German report).

In France the general regulating power belongs to the Prime Minister, who exercises it with decrees countersigned by the ministers responsible for their execution. Ministers and other administrative organs have regulating power in some cases. In Greece, ministers and other administrative authorities may be authorised to issue regulations, according to the Constitution, on condition that these acts concern special matters or small matters of local interest or technical details.

Regulating power is recognised, in most countries, in administrative organs or services constituting legal entities of public law and even, in public enterprises or public utilities constituting legal persons of private law, as well as in professional associations such as the law society. This competence is, however, limited and concerns only the organisation of these services or establishments and occasionally the special relations between them and users.

Regulating power, more or less limited, is also recognised in local authorities in every country.

Furthermore, the federal or semi-federal organisation of some of these countries lends itself to the exercise of regulating power by certain other organs.

In Germany the exercise of regulating power belongs to the government and the federal ministers and by way of subdelegation to other federal administrative authorities; but at the same time this power belongs to organs (governments, ministers and

other authorities) of the «Länder», authorised by a federal law or a law of the «Land».

In Belgium the division of the territory into Communities and Regions, endowed with a council (legislative organ) and an executive, has resulted in conferring regulating power on the executive of every Community and Region.

In Italy the executive organs of the Regions and the self-governing provinces, called «Juntas», are vested with the power to issue executive decrees of the laws passed by the Regional and Provincial councils (legislative organs).

In Portugal, the existence of two autonomous regions (archipelago of the Azores and archipelago of Madeira) has as a result the bestowal of regulating power on the governments of these regions. The regulations issued by these governments called «regional decrees» concern either the execution of the laws passed by the Regional Assemblies, or the organisation and operation of public services in the Regions.

ii. Inherent power and delegated power

Regulating power, in the majority of cases, is delegated to the administrative organ by a law designating the limits of its exercise. But the legal system in most countries recognises the existence of inherent power, whose source is the Constitution, written or customary.

According to the national reports, there is no inherent regulating power in the legal system of Denmark and Ireland, where the law constitutes the only source of regulating power of the organs of the executive.

This is also true concerning the Federal Republic of Germany, where all regulating power of the administrative organs of the Federation or the «Länder» must be delegated by law. Only local authorities have a measure of autonomy in this field.

Almost the same situation prevails in the United Kingdom, where only the orders in council based on the royal prerogatives concerning foreign affairs, the civil service and some other subjects, may claim the character of inherent regulating acts. But it is rather an exception, the scope of which, according to the UK report, is limited.

On the contrary in France, according to the 1958 Constitution, the executive exercises a very extensive inherent power since, as it was said before, the regulating competence of the Administration constitutes in this country the normal case covering all matters except those enumerated in art. 34 of the Constitution, which belong to the domain of the law. There exists, therefore, by the side of the inherent power of the Administration an inherent power delegated by the law.

Luxembourg, on the other hand, is the only country in which delegated regulating power is not in theory recognised. The doctrine and the Administrative section of the Conseil d' Etat are in agreement that apart from the Grand Duke, no other organ enjoys, on the governmental level, the power to issue regulations. The Grand Duke himself exercises, under the Constitution, an inherent regulating power, limited to the issue of regulations necessary to the execution of laws, being unable therefore to exceed the matters designated by law or suspend the effect of the law or dispense

with its execution. But in reality, as we have already seen, the law maker sometimes happens to assign regulating power either to the Grand Duke or to the government or to ministers, in violation of the Constitution. This violation does not incur sanctions, since the courts do not examine the constitutionality of laws. In reality the Grand Duke also exercises extensive regulating power when he issues decrees necessary to the execution of laws, called «de pleins pouvoirs» and considered to be consistent with the Constitution. Inherent power is, on the other hand, recognised in the Communities.

Delegated regulating power is limited in Portugal. At first there is an important field of normative activity reserved to the law, which excludes the delegation of regulating power. In all other matters such power can only be delegated to the executive when the matter has not been regulated by law. The regulating acts thus issued may in a sense be considered autonomous. There is a parallel inherent power of the Administration limited to what is necessary to the implementation of laws. Furthermore, local authorities have an inherent power concerning the affairs of local interest, while in public services and organisations and sometimes in public utility companies a similar power is conferred in relation with their organisation and operation.

In Belgium, Greece and Italy the executive has an inherent power based on the Constitution, as well as power delegated by law. In these three countries, it is recognised a regulating power limited to the issuing of regulations necessary for the implementation of the law. It is an inherent power exercised independently, without any need of legislative delegation. An inherent regulating power is also recognised in the executive in the sphere of the organisation of public services and state service (Belgium and Italy). Local authorities (communities etc) have a regulating power more or less inherent in matters of local interest. In Greece this power is delegated by law.

Very extensive regulating power delegated by law is exercised in these three countries. It extends over all matters of a legislative nature and knows no bounds other than those set by the law authorising the competent organ. However, there are some matters reserved for the law in Greece.

The important role of the delegated power in the legal system, not only of these three countries, but also in the majority of the countries so far mentioned, in which such a power is conferred on the executive, is clear. Let it be remembered that the normative power of the state is exercised above all by regulating administrative acts and that the legislative acts occupy a numerically limited place in this activity.

ACCESS TO JUDICIAL REVIEW

a. In case of direct challenge to secondary legislation

ii. Standing of the applicant - actio popularis - affected right or legal interest

The legal systems in the majority of the countries dealt with in this report, have, as

we shall see in the next chapter, two forms of judicial review of secondary legislation: Direct challenge by a citizen in the form of an application and incidental review carried out either *ex officio* or by way of *exceptio*.

Among these countries, Luxembourg has no form of judicial review at all. This also holds good for the Netherlands, in so far as the Administrative Courts are concerned, which exercise only incidental control whereas the civil judge can carry out immediate control, within the frame of a suit for damages, as the report of Holland observes.

In other countries direct judicial review is acknowledged, although the forms that it takes in the United Kingdom in Ireland and in Denmark differ from those known in the Countries of the Continent. On the other hand, the exercise of this kind of control in Germany is restricted to certain categories of regulations.

In all these countries that recognise direct control of regulating acts, access to this control is secured to a more or less great number of persons.

Actio popularis has not been introduced, but to have access to judicial review, one does not have to invoke harm to a right; the invocation of legal interest is sufficient.

Besides, even though the idea of interest is not construed in the same way in the legal system of each of these countries, it has, as far as the control of these acts, is concerned, a more or less broad meaning.

In the United Kingdom, to make an application or petition for judicial review one must have leave of the high Court. The leave is granted if the applicant is considered to have sufficient interest in the matter to which the application relates. This interest, however, observes the UK report, is broadly construed by the court under the influence of the recent jurisprudence of the House of Lords. Nevertheless, even those who cannot justify such an interest are likely to have their applications accepted, if they seek the assistance of the Attorney General and if he grants them it. This intervention in favour of the applicant is justified by the concern of the Crown as represented by the Attorney General to uphold the law for the general public benefit. The interest in challenging a regulation is construed with a similar broadness in Ireland, although there are no absolute rules in this matter and everything depends on the circumstances of the case. As note the national report, the courts have adopted a liberal outlook on the question of *locus standi* and sometimes the law itself encourages this outlook in particular on the question of the protection of environment.

In Denmark, when the legality of a regulating act which is not followed by individual measures of application is contested, the applicant must invoke concrete interest, direct or indirect, which suffers by this act.

The direct control of regulations, in cases where its exercise is allowed in the federal Republic of Germany, is initiated following an application submitted by the person, physical or legal, who has sustained harm by this regulating act or its application, or who may expect to suffer such harm within a foreseeable time limit, as well as by every, administrative authority. The jurisprudence, of the federal, administrative

court according to which the applicant should invoke a harmed right, has become in recent years much more liberal. It only requires a harmed interest.

The regime of judicial review of regulating administrative acts presents some peculiarities in Italy. The administrative courts may exclusively exert a direct control on the regulations. A sole exception concerns the acts that affect subjective rights. By contrast, the incidental control of the validity of secondary legislation is in the competence of the civil judge. On the other hand, the case law of the *Conseil.d' Etat* has classified regulating acts in those of immediate application (self-applicable) and in those taking effect through an individual act that effects their application (preliminary).

In the first case, an application for annulment must be filed against a regulation within a fixed time limit by persons invoking legal interest.

In the second case, the act must be challenged directly, together with the individual act through which it comes into effect. In both cases legal interest is required to challenge an act. This interest may be material or moral, but it must be direct, current and personal. Direct is opposed to indirect, such as the interest of the creditor, current to future or eventual, personal to general. It concerns a category of persons but one defined by fairly concrete features, e.g. owners of immovable property in a particular street and not in the whole district. As to preliminary regulations, the existence of this interest must be verified with respect to the individual administrative act applying the regulation. There are, however, some law provisions that broaden the circle of persons entitled to challenge some administrative acts, even provisions that have established some kind of *actio popularis*. This is the case of challenges in electoral matters.

An application for annulment, in Portugal, cannot be directed against all regulating administrative acts, because some of them, and not the minority, such as orders of the government, cannot be challenged by this judicial remedy but are subject, under conditions, to another regime of judicial review. Yet, access to an application for annulment is, according to the Portuguese report, more liberal when it concerns a regulating act, provided the act challenged is likely to bring about foreseeable harm, which means that the applicant may invoke mere threat of harm to a right or interest of his. Besides, the application for annulment may be made by the Attorney general in defense of the general interest.

The last three countries, that is Belgium, France and Greece, have systems more or less similar for reviewing regulating administrative acts. The basis for direct control is the application for annulment of a regulating act. Whoever makes such an application must invoke a material or moral interest protected by law, which must be direct, current and personal.

According to the French report, application for annulment of regulating acts, in view of their extensive effects, is generally accepted. Capacities such as those of taxpayer, resident, voter, user, afford adequate interest for someone to challenge a great number of regulating acts. However, the interest every citizen has in the law being respected is not enough.

These remarks are not without value for the other two countries as well (Belgium, Greece), although theoretically the same qualities are required of him who makes an application for annulment of a regulating act as of the one who challenges an individual act. Finally, it should be noted that the appreciation of the interest is by its nature never free from a degree of subjectivity, since the border line between direct and indirect interest, personal or general, cannot be clearly drawn.

ii. Time limits and other conditions of admissibility

If one goes over the provisions of the legislation of the countries dealt with in this study, one will see that the application giving rise to exercise of direct control of the administrative act should, in most, cases be made within a more or less short time limit starting from the publication date of the regulating act. This time limit is the ordinary one for making an application for annulment. This is the case in Belgium, in Greece and in France, where the time limit has been fixed at sixty (60) days or two (2) months. However, it should be noted that in these three countries incident control of the delegated administrative act is acknowledged and exercised without the time limit condition.

Italy presents a particular case. The making of an application for annulment of the administrative acts called self applicable is subject to the condition of the sixty-day time limit from the date of publication. But incidental control of the same administrative acts by administrative courts is ruled out. As for the regulating acts called preliminary must, as it has already been said, be challenged together with the individual act by which they implemented and within the same time limit as these last acts. There is no question of incidental control of these regulating acts by the administrative courts.

A time limit, within which to take action and particularly to make an application for the judicial review of delegated legislation, is fixed by law in the United Kingdom. It is a three month period starting from the date when the applicant had for the first time reasons permitting him to challenge the administrative act. This time limit also applies to individual acts. The peculiarity of Anglosaxon law in this matter is that the court itself may extend this time limit, if it considers that there are reasons to justify it.

However, there are systems in which the exercise of immediate control of the administrative act is not subject to any time limit. This is the case of Ireland, Portugal and Federal Germany. It must be, however, repeated that in the last of these countries direct control does not concern all the regulating acts but only some of them. The exercise of direct control is subject to an additional condition, in this same country, the need for judicial protection. This means, according to the report of this country, that a challenge is not admissible except only when the decision may in some way benefit the challenger.

The other conditions of admissibility of an application giving rise to the exercise of direct control are more or less common to the cases of challenging regulating and individual acts, with the exception of those conditions that cannot be accommodated

in either of these two categories. Thus, it cannot be required that the regulating act should have the character of an enforceable decision, because this is not consistent with the nature of the norm. However, for the admissibility of an application one must be in presence of an act establishing a rule and not of an act that limits itself to commenting on or explaining a pre-existing rule, for example, a circular.

b. In the case of exception of illegality

i. Quality of the person who raises the exception

Though a system of direct control of the validity of delegated legislation is not introduced in all EEC countries and though the systems existing in some of them do not cover, as we have seen, the whole of the delegated activity of the administration, the exercise of incidental control is acknowledged with considerable breadth. In the next chapter we shall take a close look at these control systems, which are put into practice in an indirect way, by means of the exception of illegality or operate *ex officio*. It only remains here to talk of the conditions of access to this control.

The main condition is to be a party in a trial. Thus, the exception of illegality may be raised before the administrative judge against an administrative act by the person who challenges an individual administrative act issued in implementation of a regulating act or based on it and being prejudicial to his interest. In the same way, access, in principle, to incidental control is recognised to the opposing party, as well as to every other person who is party in a trial, the Administration included. By the same token, the exception of illegality may be raised before the civil or penal judge, by all the parties in a trial.

These remarks lead to the conclusion that in the law systems where the idea of interest in challenging a regulating act is taken in a broader sense than the idea of interest in challenging an individual act, the access of individuals to the control of the rule is easier in the case of direct control than in the case in indirect control.

Needless to say that access to the control of the regulating administrative act by means of the exception of illegality raised before a civil judge is less open because it pre-supposes the existence of a subjective right.

We must not finish without pointing out the peculiarities of the Italian system in this field. According to this system only individual invoking a subjective right that has been prejudiced may have access to the control of a regulating act by raising the exception of illegality. Those who consider themselves to have suffered prejudice in their legal interest, are obliged to take direct action for annulment of an administrative act within the time limit of which we have spoken before. We must, however, observe that the rigidity of the system is in a way attenuated by the fact that the time limit for challenging regulating acts called preliminary does not begin before the issuing of an individual act applying the delegated legislation.

ii. Other conditions of admissibility of the exception

When a regulation is contested by means of the exception of illegality, as the French report rightly observes, those rules of admissibility are applied which are valid for the main application, since the exception of illegality, is only one way among others, designed to support this application. We should, however, add that in principle the admissibility of the exception of illegality does not depend on the possibility of the party who has raised it of taking direct action against the regulating administrative act challenged by the exception of illegality.

3. NATURE OF CONTROL

a. Direct control

i. By means of an application for annulment

The direct control of the validity of the regulating act is effected in four EEC countries (Belgium, France, Greece, Italy), by the legal remedy of application for annulment.

By this application, called application «pour excès de pouvoir» in France, the violation of legality by the Administration is penalised very energetically, since the act challenged and found illegal by the administrative judge is repealed and since this annulment has, in principle, erga omnes and ex tunc effect.

The application for annulment is in the four countries mentioned, the only remedy for direct control of delegated legislation and belongs to the exclusive competence of the administrative judge.

In Greece, as well as in Belgium, the application directed against delegated legislation is always heard by the supreme administrative court. In Italy, this legal remedy applies to regulating acts called self applicable as well as to those called preliminary. The only difference lies in the time limit within which the application for annulment must be made, since acts of the second category, as we have already said, cannot be challenged except after the issuing of the acts for their implementation, within the same time limit as those last ones.

In Portugal, the application for annulment is made before the administrative or tax courts and is directed against all regulating acts except those issued by the government or by services carrying a legal personality of public law, which acts, as we shall see, are subject to a different kind of control. Therefore, a considerable category of regulating acts is excluded from control conducted through an application for annulment.

Apart from this, the control effected through an application of annulment has not the same results; in fact it has more limited effects than those pursuant to the same application directed against individual acts, because as we shall see, the regulating

act is, in principle, annulled *ex nunc*.

Finally, it must be remembered that in the countries mentioned the application for annulment is also directed against individual administrative acts and that in other countries, such as Federal Germany and Luxemburg, this legal remedy is also known but concerns only individual acts, which are the only to be called administrative in the first of these two countries.

ii. Through others forms of appeal

The legal remedies by which the activity of the administration, in the United Kingdom, is controlled are various. The employment of legal remedies of public law, on the one hand, such as *certiorari* and of private law, on the other, such as the application for a declaration, were equally admissible. Yet, after the 1981 reform, as is pointed out by the United Kingdom report, direct control of this activity is normally effected by the legal remedy of application for judicial review. This application is raised before the High Court, following a leave from it and aims at a declaration being made in connection with the nullity of the individual or regulating act against which it is directed. According to the recent case law of the House of Lords, the application for a declaration by other legal remedies would constitute an abuse of procedure and, therefore, would have to be ruled out.

The employment of other remedies, however, is not excluded in the even of all parties consenting.

The legal remedies of English law, particularly the declaration and the *certiorari*, are, in Ireland, at the disposal of persons whose interests are affected or threatened by the activity of the Administration. These legal remedies lead to control of administrative regulations, which may take on the form of an indirect control, but sometimes may become direct.

In Denmark, according to the Constitution, which grants the courts authority to resolve all questions concerning the boundaries of jurisdiction of public authorities, there is also a control of regulating acts, which, sometimes has a direct character. The legal remedies come in this way close to the ones employed by the two previous countries.

In Germany, a form of direct control of regulating acts was introduced for the first time after the war, under the influence of professor Jellinek. The way by which this control is exercised is the procedure of abstract control of regulating acts. Its field of application however, is limited. It concerns, in the first place, the local ordinances issued on the basis of federal laws bearing on construction and housing development. The same procedure was introduced in six *Länder* and in some of them it concerns all the regulating acts of the *Land*. High administrative courts are competent to rule in the first and last degree. Even the lodging of a cassational appeal with the federal administrative court is ruled out. The decision issued by these courts declares the invalidity of the rule of law challenged without expressly annulling it.

In the same country, there exists a direct control of the validity of regulating administrative acts, which belongs to the competence of the federal constitutional court and of the constitutional courts of the Länder. The scope of this control is limited; It concerns the conformity of the rule of law challenged by the appeal to the provisions of the Constitution that guarantee fundamental rights. The appeal is not admissible except after every other legal remedy has been exhausted.

In the Netherlands, the administrative judge does not exert, as it has been said, any direct control on the regulating administrative acts. The civil judge may, however, declare non obligatory and non applicable a regulating act which he considers illegal. If such a request has been lodged within the frame of civil liability suit against the Administration, we have got here a case of direct control of secondary legislation, according to the Dutch report.

In Portugal, together with the application for annulment there are, as we have said, other means of direct control of regulating administrative acts. In this way, by means of an appeal for the assessment of legality, the Supreme administrative court exercises direct control of the legality of the regulating acts whose effects are immediately produced and of those which have been deemed illegal by a court in three concrete cases. On the other hand, the constitutional court examines the constitutionality and legality of regulations bearing upon the regional organisation of the State, following a request by the President of the Republic and some other public organs.

Finally, there are no means of direct control in Luxembourg.

b. Incident control

i. The exception of illegality

aa. General considerations

If the direct control of secondary legislation is not, as we have seen, recognised and applied in all EEC countries and if the scope and efficacy vary from country to country, the indirect or incident control is the general rule in all these countries and it is the one applied more widely. There is, however, an exception in this matter: in Italy, where the administrative judge is in no way competent to examine incidentally secondary legislation, -because the only means of control he has at his disposal is the application for annulment, that is to say, a means of direct control.

It must, however, be underlined that in Italy, as well as in other countries, ordinary courts may exercise incident control of regulations within the frame of the exercise of their jurisdiction. Nevertheless these courts are in France incompetent to judge the validity of such acts; if such an assessment is necessary to the resolution of a dispute they have to refer the preliminary question concerning the legality of the regulation to the administrative judge. In exception to this rule, the penal judge may assess the legality of such an act.

Incidental control is exercised by the judge either *ex officio* or at the initiative of the interested parties, who are the litigants in a trial. This initiative takes the form of the plea or exception of illegality, which is raised in a principal trial having another object.

bb. Within the frame of the application for annulment

Within the frame of the application for annulment, together with direct control, an incidental control of secondary legislation may be exercised. The exception of illegality is raised by the applicant to support his application, when he claims that the act he is challenging is in the main illegal or illegally founded because issued on the basis or in application of a regulating act whose legality he disputes. But the defendant, even the administration, may equally raise this exception, claiming that the applicant's request is unfounded because it presupposes the validity of a regulating act whose legality he contests.

As to the reasons one may invoke against a regulating act challenged by the exception of illegality, they are the same as could be invoked if one challenged the same act by an application for annulment.

Finally, the judge's reply to the question posed by the raising of the exception of illegality is contained in the rationale of the decision since the *pervue* can only concern the act mainly challenged.

cc. Within the frame of the application for full jurisdiction

The exception of illegality may be raised either to support an appeal of full jurisdiction introduced before the administrative judge or to support the claims of the opposing party within the framework of a trial initiated by this appeal.

It is clear that within this framework the control of the validity of secondary legislation by the judge can only be conducted incidentally.

dd. In other cases

The exception of illegality may as a rule be challenged within the framework of the procedures applied in the United Kingdom, but in some cases, as is noted in the report of this country, the judge might consider the exception inadmissible countering to the litigant who raises it that he should have challenged the regulating act directly. We must, however, underline that in English law there is no difference between an appeal requesting the declaration of invalidity of a regulation and a suit for damages accompanied by the invocation of the illegality of the said act. Besides, by the application for judicial review one can claim damages.

The legal remedies provided for in *Denmark* also lead to incidental control of the legality of secondary legislation when the question is posed by the applicant.

Finally, as it has already been said, the exception of illegality may be raised before

the ordinary courts within the context of a penal or civil trial. The competence of these courts to judge the legality of secondary legislation is recognised in all countries except *France*.

ii. Incident control ex officio

It appears that the incidental control ex officio is the rule in the countries we are talking of.

In *Portugal*, according to the report, there is a control ex officio of general nature resting on the interpretation of art. 208 of the Constitution and the provisions of the Act on administrative and tax courts, according to which these courts may refuse ex officio the application of unconstitutional rules of law or in opposition to other rules of a higher hierarchical order.

In *Luxembourg*, incident control is exercised ex officio, according to art. 95 of the Constitution, which authorises the tribunal not to apply regulations if they are not in conformity with the law.

In *Belgium*, the irregularities concerning regulating acts are examined ex officio if they are of a public order.

In *Greece*, the report cites an example of incidental control ex officio concerning a regulating act issued in violation of the Constitution. It must be noted that in this country all courts are authorised to examine the constitutionality of legislative acts ex officio.

From the German and Dutch report we learn that the judge may examine the legality of applied regulations ex officio. The exception of illegality can be raised ex officio as well in France.

4. SCOPE OF JUDICIAL REVIEW

a. Control for conformity with legislation

i. General considerations

As it has already been mentioned, what is of primary interest to this study is the substantive viewpoint on the judicial review of delegated legislation. We will not be concerned here either with defects in form or with procedural defects, not even with violation of the provisions designating jurisdiction, but we shall deal exclusively with the conformity of the contents of the regulatory act to the rules contained in the law.

Consequently, we ought to explain that the term «conformity» is being used with a certain amount of laxity, without having the intention to dispute the theoretical distinction between compatibility and conformity, of which mention is made in the France and Belgium reports, and of which we shall speak later on. It seems that the

terminology which is used by case-law has not been sufficiently influenced, and that the term conformity, as one could safely have assumed, judging from its use in the national reports covers, within the framework of control of the validity of the delegated legislation, any sort of relation existing between this regulation and the legislative act.

Finally in the analysis that follows, due regard has been paid to the distinction between the delegated authority dispensed by statutory authorisation and the autonomous one. In most cases the last one restricts itself in editing the necessary regulatory acts designed for the execution of the law. This distinction corresponds to certain peculiarities of control, which will be mentioned in the following paragraphs.

Conversely, the distinction between, direct and incident control does not seem to bear upon the extent of the control of the validity of the delegated legislation, because the reasons for which such a regulation can be judged illegal do not differentiate in these two cases.

ii. Excess of authority statutorily dispensed

Subordinate legislation is in most countries the main and the most significant source of the regulatory activity of the administration.

The first question confronting the judge who is charged with examining the validity of some regulation not stemming from the exercise of the autonomous authority of the administration, is to know if the regulating act is based on legislative authorisation. The law and the relevant article granting this authorisation and defining the prerequisites and ambit of the exercise of said authority, are ab initio referred to in the preamble of this regulating act.

If there is such an authorisation the judge ought to proceed to contrasting the contents of the rule over which he exercises control with the contents of the rule dispensing authorisation. Out of this juxtaposition the judge will decide if the regulation went beyond the authority designated to it by law, in other words if it is in excess of the statutorily prescribed authorisation.

Such excess exists, for instance, in the case where a local authority, authorised to perform policing in the area under its control, issues instead rules regarding «the service status» of police employees. If the rule contained in the regulating act exceeds the authority delegated to it by the authorising law, in other words, if it is in excess of this authorisation, then there is infringement of the law. We must add here, that in those countries where the judge can exercise control over the constitutionality of laws, of which we spoke above, the judge ought to check also the validity of the law dispensing the authorisation and especially to satisfy himself that the contents, the aim and the scope of such an authorisation have been sufficiently defined, as it is required by the Constitution.

iii. Violation of provisions of legislative act

The hierarchy of rules existing in the legal systems of all countries, as it is eviden-

ced by the national reports, requires that the secondary legislation should not oppose the legislative act.

This applies to all regulating acts irrespective of their particular features.

Thus, the rules stemming from the exercise of delegated legislation, should not run contrary to the rules contained either in the law dispensing authorisation or in other formal laws. We must, however, point out here that this applies only to the extent that the administrative organ has not been expressly authorized to amend or abolish provisions of legislative acts. However, such an authorisation cannot extend to matters which have been exclusively reserved by the Constitution for formal laws.

It is interesting to note that in accordance with the *Portugese* Constitution, authorisation to the Administration to amend, rescind or recall etc provisions of a legislative act, is absolutely prohibited. Besides, as it is underlined by the Belgian and French reports, in the case of delegated legislation the judge checks the compatibility of the secondary regulation with the legislative act. He can safely draw the conclusion that the law has been violated only in the case where the legislative provision hinders the application of the secondary legislation examined by the judge. Conversely, the control is more stiff, if it concerns an edict executory of law. It is control of conformity *stricto sensu*. The judge is not in quest only of the compatibility of the regulating act with the provisions of the law in general but he ought equally to see if this act is in line with the provisions of the particular law of which it is the necessary extension.

As to regulations stemming from the exercise of an autonomous delegated power, which is independent from the execution of a law, we must accept that they, too, just like those stemming from the exercise of delegated power statutorily dispensed, must be compatible with the provisions of legislative acts.

To verify the compatibility or conformity of a regulating act with the law, the judge ought to construe the two regulations by using the known methods. If the letter of the legislative act is not absolutely clear, he must seek out the spirit and, especially, the intention of the law-giver by referring to the explanatory memorandum accompanying the text of the law or eventually to reports prepared by teams of experts who have worked in the drawing up of the draft-law.

iiii. Violation of provisions of other regulatory acts

The hierarchy of rules, that we have spoken of above, corresponds to the hierarchy of state organs. It constitutes a principle widely recognised and applied even inside the administration.

According to this principle, the delegated legislation should be compatible not only with legislative acts but equally with regulations emanating from superior administrative organs. This of course, does not mean that the hierarchically superior organs could intervene in the duties of their subordinates or substitute them. At all events this principle does not prevent the law from expressly authorizing an administrative organ to amend the provisions of a regulating act issuing from a higher level.

In federally — structured States (Germany) or in those States where exists some form of federation or in which certain regions enjoy political autonomy (*Italy, Portugal*), there is an order of priority between the federal or national regulating acts and those of Länder or *regions*. Nevertheless, in Belgium, there is not an hierarchical order between regulations of the State and regulations emanating from organs of the regions or communities.

Thus, in accordance with the principle mentioned above, are considered illegal those regulating acts whose content runs contrary to the provisions of regulating acts stemming from hierarchically superior organs.

Further more, in cases where regulating acts from organs of equal station run contrary to each other we employ the well known principle according to which a posterior rule abolishes an anterior rule, while a posterior general rule does not abolish an anterior special rule.

b. Control of conformity with the general principles of law or with common law

Unwritten rules frequently oppose delegated legislation. In many countries, the general principles of law are recognised as a source of the unwritten law and rank above regulatory administrative acts.

Although discussion concerning the true nature of general principles is still open, one could support the view that they emanate from the unwritten law whose spirit they divulge. In reality, as is very aptly observed in the French report, they are the creation of the case law, which for this very reason constitutes a source of law.

Their number is more or less great and tends to increase every day. Among those principles one could cite as more important, the principle of the non - retroactivity of regulating acts, the principle according to which no-one can be a judge of his own case and the principle of «*audi alteram partem*».

Anyhow, where these general principles are recognised, they rank higher, as was already mentioned, than the rules contained in regulating acts and for these reasons take precedence over them. Thus, if a regulatory administrative act is contrary to such a general principle, the former has to be considered illegal.

However, we must distinguish between general principles deduced from legislative acts and those deduced from provisions of the Constitution. The first are inferior to the written law and consequently the law-maker does not feel obliged to observe them. Moreover, he may authorize the administration to issue rules that may diverge from these general principles. In such a case these rules, although contrary to the general principles of law, are held to be legal, since they emanate from an authorisation of a written law, which far outweighs general principles.

Conversely, the principles which derive their power directly from the Constitution have a legal standing superior to that of the written laws and as such take precedence even over formal laws/What has just been said, however, does not apply to legal systems of such countries as Luxembourg, where, according to its national report,

general principles are not held by case law to rank higher than laws and regulating acts.

A similar situation prevails in the *Netherlands*, where the judge refuses to control the conformity of secondary legislation to the general principles of law. But this stance of absolute denial, has shown signs of relenting, as is indicated in the report of this country.

Finally, in Portugal, the general principles of law might be said to hold a place low down the scale — a place in any case that is never above the law.

On the other hand, in countries like the *United Kingdom* or *Ireland*, their legal system acknowledges the principle of common law. General principles like those referred to above, for instance the principle «audi alteram partem», or right to a «fair hearing» or the so-called principle of «natural justice», are deduced from the totality of the unwritten provisions that make up common law.

The renowned principle of case law, according to which the Parliament could never have intended to authorize the executive to proceed to arrangements contrary to the fundamental principles or such as would not have been just or impartial or inspired by the principle of equity or good faith, is widely applicable.

According to that principle such administrative acts would be illegal.

It is clear, then, that through a variety of ways, similar solutions are arrived at in the countries mentioned above.

c. Control of conformity to the provisions of the constitution

The control of the validity of secondary legislation is a control of legality *lato sensu*, that is to say of the conformity of the rule to formal law, but also, as it has already been said, to regulating acts of a higher order, as well as to the general principles of justice and even to the fundamental law, that is the Constitution, written or customary.

Going over the national reports, we notice that the control of the constitutionality of secondary legislation has been adopted in all these countries, even by those which refuse to check the constitutionality of the formal law.

In the group of countries like *Germany*, *Denmark*, *Greece*, *Ireland*, *Italy* and *Portugal*, where the judicial control of the constitutionality of legislative acts is permitted, the exercise of control of the constitutionality of regulatory administrative acts does not pose serious problems. It is exercised in the same manner and concurrently with the control on legality *stricto sensu*.

Nevertheless, there are some peculiarities in countries like *Germany*, *Italy* and *Portugal*, where there exist constitutional tribunals, that is, courts specialized in probing constitutionality. Thus, in the Federal Republic of Germany, although in principle the judge ruling on the legality of the regulatory administrative act is at the same time a judge of its constitutionality, a constitutional appeal can be lodged against such an act before the Constitutional Federal Court by any person claiming to have suffered a

damage in one or more of his fundamental rights. In certain *Länder* the constitutional tribunals are the exclusively competent organs to check the constitutionality of the regulations emanating from the Government of the *Land*.

In *Italy*, the Constitutional Court is the judge of the constitutionality of laws but not of administrative acts, whose constitutionality is probed by the judge who checks their legality. Only the administrative judge, who is charged with checking the legality of the regulating act, is competent to annul it, even for reasons referring to its constitutionality.

In *Portugal*, even though the check on the constitutionality of a regulating administrative act falls within the purview of all the courts, the rulings of these courts are subject to appeal before the Constitutional Tribunal of the land, which decides in last instance the matter of constitutionality.

The control of the constitutionality of secondary legislation is no foreign, as we have already said, to the legal systems of countries like *France*, the *Netherlands*, *Belgium* and the *United Kingdom* where the constitutionality of laws cannot be controlled or where such a control has an exceptional character. Anyway, control in these countries is very limited. Thus, in these countries, an administrative act whose content runs contrary to provisions of the Constitution, cannot be annulled or pronounced inapplicable if it is in line with the law upon which it rests, because in that case the unconstitutionality must have been blamed on the law-maker, whose acts are exempted from all judicial control.

That is why in *Luxembourg*, according to case-law, is excluded not only the control on the constitutionality of legislative acts but equally of edicts executory of law, which, as we have already pointed out, are the only regulating acts permitted under the legal system of this country. Given that these acts derive from some law, the only thing the tribunal has to examine is the question of their agreement with the law. They are valid so far as they comply with the law, even if the law is in itself unconstitutional.

This does not appear to be the case in the Netherlands, where the constitutionality of a regulating act can be checked, even though the act may conform to the law on which it rests.

To be able, now, to extend the scope of control of secondary legislation, case law in *Belgium* tends to ascribe to the law upon which the regulating act rests a meaning that is consistent with the Constitution.

Thus, if conformity of the act to the constitution is checked and found wanting, the act is illegal, because it has exceeded the limits prescribed by the law, which obviously cannot have authorized the executive to violate the Constitution.

In *France* the problem is not so acute, because it leaves out the cases of regulating acts which derive their statutory power from the power of the executive to issue such acts without reference to any law, a power which, according to the effective constitution, is very extensive.

Lastly, in the United Kingdom, where there is not a written Constitution, whenever

the judge has to exercise control on subordinate legislation coming from statutory authorization, tends to weigh it up with some unwritten constitutional principles. Delegated legislation will be deemed void if it is contrary to these principles, provided that the law has not expressly permitted its enactment.

d. Control of conformity to international law

The rules of international law, that is, the principles or general rules (unwritten law) as well as the rules contained in international conventions, treaties or agreements, are a source of law occupying in most countries a place parallel or superior to that of a legislative act. But whereas general rules constitute in principle an integral part of national law, the rules contained in conventions, treaties or agreements are not applicable, except so far as they take on the form of an internal law, or, at least, in certain countries, as these international instruments are ratified or approved by the competent organ of the state, which is usually the parliament.

In a large number of countries the Constitution expressly recognises these rules as part and parcel of the national law and often recognises their supremacy vis-a-vis statutes. This means that in the case of conflict between a rule of international law and a rule contained in an internal law, the former prevails and is applied even if the latter may be posterior.

This principle is referred to in the Constitution of Greece (art. 28), of the Netherlands (art. 94), of Germany as to the general rules of international law (art. 25) as well as that of France (art. 55). Yet, in this last country, the judge, as long as he cannot examine the constitutionality of laws, cannot cancel administrative acts which infringe on the provisions of a convention, if they are in conformity with a law posterior to the convention.

In other countries the silence of the Constitution has not stopped case law from establishing, after an evolution more or less slow, the principle of supremacy of the rules of international law. This was the case in Belgium and Luxembourg, where it is accepted that the supremacy of international law emanates from its nature.

On the other hand, in the United Kingdom and Denmark the same results are achieved with the application of the general rule of interpretation or still better of the presumption that the law-maker had no intention of violating the international obligations of the country.

In *Portugal*, the rules and principles of general or ordinary law, the rules derived from international conventions duly ratified or approved, mentioned in art. 8 of the Constitution, prevail over legislative acts.

Finally, in Federal Germany, while, according to article 25 of the fundamental law, the general rules of international law prevail over legislative acts, the rules contained in international conventions or agreements are of equal force with legislative acts.

In the light of what has been said, one might infer that secondary legislation, which at any rate is hierarchically inferior to the legislative act, has to be compatible

with the rules of international law.

This is true for both unwritten rules and the rules contained in international conventions or treaties, seeing that these acts of international law in a great number of countries, are not introduced in the internal law except only in the form of a legislative act.

Therefore, the work done by the judge, who is responsible for the control of validity of secondary legislation, when he is examining the conformity of this act to the rules of international law, is in no way different from the work he does when he is checking its conformity to the legislative act.

We must, however, note that there are cases, as indicated by the Danish report, in which the rules contained in treaties and other international acts are introduced into the internal law in the form of a decree. But in Denmark, as well as in the United Kingdom, the general rule or the presumption that the law-maker's intention is not to violate the international obligations of the State acts in favour of the international rules, as we have already said.

Therefore, in case of conflict between a normal regulation and such an act containing rules already contained in an international treaty, the first would be interpreted in such a way as to be made compatible with the provisions of the treaty or else the second would prevail, since it would be considered that the act authorising the executive to issue the former did not have the intention of authorising the administration to issue secondary legislation violating this treaty and consequently such a regulation would have exceeded the limits of authorisation granted by the act.

e. Control of the conformity with European Community Law

Provisions by which the European legal system is introduced into the national legal system or which aim at facilitating its introduction are included in the Constitutions of several countries. Ireland has, for this reason, amended its Constitution by referendum.

But in these countries, as well as in the others whose Constitution is silent on this matter, the Common Market fact is recognised as such and leads to the superiority of Community law over national law.

This means that the rules contained in the treaties by which the European Communities were established or in the treaties by which the former were amended, as well as a part of the derivative Community law, that is the one generated by Community organs, a) have direct application in the national legal system without any need to be introduced into it in the form of legislative or regulating acts, b) prevail over the rules of national law, either pre-existing or posterior.

This supremacy of Community law is recognised even vis-à-vis rules contained in national laws, whereas the debate on the question of its supremacy over rules contained in Constitutions is still open. It should be noted, however, that the Court of Justice of the European Communities has in some way made its position clear in favour of a

positive solution, as the German report observes.

Besides, the Community Court itself may affect the relations between Community and national law through the interpretation of rules contained in the former, which interpretation comes under its competence. This competence has an exclusive character in so far as all matters concerning the meaning of these rules must be referred by the national Courts, before which they arise, to this Court.

From what we have said it follows that the national judge charged with reviewing secondary legislation must ascertain the compatibility of this legislation to Community Law. In particular he must examine if it runs counter to provisions of treaties or regulations coming from Community organs and being directly applicable in the national legal system. In addition he must compare it with the rules contained in regulating acts issued to put in concrete form the goals set by Community directives; for these regulations, on account of the superiority of Community law, belong to a higher order than that of normal regulations.

In the light of this, it is not necessary to add that in this case, as in the case of the rules of international law, if there is a conflict between secondary legislation and legislation containing in superior acts, the judge acts in the same way as when it checks the conformity to a legislative act.

Finally, in such countries as Denmark and possibly the United Kingdom, where these principles have no absolute force, the same results are more or less secured through the general rule of interpretation of through the presumption of conformity of the internal secondary legislation to the State's international obligations, about which we spoke in a previous chapter.

5. EFFECTS OF REVIEW

a. In the case of direct challenge

i. Annulment of the challenged regulation

aa. Scope of the annulment

The main result of the direct control on the validity of the administrative act when it is conducted through an application for annulment (as in the case of Belgium, France, Greece and Italy) is the annulment of the act in which this rule is contained.

The annulment may concern the whole act or a part of it that contains one or more provisions. This is determined in the court's decision. Partial annulment may be demanded by the applicant if he has no interest in the complete elimination of the challenged act. But the judge is not bound by this request. He has to consider if the challenged act may be reasonably devided. Besides, the scope of the annulment sometimes depends on the grounds accepted by the judge. So the defect that concerns the competence of the organ issuing the challenged act incurs its entire annulment.

The annulment has as a consequence the elimination of the regulating act, as well as the rules that it contains, from the legal system. The annulled act ceases to exist. It is not at all necessary for the organ that issued it to revoke it expressly. Therefore, the annulment is valid *erga omnes*. We must, however, note that this result tied up with the decision pronouncing the annulment, which alone produces an absolute *res judicata*, whereas the decision by which the application is rejected has no effect except only among the parties (*inter partes*).

In Germany the procedure called «abstract control» of secondary legislation, about which we have already talked, does not lead to the annulment of the act but to the declaration of its nullity. At all events, the decision by which this declaration is pronounced creates an absolute *res judicata* and its effects are valid *erga omnes*.

In Portugal the courts rulings issued on applications for annulment of regulating acts (applications for annulment or applications for checking their legality) could be better described as declarations.

A declaration of nullity is also pronounced in principle by the English and the Irish judges against the challenged act through the legal remedies in force in these countries, which were mentioned before. Nevertheless, as is observed in the British report, a secondary legislation may be declared void in relation to a person and remain valid in regard to another. This is true for instance in the case in which an act is judged illegal and declared void because issued without prior consultation with some authority. This act, however, remains valid in regard to other authorities that have been consulted.

On the administrative plane, the effects of the annulment are often connected with some obligations of the administration, mainly of the organ that has issued the annulled act.

There are certainly cases in which the annulment puts an end to the case at this level. The administration does not need to take any initiative. But many a time the annulment creates a legal gap that the administration has to fill up by issuing, for instance, a new decree on the matter covered by the annulled one. This new decree must obviously be without the defect which gave rise to the annulment. The Administration must, on the other hand, proceed, under certain conditions, to repealing the acts founded on the annulled act. But we shall come back to this matter later on.

bb. Annulment *ex nunc* and annulment *ex tunc*

In the countries mentioned above, in which the direct control of secondary legislation is carried out through an application for annulment, the regulating administrative act annulled is considered as never having been. The annulment, therefore, has retroactive effect. It is an annulment *ex tunc*.

Consequently, the provisions that the annulled act had abolished or modified are brought back into force. However, this does not seem true of Portugal, where, as the

national report observes, the annulment is valid *ex tunc* only when it is pronounced against an act or measure of individual character, whereas the annulment of an ordinance has in principle no retroactive effect. In this last case the annulment is valid *ex nunc* or rather begins after the expiry of the time limit in which one had to make the application. The judge may, however, remove the effect of the annulment to the date on which the annulled secondary legislation has come into force or to a later date if he invokes serious grounds of equity or of public interest. The opposite is true in regard to decisions which have a general obligatory effect and which are issued by the Constitutional Tribunal and declare the illegality or unconstitutionality of a regulation. The declaration, in principle, produces effects from the moment the secondary legislation which was declared illegal or unconstitutional went into force.

The effects of the declaration of nullity are also retroactive in Germany and in Ireland, according to their respective reports.

In English law a distinction is made between acts that are *ultra vires* and therefore void *ab initio* and acts *intra vires* vitiated from errors on their face, which remain valid up to the publication of the decision by which they are declared voidable. But, as is observed in the report of the United Kingdom, recent case law tends to accept that in all cases secondary legislation must be presumed valid and treated as such until declared void by the court.

cc. Effects on acts resting on annulled secondary legislation

Since the annulment of a regulation incurs, as we have said, its elimination from the legal system with a retroactive effect, all measures of application and generally all individual acts based on it lose their legal basis. As a consequence, all these acts suffer from illegality and if they were to be challenged through an application for annulment they would be invalidated for this reason, which the judge is in principle obliged to examine *ex officio*.

But if this is not the case, that is, if the individual acts have not already been challenged or cannot be challenged because the time limit in which to make an application for their annulment has elapsed, they remain intact. The presumption of legality of every administrative act until its annulment is in favour of these acts.

An attempt of a section of the Belgian Council of State, mentioned in the Belgian report, at establishing precedence by annulling such acts and considering the appeals lodged against them admissible, even though the legal time limit has elapsed, has failed.

Yet the survival of these acts is not entirely assured. Thus, they are threatened with revocation by the organs from which they were issued. It should be noted, however, that revocation does not depend on the absolute will of the organ issuing the act; this organ must comply with the provisions of the law or general principles, according to which the revocation of administrative acts, even if they suffer from illegality, is not permitted except under certain, more or less strict, conditions.

Another threat proceeds from the exercise of incident control, when such a control is allowed, as is the case of Greece, where the civil judge may incidentally consider the validity of every administrative act.

All these principles hold good for the countries in which direct challenge of secondary legislation is exercised by way of an application for annulment. They are more or less valid in Germany, where these acts are checked through the procedure of «abstract control».

In Ireland the declaration of nullity of a regulation does not in principle incur the annulment of individual measures resting on it. According to the report of this country the extent of annulment depends on the circumstances.

We should not conclude without talking about the effects of the annulment on the decisions of the courts. In this field too, is valid the principle according to which the judicial decision resting on the validity of secondary legislation which has been later challenged for annulment or has been declared invalid, remains intact as long as the *res judicata* is valid. However, if some legal remedy is still available, the interested party may invoke the annulment of the act, in which case annulment is absolutely binding for the judge. In exception to this principle, the constitutional court in Portugal when it declares a regulation unconstitutional or illegal may, according to the report of this country, if the regulation concerns penal or disciplinary matters, rule that this declaration should affect even the *res judicata*.

ii. Other effects

In the Federal Republic of Germany, as we learn from the report, although the texts speak only of declaration of nullity, the superior administrative tribunals, instead of pronouncing such nullity, often give their decisions a more limited result.

Thus, they pronounce the contested secondary legislation as being in disagreement with rules belonging to higher levels of judicial authority and call upon the executive to remedy this situation either by amending its own illegal regulation or by replacing it. This regulation continues to be applied up to the time defined by the court for its amendment or replacement by the competent organ.

To this end, that is in order that declarations of nullity, which are at times of no use, should be avoided, the courts themselves proceed to construe the secondary legislation whose legality is contested, in such a way as to make it conform to the law.

Thus, declaration of nullity is sidestepped and at the same time the executive is made to enforce this administrative regulation in conformity with the rules belonging to higher levels; for if the executive, fails to conform to the interpretation made by the judge, it runs the risk of seeing the act based on the contested regulation declared invalid by him.

We see, then, that the administrative judge seeks sometimes to limit the results of the control he himself exercises over these administrative regulations, by avoiding their annulment or declaration of their nullity.

His solicitude, which is not exclusively the solicitude of the German judge, is how not to put legal obstacles in the way of the administration if he can achieve the same results by adopting more flexible measures.

b. In the case of indirect challenge

The indirect challenge of the validity of an administrative regulation, as has already been said, is exercised in all the countries concerned by this report both by the administrative judge and by the ordinary judge. The only exceptions are those of the Italian administrative judge, who checks upon these administrative regulations only following an application for annulment, a remedy by which direct challenge is exercised, and that of the French civil judge, who ought to commit all preliminary matters concerning the legality of these regulations to an administrative judge. Indirect challenge does not result in the annulment or the declaration of nullity of the regulating act but in the refusal of its application if it is judged illegal by the competent court.

Therefore there are not in this case results *erga omnes* but only results confined to the outcome of the litigation in the course of which the exception of illegality was put forward either by the parties or *ex officio*. In other words, the *res judicata* which concerns the validity of this administrative regulation is not absolute; it is binding only between the parties and concerns only the proceedings in which it was raised. In a subsequent trial between the same or different litigants over another case, the judge would not at all feel bound by his previous judgment on the legality of the administrative regulation.

The executive may also continue to enforce this regulation in all other cases, for the regulating act has not ceased to exist following the adverse judgement.

In reality, the results of this judgement concern primarily the individual administrative acts which are based on this regulation. The illegality of the latter is transferred to the act which constitutes the object of the appeal and which, for this reason, is annulled or declared void *erga omnes*.

In other cases, pointed out by the Danish report, the administration is compelled by the court's ruling to acknowledge that it had no legal authority to take the individual measure based upon the regulating act that was declared illegal. The result of this judgement is that the person who contested the measure is no longer bound by it, and can claim damages and interest for losses caused by its application.

Moreover, the indirect control of secondary legislation which is exercised by the ordinary judge also produces results between the parties. Thus, in a criminal case, the defendant would be acquitted if he were charged with an offense based on the provisions of a regulating act that had been judged illegal.

It is evident, however, that the exception of illegality raised by the administration in the course of the application for annulment or for that by any litigant that opposes the appeal or the action, may result, if it is admitted, in the rejection of the appeal or of the action.

In conclusion we should not fail to add that if it is true that the results of an incident challenge are limited, we should not overlook the fact that even in cases where the *res judicata* has a limited statutory force, it does not cease to have a value of its own, especially if it is contained in a ruling of the supreme court. It would be really difficult, as it is well pointed out by the Dutch report, for the executive to continue to enforce an administrative act which has been declared unlawful and inapplicable, even though the restriction imposed on the executive by the court's judgement referred only to the adjudicated case.

It would certainly run the risk of seeing the individual administrative measures and acts which it would continue to issue on the basis of the vitiated regulating act, challenged and declared void on the grounds of the illegality of the act upon which they were based.

6. CONCLUSION AND GENERAL REMARKS

The scope of subordinate legislation by the administration has been greatly expanded in our days and tends to be further expanded at the expense of the scope of legislative activity.

This phenomenon has taken on great dimensions in France, where, pursuant to the Constitution of 1958, the secondary legislation of the administration constitutes the rule as contrasted to that of the State by and large.

Although the secondary legislation continues to be in most cases delegated (some countries do not recognise any other kind of secondary legislation), the tendency as it is shown by the French example, is towards an expansion of the inherent power of the executive based on the provisions of the Constitution.

This tendency has expanded the scope of the judicial control of the delegated power of state organs largely in countries where the control of the constitutionality of legislative acts is still not allowed. On the other hand, the judicial control of the validity of delegated legislation is practised in most of the countries which are the object of the present report in the form of direct as well as indirect challenge. Direct challenge has been the rule in such countries as recognise the application for annulment (Belgium, France, Greece, Italy), while Portugal, which has also introduced such an application, constitutes a particular case, as many categories of delegated legislation are not concerned. Ireland and the United Kingdom are also acquainted with this kind of control, which is exercised by means of remedies peculiar to their legal systems. In the Federal Republic of Germany, although the procedure of abstract control constitutes a form of direct challenge, its sphere of application is limited because it applies only to a limited number of cases of delegated legislation. In other countries, direct control is either unknown or exceptional, if not directly disputed.

The indirect control of delegated legislation by the administrative judge has been introduced into the legal systems of all countries, except that of Italy. But even there,

as well as in other countries, it is practised by the ordinary judge. However, in France, it is standard practice to refer to the administrative judge all preliminary questions concerning the legality of regulating acts.

The legal remedies by which direct control of delegated legislation is effected are available to a wide circle of persons.

Actio popularis is not recognised but it is sufficient for the applicant to establish simple legal interest in order to act. This interest is conceived in a way as broad as, or at times broader than that of the person challenging an individual administrative act.

The subordinate legislation ranking low in the ladder of statutory instruments, it should not conflict with rules of a superior standing, like those contained in the Constitution, the international law, the statutes, the general principles of justice or of Common Law, and to a certain extent, with administrative acts issuing from higher administrative organs. The judge who is charged with controlling the validity of secondary legislation, in exercising direct or indirect control, ought to ascertain conformity or compatibility of this legislation with the rules mentioned above.

Control of the constitutionality of delegated legislation is permitted even in most of those countries where control of the constitutionality of laws is otherwise prohibited. But its extent in this last case is limited. The supremacy of the international law over national law is recognised in most countries, either expressly or through the case law, while in others the presumption that it is not within the legislator's intent to violate international obligations of the state, is in favour of it.

The introduction of community law in all these countries has affected their legal systems, because of its accepted supremacy and the direct implementation of its rules. Although discussion on certain matters posed by this supremacy still remains unresolved, the legal systems of these countries have more or less accommodated themselves to the reality of the European Communities.

The main result of the direct control which is exercised by means of an application for annulment, is the annulment of vitiated delegated legislation *ex tunc* and *erga omnes*, that is to say its total elimination from the legal order. The decision pronouncing the annulment creates absolute *res judicata*. The direct challenge which, in other countries, is exercised by various other means, results in a declaration of nullity, whose effects may differ.

However, the individual acts based on, delegated legislation which has been annulled or declared void, may survive if there is no legal remedy to challenge them.

The result of the indirect challenge is the non-implementation of the regulation that has been judged illegal in the specific case. But the true value of this judgement is far greater than that accorded to it by the relative *res judicata* emanating from that judgement.

Passing in review the legal systems of control of delegated legislation, we could classify the countries of which we speak into three major groups: The first would consist of the countries that recognise the application for annulment (Belgium, France, Greece, Italy and Portugal). The second would consist of countries where legal

remedies stemming from the common law prevail (Denmark, Ireland, the United Kingdom). The third would consist of countries where direct control is not admissible or is limited (Germany, Luxembourg, the Netherlands). Inside each of these groups we note many common characteristics but outwardly they present many peculiarities.

Nevertheless, practically all these countries concur in recognising the exercise of indirect control. One could eventually wonder if these two kinds of control of delegated legislation are necessary and which one is to be preferred. For, while direct challenge is more effective, its exercise is always dependent on time - limits that restricts its extent. Indirect control, on the other hand, is available at any moment and puts no great obstacles in the activity of the Administration, which has the choice either to adapt itself to adverse judicial judgment or to wait until judicial opinion is finalized by case-law.

In some national reports hopes are being expressed either for the generalization of direct control to delegated legislation (Germany) or for the general adoption of the application for annulment (Portugal); according to Luxembourg's report the results of the indirect control are considered sufficient.

One might feel justified at this point in making a general statement to the effect that in each country the system of control has evolved under the influence of its own peculiar conditions and that for that reason these systems do not always correspond, as it is noted in the Belgian report, to a rational scheme.

If, therefore, there were reforms which would tend to rationalize national systems, these reforms would move in step with a tendency of rapprochement among these systems, a development much to be wished for.

What, however, in my opinion, divides these countries mostly, is their attitude towards the problem of the control of the constitutionality of laws. If their views could converge on that point, harmonization of their systems in the exercise of control of secondary legislation would be greatly facilitated.