Chapter 1
The Model of Constitutional Review in Central and Eastern Europe: An Overview

Before the fall of Communism, there existed only two constitutional courts in Central and Eastern Europe (CEE): in Yugoslavia from 1963 and in Poland from 1985.[1] Although these were not exactly sham institutions, their position was far from strong enough to allow for the exercise of robust constitutional review. Quite apart from the legal definitions of their competence, the genuine powers of both were inevitably subject to the restrictions stemming from Communist Party rule. The position today, on the other hand, is that all of the post-Communist countries of CEE have constitutional courts and, while the effectiveness of these tribunals varies, they have made a strong mark on the process of constitutional transition. I will begin the analysis of this phenomenon with an overview, provided in this chapter, of the emergence of a (reasonably homogenous) model of constitutional review in CEE, and with a brief "anatomy" of that model: the powers of constitutional courts, the modes of activation of constitutional review, and the system of selection and tenure of constitutional judges. In the last section, I will describe the relationship between the constitutional courts and the ordinary courts, and in particular the Supreme Courts, characterised as it is by tensions and struggle for monopoly over privileged and final access to "constitutional wisdom". All in all, the purpose of this chapter is to prepare the ground for a discussion of the legitimacy dilemma engendered by the emergence of robust systems of constitutional review in the post-Communist states of CEE.

[1] It was actually in 1982 that the constitutional amendment creating the Polish Constitutional Tribunal was passed, but the statute on the Constitutional Tribunal, which established a specific basis for that body, was only enacted in 1985. The Tribunal began its operations in January 1986. For the sake of completeness, mention should also be made of the Czechoslovakian Constitutional Court of the interwar period, although it was a rather feeble institution; see Herman Schwartz, The Struggle for Constitutional Justice in Post-Communist Europe (University of Chicago Press: Chicago, 2000) at 29–30.

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1.1 The Emergence of the Current Model

The pre-World War II traditions of constitutional review in CEE were, as everywhere else in Europe, weak, but they were not quite non-existent; in some countries at least, the constitutional designers after the fall of Communism could have appealed to their own past in making a case for constitutional review. One country in which a Constitutional Court actually existed, drafted according to the Austrian "Kelsenian" model, was Czechoslovakia. The Court was set up by the Czechoslovak Constitution of 1920, and actually established in November 1921; it only had the power of abstract review of the constitutionality of laws. Interestingly, this power existed alongside the competence of ordinary courts to review the constitutionality of the laws they applied, which shows that the whole system "of judicial review was inspired simultaneously by the Austrian and American models".[2] The Constitutional Court's jurisprudence was, however, extremely sparse. During the whole period of its existence, from 1921 to 1939, in addition to reviewing a number of parliamentary resolutions, it examined the constitutionality of only two laws (and these cases came as late as 1938), without even completing its proceedings in either case. As one contemporary Slovak scholar has commented, "the dominant practices of strong party government and majority rule limited the institutionalization of judicial review"[3] in pre-War Czechoslovakia; "limited", but did not eliminate altogether, thus providing at least a symbolic point of reference in for future constitutional designers in Czechoslovakia, and eventually in the Czech Republic and Slovakia.

There were no other examples of abstract constitutional review in the countries of the region before World War II but judicial review in the form of concrete review by courts in the process of specific cases was not unheard of. In Romania, the power of judicial review of laws by the courts that had to apply them was recognised from the beginning of the twentieth century, despite the lack of a textual basis for this in the 1866 Constitution; a Bucharest court successfully claimed this power in the 1912 Bucharest Tram Company decision. Both inter-war Romanian constitutions (of 1923 and 1938) adopted the principle of concrete review exercisable by the Court of Cassation and Justice (the equivalent of the Supreme Court). However, any finding of unconstitutionality resulted only in the non-application of the challenged law to the particular case under consideration, and not in a general invalidation of the law.[4] This power was exercised only occasionally but the very presence of such a legal possibility had a symbolic significance even outside Romania's borders.

[2] Darina Malová, "The Role and Experience of the Slovakian Constitutional Court", in Wojciech Sadurski, ed., Constitutional Justice, East and West (Kluwer Law International: The Hague, 2002): 349–72 at 351.

[3] Id. at 351.

[4] See Wojciech Sokolewicz, "Sąd Konstytucyjny w Rumunii", in Janusz Trzcinski, ed., Sądy konstytucyjne w Europie (Wydawnictwa Trybunalu Konstytucyjnego: Warszawa 1997), vol. 2: 145–74 at 146; see also Renate Weber, "The Romanian Constitutional Court: In Search of Its Own Identity", in Sadurski, supra note 2: 283–308 at 284–85.

Inspired by the Romanian example, a prominent constitutional scholar in Bulgaria, Professor Stefan Balamazov, put forward a constitutional draft in 1936 that would have had the Supreme Court of Cassation exercise a US-style judicial review. He could refer to his predecessors; a great Bulgarian legal scholar of the beginning of the twentieth century, Professor Stefan Kirov, had advocated allowing the Supreme Court to undertake judicial review in the process of hearing concrete cases. The legacy of Balamazov was so strong that, after the fall of Communism, some constitutional scholars looked sympathetically at his ideas, although it was ultimately the Kelsenian model that was adopted.[5]

Under Communism there was a universal rejection of the very principle of constitutional review, which was seen by official doctrine as inconsistent with the principle of the "supremacy of the national representative body . . . according to which the parliament is the supreme organ of state authority".[6] While the doctrinal rejection of constitutional review appealed to the principle of sovereignty of parliament, in reality judicial review was, of course, incompatible with the total political control exercised by the Communist Party. As announced by Professor Stefan Rozmaryn, a leading ideologue of constitutional law in Poland during the Stalinist period, constitutional control is "a reactionary and not a progressive institution".[7] In time, however, the severity of this hostility declined, and the first cautious proposals for a form of extra-parliamentary control of legislation were raised. This was consistent with the general calls for some institutional guarantees of legality in the "thaw" that followed the Stalinist period. It is significant, however, that any such calls were confined to procedural and formal control of legislation, and did not include demands for substantive control of laws in terms of their consistency with constitutional values.[8] Obviously, such demands would have had a subversive potential, as even the Stalinist constitutions (which in many cases persisted into the post-Stalinist era) contained many impressive-sounding proclamations of civil and individual rights. Those in power could not risk a situation in which less-than-fully controllable judges would replace the official authoritative interpretations of these rights with their own. As a Polish student of the history of constitutional justice in Central Europe has noted, although the very idea of judicial control of laws ceased being viewed as a heresy at some time in the 1980s, it was nevertheless seen as a way of insuring the "quality" of statutes rather than as a fully-fledged constitutional review.[9]

The example of Yugoslavia, where the Constitutional Court had existed from 1963 onwards without undermining the doctrine of "the unity of state power", was a

[5] Interview with Professor Neno Nenovsky, former Justice of the Constitutional Court of Bulgaria (1991–94), Sofia, 10 May 2001.

[6] Stefan Rozmaryn, quoted in Miroslaw Granat, "Droga do sądownictwa konstytucyjnego w panstwach Europy Srodkowej i Wschodniej", Panstwo i Prawo no. 12/2001 (vol. 56): 15–24 at 15.

[7] Id., quoted in note 6 at 16.

[8] Id. at 17.

[9] Id. at 19.

model that could have been accepted by Communist states without any threat to themselves. The Federal Constitutional Court (mirrored by the constitutional courts in all of the republics making up the Socialist Federal Republic of Yugoslavia) was seen "as a guarantee of the proper functioning of the institutions but not as a mechanism of a protection of individual rights or relationships [between the component units] in the Federation".[10] In any event, any head-on clash between the constitutional courts and the ruling elite controlling the Yugoslav "assemblies" was, of course, unthinkable; as one Slovenian legal scholar has observed: "the functioning of these courts remained within the confines of the communist system and ideology".[11] Apart from Yugoslavia, the only other country in which the establishment of a constitutional court preceded the fall of Communism (with the exception of the abortive attempt in Czechoslovakia in 1968, when the Prague Spring reformers designed a strong Constitutional Court as part of their overall plans for constitutional reform)[12] was Poland, where the constitutional amendment of 1982 (during the period of martial law!) announced the establishment of the Constitutional Tribunal. It was a somewhat premature announcement, though, as the statute on the Constitutional Tribunal – a prerequisite for the setting up of that body – was not enacted until April 1985.

All other states of the region introduced constitutional courts only after the political transitions of 1989, beginning with Hungary, where a constitutional amendment of November 1989 was quickly followed by the relevant statutory regulation. In Czechoslovakia, a Constitutional Court was set up as a result of the constitutional amendment of late 1990 and a statute of February 1991. However, the only important case that this Court had time to consider (before the dissolution of Czechoslovakia) concerned the "lustration" law of October 1991, i.e. the law intended to prevent all former employees of the police, security forces and higher functionaries of the Communist Party from being employed in any high government posts.[13]

In Russia, even before the new constitution was adopted, the law on the Constitutional Court was passed in July 1991. The first Constitutional Court was set up in October 1991 and, contrary to widespread expectations that it would be a powerless body, it became a very active institution under the chairmanship of Valery D. Zorkin, heavily embroiled in the political controversies of the day. Legally, it acquired very wide powers, including the competence to initiate legislation and also a duty to exercise this power in the case of a breach of the Constitution due to a failure by parliament to legislate. In the same year, constitutional courts were established in

[10] Id. at 20.

[11] Miroslav Cerar, "Slovenia's Constitutional Court within the Separation of Powers", in Sadurski, supra note 2: 213–46 at 213.

[12] Described by Jiri Priban, "Judicial Power vs. Democratic Representation: The Culture of Constitutionalism and Human Rights in the Czech Legal System", in Sadurski, supra note 2: 373–94 at 374–75.

[13] Discussed in Chap. 9 in this book pp. 346–50.

Albania (by statute) and in Bulgaria and Romania (by new constitutions), and in the following years, in all of the remaining post-Communist states of CEE. In contrast to those early cases, the birth of constitutional courts in some other countries was quite protracted, as illustrated by the efforts in this regard in the Ukraine. A provision concerning the Constitutional Court was inserted into an amended Soviet-era constitution as early as October 1990, and a fully-fledged statute on the Constitutional Court was adopted in June 1992. Despite this, however, and despite the fact a President of the Court (Leonid Yuzhkov) was appointed in the same year, the actual setting up of the Court had to wait until after the adoption of a new law on the Constitutional Court in October 1996, due to the repeated failure of the Supreme Council to appoint the necessary judges.[14] Equally tardy was the establishment of the Constitutional Court in Latvia where the appropriate constitutional amendment and a statute on the constitutional court were passed only in June 1996, and the Court met for its first session in December of that year.[15]

An altogether special case is the Constitutional Court of Bosnia and Herzegovina (BiH), established by the Constitution that in fact forms part (Annex 4) of the Dayton Accord of November 1995 (which entered into force on the 14 December of that year) on peace in Bosnia and Herzegovina. The Accord established an unusual, mixed "local-international" Court, with six judges from BiH (four elected by the House of Representatives of the Federation and two by the National Assembly of the Republika Srpska) and three external judges, with the proviso that the latter must not be citizens of BiH or from any neighbouring state, and must be appointed by the President of the European Court of Human Rights after consultation with the Presidency of BiH.[16]

While the typical trend in CEE countries has been towards the establishment and then consolidation of the constitutional courts, one country has been an exception, and has gone from having a relatively independent (even though in-effectual) body to a "court" only in name, with grotesquely reduced powers and no genuine independence. In Belarus, the Constitutional Court set up under the 1994 Constitution had, by November 1996, ruled almost 20 acts of President Lukashenko unconstitutional; immediately after this date, however, the position of the Court was drastically weakened as a result of constitutional amendments (brought about by a referendum that the Court itself had found unconstitutional, but with no effect).[17] While under the old Constitution all of the judges were elected by the parliament, under the terms of the 1996 amendments six judges are appointed by the President, and six by the Council of the Republic (the upper chamber of

[14] See Kataryna Wolczuk, "The Constitutional Court of Ukraine: The Politics of Survival", in Sadurski, supra note 2: 327–48 at 328–31.

[15] See http://www.satv.tiesa.gov.lv/Eng/ievads.htm

[16] For details, see http://ccbh.ba/home/?lang=e

[17] The account in this paragraph is based on Alexander Vashkevich, "The Republic of Belarus: The Road from Past to the Past", in Andras Sajó, ed., Out of and Into Authoritarian Law (Kluwer Law International: The Hague, 2003): 265–98.

parliament). However, even the latter "election" remains a fiction because the candidates for the position of judge can only be proposed by the chairman of the Constitutional Court, himself appointed by the President. In practice, then, all of the justices of the Court are either directly or indirectly selected and approved by the President. Furthermore, the rules of standing to bring a challenge have been restricted, with the result that, in practice, only the President has initiated challenges to legislation. The President also has power to dismiss any judge, while the Court has been stripped of the power to declare that the president has violated the constitution. Put simply, the Constitutional Court of Belarus has been turned into a sham institution, which accurately reflects the current sorry state of democracy and the rule of law in that Republic.

But even apart from this arguably aberrant case, there have been cases of constitutional courts in the region under political attack from the other branches of government, especially from the executive, and so it must be observed that the exalted position of the constitutional courts within domestic political systems is never particularly stable. At times for the right reasons (such as a concern for the democratic legitimacy of essentially non-representative bodies), and at other times for the wrong reasons (such as the displeasure felt by politicians at seeing their authoritarian tendencies curbed by independent constitutional courts), these courts have seen their position and independence occasionally reduced and challenged. The Polish Constitutional Tribunal was almost explicitly defined by the governing elite which came to power after the double elections of 2005 (presidential and parliamentary) as an enemy, and as an obstacle to the allegedly pressing reforms that the new elite intended to pass. After the 2005 political changeover (the nearly simultaneous election of Lech Kaczynski as the President, and the parliamentary victory of Jarosław Kaczynski's party, Law and Justice), the Tribunal took several decisions which clearly went against the plans and preferences of the new President and government, for example: it invalidated the amendment of a law on the broadcasting council, which enabled the new government to appoint its own protégé as the chairperson of the council[18]; it invalidated the provision of the law on public assembly according to which local authorities (including Lech Kaczynski, when he was still President of Warsaw) could refuse permission for gay parades to take place[19]; it struck down some crucial provisions of the so called "lustration" law on access to archives of the ex-secret police[20]; and it struck down a pet project of the new Minister of Justice concerning the reduction of the bar association's control over access to the legal profession.[21] These decisions put the Tribunal on a collision course with the President, the parliamentary majority and the government. These key political actors made public the fact that they were not amused, and in fact considered changes in the system of appointment of judges

[18] Decision of 23 March 2006.

[19] Decision of 19 January 2006.

[20] Decision of 11 May 2007.

[21] Decision of 19 April 2006.

(in particular, of the Tribunal's President) in order to discipline the Tribunal. The newly coined term "impossibilism" was meant to describe the doctrine of the Tribunal, meaning that the necessary reforms (in the eyes of the new political majority) were rendered "impossible" under the Tribunal's interpretation of the Constitution (which the new majority was incapable of amending, with the post-2005 division of the Parliament). This hostility persisted during the whole period of 2005–2007, until the Law and Justice-led coalition lost the following parliamentary election.

The Czech Constitutional Court had also been experiencing turbulent times during recent years, especially under the long period of Presidency (of the Republic) of Vaclav Klaus (2003–2013). For a more extensive period than its Polish counterpart, the Czech Court has had to face openly hostile attitudes of the executive and parliamentarians alike. The first act in this confrontation occurred during the period of the minority government of the Social Democrats, who were supported by their main rival, the Civic Democratic Party (1998–2002), when Milos Zeman, the Prime Minister, and Klaus, then the President of the Chamber of Deputies, drafted a series of laws amending the Constitution and political system. In particular, the fact that the Court declared the electoral law unconstitutional[22] triggered a series of political attacks against the Court. However, such attacks were merely verbal and rhetorical at the time. The attacks turned from verbal to real after Klaus became President and basically blocked the Court's ability to function by not appointing new judges. In 2004, due to this non-appointment the Court lost its power to rule on the constitutionality of laws because the number of justices fell below 12, which is the minimum number required to declare laws unconstitutional.[23] When President Klaus finally did formally nominate his candidates, he deliberately avoided any prior consultation with the Senate, effectively ensuring that the candidates would not get sufficient support (the judges of the Court are appointed by the President 'with the consent of the Senate'). By the end of 2005, the Senate had rejected seven nominations. The subsequent episode in the battle between the Court and the President followed President Klaus's dismissal of Supreme Court's President Iva Brozova, which was eventually found unconstitutional by the Constitutional Court.[24] The Court's judgment triggered a fierce response by Klaus himself, who criticized the Court's decision as 'wrong', 'an example of judicial corporativism' [sic] and a 'threat to democracy'; he even added a thinly veiled threat by saying that the Constitutional Court's decision could have a negative impact on the situation of the Czech judiciary.[25]

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[22] Judgment no. 42/2000 Pl US, of 24 January 2001. For a good analysis, see Jiří Přibáň, "Judicial Power vs. Democratic Representation: The Culture of Constitutionalism and Human Rights in the Czech Legal System", in Wojciech Sadurski, ed., Constitutional Justice, East and West (Kluwer: Dordrecht 2002): 373–394 at 389–91.

[23] For a detailed description of the whole story, see Zdenek Kühn and Jan Kysela, "Nomination of Constitutional Justices in Post-Communist Countries: Trial, Error, Conflict in the Czech Republic", *Europ. Constitutional Law Review* 2 (2006): 183–208 at 196–205.

[24] Pl. ÚS 18/06.

[25] *Klaus considers Constitutional Court ruling on Brozova erroneous*, http://www.ceskenoviny.cz/news/index_view.php?id=209019

Much more recently, the Romanian Constitutional Court found itself under attack from its government during the prolonged constitutional crisis in this country in 2012.[26] After the Court ruled on 20 August 2012 that the referendum held in July to impeach President Traian Basescu, who was the target of a political campaign led by Prime Minister Victor Ponta and his Social Liberal Union party, was invalid because of insufficient voter turn-out, the Court was attacked by the Prime Minister who believed that the voters' list were not properly updated which resulted in an unduly high threshold for voter turnout, and some judges claimed that they faced death threats and intimidation.[27] This was only the climax of an ongoing conflict between the two top politicians in which the Constitutional Court haphazardly was involved. Earlier in 2012, the Court had been called upon to arbitrate between the President and the government about whether the President was authorized to participate in a European Council meeting against the will of the government, and a deeply divided Court, in a judgment delivered on 27 June, sided with the President. Shortly after that episode, at the beginning of July, the parliamentary majority supporting Ponta's government replaced the Ombudsman (as well as the presidents of two chambers), in order to prevent the possibility of a challenge to the emergency ordinances (which, under the constitutional law in Romania, only the Ombudsman had the standing to do, and upon which the government relied heavily during the constitutional crisis of 2012) – and quickly stripped (through an emergency ordinance!) the Constitutional Court of jurisdiction to hear challenges brought against resolutions of Parliament, precisely such as the resolution replacing the Ombudsman. In this way, the government not only deprived the Court of some of its powers but also immunized the deprivation itself against a constitutional challenge.

However, the most comprehensive, radical and effective assault upon the power of a constitutional court took place in Hungary, after the landslide electoral victory of the Fidesz government led by Victor Orbán in 2010. In contrast to the Romanian crisis around the same time, which was driven mainly by personal ambitions, political corruption and attempts to minimize accountability of the executive, Hungary has experienced a deep ideology-driven, comprehensive offensive coupled with a well-designed strategy of entrenching illiberal changes against future reversals by a more liberal government. Equipped with a majority sufficient to amend and bring about a new constitution, Orbán correctly viewed the Constitutional Court as an obstacle in its radical-conservative reform agenda and as one of the few remaining veto powers in the political system. Hence, soon after coming to power the new government set about disempowering the Court, to ensure that the Court is unable to hinder the new government's actions.

The main step in this process was a successful operation of 'Court-packing': the number of judges was increased from 11 to 15 (with the term of office prolonged

[26] I am grateful to Professor Vlad Perju for his advice on the account contained in this paragraph.

[27] Nikolaj Nielsen, "Romania court rules to reinstate President Basescu", EUobserver, 21.08.2012 available at http://euobserver.com/justice/117292

from 9 to 12 years), and all the new judges were Fidesz sympathizers (including two new judges appointed directly from their positions as members of parliament), which resulted in a composition of the Court with 8 out of 15 judges being Fidesz appointees. To make this possible, the rules of judicial selection were fundamentally changed by a constitutional amendment of June 2010: rather than having constitutional judges nominated by a parliamentary committee drawn from members of each parliamentary faction in a procedure that was meant to produce an intra-party consensus (as in pre-2010 years), a new rule was adopted so that the committee members are nominated by parties according to their share in parliament, with no provision for multiparty agreement, which in the new parliamentary configuration amounted to a "winner takes all" approach. In addition, the election of the Constitutional Court's president was transferred from the Court to the Parliament (by two-thirds majority).

As Lembcke and Boulanger observed, "The [Fidesz] government did not want to rely on the effects of court packing alone, however. The institution itself had to be changed so that it would no longer prevent the majority in Parliament from ruling as it wished".[28] A number of structural changes to the operation of the Court were introduced by the new Fundamental Law (the Constitution) promulgated on 25 April 2011 and which entered into force in the beginning of 2012, the most important of which was the abolition of *actio popularis* – the most effective way of triggering the Court's abstract scrutiny by citizens and non-governmental organizations and advocacy groups so far (while the constitutionally complaint mechanism, with the standing-related prerequisites, was retained, this is basically only against specific rulings alleged to violate a citizen's rights, and only in exceptional circumstances, also against legal norms incompatible with fundamental rights). The list of actors empowered to trigger an ex post abstract scrutiny has been reduced to the government, the Ombudsman, and the one-fourth of the members of parliament, making it virtually impossible for non-Fidesz parties to mount a constitutional challenge in the post-2010 parliament, where no unified one-fourth opposition bloc is conceivable. The Court's competences were also largely curtailed by the adoption in the constitutional amendment of October 2010 of the principle that Court may no longer review budgetary laws (except for violations of a narrow and exhaustively stated list of rights).

Further, and perhaps most ominously, a constitutional amendment of 2013 effectively annulled the 22 years of the Court's entire case law history by proclaiming that the rulings of the Court adopted before the entry into force of the Fundamental Law shall be repealed (or, more precisely, by prohibition of

[28] Oliver W. Lembcke & Christian Boulanger, "Between Revolution and Constitution: The Roles of the Hungarian Constitutional Court", in Gabor Attila Tóth, ed., *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (CEU Press: Budapest 2012): 269–99 at 280–81.

interpreting the articles of the Fundamental Law with reference to the decisions of the Constitutional Court under the previous Constitution).[29] Quite apart from the inherent absurdity of this provision (how can one expect the Court to abstain from following or relying on the reasoning applied in its former decisions?), the Amendment contradicted directly and explicitly the Constitutional Court's decision of 11 May 2012 in which the Court established that its rulings made on the basis of fundamental values and human rights that have not been changed significantly by the Fundamental Law remain valid.[30] As the Court had said in this decision, "the principles laid down in the decisions delivered on the basis of the former Constitution must be taken into account in the decisions interpreting the [new] Fundamental Law. . . . In case the former Constitution and the Fundamental Law contain substantively equivalent provisions, the Constitutional Court shall provide justification not for following the principles laid down in previous jurisprudence but for departing from those principles".[31] In the short period, a window of opportunity, between this Court judgment and the Fourth Constitutional Amendment, the Court used this principle as a basis of decisions which struck down the proposed new system of electoral registration,[32] and which assessed the constitutional petition concerning the right of freedom of assembly.[33] (A hint of things to come was given in a separate opinion by one of the Fidesz appointees, Justice Pokol, to yet another judgment handed down in this short period in the first half of 2013: "The protection of fundamental rights must always be provided with reference to the capacities and abilities of societies, which may change and may require lowering the protection of the rights of individuals, and this must not be resisted by the Constitutional Court. . ..").[34] An apparent incoherence of almost grotesque character did not go unnoticed: the principle of discontinuity declared by the Fourth Amendment cannot apply to the Decision 22/2012 (which announced the principle of continuity) because the Decision was handed down already on the basis of the new Fundamental Law![35]

The same Fourth Amendment to Fundamental Law also excluded the Court's power to review constitutional amendments on substantive grounds, retaining procedural requirements as the only grounds for scrutiny. Put together, these actions have turned the most activist and dynamic of all the courts of the region into a pale

[29] Art. 19 of the Fourth Amendment of Hungary's Fundamental Law.

[30] Decision No 22/2012 (V.11.).

[31] Decision no. 22/2012.

[32] Decision no. 1/2013 (I.7.).

[33] Decision no. 3/2012 (II.14.) quoted in "Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary" ed. by Gabor Halmai and Kim Lane Scheppele (April 2013), available at http://halmaigabor.hu/dok/437_Amicus_Brief_on_the_Fourth_Amendment4.pdf (last accessed 18 January 2014) at p. 81.

[34] Separate opinion by Justice Pokol in Decision 4/2013 (II.21).

[35] "Amicus Brief", supra note 33 at p. 82.

shadow of its former self. The European Parliament's "Report on the situation of fundamental rights, standards and practices in Hungary" (the Tavares Report) concluded in June 2013, that "the Constitutional Court can no longer fulfill its role as the supreme body of constitutional protection".[36]

1.2 The Powers of Constitutional Courts and Initiators of the Review Process

Although there are certain local variations, one may attempt a description of the common model of constitutional tribunals in the region. The general model adopted is that of a 'concentrated' or 'centralised' constitutional review, conducted by a court composed of judges appointed for limited tenure by the political branches of government, exercising abstract, ex post and final review of the constitutionality of statutes and other infra-constitutional acts. There are, however, also some departures from the dominant model, which I will now briefly note.

Centralised and concentrated review is understood here as an arrangement according to which only one institution in a given country has the right to authoritatively scrutinise laws in terms of their constitutionality. The task of constitutional review is conferred upon a special body established outside of the regular judicial system. The only, and minor, exception is Estonia, where the constitutional court is known as the "Constitutional Review Chamber" and is structurally a part of the National Court (the equivalent of the Supreme Court). This Chamber is elevated above the other chambers of the National Court (criminal, administrative and civil) in that its chairman must always be the chief justice of the entire Court. This special design, however, does not importantly affect the position of the Constitutional Review Chamber in the overall constitutional system and, for all practical purposes, the Estonian Chamber can be viewed as a separate constitutional court, like any other in the region.

The most important power of constitutional courts, for the purposes of the discussion in this book, is their exercise of abstract judicial review, that is, the method of considering a statutory rule not in the actual context of a specific case but rather in abstracto. It is the textual dimension of the rule rather than its operationalisation in application to real people and real legal controversies that is assessed by judges. Most of these courts, like their counterparts in Germany, Italy or Spain, in addition exercise the power of concrete review initiated by other courts, which, when faced with doubt as to the constitutionality of a law that they are about to

[36] European Parliament, Report on the situation of fundamental rights, standards and practices in Hungary pursuant to the European Parliament resolution of 16 February 2012, 24 June 2013, A7-0229/2013, para 17.

apply in the case before them, are obliged to suspend the proceedings and address their constitutional query to the Constitutional Court.[37]

The list of those subjects who are authorised to formally initiate abstract review varies from country to country. In all countries of the region, the president has such a power,[38] and almost all grant similar competence to the government or prime minister.[39] Many states also allow for the review process to be initiated by groups of parliamentarians, which may be defined either as a particular number (e.g. a minimum of 20 members of the Latvian Parliament) or a fraction (e.g. one-fifth of the members of the National Assembly of Bulgaria or one-third in Slovenia).[40]

[37] The exceptions are Moldova, Montenegro, Serbia, and the Ukraine; in these states, solely abstract control by the Constitutional Court is envisaged. In Latvia, the possibility of concrete review has been established through the constitutional amendments of 30 November 2000, and, to my knowledge, this has not been taken advantage of by the courts as yet. In Bulgaria, concrete review can only be initiated by the two top 'regular' courts; the Supreme Court of Cassation and the Supreme Administrative Court; see Art. 150 (2) of the Bulgarian Constitution. A quasi-concrete control, nevertheless departing from the standard form as characterised in the main text, exists in Belarus, where any court encountering a statute deemed by it to be unconstitutional has a duty to decide the case on the basis of the Constitution and then to petition the Supreme Court, which, in turn, has a duty to petition the Constitutional Court regarding the (un)constitutionality of the statute. In the Ukraine, there is also an element of "concrete" control; under Art. 83 of the Statute on the Constitutional Court, when an ordinary judge believes that a law that he must apply is inconsistent with the Constitution, he should address the Supreme Court, which may subsequently lodge a formal challenge to that law with the Constitutional Tribunal. There is, however, no stay of the proceedings granted by the "ordinary" judge, no obligation on the part of the Supreme Court to lodge a challenge, and the subsequent consideration by the Constitutional Court is identical to that conducted in the case of any other abstract review. Nevertheless, in the perception of several judges of the Constitutional Court, this amounts to a form of "concrete" control; interview with Professor Wolodymir Tychyj, Judge of the Constitutional Court of Ukraine, Kiev, 22 November 2002.

[38] The exception is Lithuania, where the President can only challenge the constitutionality of Government acts but no other laws (in particular, he cannot challenge the constitutionality of parliamentary statutes). In Estonia and Romania the President's power to initiate review is limited to only preventative control of statutes, and cannot therefore be used after they enter into force.

[39] The exceptions are Croatia (where the government can initiate review of only sub-statutory laws), the Czech Republic (as in Croatia), and Georgia and Estonia (where the government has no role in the process of constitutional review).

[40] The exception is Estonia. However, based on a new statute on constitutional review of 2002, the Parliament may submit a request for an opinion to the Supreme Court for interpretation of the Constitution in conjunction with the EU law if the interpretation of the Constitution is of critical importance in adopting an Act in fulfilment of obligations of the member states in the EU.

Furthermore, a large number of CEE countries allocate this power to the Prosecutor General,[41] Ombudsman (or an equivalent body),[42] a Supreme Court,[43] and/or central audit bodies.[44] There are also a number of other assorted bodies that, in various constitutional systems, can initiate abstract judicial review, such as the executive and legislative bodies of constituent units of a federation,[45] representative bodies of local government,[46] and trade unions.[47]

This suggests that there is a spectrum of patterns of accessibility to judicial review. On one hand, there are very restrictive systems such as those of Estonia (where not even members of parliament can challenge the laws) or Lithuania (where only the government and a group of parliamentarians can initiate abstract review of statutes). On the other hand there are the systems that assured virtually unlimited access to this process in the form of actio popularis, that is, the right of each individual citizen to initiate abstract review regardless of their specific legal interest in the case in question. The greatest opening-up of such access occurred in Hungary, where even non-citizens had the right to launch an actio popularis and where this possibility was effectively used to invalidate a number of important laws – until the actio popularis was removed by the Constitution of 2011. For example, the death penalty,[48] the official use of personal identification numbers,[49] and penalties for criticism of public officials[50] have all been abolished as a result of constitutional review initiated through actio popularis in Hungary; the statistics show that, also in quantitative terms, actio popularis has been by far and away the most frequent way to initiate review in that country.[51] It is for this reason that a (former) Chief Justice of the Hungarian Constitutional Court, László Sólyom, could observe, with only a little exaggeration, that the "actio popularis became a

[41] In Bulgaria, Latvia, Moldova, Poland and Slovakia.

[42] In Albania, Croatia, Czech Republic, Hungary, Latvia, Poland, the Ukraine. In Estonia, the ex post abstract review can be initiated only by the Legal Chancellor, who is responsible for monitoring legal acts in the country from the point of view of their constitutionality. The Legal Chancellor, an office similar to the one in Finland, either calls on the body that passed the (in his view) unconstitutional legislation to rectify it, or he files a petition to the Constitutional Review Chamber for the act in question to be annulled. In addition, Estonian constitutional review can also be initiated by the President and local government councils (as an ex ante review) or, for concrete review, by ordinary courts.

[43] In Belarus, Bulgaria, Moldova, Poland, Russia and the Ukraine.

[44] In Albania, Latvia and Poland.

[45] In Russia. In Ukraine, the Parliament of the Autonomous Republic of Crimea also has such a power.

[46] In Slovenia and Ukraine.

[47] In Slovenia.

[48] Decision 23/1990 of 31 October 1990.

[49] Decision 15/1991 of 13 April 1991.

[50] Decision 36/1994 of 24 June 1994.

[51] See Georg Brunner, "Structure and Proceedings of the Hungarian Constitutional Judiciary", in László Sólyom & Georg Brunner, Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court (University of Michigan Press: Ann Arbor, 2000): 65–102 at 99 n. 40.

substitute for direct democracy".[52] Likewise, another Hungarian lawyer has noted that this method of triggering review "has made the citizens participants in the process of the transformation of the old legal system".[53] The most important difference between a "popular action" and a constitutional complaint was that the former presupposes no restrictive rules of standing. Indeed, the very idea of standing is inappropriate to an actio popularis because the individual who is launching such an action is seen as "a trustee of the public good" rather than as someone with a particular grievance who approaches the Constitutional Court as an instance of last resort.[54] No wonder that the abolition of actio popularis after the post-2010 constitutional turn in Hungary was described by a Hungarian scholar, Paul Blokker, as "just one of the indications of a radical move away from a democratic dimension in constitutionalism".[55]

The distinction between an actio popularis and a constitutional complaint (a complaint made by a citizen who claims that her constitutional rights have been violated by a particular rule, either directly or through an authoritative decision taken on the basis of that rule) is reasonably clear in theory but, in practice, may be somewhat blurred. According to one justice of the Constitutional Court of the Czech Republic, an actio popularis-type complaint can be smuggled in through the back door of a constitutional complaint when a petitioner complains about a particular decision and additionally claims that the law behind the decision is unconstitutional.[56] When the process of constitutional complaint is available only against the legal rule in general and not against a specific decision in the application of the rule (as is the case in Poland), the only thing that distinguishes the complaint from actio popularis is the operation of the rules of standing. In Poland, the current position is that a complaint can be made against a specific statute (or other act) that formed the basis of a particular decision that has directly affected the petitioner. In other words, to prevent the transformation of the complaint into an actio popularis, there is a relatively stringent requirement of standing: one cannot petition the court regarding a statutory provision "that only indirectly affects the legal position of a complaining person but has not been the basis for a final determination in a given case".[57] Further, in Poland a complaint cannot be made against a legislative omission or a law that is no longer valid.[58] In addition, the complaint

[52] Oral remarks by Professor László Sólyom, former Chief Justice of the Hungarian Constitutional Court, Workshop on Constitutional Adjudication in Southern and Western Europe, Fondazione Adriano Olivetti, Rome, 26 March 2002.

[53] Gábor Halmai, "The Hungarian Approach to Constitutional Review: The End of Activism? The First Decade of the Hungarian Constitutional Court", in Sadurski, supra note 2: 189–212 at 193.

[54] Id. at 81–82.

[55] Paul Blokker, New Democracies in Crisis? (Routledge: London, 2014), p. 155.

[56] Interview with Professor Vojtech Cepl, Justice of the Constitutional Court of the Czech Republic, Prague, 22 March 2002.

[57] Leszek Garlicki, "Orzecznictwo Trybunalu Konstytucyjnego w 2000 roku", Przegląd sądowy (2001:9): 77–105 at 85–86.

[58] Leszek Garlicki, "Orzecznictwo Trybunalu Konstytucyjnego w 1998 roku", Przegląd sądowy (1999:6): 104–28 at 113.

must be based on a violation of one's constitutional rights and liberties; it cannot be founded exclusively on a violation of other constitutional provisions. In particular, constitutional complaints cannot be based on those articles that concern state policy goals (even if, formally speaking, they are in the Polish Constitution's chapter on constitutional rights, e.g. art. 71: protecting the interests of the family), or on general constitutional clauses such as art. 2 (the principles of a democratic state based on law, and of social justice). This latter article can be cited in conjunction with a claim of violation of other rights but is not in itself considered to be an independent source of any constitutional rights or liberties.[59] The important thing is that in Poland – in contrast to, for example, the Czech Republic – a constitutional complaint cannot be made against an alleged violation of constitutional rights in the process of the application of the law, but must rather be based on the alleged unconstitutionality of the law itself.[60] This has increasingly been seen by the justices of the Constitutional Tribunal as a weakness of the current model of constitutional complaint; Chief Justice Marek Safjan stated that the complaint procedure "does not meet the citizens' expectations" because it does not provide any remedies for "a defective application of the law".[61] The pressure for change has, however, been resisted by the Supreme Court which fears that such an extension of the ambit of constitutional complaint would allow the Constitutional Tribunal to police its own decisions.[62]

The Hungarian position on individual constitutional complaint is similar in many ways. The target of the complaint cannot be the decision in application of a sub-constitutional rule, but only that rule itself. Given that virtually the same result (invalidation of the provision in question) could be achieved in a simpler fashion by an actio popularis (until the new constitutional framework of 2011), it is no wonder that constitutional complaint has not been a particularly popular device there.[63] In fact, the Constitutional Court attempted to enhance the complaint ("to breathe life into the lifeless institution", as one commentator put it)[64] by allowing to use a specific complaint to overturn a judicial decision which, as it held, had applied a regulation in an unconstitutional manner. However, in a pattern resembling the similar institutional conflict in Poland, it ran into conflict with the Supreme Court which protested that the Constitution did not provide that such a course of action should be available to the Constitutional Court, and that it was thus infringing the competencies of the regular courts.[65]

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[59] Garlicki, supra note 57 at 86.

[60] See Malgorzata Masternak-Kubiak, Ustawa o Trybunale Konstytucyjnym (Wydawnictwa Prawnicze PWN, Warszawa 1998): 48–49.

[61] "Trybunal buduje praworządną Rzeczpospolitą", Rzeczpospolita, 20th March 2002 at C-2 (remarks by the Chief Justice of the Constitutional Tribunal, Professor Marek Safjan).

[62] Id. (remarks by the Chief Justice of the Supreme Court, Prof. Lech Gardocki).

[63] Brunner, supra note 51 at 84. He adds, however, that in some exceptional circumstances, constitutional complaint may be the only avenue available to a citizen, see id. at 84.

[64] Halmai, supra note 53 at 204.

[65] For a description of this case, and the ensuing attempt to find an institutional compromise, see id. at 204–206.

In contrast in Slovakia, the Czech Republic and Russia constitutional complaints are available against statutes "as applied". This immediately raises the issue of a law that is about to be applied, and that the citizen fears is likely to violate his or her rights. For example in Russia, although the rules of standing applicable to such cases are rather unclear, there is the possibility of complaint by a citizen against a statute even before its actual application, as long as the statute is likely to be applied against that citizen. To ascertain this likelihood, the Constitutional Court requires some documentary evidence, "something in writing ... such as a letter from an official", that supports the proposition that the statute is about to be applied against the individual in question.[66] The constitutional complaint procedure was introduced in Russia as early as 1991, by the Law on the Constitutional Court, and was further expanded by a 1994 law that stripped the Court of the discretion to refuse to hear citizens' claims. While there have been some important decisions taken as a result of citizens' complaints (for instance, the decision of 2 February 1999 suspending the death penalty throughout the Russian Federation on the basis that it violated the right of capital defenders to trial by jury, as very few regions in Russia had jury trials), nevertheless the popularity of this device is not great. As one legal scholar suggests, this relative unpopularity "may be explained by the weakness of the law enforcement system as well as by the general dissatisfaction (widespread among the Russian population) with the work of the Russian Government".[67]

In either form, whether applying to the rule in abstracto or to its specific application, the possibility of constitutional complaint initiated by citizens exists in only about a half of the CEE states.[68] There is a clear correlation between the existence of an activist, powerful constitutional court and the availability to citizens of a direct constitutional complaint procedure, which, of course, is not surprising. However, it must be said that in those constitutional systems that fail to offer their citizens this legal instrument, the views of lawyers and constitutional judges (including those who are certainly committed to the protection of constitutional rights) are not unanimously in favour of legal reform aimed at the introduction of such a procedure. The reasons behind this uneasiness are varied. For example, in Romania the President of the Constitutional Court stated, in an interview, that the availability of constitutional complaint would clash with the principle that the Constitutional Court should be activated only when there is a "hot case", as evidenced by the existence of a legal case before a regular court.[69] In Bulgaria,

[66] Interview with Professor Boris A. Strashun, of the Centre for Analysis of Constitutional Justice at the Constitutional Court of the Russian Federation, Moscow, 19 November 2001.

[67] Suren Avanesyan, "Constitutional Protection for Human Rights in the Russian Federation", Journal of East European Law 6 (1999): 437–68 at 462.

[68] In Albania, Croatia, the Czech Republic, Hungary, Latvia (since 1 July 2001), Macedonia, Poland, Russia, Slovenia and Slovakia (although, in the latter, the competencies to consider constitutional complaints are restricted only to those matters that do not fall under the powers of other courts).

[69] Interview with Prof. Lucian Mihai, President of the Constitutional Court of Romania, Bucharest, 9 March 2001.

one constitutional judge argued that, for practical reasons, it would not be a good idea for the Court to hear individual complaints: "We are only twelve judges. Practically, if you knew Bulgarian mentality, every case before a regular court would be appealed before the Constitutional Court to challenge the constitutionality of such and such an article. We have neither the money nor the apparatus to bear such responsibility".[70]

However, even when such complaint procedures are not available, there may be some limited ways open to citizens to attempt to initiate judicial consideration of the constitutionality of a law. In Ukraine, for example, citizens may apply to the Constitutional Court for an official interpretation of the Constitution or of a statute; the application must state that a particular interpretation of the rule in question may lead to the infringement of that citizen's rights. In practice, the Constitutional Court will consider such applications only if a citizen can show that, in reality, the application of a given statute is not uniform throughout the Ukraine.[71] In Bulgaria, when the ordinary Bulgarian courts are confronted with the argument that a particular norm is unconstitutional, they may refer the issue to the Supreme Court of Cassation, which, in turn, may hold the proceedings in abeyance and file a petition to the Constitutional Court. To date, however, this procedure has not often been used.

There is, finally, the possibility for some constitutional courts of the region to act sua sponte, that is, to initiate constitutional review themselves.[72] As with many other aspects of constitutional courts' activism, the Hungarian Court until 2011 was the leading example here. Its self-initiated procedures, in particular with regard to the unconstitutionality of legislative omissions, have led it to make some important decisions in which the Court set deadlines for the Parliament to fill the relevant legal lacunae. For example, in a 1992 decision, it established that the Parliament had failed in its constitutional duty to enact a law regulating the broadcast media[73]; in response, though with a considerable delay, the Parliament passed the Media Law in 1996, satisfying the Court's requirements. In the early years of its existence, the Hungarian Court had made use of type of review quite frequently but, with time, its popularity among the judges diminished.[74] In other countries, the right of self-initiation of judicial review has had a more tentative status. In Russia, it existed in the "First Court" (1991–1993) but this power was removed by the 1994 statute on the Constitutional Court. Similarly in Poland, such a possibility existed under the old statute on the Constitutional Tribunal of 1985, but the new law on the

[70] Interview with Professor Todor Todorov, Justice of the Constitutional Court of Bulgaria, Sofia, 11 May 2001.

[71] Interview with Judge Pavlo Jevgrafov of the Constitutional Court of the Ukraine, Kiev, 22 November 2002.

[72] Apart from Hungary (and in the past, Poland and Russia), such a possibility exists in the statutes on constitutional courts in Albania, Montenegro and Serbia.

[73] Decision no. 37/1992 (V.10) AB of 8 June 1992, reprinted in East European Case Reporter of Constitutional Law 2 (1995): 27–35.

[74] See Brunner, supra note 51 at 85–6.

Constitutional Tribunal (of 1997) extinguished this procedure, and in addition established explicitly (in Article 66) that the Tribunal is bound by the limits of a petition. The rejection of this power to initiate review, in the legislative process leading to the adoption of the 1997 law, was argued on the basis that the Tribunal should not be "politically activist", and that the Tribunal would be vulnerable to an accusation of bias if its decision was not bound by the substantive parameters of a petition.[75] However, it should be added that, even under the pre-1997 rules, self-initiation was considered an exceptional power, to be used only with regard to particularly important constitutional violations.[76]

As already mentioned, in Poland the Constitutional Tribunal is restricted by the limits of the original petition; in some other countries, however, the constitutional courts have the power to go beyond a petition and invalidate even those provisions of a statute under review that had not been challenged (this power may be seen, naturally, as a weak version of the sua sponte initiation of review by the court). For example in Slovenia, Article 30 of the Constitutional Court Act explicitly states that the Court "shall not be bound to the proposal given in a request or initiative [to evaluate a statute]", and the Court has actually taken the opportunity to exercise this power. For example, when reviewing the 1995 law on associations which was challenged (successfully) on the grounds that it restricted the rights of minors by requiring their parents' permission to join an association, the Court looked at the other provisions of the same statute and, on its own initiative, found the requirement of a minimum of ten members to form an association unconstitutional (it decided then that three was a sufficient minimum).[77] Elsewhere, constitutional courts have assigned to themselves the power of going beyond the bounds of a petition; for instance, in Estonia – just as in Poland – the statute on the Chamber of Constitutional Review explicitly restricts the Chamber's deliberations to the limits of the original petition.[78] Nevertheless, the Chamber has occasionally noted the unconstitutionality of provisions other than those under challenge. For example, in a decision that struck down the 1996 law on non-profit associations because it restricted the rights of children (as the petitioner, the President of the Republic, claimed), the Chamber "considered it necessary" to observe that there was also another provision in the same act that was constitutionally faulty; namely the requirement of parliamentary permission to form associations possessing weapons

[75] Zdzisáaw Czeszejko-Sochacki, Leszek Garlicki & Janusz Trzcinski, Komentarz do ustawy o Trybunale Konstytucyjnym (Wydawnictwo Sejmowe, Warszawa 1999) at 202.

[76] For example, in its Decision K 19/96 of 24 February 1997 the Constitutional Tribunal declared: "Deciding on its own initiative has an exceptional character and can take place only in cases of particularly flagrant breaches of the Constitution", Orzecznictwo Trybunaáu Konstytucyjnego, Rok 1997 (C.H. Beck: Warszawa 1998), item 6: 65–77 at 72.

[77] Decision U-I-391/96 of 11 June 1998, translation in http://www.us-rs.si/en/casefr.html, Part B.-III.

[78] Constitutional Review Court Procedure Act of 1993, Section 4.3, translation in http://www.nc.ee/english

or having a paramilitary character.[79] Perhaps the fact that the Chamber invalidated the law as a whole, not just the defective provisions, renders less relevant the question of whether it confined itself only to the provision actually challenged or whether it did indeed go beyond the bounds of the petition.

In the countries where the possibility of self-initiation is absent, the views on the lack of this capacity are mixed. In Bulgaria, one Constitutional Court justice, when asked about the idea of self-initiation, stated: "I think it could be quite risky here. . . . It could tempt political justices to participate in the political game".[80] For a similar reason, a Russian constitutional judge has also rejected the idea: "It would make us the judges in our own case".[81] However, in Romania, according to some observers this is the greatest weakness of the Constitutional Court. As one expert puts it, as a result of the inability to act sua sponte, the Court is absent from the major debates involving constitutional issues whenever the government and the opposition parties have no interest in raising a particular issue.[82] Thus, Professor Parvulescu argues that "this is an essential power for a strong [Constitutional] Court".[83] However, the predominant doctrinal opinion seems to be to the contrary. According to Professor Mihai Constantinescu (himself a former Judge of the Romanian Constitutional Court), the availability of self-initiation undermines the legitimacy of the Court which should only be able to act when there is "a social conflict" as confirmed by a legal challenge by one of the parties to the conflict.[84] "Have we abolished the power of kings only in order to replace it with the power of judges?" he asks in this context.[85] He strongly criticises the evolution of the Constitutional Court which became, in his opinion, "a co-legislator" and not merely a "negative legislator".[86] Similarly, the (then) President of the Court, Lucian Mihai, considers the absence of the power of self-initiation of review to be the "correct solution", which assures the Court's "neutrality" and prevents the situation in which the Court could "select the issues taking into consideration the political situation".[87] According to him, "it is not for the Court to decide which issues are important", as this is a task for the political branches of the state.[88]

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[79] Decision No. 20 of 10 May 1996, reprinted in the East European Case Reporter of Constitutional Law 4 (1997): 57–63, see also http://www.nc.ee/english/const/96/4a9601i.html

[80] Interview with Professor Todor Todorov, Justice of the Constitutional Court of Bulgaria, Sofia, 11 May 2001.

[81] Interview with Dr Vladimir G. Yaroslavtsev, Justice of the Constitutional Court of the Russian Federation, Moscow, 19 November 2001.

[82] Interview with Professor Cristian Parvulescu, Bucharest, 8 March 2001.

[83] Id.

[84] Interview with Professor Mihai Constantinescu, Bucharest, 9 March 2001.

[85] Id.

[86] Id.

[87] Interview with Professor Lucian Mihai, President of the Constitutional Court, Bucharest, 9 March 2001.

[88] Id.

In fact, the Romanian Constitutional Court did once attempt bravely, even if unsuccessfully, to establish for itself the authority to initiate review, by pointing at an unconstitutional omission and trying to set a deadline for the government to remedy this. In 1993, a panel of three judges: Justices Mihai Constantinescu (the same who was later to strongly criticise the idea of self-initiation), Antonie Iorgovan and Viorel Ciobanu found that, under Art. 135 of the Constitution (the right to property), the higher criminal penalties for crimes against public (as opposed to private) property were unconstitutional. They gave the Parliament 6 months to amend the Criminal Code. However, according to one report, the (then) Chairman of the lower chamber of Parliament, Andrea Nastase, convinced the remaining six judges to overturn the decision at a plenary session of the Constitutional Court, which thus, in effect, overturned it by a six to three majority.[89] The plenary decision stated that the Court had no authority to tell the Parliament what to do. According to one observer, this was "a decisive moment in the struggle for the authority of the Constitutional Court vis-à-vis the Parliament and the government, and it was lost [by the Court]".[90]

For a similar reason – namely, concern over the intrusion of courts into the domain of legislators – the constitutional courts are not seen as being entitled to pronounce upon failures by the legislature to enact a law in most CEE countries (although, as we have seen, the Hungarian Court was an exception in this regard). Significantly, the (then) judge of the Polish Constitutional Tribunal explained, in a law review article, this inadmissibility of establishing unconstitutional omissions by arguing that, in principle, to make omissions subject to review "would require making political judgements".[91] However, the same Court did establish a narrow window of opportunity for itself in this field, by holding that, if a given issue has been regulated by statute, an objection of unconstitutionality "may apply both to what the legislators did in a given statute and to what they failed to do even though, in accordance with the Constitution, they should have regulated".[92] In Bulgaria, the Constitutional Court has occasionally declared "the lack of law" to be unconstitutional. One example was the 1995 budget law adopted by the (post-Communist) BSP-dominated parliament, which did not allocate any moneys for the Supreme Judicial Council, dominated then by the rival (liberal) UDF party.[93] As a justice who participated in this decision notes: "We declared this omission unconstitutional arguing that it is the obligation of the Parliament to assure money for all constitutional organs to function normally and to fulfil their constitutional obligations".[94]

[89] Interview with Mr Horatiu Dumitru, Bucharest, 10 March 2001.

[90] Id.

[91] Garlicki supra note 57 at 84.

[92] Decision K 37/97 of 6 May 1998, Orzecznictwo Trybunaáu Konstytucyjnego, Rok 1998 (C.H. Beck: Warszawa 1999): 167–75 at 172.

[93] Decision 17/95 of 3 October 1995. The background of the decision is well described in Herman Schwartz, The Struggle for Constitutional Justice in Post-Communist Europe (University of Chicago Press: Chicago 2000) at 176–77.

[94] Interview with Professor Todor Todorov, Justice of the Constitutional Court of Bulgaria, Sofia, 11 May 2001.

The parliament duly complied with the Court's decision and amended the budget law accordingly.

In addition, some of the constitutional courts in the region also have the competence to establish a binding interpretation of the Constitution[95] and/or of statutes.[96] The power to declare a binding interpretation of the Constitution, at the request of authorised bodies,[97] is vested in these courts quite apart from their function of examining the constitutionality statutes, and is seen as a natural complement to their overall guardianship of the Constitution; it is, incidentally, not an unusual function for some Western European courts to exercise.[98] Some of the CEE courts have attempted to restrict this function somewhat, by establishing the requirement that there must be an existing dispute that has led to the uncertainties as to the correct interpretation of the constitution. For example, the Hungarian Court refused, in 1990, to consider a request by the Minister of Finance to interpret the scope of the constitutional right to social protection. This refusal was based upon the fact that the request had been motivated by the minister's intention to use the Court's opinion in the legislative process related to the bill on social protection, rather than the existence of a real controversy.[99] Notwithstanding this limitation, the Hungarian Court has issued some important decisions in the process of abstract interpretation of the Constitution; for example, establishing that the Constitution cannot be amended by a referendum,[100] as one of the political parties (the Independent Smallholders Party) had proposed in 1995. It seems natural that this function of interpreting the Constitution played a relatively important role in Hungary, where the choice was taken to heavily amend the old Constitution instead of creating a new one, thus perhaps giving rise to many doubts and uncertainties in the initial post-transition period, particularly in relation to the organisation of government, the legislative process, etc. At the same time, the request for an interpretation of the constitution can be used by the executive as a form of preventive review. As one observer notes, a number of requests for constitutional interpretation were made because "the executive wanted the constitutionality of specific regulatory concepts clarified before a draft law was introduced".[101] In such cases, this process comes dangerously close to an ex ante clearing by the Court of a draft law. It is in this context that the restriction (noted above) on the admissibility of such requests was introduced by the Court itself.

[95] In Albania, Bulgaria, Hungary, Russia, Slovakia, the Ukraine.

[96] In Poland, until the 1997 Constitution removed this authority.

[97] For example, in Hungary the following bodies can make such a request: the Parliament or its standing committee, the President of the Republic or the Government.

[98] For instance, the German Federal Constitutional Court decides on the interpretation of the Basic Law, but only in the event of disputes about the competencies of the highest federal bodies.

[99] Decision 128/1990 of 18 December 1990.

[100] Decision 5/1995 (V.10) AB hat., discussed in "Constitution Watch", East Europ. Constit. Rev. 4:3 (Summer 1995): 10 at 10–11.

[101] Brunner, supra note 51 at 80.

Those other courts that possess this competence have more rarely been asked to exercise it, even although there have been occasional important decisions issued under this procedure in Russia,[102] the Ukraine[103] and Bulgaria.[104] The legal doctrine in these countries accepts, albeit often grudgingly, that the power of establishing a binding interpretation of the constitution amounts to a form of law-making by the court or of ex ante constitutional review (because as a rule, petitions for such interpretation are filed in the course of legislative work on concrete statutes),[105] or to a precedent-creating role for the court,[106] though this characterisation is sometimes mitigated by the proviso that these decisions are only "secondary" sources of constitutional law.[107] This is not universally applauded; according to one Bulgarian constitutional scholar (and former Constitutional Court judge), the persistence of this power is "a legacy of Communism" when a "collective head of state" (the Presidium of the National Assembly) had the competence to provide a binding interpretation of the Constitution.[108] In turn, in those countries in which the constitutional courts do not possess this power, there are occasional attempts by other bodies to treat the court as the authoritative interpreter of the Constitution, even outside of the formal review process. In Romania, for example, some officials regularly ask the Constitutional Court to provide them with the "correct" interpretation of this or that constitutional provision.[109] As an expert on the Romanian Court, Renate Weber, observes: "on each such occasion the Court … answered starting [sic] by saying that they were not allowed to make any comment … but ended by giving their opinion on the issue discussed!".[110] This, Weber explains, is due to the sense of self-importance of the judges in question, who, regardless of the institutional restrictions in place, want to

[102] For example, on 20 February 1996 the Constitutional Court issued, at the request of President Yeltsin, an interpretation of the notion of parliamentary immunity. It established that such immunity did not release parliamentarians from liability for any violations of the law not connected with their official duties, see "Constitution Watch: Russia", East Europ. Constit. Rev. 5:1 (Winter 1996): 21–25 at 24.

[103] E.g. decision N 1-6/99 of 14 December 1999 regarding the interpretation of the constitutional provision that Ukrainian is the state language; a decision widely seen as adversely affecting the interests of the Russian-speaking minority; see Wolczuk, supra note 14 at 338–39.

[104] For example, Decision 7/96 of 4 June 1996, summarised in Bull. Const. Case L. 1996 (2): 187–89, concerning the interpretation of freedom of expression, freedom of the press, and freedom of access to information; see the discussion in Chap. 6 of this book.

[105] Venelin I. Ganev, "The Bulgarian Constitutional Court, 1991–1997: A Success Story in Context", Europe-Asia Studies 55 (2003): 597–611 at 600.

[106] Interview with Professor Petro F. Martinienko, Dean of the Faculty of Law, International Solomon University in Kiev, a former judge of the Constitutional Court of the Ukraine, Kiev, 22 November 2002.

[107] Interview with Professor Neno Nenovsky, former Justice of the Constitutional Court of Bulgaria (1991–94), Sofia, 10 May 2001.

[108] Id.

[109] Interview with Professor Lucian Mihai, President of the Constitutional Court, Bucharest, 9 March 2001.

[110] Weber, supra note 4 at 293.

show that they are "the only ones who can give a professional authorised opinion" as to the correct meaning of the Constitution.[111]

One rather unusual power that the Constitutional Tribunal in Poland possessed between 1989 and 1997 was the binding interpretation of statutes. There were actually a number of important decisions taken by the Tribunal in this way, including on the interpretation of the election law, which effectively made the Senate elections possible by means a creative application of the Sejm (the lower chamber of Parliament) election law.[112] In the process of preparing the Constitution of 1997 there was a degree of controversy over whether this procedure should be maintained; its opponents claimed that such decisions of the Tribunal become, improperly, an "extra-statutory source of law".[113] Those who supported the retention of this power, who included the then Chief Justice of the Constitutional Tribunal Andrzej Zoll, warned that its removal would mean the end of constitutional justice in Poland. In the end, the arguments of the opponents prevailed, and in particular the argument that the principle of the independence of the (regular) judiciary required that ordinary courts be able to provide their own interpretation of a statute when applying it, subject only to a formal appeals procedure.[114]

These two types of prerogatives – binding interpretations of the constitution and of statutes – can be seen as offshoots of the central power of the constitutional courts which is to review (and, if necessary, invalidate) the laws it finds to be inconsistent with the constitution. However, for the sake of completeness, it should be added that the constitutional courts in the region, like many of their Western European counterparts, perform a number of other functions that are marginal from the point of view of the central focus of this book, but that nevertheless add to the overall authority and power that they enjoy. For one thing, most of these courts review international treaties prior to their ratification,[115] although this can be still seen as deriving from the general power to review the constitutionality of laws. Secondly, some of the constitutional courts of the region have a formal role in the process of making or amending the constitution.[116] Thirdly, in a number of CEE states, just as in Germany and Austria, constitutional courts have the power to decide on jurisdictional disputes between the highest institutions of the state, as

[111] Id. at 293.

[112] Decision W 4/93 of 16 June 1993.

[113] See Anna M. Ludwikowska, Sądownictwo konstytucyjne w Europie ĝrodkowo-Wschodniej w okresie przekształceĚ demokratycznych (TNOiK, Torun 1997) at 94.

[114] See id. at 97.

[115] The exceptions are the courts in Belarus, Slovakia and Romania.

[116] In Moldova and the Ukraine. In Moldova, all revisions of the Constitution must be first endorsed by the Constitutional Court before being submitted to the legislature (Art. 141 of the Constitution). In the Ukraine, the Constitutional Court considers proposed amendments to the Constitution (in an ex ante review) in terms of whether they restrict constitutional rights and freedoms or the independence and territorial integrity of the Ukraine, because such amendments are prohibited (arts. 157 and 159 of the Constitution).

well as between central and local institutions.[117] Fourthly, and again similarly to the Austrian and German institutional design, some constitutional courts in CEE play a role in decisions on the constitutional liability of top officials, in particular the president,[118] by ruling on impeachment.[119] Fifthly, similarly to the German and Portuguese models, some of the CEE constitutional courts can outlaw a political party on the basis of inconsistency of the aims, statutes and/or the activity of the party with the constitution.[120] Finally, some of the courts of the region have some specific functions with regard to the control of elections and referenda; for example, the Romanian Constitutional Court, following the example of the French Conseil constitutionnel, controls the procedures for the election of the President and certifies the result of the election, and performs similar functions with regard to referenda (but not with regard to parliamentary elections). A similar role is played by the constitutional courts in Slovakia, the Czech Republic, Lithuania and Bulgaria.

As already noted, the dominant model of constitutional review in CEE is that of ex post review, that is, of laws already enacted, although there are some exceptions. In Romania, abstract review can be undertaken only in respect of statutes that have been adopted by the Parliament but not yet promulgated (although there is also the possibility of concrete review, initiated by regular courts, which by its very nature can only be ex post). This resembles the position of the French Conseil constitutionnel which, until the reforms of 2009 (effective from March 2010), could also review parliamentary acts only before promulgation. Furthermore, some other constitutional courts in the region (in Poland, Hungary and Estonia), in addition to their more routine, ex post review process, can be asked by the presidents to conduct an ex ante review of an act just passed by parliament. The Hungarian Court could even be asked to issue an advisory opinion on a bill not yet voted on by Parliament. There is, however, a marked tendency to view such ex ante reviews and advisory opinions as an exception rather than the rule.[121]

Decisions on the unconstitutionality of statutes in all CEE countries are final; there is no way of reversing the verdict other than by constitutional amendment.

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[117] In Albania, Bulgaria, the Czech Republic, Hungary, Poland (but only after the 1997 Constitution), Russia, Slovakia, and Slovenia.

[118] In Bulgaria, also the Vice-President.

[119] In Bulgaria, the Czech Republic, Hungary, and Slovakia. The procedure of impeachment may only be initiated by a constitutionally designated body, the Senate (in the Czech Republic) or the lower chamber of Parliament. In Russia, the Constitutional Court only decides on the legality of the preliminary phase of the impeachment process. In the Ukraine, the Constitutional Court can only declare the completion of the constitutional process of impeachment of the President, and in Romania the Constitutional Court only has a consultative role in the impeachment process.

[120] In Albania, Bulgaria, the Czech Republic, Poland, Romania and Slovakia. In contrast, in Hungary a party may be prohibited by a local court (upon application by the public prosecutor), with an appeal to the Supreme Court. In Russia this power belonged to the Court on the basis of a constitutional amendment of the 2 April 1992, and was discontinued after the dissolution of the "First Court" in 1993.

[121] More on this, in Sect. 3.2.

In Romania, verdicts of the Constitutional Court resulting from abstract review, conducted prior to promulgation, could be overridden by a two-thirds majority of both chambers until the constitutional amendment of 2003 which abolished this possibility. In Poland, a similar possibility existed until the Constitution of 1997 introduced the concept of the finality of all Constitutional Court decisions.[122]

1.3 The Tenure and Selection of Judges

Judges of constitutional courts are appointed for a limited tenure, usually for 9 years.[123] The prevailing pattern is that they can be reappointed once, although in a number of countries there is an explicit ban on reappointment.[124] The exception is the Constitutional Review Chamber in Estonia the members of which are appointed until retirement (at 68) – a reflection of the position of this body as one of the chambers of the Supreme Court. Another exception is the Constitutional Court of Bosnia and Herzegovina, where the first judges appointed were to serve a 5 year term, with all subsequently appointed ones serving until the age of 70. With very few exceptions, constitutional justices tend to be either legal scholars (with a marked preponderance of constitutional law professors) or senior members of the "regular" judiciary.

The length of tenure (and the possibility of re-appointment, or lack thereof) is related to the question of judicial independence; it is frequently asserted that life tenure (perhaps only subject to a compulsory retirement age) guarantees the highest degree of independence, while appointment for a set period with the possibility of re-election has the opposite effect (because, it is claimed, "[I]f judges can run for a second term, their independence in the first term is severely hampered and they will want to be popular among their nominators").[125] The system of set (preferably, reasonably long) terms without the possibility of re-election is seen as falling in between.[126] As virtually none of the CEE constitutional court systems opted for life tenure,[127] which may be seen as a natural consequence of seeing these courts as de

[122] There will be further discussion on this in Sect. 3.3.

[123] Different limits may, however, apply: 6 years in Moldova, 8 years in Croatia, 10 years in the Czech Republic, Latvia and Georgia, 12 years in Slovakia and Hungary, 15 years in Russia. The 15-year term for Russian constitutional judges is a recent innovation. During the first stage of the Court's existence, judges were appointed for an unlimited term with compulsory retirement at the age of 65; in the second stage, a (non-renewable) tenure of 12 years was established, and extended by a new law of 2001 to 15 years.

[124] In Bulgaria, Latvia, Lithuania, Poland, Romania, Russia, Slovakia (although only since a constitutional amendment in 2001), Slovenia and the Ukraine.

[125] Eli M. Salzberger & Stefan Voigt, "On the Delegation of Powers: With Special Emphasis on Central and Eastern Europe", Constitutional Political Economy 13 (2002): 25–52 at 38.

[126] Id. at 38–39.

[127] With the exception of Estonia, for the reasons mentioned above, and the "first Court" in Russia, which now can be seen as an aberration.

facto "third chambers" (or "second chambers", as the case may be), it is tempting to assert that long set periods without the possibility of re-appointment produce better circumstances for ensuring the independence of judges than those systems that do offer the chance of renewal. This, in any event, is the view that is often expressed by the specialists. A Polish scholar (and former judge of the Constitutional Tribunal) has claimed that the prohibition against re-appointment is an important guarantee of independence "because it prevents [the judges] from soliciting favours of the Parliament and politicians".[128]

Does the possibility of reappointment (as exists, for example, in the Czech Republic) indeed create incentives for such "solicitation of favours" from politicians? Speculation of this kind cannot be simply ignored; indeed, it is actually supported by some knowledgeable observers of the Czech Constitutional Court.[129] The following anecdote from the Czech Republic may be an illuminating illustration of this: at a conferral ceremony for new judges of the Constitutional Court, lead by President Havel, only five of the current Constitutional Court judges attended. This was interpreted by a leading Czech politician as a possible sign of opportunism by those judges who chose not to attend; the attitude being "Who knows who the new President of the Republic will be, and how he will view my presence at ceremonies chaired by President Havel?"[130] It is generally considered a matter of constitutional error in the Czech Republic that the possibility of reappointment has not been excluded explicitly.[131]

What of judges who do not have enjoy the possibility of reappointment, and yet who attempt nonetheless to secure a good position for themselves after their term at the court? Professor Lech Garlicki concedes that the prospect of a post-court career "may . . . encourage them to seek connections with politics before their leaving the Constitutional Court" but quickly adds that "this is rather a question of personal integrity and character".[132] However, it is hard to see how this is any different from the situation of judges who can be reappointed; after all, is the question of whether they will try to win favours from the powers that be in order to secure a second term in office not also a matter of "personal integrity and character"? In fact, judges who come to the end of their term at the constitutional court and yet are well before retirement age can be quite conscious of the fact that their future may be shaped by politicians, and this may contribute to their political dependence. This may be particularly visible with regard to those judges who do not come on

[128] Leszek Lech Garlicki, "The Experience of the Polish Constitutional Court", in Sadurski, supra note 2: 265–82 at 271.

[129] Interview with Mr Mark Gillis, Prague, 21 March 2002. (Mr Gillies has taught law for several universities in Prague; from 1999 until 2001, he was the head of the Czech Supreme Court's Department of Foreign Relations).

[130] Interview with Mr Petr Pithart, President of the Senate of the Czech Republic, Prague, 21 March 2002.

[131] Interview with Professor Vojtech Cepl, Justice of the Constitutional Court of the Czech Republic, Prague, 22 March 2002.

[132] Garlicki, supra note 128 at 271.

secondment from universities, and who therefore do not have the natural and guaranteed prospect of going back to an educational and research career. This is, for instance, the case in Bulgaria where a relatively low percentage of constitutional judges (in comparison with other CEE countries) are academics.[133] As one of the Constitutional Court judges there told me, "this [phenomenon of trying to please political forces in order to assure good post-tenure prospects] happens continuously.

. . . It depends on the self-esteem of a given judge, and also on his plans for his future career. . . but most of the judges here think this way. It is understandable".[134] He added that he himself was not "thinking this way" because he had a guaranteed position as a university law professor waiting for him upon his retirement from the Court. Another Bulgarian constitutional expert has argued, for the similar reasons, that the judges of the Constitutional Court should not be young; younger judges tend more to "think about their future and to maintain contacts with the political parties that nominated them to the Court".[135] Similarly, in the Ukraine (where the tenure system is the same: 9 years, non-renewable) a Constitutional Court judge openly admitted that, although such a tenure system is "quite good for those who will retire" soon after serving at the Court, "our younger judges think about what they will be doing after" and "must adjust themselves to the political forces".[136] For these reasons, he believes that the system of tenure until retirement (say, at 65) would be optimal from the point of view of guaranteeing judicial independence. Such a system once existed in Russia and, even though life tenure (until retirement) has been abolished, a very long set tenure (15 years) helps attain a similar result; even judges who are relatively young at the point of selection will be close to retirement age at the end of their tenure, and so the incentive to please politicians in order to assure a post-judicial career is minimised.

The appointment process of judges to constitutional courts in CEE is thoroughly political although "high legal qualifications" (or an equivalent description) are usually listed as one of the criteria of eligibility. In some countries of the region, constitutional judges are appointed through a process that requires the participation of both the legislative and executive branches. This is often referred to as a "collaborative" system of appointment (similar to that used in the US) in which the parliament (or one of its chambers) elects the judges from a group of candidates

[133] As Professor Nenovsky observes, the number of academics has gradually decreased in the Bulgarian Constitutional Court; in the first Term it had three law professors and two doctors of law, while by 2001 it counted only one law professor (Todor Todorov). Interview with Professor Neno Nenovsky, former Justice of the Constitutional Court of Bulgaria (1991–94), Sofia, 10 May 2001.

[134] Interview with Professor Todor Todorov, Justice of the Constitutional Court of Bulgaria, Sofia, 11 May 2001.

[135] Interview with Professor Neno Nenovsky, former Justice of the Constitutional Court of Bulgaria (1991–94), Sofia, 10 May 2001.

[136] Interview with Professor Volodymir Tychyj, judge of the Constitutional Court of the Ukraine and former Vice-President of the Court, Kiev, 22 November 2002.

chosen by the president,[137] or the president appoints the judges from a list nominated by the parliament.[138] The second model is a 'split' appointment system, in which different bodies, usually the president, the parliament and the body representing the judiciary, each have their own "quota" of positions to fill on the constitutional court; this system is based upon that adopted in Italy, where each of these bodies elects one-third of the Corte costituzionale.[139] The third possibility is that of the exclusive competence of the parliament to elect the judges of the constitutional court.[140] Again, an altogether different system was adopted in Estonia, where all members of the Constitutional Review Chamber are professional judges and are appointed just as all other justices of the Supreme Court, namely by the President of the Republic, on the proposal of the Supreme Court.

Each of these systems of selecting constitutional court judges creates different dysfunctionalities and incentives for politicians to shape the composition of the court to suit their own political needs. Perhaps the most obvious risk occurs when the parliament has the full power of appointment, as in Poland, Hungary and Croatia. As a Polish constitutional scholar has observed, this generates "a risk of excessive politicisation of these [appointment] decisions" and the "temptation of a system of "spoils" may become too irresistible for parliamentary majorities".[141] Indeed, the practice of the selection of constitutional judges in Poland shows that the process has been overwhelmingly controlled by the parliamentary majority of the day. Out of 29 judges elected to the Tribunal in 1989–2002, in 27 cases the elected candidates were those who had been supported by the then parliamentary

[137] In Russia, the Federation Council elects the judges from a list submitted by the President; in Slovenia and Serbia the parliament elects the judges from a group of candidates nominated by the President.

[138] In Albania, the President elects judges with the consent of the Assembly; in the Czech Republic, the President appoints judges with the consent of the Senate.

[139] In Bulgaria, four judges are appointed by the National Assembly, four by the President, and four by a joint meeting of the justices of the Supreme Court of Appeals and the Supreme Administrative Court; in Latvia, three are appointed by Parliament, two by the Government and two by the Plenum of the Supreme Court from among the judges of the Republic of Latvia, and, in addition, all have to be confirmed by the Parliament; in Lithuania, the staggered process of nomination is divided between the President of the Republic, the President of the Seimas (the Parliament) and the President of the Supreme Court, and then the Parliament chooses three from each nominator; in Moldova, two are elected by Parliament, two by the President and two by the Supreme Council of the Magistracy; in Romania, three are appointed by the lower chamber of Parliament, three by the Senate and three by the President; in the Ukraine, six are appointed by the President, six by Parliament and six by the Assembly of Judges.

[140] In Croatia (where the lower chamber elects judges by an absolute majority of votes, on the recommendation of the upper chamber of Parliament), Hungary (where the Parliament elects the judges by a two-thirds majority from among the candidates nominated by the parliamentary nominating committee, in which parliamentary factions are represented in proportion to their parliamentary seats) and Poland (where the lower chamber of Parliament, the Sejm, elects the judges by an absolute majority of votes).

[141] Leszek Garlicki, "Trybunaá Konstytucyjny w projekcie Komisji Konstytucyjnej Zgromadzenia Narodowego", Panstwo i Prawo 51:2 (1996): 3–19 at 6.

majority (even though in most cases the opposition also nominated candidates).[142] This shows that "the majority parties, regardless of their political provenance, believed that they did not have to share decisions concerning appointments with the Opposition"; as a result, "it became increasingly apparent that each change of political configuration of the Sejm will be reflected in future appointments".[143] In Hungary this effect had been somewhat mollified prior to 2010 changes. The fact that, prior to 2010, the nominating committee was composed of an equal number of representatives of each party (one member per each parliamentary faction) eliminated the dominance of the stronger parties at the crucial early stage of the process, and the requirement that judges were elected by a two-thirds majority vote of the parliament (rather than by an absolute majority, as in Poland) meant that a degree of consensus was required.[144] However, this was changed by the June 2010 constitutional amendment which maintained the two-third majority requirement for the election but changed the composition of the nominating committee, making it reflect the representation of particular parties in the parliament, thus removing the requirement and incentive for consensus-seeking and establishing a "winner takes all" system. In the third country that adopted the system of exclusively parliamentary appointment, Croatia, the fact of concentrating the selection process in one body has made it possible for politicians to control the process. As one Croatian expert observes with regard to the election of the eight judges who took up their posts on the 7 December 1999: "The election procedure was in fact politically predetermined, allowing bloc vote for all the judges without examination of and discussion on their individual professional competences. Needless to say, [the] majority of them were publicly very well known [sic] members of political parties".[145] In fact, they were not all members, or sympathisers, of one party. Even though, in the opinion of Croatian experts, the then ruling party (the Croatian Democratic Union (CDU)) could have filled all eight vacancies at that time, they decided to compromise and "to leave some [positions on the Court] to other parties",[146] in particular to the Social Democratic Party and to the Croatian Social Liberal Party, largely as part of their strategy to be on good terms with the opposition. However, this does not deny the fact that the CDU had full control over the process from the beginning to the end, and that the deal between the CDU politicians and the opposition leaders took the form of a shrewd give-and-take within the respective party leaderships.[147]

[142] Garlicki, supra note 128 at 268.

[143] Id. at 268.

[144] Halmai, supra note 53 at 191–92.

[145] Sanja Baric, "The Constitutional Court of the Republic of Croatia: Its Institutional Role Within the System of Government", in Giuseppe di Vergotini, ed., Giustizia costituzionale e sviluppo democratico nei paesi dell'Europa Centro-Orientale (G. Giappichelli Editore: Torino, 2000): 115–25 at 117.

[146] Interview with Professor Siniša Rodin of the Faculty of Law, University of Zagreb, Zagreb, 7 April 2000.

[147] For a detailed account of the deal, see "Constitution Watch", East Europ. Constit. Rev. 9:1/2 (Winter/Spring 2000) at 12.

In turn, when the appointment process is managed by different bodies acting separately from one another, one danger is that each of the bodies will elect "their own" judges who will then be held under an obligation to be loyal to their appointing body. This can be seen, for example, in the Ukraine, where appointments are made by the President, the Parliament and the Council of Judges who each have six positions to fill. In effect, those who were appointed by the President are likely to be seen as "his" judges and, according to one expert, are largely "loyal to the President" and "support him".[148] According to a judge of the Ukrainian Constitutional Court, this is not the case but at the same time he believes that a collaborative appointment process would be a better system (e.g., elections by the Parliament from a list proposed by the President).[149] Still another expert, and a former judge of the Ukrainian Constitutional Court, believes that the distinctions between the three groups of appointees are not in terms of their institutional loyalty but in terms of their professional background and qualifications; the President tends to appoint law professors, the College of Judiciary chooses judges, and the Parliament tends to opt for politicians.[150] According to this expert, the real split is between those judges who are "competent" and those who are "incompetent" (the implication being that the Parliament-appointed judges belong to the latter category).

Another example is that of Bulgaria where the party-political colours of the judges are also evident. As one of the Justices reports, in the last term of the Court there were three or four justices who always voted against any legal challenges made by the BSP (then in opposition) to laws sponsored by the UDF Government, except when the unconstitutionality of the laws was absolutely obvious.[151] As Professor Nenovsky, another (ex-)Justice of the same Constitutional Court states, "we do not have a situation like in Germany when different parties discuss with each other about the new justices in order to maintain a proportional representation [of parties] on the Court. In Bulgaria it is different. If the President and the parliamentary majority represent the same parties, as it is now [May 2001], they can select very politicised judges to the Court".[152] This is what happened, according to him, in Autumn 2000 when four vacancies were filled with judges characterised as "reasonably good jurists but very strongly connected to political parties".[153] This is said to have caused "a very big surprise

[148] Interview with Professor Yurii S. Shemshuchenko, Director of the Institute of State and Law, National Ukrainian Academy of Sciences, Kiev, 21 November 2002.

[149] Interview with Judge Pavlo Jevgrafov, judge of the Constitutional Court of the Ukraine and former Vice-President of the Court, Kiev, 22 November 2002.

[150] Interview with Professor Petro F. Martinienko, Dean of the Faculty of Law, International Solomon University in Kiev, former judge of the Constitutional Court of the Ukraine, Kiev, 22 November 2002.

[151] Interview with Professor Todor Todorov, Justice of the Constitutional Court of Bulgaria, Sofia, 11 May 2001.

[152] Interview with Professor Neno Nenovsky, former Justice of the Constitutional Court of Bulgaria (1991–94), Sofia, 10 May 2001.

[153] Id.

in the [legal] community". Professor Nenovsky's preferred method of preventing the recurrence of this situation is the adoption of a rule similar to that currently applied in Austria, to the effect that whoever has performed political functions in the 4 years preceding the elections of judges should be ineligible for admission to the Court.[154] Furthermore, it must be added that at least one-third of the Court (the justices elected by the two Supreme Courts) can be, and actually have been, largely apolitical. In addition, those judges appointed by successive Bulgarian presidents have thus far been selected not on the basis of their party-political affiliations but rather because they enjoy a good personal rapport with the President, thus creating what one observer has called "a presidential power base" within the Court.[155]

In fact, the allocation of a "quota" of judges to different branches of the government may be largely illusory if one branch has strong control over the others; if, for example, the president dominates the parliament, and the constitution does not (through, for example, a requirement of qualified majority) compel the parliament to obtain opposition consent to the nominations. This is the case in Romania where the President and the two chambers nominally have the power of appointing three judges each; in fact, however, the perception is that the central role in appointing all of the judges is played by the President, and, more specifically, by his legal and constitutional advisors.[156] This de facto domination by the President over the entire composition of the Court has been pushed to an extreme (which cannot be described other than as an aberration) in Belarus. Here, the President appoints one half of the Constitutional Court, and has the exclusive power to appoint its President; the other half is appointed by the Senate, which is, however, also dominated by the President, who nominates one third of its members!

Finally, US-style systems in which different bodies control different stages in the process of admission may well turn out, de facto, to be a process controlled almost exclusively by one of the branches, usually the executive. This is the case in Russia, where the President has almost full control of the candidates (the Duma "may" also propose candidates but the President has the final say over the

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[154] Id.

[155] Ganev, supra note 105 at 600–601.

[156] Interview with Professor Cristian Parvulescu (Professor of Political Science), Bucharest, 8 March 2001. Although Professor Parvulescu stresses that all the judges of the Constitutional Court have high legal qualifications, in his opinion "they are not politically independent", and the process of appointments is largely controlled by the office of the Presidency and also by the Minister of Justice. The impact of this is somewhat lower when the Government is based on a coalition (as in 1996–2000) than when there is a mono-party Government; in the former case, the President has to conduct negotiations within the coalition. According to Professor Parvulescu, one can identify the "Iliescu judges" and the "Constantinescu judges" within the current composition of the Constitutional Court (referring, respectively, to Presidents Ion Iliescu, 1990–1996, and Emil Constantinescu, 1996–2000). It is also significant for him that the current (at the time of my interview) President of the Court, Professor Lucian Mihai, was, before his appointment in 1998, a secretary-general of the Chamber of Deputies (1996–98), "a political function" (in the opinion of Prof. Parvulescu) to which he was appointed by the then governing National Liberal Party.

composition of the list). Parallel to this, the Parliament has a negative power in that the Federation Council must give final approval for appointments; a power that it has exercised at times, for example in rejecting many of President Yeltsin's candidates, thereby "creating a long and arduous appointment process".[157] As one of the current judges of the Constitutional Court of the Russian Federation, Mr Vladimir Yaroslavtsev, describes, his own appointment to the Court on 25 October 1994 was preceded by a lengthy process managed by the presidential administration.[158] In the end, President Yeltsin's decision was announced to Mr. Yaroslavtsev in a manner not unlike the announcement of victory to the winning candidate in a competition for a valuable prize.[159] Significantly, much of Mr Yaroslavtsev's narrative, developed during an interview, creates the perception that the President's administration was aiming to engender a feeling of gratitude in him.[160] It has to be added, however, that the Federation Council voted against those of Mr Yeltsin's candidates who were perceived as being too close associates of his. At the selection round during which Mr Yaroslavtsev was appointed, President Yeltsin proposed six candidates for the six vacancies at the Court; only three were approved at that time, and the remaining three were appointed one-by-one during the next 4 months. The picture emerging from this account is of a certain game between the President who fully controls the pool of candidates and wants to have as many loyal members appointed as possible, and the Federation Council which fully controls the actual appointment stage and will oppose those whom they see as being too close to the President. Neither party can achieve the goal of appointing a judge without the co-operation of the other. In consequence, in order to avoid a stalemate (which serves neither of the institutional players) they must be, in the end, "reasonable". The President must choose candidates that may be seen as relatively "neutral"[161] and the Council must not undermine the President's desire to have judges whom he trusts.

[157] Leigh Sprague, "The Russian Constitutional Court", Parker Sch. J.E. Eur. L. 4 (1997): 339–56, at 345.

[158] Interview with Dr Vladimir G. Yaroslavtsev, Justice of the Constitutional Court of the Russian Federation, Moscow, 19 November 2001.

[159] Id.

[160] He was invited to Moscow (prior to the appointment he was a professional judge in St. Petersburg) to a series of special meetings with high officials in the personnel office, and was then interviewed by a "personnel panel". After his return from holiday he was urged to call immediately a "special number" at the Kremlin to contact, in the middle of the night, the "Head of Yeltsin's administration", who then announced to him that he was the President's choice; id.

[161] "Neutral" is a self-description chosen by Justice Yaroslavtsev when hypothesising about some of the reasons for his successful appointment, id.

1.4 Constitutional Courts' Pursuit of a Monopoly Over Constitutional Adjudication

All CEE countries have established a power of judicial review to be exercised by the constitutional courts, and all of the constitutional courts have been granted the authority to conduct such review in abstracto, irrespective of the concrete cases to which the law might have, or actually was, applied. Most of the constitutional courts of the region also have the task of considering requests from ordinary courts of law to examine the constitutionality of laws that the (ordinary) courts are obliged to apply in the consideration of concrete cases. It should, though, be added that concrete control, initiated by regular courts, is still very rarely practised in CEE; overall, the courts are the least frequent initiators of constitutional review of statutes.[162] There are a few exceptions to the adoption of this German-type model (characterised as it is by a combination of the powers of abstract and concrete review).[163] These exceptional cases apart, the dominant model indicates a neat division of labour: ordinary courts merely apply the law, and if the law seems questionable all they can do is to ask the constitutional court for its advice as to the constitutionality or otherwise of the law in question.

This division is, however, neat in theory only, and the reduction of the "ordinary courts" (including the supreme courts) to the role of docile supplicants who should defer to constitutional courts whenever they have any doubts as to the constitutionality of a law immediately raises problems of the mutual relationships between these two categories of court. As an American constitutional theorist has noted: "Systems that divide legal authority between a constitutional court and a supreme court face co-ordination problems when allocating jurisdiction and resolving inconsistencies in rulings".[164] Such a division also raises problems of professional pride, the sense of dignity and, last but not least, institutional competence. After all, it is the ordinary courts that are at the front line, so to speak, of the application of the law, and whether a given law is constitutional can be best detected from the perspective of its application in specific cases. Specific cases are the business of ordinary courts, and it would thus seem that they should be entrusted with the power to decide on the constitutionality (or otherwise) of the laws that they are obliged to apply.

This, in brief, is the standard rationale for granting the power of concrete judicial review to the ordinary courts. I will discuss the abstract/concrete review dilemma more specifically in Sect. 3.2; here, however, my purpose is to give a brief account of the institutional conflict (between constitutional and ordinary courts of the region) generated by the constitutional courts' monopoly over constitutional

[162] See Ludwikowska, supra note 113 at 186. Regarding Hungarian courts, see Brunner, supra note 51 at 82.

[163] See footnote 37 above.

[164] Tom Ginsburg, "Economic Analysis and the Design of Constitutional Courts", Theoretical Inquiries in Law 3 (2002): 49–85 at 59.

adjudication. This monopoly is not a necessary consequence of their existence; one could reconcile the role of constitutional courts in the conduct of abstract review with the role of ordinary (including supreme) courts in setting aside laws that they find unconstitutional in the course of the consideration of concrete cases. As Gábor Halmai proposed with respect to the Hungarian practices of judicial decision-making:

> When a judge, identifying a conflict between the fundamental law and the legal instruments he is supposed to apply, lets himself be guided by the former, he is only applying section of Article 77 of the [Hungarian] Constitution ... which describes the fundamental law as a system of norms which is binding on everyone.[165]

In practice, however, the attribution of the power of abstract review has created an incentive for constitutional courts to insist that they alone have the rights to review laws in terms of their constitutionality. The reverse side of the coin has been a (more or less successful) denial of the power of ordinary courts to set aside laws that they find to be unconstitutional, even though they are supposed to apply the constitution directly. How can one reconcile the duty of the courts (of all courts) to apply the constitution directly with the constitutional court's monopoly over declarations of unconstitutionality? Direct application of the constitution, in conjunction with the principle of the supremacy of the constitution over ordinary laws, necessarily implies the right (indeed the duty) of an institution to refuse to apply any law found by it to be unconstitutional. Whether this refusal must be followed by a direct application of the constitution by that very court, or should rather lead to a referral to a constitutional court that has the last word whenever a doubt as to the constitutionality of a law arises, became the central issue in the inter-institutional conflicts that emerged in CEE in connection with constitutional review.

In these conflicts a familiar pattern occurred in almost all the countries of the region.[166] Ordinary courts (led by the supreme courts) fought for the right to set aside laws they found to be unconstitutional, while the constitutional courts claimed a monopoly over the power to make such findings. Russia provides a good example of such a conflict; it resulted in a victory for the Constitutional Court which fiercely fought against granting regular courts the power to make their own declarations as to the unconstitutionality of statutes. It maintained that the only avenue open to

[165] Gábor Halmai, "Who is the Main Protector of Fundamental Rights in Hungary? The Role of the Constitutional Court and the Ordinary Courts", in JiĜí PĜibáĖ, Pauline Roberts & James Young, eds., Systems of Justice in Transition: Central European Experiences since 1989 (Ashgate: Aldershot 2003): 50–73 at 66.

[166] There are exceptions, however. In Hungary, the Supreme Court actually resisted a proposition (pressed upon it by the state prosecutor in a specific case before it) that it should consider all legal instruments relevant to the case, including the Constitution, and that in the process it should be able to set aside the sub-constitutional provisions inconsistent with the Constitution, see Halmai supra note 166 at 65–66. The Supreme Court announced on this occasion: "Since no other agency is entitled by the Constitution to do so, only the Constitutional Court is entitled to state whether a given provision of substantive or procedural law valid at the time is in contradiction with the Constitution or not", cited id. at 66.

courts in such cases was to stay the proceedings and address the Constitutional Court in the form of "concrete review". This doctrine, developed by the Constitutional Court, was a reaction to the "rasjasnienie" [clarification] by the Supreme Court of the 31st October 1995,[167] addressed to all the courts of the land. The Supreme Court urged all judges that if they were to come across, in the process of taking a decision in a specific case, a statute that they find to be unconstitutional, they should disregard it and apply the Constitution directly instead. The Supreme Court explicitly stated that "the court, in determining the matter under review, will apply the Constitution directly ... whenever a judge becomes convinced that a federal law ... is in conflict with the Constitution". The option of seeking the opinion of the Constitutional Court on the question of constitutionality was recommended in cases "of imprecision relating to the question of conformity, or lack thereof, with the Constitution of a law which has been, or is to be, applied to an actual matter".[168] The clear implication of this clarification was that the process of concrete review by the Constitutional Court should be activated only when an ordinary court has doubts. In contrast, if the court was convinced about the unconstitutionality of a statute, it could simply disregard the statute and apply the Constitution directly. In other words, it could give effect to its own understanding of the true meaning of a constitutional provision as applied to a concrete case before it.

However, the Constitutional Court reacted by asserting its monopoly over judicial review. In a decision of 16th June 1998, taking the form of a binding interpretation of the Constitution, it reminded the courts that it was itself the only body competent to decide upon issues of constitutionality, either in abstracto or in concrete cases.[169] Also, acting extracurially, some Constitutional Court Justices strongly reacted against the Supreme Court's view and reasserted, in no uncertain terms, that even when an ordinary court is convinced about the unconstitutionality of a statute it has a duty to petition the Constitutional Court rather than to refuse to apply the law in question.[170] It is only with regard to sub-statutory acts that the regular courts may directly apply the Constitution rather than the act.[171] A justice of the Constitutional Court in Russia explained the reasons for the strong rejection of the principle that ordinary courts could apply the Constitution directly and, in the process, declare statutes unconstitutional in the following manner: "We would reach the situation that, in one place, a court would declare the statute invalid

[167] Discussed in detail by Angela Di Gregorio, "The Evolution of Constitutional Justice in Russia: Normative Imprecision and the Conflicting Positions of Legal Doctrine and Case-Law in Light of the Constitutional Court Decision of 16 June 1998", Review of Central and East Europ. Law 24 (1998): 387–419 at 389–96.

[168] Quoted id. at 390.

[169] For a discussion of this decision, see id. at 398–401.

[170] See the opinions of Constitutional Court Justice Morshchakova expressed in legal periodicals, summarised by Di Gregorio, id. at 394–95.

[171] Interview with Professor Boris A. Strashun of the Center for Analysis of Constitutional Justice at the Constitutional Court of the Russian Federation, Moscow, 19 November 2001.

and, in another place, the same statute would be found valid. ... We would have disorder. ... In such a big country we need to have a centralised system and this role is played by the Constitutional Court".[172]

However, not all Russian Constitutional Court justices think in this way. It is worth noting the remarkable opinion expressed by Justice Gadzhiev in his dissent to the June 1998 decision:

> Decisions of the ordinary courts which have identified a conflict between a law and the Constitution, and have declined to apply the law, without repealing them [sic], represent the birth of a judicial law, the development of which is particularly indispensable to the Russian legal system in its search to avoid positivist approaches.[173]

It should be added that such a pattern of conflict is not specific to CEE courts only. One may observe a more general trend that whenever constitutional courts have been established in post-authoritarian contexts, a pattern of conflict between these courts on the one hand, and the supreme courts (plus other ordinary courts) on the other, has emerged. This was the case, for example, in Spain soon after the establishment of the Constitutional Court,[174] and also in Italy and Portugal. Such conflicts are understandable. A new, powerful and popular institution, endowed with a lot of political prestige and eager to make use of self-righteous rhetoric, is seen with distrust and perhaps envy by the less glamorous, more established institutions, including the Supreme Court. On the other hand, the supreme courts and the rest of judiciary are viewed by constitutional courts, composed largely of academics (often former dissidents or opposition activists in the authoritarian era), as the vestiges of the ancien régime, unwilling and incapable to behave in the new spirit of democratic and liberal values prevailing after the transformation. Hence, a territorial conflict develops, in which both institutions try to enlarge their own powers and to restrict those of their rival. Often, this conflict leads to a real "war of the courts", in which the supreme courts seek to simultaneously establish their own right to declare statutes unconstitutional (and also to establish such a right for lower courts) and to limit the authority of the judgements of the constitutional court vis-à-vis the judiciary.

The latter aspect became particularly pronounced in the Czech war of the courts. The "war", apart from its legal and constitutional implications, also had a clearly political dimension. The Constitutional Court, perhaps uniquely among the constitutional courts in CEE, was, since its inception, homogeneously anticommunist in its political make-up. All of the judges were appointed almost at the same time, between July 1993 (when the first 12 Judges were selected) and January 1994 (by which time the remaining three had been appointed), by President Vaclav Havel, with the consent of the Parliament in which the Civic Democratic Party

[172] Interview with Dr Vladimir G. Yaroslavtsev, Justice of the Constitutional Court of the Russian Federation, Moscow, 19 November 2001.

[173] Quoted in Di Gregorio, supra note 167 at 403.

[174] Oral remarks by Pedro Cruz Villalon, Justice of the Spanish Constitutional Court, Workshop on Constitutional Adjudication in Southern and Western Europe, Fondazione Adriano Olivetti, Rome, 25–26 March 2002.

(of the then Prime Minister Vaclav Klaus) enjoyed a majority.[175] There was therefore no need to try to strike a compromise between the forces of the ancien régime and the new post-transition elite (as in Hungary). Neither was there a gradual, staggered cycle of appointments resulting in a politically heterogeneous court (as was the case, for example, in Poland). The judges on the Czech Constitutional Court felt that they belonged to a relatively cohesive democratic bloc, and they considered the Supreme Court as belonging to the old apparatus of the authoritarian regime. Conversations with the judges of the Constitutional Court and with its observers clearly confirm the prevalence of this self-perception. For example, one of the justices described the judges of the Supreme Court (at least, at the time of the "war of the courts") as belonging to the "old structures", by which he meant that they were rooted in the previous, communist establishment.[176]

The legal dimension of the conflict in the Czech Republic was related to the binding power of Constitutional Court decisions taken in the process of hearing constitutional complaints from individual citizens. The Supreme Court maintained that such decisions did not bind the ordinary courts (including the Supreme Court) in their future decision-making, and further that ordinary courts were not included in the category of "public authorities" that, according to the constitution, are bound by the decisions of the Constitutional Court.[177] In turn, the Constitutional Court held that it had the authority, within its constitutional-complaint jurisdiction, to review the final decisions of all authorities, including the courts, insofar as they may breach the constitutional rights of Czech citizens. The immediate confrontation arose with respect to a decision on conscientious objection, in which the Supreme Court refused to consider the argument used by the Constitutional Court in arriving at its judgment (as opposed to a mere statement of the verdict) as being binding upon it.[178] To be more precise, the controversy between the two courts centred on three inter-related issues. First, whether the Constitutional Court could review the decisions of courts (this being an element of the debate over whether courts are "public authorities" in the constitutional sense). Second, whether decisions of the Constitutional Court are binding upon the future decisions of all courts, and not only in the specific case decided. Finally, whether the decisions are binding only insofar as the statement of the verdict is concerned (which is a statement of unconstitutionality only a few sentences long) or whether the reasoning (ratio decidendi) is binding as well, as the Constitutional Court maintained. The controversy was pushed to the point that the

[175] According to the Constitution, the justices of the Constitutional Court are appointed by the President of the Republic with the consent of the Senate. However, the Senate had not been set up by 1996, and so until it was its role was played by the Chamber of Deputies.

[176] Interview with Professor Vojtech Cepl, Justice of the Constitutional Court of the Czech Republic, Prague, 22 March 2002.

[177] For an account of this controversy, see Pavel Holländer, "The Role of the Czech Constitutional Court: Application of the Constitution in Case Decisions of Ordinary Courts", Parker Sch. J.E. Eur. L. 4 (1997): 445–65.

[178] Decision IV.US 81/95 of 18 September 1995, http://www.concourt.cz/angl_verze/doc/4–81–95.html

Czech Constitutional Court, in one of its decisions, accused the Supreme Court of violating the Constitution by refusing to decide a specific matter in conformity with the law as enunciated by Constitutional Court jurisprudence.[179]

The Constitutional Court eventually prevailed on all three of these issues. However, at least according to some academics, there was no clear legal basis for granting it the authority to establish norms binding upon the future decisions of all courts. According to these critics, the ratio decidendi should properly have a binding effect only upon the Constitutional Court itself, and a merely "persuasive" effect upon all other courts.[180] Against this point of view, a justice of the Constitutional Court has argued that the confinement of the binding power to the statement of verdict only would lead to a paradoxical result in those cases in which the Court upholds a statute but at the same time prescribes a constitutionally required interpretation. It would render such decisions superfluous, because the constitutionally prescribed interpretation is contained in the justification of the decision, not in the statement of the verdict.[181] This, according to Justice Holländer, "would also force the Constitutional Court into a course of action which, in its consequences, would appear absurd and unsustainable: not to rely on the possibility of a constitutionally conforming interpretation, to abandon the principle of judicial restraint, and to nullify a contested enactment whenever there is the least possibility of it being interpreted in a constitutionally non-conforming manner".[182] Regardless of this, the level of compliance by the ordinary courts with Constitutional Court precedents is less than perfect; as Justice Holländer concedes, "In its practice, the Constitutional Court is frequently confronted with cases in which ordinary courts refuse to decide in conformity with the proposition of law declared by the Constitutional Court".[183]

Similarly in Poland, the Constitutional Tribunal has repeatedly rejected the proposition that the duty of regular courts to apply the Constitution directly justifies those courts' prerogative "to disregard statutory regulations" deemed unconstitutional. It has urged that the only avenue open to courts in such cases is to address a question to the Tribunal.[184] As it declared in one of its early decisions: "A judge, while being subordinate to the Constitution, is not thereby relieved of subordination to a statute".[185] The combination of the principle that only the Tribunal can declare laws unconstitutional with the principle of the presumption of the constitutionality of statutes, effectively denies the regular courts any role in deciding to disregard a statute due to its unconstitutionality. As a senior Constitutional Tribunal judge

[179] See Holländer, supra note 177 at 454.

[180] Interview with Dr Vladimir Sladecek of the Law Faculty, Charles University of Prague, Prague, 23 March 2002.

[181] Holländer, supra note 177 at 450–52.

[182] Id. at 452.

[183] Id. at 456–57.

[184] Garlicki, supra note 57 at 89.

[185] Decision P. 8/00 of 4 October 2000, full text on file with the author.

(indeed, its Vice-President) declared in a scholarly article, to allow the "regular" judges to review the constitutionality of statutes would lead to situations in which a judge could, for example, impose a 40-year jail sentence or establish taxation rates on the basis of his own understanding of the constitutional principle of social justice.[186] While this example is quite misleading, the fact that such a "parade of horribles" was given as an illustration of the perceived consequences of universalised judicial review indicates how strenuously the principle is rejected by constitutional judges, and how strongly they defend their exclusive authority to review the constitutionality of laws.

This doctrine of the exclusive competence of the Constitutional Tribunal on matters constitutional is not universally accepted in Poland.[187] As one justice of the Tribunal has admitted, "the problem of a 'division of powers' between the Constitutional Tribunal and the other parts of judiciary [has] acquired now a very serious character".[188] Clearly, the Supreme Court of Poland believes that all ordinary courts are authorised to declare whether a statutory provision is inconsistent with the Constitution, and to refuse to apply it. This view is seen as resulting from the combination of two constitutional rules: that of the direct applicability of the Constitution (art. 8 (2)), and the principle of judicial independence and, more relevantly, their "submission only to the Constitution and statutes" (art. 178 (1)). The only limit upon this power is the binding nature of the decisions of the Constitutional Tribunal. If the Tribunal has already declared a given statutory provision constitutional, an ordinary court (including the Supreme Court) cannot declare it otherwise. It is significant, however, that, even in this latter case, the subordination of ordinary judges to the Tribunal was questioned by the regular judiciary. The Supreme Court had to deal with a "legal question" addressed to it by a judge who inquired whether the courts are bound by "affirmative" decisions of the Constitutional Tribunal, on the basis that only the invalidating decisions can be seen to be generally binding decisions in the constitutional sense.[189] The Supreme Court declined to go down this path, and confirmed the equally binding nature upon all courts of "affirmative" decisions of the Tribunal. Nevertheless, the very fact that such a doubt was expressed by a judge indicates the persisting unease within the judiciary relating to the monopolistic role of the Constitutional Tribunal in terms of the articulation of constitutional norms.

However, in the absence of a specific decision by the Constitutional Tribunal, the power of judicial review of the constitutionality of statutes by all judges is considered by the "regular" judiciary to be a natural corollary of the direct binding effect of constitutional provisions.[190] As the Chief Justice of the Polish Supreme

[186] Janusz Trzcinski, "Orzeczenia interpretacyjne Trybunalu Konstytucyjnego", PaĔstwo i Prawo 57:1 (2002): 3–14 at 9.

[187] Garlicki, supra note 57 at 89 n. 17.

[188] Id. at 89.

[189] For a description of this "legal question" and of the Supreme Court's response (in its decision of 4 July 2001), see Trzcinski, supra note 186 at 12.

[190] See "Ustawa zasadnicza w sądach powszechnych", Rzeczpospolita (Warszaw) 5 July 2001 at C-1.

Court observed, ordinary courts do, after all, routinely conduct a "positive control of constitutionality of laws", namely, when they decide not to lodge a constitutional question to the Tribunal, "and yet, such decisions may also in practice lead to inconsistency between the case law of the Supreme Court and of the [Constitutional] Tribunal".[191] Quite apart from the doctrinal controversies, it is a fact that courts of lower instance do occasionally refuse to apply laws that they consider unconstitutional, on the basis of the constitutional principle of the direct binding force of the Constitution, proclaimed in Article 8(2). The same applies to the Supreme Administrative Court; as its President wrote, his Court has on a number of occasions refused to apply a statute (for example, some articles of the Customs Code) on the basis of its unconstitutionality, upon ascertaining that the Constitutional Tribunal had previously invalidated similar statutory provisions.[192] In these cases, according to the President of the Administrative Court, it was not necessary to lodge a "legal question" to the Tribunal.

At a certain point in the Polish "war of the courts" the Supreme Court achieved a victory in the battle. Under the pre-1997 constitutional rules, the Constitutional Tribunal had the power to provide a binding interpretation of the law (not just of the Constitution but also of statutes). The Supreme Court considered this to be an anomaly and thought, in particular, that it conflicted with its own power to interpret the meaning of a law as applicable in a given case. In the end the arguments of the Supreme Court prevailed; in the 1997 Constitution the power in question was removed from the Constitutional Tribunal. As the Chief Justice of the Supreme Court (appointed to this position only after the 1997 constitutional change) remarked on the background to this controversy: "Many judges of the Supreme Court had not only expressed doubts as to the merits of certain interpretative decisions [by the Constitutional Tribunal] (particularly if they differed from the jurisprudence of the Supreme Court), but they had also questioned the binding force of such interpretations upon the courts, including naturally upon the Supreme Court".[193] However, the tension did not end there. Ever since the loss of this particular power, the leading justices of the Constitutional Tribunal (including its Chief Justice) have continuously complained about this "defect", demanding the restoration of their competence to provide binding interpretations of all laws.[194] At the same time, the justices of the Supreme Court have warned that giving in to such a demand would inevitably lead to "a new conflict between the Constitutional Tribunal and the Supreme Court".[195]

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[191] Lech Gardocki, "Osiagniecia i spory", Rzeczpospolita (Warsaw) 15 April 2002 at C-2.

[192] Roman Hausner, "Zapytajcie Trybunal", Rzeczpospolita (Warsaw) 18 March 2002, http://www.rp.pl/gazeta/wydanie_020318/prawo/prawo_a_2.html

[193] Lech Gardocki, "Czy potrzebna jest wykáadnia Trybunalu Konstytucyjnego", Rzeczpospolita (Warsaw) 9 July 2001 at C-1.

[194] See Marek Safjan, "Wykladnia prawa – uzyteczny instrument eliminowania niepewnosci", Rzeczpospolita (Warsaw) 4 June 2001 at C-1.

[195] Statement of the Chief Justice of the Polish Supreme Court, Lech Gardocki, quoted in "Trybunal buduje praworządną Rzeczpospolitą", Rzeczpospolita (Warsaw) 20 March 2002 at C-1; see also "Trybunal przed dorocznym podsumowaniem", Rzeczpospolita (Warsaw)19 March 2002 at C-2.

Similarly, the constraints upon the individual constitutional complaint procedure, which in Poland is restricted to the abstract review of a law that has formed the basis for a particular, rights-affecting decision (rather than the actual application of the law in question), have been a source of tension between the two courts. The Supreme Court fears that removal of this restriction would place the Constitutional Tribunal in the position of a super-appellate court, with the competence to control, and overturn, "final" decisions of the Supreme Court.[196] The Chief Justice of the Polish Supreme Court warned that to allow the Constitutional Tribunal to rule on potentially unconstitutional applications of laws would imply "the entry of the [Constitutional] Tribunal into the field of concrete decision making". He noticed caustically that it would mean that Poland would have "the Supreme Court and also the 'Truly' Supreme Court".[197] Indeed, the choice of a model of constitutional complaint restricted to control of the unconstitutionality of laws (and not of the application of those laws, as is the case in some countries, such as the Czech Republic) was partly a result of the "fears of representatives of the [Supreme Court] that the [Constitutional Tribunal] may become a judicial body empowered to control the decisions of the [Supreme Court]".[198]

1.5 Conclusions

Notwithstanding the virtual absence of any tradition of judicial review in their pre-Communist histories (not to mention the abhorrence with which Communist constitutional theory viewed judicial review), all post-communist states of CEE have established institutions and processes of constitutional review of considerable homogeneity: they have all opted for a system of centralised, ex post and abstract review of statutes, with no possibility of appeal from the constitutional court's decision. As noted, there have been some departures from this paradigm: for example, almost all countries of the region provide for the possibility of a "concrete" review of a given provision, in conjunction with a specific court case (always, however, in addition to, rather than replacing, abstract review); some constitutional courts can review bills before they enter into force; and there have been occasional departures from the principle of the finality of the decisions of these courts, etc. Nevertheless, the exceptions to the norm have been rare, and the similarities clearly outweigh the differences.

The powers of the different courts to control the constitutionality of statues vary somewhat in terms of the authority to identify constitutional omissions, to act sua sponte (and to go beyond the bounds of the original petition), or to review the constitutionality of the application of statutes as opposed to the abstract content of

[196] Id.

[197] Gardocki, supra note 191 at C-2.

[198] Czeszejko-Sochacki et al., supra note 75 at 155–56.

the statutes themselves – but again, these are differences pertaining to the margins, not the core, of the process of judicial review. More significant divergences exist in relation to the definition of who has standing to bring a challenge before the court, and in particular whether individual citizens have the right to lodge a constitutional complaint; there is, however, quasi-uniformity on the conferral of the right of initiation of proceedings upon top executive officials and groups of MPs. The tenure of judges is limited but relatively long (although there is a lack of uniformity regarding re-appointment), and the systems through which they are appointed are thoroughly political: such appointments are either made exclusively by parliaments, through a process of collaboration between the executive and the parliament, or by allocating a quota of seats on the court to be filled by different bodies (normally the president, the parliament and a body representing the judiciary).

This institutional design has led to a concentration of the power to interpret, articulate and apply the meaning of constitutional norms in a prominent body of high public visibility, setting it quite evidently apart from the judicial system. This, naturally, created tension in terms of the interaction between and interdependence of the judicial system and the new institutions for judicial review; a tension fuelled by the apparent monopoly granted to constitutional courts to articulate with finality the "correct" meaning of the relevant constitution. This, in turn, led to the "wars of the courts", which occurred, along very similar lines, almost everywhere in the region. This "war" was not only about institutional self-aggrandisement; it also concerned the much more fundamental principle of the direct application of the constitution by all courts, and consequently their power to set aside laws that they consider unconstitutional, making in the process direct appeal to their own understandings of the constitution. Such an approach has, however, been strongly resisted both by the constitutional courts and by the predominant part of scholarly commentary on this issue: the power of the "ordinary" courts to conduct their own binding constitutional interpretation has been seen as inconsistent with the logic of the system of judicial review as adopted in CEE. But can the monopoly claimed by constitutional courts, to articulate the true meaning of the constitution, be reconciled with their claims to legitimacy as judicial (or quasi-judicial) bodies? Is this zeal in asserting a privileged insight into constitutional wisdom not a good reason to reconsider the grounds for the adoption of the concentrated/abstract model of judicial review in the first place? These two questions will be pursued further in the next chapter.