Chapter One

THE BEGINNING

Americans may find it surprising, but judicial review of legislative and executive action has a long history outside the United States.[1] The modern history of judicial review in Europe and elsewhere can nevertheless be seen as a 250-year progression from hostility to widespread acceptance of judicial oversight over everything from police investigative techniques to legislation enacted by super majorities, with supervision of elections, the banning of political parties, and trials of the highest state officers often thrown in.

The French Revolution and its antecedents were seminal to the development of judicial review.[2] As early as 1748, Montesquieu, himself a judge, called for a strict separation of governmental powers, but downgraded the judiciary to an "inanimate being," a mere "*bouche de la loi.*" For him, the judiciary was not a true and legitimate power of government like the legislature, but merely a subordinate appendage. This downgrading of the judicial branch was reinforced by the dominance of the Rousseauian notion that a society's general will is embodied only in its legislation.[3]

The ideas of Montesquieu and Rousseau evoked a sympathetic response from the revolutionaries who had suffered under the French *parlements,* courts manned by hereditary aristocrats who exercised broad judicial, administrative, and legislative powers. Their power included the authority to determine whether royal decrees would be enforced as law, and they used this power to block liberal reforms.[4]

In the opening days of the revolution in November 1789,[5] the revolutionary reformers abolished the *parlements* and concentrated all lawmaking powers in the legislature to prevent any possible continuation of this "*gouvernement des juges.*"[6] To ensure that judges would only apply

the law made by others and would not themselves make law, the reformers tried to write legislative codes that would cover virtually every possible situation and be so clear that any citizen could understand them.[7] If any ambiguities arose, the revolutionaries ordained that "judges shall have recourse to the legislative body whenever it appears desirable to interpret a law."[8] Judges were also denied the power to "interfere" in any way with administration.[9] And to make absolutely sure that judges did not engage in law making, it was established that their decisions applied to and bound only the specific parties in the case before them, with no precedential value for future cases.[10]

With the initial success of Napoleon's armies and the continuing influence of French law and culture, these attitudes and approaches spread throughout continental Europe and its different national legal systems. Judges became civil servants, mere bureaucrats. They were denied any independent judgment as to the meaning or purpose of the law and given no power over the other branches of government. Legislative bodies were supreme, not only in adopting and interpreting ordinary law but in construing, applying, and if necessary, altering the Constitution.

As everyone knows, events on the other side of the Atlantic took a very different turn. Chief Justice John Marshall's assertion of the power of judicial review over federal and state legislation[11] and over administrative action[12] went unchecked and virtually uncriticized, despite the intense partisanship of the times and the absence of any reference in the Constitution to this power.[13] Moreover, Marshall's assertion of this power was not unprecedented. Some state courts had already overturned state legislation during the Articles of Confederation period, and in The Federalist No. 78 Alexander Hamilton had expressly asserted the power.[14]

As American ideas about judicial review began to filter into Europe (although the U.S. Supreme Court itself struck down no federal legislation for over half a century after *Marbury v. Madison* until the notorious *Dred Scott* case in 1857),[15] some continental reformers began to think that such a tribunal would be useful in Europe as well. In 1849 German liberal reformers at the Frankfurt Assembly proposed a constitution with not only a bill of rights but also a special court with exclusive jurisdiction to exercise constitutional review over federal and state legislative, executive, and judicial power. In a remarkable anticipation of what was to be adopted a century later, they also included a constitutional provision for individual complaints against either unconstitutional or unjust actions.[16]

The collapse of the 1848 revolution in Germany effectively blocked this early attempt at judicial review. And though as early as 1863 a majority of an association of German jurists "came out in support of judicial review, an attitude that existed among German scholars until the Hitler era,"[17] it would take several military disasters and a foreign occupation before Germany would again make a meaningful effort at judicial oversight of the constitutionality of legislative action.

More surprising is that even in France, the American experience stimulated interest in judicial review of legislative action. There, however, the traditional hostility to judges and a near-religious allegiance to parliamentary supremacy were too strong. The obvious need for some type of judicial control of *administrative* action nevertheless produced some very significant results. Since the hostility to judges was still strong, the French developed a system of administrative tribunals to "supplement" parliamentary control. Over the decades this became the Conseil d'État. Though nominally not a "court" because it is in the executive branch, in 1872 the Conseil d'État was authorized to resolve complaints against administrative officials and agencies and even to impose damages on behalf of injured complainants, becoming a court in all but name. It has since become crucial to the defense of individual rights, with the authority to invoke the current Constitution, the Principles of the Revolution of 1789, and even the "Republican tradition." It still has no formal authority to review laws enacted by the French parliament, but it does have the authority to review the constitutionality and legality of executive decrees. Since the 1958 Constitution created for President Charles de Gaulle turned over to executive decree a great deal of authority usually considered legislative, the Conseil d'État has obtained jurisdiction over a wide range of administrative actions and edicts that are legislative in all but name.[18]

The French-inspired effort to deny the ordinary judiciary virtually all power to interpret laws and establish precedents could not succeed either. Obviously, no code can be so clear as to obviate the need for a substantial amount of interpretation, and a judicial reference back to the legislature for each interpretive question is manifestly unworkable.[19] Moreover, any legal system that aspires to stability and legal security must pay attention to decisions in prior cases.[20] As a result, French judges resorted to Roman law and Roman history for guidance.

Under the guise of "interpretation" and with the help of broad statutory "general clauses"[21] continental judges were thus soon involved in law making, despite the official theory to the contrary.[22] This interpretive role became particularly prominent in the latter half of the nineteenth century because the legislatures, which had initially been cautious about enacting laws to change social reality, began to engage in more social engineering. This produced statutes that for technical and political reasons often contained gaps and ambiguities.[23] In Germany and elsewhere, the

interpretive process was quite open, more so than in France,[24] but even the French recognized the breadth of the lawmaking power actually exercised by judges.[25]

Judicial control of *statutes* also put down some roots in France during the nineteenth century. Even before the Revolution, certain Physiocrat jurists had contended that judges had an obligation to honor constitutional principles and to override statutes they deemed inconsistent with the constitution. "A constitution is a body of obligatory laws or it is nothing," declared the Abbé Sièyes. Blown away by the Revolution, these ideas were revived at the end of the nineteenth century, when French public law experts began to urge emulation of the American system. According to Alec Stone, "no major figure in French public law after 1890 took issue with the logic of Sièyes and John Marshall."[26] Unlike the German reformers in 1849, these experts did not advocate a special constitutional court, but favored the American system, where ordinary courts exercised judicial review as part of their jurisdiction over ordinary lawsuits.

In the 1920s, the campaign for judicial review in France stalled, seemingly for good. Opponents pointed to the hostility to social reform of the contemporary U.S. Supreme Court, arguing that the backgrounds and training of judges made such conservatism inevitable.[27] The judiciary would dominate the state on behalf of reactionary principles and policies, they warned. The opponents prevailed, and judicial review was blocked until the adoption of the 1958 Constitution, which established judicial review but in a unique French form.[28]

The discussion so far has focused on France because of its influence on European law during the nineteenth century[29] and on Germany because of that country's influence on European legal and especially constitutional thought in the twentieth century.[30] But there were developments elsewhere. Following the lead of the United States, almost all Latin American nations authorized judicial review of legislation during the nineteenth century; only Chile, Paraguay, and Uruguay did not.[31] Whether Latin American judicial review amounted to much is dubious. These unstable regimes, frequently subject to violent coups and takeovers, were hardly an ideal setting for so delicate a function.[32]

On the Continent, as early as 1847, Greece authorized judicial review of legislation by its Supreme Court. Initially, this was limited to review of formal defects in legislation, but in 1871 and 1897 it was expanded to include substantive matters.[33] In Denmark, review by the regular courts also existed, but it was rarely invoked. And in Romania, in 1912, a lower court struck down a statute as unconstitutional, despite the absence of any constitutional or statutory authority. Curiously enough, this was done after consultation with French experts at a time when France denied its courts this authority. The action was upheld by the Romanian Court of Cassation. In 1923, Article 103 of the Romanian Constitution formalized this power but limited it to the Court of Cassation and restricted the effect of the court's ruling to the case before it. The court used it primarily on behalf of the propertied interests, annulling statutes on agricultural credit and the gas monopoly.[34] The provision was carried forward in the 1938 Constitution (Art. 75) but there is no evidence that it was ever invoked.[35]

Despite all this judicial lawmaking, the official ideology insisting on judicial impotence persisted. So much so that, according to Alec Stone, the campaign for constitutional review failed in France not only because of political opposition but also because "judges had internalized their bureaucratic role and were further constrained by their lack of independence from authority."[36] This also held true for Germany, and, interestingly enough, for Romania, despite the 1912 decision and the 1923 Constitution. There was also burgeoning authoritarianism throughout the Continent as disillusionment with democracy grew, and this precluded the necessary judicial independence.

Nevertheless, the early post–World War I period saw the beginnings of the movement toward judicial review that swept Europe after 1945. Despite the continuing rejection of judicial review in most of Europe, in 1920 and 1921 the Austrian Hans Kelsen conceived and established in Austria a specialized constitutional tribunal to decide constitutional questions; Czechoslovakia also established such a tribunal. This institution became the model for almost everything that came after.

Kelsen, one of the most influential legal theorists of the twentieth century, was asked to draft a constitution for the new Austrian republic that emerged from the ruins of the Austro-Hungarian Empire in 1919. Believing, with Marshall, that constitutions have to be treated as a set of legal norms superior to ordinary legislation and should be enforced as such, he also recognized (and perhaps shared) the prevalent distrust of the established judiciary as a vehicle for that kind of enforcement. He therefore hit on the same kind of mechanism that the Frankfurt liberals had come up with in 1849—a specialized tribunal separate and apart from the regular judicial system that would monitor legislation and had the power to nullify a law it found had run afoul of the constitution. To counter arguments that this tribunal would be doing the kind of policy making that should be done only by a legislature, Kelsen deliberately omitted a bill of rights from his constitution, restricting the tribunal to what he called "neg-

ative" lawmaking. Standing, the right to invoke the tribunal's jurisdiction, was given to the ordinary courts, which would be required to refer any issues relating to the constitutionality of a law. This right was also granted to specific high public officials who could bring an issue to the tribunal as a matter of original jurisdiction.

Although Kelsen designed this model for Austria, the first constitutional court to be adopted on his model was actually not in Austria, but in Czechoslovakia in February 1920. In its entire eighteen-year history, however, the latter dealt with the constitutionality of only two laws.[37]

The Austrian Constitutional Court, which came into being a few months later in October 1920, was very similar to the Czechoslovak court, except that its jurisdiction was wider: it decided not only constitutional questions but also disputes growing out of Austria's federal structure, elections, and referenda and accusations against high state officials. Although standing was originally limited to high state officials in both the Austrian and Czechoslovak systems, in 1929 Austria extended standing to the *länder,* (the regional units in Austria's federal structure), to challenge certain federal actions. It also authorized referral of constitutional questions to the Constitutional Court by the high courts of the regular court system.[38]

Germany also experimented with judicial review during the Weimar regime. The 1919 Constitution provided for a special constitutional tribunal to decide constitutional controversies involving the German *länder* and for the impeachment of high state officials. Although the tribunal decided a few cases, it did not become an important institution. In 1921, the Federal Supreme Court asserted the power of judicial review, claiming that it had always had this power, a dubious claim according to almost everyone.[39] The court used this power sparingly, and primarily to protect property and business interests, arousing resentment among more liberal elements.[40]

World War II transformed the picture. Constitutional judicial review spread all over Western Europe and through much of the rest of the world. Because this story has been described and discussed so often, there is no need for more than a brief sketch at this point.

Kelsen's continental model—a special tribunal outside the regular judiciary to provide a "constitutional defense" against unconstitutional legislative action[41]—was the preferred form. Former German Constitutional Court Judge Helmut Steinberger has called the establishment of such special constitutional tribunals "the only truly novel institution within

the parliamentary systems of Western Europe,"[42] and the same holds true for the emerging nations in Central and Eastern Europe.

The former authoritarian regimes, obviously reacting to their recent history of human rights abuses and dictatorial government, started the movement toward judicial review. As Luis Lopez Guerra, vice president of the Spanish Constitutional Court commented about his country and other former authoritarian regimes,

> Constitutional courts appear historically during the creation of new democratic regimes and, in many cases, after experiences of authoritarian regimes in which constitutional norms and guarantees had been violated or disregarded, often with the collaboration of the legislature. . . . Thus, the establishment of constitutional jurisdiction is linked with the desire to guaranteed democratic constitutional stability in the light of past and present dangers and to prevent constitutional mandates from being eroded and eventually suppressed by a parliamentary majority which disregards the Constitution.[43]

Austria was the first to follow this path, reestablishing its prewar Constitutional Court in 1945. Germany, however, was the most influential, adopting express provisions in the 1949 Basic Law for constitutional review and a Kelsen-style constitutional court. Unlike Kelsen's model, the protection of human rights was intended from the first to be an essential element of the tribunal's jurisdiction, and so it has turned out.

Italy also moved quickly to establish judicial review, even before Germany, in 1947. At first it gave this jurisdiction to the regular court system, following the American model.[44] Apparently, this was not too successful because, according to William Cohen and Mauro Cappelletti, "the ordinary 'career' judge, particularly the elderly judges . . . did a very poor job in the implementation of a highly programmatic and progressive constitution."[45] In 1956, Italy therefore adopted the European model and since then its constitutional court has become a powerful institution in Italian life.[46]

Greece, Spain, Portugal, Belgium, France, and other countries soon followed suit, and, in almost all of them as well, the court became a significant political and judicial force. Human rights accounted for a significant proportion of these courts' jurisdiction almost everywhere, as did federalism in the federal states like Spain and Belgium. Some of the Communist countries also experimented with judicial review: Yugoslavia established a constitutional court in 1963[47] and Poland authorized a seemingly weak tribunal in 1982, which went into operation in 1986.[48] And

under Mikhail Gorbachev, even the Soviet Union adopted a Constitutional Committee in 1988 that had a not insignificant impact on the Soviet legal system.[49]

The most important holdout was France, but it too wound up adopting a form of judicial review, although one different from both the American and Austrian models. The process went through several phases. The 1946 French Constitution created a constitutional committee to review the constitutionality of legislation.[50] Then, the 1958 Constitution created a special constitutional tribunal, the Conseil Constitutionnel. The original purpose of this tribunal was to ensure that the French parliament, the National Assembly, whose legislative jurisdiction was limited to certain subjects, did not encroach upon the decree powers of the government, which were made very broad.[51] Composed of nine members chosen by the president and the heads of the two parliamentary chambers,[52] the Conseil was intended to protect the executive from the Assembly by reviewing parliamentary enactments *before* they were promulgated to make sure they were within the limits of the shrunken legislative authority given the National Assembly by the 1958 Constitution. It was also empowered to review elections.

Two events transformed the Conseil Constitutionnel into a powerful protection for individual liberty and constitutional government, as well as a significant political force. As described by F. L. Morton,

> [The first was] a 1971 decision [that] struck down a government bill that seriously restricted freedom of political association. To support their ruling, the Conseil interpreted the Preamble of the 1958 Constitution as incorporating all the rights enumerated in the 1789 Declaration of the Rights of Man and the Preamble of the Constitution of the Fourth Republic. . . . Subsequent decisions incorporated additional rights declared in previous French laws and constitutions. By 1987, "fundamental rights" accounted for forty percent of the Conseil's annulment of ordinary laws.
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> The second catalyst of the Conseil's rise to political prominence was the 1974 reform that extended its authority to rule on the constitutionality of a law upon petitions by any sixty members of the National Assembly or the Senate. Prior to this, a law could be referred to the Conseil Constitutional by only four officials: the President of the Republic, the Prime Minister, the President of the National Assembly, and the President of the Senate. Since all four were usually members of the governing majority party/coalition, they were unlikely to challenge the validity of their own legislation. The 1974 reform conferred this power of reference on opposition parties (providing they could muster sixty signatures), who immediately seized this opportunity as a way to obstruct, at least temporarily, new government policies. By 1987, parliamentary references accounted for eighty percent of all decisions dealing with ordinary laws. Even more striking—since 1979, forty-six of the forty-eight decisions nullifying laws have been initiated by members of Parlement.
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> It is now common practice for all major government bills to be challenged in this manner by the opposition.[53]

By 1989, almost every West European country thus had some provision for judicial review of the constitutionality of legislative and administrative acts.[54] Such institutions were established as well by Japan, the Latin American countries, and emerging nations in Africa and elsewhere. It is thus hardly surprising that all the nations emerging from Communism and eager to become members of the Western community established some kind of constitutional tribunal.

Chapter Two

CONSTITUTIONAL COURT PROCEDURES

Although public attention normally focuses on the substantive issues decided by a court, such as human rights or executive-legislative conflicts, questions relating to structure and procedure profoundly reflect the nature of the institution and often determine the results in particular cases. The 1971 decision on freedom of association made by the French Conseil Constitutionnel signaled that the Conseil would protect human rights, but it was the 1974 reform giving sixty deputies or senators "standing," or the right to bring constitutional challenges" that made the Conseil a major force in French life.[1]

The variations among the many new East European constitutional courts in these structural and procedural matters are substantial, although there are many common features. In this chapter I will discuss some of these common aspects while noting some of the important differences.

Why a Special Tribunal?

Given the prehistory of judicial review with its entrenched distrust of judges as policy makers, none of the ex-Communist countries was eager to vest so great a power as review and possible annulment of legislation in ordinary judges,[2] even if that power was restricted to a supreme court. And a great power it was expected to be. Not only was a judicial tribunal to be authorized to annul legislation, but most of the constitutional tribunals were also given jurisdiction over the allocation of power among different branches of the state and the protection of human rights, as well as other sensitive functions, such as validating elections and impeachments of the highest officials.

The experiences that Germany and other West European countries had with special constitutional courts and judges were also influential on

this question. By the 1990s, many West European nations had had judicial review for decades, and almost all were in special constitutional courts, separate and very different from the regular court systems. These special tribunals had functioned very successfully. The newly emerging democracies in Eastern and Central Europe had the same civil law tradition as the West Europeans and were eager to be a part of Europe again after their grim decades within the Soviet sphere. They also had little familiarity with the American system of judicial review. It was therefore natural that they would opt for the European model.

In some of the countries, there was also an additional reason. The decision to adopt a unicameral legislature led some to think it necessary to have an alternative check on the legislative majority.[3] For such a purpose, the American model, which discourages constitutional challenges, especially by minority legislators,[4] was particularly inappropriate.

Assigning the constitutional court a quasi-legislative function obviously has theoretical and practical difficulties. A constitutional court should decide solely on legal and constitutional grounds, whereas a legislative chamber decides policy. Giving the court such a role also threatens its legitimacy and acceptability, for insofar as it is seen as a second legislative chamber it is subject to attack as "political," even when it rules solely on conventional legal grounds.

Still another reason for bypassing the ordinary judiciary when establishing a system of judicial review is that the civil law judge's bureaucratic timidity usually makes him or her[5] unlikely to take a broad and creative approach to constitutional interpretation. A 1993 Council of Europe study put it more delicately:

> [I]f a state wishes to introduce constitutional jurisdiction to its legal system, for the first time, possibly in connection with a new constitution, it appears preferable to entrust the decision of constitutional issues to a special institution, raised (to that extent) above the ordinary courts. For in this situation the judges of the ordinary courts may be neither trained nor used to dealing with constitutional matters.[6]

There were also technical reasons for establishing a new form of adjudication. For one thing, the issues to be decided—power, constitutional validity, individual rights—should be decided definitively and permanently (unless overruled) and for all people. Civil law decisions have no formal precedential effect, however, and determine only the rights of the parties.

One additional factor probably clinched the preference for a new kind of tribunal: in all of these countries, except perhaps Hungary and Poland,

virtually the entire ordinary judiciary had been part of the Communist regime and was thoroughly discredited and distrusted after 1989.

Opting for establishing a special tribunal was not wholly free from controversy. In some countries, such as the former Soviet Republic of Georgia, the Supreme Court tried to get the constitutional review jurisdiction for itself but failed. In Estonia, that effort was successful, though the reason there had more to do with economics than with philosophy, politics, or history.[7] It must be noted, however, that the ordinary courts have not been entirely removed from the process of constitutional review, as will be shown below.

What Constitutional Courts Do

The nature of the European constitutional court is reflected in the issues it deals with, the kinds of rulings it makes, the frequency of its sitting, and who has standing. In most of these respects, the European constitutional court is very different from the U.S. Supreme Court.

Subject Matter, in General

With variations among the different countries, the issues the courts deal with (their "subject-matter jurisdiction")[8] fall into a handful of general areas: (1) constitutional review of laws, decrees, and other norms adopted by national and local authorities,[9] especially those affecting human rights;[10] (2) conformity of legal norms to international treaties, where such treaties are constitutionally superior to domestic law;[11] (3) jurisdictional and other disputes between national and lesser authorities or between and among different national authorities;[12] (4) elections and election-related matters like referenda;[13] (5) impeachment and matters related to removing the president and other executive judicial officials;[14] and (6) the "constitutionality" of parties.[15]

No court has all of this jurisdiction, but all have at least some. The most common subjects include the constitutional review of national laws, the conformity of laws to international treaties, electoral issues, and the impeachment for misconduct or the incompetence of high officials.[16] Some constitutional courts also pass on the constitutionality of treaties, but only before ratification.[17] Electoral jurisdiction includes adjudicating complaints against election results,[18] in some cases including referenda and initiatives;[19] in Romania, it also includes routinely confirming election results.[20] Following the German example, some courts also pass on the "constitutionality" of parties or other associations,[21] and these courts have the power of deciding whether they should be allowed to exist at all.[22]

It should be noted that in almost all of these contexts, the constitutional court is given no discretion to refuse to issue a ruling—unlike the U.S. Supreme Court, which has virtually complete control over its caseload. This limitation is in keeping with European tradition, which distrusts judges too much to give them such discretion.[23] One reason for the difference under the European system of concentrated review is that if the constitutional court does not decide the question, it is often the case that no court will be able to. In the United States, by contrast, if the Supreme Court declines to hear a case, the decision of a high state court or federal appeals court will decide the question, at least for the territorial jurisdiction of the respective court.

In practice, as will be seen below, most courts have devised ways to avoid deciding at least some of the issues that are thrust upon them, but in general and in keeping with continental practice, a constitutional court must decide every question properly before it.

Forms of Ruling

Decisions about Legal Norms

The U.S. Supreme Court is a conventional supreme appellate tribunal that, except for a few special situations,[24] is limited to appellate judgments in litigated disputes. The judgments are almost always accompanied by an explanatory opinion and dissenting or concurring opinions from individual justices who wish to say something opposed to or different from the Court. Resolving the dispute is the sole legitimate purpose of the Court, and if there is a constitutional issue, it will be decided if a decision on that issue is necessary to resolve the dispute. Because the Court believes that judicial review of legislation is so delicate a function, the constitutional issue is decided only if the dispute being litigated cannot be resolved without such a decision.[25]

The new constitutional courts in Europe are very different. They do not adjudicate and resolve concrete factual disputes like the U.S. Court. The ordinary courts do that. The main reason for creating these special courts is to resolve constitutional questions, which may be raised in many contexts and ways having nothing to do with ordinary litigation.

In one situation conventional litigation is involved: a court of general jurisdiction may be confronted with a constitutional issue in the course of litigation, in which case it may be required to refer the issue to the constitutional court. Such referrals are now common in Western Europe, where, it has been said, the German, Italian, and Spanish courts "behave increasingly as supreme courts and appear as a fourth level of jurisdiction . . . overseeing the decisions of ordinary jurisdictions."[26] Referrals are still rare in Eastern Europe.

Even in West Europe, however, the constitutional court does not act like a conventional appellate court, for it does not take the case over from the general court and proceed to resolve the dispute between the parties. Instead, it decides only whether the norm or act in question is consistent with the constitution. This ruling, which is purely legal in nature, is then referred back to the general court, which uses it as the legal basis for its resolution of the underlying dispute.[27]

Constitutional Interpretations

A constitutional court may also be required to interpret constitutional provisions if members of Parliament, the president, or the government request it to, separate and apart from any law or other legal norm.[28] This represents an even greater difference from the U.S. Supreme Court, which does not provide constitutional "interpretations," except as incident to deciding a litigated case.[29] In European systems, a request for such an interpretation must be responded to even absent the kind of dispute involved in proposed or enacted legislation or a referral from a court. The matter is entirely abstract. The ruling must therefore be made on the bare text of the constitutional provision, without the benefit of seeing it in the context of its application to a particular legal norm (itself an abstract matter) and not in the specific social or economic setting in which a decision on a particular litigated dispute is usually made. The latter kind of decision can be quite different from what is suggested by the bare text of the statute, for once a court sees how a law actually operates, it might well rule differently from the way it would decide on the bare text. Indeed, in most cases the court does not even have the aid of contending parties to frame and sharpen the issues.

This judicial obligation to "interpret" the constitution when requested by governmental officials—usually the same broad range of officials given standing to challenge a law[30]—is the clearest manifestation of the special advisory nature of these courts and their primary mission, which is to assist officials to legislate and otherwise govern according to the law and the constitution. One goal is to avoid constitutional problems before they arise. The authority to "interpret" also offers the constitutional court an opportunity to "create" the constitution by developing constitutional doctrine even when there is no concrete dispute.[31]

Omissions

A jurisdiction that a few countries have established is the identification, either on the constitutional court's own initiative or in the course of a ruling,[32] of a legislative gap, that is, the absence of a legislative provision that

the court believes the constitution requires. This function brings the court directly into the legislative process—it is mandating or at least suggesting legislation. More important, it raises enforceability problems: the legislature may refuse to obey or, as happened in Hungary, find it politically very difficult to do so. A legislative failure to obey the court can damage the court's prestige, though it must be said that so far this kind of damage has not occurred. Nevertheless, the first Polish Constitutional Tribunal judges found this jurisdiction very frustrating, for, as one judge commented, most of their suggestions were not even acknowledged. The experience in Hungary, where the Constitutional Court called for enactment of a television law, a law on minorities, and an administrative court, is also instructive and will be discussed in detail below. Here it is enough to say that this jurisdiction may sometimes be useful, but it raises troubling issues.

Timing of Review

Some of the new courts, following the model of the French Conseil Constitutionnel, have the authority to pass on proposed legislation even before it goes into effect; this is the *a priori* review noted earlier.[33] In France, this is after passage of a bill by the Assembly, but before promulgation. Article 1.1(a) of the Hungarian Constitutional Court Act allows even earlier entry by the Court. The Act authorizes "Parliament, its Standing Committee or 50 Members" to require the Hungarian Constitutional Court to engage in a preliminary examination of the unconstitutionality of Bills, of Acts of Parliament, enacted but not yet promulgated, of the Standing Orders of Parliament, and of international treaties." The Court has interpreted this in a manner similar to the French provision, and has refused to review bills that have not yet been passed by the parliament.

A priori review increases the politicization of a constitutional court. It makes it easier to charge that the court is taking sides politically, for as former French Conseil Constitutionnel president Robert Badinter has observed, such review immediately follows the political conflict, before partisan feelings have had a chance to die down.[34] It also injects the court into the legislative process before that process is fully concluded.

Some of the arguments for and against preventive review have been laid out in a comprehensive and penetrating analysis by Helmut Steinberger, formerly a member of the German Constitutional Court, in a study for the European Commission for Democracy through Law of the Council of Europe.[35] The primary advantage is obvious: early resolution of problematic situations, thereby enhancing "judicial security."[36] This can be especially useful for international agreements. The primary disadvantage has already been noted: the economic and social impact of the law

will not yet be clear, especially if the situation is fluid, and the decision is made under time pressure.[37] As Steinberger observed, obviously drawing on his experience as a member of the German Constitutional Court,

> Judicial cognition of the constitutionality of laws needs a certain distance to the actual, day-to-day arguments surrounding the political process of legislation. The quality of decisions takes time. . . . Social and economic conditions to which the law originally had been addressed in our affluent societies may change so that the law in action with this change may lead to unconstitutional results no longer justifying to find it constitutional.[38]

Preventive control also blurs the separation of powers. When the court strikes down a law that has not yet become effective, and—as is usually the case—provides reasons for its action, it is, in effect, providing advice to the legislature during the legislative process. This was indeed Kelsen's purpose, and why he called the constitutional court a "negative legislature" and a "legislative auxiliary."

A priori review may thus undermine the necessary judicial isolation from the legislative process that is essential to a system of separated powers, for it brings the constitutional court into the legislative process before the process is completed. An adverse decision on some or all of a law not yet in force is, in effect, a command to the legislature to revise the law, often with indications of how it should be revised. It may also inject the court into a political battle between the legislature and the executive. Although the same kind of dialogue occurs when a court issues an adverse decision on a fully enacted law, that often occurs much later, well after the lawmaking bodies have completed their part of the legislative process.[39]

Standing

The rationale for abstract review, which goes to the heart of the different rationales for judicial control over the constitutionality of legislation, also explains the different approaches as to *who* may file a challenge, the question of "standing." Here, the difference between the U.S. system's restrictiveness and the Continental system's hospitality, particularly to public officials, is drastic.

The U.S. law of standing, which has gone through several stages, has traditionally been based on the nineteenth-century model of a lawsuit: usually two adversaries, one of which claims to have been injured by the other and seeks redress through the courts. To a great extent that model still holds, despite the many far-reaching changes in the nature of modern litigation, which often focuses today on broad questions of wide public concern.[40] Additionally, the U.S. Supreme Court has recently overlaid

separation of powers considerations on the standing requirements and introduced additional constitutional requirements, such as a preliminary showing that the defendant directly caused the plaintiff's injury and that the plaintiff's victory will remedy this loss.[41] It has also created requirements based on "prudential" considerations: the plaintiff's injury must be specific to him and not common to everyone, and the rights he asserts must usually be his own and not those of third parties.[42] With these requirements, the U.S. Supreme Court has created significant legal obstacles for litigants who seek a federal court decision on the constitutional or legal validity of official action.

The European approach is very different. European constitutions provide ready access to the constitutional court for those with the greatest interest and best opportunity: members of the minority opposition and other officials unhappy with the actions of other public officials, governments, or legislative majorities. The list of officials who can invoke constitutional court jurisdiction in the current Russian Constitution is typical:

> the President of the Russian Federation, the Council of the Federation, the State Duma, one-fifth of the members of the Council of the Federation or the deputies to the State Duma, the Government of the Russian Federation, the Supreme Court of the Russian Federation, the Higher Court of Arbitration of the Russian Federation, or bodies of legislative and executive power of members of the Russian Federation.[43]

In contrast with the favored European treatment of legislators and other officials, U.S. law makes it almost impossible for a legislator *qua* legislator to challenge the validity of a statute, whether he is in the minority or the majority.[44] The reason for this restrictive American attitude is obvious—to keep political disputes out of the courts as much as possible in order to maintain the courts as judicial and not political institutions, despite the political elements of many of the controversies that do get to the court.

Europeans are more open about the political aspects of constitutional decision making, though they probably go too far in the other direction by virtually encouraging political adversaries to get the constitutional court to resolve their disputes. This court is thereby thrust into these controversies again and again, frequently offending one side or the other by its response.

In the very earliest years, that was not always so. For example, the 1920–29 Czechoslovak Constitutional Court, the first constitutional court, granted standing only to public officials who had little reason to invoke the Court's authority: the highest courts and the legislative chambers. Also, the challenge could be brought only within three years of the stat-

ute's enactment, so a later legislative majority with opposing or different views had little or no opportunity to challenge actions by its predecessors. As a result, there were no challenges to the constitutional validity of a statute, for legislative majorities have no incentive to challenge their own handiwork. For their part, the other high courts—supreme, administrative, and electoral—who were also given standing, were not inclined to invoke the authority of a competing institution.[45]

Broad standing may be the single most important factor in transforming the European constitutional courts from the inhibited tribunal of prewar years to the activist institutions of today.[46] The idea of giving a minority the right to challenge laws, either before promulgation or at any time, has its roots in an idea proposed by the Austrian Georg Jellinek in 1885, who urged that the *Reichsgericht* be empowered to pass on the constitutionality of a statute and that a small faction of parliament be able to raise the issue. Hans Kelsen made a similar suggestion in 1928. The idea was finally adopted in Germany in the 1949 Basic Law, which allowed a third of the Bundestag to invoke the Constitutional Court's jurisdiction; the establishment of broad standing did not take place in Austria until 1975.[47] It has been followed everywhere in the ex-Communist constitutional courts, even though it has brought an immense number of political issues to the court. The reason has been stated quite openly and frequently: to protect the minority against the majority.[48]

Giving presidents standing to challenge also contributes significantly to the vast amount of politically sensitive constitutional court business in the former East Bloc countries.[49] Presidents in these ex-Communist nations have often been at odds with the legislative majority and prime ministers, most prominently in Hungary, Poland, Slovakia, Bulgaria, and Russia. The grant of standing to both the presidents and the minority has forced the constitutional courts to become umpires in what are basically political fights with constitutional ramifications. In part, this is because in at least some of these countries, such as Bulgaria and Slovakia, the constitution was passed as part of a democratic and liberal transformation. The authoritarian elements in society thus retained a good deal of power. As these authoritarian attitudes began to reemerge and regain some of their power, they resorted to measures that were inconsistent with either the text or the spirit of the constitution. The presidents, on the other hand, have often come from the antiauthoritarian dissidents and have challenged these measures, often calling on the constitutional courts. As a result, prime ministers in Slovakia, Hungary, and Bulgaria who have lost before the constitutional court in disputes with these presidents have bitterly attacked the constitutional judges for being "political" and for siding with their opposition.

Here again this would seem to be in accord with the original conception of the constitutional court as a curb on the majority, to keep it within constitutional bounds. One problem of course is that "constitutional" bounds are very flexible. It is rare that a constitutional text is clear and definitive on such matters, since matters that are clear are not likely to get to the court.[50] The constitutional court must often weigh a wide range of policy considerations, including complex and controversial moral, social, and philosophical considerations. These new East European courts have therefore had a substantial and sometimes decisive influence on controversial matters. The nature and impact of the issues decided in these constitutional challenges brought by defeated political factions heightens the danger of politicizing the constitutional courts and undermining their legitimacy.[51]

In Western Europe, this politicization has apparently not been a serious problem; except in France, few such "abstract" challenges are now brought.[52] In Germany, this may be because legislative apprehension about having the Constitutional Court strike down a statute has purportedly produced a "judicialization" of the legislative process whereby the parliamentary majority and minority work together to avoid constitutional challenges.[53] Partly because of the heated political situation in the emerging democracies in Eastern Europe, that type of advance conciliation has not happened there. Legislative minorities and the presidents have not hesitated to go to their respective constitutional courts as soon as legislation they oppose is passed by the governing majority. The newest institutions, established in countries almost none of which have lived under a rule of law during this century, have thus had to confront many of the most delicate challenges.

The standing provisions are not the same for all types of challenges. So far, standing to file *a priori* preventive challenges to statutes or decrees before promulgation has been limited to public officials, unlike challenges to enacted legislation or promulgated decrees, where some constitutions authorize standing for private entities and the general courts. One reason may be that until a law goes into effect, it theoretically has no effect. In reality, that is not always true. The prospect of legislation, especially if already passed by the parliament, even if not yet promulgated, may significantly unsettle existing or anticipated relationships and can significantly affect behavior.

If *a priori* review is the only kind available, standing should be given to

private parties to invoke such review because there are times when even the opposition does not contain enough members who care about a piece of legislation. Even if some members are concerned, they may be negligent or involved in other matters. This can be particularly true with legislation affecting ethnic or religious minorities, unpopular individuals or groups, or human rights in general. Laws against the Roma are a current example. Unless there is such private standing in countries like France, where preventive review is the only kind available, unjust legislation of doubtful constitutionality may escape scrutiny entirely.[54]

Where review is readily available for legislation after it goes into effect, however, there is no need for such early judicial intervention at the instance of a private party and indeed, it exists almost nowhere.[55] Granting private individuals standing for preventive challenges might produce many frivolous cases and increase what may already be a heavy case load.

Postenactment A Posteriori *Review: Concrete, Remedial, and "Creative" In General*

The more common type of review is of statutes, regulations, and decrees that have already been enacted. Not usually subject to such review are treaties already ratified, for that might impair or complicate relationships that are already established with foreign states and organizations, which are obviously outside a state and a court's control.[56] Omission of such norms does, however, create the possibility that a treaty inconsistent with the state constitution may remain in effect, creating an anomalous situation whereby legal rules inconsistent with the constitution govern official and public behavior, even though treaties are usually subordinate to constitutions.[57]

Postenactment review has the converse of the benefits and shortcomings of preventive review. The court has a better chance of knowing how a statute or regulation actually works so that the review is not abstract and textual. Also, because people may have come to rely on a law, the court may be more careful in appraising it.

On the other hand, if sufficiently delayed, postenactment review can destabilize existing or planned relationships, undermining juridical security.[58] And there may be little to gain from delaying review until the law goes into effect: postenactment review of the bare text of a law, even before it goes into effect, is not uncommon, and review in such circumstances can be just as abstract as preventive review and equally subject to partisan abuse.[59] Destabilization can be particularly severe if the decision is given retroactive effect, and especially if it is applied to laws adopted under the former regime and prior to the adoption of the currently governing constitution. To avoid some of this destabilizing effect, some nations have chosen to limit the retroactive effect of decisions so as not to upset already existing legal relationships.[60]

Standing to Invoke A Posteriori Review

Officials. Standing to bring these postenactment challenges to legislation is usually available not only to those officials named earlier, including parliamentary factions of a certain size, but also to others, depending on the way the issue arises.[61] In Poland, for example, the ombudsman is allowed to bring challenges to the Constitutional Tribunal and Ewa Łetowska, Tadeusz Zielinski, and Adam Zielinski, the first three ombudsmen, have accounted for a very large proportion of the Tribunal's work. In Russia, local governments have standing.[62]

Of perhaps equal significance are two other ways in which these constitutional issues may be raised: referral from courts of general jurisdiction and complaints by private individuals directly to the constitutional court. Both provide a vehicle for private persons to obtain justice from the constitutional court, but there are serious impediments to each process.

Referrals from General Courts. If a court of general jurisdiction, high or low, is faced with a challenge to the constitutionality of a legislative norm, it may have to suspend its proceedings and refer the question to the constitutional court. The latter's ruling then becomes part of the law of the case. The matter is then returned to the general court, which must decide the case in a manner consistent with the constitutional court's ruling. In some countries, authority to invoke the jurisdiction of the constitutional court is given only to high courts[63] and in others to any court.[64]

Provision for a referral by the high courts—and only the high courts—of the general court system was first made in 1929 by an amendment to the original Austrian system. The Austrian model has since been followed in countries throughout Western and Eastern Europe and has often been extended to the lower courts.[65] The effect is to give the constitutional court jurisdiction for a form of "concrete" case review, thereby making it something of an appellate tribunal. Although the review may be limited to the facial validity of the statute, the constitutional court will almost inevitably view the issue in its concrete social and economic setting, with the benefit of whatever experience there has been with the statute.

Concrete control changes the court from a "negative" tribunal focused

on saying no to *ultra vires* legislative and executive actions, to a creative institution. According to Judge Luis Lopez Guerra, Vice Chairman of the Spanish Constitutional Court, concrete constitutional control "is more than a technique for defending the constitution from parliamentary attacks. . . . [It] has become a procedure for interpreting the constitution and for deducing from it rules which are applicable in specific cases." Also, he adds, "procedures of concrete control . . . make it possible to examine laws already applied on multiple occasions over a long period of time, without implying any (explicit or implicit) criticism of Parliament."[66] In some Western European countries, these referrals have become the primary vehicle for raising constitutional questions.[67]

One problem with the referral provisions is that following the German model, many systems do not call for such a referral unless the general court concludes that the norm in question is indeed unconstitutional.[68] It need not make the referral if there is only a serious question as to unconstitutionality. The reason for this limitation is not hard to surmise: since under European tradition, it is only the *invalidation* of a law that is forbidden to the general court, it is only when that court is prepared to invalidate a law that it must refer the matter to an extraordinary tribunal.

Private Person Access. Individuals, both natural and juridical, may also have direct access to some constitutional courts, in addition to the indirect access through referrals from the regular court system. The availability of direct personal access represents the most significant departure from Hans Kelsen's model of a negative adjunct to the legislative process, especially where the allegation of unconstitutionality is that human rights have been violated. In the latter context—which is the most common—the inevitable generality of the constitutional provisions and the equally inevitable diversity in value judgments in any community, ensure that many decisions will be "creative," expansive, and controversial, not merely "negative" and restrictive. Moreover, human rights jurisdiction virtually guarantees conflict with the authorities and even the community: human rights are needed for minorities and for those who dissent from official policy or community opinion, and if the constitutional court does its job, the dissenters may often prevail.[69]

Direct access by individuals can arise in the following three contexts: a complaint filed directly with the constitutional court that an allegedly unconstitutional *rule* like a law, regulation, or decree injured the complainant, a procedure which is quite common;[70] a complaint that a government official unconstitutionally *applied* a valid law, thereby injuring the

complainant,[71] which is usually outside a constitutional court's scope; and a challenge to the constitutionality of a law or decree by anyone, regardless of whether the challenger was personally affected, the *actio popularis,* which is allowed only in Hungary. Bulgaria, Romania, and Armenia do not allow any direct access at all to their courts by individuals or legal entities, but the first two do allow indirect access by referral from ordinary courts.[72]

Some countries like the Czech Republic, Slovakia, and Georgia[73] allow direct individual access only to complaints for alleged violations of constitutional rights; Hungary seems to impose no such limit. Slovakia, on the other hand, seems to limit individual access to challenges to the application of law, not to the law itself.

In Western Europe, the individual claim has come to account for the overwhelming bulk of the business of the constitutional court.[74] To limit the caseload, the Germans require exhaustion of all other judicial remedies.[75] The East Europeans have followed this example, except that the Czech and Slovak Republics do not require exhaustion if the significance of the complaint "substantially transcends the individual interests of the complainant" or there is a grave danger of unavoidable harm from delay.[76]

Because continental legal thought abhors judicial discretion—it seems to exist only in the above-described occasions for excusing a failure to exhaust other remedies—there are few mechanisms for reducing the inevitably heavy volume of such cases. The Hungarian Court, where standing is available to "anyone" to challenge any law on the books, has reportedly come to rely simply on an informal priority system whereby less important cases that cannot be dismissed for lack of jurisdiction are simply put on the back burner.

Hungary's unique standing rule *(actio popularis)* is obviously the cause of the early overload of that country's constitutional court: "anyone," regardless of injury or any other direct or indirect effect, may file a challenge to a law. At first, this resulted in a flow of frivolous cases, as well as several very significant rulings, including an early decision outlawing capital punishment. Since then, a combination of relegating minor issues to the back burner, invoking procedural devices, growing public awareness of the futility of filing complaints that will be ignored, and the development of the informal priority system noted above, have apparently shrunk the caseload to manageable proportions.

Ex Officio. A few jurisdictions have allowed their constitutional courts to initiate proceedings against an arguably unconstitutional law on their

own.[77] In practice, this is often a response to complaints by persons who have no standing but who wish to bring certain issues to the attention of the constitutional court. This jurisdiction is perhaps the most extreme example of the difference between the appellate aspects of the U.S. Supreme Court and the quite different conception of the European constitutional tribunal as the guardian of the constitution. It legitimizes a judicial activism that seeks out constitutional issues rather than avoiding them.

Few countries give their tribunals this power. It is therefore paradoxical that the first Polish tribunal, which was deliberately intended to have only modest powers should have been given this power, which it did in fact exercise.

Special Subject Matter Jurisdiction

Parliamentary Rules

Romania[78] and Hungary authorize preventive judicial review of parliamentary procedures. In both cases, standing is limited to parliamentary bodies, except that in Hungary, only "Parliament" may make the referral to the court—presumably either a parliamentary majority or the parliamentary leadership—and not a minority or even a standing committee, as with "contestable provisions of a bill." Romania, by contrast, allows parliamentary minorities and a formal parliamentary "group" to challenge standing orders, apparently even after they are adopted.[79]

A review of parliamentary procedures is a quite appropriate part of a constitutional court's jurisdiction. As a recent Romanian decision indicates,[80] these procedures can raise many constitutional issues, especially since European constitutions are often quite detailed about parliamentary procedures, thereby constitutionalizing much that in the United States is left to congressional rules.[81] Moreover, the ordinary courts probably have the same timidity when considering such rules as they have with statutes.

Administrative Decrees

It has been suggested that substatutory decrees and other legal norms of less than statutory dimension be excluded from the jurisdiction of constitutional courts and left to the regular court system.[82] Where there is an administrative court, as in France, Austria, and Poland, that makes sense, especially if the administrative court is well established and functions effectively and vigorously. But even without an administrative court, there is much to be said for having these cases handled in the regular court system. Where the decree or act is allegedly contrary to a higher but *non*-constitutional norm, such as a statute, the ordinary courts are equipped

by experience and training to decide the issue. This is a conventional judicial function, and parliamentary supremacy is not at issue.

Even where the constitutionality of a decree is at issue, leaving it with the ordinary courts in the first instance will accustom those courts to dealing with constitutional questions, possibly broadening their outlook. When the constitutional issue involves human rights, dealing with such issues may sensitize these courts to the importance of rights, perhaps even with a beneficial effect on their other decision making.

There are, however, problems with dividing jurisdiction over constitutional questions. Where different tribunals deal with similar issues, particularly human rights issues, there must be one supreme and final authority. Otherwise, a country's constitutional court may decide an issue one way when reviewing a statute, and its ordinary court system may decide the issue differently when reviewing an administrative decree or act. For example, the constitutional court may strike down a statute on wage scales as discriminatory against women, but the supreme court may uphold an administrative decree that allows such differentials.

If different court systems are permitted to deal with what may be identical or similar constitutional issues, there must be a way of getting all constitutional cases to an ultimate and supreme expounder of the constitution. This should be the constitutional court. It is set up for the express purpose of dealing with constitutional questions and will have the most experience with such issues.[83] The constitutional court should, however, have discretion over whether to hear cases involving substatutory norms, so it can control the caseload volume by avoiding cases where there is no need for its intervention, such as a clearly correct decision by the ordinary courts or a case that involves only minor issues best heard elsewhere.[84]

Inter- and Intragovernmental Jurisdictional Disputes

Jurisdictional disputes between governmental entities, either horizontally between units of the national government and between different regional/local entities or vertically between national and regional/local bodies, often fall within a constitutional court's jurisdiction.[85] If the governing law is less than constitutional, there is normally no need for the constitutional court to decide such cases, for here, too, the ordinary court system is competent to construe nonconstitutional enactments. On the other hand, jurisdictional disputes in federal states between the central national authority and relatively autonomous constituent units are extremely delicate, particularly where, as in Russia, the units are ethnically and otherwise different from the central authorities and there are very strong separatist tendencies. In such cases, many controversies, even those

growing out of statutory disputes, are likely to have constitutional overtones and implications, and it is appropriate to have them resolved by the constitutional court that is designed to deal with such controversies.

Finality

In some countries—Romania, Poland, and Portugal—decisions of the constitutional courts have been subject to reversal by the parliament, although such an action requires a two-thirds supermajority, equivalent to that often required for a constitutional amendment in those countries;[86] in Poland, the 1997 Constitution eliminated the Sejm's power to overrule, but only after a two-year transition period that ended in October 1999.[87] In Romania, legislative overruling is possible only for constitutional court decisions annulling bills passed by parliament but not yet promulgated. It is not permitted for decisions striking down parliament's procedural rules or that annul laws already in effect and which arise in cases referred to the Court by the general courts.

Such provisions have come under severe criticism although there have been very few overrulings—only eight in the history of the first Polish Constitutional Tribunal prior to October 1998, and never in Romania. In the frequently fragmented parliaments of these first years of emerging parliamentary government, it may have been just too difficult to obtain the needed two-thirds, even in Poland where overruling required only two-thirds of those present, or only one more than one-third of the total, since the quorum requirement was only 50 percent.[88]

Despite the infrequency with which the Polish Tribunal has been overruled, it was generally agreed that the possibility of such a challenge was troubling, which led to its abolition as of October 1999 in the 1997 Constitution. In Romania, however, there seems to be no movement for abolition.

Finality is crucial to judicial independence. The refusal to accord finality to the constitutional courts' decisions reflects an insistence on parliamentary sovereignty and a mistrust of both the constitutional court and the separation of powers doctrine.[89]

A related issue is the effect of the annulment of a law on actions based on the annulled law or regulation. In many countries, it has been decided that legal relations established on the basis of old norms will not be disturbed.[90] This has raised problems with efforts to restore property wrongly taken from former owners.

Independence and Impartiality

The bedrock preconditions for the success of these new constitutional tribunals are independence and impartiality from the dominant political

power, from the appointing authority, and from outside pressures of all kinds. Without independence and impartiality and public faith in the existence of those qualities, the court cannot become an authority whose orders are to be obeyed and an effective promoter of the rule of law.

Independence and the public perception of such independence are crucial to all courts of course,[91] but they are especially necessary for constitutional tribunals because they continually determine partisan political disputes as a matter of course, unlike the general courts.

During the Communist era, judicial independence was notable for its absence. Lenin and his successors disdained the rule of law and judicial independence as shams, a deceptive facade to hide the reality of class power. The "unity of state power" concept that Lenin originated precluded any separation of powers, and the "leading role" taken by the Communist Party made all governmental actions, including judicial decisions, subject to what the party elite wanted. The judiciary became part of the executive power, in practice simply an arm of the elite. "Telephone law" governed—judges did what the procuracy and the KGB telephoned them to do.[92]

As Andrzej Rzeplinski reported in a study of the Polish judiciary during the Communist era,

> an elaborate system of appointments, transfers, promotions, rewards, disciplinary measures, and supervision by chairmen of the courts and the Ministry of Justice functioned rather smoothly and succeeded in maintaining the judiciary in a clearly subservient position. Needless to say, all higher-level administrative positions were strictly reserved for trustworthy Party members. Exceedingly unsatisfactory salaries of judges as well as inadequate working conditions contributed to the generally felt malaise, low morale, and the lack of self-esteem.[93]

Not surprisingly, the higher the office, the more subservient the judge, with the chief judge serving as a primary conduit of party authority over the other judges.

By 1989 the judges in almost all the East Bloc countries were discredited and distrusted, despite the existence of a handful of courageous exceptions. This was not a serious problem for the establishment of constitutional courts. By adopting the German or French model of a special tribunal that was not intended to be part of the ordinary judiciary, these countries were creating new institutions with new people.

Nevertheless, the threats to independence and impartiality created by decades of authoritarian rule and the absence of a rule-of-law tradition in most countries made it important to provide appropriate guarantees in the constitutions and implementing laws.[94] The need was especially great

because of the great powers over vital governmental power arrangements and policies that these courts were given.

It is obviously not enough merely to declare that the judges are to be independent—the Communist constitutions had done that.[95] The constitution must also contain basic guarantees for independence that are virtually unalterable except in very rare circumstances.[96] It is important also to include provisions on impartiality in the constitution, because disinterestedness, freedom from any personal interests on the part of the constitutional court judges themselves that might impair their objectivity, is equally basic to the rule of law. The widespread perception that the judiciary in Eastern Europe is for sale has been a major impediment to developing respect for law in those countries.

The key to guaranteeing independence and impartiality is the insulation of essential aspects of the constitutional court judges' work and life from legislative and executive interference. Those aspects used by the Communist regimes to control the judges are obviously the ones that need protection. Some of these, such as assignment, transfer, promotion, and supervision by a higher court are inapplicable to constitutional courts and judges. But appointment, tenure, discipline, immunity to criminal action, removal, salaries and other perquisites of office, working conditions, administrative and budgetary matters, the position of the head of the court, and the finality of the court's decisions, to name just some of the essentials, are all subject to influence and sometimes control by the other branches, and all must be immunized against improper interference.[97] An additional source of potential pressure on the constitutional court is legislative control over the court's subject matter and other jurisdiction, as shown by the efforts in the United States by some members of Congress to eliminate the Supreme Court's jurisdiction over cases decided contrary to the members' liking.

Few of the new constitutions contain enough of the needed protections. Nevertheless, as the discussion of the individual courts will show, almost all the courts in Eastern Europe have been remarkably independent—astonishingly so in some cases—and quite ready to challenge and overturn important statutes, bills, and regulations. And most seem to have gotten away with it. For example, the entire set of constitutional provisions in the Hungarian Constitution governing the operation of the Hungarian Constitutional Court consists of six paragraphs in Article 32/A setting out the authority of the Court, the effect of its decisions, standing, appointment and number of justices, a ban on political party affiliation, and a provision regarding adoption of the governing statute. Yet, the Court has not hesitated to strike down statutes and other legislative and executive actions that were obviously vital to the governmental branch involved.[98]

Protection of Independence

Selection and Tenure of Constitutional Court Judges

Although the U.S. Supreme Court is a profoundly political institution, both in its subject matter and in the way its members are chosen, it purports not to be and tries to distance itself as much as it can from partisan political conflicts.[99] The European constitutional courts are quite different. Their involvement in political struggles is not hidden. The qualifications and kinds of people who become constitutional court judges, the way they are appointed, their tenure, the issues they decide, who is given standing, the effect of their decisions—all reflect this essentially political nature.

QUALIFICATIONS. The formal qualifications for constitutional court judges, which usually appear in the constitution itself, are the obvious ones.[100] The Bulgarian provision is typical: "lawyers of high professional and moral integrity and with at least fifteen years of professional experience."[101] Unlike the French Conseil Constitutionnel, all the new East European countries require the judges to be trained in the law.[102] A few countries have age minimums, usually forty or forty-five years, and all have experiential requirements.[103] All require citizenship, either by constitution or in the implementing legislation.[104]

More significant are the kinds of people chosen to serve; here, too, the practice is fairly consistent: most of the appointees have been law professors or other legal scholars.[105] Only occasionally is a sitting judge chosen, for reasons already noted: the lack of trust in the regular judiciary with respect to both its integrity and its capacity for transcending a narrow, textual approach.[106]

Selection Processes

The political nature of these courts, as well as an attempt to ensure some sort of representative quality, is reflected in and guaranteed by the selection process. This is almost always done by a combination of political entities, usually though not always from different branches of the state governmental apparatus. Romania, for example, divides selection of a nine-judge court equally among the two parliamentary chambers and the president.[107] In Bulgaria the twelve judges are appointed one-third by the President, one-third by the parliament, and one-third by the highest judges of the regular court system.[108] The Czech approach is similar to the American model: appointment is made by the president but subject to approval by the Senate.[109] Hungary leaves it entirely to the parliament, but a two-thirds vote is necessary, and the nominees must be chosen by a committee in which each party in the parliament has one vote, almost

guaranteeing that the governing party will often be outvoted in the committee.[110] As in Western Europe, none of the appointment processes involve any kind of public participation, either in the form of public hearings or otherwise; selection is solely by the politicians.[111]

Political influence in the appointment process is both inevitable and appropriate. A constitutional court deals with some of the most important issues a country will face. Those who establish the political structure for a nation are not likely to vest the power to resolve such fundamental matters in a group whose composition they do not at least influence, if not wholly control.

That kind of influence also is quite appropriate. If the decisions on such matters are to be accepted by a nation, those decisions must reflect the deepest values and beliefs of that people, if only by a rough correspondence. Appointment by a popularly elected legislature and executive, particularly if the appointments are for limited terms, as is generally the case, is a useful way to ensure that the court does indeed reflect those values and beliefs, even as they change over time.

Tenure

Although ordinary court judges normally have life tenure as do most civil servants, constitutional court judges have limited terms. Most are constitutionally restricted to a single eight- to twelve-year term,[112] though Hungary permits a second successive term,[113] and the Czech and Slovak republics permit indefinite reappointment.[114]

Term limits probably reflect a fear of creating a powerful unaccountable body. The practical politicians who created and adopted the East European constitutions were not about to hand the immense power potentially available to a constitutional court to a group of uncontrollable lawyers, most of them academics, for an indefinite period, as in the United States.

Tenure obviously affects independence, and a term limit or lifetime appointment both promote independence. For equally obvious reasons, the worst situation is a short and renewable term, as in Slovakia where the term is seven years and indefinitely renewable; the situation is marginally better in the Czech Republic where each term is ten years.

In many countries, the terms are staggered, so that changes in judicial personnel will not interfere with continuity.[115] Even though retirement, death, incapacity, or resignation will produce some gradual changes, staggering terms is necessary. A full replacement of most of the judges can result in a loss of both continuity and collective memory, impairing the efficiency of the court. Also, major shifts in the electorate's attitudes can

often produce unpredictable and large-scale changes in political dominance. If such a shift produces a total replacement of the judges and a major switch in the court's decisions, as is likely, this will damage legal stability. It can also affect the society's faith in the court's independence and impartiality, and with that, the court's status and legitimacy.

Finances and Administration

For obvious reasons, financial and administrative independence is vital. Unfortunately, few courts have that. The danger for financially dependent courts is that either the executive or the legislature will try to create pressure by cutting off or reducing the body's financial sustenance. In several countries, such as Bulgaria and Slovakia, the Court was deprived of basic services like transport and elevator service; in Bulgaria, efforts were made to deprive the Court of its building.[116]

To prevent this, Hungary allows the Court to prepare its own budget.[117] This, however, is uncommon. The Slovak arrangement, for example, simply declares that "the Constitutional Court has a separate chapter in the State Budget,"[118] with no indication of who prepares it. And since in all countries the parliament is the ultimate financial decision maker, there is no way to escape that body's power. Typical is the Russian Federation Constitution,[119] which provides that the courts (presumably all courts) are "financed solely from the federal budget [to] make possible" judicial independence—but apparently not from the government, which prepares the budget, and the two chambers of parliament, which have to pass it.[120] As detailed in chapter 5 below, the president of the Russian Federation has not hesitated to use his power over the Court's material supports to pressure it.

The Czech Act also sets the salary and privileges (car, house, telephone) of the judges.[121] This may help to ensure that the kinds of pressure employed by Russian president Boris Yeltsin against former Constitutional Court chairman Valery Zorkin—taking away his dacha and downgrading his car in retaliation for decisions Yeltsin did not like—will not be available in the Czech Republic.[122]

To provide additional protection, all of the new constitutions grant constitutional court judges immunity to prosecution and arrest in most circumstances.[123] The Slovak Constitution is typical: (1) members of the Constitutional Court enjoy immunity in the same manner as do deputies of the National Council of the Slovak Republic and (2) consent to the criminal prosecution of a judge of the Constitutional Court or to taking him into custody can be given only by the Constitutional Court.[124]

Even immunity provisions are sometimes compromised. For example,

although the Czech constitutional provision provides for the Constitutional Court judges' immunity to prosecution, like the Slovak provision, the Senate can lift that immunity, a dangerous provision.[125] Also, the standards for imposing discipline on the Czech judges are much too vague:

> A disciplinary offense is conduct [including conviction for a misdemeanor] by which the Judge debases the respectability and dignity of his function or threatens the trust in independent and impartial decision making of the Constitutional Court, as well as another culpable violation of the duties of Judge.[126]

This broad definition, too, is typical.[127]

The Czech procedural provisions for imposing discipline do, however, require the vote of at least nine of the fifteen judges. Even this does not guarantee due process, however, since criminal case procedure applies "as appropriate."[128]

Impartiality

Apart from the provisions seeking to ensure independence, impartiality of decision making—a disinterested judgment that is not influenced by a judge's financial, political, or personal interests—is usually dealt with by provisions requiring the judge to separate him- or herself from a connection with anything that might create a conflict between that interest and an objective decision in a particular case. The Czech example again is typical:

> (3) the execution of the function of Judge is incompatible with another paid function or other gainful activity with the exception of the administration of the judge's own property, scientific activity, pedagogy, literary and artistic activities, if such activities do not impair the function of Judge, its significance and dignity, and if it does not threaten the confidence and the independence and impartiality of decisions of the Constitutional Court; (4) the execution of the function of Judge is incompatible also with the membership of a political party or a political movement.
>
> Section 36
> Exclusion of Judges
>
> (1) The judge shall be excluded from the proceedings and decision making, if his impartiality can be doubted because of his relation to the case, its parties, enjoined parties or their representatives.
> (2) The judge shall be excluded also if he has been active in the case in the execution of another function or calling [other] than the function of the judge of the Constitutional Court.

> (3) The participation and the preparation, review and approval of legal regulations shall not be considered as activities in the meaning of para. 2.[129]

The exception in art. 36.3, which was also in the Court's Czechoslovak predecessor, is inconsistent with the objectivity and open-mindedness with which a judge should approach an issue. This practice has already had an unfortunate result, since some of the judges in the Czechoslovak Constitutional Court who upheld the much-criticized Czechoslovak lustration law had voted for it as members of the parliament before going on to the Court.

Decision Making

Panels v. Plenums

Unlike the U.S. Supreme Court, most of the European constitutional courts, including the new ones, divide their work between panels for most cases and plenary hearings for the more important matters; the Bulgarian and Armenian courts, which meet only in plenary sessions, are the only exceptions. The Russian Court follows the German model of dividing the court into two large groups; in Russia one panel has nine members and the other has ten.[130] The composition of the two plenums is by lot. Elsewhere, the panels are smaller, usually three or five.[131]

Plenary sessions are used for the more important cases or where there is a conflict between panels. The Czech Republic's division is typical: the plenum deals with the constitutionality of laws and other legal regulations, the constitutionality of political parties, the rules of procedure, impeachments, and other especially delicate matters.[132]

In both plenary and panel sessions, a judge-rapporteur is usually assigned the task of preparing the case, and he then submits his product to the others. In most courts, the rapporteur is often the effective decision maker.

Opinion Writing

There are two models: the French, which is conclusory, terse, and does not usually include a detailed statement of reasons for the decision, and the German, which often involves a full exploration of arguments and counterarguments. Although most courts purport to follow the German model and sometimes do, in practice many follow the French, for the opinion often contains nothing more than a statement of the constitutional or treaty provisions relied upon, with little discussion of the reasons for the applicability of these provisions and virtually no effort to counter arguments on the other side.

Most courts authorize dissenting votes and opinions and publish them.[133] In some places, only the fact of dissent is noted.[134]

Appendix
Constitution, Legislation, Court Rules: What Goes Where

The creation of so significant a power as judicial review of statutes and other forms of law is properly a matter of constitutional structure. Thus, all the new constitutional courts in Eastern Europe are established by the respective constitution.[135] These provisions differ substantially, however, ranging from relatively brief descriptions to great detail. In almost all cases, the constitution also calls for a law setting out additional details about the functioning of the court either in ordinary legislation or in an "organic" or "constitutional" law requiring a supermajority to pass or change. In addition, rules of procedure are adopted to regulate the court's business.

What provisions go into each of these three—constitution, statute, or rules—bears directly on the court's powers, independence, impartiality, and efficiency. This is because the location of a particular provision determines who can change it and how easily it can be changed, and that in turn largely determines the nature of the court. Obviously anything put in the constitution is the hardest to change, for that may require the concurrence not only of supermajorities in the legislature but also of the executive and, in some countries, the people by referendum.

The court's subject matter jurisdiction is always in the constitution for obvious reasons, except that some constitutions (following the German model) contain an open-ended provision that the constitutional court "shall also rule on any other cases referred to it by federal legislation."[136] One problem with such a provision is that not only is the grant of this extra subject matter subject to the legislative will, but presumably its withdrawal as well. As American experience shows, where a court's jurisdiction is subject to legislative control, there is the possibility of challenges to the court's independence by threats of withdrawing that jurisdiction if the legislature is displeased with how the court has used it in some cases.

Two other constants in the constitutional provisions are the method of selection, qualifications and tenure of the judges, and often, though not always, standing.[137]

Because of the supreme importance of independence to a constitutional tribunal, provisions necessary to guarantee independence such as judicial tenure, discipline, privileges and perquisites of office, and budget should all be in the constitution as well, and should be set out in such a way as to make the court immune to ordinary political pressures from either the legislature or the executive. Even the requirement of a supermajority may not be an adequate safeguard. Many of the court's decisions will, of necessity, be so unpopular with legislators and members of the general public that the normal difficulties of amassing even a supermajority of the legislature may be readily overcome.[138] This will be particularly true where decisions favoring unpopular minorities or individuals are involved, such as a relatively small ethnic minority like the Turks in Bulgaria or the Hungarians in Romania and Slovakia, and the Roma everywhere.

Constitutional protection for the compensation, perquisites, and privileges of both individual judges and the court, as well as for the administration of the court including its staff, is especially important, for those may be subject in whole or in part to the executive as well as to the legislature. In 1993, Russian president Boris Yeltsin reportedly showed his displeasure with the decisions of the Russian Constitutional Court by taking away Chairman Valery Zorkin's dacha and replacing his limousine with a smaller car. In 1995, the Bulgarian government, led by the post-Communist Bulgarian Socialist Party, set out to destroy the courts' independence, and that of the Constitutional Court in particular. The Court had annulled many of the government's efforts to take over the judiciary and other parts of the justice system, as well as certain other important government laws. The government ordered the Court out of its building and into cramped quarters. The Court struck down the order and also sued successfully in the Supreme Court to block the move.

Unhappily, few of the new East European constitutions contain protections against this kind of interference with a constitutional courts' independence, though they all declare unequivocally that the courts are meant to be independent.

Whereas independence must be safeguarded against outside pressure, threats to impartiality and objectivity can also come from the private interests of the judges themselves and those with whom they may choose to associate. It is thus important to put the safeguards against such interests into the control of others besides the judges, such as the legislature. Since, however, independence is threatened when legislatures have too much control over courts, the ban on such outside interests is usually placed in either supermajority organic laws or in the constitution itself, where the provision is not susceptible to legislative manipulation.[139]

What should go into court-mandated rules of procedure is simple to state in the abstract but often difficult in practice. Procedure often has great substantive significance and can involve policy decisions that are of constitutional dimension, such as the rights of parties. What is most

important is to allow the court enough leeway over its own procedures so that it has the flexibility necessary to benefit from trial-and-error experience on matters related primarily to efficient operation. Thus, a matter as important as how ties are broken, *i.e.,* whether the chief judge should have an extra vote, should be in the constitution. Whether the court should sit *en banc* or in panels should be for the legislature, because the issue turns on the relative importance of the subject, and this is a matter for a legislature to decide. But whether and when cases should be orally argued, or what interests to hear apart from those directly affected, or what should be the role of a panel rapporteur, should normally be left to the court to decide, in internal rules.

Unfortunately, so neat a division is rarely made, and reasonable differences as to what should go where are inevitable. Wherever particular provisions may be placed, the overall structure should guarantee judicial independence and operational flexibility so that the court may function freely and efficiently.

Chapter Three

POLAND

The Antecedents

The pioneer constitutional court among the former Soviet-bloc states is the Polish Constitutional Tribunal.[1] That is more than accidental. The Solidarity trade union initiated the ultimate breakup of the Soviet Union, and, supported by other democratic forces, urged the establishment of such a tribunal. Despite the suppression of Solidarity in December 1981, those efforts, together with those of earlier reformers, bore fruit. The necessary constitutional authorization was enacted in 1982, and the first constitutional tribunal in the Soviet empire was established in 1985. That tribunal functioned from January 1, 1986, through October 1997, when it was transformed into a somewhat larger successor tribunal established by the Constitution adopted in April 1997 and operative as of October 1997. This chapter will concentrate on the first Tribunal, with references where appropriate to the changes effected by the 1997 Constitution.

Poland was also the East Bloc's pioneer in establishing an ombudsman in 1987, and this institution contributed importantly to the human rights jurisprudence of the Tribunal by bringing many human rights issues before it.

All of this meshes with the historical fact that Poland had the first written constitution in Europe on May 3, 1791. That constitution introduced the notion of constitutional supremacy to which "all further statutes . . . are to adhere to the full."[2] It never went into effect, however, because four years later, in 1795, Poland lost her independence and was partitioned by Austria, Prussia, and Russia. It did not regain independence until almost a century and a quarter later, in 1918.

In accordance with this constitutional tradition, the 1921 Polish consti-