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THE INSTITUTIONALIZATION OF THE RULE OF LAW: THE ESTABLISHMENT OF CONSTITUTIONAL COURTS IN THE EASTERN EUROPEAN COUNTRIES

Matthias Hartwig*

INTRODUCTION

"A ghost is haunting Europe, the ghost of democracy" — this persiflage of the famous first sentence of the Communist Manifesto was a common saying in many of the socialist countries just three years ago. Today the ghost of the Communist Manifesto is itself disappearing as democracy moves into the eastern wing of the common house of Europe, becoming the only legal and legitimate tenant of the various rooms. In Poland, the Czech and Slovak Federal Republic (CSFR), Hungary, Bulgaria, the former German Democratic Republic (GDR), Romania, and in many of the Republics of the former Union of Soviet Socialist Republics (USSR), free elections have taken place and brought democracy to the region.

The political landscape in these countries has drastically changed with the end of socialism. The development of the State of Law is the most fascinating and most important factor of the reforms and restructuring being observed in Eastern Europe. Most of the recent constitutional documents passed in Eastern Europe mention the principle of the State of Law as the foundation for the legal order being erected.¹ The

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¹ Article 1 of the Constitution of Poland (amended Dec. 29, 1989) reads: "The Republic of Poland is a State of Law, which realizes the principle of social justice." See HUNG. CONST. art. 2, para. 1; RUSSIAN CONST. art. 1.1 (draft); BULG. CONST. art. 4, para. 1; ROM. CONST. art. 1, para. 3 (draft); Geza Kilenyi, Ungarn Schreitet in Richtung Rechtsstaatlichkeit, EUROPÄISCHE GRUNDRECHTEZEITSCHRIFT 513 (1989)
power of the State shall be bound by legal principles, not by the will of those who hold power.

The former socialist states have all either reformed their constitutions, adopted a new constitution, or, like the CSFR, adopted part of a new constitution. These countries have implemented the provisions of these acts with extensive legislation in such fields as: property, real estate, corporations, as well as law regarding freedom of the press and freedom of association. After all these years characterized by a sort of legal nihilism in this region, Eastern European law, for the first time, truly exists.

Since the middle 1980's, more statutes and decrees have been adopted and more judicial sentences have been passed, at least in the field of administrative and constitutional law, than in all the time since the Second World War. It is impossible to deal with all the details of these enactments in this Article. This Article, therefore, is limited to the constitutional courts.

The legal problems of the socialist countries did not originate due to a lack of constitutional provisions. Even the bills of rights of these countries, contained in the constitutions, cannot be considered as under-developed, although the fundamental rights were operating under restraints that limited the material value of these guarantees. Non-application was the main problem with these socialist constitutions. All organs of the state were bound by the constitution, but no organ was controlled if it fulfilled the constitutional requirements. This was the result of the socialist theory that all power is concentrated in the soviets, the councils, or parliamentary organs. The idea of checks and balances between and among the organs does not fit within that theory. The protection of the supremacy of the constitution, therefore, was not institutionalized.

This lack of control was significantly noticeable in the field of human rights. There were rare cases, in both the civil and criminal courts, in which the human rights laws were directly applied. Special organs for

(an analysis of the state of law in Hungary by former Hungarian Deputy Minister of Justice); Laszlo Kiss, Einige Fragen der Rechtsstaatlichkeit und der Gesetzgebung in Ungarn, Osteuropa Recht 12 (1990); see also, A. A. Golzblat, State of Law or Dictatorship, CONSTITUTION OF THE RUSSIAN FEDERATION, DRAFT AND COMMENTARIES, 127 (Moscow 1991) (in Russian) (providing an historical description of the notion of state of law).

the protection of human rights did not exist. The problems of enforcing human rights were connected with the lack of adequate institutions able to cope with the task of realizing the guarantees given to the individual by the constitutions.

It is important to establish constitutional courts in the former socialist countries. This has been the tendency observed in Europe since the Second World War. With the end of a dictatorship, the restructured state establishes a constitutional court. For these former socialist nations, a juridical organ dedicated to constitutional control is considered a constituent element of democracy.6

The idea of establishing a constitutional court as a state organ is not new to Central and East European nations. Some socialist constitutions historically provided for a constitutional court, such as the Yugoslavian Constitution of 1963 and the Czech and Slovak Constitution of 1965. In Yugoslavia, however, the court failed to gain great influence within the legal structure and in Czechoslovakia, the court was never created.

Only with the beginning of the current reforms, were the discussions about such organs renewed. The discussions progressed at the same speed as the political reforms. Thus, it was no accident that Poland started to think about the introduction of a constitutional court before the drastic political changes were foreseeable. The now defunct Soviet Union also provided for a constitutional committee when it became evident that purely cosmetic corrections in the political system would not suffice. Other countries such as Hungary, Bulgaria, and the CSFR established the constitutional courts after the political changes took place. This Article presents a broad overview of the composition and functions of the constitutional court of each country and gives a short analysis of the tendencies and underlying ideas of each.

I. THE CONSTITUTIONAL COURT OF YUGOSLAVIA6

The constitutional court of Yugoslavia is not a product of the recent period of “revolutionary reforms.” On the contrary, this organ has lost

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5. It must not be overlooked, however, that traditional democracies such as Great Britain, Norway and Sweden do not have a constitutional court; this diminishes their democratic qualities in no way. Sometimes these structures, however, cause problems on an international level, especially insofar as the protection of human rights by the European Court for Human Rights is concerned.

all power at the time when its influence is needed the most — during the current bitter dispute within the Federation, represented by Serbia and Montenegro, and the seceding federal states.\(^7\)

The Yugoslavian Constitutional Court is nevertheless, within this context, a forerunner, to which the discussion on the establishment of constitutional courts is always referred in the socialist countries. The socialist state doctrine for a long time upheld the idea of the unity of state power, and this meant that the will of a soviet could not be questioned by another organ. The Yugoslavian example is proof to the contrary.\(^8\)

The court is comprised of fourteen judges, elected by the federal assembly for a term of four years. Each Republic sends two judges, while the autonomous provinces of Kosovo and Voivodina each send one. A judge cannot be reelected. A judge may be removed only by the constitutional court and only under certain conditions, such as the commission of a crime that requires a term of imprisonment or the permanent loss of working capability.

The constitutional court has jurisdiction to review the constitutionality of federal statutes and the statutes or norms, which are ranked below statutes, of the republics. The constitutional court also has jurisdiction to decide on conflicts between political communities, between the Federation and the Republics, and between the Republics. The court also can deliver advisory opinions on the compatibility of the constitution of a Republic with the constitution of Yugoslavia.

A special aspect of the constitutional court's jurisdiction is that it can declare a norm unconstitutional not only because it positively violates the constitution, but also because it does not contain a provision required by the constitution. A lack of implementation, essentially, constitutes a violation of the fundamental law.

The initiative to review a norm can come from many sources. For example, the Assembly and the Presidium of the Assembly, the Presidiums of the Republics and autonomous provinces, the governments (though not with respect to statutes adopted by the Assemblies), judges and prosecutors, and any citizen are all authorized to bring a case before the constitutional court. The court can also act on its own initiative. In all cases, however, the control is abstract. No person or organ, by bringing a case, must defend his, her, or its own interest.\(^9\) This

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7. In the following it is supposed that the Federal State continues to exist although this might be questioned.
9. YUGO. CONST. art. 357, para. 1.
shows that the real function of the constitutional court is to uphold the
constitutionality of the legal order and not to defend specific individual
rights.

The court’s competence to bring in a draft of a bill lies in the same
line. This is a broad jurisdictional power, which is also found within the
committee of constitutional supervision of the former Soviet Union.
The constitutional court gets an almost legislative power, which is quite
significant for its role within the legal system. The main task of the
court is to defend the legal order and respect for the constitution in a
very broad sense.

The decisions of the constitutional court of Yugoslavia are binding,
 apart from the advisory opinions on the constitutions of the Republics
or the autonomous provinces. If it declares a statute unconstitutional,
the Assembly must change it. If the Assembly refuses to comply with
the court’s decision, the statute loses its force after six months. This
provision was adopted as a compromise. On the one hand, the power of
the Assembly is respected insofar as the court itself cannot repeal a
statute. The statute loses its force either by an amendment by the par-
liament or by a constitutional provision. On the other hand, the court’s
decisions have not only an advisory character, but a direct impact upon
the legal order.

II. THE CONSTITUTIONAL COURT OF POLAND

Poland, with a history of non-conformism, started intensive discus-
sions on the establishment of a constitutional court in 1982, immedi-
ately after the proclamation of martial law in December 1981. On
March 26, 1982, the constitution was amended to include article 33,
which provides for the possibility of judicial review of norms. During
deliberations over the amendment, many different positions were ex-
pressed on the creation of such an organ. The issue of the transfer of
the highest controlling power to an organ other than the Sejm, the Po-
lish parliament, was the object of particularly animated debate because
it meant overcoming a traditional position of socialist state doctrine.
The general structure and procedure of the constitutional court was
laid down in a statute on April 29, 1985. The Constitutional Court of

10. Id. at art. 375.
11. Garlicki, supra note 8, at 5.
12. Dziennik Ustaw Polskiej Rzeczypospolitej Ludowej 1985, No. 22, Pos. 98
(German translation in WGO - Monatshefte für Osteuropäisches Recht, 177
(1984/85)) [hereinafter Dziennik Ustaw]; see K. Dzialocha, Der Verfassungsgericht-
shof der Volksrepublik Polen (Gesetzliche Voraussetzungen), Osteuropa-Recht, 13
(1986) (providing an analysis of this statute); R. Machaceke Z. Czeszejko-Sochacki,
Poland consists of twelve members elected by the Sejm, for a term of eight years. The eligibility requirements are profound knowledge in law and the fulfillment of the criteria for becoming justices in the Supreme Court or the Supreme Administrative Tribunal. The justices cannot be reelected. The parliament can decide on the premature removal of a member, but only if certain requirements, established by law, are fulfilled. The judges enjoy immunity and independence and their function is separate from any other function in a state organ.

The Constitutional Court of Poland may decide the constitutionality of a statute adopted by the Sejm, as well as the constitutionality and legality of decrees of other state organs. International treaties, however, are not subject to judicial control by the court. This exception exists because in Poland, the relation between domestic law and international law is still unresolved. The constitutional court only has jurisdiction to deal with normative acts; administrative and judicial acts escape its jurisdiction. It can review any case brought before it in an incidental procedure that is relevant to a case pending before the court. There is, contrary to the situation in the United States, no "diffuse judicial review," although there exists a tribunal especially established for this purpose.

Apart from incidental review, the constitutional court may decide on a case if special state organs, such as the President, the Council of Ministers, the state court or the presidents of the supreme courts (in civil, criminal, and administrative matters), the Presidium, and/or the committees of the Senate or fifty Senators, raise the question of constitutionality of a certain act. This may be done by initiative of the respective organs or after an analysis of the complaints brought before them by the citizens. The court may also act on its own initiative. A citizen, however, has no direct access to the court. This implies that the court has only a limited and indirect capability to guarantee the protection of human rights. The creators of the constitutional court feared that the tribunal might be overburdened with cases if the possibility of individual complaints existed. In Poland, the institution of an


13. Dziennik Ustaw, supra note 12, at art. 15 paras. 1 and 2.
14. Id. at art. 13, para. 5.
15. Id. at arts. 6, 7.
17. Dziennik Ustaw, supra note 12, at art. 9.
The ombudsman was introduced and was supposed to be, at least in theory, a sufficient guarantee for human rights.\(^{18}\)

The constitutional amendment of 1989 provides for a preventive control of normative acts.\(^{19}\) The President may bring the question of a statute's constitutionality, which has been adopted but not yet published, before the court. The effects of the decision depend upon the object of the review. If the constitutional court declares a statute, adopted by the Sejm, to be contrary to the constitution, the case goes before the parliament. The Sejm can then overrule the court's decision with a two-thirds majority.\(^{20}\) This provision is a compromise between a direct binding force of the court's rulings and a purely advisory function of the court. The parliament retains ultimate control concerning the constitutionality of laws. If the parliament wants to retain a statute that the court has declared unconstitutional, it needs a qualified majority, which is the majority necessary to amend the constitution. In a certain sense, the enforcement of an unconstitutional law constitutes an amendment to the constitution.\(^{21}\)

Decisions on other normative acts, such as the decisions of executive organs, have direct binding force. The organ that issues the act has to amend or repeal it within three months of its being declared unconstitutional. If it does not do so, the act automatically loses its validity.\(^{22}\) Decisions of regular or administrative courts that are based on normative acts later declared unconstitutional can be reversed in new hearings or retrials within a certain period of time. If the constitutional court declares an act unconstitutional more than five years after its adoption, it must advise the Sejm about its conclusions. In this circumstance, the parliament is not required to change the act.\(^{23}\)

The Constitutional Court in Poland started with fervent activity. From 1986 to 1990, 123 questions were raised before it and seventy-

\(^{18}\) Actually, more than 50,000 complaints are brought before the ombudsman every year. E. Letowska, *Der Bürgerrechtsbeauftragte in der Volksrepublik Polen*, RECHT IN OST UND WEST 261 (1989).

\(^{19}\) POL. CONST. art. 27 paras. 4 and 5; Dziennik Ustaw, *supra* note 12, at No. 19.

\(^{20}\) Dziennik Ustaw, *supra* note 12, at art. 6, para. 4.

\(^{21}\) In this context, it can be analogized to the concept of the German constitutional doctrine “Verfassungsdurchbrechung,” which means the change of the constitutional order without changing the text of the constitution. This was quite common during the Weimarer Republic and contributed to the degradation of the normative force of the constitution, a reason for which the Bonner Basic Law prohibited a change of the constitution without laying it down in the text.

\(^{22}\) Dziennik Ustaw, *supra* note 12, at arts. 8 and 9, paras. 1 and 2.

\(^{23}\) Id. at arts. 5, 21.
eight decisions were delivered. In all, 449 provisions were discussed, and almost half of them were declared unconstitutional.24

III. THE COMMITTEE FOR CONSTITUTIONAL CONTROL OF THE FORMER SOVIET UNION

The idea of judicial review of statutes by courts was not completely alien to the Soviet Union. The constitution of 1924 provided the possibility for control over statutes of the republics,25 although it was abandoned for a long time. Constitutional history was characterized by a sort of legal nihilism. The concept of "socialistickaja zakonnost," socialist legality, created by Stalin and then stressed during the Brezhnev period, hid the defects in enforcing the constitution more than it strengthened the respect for basic law. The Presidium of the Supreme Soviet exercised a certain measure of control. This control, however, did not work in times when the will of the party became the supreme law of the land. The ill-advised article 6 paragraph 3 of the Constitution of 1977 guaranteed the Communist Party a powerful position beyond the constitution and further immunized it against any constitutional control.

This structure was questioned shortly after perestroika started. When the idea of the State of Law began to replace the ideology of the dictatorship of the working class, it became necessary not only to list the rights within the bill of rights of the constitution, but also to provide for mechanisms to enforce those rights. The establishment of the Committee for Constitutional Control of the Soviet Union must be viewed in the context of this development. The constitutional reform of December 1, 1988, introduced in article 125 the possibility of establishing a special organ to supervise the conformity of normative acts with the constitution.26 This provision was implemented by the statute of


December 23, 1989.27

The Committee for Constitutional Control of the USSR was to be comprised of twenty-seven members, all specialists in the field of politics and law.28 The members, one from each republic, were elected by the Congress of the People’s Deputies for a term of ten years.29 The members were independent, subject only to the constitution,30 and enjoyed complete immunity.31

The Committee was competent to review: the constitutionality of legislative projects and normative acts adopted by the parliament, the Congress of the People’s Deputies, or the Supreme Soviet; decrees and decisions of the Council of Ministers; statutes of the Republics; and international treaties that were submitted for ratification.32 The Committee could only review normative acts, such as decisions of administrative authorities or of the courts. In this respect, its jurisdiction was more limited than that of western constitutional courts.

The criteria of control derived from the constitution. Beyond that, all acts, aside from the acts adopted by the Congress, were reviewed with respect to the Constitution and to the acts adopted by the Congress. All decrees were reviewed with respect to their conformity to the acts of the Supreme Soviet.33 The constitution further provided for an advisory opinion as to whether a reviewed act conflicted with an international obligation laid down in an international treaty. This reflects a general tendency toward an emerging approach with respect to international law. After having lost their ideological identity, Central and Eastern European countries are attempting to find a new ground on which they can establish their legal structure by referring to international standards.34

A qualified majority of one-fifth of the Congress, the Supreme Soviet, its Presidium, and the supreme organ of the republics were each

27. Vedomosti S’ezda Narodnych Deputatov SSSR i Verchovnogo Soveta SSSR 1989, No. 29, st. 572, p. 817 [hereinafter Vedomosti SSSR]; see Hartwig, supra note 26, at 44 (providing the German translation).
28. Vedomosti SSSR, supra note 27, at art. 5.
29. Id. at art. 6.
30. Id. at art. 24.
31. Id. at art. 27.
32. Id. at art. 10.
33. Id. arts. 16, 18.
34. Art. 5 para. 4 of the Bulgarian Constitution states: “Any international instruments which have been ratified by the constitutionally established procedure, promulgated and come into force with respect to the Republic of Bulgaria, shall be considered part of the domestic legislation of the country. They shall supersede any domestic legislation stipulating otherwise.” Compare Charter of the Fundamental Rights and Freedoms of the Czech and Slovak Federal Republic art. 2; ROM. CONST. art. 20 (draft).
authorized to bring the question of the constitutionality of a constitution or a statute of a republic before the Committee. All such organs were authorized to take the initiative with respect to normative acts of other state organs and the Supreme Court, the prosecutor general, the main arbitrator, the all-union organs of social organizations, and the academy of sciences. The Committee could also take up cases on its own initiative. Citizens, however, had no direct access to the Committee. If a citizen wanted to raise the question of the constitutionality of a normative act, he or she had to first address an organ that was authorized to bring the case before the Committee.

The Committee's opinions did not have binding, but only suspending force. If the Committee reached the conclusion that an act was unconstitutional, it first submitted the act to the organ that adopted it. The organ then had the opportunity to repeal the act within three months. If the organ did not repeal the act within the three months, the Committee required the repeal of the act by the Congress, Supreme Soviet, or Council of Ministers. The Congress could overrule an advisory opinion with a majority of two-thirds vote, the same majority required for the amendment of the constitution. The decision of the Congress was final.

There was one instance when the decision of the Committee had direct binding force; if the Committee declared an act contrary to fundamental rights and freedoms, as laid down in the Soviet constitution or in an international treaty in which the former Soviet Union was a party, the act was null and void. The Soviet legislature was anxious to qualify the Committee as a real constitutional court. This would have meant a departure from the traditional state doctrine. Yet, the Committee was, by far, more than a purely advisory organ. Although the Committee, created to protect the constitution, did not hold a position elevated above other institutions in its specific field of activities, the Committee was ranked higher than the ordinary legislature, which could not uphold a statute declared unconstitutional. The Committee, in a way, was transcending itself, endearing some characteristics that could have developed in the direction of a true constitutional court. In the course of the discussions on the new union treaty, there was an

35. Vedomosti SSSR, supra note 27, at art. 12, para. 1.
36. Id. at art. 12, para. 2.
37. Id. at art. 12, para. 3.
38. Id. at art. 21, para. 1.
39. Id. at art. 22, para. 1.
40. Id. at art. 22, para. 3, art. 19, para. 4.
41. Id. at art. 21, para. 3.
intent to transform the Committee into such a court. The draft of the constitution of Russia provided a real constitutional court and the statute establishing it has already been adopted.

Similar to the Yugoslavian and Polish constitutional court, the Committee for Constitutional Supervision within the USSR had the task of guaranteeing respect for the legal order, but it did not protect against the encroachment of individual rights by state authorities. This is apparent through an analysis of the types of acts authorized for review and of the organs capable of bringing such cases before the Committee. The task of the Committee went beyond that of a mere constitutional court, as it reviewed not only constitutional norms, but also the conformity of substatutory law to statutes. The protection of human rights was only an indirect effect, as human rights were among the provisions applied as the criteria of any review. The violation of these rules entailed more direct consequences, as did the normative acts that automatically lost their force if violated. Special attention was paid to these norms and almost all cases decided by the Committee concerned questions of human rights. The Committee also had the responsibility to ensure the legality of each act within the legal system and to monitor the respect for the law by the State organs.

The Committee for Constitutional Control was established in May 1990. The members of the Committee were elected without the participation of the Baltic States and Kazakstan, which had already declared their independence and, therefore, did not consider the Union competent to decide on their internal affairs.

The decree, by which the statute on the Committee was enforced, made an exception with regard to normative acts of the republics. The Committee was not considered competent to decide on such acts before the enactment of the amendment of the parts of the constitution concerning the federal structure. The Committee was only considered competent to review cases when human rights were at stake.

The Committee delivered its first advisory opinion in July 1990. The Committee subsequently delivered more than fifteen others. It considered most cases on its own initiative. It reviewed crucial issues, such as the treatment of alcoholics and the freedom of movement, which was sensitively limited by the necessity to get “propiska,” permission to move to another city. Perhaps the most famous and important case addressed concerned the secrecy of many normative acts in the Soviet

42. Vedomosti SSSR, supra note 27, at No. 29, st. 572, p. 820
The court declared all the acts that had not been published null and void because they violated the fundamental principle that the citizens must be informed about the norms in force in order to be able to respect them and refer to them. The necessity of such an advisory opinion proved the poor standard of the Soviet legal culture; yet, such an advisory opinion also proved that the Committee did not deal with marginal questions, but rather with issues that constituted the core of the state of law.

Some cases raised the issue of whether various statutes of the republics violated human rights, as laid down in the constitution or in international treaties. Thus, for example, the Committee reviewed a statute of a Baltic State that abolished the privileges of military personnel in obtaining houses. In these latter cases, it was a central organ, generally the president of the Supreme Soviet, that brought the case before the Committee.

In all cases in which the Committee reviewed a statute, it concluded that the respective statute violated the constitution. This outcome was due to the actual state of the Soviet legal system and the fact that the Committee selected quite obviously violative cases. It also proved the necessity of such a control. Although the Committee vanished along with the Soviet Union, it illustrates the surprising development of constitutional courts in Central and Eastern European nations.

IV. THE HUNGARIAN CONSTITUTIONAL COURT

The need to protect human rights was urgent prior to the great changes in the political system, which, in Hungary, took place in a less revolutionary fashion than in the other Eastern European countries. As in Poland, the institution of an ombudsman was introduced in Hungary. In the autumn of 1989, the political transition emerged and the constitution was amended in order to conform to the exigencies of a state of law. Among the first measures introduced was a constitutional court with broad jurisdiction.

44. The president of the Supreme Soviet was then Lukianov, a person who was later arrested for his involvement in the coup of August 19, 1991.
The court is comprised of fifteen judges elected by the parliament for a term of nine years. The judges are elected from among academic jurists of profound learning, university professors, doctors of legal sciences, and lawyers with at least twenty years of professional practice. A judge may be reelected only once. A judge may be released from duty or removed from the court for non-fulfillment of his duties. This is preceded by a resolution of the court’s plenum to this end. Each member of the court is required to retire upon turning seventy.

The constitutional court has jurisdiction to investigate, ex ante, cases concerning the unconstitutionality of bills, acts of parliament adopted but not yet promulgated, the parliament’s rules of procedure, and international agreements. A motion to this end may be made by either the parliament, any of its standing committees or a group of fifty members of parliament, or by the president of the republic or the council of ministers. Further, the constitutional court is competent, ex post, to review the conformity of statutes, decrees and, in contrast to the regulations of the Polish constitutional court, other measures of the state involving the constitution. In such instances, anyone may initiate a procedure. A person, even a foreigner, who takes the initiative, does not have to prove that he or she has a personal interest in the case. This possibility of unlimited access to the court could lead to an overburdening of this organ. There are already initial signs of such a development, and it is probable that before long this procedure will be regulated in a more restrictive manner.

A court that observes an unconstitutional provision in a case pending before it is required to initiate a proceeding before the constitutional court. In addition, any individual has the right to lodge a constitutional complaint alleging an injury due to the application of an unconstitutional provision of law with respect to his or her rights, providing no other remedy is available. This includes cases in which the unconstitutionality is a result of the non-implementation of the constitution. The pure misapplication of a norm, however, does not in itself, allow for judicial review.

47. Birosagi Tv., supra note 46, at arts. 4, 8 para. 3.
48. Id. at art. 5, para. 2.
49. Id. at art. 8, para. 3.
50. Id. at art. 15.
51. Id. at art. 1(a).
52. Id. at art. 21, para. 1.
53. Id. at art. 1(b).
54. Id. at art. 21, para. 2.
55. Id. at art. 35.
56. Id. at arts. 1(d), 21 para. 4, 48.
Beyond the organs mentioned, which are capable of initiating a procedure on an unconstitutional law, any member of the parliament, any minister, the president of the Supreme Court, and the chief procurator is entitled to make a motion requiring the constitutional court to investigate conflicts of legislative provisions as well as other acts of state organs that conflict with provisions of international agreements.\(^\text{57}\) In such instances, the court acts *ex officio*. If the national norm in question is superior to the international norm, the court invites the organ that concluded the international agreement to remove the conflict. Once again, the special importance attributed to international norms in today's Eastern European law systems is evident.

The court also decides on conflicts between organs or autonomous authorities.\(^\text{58}\) On request of the parliament, the Permanent Commission of the parliament, the President of the Republic, the Council of Ministers, the President of the Supreme Court, and the Prosecutor General, the court is required to give an interpretation of the constitution.\(^\text{59}\) The court also has the authority to change an unconstitutional situation created by the omission of a state organ, by inviting the competent organ in default to comply with its duty.\(^\text{60}\)

If the constitutional court declares a norm or another act of state organs unconstitutional, it is authorized to annul them.\(^\text{61}\) The respective acts lose their effect on the day the decision is published.\(^\text{62}\) Acts of state organs based on a provision later declared unconstitutional are not affected.\(^\text{63}\) The constitutional court is required, however, to order a retrial of criminal proceedings.\(^\text{64}\) If in cases of *ex ante* investigations, the court concludes that an act is unconstitutional, the parliament has to amend it before adopting it.\(^\text{65}\) The decisions of the constitutional court are binding.\(^\text{66}\)

The Hungarian Constitutional Court has already experienced great activity. It has dealt with crucial issues such as the death penalty, the problem of data protection, the right to privacy, and the consequences of expropriations under the socialist regime. The reasoning in its decisions prove that, notwithstanding the adverse circumstances during the

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57. *Id.* at arts. 1(c), 21 para. 3, 44.
58. *Id.* at arts. 1(f), 50.
59. *Id.* at arts. 1(g), 51.
60. *Id.* at arts. 1(e), 49.
61. *Id.* at art. 40.
62. *Id.* at art. 42.
63. *Id.* at art. 43, para. 2.
64. *Id.* at art. 43, para. 3.
65. *Id.* at art. 34, para. 2.
66. *Id.* at art. 27, para. 2.
last forty years, Hungarian lawyers have succeeded in maintaining a high level of legal tradition.

V. THE BULGARIAN CONSTITUTIONAL COURT

Bulgaria was the first country in the former socialist bloc to change its constitution. The new constitution established the constitutional court and was adopted by the parliament. The court consists of twelve justices: one-third elected by the National Assembly; one-third by a joint meeting of the Supreme Court of Cassation and the Supreme Administrative Court; and one-third appointed by the President. The justices of the court must be lawyers of high professional and moral integrity with at least fifteen years of professional experience. Article 149 of the constitution and article 12 of the statute define the jurisdiction of the court. According to these provisions, the constitutional court has the power to give a binding interpretation of the constitution. It reviews the constitutionality of statutes and other acts of the parliament and acts of the President in an abstract procedure. An organ bringing a case before the court is not required to allege that it has been injured with respect to its own rights. The court also has the authority to review international treaties, based on their constitutionality, prior to their ratification. In addition, the court reviews statutes with respect to their conformity with generally recognized norms of international law and international treaties. Once again, the importance of international norms as criteria for the state of law is evident.

Further, the Supreme Court or the Supreme Administrative Court can raise a question of constitutionality of a statute relevant in a case to be decided by them. In such instances, the courts have to suspend the procedure and wait for the decision of the constitutional court. The constitutional court also decides conflicts between organs of the state, such as between the President and the Assembly or the Assembly and the council of ministers, or between central organs and organs of local self-government. The court has jurisdiction to review challenges to the constitutionality of political parties and associations, the legality of the election of the President and the Vice President, and the legality of the election of a member of the National Assembly. Finally, the court

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68. BULG. Const. art. 147.
70. Id. at art. 4. This procedure for composing the constitutional court is similar to the Italian.
71. BULG. Const. art. 150, para. 2.
decides on impeachments by the National Assembly against the President or the Vice President.

In contrast to the Yugoslavian Court or the Committee for Constitutional Supervision in the Soviet Union, the Bulgarian constitutional court cannot take up a case on its own initiative. It may deal with a question only if brought before it by the President, one-fifth of the deputies, the Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court or the Procurator General. Individuals do not have direct access to the court. Neither the constitution nor the statute creating the court provides for individual complaints because of the fear of overburdening the court.

The court must publish its decisions in the state Gazette within fifteen days. Decisions are binding upon all state organs, juridical persons, and citizens. The constitutional court was established in October 1991, and expects to release its first decisions by the end of 1991.

VI. THE CZECH AND SLOVAK CONSTITUTIONAL COURT

Since 1968, the constitution of the former Czechoslovakia Socialist Republic (CSSR) provided for a constitutional court. This tribunal, however, was never constituted. After the November Revolution of 1989, Czechoslovakia, currently the Czech and Slovak Federal Republic (CSFR), started a profound reform of its constitution. In contrast to the Bulgarian developments, though similar to what was taking place in Poland and Hungary at the time, this reform did not lead to the adoption of an integrated constitutional document, but rather to several statutes that enjoy constitutional force. One of the most important documents is the Charter of Rights, adopted in January 1991. Human rights and fundamental freedoms are listed in this document and the constitutional court protects these rights. The statute addressing the constitutional court was adopted on February 27, 1991.

The court consists of twelve justices appointed by the President. The President chooses from lists proposed by the Federal Assembly, the Czech National Council, and the Slovak National Council. On each list, there are eight individuals nominated; the federal list proposes four candidates out of the Czech Republic and four out of the Slovak Re-

72. BULG. CONST. art. 150, paras. 1, 2; Darzhaven Vestnik, art. 16 (1991).
74. Id. at art. 14, para. 6.
75. Like Austria, the CSFR has a tradition of having several texts compose the constitution.
77. Id. at art. 1, para. 2.
public. Any person of good reputation who is thirty-five years old, has an academic foundation in law, and has practiced as a lawyer for ten years may be nominated. The term of office for each justice is seven years. The justices enjoy immunity, which may be lifted only by the constitutional court itself.

The constitutional court has jurisdiction in several areas: it can decide on the conformity of the federal Parliament's statutes with the constitution, and decrees and it controls situations where jurisdiction statutes of the Federation, constitutional, or statutory acts of one of the two republics, violate provisions of international human rights instruments ratified by the CSFR. Here again, a special importance is attached to international norms. The constitutional court is likewise competent to review decrees and other norms under the statutes, with respect to their conformity with the constitution or ordinary statutes. The court further decides on federal conflicts, and construes the constitution if an abstract question arises within this context. The dissolution of parties or political associations falls within its functions as well. The Czech and Slovak constitutional court, similar to the Hungarian Constitutional Court and in contrast to the Bulgarian Constitutional Court, has the power to review individual complaints insofar as a person alleges a violation of fundamental rights laid down in the constitution or in an international treaty ratified by the CSFR.

A norm is suspended if the constitutional court declares that it is not in conformity with the constitution or an international treaty. The organ that adopted the norm is then required to bring it in conformity with the constitution. If it does not comply with this obligation, the norm will lose its force after six months. The constitutional laws of the two republics, however, are excepted from these consequences. This is a concession to the autonomy of the republics, as the "federal question" in the CSFR is not yet resolved.

VII. THE CONSTITUTIONAL COURT OF RUSSIA

With the dissolution of the Soviet Union, the republics composing it have laid down the principles of their own statehood. It began with

78. Id. at art. 10.
79. Id. at art. 15.
80. Id. at art. 2.
81. Id. at art. 4.
82. Id. at art. 5.
83. Id. at art. 7.
84. Id. at art. 6.
85. Id. at art. 3.
more political than constitutional declarations of independence, most of them pronounced in 1990. When it became evident that the Soviet Union would not be sustained, the republics set about to adopt their own constitutions. Russia, the most advanced of the republics in this respect, has provided, in all its projects, for a constitution and a constitutional court. Even before the constitution was adopted, a statute on the constitutional court was set in force.86 This statute, comprised of eighty-four articles, is the most comprehensive regulation on the composition, jurisdiction, and procedures of any constitutional court adopted in any Central or Eastern European country. The court has been created and the first decisions were expected by the end of 1991.

The court consists of fifteen judges elected by the Congress of Russia, on proposal of the President of the Supreme Soviet.87 Any person between thirty-five and sixty years of age, who has a solid knowledge in law, high moral qualities, and who has practiced law for more than ten years is eligible.88 The term is unlimited, although judges must retire at the age of sixty-five.

The Constitutional Court of Russia is competent to review international treaties of Russia before they enter into force, as well as the constitutionality of acts of the Congress or the Supreme Soviet and other governmental organs.89 The constitutionality of a normative act of a supreme organ, with the exception of those acts of the Congress, the Supreme Soviet, or the Presidium of the Supreme Soviet, is investigated only with respect to the conformity of these acts with the division of powers between the supreme organs.90 In reviewing an act of the Republic of Russia, the only criteria of control the constitutional court uses is distribution of the competencies.91

The organs allowed to initiate a procedure before the constitutional court are the Congress, the Supreme Soviet and the President of the USSR, the respective organs of Russia, fifty deputies, the Supreme Court, the Procurator General, the supreme organs of the republics forming part of Russia, and the supreme organs of social organizations.92 The Russian Constitutional Court, in contrast to the Committee for Constitutional Supervision of the former Soviet Union, is com-

87. Id. at art. 3.
88. Id. at art. 12.
89. Id. at art. 57.
90. Id. at art. 55, para. 2.
91. Id. at art. 55, para. 3.
92. Id. at art. 59.
competent to review individual complaints. Any person who alleges injury of a constitutional right through the application of the law by a state organ may bring the case before the constitutional court within three years of the injury. The admissibility of the individual's complaint requires that the complaining person must first exhaust all legal remedies. The constitutional court does not admit the complaint if it does not seem suitable to it.

The constitutional court may inform other organs of the violation of the constitution. The organs to which such information is directed must take notice of it within one month and then inform the constitutional court of the measures taken to abolish the unconstitutionality. Every year the constitutional court delivers a report on the "Constitutional State of Affairs," which must be discussed by the Supreme Soviet or the Congress within two months of receipt.

A normative act declared unconstitutional loses its force ex nunc. The constitutional court may, however, make the act's invalidity retroactive for up to three years. The decisions of the court are binding on the whole territory of Russia, on all organs and citizens. Decisions on individual complaints only affect the parties involved. If the decision is favorable to the complaining person, a rehearing of the case before the ordinary tribunal is possible. The court's judgment may require an organ to abolish an unconstitutional act.

VIII. THE CONSTITUTIONAL COURT OF ROMANIA

Romania has not yet adopted a new constitution or established a constitutional court. A draft constitution, which is expected to be set in force soon, however, provides for such a body. The constitutional court provides for nine members, three members appointed by the Chamber of Deputies, three by the Senate, and three by the President of Romania. All members must be lawyers of high professional competence with at least fifteen years of practical experience. The justices will be independent and irremovable. The constitutional court will have the authority to make pronouncements regarding: the consti-

93. Id. at art. 57.
94. Id. at art. 55.
95. Id. at art. 54.
96. Id. at art. 65.
97. Id. at art. 3.
98. Id. at art. 73.
99. Rom. Const. arts. 139-144.
100. Id. at art. 139.
101. Id. at art. 140.
102. Id. at art. 142.
tutionality of organic laws prior to promulgation; initiatives to revise the constitution; and, the constitutionality of ordinary laws before promulgation but upon notification by the President of Romania, the President of either Chamber of the Parliament, the government, the Supreme Court of Justice, or by at least fifty Deputies or twenty-five Senators. The constitutional court will also have the authority to decide the constitutionality of a law if such a question is raised before the regular courts, to watch the procedure of a referendum, to decide impeachment issues, and to decide the constitutionality of political parties. The decisions of the constitutional court will be binding.

CONCLUSION

The institution of a constitutional court is, by far, not the only means by which to guarantee constitutional or human rights norms. In the Scandinavian countries, the ombudsman fulfills the function of a custodian of human rights. Poland and Hungary followed this idea. But, for the new democracies in Central and Eastern Europe the constitutional court is the most adequate institution to ensure the protection of human rights.

The establishment of these courts may reinforce radical transformations from socialist states into states of law. The rule of law, as a basic principle, has become the cornerstone of the legal systems in these countries. The protection of this principle has already been institutionalized, or will be soon, throughout all former socialist countries. Institutions were specially created to defend the supremacy of constitutional provisions against all other organs of the government — even the parliament. These nations do not confine themselves to drafting particularly detailed constitutions, but are rather, more willing to provide for effective procedures to turn the content of these norms into political realities. The states will be ruled not only by the will of the legislature, but by the fundamental principles laid down in the constitution. The law will be binding on all institutions and will be enforced against them. The law-defending function of the constitutional court has become so essential that, in various countries, the constitutional courts will even guarantee the hierarchy of norms that are beyond the protection of the constitutions. The law does not serve pure decorative goals, but has become a goal in itself.

103. Id. at art. 143.
104. Id. at art. 144.
Many states prefer to give constitutional courts independence from other organs through systems of election and appointment of its judges. In all of these states, the removal of justices is not purely within the discretion of the electing or appointing organ. The justices can be removed only if certain conditions, prescribed by the respective statutes or constitutions, are met. The justices also enjoy immunity, which gives them additional independence.

In some countries, the jurisdiction of the court goes even beyond the functions ordinarily ascribed to constitutional courts. In the former Soviet Union and Yugoslavia, for example, the courts had the authority to declare an act unconstitutional or to introduce a statute to parliament. Moreover, in many countries, the courts have the ability to take up a case on their own initiative. This vast authority symbolizes how much trust is given to the courts. It is believed that this trust will more effectively ensure the observance of the constitution.

It is significant that most of the nations in Central and Eastern Europe attach a special importance to the provisions of international law that reinforce the legitimacy of the law as applied by constitutional courts. This admission supports the view that the internal laws of these nations lag behind the principles developed on an international level. One reason for the focus on international law may be the complete loss of legitimacy of the state after the failure of the socialist experience. The international standards to which the majority of civilized states are bound gain their legitimacy out of their general recognition. International standards express general principles of law which, in turn, add legitimacy to the new nation's government.

The will of the Central and Eastern European states to join international and regional organizations, such as the European Council or the European Communities, must be preceded by the fulfillment of certain conditions guaranteeing that each member state be a free and democratic country ruled by law. The introduction of constitutional courts may enable these countries to reach this goal of membership and may help close the gap separating former socialist nations from western democracies. The state of law or the rule of law as a common value of all European nations may further solidify the European community.

Human rights must be protected in all countries, even where the individual is without standing before the constitutional court. The most significant and most effective protection of human rights is guaranteed by the individual complaint mechanism. Where every individual has direct access to the court, he or she can defend his or her rights. Direct access to a court enables the individual to gain status as an autonomous personality vis-a-vis the state. The constitutional courts will become the
custodians of the constitutions, and will enable individuals to defend their rights, even against state organs. The constitutional courts will inspire trust in the law and will foster respect for the newly established legal systems of Central and Eastern Europe.