Judicial Referral of Constitutional Questions in Austria, Germany, and Russia

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I. INTRODUCTION: TWO SYSTEMS OF CONSTITUTIONAL REVIEW

Constitutional review has grown from specific historical and political conditions that have differed from one country to another. Generally speaking, one may distinguish an older *American system* of a uniform and decentralized ("diffuse") judicial review, in which all courts participate, from a younger *Austrian system* of specialized and centralized ("concentrated") constitutional review, which is exercised outside the regular court system by a separate constitutional court.[1]

In the American system, constitutional review is exercised only "*incidenter*," i.e., in the context of a specific case litigated in the regular court system ("case and controversy approach"), its effect is fundamentally *inter partes*.[2] In the Austrian system, constitutional

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1. *See generally* Louis Favoreu, *American and European Models of Constitutional Justice*, *in* COMPARATIVE & PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN HENRY MERRYMAN 105, 105-20 (David S. Clark ed., 1990); MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 1, 132-49 (1989); ALLAN A. BREWER-CARÍAS, JUDICIAL REVIEW IN COMPARATIVE LAW 1, 125-37, 185-94 (1989).

2. BREWER-CARÍAS, *supra* note 1, at 133.

review is also conducted "*principaliter*," without a specific case in point, and its effect is basically *erga omnes*.[3] Both systems have their particular strengths and weaknesses.

The core area of constitutional review under the Austrian (also called European) system is the examination of the *constitutionality of statutes*.[4] Other judicial competencies such as examining the legality of substatutory acts (e.g., government ordinances or regulations), resolving jurisdictional conflicts among other state organs, deciding electoral disputes, holding impeachment trials, and so forth, may be entrusted to a constitutional court in addition to this principal function.[5] Austria and Germany have endowed their constitutional courts with a multitude of such competencies, whereas France has been more reticent.[6]

The Austrian system has its roots in the constitutional law discussions of the late nineteenth century.[7] It was further developed by Hans Kelsen, a prominent legal theorist, constitutional law scholar, and the "father" of the Austrian Constitution of 1920.[8] After the Second World War, it was this system rather than the American that profoundly influenced the creation of constitutional courts within the new constitutions of Italy (1948)[9] and Germany (1949).[10] In the following years, the Austrian model of constitutional review—often as modified by contemporary German theory and experience—was adopted by most West European as well as by several Central and Latin American states.[11] Most recently, virtually all emerging democracies in Eastern Europe have established constitutional courts based on the Austrian and/or German experience.[12]

There are several reasons why the older American system was not adopted by European nations in course of their constitutional

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3. *See* Favoreu, *supra* note 1, at 113-15. *See generally* BREWER-CARÍAS, *supra* note 1, at 192-202.

4. *See* BREWER-CARÍAS, *supra* note 1, at 195-202.

5. *See id.*

6. *See generally id.* at 195-98, 205-07, 253-55.

7. *See id.* at 190.

8. *See id.*

9. The Italian Corte costituzionale became operative in 1956, *see* BREWER-CARÍAS, *supra* note 1, at 215. *See also* Alessandro Pizzorusso, *Constitutional Review and Legislation in Italy*, *in* CONSTITUTIONAL REVIEW & LEGISLATION 109, 109-10 (Christine Landfried ed., 1988).

10. The German Constitutional Court began to function in 1951. *See* DONALD P. KOMMERS, THE FEDERAL CONSTITUTIONAL COURT 1, 9 (1994); DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 1, 1-11 (2d ed. 1997).

11. *See* FAVOREU, *supra* note 1, at 106. *See generally* BREWER-CARÍAS, *supra* note 1, at 156-67.

12. Sarah Wright Sheive, *Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review*, 26 LAW & POL'Y IN INT'L BUS. 1201, 1208 (1995).

reforms following World War II.[13] European constitutional review is the product of a specific model of separation of powers and rule of law in continental Europe, a model that emphasizes the notions of supremacy of parliament and the product of its legislative activity, the statute.[14] In European civil law countries, statutory regulation is comprehensive, and judges have no overt law-making function similar to that of their common law brethren.[15] They are faithfully to apply the statute, not to challenge it.[16] Their activism is also curbed by the fact that they are part of a civil service hierarchy, in which they are promoted from lower to higher courts according to professional competence and seniority.[17] Constitutional review being a quasi-legislative function, it is considered to differ substantially from "regular" judicial work.[18] It is, therefore, assigned to a special procedure before a separate constitutional organ with justices particularly selected for this politically sensitive activity.[19]

One should note in particular that in times of radical political change from totalitarian to democratic systems, e.g., after the collapse of the Soviet regime in Eastern Europe, the regular judiciary is invariably tainted but cannot be quickly replaced, whereas a specialized constitutional court may be staffed with competent and reputable jurists[20] (such as law professors). If sufficiently broad access is provided (like for instance in Hungary today), this court may swiftly impose constitutionality from above.

I will now discuss one specific aspect of European constitutional review in three different political systems: Austria, Germany, and Russia. It concerns an important question of jurisdiction and access to the constitutional court, namely the *judicial referral* (or preliminary reference) of constitutional questions from the ordinary judiciary to the constitutional court.

13. *See generally* FAVOREU, *supra* note 1, at 106-11; Cappelletti, *supra* note 1, at 132-49.
14. *See* FAVOREU, *supra* note 1, at 107.
15. *See id.* at 107-08.
16. *See id.*
17. *See id.* at 110.
18. *See id.* at 109.
19. *See id.* at 111-12.
20. *See* FAVOREU, *supra* note 1, at 110-11.

II. FUNCTIONS OF CONSTITUTIONAL COURTS

A. The Austrian Court

1. Competencies

There are at least eight types of competencies of the Austrian Constitutional Court, all of which are extensively regulated in the Constitution.[21] Among these, the most significant and most typical function is undoubtedly the examination of the constitutionality of *statutes*.[22] But one should note that in the Austrian legal system, examination of *all* general norms, i.e., statutes, administrative regulations, and international treaties, as to their constitutionality *or legality* is monopolized by a single institution, the Constitutional Court.[23] According to Austrian theory, all lower norms that violate a higher norm are in general valid until they are nullified by the Constitutional Court.[24]

I will focus my remarks on the examination of constitutionality of statutes. Austria is a federal state. The Austrian Constitutional Court examines the constitutionality of federal or state (*Land*) *statutes* (*Gesetze*) either *ex officio*, when they are prejudicial to a case before the Court itself, or at the request of certain organs or persons.[25] Such requests may be brought by Courts of Appeal, Independent Administrative Panels, the Supreme Court, or the Administrative Court in the case of prejudiciality.[26] The Federal Government may contest *Land* statutes; a *Land* government, or one third of the members of the National Council may challenge a federal statute.[27] In addition, every person may challenge a statute if it violates his

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21. *See* BUNDES-VERFASSUNGSGESETZ [Constitution] [B-VG] Const. arts. 137-145, (Austria); Federal Press Service, Austrian Federal Constitutional Laws (selection 1995); Constitutions of the Countries of the World, Austria (Albert P. Blaustein & Gisbert H. Flanz eds., 1985). The current German text of the Bundesverfassung is available in the loose leaf edition of Heinz Schäffer, Österreichische Verfassungs-und Verwaltungsgesetze. For the current (amended) text of the Verfassungsgerichtshofgesetz 1953 [Law on the Constitutional Court] (Austria), *see id*. There is, unfortunately, very little English language literature on the Austrian Constitutional Court. *But see* Manfried Welan, *Constitutional Review and Legislation*, *in* CONSTITUTIONAL REVIEW & LEGISLATION IN WESTERN DEMOCRACIES 63, 63-80 (Christine Landfried ed., 1988). *See also* KURT HELLER, OUTLINE OF AUSTRIAN CONSTITUTIONAL LAW 1, 17-31 (1989); RUDOLF MACHACEK, AUSTRIAN CONTRIBUTIONS TO THE RULE OF LAW 1, 11-12 (1994), and, most recently, HERBERT HAUSMANINGER, THE AUSTRIAN LEGAL SYSTEM 127-45 (1998).

22. *See* Welan, *supra* note 21, at 63-64; MACHACEK, *supra* note 21, at 11.

23. *Cf.* Const. art. 89(1) "the courts are not entitled to examine the validity of duly published statutes, ordinances, and treaties." *See also* Welan, *supra* note 21, at 66-70.

24. *See* MACHACEK, *supra* note 21, at 10-12.

25. *See id.*

26. *See id.* at 12.

27. *See* Brewer-Carías, *supra* note 1, at 199.

constitutional rights immediately, that is to say when it affects them directly without mediation by a court decision or administrative act.[28]

Of the 301 cases of review of statutes initiated in 1994, one-third (101) concerned federal statutes, two-thirds (200) concerned *Land* statutes.[29] One-third of these cases (103) were examined by the Constitutional Court *ex officio*, another third (102) was brought by way of individual citizens' complaints, and the last third (92) was brought by various courts and tribunals, namely, thirty-five by the Administrative Court, nine by Independent Administrative Panels, forty-eight by regular courts.[30] Only four cases were brought by *Land* governments and none by the federal government.[31] The distribution was similar in 1995 and 1996.[32]

2. Judicial Referral

In the original Austrian concept of separation of powers, administrative authorities were first and foremost to police themselves in a system of internal appeals.[33] Only at the very top, a specialized Administrative Court, created in 1875, was to provide specialized, centralized, one-tier judicial review of administrative legality.[34] But this system was found to be insufficient under the European Human Rights Convention of 1950,[35] and Independent Administrative Panels were introduced in Austria in 1988 to perform quasi-judicial trial-

28. The *individual request* for constitutional review was introduced in Austria in 1975, following the German example. *See* BREWER-CARÍAS, *supra* note 1, at 200. In his constitutional complaint, a citizen may attack any law as unconstitutional that he thinks to be in violation of his constitutional rights. *See id.* Most of these complaints are based on the equal protection clause, *see* HELLER, *supra* note 21, at 29, and they are, of course, subject to certain prerequisites, such as a degree of seriousness ("*Betroffenheitsdichte*") of direct interference with a person's rights (and not just interests) that must be actual (as opposed to merely potential); and there must also be a finding of unreasonableness in requiring the complainant to pursue his right by taking a circuitous route ("*Umwegsunzumutbarkeit*") e.g., that the complainant accept a penalty in an administrative procedure in order to exhaust a line of appeal and finally have the decision reviewed in the Constitutional Court.

29. This statistical information is contained in the (nonpublic) Ann. Rep. of the Constitutional Court, n.2, Appendix 1 (1994).

30. *See id.*

31. *See id.*

32. See generally Ann. Rep. of the Constitutional Court (1995); Ann. Rep. of the Constitutional Court (1996).

33. *See* MACHACEK, *supra* note 21.

34. *See id.* at 11; HAUSMANINGER, *supra* note 21, at 123-26.

35. Art. 6 of the Convention grants everybody "in the determination of his civil rights and obligations or of any criminal charge against him" the right to a hearing before "an independent and impartial tribunal." The mere possibility of subsequent judicial review of administrative decisions in the Administrative Court did not satisfy this requirement, because the fact determinations made by administrative authorities that did not enjoy judicial independence were binding on the Administrative Court.

court functions below the level of the (Supreme) Administrative Court.[36] From the very beginning, the Administrative Court, and more recently the Independent Panels, have had the right (and duty) to interrupt proceedings and certify a question concerning the constitutionality of a statute or the legality of a regulation to the Constitutional Court.[37]

Concerning the regular Austrian court system that functions in criminal and civil matters, at first only the Supreme Court could certify constitutional questions to the Constitutional Court.[38] In 1975, this right was extended to Courts of Appeal.[39] Trial courts must still apply *statutes* they consider unconstitutional, but they are to refer questions of legality or constitutionality of administrative *regulations* to the Constitutional Court.[40]

B. The German Court

1. Competencies

The German Federal Constitutional Court like the Austrian enjoys a broad range of jurisdiction. In pursuance of article 93 of the Basic Law,[41] the Law on the Federal Constitutional Court[42] lists no fewer than fifteen conflict types.[43] Like its Austrian counterpart, the German Constitutional Court is largely called upon to function as the guardian of civil rights. According to German theory, statutes that violate the Constitution are null and void *ab initio*, but ordinary judges may not hold a statute unconstitutional: they may only suspend proceedings and refer the constitutional question to the Constitutional Court.[44] Whereas Austrian courts also submit questions of the conformity of administrative regulations with

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36. *See generally* MACHACEK, *supra* note 21, at 34. *See also* BUNDES-VERFASSUNGSGESETZ [Constitution] [B-VG] arts. 129-129(b) (Austria); HAUSMANINGER, *supra* note 21, at 119-23.

37. *See generally* MACHACEK, *supra* note 21, at 12. *See also* BUNDES-VERFASSUNGSGESETZ [Constitution] [B-VG] arts. 139(1), 140(1) as amended (Austria).

38. *See generally* MACHACEK, *supra* note 21, at 11-12.

39. *See generally* MACHACEK, *supra* note 21, at 12. *See also* BUNDES-VERFASSUNGSGESETZ [Constitution] [B-VG] art. 140(1) as amended (Austria).

40. *See generally* MACHACEK, *supra* note 21, at 12. *See also* BUNDES-VERFASSUNGSGESETZ [Constitution] [B-VG] art. 139(1) (Austria).

41. Press and Information Office of the Federal Government, Basic Law for the Federal Republic of Germany, official translation, revised and updated (1994).

42. Gesetz über das Bundesverfassungsgericht [LAW OF THE FEDERAL CONSTITUTIONAL COURT] [BverG] (repromulgated as amended, August 11, 1993, BGBl I S. 1473).

43. *See* THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY, *supra* note 10, at 10.

44. *See* THE FEDERAL CONSTITUTIONAL COURT, *supra* note 10, at 7-8.

statutory law, ordinary German judges are empowered to simply ignore regulations that violate statutes.[45] Since they may not repeal them, and the Constitutional Court examines only questions of constitutionality, illegal ordinances may enjoy a long life.[46]

2. Judicial Referral

Every German judge, who is convinced that the statute he would have to apply in a specific case is unconstitutional, must interrupt proceedings in order to certify the constitutional question directly to the Constitutional Court (art. 100 I Basic Law).[47] This procedure (*Richtervorlage*) is to protect the legislator against disregard of his enactments on the part of the judiciary, and to ensure legal uniformity and reliability of the law by concentrating constitutional adjudication in one single institution.[48] The judge (or court) has to make a reasoned submission, explaining why he cannot reach an interpretive solution in conformity with the Constitution.[49] In view of the rich and sophisticated jurisprudence of the Constitutional Court, this task often exceeds the capabilities of ordinary judges.[50] Two-thirds of the usually fewer than 100 requests of this type per annum[51] come from lower courts, the majority of them are rejected.[52]

Since 1993, a three-judge chamber (*Kammer*) of the Constitutional Court may unanimously reject a judicial referral as unfounded.[53] Until that date, the entire panel (*Senat*) of eight had to examine the case.[54] As a matter of courtesy, referrals by supreme courts still have to go to the full senate.[55]

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45. *See* THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY, *supra* note 10, at 61.

46. *See id.*

47. *See generally* KLAUS SCHLAICH, DAS BUNDESVERFASSUNGSGERICHT: STELLUNG, VERFAHREN, ENTSCHEIDUNGEN 1, 88-112 (3d ed. 1994); DONALD P. KOMMERS, THE FEDERAL CONSTITUTIONAL COURT 1, 14 (1994).

48. *See* SCHLAICH, *supra* note 47, at 89-91.

49. *See id.*

50. *See id.*

51. Recent numbers have been lower: 44 (1996), 55 (1995), 55 (1994), 90 (1993), 137 (1992). The procedure takes second place in frequency behind constitutional complaints of individual citizens for violation of their constitutional rights (*Verfassungsbeschwerde*, art. 93 I Nr. 4a Basic Law), the number of which remains overwhelming: 5,097 (1996), 4936 (1995), 5,194 (1994), 5,246 (1993), 4,214 (1992).

52. *See* SCHLAICH, *supra* note 47, at 93.

53. Fünftes Gesetz zur Änderung des Gesetzes über das Bundesverfassungsgericht [Fifth Law Amending the Law on the Federal Constitutional Court] of August 2, 1993, BGBl. I S. 1442.

54. *See* THE FEDERAL CONSTITUTIONAL COURT, *supra* note 10, at 14-15.

55. *See id.*

There has been talk in Germany to eliminate judicial referral as superfluous, because every citizen, after exhausting remedies in ordinary courts, may bring a complaint in the Constitutional Court for violation of his constitutional rights.[56] Yet for several reasons, including the educational function of active involvement on the part of the regular judiciary and the opportunity to shorten the process, judicial referral should definitely be retained.[57]

The Austrian legal system does not provide for this avenue of constitutional review on the level of trial courts.[58] The German experience seems to demonstrate, however, that there is room to improve constitutional law knowledge on this level of the judiciary without leading to a significant increase in the workload of a Constitutional Court. Besides, Austria's recent accession to the EU calls on *all* judges to certify all questions of compatibility of Austrian law with EC law to the Court of Justice of the European Communities in Luxembourg.[59] There is no reason for denying the Austrian trial judge a function in domestic constitutional law that he has been granted—and already quite vigorously exercises[60]—with respect to supranational legal rules.

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56. *See* THE CONSTITUTIONAL JURISPRUDENCE, *supra* note 10, at 59-60.

57. *See id.*

58. Originally, only the Supreme Court and the Administrative Court enjoyed this right. In 1975, it was broadened to include all courts of appeal, *see* HAUSMANINGER, *supra* note 21, at 143.

59. European Community Treaty art. 177:

> "The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
> the interpretation of this Treaty; the validity and interpretation of acts of the institutions of the Community and of the ECB; the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member state against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."

60. The number of preliminary references submitted by Austrian courts and tribunals are 2 in 1995, 6 in 1996, and 22 prior to Oct. 14, 1997. I am indebted for this information to Dr. Bernhard Schima, who discusses these cases in a broader context in his forthcoming book "Das Vorabentscheidungsverfahren vor dem Gerichtshof der Europäischen Gemeinschaften unter besonderer Berücksichtigung der Rechtslage in Österreich."

C. The Russian Court

1. Competencies

The Russian Constitutional Court was originally established in 1991.[61] Under its first chairman, Valerii Zorkin, it became involved in the political power struggle between President Yeltsin and a hostile parliament.[62] In this conflict, the Constitutional Court unwisely supported the losing side.[63] It was suspended by the President and threatened with abolition.[64] But after the adoption of Yeltsin's New Russian Constitution in 1993, the Court was able to resume its work in March of 1995, albeit with *reduced* legal functions in a *different* political environment.[65]

Under the new Constitution, the Court's functions were *refocused* on the traditional task of constitutional review under the European model, viz. to examine the *constitutionality of statutes* and other general norms of similar quality at the request of other organs of state power.[66] Evidently inspired by the German model, the framers

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61. *See generally* Herbert Hausmaninger, *From the Soviet Committee of Constitutional Supervision to the Russian Constitutional Court*, 25 CORNELL INT'L L.J. 305 (1992).

62. *See generally* Herbert Hausmaninger, *Towards a "New" Russian Constitutional Court*, 28 CORNELL INT'L L.J. 349, 352 (1995).

63. *See id.*

64. *See id.*

65. *See* Konstitutsiia RF [Constitution] [Konst. RF] (1993) (Russia) *in* Constitutions of the Countries of the World, Russian Federation , Release 93-8 (Albert P. Blaustein & Gisbert H. Flanz eds., 1993); The 1994 Law on the Constitutional Court, *in* 46 Current Dig. of the Post-Soviet Press No. 25, 17 trans. (1994). The new provisions concerning the Constitutional Court are a strong reaction against perceived *mistakes* committed by the Zorkin Court: The Constitutional Court was demoted from its previous position at the apex of the judicial pyramid and placed on an equal footing with two other supreme courts. It was deprived of functions that had encouraged its excessive politicization, e.g., the right to examine cases on its own initiative and to play a substantial role in impeachment proceedings against the President, or the duty to accept requests for constitutional review from single deputies of Parliament. The Court may no longer review the constitutionality of political parties, and its function to decide jurisdictional disputes between organs of state power has been relegated to a subsidiary role behind conciliation procedures conducted by the President. *See* Hausmaninger, *supra* note 62, at 349.

66. *See* Konstitutsiia RF [Constitution] [Konst. RF] art. 125(2) (Russia) of the Constitution that grants the right to bring constitutional issues to the Constitutional Court to the President, either chamber of parliament, one-fifth of the deputies of either chamber, the Government, the Supreme Court, and the Supreme Court of Arbitration, and finally all organs of legislative or executive power of the more than 80 subjects of the Russian Federation. They may contest the constitutionality of (a) federal statutes, presidential decrees, government regulations; (b) republic constitutions and other legislative acts of subjects of the Federation; (c) treaties between the Federation and subjects or between subjects, and international treaties that have not yet entered into force.

Art. 125(3) provides for another traditional role of Constitutional Courts, viz., to adjudicate *jurisdictional disputes* between (a) federal organs of state power, (b) between organs of state power of the Federation and those of subjects of the Federation, and (c) between the highest state organs of subjects of the Russian Federation.

of the new Russian Constitution also opened a new access route to the Constitutional Court by providing for *judicial referral* of constitutional questions from the ordinary courts.[67] Under the previous law, this opportunity did not exist, but citizens could, after exhausting remedies in the ordinary court system, lodge complaints against the violation of their fundamental rights by an unconstitutional court practice.[68] This did not go as far as the respective German rule, but the old Constitutional Court interpreted the word "practice" liberally, not rejecting a single case because the petitioner could not demonstrate a general unconstitutional practice beyond the case in point.[69] Today, unfortunately, petitioners may no longer contest unconstitutional Supreme Court *decisions*, but only unconstitutional *statutes* that have been, or are about to be, applied to them on any level of the judicial hierarchy.[70] And they have also lost the right to contest the application of unconstitutional administrative *regulations*.[71]

The draftsmen of the new Russian Constitution apparently intended to strengthen the executive branch and the regular court system vis-à-vis the Constitutional Court. It is less clear that they were conscious of three serious problems that would result from this approach:

(1) Although Russian courts are not to apply unconstitutional or illegal substatutory regulations,[72] they have *no power to nullify* them. They may merely notify the authors of this legislation of their view and recommend that they change or withdraw it. This creates the unsatisfactory situation that many or most of these regulations will remain on the books, with some judges applying them, and others ignoring them.

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67. *See* Konstitutsiia RF [Constitution] {Konst. RF] art. 125(4) (Russia).

68. Art. 66 Law on the Constitutional Court of the RSFSR, Ved. No. 30, item 1017 (1991), trans. in FBIS-USR-91-029, Sept. 10, 1991.

69. *See* T. Morshchakova in N.V. Vitruk, L.V. Lazarev, B.C. Ebseev, Federal'nyi konstitutsionnyi zakon O Konstitutsionnom Sude Rossiiskoi Federatsii: Kommentarii (Federal Constitutional Law on the Constitutional Court of the Russian Federation: Commentary), 295 (1996) (commenting on art. 96 of the new law).

70. *See* Ernest Ametistov, *Zashchita sotsialnykh prav cheloveka v. Konstitutsionnym Sude Rossiiskoi Federatsii: Pervye itogi i dal'neishie perspektivy* (Protection of Social Rights of Man in the Constitutional Court of the RF), *in* VESTNIK KONSTITUTSIONNOGO SUDA 32, 32-33 (Apr. 1995).

71. Yet it is precisely in these two areas that most violations of the Constitution occur, *see id.*

72. *See* Konstitutsiia RF [Constitution] [Konst. RF] art. 120 "(1) Judges are independent and are subordinate only to the Constitution of the Russian Federation and to federal law. (2) The court, having determined in the course of examining a case that an enactment of a state organ or other organ is not in accordance with the law, adopts a ruling in accordance with the law."

(2) The Russian Constitutional Court has lost an opportunity to *teach the ordinary courts modes of constitutional interpretation* in a case-by-case approach involving the balancing of conflicting values.

(3) There is ample reason to believe that ordinary Russian judges will be slow if not reluctant to *uphold citizens' rights against the state*.[73]

2. Judicial Referral

Article 101 of the Russian Constitutional Law on the Constitutional Court provides "When examining a case at any level and concluding that the statute applied or due to be applied in the said case does not conform to the RF Constitution of the RF, the court asks the Constitutional Court of the RF to verify the constitutionality of the statute in question."[74] Unfortunately, the article says "*the court asks*" instead of clarifying "shall ask" or "may ask."

In the Russian Supreme Court's view as expressed in a guiding explanation sent to all lower courts on October 31, 1995,[75]ordinary courts *may* refer such a case to the Constitutional Court if they are *uncertain* whether the statute conforms to the Constitution.[76] If the court is not uncertain, but *convinced* that the statute contradicts the Constitution, it is to apply the Constitution and simply *ignore* the unconstitutional statute.[77] In a law review article on this topic, Supreme Court President Lebedev explains that heated discussions of experts and justices had preceded this instruction.[78] The Plenum of the Court ultimately took the position that judges are to approach the Constitutional Court only in case of doubt and that this judicial

73. *See* Ametistov, *supra* note 70, at 33. The Constitutional Court, however, heard the first citizen's complaint in one of its very first sessions on April 25, 1995. *See* VESTNIK KONSTITUTSIONNOGO SUDA 17, 23 (Feb./Mar., 1995). Between March 23, 1995, and February 18, 1997, the Tumanov Court devoted 19 out of a total of 47 published decisions of the Court to citizens' complaints. They concern alleged violations of citizenship, housing, labor, health protection and pension rights, of judicial independence, and a number of provisions of the criminal and criminal procedure codes. The new Constitutional Court seems to have realized that a *shift in emphasis* to that area may be a good way of regaining institutional prestige and legitimacy.

74. *See* Konstitutsiia RF [Constitution] [Konst. RF] art. 101 (Russia).

75. Postanovlenie Plenuma Verkh. Suda RF "O nekotorykh voprosakh primeneniia sudami Konstitutsii Rossiiskoi Federatsii pri osushchestvlenii pravosudiia" (Decree of the Plenum of the Supreme Court of the RF "Concerning several problems of application of the Constitution of the RF by the courts . . ."), *reprinted in* Gos. i Pravo, April 1996, at 8.

76. *See id.*

77. *Id.*

78. V.M. Lebedev, Priamoe deistvie Konstitutsii Rossiiskoi Federatsii i rol' sudov (Direct Effect of the Constitution of the RF and the Role of the Courts), Gos. i Pravo 1, 3 (April 1996).

reference was a right and not a duty.[79] Members of the Russian Constitutional Court, however, hold that a regular court that is convinced that a statutory provision violates the Constitution may not simply ignore the statute, but has the *obligation* to refer the question to the Constitutional Court.[80]

Among forty-seven published decisions of the Tumanov Court between March 23, 1995, and February 18, 1997,[81] we find only four judicial referrals.[82] This is regrettable and will hopefully improve over time. Judicial referral of constitutional questions to specialized Constitutional Courts is an *important part of European systems of constitutional review*. The reference procedure serves as an excellent teaching tool for constitutional awareness and is in several variations practiced very successfully in countries like Austria, Germany, and Italy, and also by the Court of Justice of the European Communities in Luxembourg.[83]

Soviet legislators appear to have been misguided when they reduced the centralized function of constitutional review by the Constitutional Court, and it is even more deplorable that the present distribution of jurisdiction will inevitably lead to conflicts between the Supreme Court and the Constitutional Court. What has emerged is a mixed system of two parallel authorities exercising constitutional review, in which the ordinary courts under the guidance of the Supreme Court may develop their own constitutional interpretations without being subject to Constitutional Court control.[84]

III. CONCLUSION

Permit me to briefly summarize. I have attempted to compare one selected aspect of constitutional adjudication in three European

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79. *See id.*

80. See Morshchakova, supra note 69, at 314 (commenting on art. 101 of the Law on the Constitutional Court).

81. Court President Tumanov had to retire upon reaching the constitutional age limit of 70 years. His successor Marat Baglai assumed his office on February 20, 1997.

82. June 23, 1995 (People's Court); June 21, 1996 (Supreme Court Bashkortostan); November 28, 1996 (District Court); December 24, 1996 (Supreme Court of the Russian Federation).

83. *See generally* DAVID W.K. ANDERSON, REFERENCES TO THE EUROPEAN COURT (1995); C.O. Lenz, G. Grill, *The Preliminary Ruling Procedure and the United Kingdom*, 19 FORDHAM INT'L L.J. 844 (1996); Jeffrey C. Cohen, *The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism*, 44 AM. J. COMP. L. 421 (1996).

84. Most recently on this topic, see Peter B. Maggs, *Russian Courts and the Russian Constitution*, 8 IND. INT'L & COMP. L. REV. 99 (1997); Peter Krug, *Departure from the Centralized Model: The Russian Supreme Court and Constitutional Control of Legislation*, 37 VA. J. INT'L L. 725 (1997).

countries. In this analysis, it has become obvious that constitutional courts in the course of their development come to face similar problems and in dealing with them have benefited from each other's experience (or may yet benefit from it). In all three systems, we must consider judicial referral in the context of other avenues of access to the Constitutional Court.

1. In *Germany*, judicial referral has become less important over time because of the high level of constitution-consciousness reached by all state bodies, judicial review of all executive acts, and the broad access individuals have to the Constitutional Court. They may bring constitutional complaints against regular Supreme Court judgments that violate their fundamental rights and thus seem well-protected. Yet, judicial referral remains the second most frequent approach to the Court and still plays a considerable supplemental role.

2. In *Austria*, judicial review of executive acts is incomplete, and there is no constitutional review of the decisions of ordinary courts. It would be desirable to introduce a genuine administrative court system below the (Supreme) Administrative Court and also to establish a constitutional complaint of individuals against decisions of regular courts of last resort. Finally, Austria should extend the right and duty to refer questions of unconstitutionality of statutes to its trial courts. But one should not overlook the fact that Austria protects individuals by permitting them to challenge in the Constitutional Court statutes and ordinances that directly affect their constitutional rights without having to take the circuitous route through the regular courts.

3. *Russia* still has to develop a satisfactory system to protect individual civil rights. Judicial referral of constitutional questions could play an important role in promoting constitution-consciousness throughout the system. The most recent reforms of constitutional review were influenced by German ideas, but they were implemented in the same hasty and unreflected fashion as the previous ones. Otherwise one would not have entrusted the widest control over legislative acts in any civil law country to the ordinary Russian judiciary, which is least qualified for the job. American-type diffusion or mixed systems of judicial review require a high level of judicial sophistication and still pose a threat to uniformity and equality in the application of constitutional law. In the case of Russia, one may thus wish for early course corrections that would permit the emergence of broad and effective centralized constitutional review, which in the circumstances seems the most promising road towards a functioning system of rule of law.