Constitutional Courts of Central and Eastern European Countries as a Dynamic Source of Modern Legal Ideas

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I. THE THREE DIMENSIONS OF CONSTITUTIONAL LAW DEVELOPMENT

There are three dimensions which are characteristic of modern constitutional thinking. These are the fundamental importance of the rule of law, the anthropocentric approach to the law and the internationalisation of basic legal concepts. These dimensions are linked together and thus form a unitary whole.

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A. The Rule of Law

The rule of law signifies that every application of public power must follow the legal rules accepted by the people who are destined to be affected by the exercise of that power.[1] Legal norms are basically made by institutions which have been created and vested with power through the will of the people. This will is itself expressed in a constituent act (commonly known as a constitution) and is renewed at regular intervals by elections which entrust particular persons with the ascertainment, both direct and indirect, of this will. In some systems this ascertainment is not only attributed to parliament but exercised directly by the people by means of referenda which are mainly (yet not exclusively) dedicated to fundamental questions.

Therefore the basic idea behind the rule of law is the people's sovereignty, founded on the autonomy, freedom and (as the uppermost value) dignity of the individual. Thus the rule of law, in the sense of law-bound public power, stems from the same source as fundamental rights, which are in turn the basis of modern anthropocentrism. Freedom and self-determination as expressions of human dignity are clearly inter-connected.

The rule of law must not be conceived in the original narrow sense as developed in nineteenth century England nor in the original sense of "Rechtsstaat" which developed in Germany at nearly the same time. At this early stage of constitutionalism the rule of law concept has a rather institutional meaning. The rule of law is the rule of parliament, which was then gaining a predominant position over the Crown by means of the victory of popular sovereignty over that of the monarch. Individual rights formulated in documents, such as the French Declaration of 1789 or the German Constitutional Draft of 1848-49 (Paulskirchen Convention)[2] were ideological landmarks for future generations but did not replace this institutional meaning with substantive thinking in the field of the rule of law. Legality seemed enough at the time, whereas constitutionality (which has both an institutional and substantive value orientation) took longer to triumph in legal thinking and was for a long time hindered by the notion of parliamentary supremacy and the separation of powers.

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1. See Antonio-Carlos Pereira-Menaut, *Rule of Law*, Estado de Derecho, *in* BOLETIM DA FACULDADE DE DIREITO, UNIVERSIDADE DE COIMBRA 55, 77 (2001).

2. *See* Bernd Hartmann, *How American Ideas Traveled; Comparative Constitutional Law at Germany's National Assembly in 1848-49*, 17 TUL. EUR. & CIV. L.F. 23 (2002).

B. The Anthropocentric Dimension

The modern approach embraces the anthropocentric dimension[3] as a basis for the exercise of public power. This is closely linked to the substantive meaning of the rule of law. Legitimacy instead of mere legality is required, and this can only be fulfilled by respect for the constitution. The constitution itself acts as a guarantee of values such as human dignity and fundamental rights. A value-oriented rule of law must be a rule of constitutional law. Consequently, a formal constitution must have a higher rank than legislation.

Constitutional judicial review is the appropriate means for assuring these values. It is a sign of the advanced state of constitutional law, as developed in Europe in the second half of the twentieth century, that the very source of public action in a state, the legislator, can be challenged by courts. Sovereignty of parliament and separation of powers are no longer considered to be obstacles to such control. Primacy of constitutional law means that these high-ranking values are taken seriously. The only efficient instrument for assuring constitutional primacy is judicial control of the legislator.[4] The more judicial review of legislation takes places in a legal system, the more the rule of law (in the present day sense) is achieved from an instrumental point of view. Therefore the level of constitutional judicial review corresponds to the actual state and progress of constitutional law.

Thus it can be stated that the rule of law, fundamental rights protection and constitutional jurisdiction are closely linked ideas. Progress in developing one area also signifies progress in the other two. If one of them is weakened then this is detrimental to the others.

C. Internationalisation of Basic Constitutional Concepts

Internationalisation of constitutional law means that matters formerly protected explicitly by internal constitutional law have become matters of international interest. Thus the notion of fundamental rights, for example, was essentially furthered by the 1948 Universal Declaration

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3. As to the notion, Rainer Arnold, *Profili di giurisdizione comparata. I sistemi tedesco, austriaco e francese*, TRIESTE 1990, at 1-6.

4. Judicial control of the executive has for a long time been primarily based on a control of legality. It is common today for courts to examine the compatibility of administrative action with legislation and, should the alleged violation not result from unconstitutionality of the law applied but from the administrative action itself, then the courts will directly examine the compatibility of administrative action with the constitution. If during control of administrative action a court recognises the unconstitutionality of legislation on which the administrative action is based, the court usually has to address the matter to the responsible constitutional court.

on Human Rights which, though not legally binding, became the mother of vigorous international human rights guarantees. The most important instrument within Europe, i.e., the European Convention on Human Rights, signed in 1950 by the members of the Council of Europe, is today a highly respected common charter for forty-three countries and is the ideological product of this Declaration. This Convention is of central importance for the protection of human rights in Europe, not only ensuring this protection with the help of international law but also strengthening the concept of individual rights generally by declaring them to be an appropriate matter for the international community. The Convention has evolved into a sort of supranational order, constituting a second constitutional level. Though of international character in outward appearance, the Convention reveals itself to be of supranational force in substance. Its judicial and ideological influence on internal constitutional law is so intense, that it can be qualified as being not only supranational but constitutional.[5]

A further body of law, which has the status of constitutional law in a material sense, is that of European Union law. This level has progressively taken over internal national functions and has evolved values, institutions and instruments that are analogous to those present in the states themselves. It was an indispensable step for the Luxembourg judges (the European Court of Justice) to develop fundamental rights as general principles of EC law, using a common law approach, so as to give a constitutional foundation to matters which had been taken over from the states. This value-finding process ended up by shaping a written charter of fundamental rights[6] which is a symbol of the constitutionalisation of the supranational order on the one hand and the supranationalisation of the states' constitutional law on the other. Supranational rights have effect not only in the legal order of a particular state but equally in other national orders in which supranational norms are valid and must be applied by national institutions. Therefore it can be stated that there is a close interdependence and reciprocal influence between these two levels.

Judicial review has shown itself to be a real motor for constitutionalism in Europe from the second half of the twentieth century onwards. This is true for national constitutional courts (which for these

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5. See the contribution of Lucius Wildhaber, *Eine verfassungsrechtliche Zukunft für den Europäischen Gerichtshof für Menschenrechte?*, *in* EUROPÄISCHE GRUNDRECHTESZEITSCHRIFT (EuGRZ) 569-74 (2002).

6. *See* Rainer Arnold, *A Fundamental Rights Chapter for the European Union*, *in* 15/16 TUL. EUR. & CIV. L.F. 43-59 (2000–2001).

purposes includes ordinary courts which assume the task of substantive constitutional review) as well as for the supranational systems. The European Court of Justice in Luxembourg can be characterised as a constitutional court due to its power to challenge Community legislation and in view of its effectiveness in developing both the fundamental constitutional structure and the constitution of the European Communities.

To a certain extent the Strasbourg Court (European Court of Human Rights) also exercises constitutional jurisdiction. It has had the task of shaping Europe-wide individual rights as embodied in the Strasbourg Convention (ECHR), by developing an authoritative jurisprudence with far reaching effect for the interpretation of internal concepts. Consequently, national constitutional courts, the Luxembourg Court and the Strasbourg Court have all proved themselves to be dynamic vehicles of constitutional development.

II. CENTRAL AND EASTERN EUROPEAN PERSPECTIVES ON CONSTITUTIONAL JUDICIAL REVIEW

Constitutional review plays an enormous part in the new democracies of Central and Eastern Europe. Their new constitutions have to be efficiently applied in these systems which are undergoing transformation. Primacy of constitutional law is vital for them because the values of a democratic society can only be efficiently instilled if these values become obligatory for all public authorities. It would be insufficient if constitutional law were only nonobligatory or advisory, or simply apolitical and moral guidelines. Constitutional law taken seriously means it will necessarily be enforced through judicial decisions. It seems that the very characteristic of an advanced state of constitutionalism is an efficient system of constitutional control with judicial review of legislation at its centre. Of course the relevant judicial instruments must be applied by judges who are conscious of their particular task.

III. FROM THE AUSTRIAN TO THE EUROPEAN MODEL OF CONSTITUTIONAL CONTROL

There are two basic models of constitutional jurisdiction: The American model attributes the review of legislation to the ordinary courts and follows the example of the United States Supreme Court, which has

exercised this control since the case of *Marbury v. Madison* (1803)[7]. The Austrian model on the other hand is based on the existence of a separate constitutional court especially created for this purpose. Austria installed such a court in 1920,[8] an extraordinary event at the time, because the review of legislation was not consistently recognised as being a judicial power. In the same year and influenced by the same ideas, a constitutional court of this type was also established in Czechoslovakia but it did not obtain the same importance as the Austrian court.[9]

European constitutional development in the second half of the twentieth century strongly leans toward the Austrian model. It is clear that the new democracies in Central and Eastern Europe (with the exception of Estonia where a specific chamber of the supreme court assumes the task of control over legislation) erected their own constitutional courts as a judicial manifesto for a new, anti-totalitarian orientation based on the primacy of the constitution over the whole range of public power, including the legislative power. Accordingly, the Austrian model has spread widely throughout Europe and can now be characterised as the European model.[10]

One of the main arguments for installing European-style constitutional control is the fact that constitutional judges in an independent tribunal, separated from the ordinary courts, develop self-understanding about being members of a very special institution whose destiny is to be the guardian of the constitution. Such constitutional judges are able to maintain a constitutional focus better than ordinary judges familiar with thinking in terms of legality rather than of constitutionality. Often this different outlook corresponds to differences in legal education as well. Constitutional judges in most European countries must be trained as lawyers. Not so in France, however, where members of the Conseil constitutionnel are sometimes "merely" experienced politicians or renowned academics. This combination of expert judicial skill and familiarity with or experience in political decision-making is apt to create the type of judge who possesses the necessary attitude to be a member of a small group of highest-level constitutional guardians of the people's

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7. 5 U.S. (1 Cranch) 137, 177–80 (1803).

8. *See* H. HALLER, HANS KELSEN, SCHÖPFER DER VERFASSUNGSGERICHTLICHEN GESETZESPRÜFUNG 62 *et seq.*, 92 *et seq.* (Wien 1977).

9. *See id.* at 83 *et seq.*

10. This term was used by Professor Louis Favoreu in his speech on the developments of constitutional jurisdiction at the International Conference on European Constitutional Law, Regensburg 1997. See also the important analysis by HERMAN SCHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE (Chi. 2000) and for a general view, MICHEL FROMONT, LA JUSTICE CONSTITUTIONNELLE DANS LE MONDE 20 *et seq.* (Paris 1996).

consensus with regard to fundamental values and power-exercising institutions. Their legitimacy is derived from their status and the fact that there are chosen from democratically legitimate institutions, such as parliaments, chosen by the people.

The primary function of modern constitutional jurisdiction always includes the review of legislation. The act of challenging the will of parliament, being the constitutional institution which is directly elected by the people and which fulfils a high political function in the state, requires an institution with a particular standing amongst the state institutions, with full independence, a high reputation and acceptance within society. In European legal thinking, at least on the continent, such acceptance has evolved. This phenomenon also appears in Central and Eastern Europe. Over the past ten years the constitutional courts have turned into real forces of transformation, spreading an idealistic vision strongly committed to the new anthropocentric approach. In many Central and Eastern European courts, the number of renowned academics is high, and consequently these courts are regarded as strongholds of these new ideas. Constitutional judges in the new democracies do not seem to have reservations about challenging legislation. Indeed the criticism that the interference of constitutional courts with political institutions is tantamount to an unrestrained and illegitimate "government of judges" is not heard so frequently these days as it was in Western European countries in the past.[11]

This high level of acceptance is to some extent qualified by a specific deficit in the general recognition of the positions of the constitutional courts. With particular reference to countries such as Poland and the Czech Republic, the superior position of the constitutional court is not yet fully accepted by the supreme ordinary courts. More than in the traditional European democracies, the supreme courts within the ordinary court structure do not implement the views of the constitutional court without hesitation.[12] At the end of the day, however, this struggle is won by the constitutional courts.

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11. *See* R. Arnold, *La politica e la Corte costituzionale in Germania*, *in* NORME DI CORRETTEZZA, COSTITUZIONALE, CONVENZIONI ED INDIRIZZO POLITICO, ATTI DEL CONVEGNO ORGANIZATO IN RICORDO DEL PROF. PAOLO BISCARETTI DI RUFFIA (A CURA DI GIANFRANCO MOR) 63 *et seq.* (Milano 1999).

12. See for the Polish example, Bolesław Banaszkiewicz, *Normenkontrolle durch Fachgerichte versus Verwerfungsmonopol des Verfassungsgerichtshofes in Polen—am Beispiel des Streits um die Richtergehälter*, *in* JAHRBUCH FÜR OSTRECHT (JOR) 43, 69 *et seq.* (2002).

IV. JUDICIAL REVIEW AS PROCEDURAL NUCLEUS OF PRESENT-DAY CONSTITUTIONALISM

It is a common feature of all the constitutions of Central and Eastern Europe that they place judicial control of legislation at the centre of the competence of their constitutional courts. All these systems have introduced both an abstract and concrete type of legislative control.[13] Abstract review indicates that independently of an actual case or dispute between parties brought before the court, certain state institutions can order a review of laws which have been approved by parliament (in rare instances, however, even certain individuals have this right to invoke abstract review, as has been the case in Hungary and Slovenia).[14] In federal systems, a review for incompatibility of a regional law with a national law can also be attributed to constitutional courts.[15] Concrete review, on the other hand, signifies a review of legislation during an actual case where the judges are convinced or have doubts about the conformity of this law with superior law (such as the compatibility of national law with the constitution or regional law with higher national law. It is obvious that abstract control is instigated much less frequently than the concrete form of control. The frequency of the latter is comparable to the level in Western Europe.

Nevertheless, when cases of abstract control are before the court they regularly lead to profound decisions which are often of such importance as to bring about further constitutional developments in the particular country. The procedure of abstract control refers preponderantly to fundamental questions regarding the institutional system, especially when review is requested by important representatives of the state, such as the state president (sometimes in the form of pre-enactment review),[16] the prime minister or the parliamentary president. Abstract control in the new democratic orders is frequently placed in the hands of institutions with specific functions, for instance the ombudsman in Poland,[17] whose aim is to protect the rights of the individual, so that such legal actions regularly relate to the fundamental guarantees in the constitution. In some systems, abstract control is not limited to formal

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13. As to the example of Poland, see arts. 41–45; of Czech Republic, arts. 64-71; and of Hungary, arts. 33-47 of the Act on the Constitutional Courts.

14. *See* Georg Brunner, *Der Zugang des Einzelnen zur Verfassungsgerichtsbarkeit im europäischen Raum*, *in* JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART (JöR) 50, 191 *et seq.*, 230-31 (2002).

15. *See, e.g.*, GERMAN GRUNDGESETZ art. 93 I no. 2 and 100 I second phrase.

16. *See, e.g.*, Polish Act, arts. 2 II, 41-45; Hungarian Act on the Constitutional Court, arts. 33-36.

17. Art. 191 I Constitution, 41-45 Act on the Constitutional Court.

legislation but extended to regulations and other executive legal acts as well.[18] Sometimes specific institutions (e.g. municipalities) have the right to initiate abstract control as a means of defending their own constitutional autonomy.[19] In this sense, control extends to other legal acts so that they can be examined as to their compatibility with superior law. Thus, the function of abstract control is not only the guarantee of constitutionality but of legality and of the rule of law in general. The importance of this is easily understood in the context of the transformation of a society that must establish a law-based system in an effective manner.

V. THE ADVANCE OF SUBSTANTIVE CONSTITUTIONAL LAW THROUGH JUDICIAL REVIEW OF LEGISLATION AND OTHER LEGISLATIVE ACTS

Judicial control of parliament and other institutions that create normative acts comprises all aspects of modern constitutional development.[20] It turns out to be the most efficient instrument of control. Bringing about the fundamental features of a democratic liberal state can only be accomplished by such an instrument if the transformation from a totalitarian system has sufficiently progressed. Formal legislation always constitutes the starting point for creating a democratic system: the electoral system, political parties, freedom of the press and mass media etc. are all implemented on the basis of legislation. Legislation is indispensable for achieving equality in all branches of state action and in the field of social welfare. Furthermore, legislation is important for the improvement and definition of the relations between the state and the individual. Fundamental rights have to be implemented by laws in a large number of matters. The legislator is obliged not only to protect the values embodied in these rights but to make them enforceable in an efficient manner in state and society. Controlling legislation via constitutional courts means accomplishing fundamental rights and assuring an adequate status for the individual in this respect.

Moreover, it is evident that the control of legislation is of paramount importance in all other fields covered by the constitution including, for

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18. *See* Hungarian Act on the Constitutional Court, art. 37.

19. *See* CZECH CONST. art. 87 I a, b and Act on the Constitutional Court, art. 67.

20. In European countries, judicial control of the executive developed sooner than judicial control of legislation. As already mentioned, the object of such control is usually legality rather than to supervise the unconstitutionality of legislation on which the executive act is based. The latter can be unconstitutional in itself. This means that the unconstitutionality results not from the legislation applied but from the executive act itself. This can be reviewed by administrative courts or, in the absence of these, ordinary courts. This type of review is more traditional and is not as significant for modern constitutional developments.

example, dispositions concerning the federal or regional system or the distribution of local governmental powers.

Hence, the broad question arises as to the relation of the constitutional court to the legislator, as revealed by the constitutional jurisprudence of the last ten years. As a rule, the principle of the separation of powers, which in traditional legal systems has been regarded as an obstacle to judicial review of legislation, does not attract the same prejudice in the new democracies. It seems that their understanding tallies with the present day concept usually found within the member states of the European Union. Perhaps there is a broad tendency (particularly with regard to the Polish, Czech, Slovak, Hungarian, Russian, and Baltic courts) to even take over advanced methods as have developed in Germany,[21] for instance, thus instructing the legislator to amend unconstitutional parts of a legislative act. This technique, which is well established in German constitutional jurisprudence, includes fixing a date by which parliament must fulfil this order. However, there is much controversy in the traditional systems over the consequences of a failure by parliament to act in time. The constitutional courts of the new democracies have not found a clear answer to this question, and neither have Germany or other countries with similar practices (e.g. Italy and Spain). Nevertheless, there is a visible overall tendency to make sanctions more efficient, for example by vesting ordinary judges with the power to decide such questions directly, even against the will of the legislator).[22]

All the well-developed techniques of Western systems, including the technique of interpreting legal dispositions in conformity with the constitution, are also being practised in the new courts.[23] On the other hand, there is a clear willingness to respect judicial self-restraint by showing consideration for political decisions of the legislator and of other state authorities, to the extent that nonjusticiable questions may be concerned. Yet the need for political transformation as a constitutional requirement for the reintegration of free countries into the European family requires close constitutional supervision. For this reason, the degree of restraint of constitutional courts did not go too far. Thus

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21. *See* GERMAN CONSTITUTIONAL COURT, vol. 39, at 1, 42; vol. 46, at 160, 164; vol. 49, at 89, 191-92; vol. 53, at 30, 57 *et seq.*; vol. 88, at 203, 251 *et seq.*; vol. 92, at 26, 46.

22. See the examples of the German Constitutional Court, in R. Arnold, *Les développements majeurs du droit allemand en 1999*, REVUE INTERNATIONALE DE DROIT COMPARÉ 213 *et seq.*, 224, 226 (2000).

23. *See* Pavel Holländer, *in* VERFASSUNGSGERICHTSBARKEIT IN DER TSCHECHISCHEN REPUBLIK 41 *et seq.* (Georg Brunner/Mahulena Hofmann/Pavel Holländer eds., Baden-Baden 2001) (for the example of the Czech Republic); Brunner, *supra* note 14, at 222.

constitutional courts, as accepted by society, appear to be judicial counterparts to the political process.

VI. THE ROLE OF THE INDIVIDUAL COMPLAINT

The individual complaint procedure before a constitutional court has been introduced into the constitutional orders of various of the new democracies. Its chief characteristic in most of these countries, contrary to the use of the procedure in EU member states, is to review unconstitutional legislation in cases in which an individual's fundamental rights have been violated by the executive's application of the law. This indicates that unconstitutionality results from the legislation itself. Consequently, this procedure seems to be a specific form of legislative review.[24] The individual complaint as it is generally known in Western Europe and as applied in a few of the new democracies, such as the Czech Republic, contrasts with this type of complaint in that it is not limited to the review of legislation but can moreover be invoked when a public authority contravenes the constitution through its own actions. If, for instance, the constitutional principle of proportionality is not observed by a particular administrative body, this failure can be challenged by an individual complaint before the constitutional court as long as other legal remedies have been exhausted. This form of complaint has a wider range of control, while the aforementioned type is limited to the review of unconstitutional legislation that has been applied in a particular case. As already mentioned, abstract control of legislation may sometimes be placed in the hands of individuals which includes some features of the individual complaint as known in the West. Usually such a complaint is not invoked when the public authority contravened the constitution by its own actions. If the principle of proportionality is not observed by an administrative body, for instance, what does misbehaviour of the executive as such mean? If it is not an unconstitutional application of the law then it is not covered by this particular type of complaint. Executive action must be controlled by administrative tribunals or, in the absence thereof, by the ordinary courts. This demonstrates the basic idea that constitutional jurisdiction is necessarily connected to the control of legislation and of other normative acts, but not of purely executive action. As already mentioned above, the abstract control of legislation can sometimes be placed into the hands of individuals, as illustrated by the so-called "actio popularis" mechanism in

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24. For Hungary, see GÁBOR SPULLER, DAS VERFASSUNGSGERICHT DER REPUBLIK UNGARN 82 (Frankfurt a.M. 1998); Brunner, *supra* note 14, at 219.

Hungary and Croatia, thereby allowing individuals to attack acts of Parliament before the constitutional court without having been personally or directly violated in their fundamental rights.[25] Thus, the individual is made a guardian of the constitutionality of laws, along with judges and state institutions, and thus is able to initiate abstract or concrete control of legislation before the constitutional court. It is obvious that this "actio popularis," an extraordinary instrument that is rarely introduced into legal orders, comes very close to the individual complaint procedure mentioned above.

Various characteristics of the individual complaint procedure are shared by both traditional and newly democratic systems: Individual complaints are based on violations not of all the provisions of the constitution but of individual fundamental rights or other rights enumerated specifically either in the constitution or in a particular law relating to the constitutional court.[26] Frequently the competent administrative or ordinary court must be addressed in the first instance in order to challenge a violation of fundamental rights at the lowest level. All courts are obliged to contribute to the guarantee of fundamental rights and must therefore take into account such violations. Only after the legal remedies intended for the control of administrative and judicial action have been exhausted can the individual lodge a petition with the constitutional court.[27] A further common requirement is the observation of a certain deadline for putting forward a claim of a violation of fundamental rights to the court.[28] Moreover, this instrument is the most frequently used form of judicial action both in the traditional systems and in Central and Eastern Europe countries. It appears that having a case of this kind decided before the constitutional court is a vital instrument for the realisation of the liberty of the individual in post-totalitarian

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25. *See* László Sólyom, *in* VERFASSUNGSGERICHTSBARKEIT IN UNGARN 62 (G. Brunner/L. Sólyom eds., Baden-Baden 1995); *see also id.* at 30 *et seq.*; SPULLER, *supra* note 24, at 51 *et seq.*; Brunner, *supra* note 14, at 222, at 230. In Croatia individuals have a right to "propose" such a control (Act on the Constitutional Court, art. 36 I); *see* Tomislav Pintaric, *Das kroatische Verfassungsgerichtsgesetz von 1999*, JAHRBUCH FÜR OSTRECHT (JOR) 43, 403 *et seq.* (2002).

26. *See, e.g.*, CZECH CONST. art. 87 I d; Hungarian Act on the Constitutional Court, art. 48.

27. *See* KAREL KLÍMA, ÚSTAVNÍ PRÁVO 497 (2002); PAWEŁ SARNECKI, POLISH CONSTITUTIONAL LAW. THE CONSTITUTION AND SELECTED STATUTORY MATERIALS, Introductory Remarks, 21 (Warsaw 2000); *see also* Act on the Polish Constitutional Court, art. 46 I. Referring to a certain exception in Russia, Brunner, *supra* note 14, at 218, 226-27.

28. *See* KLÍMA, *supra* note 27. The Russian individual complaint is exceptional also in this point, Brunner, *supra* note 14, at 227; *see also* V.A. KRJAŽKOV/L.V. LAZAREV, VERFASSUNGSGERICHTSBARKEIT IN DER RUSSISCHEN FÖDERATION 258 *et seq.* (Berlin 2001).

countries. It gives citizens the feeling of being supported by an independent body against a nearly omnipotent bureaucracy.

The fact that courts are overloaded with individual complaints confirms the importance of this mechanism in the eyes of the population. As this is a Europe-wide phenomenon it is absolutely necessary to introduce filter mechanisms[29] for the screening of complaints, selecting for review only those cases which fulfil the minimum procedural requirements and which are of importance for the development of constitutional law. Accordingly, a dilemma exists because this instrument is on the one hand regarded as very helpful both in the process of transforming state and society and in the progressive emancipation of the individual, who under the preceding regime was regarded more or less as an anonymous member of a great society dedicated to a determined overall ideology. On the other hand, the constitutional court would sacrifice efficiency if it were to admit all complaints without any prior filter mechanism. These practical justifications are so considerable that as a general rule the legal systems have accepted the dilemma and introduced filtering mechanisms.

VII. INTERNATIONAL LAW BEFORE THE CONSTITUTIONAL COURTS

The new democracies in Central and Eastern Europe pay much attention to international law. Therefore, to a greater degree than in Western countries, their constitutional orders have chosen the mechanism of "reception" rather than that of "transformation" for introducing international provisions into the internal legal order.[30] This is particularly significant for the protection of human rights. Reception in this sense means that international treaties are considered to be part of the law of the country, in that they are automatically introduced into the internal legal order without having to be transformed separately into national law. The traditional model of transformation, as present in Germany and Italy for instance, keeps international legal provisions outside the state as such but transposes them into national law by means of an Act of approval, which then binds internal authorities and tribunals. Evidently the reception model is more favourable towards international law, automatically accepting it as a directly applicable source of law that binds all internal institutions.

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29. *See* Polish Act on the Constitutional Court, arts. 49 and 36; Holländer, *supra* note 23, at 66.

30. *See* GERMAN GRUNDGESETZ art. 59 II; ITALIAN CONST. art. 80.

Constitutional courts are concerned with various aspects of international law: They supervise the constitutionality of international treaties that are to be concluded in the future, which as a control mechanism can only be carried out efficiently prior to their entry into force. After that point, the "pacta sunt servanda" maxim opposes unilateral annulment or suspension of the treaty. Consequently, preventative control is very common in these countries, whereas "a posterori" control is usually regarded as inefficient (but nevertheless admitted in the Russian Federation).[31] Certainly control over legislation which approves an international treaty is possible as a general rule but always limited by the aforementioned principle by which international treaties are binding once they have entered into force.[32]

Control of internal legislation with regard to its conformity with international law is equally important in this context. If international treaties obtain a status above ordinary internal law then control of the latter is a consequence of the model of reception rather than that of transformation. Therefore the new democracies (e.g. the Czech Republic and Poland)[33] are inclined to entrust their constitutional courts with the supervision of constitutional conformity.

VIII. FURTHER INSTRUMENTS OF CONSTITUTIONAL CONTROL

Some brief indication should be given as to further instruments which are important for the internal legal system. These may not contribute to the development of constitutional law in the same noticeable way as the review of legislation and individual complaints, but these instruments are still important for making effective decisions on certain constitutional questions. At the same time, however, they may have a more limited impact on constitutional thinking in general or, when serving as the instrument for an isolated interpretation of the constitution, are not used as frequently, thus making their contribution limited in effect, even when the subject matter deals with quite a fundamental problem.

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31. *See* KRJAŽKOV/LAZAREV, *supra* note 28, at 58 *et seq.*

32. In Germany, the Maastricht Treaty was brought before the Constitutional Court on the basis of an individual complaint against the Act of approval (see the decision in this case, vol. 89, at 155 *et seq.*); PIOTR WINCZOREK, KOMENTARZ DO KONSTYTUCJI RZEZYPOSPOLITY POLSKIEJ Z DNIA 2 KWIETNIA 1997 r., at 243 *et seq.* and 110 *et seq.* (Warsaw 2000); G. Brunner, *Entwicklung der polnischen Verfassungsgerichtsbarkeit in rechtsvergleichender Sicht*, *in* VERFASSUNGS-GERICHTSBARKEIT IN POLEN 15 *et seq.*, in particular 47-48; SPULLER, *supra* note 24, at 163 *et seq.*

33. *See* Mahulena Hofmann, *Völkerrecht in der Rechtsprechung des Tschechischen Verfassungsgerichts*, *in* Holländer, *supra* note 23, at 85 *et seq.*, in particular 91 *et seq.*; Brunner, *supra* note 32, at 40.

Federal or regional controversies are not of great importance because federalism seldom exists in these countries, exceptions being Russia and the former Yugoslavia. Compared to its long-standing importance for the Member States of the EU, regionalism has not been regarded as decisive in Central and Eastern Europe.[34] This is perhaps a heritage from the totalitarian period in which the autonomy of the territorial sub-entities was not favoured as a mechanism for avoiding the vertical separation of power. Some new tendencies, however, are starting to become apparent. The Czech Republic, for instance, initiated a strong regionalist reform in 2002. Today's constitutional courts are authorized to settle conflicts of competence, and while this is a less influential instrument in practice, nevertheless they resolve legal conflicts with regional concern (if regions exist) as well as legal conflicts between the state or institutions and organs.[35] Disputes regarding conflicts of competence are often settled by means of the control of legislation if this question coincides with the question of legislative competence.[36] Constitutional interpretation as an isolated procedure can be found in some constitutions, including those of Hungary, Bulgaria, and the Slovak Republic,[37] but this is in contrast with the European tradition and with the exceptional nature of constitutional judicial review. A very common but in practice marginal mechanism is the procedure of accusation[38] of state presidents and the heads of other highly visible institutions.[39] The same can be said for the possibility of banning a political party, which exists in

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34. *See* M.V. BAGLAI, CONSTITUTIONAL LAW OF THE RUSSIAN FEDERATION (in Russian) 293 *et seq.*, 314 *et seq.* (Moscow 1998); N.V. VITRUK, CONSTITUTIONAL JURISDICTION IN RUSSIA (1991-2001) (in Russian) 278 *et seq.* (Moscow 2001); *see also* G. BRUNNER, DIE NEUE VERFASSUNGSGERICHTSBARKEIT IN OSTEUROPA, ZEITSCHRIFT FÜR AUSLÄNDISCHES UND ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZAÖRV) 819 *et seq.*, 852 (1993).

35. Brunner, *supra* note 32, at 852-53.

36. *See* R. Arnold, *Profili di giurisdizione comparata. I sistemi tedesco, austriaco e francese*, TRIESTE, 1990, at 12 *et seq.*

37. KRJAŽKOV/LAZAREV, *supra* note 28, at 283 *et seq.*; L. GARLICKI, POLSKI PRAWO KONSTYTUCYJNE 372 *et seq.* (4th ed. 2000); KRJAŽKOV/LAZAREV, *supra* note 28, at 64 *et seq.*, 283 *et seq.*; MAIA NANOVA, VERFASSUNGSGERICHTSBARKEIT IN BULGARIEN 64 *et seq.* (Baden-Baden 2002); Brunner, *supra* note 32, at 854 *et seq.*

38. The procedure of accusation in this context embraces intentional violations of the head of state (or other persons of high function in the state) of the constitution or ordinary laws, on the one hand, or the penal law, especially dispositions on state security, on the other hand.

39. *See* RUSSIAN CONST. art. 93; CZECH CONST. art. 87 Ig and 65 I; Act on the Czech Constitutional Court, arts. 96-108; *see also* COMMENTARY ON THE CONSTITUTION OF THE RUSSIAN FEDERATION (in Russian) 646 *et seq.* (V.D. Karpovich ed., Moscow 2002); Brunner, *supra* note 32, at 859 *et seq.*

Poland, Russia, Bulgaria, and Slovenia, for instance.[40] There seems to be a common tendency throughout Europe to only use this power very cautiously due to the political implications of substituting the decision of a court for the decision of the voters.

XI. THE CONTRIBUTION OF CONSTITUTIONAL COURTS TO SUBSTANTIVE CONSTITUTIONAL LAW

Constitutional jurisdiction in Central and Eastern Europe started with concepts developed in the noncommunist liberal orders during the second half of the twentieth century. There has been a spontaneous reception of these notions, which were placed into an idealistic framework by countries with a new orientation after a prolonged experience with totalitarianism. In general, constitutional judicial review in these countries reflects the willingness to develop these concepts rapidly, in part even more rapidly than has been the case in the traditional democracies. The most progress has been made in the field of values and in particular values relating to the human being, such as dignity, autonomy and liberty, as specified in fundamental rights and in the values enshrined in the respect of the law. Fundamental rights are conceived as broad guarantees that ensure protection against all risks for the individual, and as such are seen as living instruments which cover new injuries resulting from rapid technological progress as well. Limitations on these guarantees must be conceived narrowly. The principle of proportionality as a flexible criterion for balancing public and individual interests has been introduced as an essential part of their legal reasoning so that the very nucleus of a fundamental right cannot be infringed. These attributes of anthropocentrism are not only in part embodied in the constitutions themselves but are also elaborated on by jurisprudence, this being major proof of the current dedication of judges towards these ideals.

Yet the attitude of judges does not always match the political approach. It seems that constitutional judges in newly established courts, chosen from amongst highly reputed academics and practitioners, began with a new tradition based on a new orientation. Consequently, the creation of constitutional courts was the initial sign of the dawning of a new era in constitutional thinking, and not a continuation of the past.

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40. *See* POLISH CONST. arts. 13, 188.4; CZECH CONST. art. 87 Ij; Polish Act, arts. 55-58; Czech Act on the Constitutional Court, art. 73; GARLICKI, *supra* note 37, at 372; Brunner, *supra* note 32, at 861 *et seq.*

Seen as a whole, constitutional jurisdiction in the new democracies in Central and Eastern Europe emerges as a highly significant and crucial catalyst for the promotion of constitutional ideals throughout Europe.