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Herman Schwartz
American University, Washington College of Law

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THE NEW EAST EUROPEAN CONSTITUTIONAL COURTS

Herman Schwartz*

Before World War II, few European States had constitutional courts, and virtually none exercised any significant judicial review over legislation. After 1945 all that changed. West Germany, Italy, Austria, Cyprus, Turkey, Yugoslavia, Greece, Spain, Portugal, and even France, one of the last bastions of parliamentary sovereignty, created tribunals with power to annul legislative enactments inconsistent with constitutional requirements.

Many of these courts have become significant—indeed powerful—institutions; most notably the West German Constitutional Court, now one of the most highly esteemed courts in the world. Thus, it was hardly surprising that the newly liberated nations in Central Eastern Europe and the former Soviet Union, most of which want to become part of the Western community, decided to establish such courts.

Since these countries have only recently shaken off communist domination—and even that is not clear in Romania—some of these

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Professor Schwartz has worked for human rights both in the United States and abroad for more than three decades. He founded the American Civil Liberties Union Prisoners’ Rights program and the U.S./Israel Civil Liberties Law program, and served as the ACLU expert on electronic surveillance. He has chaired a Human Rights Watch Committee project on prisons throughout the world and has personally visited and reported on prison conditions in Eastern Europe and Latin America. Professor Schwartz has litigated scores of civil liberties cases throughout the United States and filed briefs on human rights cases abroad involving President Vaclav Havel of Czechoslovakia and others. He is currently advising more than seven Central and East European and former Soviet Union countries on constitutional and human rights reform. A member of the Board of the Charter 77 Foundation—New York, he currently co-chairs the project on Justice in Times of Transition. Professor Schwartz is the author of many books and articles on American, European, and Israeli constitutional and human rights issues.

1. The Czechoslovak Constitutional Court, for example, created in 1920 on an Austrian model, did not hear a single case challenging the constitutionality of a statute. See generally Edward Taborisky, Czechoslovak Democracy at Work (1945). For Weimar Germany see, e.g., A. Brewer-Carias, Judicial Review in Comparative Law 203-04 (1989).

2. Even Great Britain has subjected its legislative and executive action to a judicial tribunal, the European Court of Human Rights. For a survey of West European constitutional courts, see Louis Favoreu, Constitutional Review in Europe, in Constitutionalism and Rights: The Influence of the United States Constitution Abroad 38 (Louis Henkin and Albert J. Rosenthal eds., 1990); for the development of judicial review in the West, see generally, Mauro Cappelletti, The Judicial Process in Comparative Perspective (1989).

3. In some countries, such as Ukraine and Estonia, these provisions are parts of draft constitutions that had not been adopted as of May 1992.
new courts, such as those in Czechoslovakia and Romania, have barely begun to function regularly. Of the regularly functioning East European constitutional courts, some—notably those in Hungary and Russia—have operated with surprising independence, forcefulness, and insistence on protecting human rights and the rule of law. In this respect, these courts are following the lead of many of their West European predecessors, including the courts of France, Germany, Italy, and Greece.  

This article will describe some aspects of the different tribunals in Russia, Hungary, Poland, Czechoslovakia, Bulgaria, and Romania, and will compare them with each other and with the U.S. Supreme Court. The first part will begin by explaining a few basic differences between the American and Continental systems of judicial review, and will then describe the functions of the new East European constitutional courts. The second part will use the decisions of the new Russian Constitutional Court to illustrate the new courts' exercise of authority, and will summarize the recent activities of a few other new constitutional courts.

I. CONSTITUTIONAL COURTS AND JUDICIAL REVIEW

To Americans familiar with constitutional tribunals like the U.S. Supreme Court, these European constitutional courts look very strange. These new courts are not based on the U.S. Supreme Court, but on the Continental model created after World War I by the great Austrian legal theorist Hans Kelsen.

Like their U.S. counterparts, European constitutional courts were created to ensure governance under the rule of law. Many key elements, however, such as standing, mootness, ripeness, political questions, judicial selection, and tenure are handled differently in Europe than in the United States. The European constitutional courts' subject matter jurisdictions, though varying among themselves, also differ from the typical American model, as do some of their powers.

The following section will compare the different American and European approaches to these issues, and in the course of comparison describe the functions of the new constitutional courts in Russia, Hun-

4. For one of the leading analyses of the German experience, see DONALD P. KOMMERS, JUDICIAL POLITICS IN WEST GERMANY: A STUDY OF THE FEDERAL CONSTITUTIONAL COURT (1976), and Donald P. Kommers, German Constitutionalism: A Prolegomenon, 40 EMORY L.J. 837 (1991); for France, see James Beardsley, Constitutional Review in France, in 1975 SUP. CT. REV. 189 (Philip B. Kurland ed., 1976); for Italy, see BREWER-CARIAS, supra note 1, at 215.

5. The terms "Continental" and "European" refer to all of Europe and will be used interchangeably throughout the article. Any discussion pertaining solely to Eastern Europe will be indicated as such.
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gary, Poland, Czechoslovakia, Romania, and Bulgaria.6

A. Diffuse v. Concentrated: The American and European Models

Most of the disparities between the Eastern European constitutional courts and the U.S. Supreme Court grow out of differences in the fundamental premises underlying the respective institutions. The U.S. Supreme Court, the highest appellate level of the U.S. federal judicial system, exercises the federal government’s judicial power. It is not a court for constitutional issues in the strictest sense, but rather a final appellate tribunal,7 which, in the course of traditional judicial activity, sometimes issues opinions on basic constitutional questions that federal and state inferior courts must follow in resolving disputes. Though the highest court in the system, the Supreme Court is still just a part of the federal judiciary, adjudicating controversies referred to it from the lower federal and state courts.

While engaged in the business of resolving these disputes, the U.S. Supreme Court may interpret federal law, assert the supremacy of federal law over state law, and resolve jurisdictional conflicts between state and federal governments, or within the federal government itself. Like any other federal court, the Supreme Court performs all these functions only as incident to settling live controversies between contending parties in a suit brought into the system for resolution. The U.S. Constitution does not explicitly grant the Court power to review and possibly annul legislative acts, and some judges and scholars still challenge the exercise of such power, at least in some specific cases.8 With respect to this dispute-resolving function, the U.S. Supreme Court resembles the traditional highest courts in conventional European judicial systems, although the latter are not empowered to strike down legislative enactments in the course of their adjudicatory activities. If the U.S. Court can resolve the case without deciding any fundamental issues, constitutional or otherwise, it is obliged to do so.

6. Because Peter Paczolay, counsel to the Hungarian Constitutional Court president, is writing an article devoted to that court’s role in the area of property rights for this symposium, there will be virtually no discussion of the decisions of the Hungarian Court in this article. See also Ethan Klingsberg, Judicial Review and Hungary’s Transition from Communism to Democracy, the Constitutional Court, the Continuity of Law, and the Redefinition of Property Rights, 1992 B.Y.U. L. REV. 41 (1992). As of May 1, 1992, the Romanian Court’s judges had not been appointed.

7. The U.S. Supreme Court also exercises original jurisdiction over a few types of disputes. U.S. CONST. art. III, § 2.

8. The largely empty debate over judicial restraint versus judicial activism is based on the disagreement over the extent to which the courts are authorized to review and annul legislative acts. As demonstrated by the Rehnquist Court, all Supreme Court Justices are judicial activists. For an elaboration of this contention, see HERMAN SCHWARTZ, PACKING THE COURTS (1988).
Usually, the narrower the basis for the decision, the better.9

One consequence of the incidental nature of such constitutional decisionmaking has been that since all courts are supposed to resolve these cases completely, definitively, and without the need for further judicial action by a higher court, all U.S. courts can resolve the constitutional issues. Comparativists call this the "diffuse system" of judicial review.10

The Continental system of constitutional judicial review differs theoretically. As opposed to the American "diffuse system," Europeans concentrate the power to review the constitutionality of legislation in one special tribunal which is not a part of the ordinary judiciary and does not adjudicate conventional litigation,11 a function left for ordinary courts. Thus, the constitutional provisions for the constitutional courts do not usually appear in the judiciary section of European constitutions but in a separate section, after the articles on the structure of the national government and sometimes after those on local government as well.12 The provisions for the traditional judiciary, on the other hand, usually appear after the provisions for the executive branch.

Unlike its U.S. counterpart, the European constitutional court's primary function is not to adjudicate controversies between individuals or between them and their government, but rather to provide interpretations of that nation's constitution, regardless of how the interpretational issue arises. As one Italian expert explained:

[The European Constitutional Court] is neither part of the judicial order, nor part of the judicial organization in its widest sense: . . . [T]he Constitutional Court remains outside the traditional categories of state power. It is an independent power whose function consists in [e]nsuring that the Constitution is respected in all areas.13

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10. It didn't have to be this way. Because of the importance of constitutional questions, lower U.S. courts could have been required to refer such issues to a higher court. This practice is followed in some state court systems; when lower courts consider it inappropriate to strike down a statute as unconstitutional, they leave the issue for a higher court to decide.
11. These courts also perform certain other functions such as supervising elections and banning political parties. See infra text accompanying notes 45-48.
12. In the Ukrainian draft constitution, the constitutional court appears in a separate chapter entitled "Defense of the Constitution" after the local government and before the ratification and amendment provisions, although it is listed among the other courts in the judiciary article. See also, e.g., BULG. CONST. ch. 8, arts. 147-51; HUNG. CONST. chs. IV (Constitutional Court), X (Judiciary); ROM. CONST. tit. V, arts. 140-45; CZECH. CONST. (Constitutional Act No. 143, 1968) ch. 6, arts. 86-101; SPAIN CONST. tits. V (Judiciary), X (Constitutional Court); But see, F.R.G. CONST. ch. IX, arts. 92-104; RSFSR CONST. (Oct. 1991) ch. XXI.
13. Quoted in Favoreu, Constitutional Review in Europe, supra note 2, at 56; see also Louis Favoreau, Conseil Constitutionnel: Mythes et Réalités, REGARDS SUR L'AUTALITÉ, June 1987, at 12, 13 ("constitutional judges and ordinary judges do not belong to the same family") (author's translation).
The constitutional court thus stands apart from the rest of the governmental apparatus, including the judiciary, and is responsible only to the nation's constitution and the values it incorporates. It is not concerned with resolving concrete, live disputes between people or with their government, but with "defense of the constitution." As Judge Valery Zorkin, chairman of the new Russian Constitutional Court, remarked:

[M]y twelve [ultimately fourteen] colleagues and I are real watchdogs. The executive and the legislative powers are the bodies the Constitutional court and its chairman must watch. I will never let the President or the parliament take a wrong step and fall into the abyss. The Court has all the necessary powers, including impeachment. 14

Although far more openly assertive about the Court's—and his—role than other European constitutional court judges, 15 Chairman Zorkin's attitude is probably not too different from that of his colleagues serving on the bench of other Continental constitutional courts, 16 including those in Eastern Europe.

Accordingly, German, French, and other Continental constitutional tribunals have neither hesitated nor apologized when issuing wide-ranging decisions on basic constitutional issues, often drawing on unwritten or historical principles and values. 17 A French decision on freedom of association and an abortion decision in Germany are good examples: the French Court drew on the Preamble to the Declaration of 1789 on the Rights of Man for its ruling; 18 the German court interpreted the "right to life" in Article 2(2) 1 to limit abortion rights, relying in part on its notions of "the dignity of man" and sociopolitical considerations, as well as its reaction to the Nazi policy of destroying "life unworthy to live." 19

The new East European constitutional courts appear willing to

16. Chairman Zorkin may be a bit too optimistic about the extent of the Court's power to implement its decrees. See infra Part II, regarding the Tatar defiance of the Court's finding that the Tatarstan referendum on sovereignty was unconstitutional. Constitutional Court Decision on Sovereignty, ROSSIISKAYA GAZETA, Mar. 16, 1992, at 1, 2, translated in FBIS-USR-92-038, Apr. 3, 1992, at 84-90.
17. See CAPPELLETTI, supra note 2, at 53 (the new courts have "frequently...adopted a 'non-interpretive model' going beyond 'the language of the constitution as illuminated by the intent of its framers.'") (footnote omitted).
18. See Beardsley, supra note 4; see also Cynthia Vroom, Constitutional Protection of Individual Liberties in France: the Conseil Constitutionnel since 1971, 63 TUL. L. REV. 265, 280 (1988). But see, id. at 303-04 (narrowing the bases for decision).
take a similarly broad approach to constitutional analysis. With the exception of the Russian court, virtually no political question limits restrain the jurisprudence of many of these courts. Indeed, contrary to U.S. practice, the justiciability provisions in many of these countries seem designed not to impede but rather to encourage judicial resolution of volatile political disputes. As experiences in Russia, Hungary, and Czechoslovakia show, Eastern European political figures have not hesitated to go to their constitutional courts in highly charged political situations.  

The broad decisionmaking powers and authority to resolve political issues vested in the constitutional courts are far beyond the range of the typical civil law judge, whose approach to the judicial function is usually narrow and mechanical. As Louis Favoreu notes:  
Continental European [civil law] judges are "career judges" and in a sense bureaucrats. Before an all-powerful parliament they do not dare insist on their conception of the law. This is especially true in view of the fact that, unlike American judges who mostly pass on the constitutionality of state laws, European judges would have to verify—above all and even sometimes exclusively—the constitutionality of national laws, emanating from the representatives of the whole of the nation. That is why Continental European judges have never dared to start down the path to judicial review.  

Indeed, in cases of statutory ambiguity, the French originally insisted that judges refer the matter back to the legislature, to resolve the ambiguity, though this idea was abandoned quickly. This attitude was obviously a far cry from how Chairman Zorkin and other European constitutional court judges view themselves today. In this respect, judges on the constitutional court in Europe are much closer to their American counterparts than to their colleagues in the regular  

21. See infra discussion in Part II.  
23. Vroom, supra note 18, at 267. See also MERRYMAN, supra note 22, at 36, 39-40 (discussing the general civil law approach to resolving statutory ambiguity).  
24. "Indeed, a few purists within the civil law tradition suggest that it is wrong to call such constitutional courts 'courts' and their members 'judges.' Because judges cannot make law, the reasoning goes, and because the power to hold statutes illegal is a form of lawmaking, these officials obviously cannot be judges and these institutions cannot be courts." MERRYMAN, supra note 22, at 38.
Continental judiciary.25

Why have all these countries adopted such institutions? After all, the European tradition involves parliamentary supremacy, for in parliament the will of the people is supposed to truly reside. The answer lies partly in the nations' quest to protect civil and political liberties. For apart from the East Europeans' desire to follow Western models in order to be thought fit to join in the Western community of nations, East Europeans have come to realize what the framers of the U.S. Constitution discovered 200 years ago: although one must indeed rely on popular sovereignty if one desires a free democratic society, the legislature and the executive are also likely to abuse their powers,26 and an independent judiciary is necessary to guard and promote the rights of the people against these officials.27 Judge Learned Hand once noted that when liberty dies in the hearts of a nation, "no constitution, no court, no law can save it."28 This is quite true, but a court can interpose obstacles to tyranny, and it can embarrass the tyrant. Moreover, as the American founding fathers realized, even a free society is prone to "ill humors" that can tyrannize its minorities and others.29 Free and independent courts can provide some protection against these "ill humors" as well.

B. The New East European Constitutional Courts

What kinds of institutions are these East European constitutional courts? Perhaps the best way to answer this is to describe what they

25. A good summary of the fundamental characteristics of the European constitutional courts was made in 1987 by Professor Favoreau in discussing the French Conseil Constitutionnel: The Conseil Constitutionnel presents the same characteristics as the [European] constitutional courts: [1] "A concentrated control" in the hands of a unique jurisdiction constituted especially for this purpose and independent of the ordinary jurisdictional structure; [2] recruitment of nonprofessional judges by political authorities chosen for political purposes, which, far from being a drawback—as one often believes in France—is a necessity because this assures democratic legitimacy for the constitutional courts when confronting the legislators; [3] abstract control initiated by political authorities and able to issue a decision voiding legislation which has the effect of a final judicial judgment; [and 4] a constitutional statute establishing the court in the constitution itself, its composition and its attributes so that only a constitutional law . . . (which is usually very difficult and often impossible to enact . . .) can change the constitutional court statute.
Favoreau, Conseil Constitutionnel, supra note 13, at 115-19 (author's translation).


are supposed to do. And since form follows function, the constitutional courts’ tasks, including subject matter jurisdiction, determine to a large extent the procedures by which issues come before them; procedures that include examination of standing, ripeness, mootness, abstractness, and political questions.

The following section therefore will focus first on the subject matter jurisdiction of the constitutional courts of Bulgaria, Czechoslovakia, Hungary, Russia, Poland, and Romania, their interpretive and adjudicative roles, as well as the other functions, some of which seem quite different—though perhaps only superficially—from those required of the U.S. Supreme Court. Justiciability matters such as standing and mootness will also be examined. Thereafter, the discussion will turn to individual courts’ authority to enforce their decisions and the selection and tenure of the constitutional court judges.

1. Subject Matter Jurisdiction

The constitutional jurisdiction of the U.S. Supreme Court, as set out in Article III, Section 2 of the U.S. Constitution, does not differ much from the jurisdiction of an ordinary American court: “all Cases, in Law and Equity, arising under this Constitution, . . . laws . . . and Treaties” of the national governmental authority, “admiralty and maritime” cases, and a variety of other conventional law suits involving certain classes of parties, including officials, the United States, states, and citizens of different states.

In practice, the U.S. Supreme Court has come to limit its jurisdiction almost entirely to cases involving important questions of federal statutory and constitutional law, particularly federal statutory interpretation and review of federal agency action. Indeed, except for state and federal criminal cases, the bulk of the U.S. Supreme Court’s civil work in recent years has been the interpretation of federal statutes.30

With rare exceptions, the subject matter jurisdiction of the new East European constitutional courts differs from that set out in Article III, even as narrowed by the U.S. Supreme Court. Unlike the U.S. Supreme Court, the new Eastern European courts concentrate their judicial activity on constitutional questions. They do not often deal with such matters as statutory interpretation, which are handled by the traditional continental court system, except when necessary to re-

30. Of the Court’s 120 formal decisions in the 1990-91 term, there were 85 civil cases: 60 were federal statutory cases, 21 were federal constitutional cases, and 4 were state cases not raising constitutional issues. Of the Court’s civil cases, 62 cases involved federal statutory or other non-constitutional matters; of its purely federal docket, 60 of 76 cases were non-constitutional. See Note, The Supreme Court, 1990 Term, 105 HARV. L. REV. 77, 424-26 (1991).
solve jurisdictional conflicts and the occasional referral from ordinary courts.  

All six countries under discussion—Bulgaria, Czechoslovakia, Hungary, Russia, Poland, and Romania—explicitly grant their constitutional courts the authority to determine the constitutionality of federal laws and, in some cases, other legislative acts. Each of the aforementioned nations, except perhaps Romania, authorizes review of presidential and ministerial decrees and orders. Only three—Czechoslovakia, Romania, and Russia—explicitly authorize their courts to review the constitutionality of state or local law. Poland, Hungary, and Russia give their courts the authority to review the constitutionality of treaties, either proposed or adopted. Czechoslovakia, Hungary, and Bulgaria appear to consider treaties superior to domestic law, whereas Romania, Russia, and Poland do not explicitly authorize their courts to compare domestic law with international treaties or international law.

One rather odd piece of jurisdiction appears in both the Romanian and Hungarian constitutions: the authority to rule on the constitutionality of parliamentary procedures. The U.S. Constitution, on the other hand, explicitly gives each legislative chamber the authority to “determine the Rules of its Proceedings,” which would seem to preclude judicial review of such matters.

Jurisdictional disputes also fall within the East European constitutional courts’ explicit subject matter jurisdiction. Federal-state disputes are mentioned in the Czechoslovak, Bulgarian, Russian, and

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32. For purposes of clarity for American readers, “federal” will be used to describe the countrywide authority, “state” will be used to describe the next level of relatively autonomous governmental authority, and “local” will be used for the regional and municipal government.

33. Neither Poland’s constitutional act nor Bulgaria’s constitution seems to give their constitutional courts authority to review the constitutionality of state or local law; in Bulgaria, this may be because the constitutionality of Bulgarian local and regional laws is subject to challenge in the administrative court because these laws are considered administrative acts. Memorandum from Judge Metody Tivel to the author (Apr. 1992) (on file with the Michigan Journal of International Law).


36. U.S. CONST. art. 1, § 5, cl. 2.

37. See Baker v. Carr, 369 U.S. 186 (1962). The first criterion for classifying an issue as a “political question” is that there is “a textually demonstrable commitment of the issue to a coordinate political department.” Id. at 210.
Hungarian provisions. Intragovernmental disputes between and among the president, parliament, and cabinet are also included in the Bulgarian and Russian laws, while Czechoslovakia and Hungary empower their courts to resolve interagency disputes.\(^3\)

Federal-state disputes raise particularly delicate questions that will likely test these courts' authority. Such disputes are especially sensitive in ethnically diverse nations like Russia, where Tatarstan's decision to hold its referendum despite a Russian Constitutional Court declaration that doing so was unconstitutional raised questions about the Constitutional Court's ability to enforce its decisions,\(^3\) and in Czechoslovakia, where federal-state questions reflect deep divisions in the country between Czechs and Slovaks.

The Czechoslovak Constitutional Court Act does not contain a clause making Czech or Slovak law—either constitutional or statutory—subordinate to Czechoslovak federal legislation, but only to the Czechoslovak federal constitution.\(^4\) Even the Czechoslovak Court's authority to subordinate Czech or Slovak constitutional acts, but not ordinary legislation, to the Czechoslovak federal constitution will become effective only after a new federal constitution is adopted.\(^4\) This may not occur for a long time, if ever, given the current impasse between the Czechs and Slovaks over a new constitution. The impact of the federal Constitutional Court's ruling that a Czech or Slovak constitutional act violates the federal constitution is also uncertain. When the Court finds an ordinary law unconstitutional, the appropriate legislature has six months to change it, and if it fails to do so, the law becomes "null and void." But this does "not apply to Constitutional Acts" of the republics.\(^4\) What then happens? What is the constitutional status of a constitutional law that the Court has found inconsistent with the federal constitution? The Czechoslovak Constitutional Court Act is silent.\(^4\) Thus, the Czechoslovak Court's jurisdiction over such disputes may be quite limited, even if its rulings are obeyed in full, which itself remains to be seen.

\(^3\) Deciding intra-agency disputes is one of the few areas where the courts' mandate goes beyond constitutionality since such issues need not involve any constitutional questions.

\(^3\) See infra Part II A. The Russian Constitutional Court was also denied the authority to settle inter-republic disputes, another indication of the republics' refusal to give a central authority too much power.

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The constitutions of Czechoslovakia, Russia, and Hungary specifically grant their courts human rights jurisdiction. Under these provisions, private parties may bring complaints directly to those constitutional courts, subject to certain procedural requirements. No such right exists in the other three countries, where it seems that human rights issues may be raised only in the context of challenges in the regular court systems. Some of the problems this creates will be discussed below.\textsuperscript{44}

Romania, Bulgaria, and Czechoslovakia also give their constitutional courts authority beyond the adjudicative function. Constitutional courts in these countries may outlaw political parties and political associations for “unconstitutionality,” as in the case of Romania and Bulgaria, or unconstitutional or illegal “activities,” as in Czechoslovakia.\textsuperscript{45}

In several countries, the constitutional courts supervise elections. Romania, for example, gives its Court the responsibility of “watch[ing] over the observance of the procedure for the election of the President of Romania and to confirm the returns thereof; . . . [the] organization and holding of a referendum and to confirm its returns; . . . [and] check[ing] on . . . the exercise of legislative initiative by citizens . . . .”\textsuperscript{46} The Bulgarian court is required to monitor parliamentary as well as presidential elections.\textsuperscript{47}

These non-judicial supervisory functions over elections are quite alien to U.S. practice, although the federal courts’ role in election cases, especially reapportionment litigation, may come close in some respects.\textsuperscript{48} The decision in Eastern Europe to turn over the delicate function of supervising elections to the constitutional courts reflects a

\begin{itemize}
\item 44. See infra notes 81-82, and the accompanying text.
\item 45. Rom. Const. art. 145(i); Bulg. Const. art. 149.(1) 5; Czech. Const. Ct. Act, art. 7. These extremely dangerous provisions seem to be patterned on the F.R.G. Const. arts. 9 (2), 21 (1), under which both a Nazi successor party and the Communist Party were banned in the 1950s, though attitudes since then have changed in Germany. Article 21 (1) provides:
\begin{quote}
The political parties shall participate in the forming of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for the sources of their funds.
\end{quote}
Article 9 (2) provides:
\begin{quote}
Associations, the purposes or activities of which conflict with criminal laws or which are directed against the constitutional order or the concept of international understanding are prohibited.
\end{quote}
The two cases involving the Nazi successor party and the Communist Party are excerpted in Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany, supra note 19, at 222-31.
\item 46. Rom. Const. art. 144(e), (g), (h).
\item 47. Bulg. Const. art. 149.(1)(a), (b).
\item 48. The U.S. federal courts’ role in naturalization proceedings is another example.
\end{itemize}
confidence that these institutions are above the fray and can be entrusted with supervising vital political activities.

Finally, since most of the European constitutional courts' work is original jurisdiction, they take evidence and make factual findings, unlike the overwhelmingly appellate U.S. Supreme Court.

2. Justiciability

U.S. justiciability requirements enable the federal courts to avoid deciding many questions of major constitutional significance—a goal frequently invoked in American constitutional jurisprudence.49 The U.S. Supreme Court has limited its own authority by requiring that constitutional issues affecting legislation may only be challenged through adversary proceedings. Issues may not be raised before their resolution becomes necessary or in broader terms than are required by the specific facts of the issue before the court. Challengers must demonstrate that they were injured by the statute's operation or have availed themselves of its benefits. Furthermore, if the record before the Court presents some non-constitutional ground upon which the case may be disposed of, the court must rely on the non-constitutional rationale.50 As Justice Wiley Rutledge wrote in 1947:

The policy's ultimate foundations, some if not all of which also sustain the jurisdictional limitation, . . . are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system.51

These notions are alien to the Europeans who have created the constitutional court for the express purpose of deciding constitutional issues, not evading them. Unlike the American model, standing is not based solely on the adversary process; abstract judicial review is welcomed, rather than avoided; questions may be considered both before the question arises as well as after it has been rendered moot; and


51. Rescue Army v. Municipal Court, 331 U.S. at 571 (footnote omitted).
finally, political questions lie well within the European court’s judicial authority.

a. Who May Sue

The American law of standing, which has gone through several phases, is premised on the nineteenth century notion of a law suit—two adversaries, one of whom has allegedly been injured by the other and is seeking redress through the courts. On top of that, the U.S. Court has recently overlaid separation of powers considerations and has injected additional constitutional requirements—injury in fact, causation, redressability, directness. It has also created requirements based on “prudential” considerations: The plaintiff’s injury must be specific to him and not generalized, and the rights he asserts must be his own and not those of third parties.

The East European approach is quite different. Under the East European model, public officials are a favored class—they are the only group given standing everywhere and are often the only group at all with any standing. For most kinds of cases, these constitutions or constitutional acts generally allow one or more categories of public official—and only such officials—to bring a given issue to the constitutional court at a certain time with no additional requirements.

The reason for this lies in the original purpose of these courts: to ensure compliance with the constitutionally mandated government structure and to provide legislators with impartial and expert advice about the constitutionality of proposed or enacted legislation. Private persons are thus allowed to sue only occasionally. Human rights violations are one occasion that has been added, and even there the specific requirements plaintiffs must meet to achieve standing are somewhat unclear, possibly for the kinds of considerations the U.S. Supreme Court has fashioned.

52. See Tribe, supra note 50, at 67 (“the business of federal courts [is limited] to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process”); Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1285-88 (1976).
57. For a general discussion of the origins and rationales for these courts, see Brewer-Carias, supra note 1, at 185-96.
58. See RSFSR Const. Ct. Act, art. 69.1(14) (Court may refuse to hear the case if “inadvisable.”). Favoreu suggests that in few systems do private people have ready access to the constitutional court. Quoted in Vroom, supra note 18, at 272 n.30. But in the United States, there is
The Bulgarian provisions seem most restrictive: Standing is given only to the president, a fifth of the national legislature, the government, the chief prosecutor, both the Supreme Administrative Court and the highest regular court, and in some cases, municipal councils; no direct private access seems available. Other countries are much more open. In Czechoslovakia, for example, challenges to laws or decrees as violative of federal constitutional, international, or statutory law may be filed by any of numerous federal, Czech, or Slovak officials, or one-fifth of the members of the federal or republic legislatures. Conflicts of jurisdiction may be brought to the Czechoslovak court by one of the agencies involved. When a political party is banned, the representative of that party, of course, may bring the action, and where human rights are concerned, a private complaint is enough “under conditions set by an Act of the Federal Assembly.” Since the Constitutional Act says nothing more, the federal law—presumably by an ordinary law and not a constitutional act—will set the requirements private persons must meet in order to have their cases heard.

The Hungarian Court’s approach is the most generous. In Hungary, anyone can challenge “legal rules and other legal means of state guidance” as well as human rights violations. There are thus no standing restrictions for any legal rule that has become effective, thereby allowing challenges to all existing as well as newly enacted legislation. But where a preliminary examination of bills, parliamentary acts enacted but not yet implemented, standing orders of parliament, or international treaties are concerned, standing is given only to

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59. BULG. CONST. art. 150.(1).
60. The CSFR law with its broad standing provisions for public officials is probably a reaction to the very narrow standing provisions in the Constitutional Court’s interwar predecessor, under which only a few of the highest federal judicial and legislative officials had standing. The latter had little incentive to challenge legislation they had usually supported, and the judicial officials were probably not eager to have another court review their rulings. As a result, in some twenty years the interwar Court did not handle a single case involving judicial review of legislation. TABORSKY, supra note 1, at 77-78.
61. A human rights organization relied successfully on this provision in challenging the Hungarian capital punishment law.

According to Peter Paczolay, both this broad standing requirement and the very broad grant of subject matter jurisdiction were sought by the democratic opposition to the Communists when the two sides were arranging what turned out to be a transfer of power from the Communists. The opposition did not trust any of the established institutions and wanted to give this new power center, the Constitutional Court, as much authority as possible. The Communists were apparently unaware of the power they were giving the Court, with which they were unfamiliar, and did not object. The Court has fully met the opposition’s expectations, probably to a greater degree than some of those who maneuvered its creation now like. Peter Paczolay, counsel to the Hungarian Constitutional Court president, address at The American University, Washington College of Law, Apr. 17, 1992.
the president, parliament, a standing parliamentary committee, groups of deputies greater than fifty, and apparently the collective government, not just a single minister. Conflicts of jurisdiction also can be raised only by the parties involved. Parliament, however, can extend standing to those not already included in the various categories.

Like the others, Polish law allows high government officials to initiate Constitutional Tribunal review, as well as “committees of 50 deputies” and the Ombudsman; the latter is a particularly prolific source of Constitutional Tribunal cases. In addition, certain private organizations such as trade unions and trade associations are allowed to file constitutional court actions in matters affecting them. The latter petitioners must go through an initial screening by a single judge, but may be rejected if their petition “fails to meet the requirements set by provisions of this law or when it is obviously unfounded or misaddressed.” These objections would seem applicable to all petitions, however, not just those brought by such groups as unions and trade associations, and it is difficult to see what additional requirements the screening process is supposed to impose.

The Romanian constitution sets out few standing rules: Review is allowed only for initiating rulings on legislation prior to promulgation or about parliamentary procedure, in which case standing is limited to high government officials and “at least 50 deputies or 25 Senators.” Specific legislation may set out the rules for invoking the court’s jurisdiction in other matters.

The Russian Constitutional Act, which includes hundreds of detailed paragraphs and subparagraphs, sets up a very complex system in which a wide variety of public officials can petition the court to hold “international treaties or enforceable enactments” unconstitutional, and individual citizens can challenge “law-applying practices” in accordance with customary law and practice. Whereas review is mandatory in the former case, private complaints can be refused if “inadvisable.” This latter provision, of course, allows the Russian

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62. It is not clear from the Act what it takes to challenge such a petition. Does it require a majority vote or just action by the parliamentary leader? See Hung. Const. Ct. Act, ch. III.
63. Ombudsmen are officers of the Polish court system whose duties include the power to appeal to the constitutional court matters that involve conflicting practices of administrative bodies. Memorandum to the author from Prof. Leonard Lukaszuk, Constitutional Tribunal vice chairman (Apr. 25, 1992) (copy on file with the Michigan Journal of International Law).
65. Rom. Const. art. 144(a), (b).
67. Id. at arts. 66-67.
68. Id. at art. 69.1(14).
court to develop standing and other justiciability requirements. At the request of a few high Russian officials, officials of one of the Russian republics, or on its own initiative, the Russian court may also issue “findings,” which are binding on other courts in their decisionmaking.

In another departure from conventional U.S. practice, several of these courts—the Russian, Romanian, and Hungarian—can in some cases initiate actions on their own, without a complaining party. Indeed, the Russian Court even has the right to initiate legislation, and is encouraged to do so. Such broad judicial authority seems a serious encroachment on separation of powers principles. What would happen, for example, if a law originally proposed by the constitutional court were challenged as violative of either the constitution or a treaty? Who would pass upon it?

Finally, unlike the U.S. Supreme Court, these courts may rarely decline jurisdiction. The Russian provision allowing a refusal to hear private complaints as “inadvisable” seems to be the exception, rather than the rule. This has created serious overload difficulties for the Hungarian Court because of its enormously broad standing provision.

b. Ripeness, Mootness

As noted previously, the U.S. Supreme Court usually will not consider a constitutional attack on legislation unless the challenge is raised in an ongoing dispute. Unlike U.S. courts, none of the East European constitutional courts under consideration seem to require a particular live dispute between adversaries, for all allow the appropriate bodies to challenge and test laws simply by filing the requisite papers by the appropriate bodies. The Romanian and Hungarian constitutions allow review even of unimplemented laws. Thus all permit, and indeed provide, that the normal review procedure will be abstract: a legislative act, treaty, or executive decree is to be analyzed on its face, and not as it applies in a particular disputed instance. Only

69. See id. at art. 55; Rom. Const. art. 144(a); Hung. Const. Ct. Act, § 21(7).
70. RSFSR Const. Ct. Act., art. 9.
71. According to a recent newspaper report:

In 1991, the number of cases addressed to the Constitutional Court increased considerably over the previous year’s figure: 1,625 cases were filed in 1990, while the number for the first ten months of 1991 amounted 2,010. Two-thirds of the cases that have reached the Court so far were found to fall outside its competence. The Court rejected 1,200 appeals, and a further 100 cases were either transferred to other authorities or returned for lack of information. The number of cases that were actually deliberated was 698. Most of the cases (1,620) were brought before the Court by private individuals. Out of the 53 cases in which the Court declared its verdict this year, 40 were found to have violated the Constitution. Hungarian Observer, Jan. 1992, available in LEXIS, Nexis Library, Hunobs File.
the Russian provisions for complaints by individual citizens about law application practices seem to contemplate an existing controversy.

Furthermore, there is no indication that mootness will end the courts' obligation to pass on the challenged legislation or treaty. Indeed, the Russian Constitutional Court Act requires that court to continue a proceeding that has begun despite a repeal or expiration of the act in question.\(^{72}\)

This combination of public-official standing and the abstract nature of the review underscores the special nature of the European constitutional courts, another difference from U.S. courts, which avoid ruling on abstract or moot issues. One of the landmark rulings by the early U.S. Supreme Court was its refusal to answer questions about a treaty posed by Secretary of State Thomas Jefferson. In a very brief response, Chief Justice John Jay and his colleagues wrote Jefferson that acceding to his demand would be inconsistent with separation of powers and finality principles.\(^{73}\) This view is obviously 180 degrees away from the European practice.

Moreover, the European system can continually plunge constitutional courts into political controversies by giving standing to relatively small groups of legislators who have lost a legislative battle. Thus, the 1974 expansion of standing to sixty deputies of the French National Assembly\(^{74}\) transformed the French *Conseil Constitutionnel* from a protector of the executive against the legislature to a legislative weapon against executive action.\(^{75}\) This is quite common among European courts.\(^{76}\) Perhaps for this reason very few of these new courts are precluded from deciding political questions. Only the Russian court is under such a ban, and the meaning of that phrase in the Russian Constitutional Court Act is quite uncertain.\(^{77}\) This sharply contrasts with the United States, where congressional standing is narrowly confined to *prevent* losing political factions from turning to the courts to win judicially what they lost legislatively.\(^{78}\)

72. RSFSR Const. Ct. Act, art. 62.3.
74. Standing had been limited to the president, prime minister, and presidents of the two legislative chambers.
75. Private parties in France still have no standing before the *Conseil Constitutionnel*. See Mauro Cappelletti & William Cohen, Comparative Constitutional Law 47-48 (1979); Beardsley, supra note 4; Vroom, supra note 18.
76. Brewer-Carias, supra note 1, at 199.
77. RSFSR Const. Ct. Act, art. 1.3. For concerns that this may cover a wide range of cases, see Carla Thorson, RFE/RL Report on the USSR, *RSFSR Forms Constitutional Court*, Dec. 20, 1991, at 14, 16. If the American experience is any guide, these fears are groundless.
78. See Tribe, supra note 50, at 152-53 (especially authorities cited in nn.54-55).
Cases also get before the constitutional courts through referral from the regular courts. It is inaccurate to say that the ordinary East European judges are barred from deciding constitutional questions. They can, but they are permitted to rule only one way: They may not ordinarily strike down statutes. If the ordinary courts find a statute is unconstitutional, they must refer the case to the constitutional court, a practice similar to that found in German law. Thus, in Bulgaria and Hungary, the regular courts must refer a case to the constitutional court if they find a "discrepancy" between a law or a treaty and the constitution.\textsuperscript{79} The ordinary courts\textsuperscript{80} must suspend proceedings and await the constitutional court's ruling. This, of course, reflects the Continental style of "concentrated" judicial review, as opposed to the diffuse American style where every court is theoretically authorized to strike down an unconstitutional statute.

Such a referral requirement has several unfortunate aspects. Apart from the delay involved in the referral, the procedure is one-sided: Because referral is mandatory only if the regular or administrative court finds a "discrepancy" or "considers unconstitutional a legal rule," only a successful challenge to that law is referred to the constitutional court. To put it in a litigation context, only the government—the usual defender of such a law—has an automatic right of appeal to the constitutional court. If the regular court does not find a "discrepancy," and the challenger does not have a right to appeal, the matter will end there.

This is not a great problem in Germany and Hungary, where private parties are entitled to go to the constitutional court, but this right does not exist in Bulgaria, Poland, or Romania, and only in a modified form in Russia and Czechoslovakia.\textsuperscript{81} Moreover, given the normal timidity of traditional continental court judges toward striking down legislation as discussed above,\textsuperscript{82} few will be inclined to find the "discrepancy" which, in Germany at least, they must justify in writing.

Thus, when a nation creates a special constitutional tribunal because it either lacks confidence in the capacity of the ordinary court system to decide constitutional questions or considers it inappropriate for such courts to review the acts of the legislature—the primary rea-

\textsuperscript{79} BULG. CONST. art. 150(2); Hung. Const. Ct. Act, § 38(1). In Poland, Czechoslovakia, Russia, Bulgaria, and Hungary, the highest ordinary and administrative courts can also initiate proceedings in, or refer a case to, the constitutional court on a voluntary basis.

\textsuperscript{80} In Bulgaria, the Supreme Administrative Court and Supreme Court of Cassation.

\textsuperscript{81} In Russia, a private party has only a limited right, subject to the Court's discretion. RSFSR Const. Ct. Act, art. 36; in Czechoslovakia, a private party may go the Constitutional Court only for a human rights violation.

\textsuperscript{82} See supra text accompanying note 22.
sons for the "concentrated" approach to judicial review—a referral should be required whenever a regular court considers that a constitutional challenge simply presents a serious question, as the Polish Constitutional Act provides in certain situations. 83 Otherwise, judicial review by constitutional courts of constitutional issues arising out of ordinary litigation will operate largely to the benefit of the defenders of the law and not the challengers. The latter will get to the constitutional court only if they have already won, and not if their challenge failed. Such one-sidedness does not belong in a system of justice.

3. Selection and Tenure

Constitutional court judges are appointed through explicitly political methods. In each case, the constitutional court judges are selected in whole or in part by the parliaments, sometimes by simple majority rule. 84 In Czechoslovakia, the president chooses from among lists submitted by the federal, Czech, and Slovak legislatures. In Romania and Bulgaria, the nations' respective presidents also select some members, and in Bulgaria the chief judges of the administrative and ordinary courts select a third.

Only the Russian court judges have life tenure, though only until retirement at age sixty-five. 85 The rest of the countries, possibly concerned about concentrating too much power in such a group, usually limit their judges to one term of seven to nine years, with the exception of Hungary, which allows one renewal of a nine-year term, and Czechoslovakia, where the Constitutional Court Act 86 is silent as to renewability, thereby implicitly allowing it.

Despite the lack of life tenure and the inevitably political nature of the selection process—which, incidentally, is equally political for the courts of several other countries including France, Germany, and the United States—those East European courts that have decided cases have shown little deference to the governments and legislatures that appointed them. The Hungarian and Russian constitutional courts have shown remarkable independence and courage. 87 In this respect, these judges are following the pattern laid down by the French and German constitutional court judges, who have also been quite in-

84. RSFSR Const. Ct. Act, art. 3.1; Pol. Const. Trib. Act, art. 13.2; BULG. CONST. ch. 8, art. 147(1) (one-third of twelve judges); ROM. CONST. tit. V, art. 140(2) (three of nine judges by one legislative chamber, three by the other); HUNG. CONST. ch. IV, § 32/A(1) (a judge must be elected by two-thirds majority of the parliament).
85. RSFSR Const. Ct. Act, art. 16.1.
86. HUNG. CONST. ch. II, § 8(3); Czech Const. Ct. Act.
87. See infra Part II.
dependent, despite the political selection process in those countries. In part this may be because the almost universal limitation to one judicial term means there is little to gain from deferring to the politicians; this may also occur in part because many of the lawyers chosen as judges have been distinguished lawyers—especially the chief judges, who may be relatively apolitical—though some have not had good reputations. And finally, it may in part follow because few are professional politicians with continuing political ambitions.

The uncertain effect of some European constitutional rulings may also be different from the emphatic finality insisted upon by the U.S. Supreme Court for its rulings and those of its fellow federal courts, though that is not certain. In Hayburn's Case the Supreme Court refused to accept jurisdiction over pension claims of disabled veterans because the judicial decisions were not final but could have been at least suspended “by the Secretary of War ... where he [had] cause to suspect imposition or mistake ....”

Although the decisions of most of these Continental constitutional courts also are said to be final, in Romania pre-promulgation decisions on the constitutionality of legislative enactments and parliamentary rules may be overridden by a two-thirds vote of either legislative chamber. Since a two-thirds vote of both chambers is necessary for a constitutional change in Romania, the override possibility represents a true intrusion on the finality of constitutional decisions, except that it applies only to pre-promulgation enactments and parliamentary procedures, not to enacted laws. In Poland, a Constitutional Tribunal decision annulling a law may also be overridden by a two-thirds vote of the Sejm, the primary legislative chamber, in the presence of at least half the Sejm deputies. But since these are the same requirements as those for a constitutional amendment, the override is tantamount to such an amendment, which can always override a constitutional nullification. So far, only one minor Tribunal decision has been overturned by the Sejm.

88. See Cappelletti, supra note 2; Brewer-Carias, supra note 1.
89. 2 U.S. (2 Dall.) 409 (1792).
90. Id. at 410 n.2.
92. POL. CONST. art. 106.
II. **The East European Constitutional Courts in Action**

As of this writing, only five of these new constitutional courts have become operational—those in Czechoslovakia, Bulgaria, Poland, Hungary, and Russia. Of these five, the Hungarian and Russian courts are perhaps the most powerful. Because Peter Paczolay, counsel to the Hungarian Constitutional Court president, will discuss that court elsewhere in this symposium, I will focus my discussion on the Russian Court and then summarize some recent actions of the Bulgarian, Polish and Czechoslovak courts.

A. **The Russian Constitutional Court**

Established in October 1991, the Russian Court’s first few months in office provide many lessons about the scope and limits of a constitutional court’s power. In a nation without a history of either judicial review or even an independent judiciary, the Court first struck down a decree by a popular president and then a proposed referendum action by an autonomous republic. Between the two, it responded to private-citizen complaints on a pension matter and at the end of April decided another jurisdictional dispute between the president and the parliament, this time in favor of the president. On its docket are many more delicate questions, including the legality of President Boris Yeltsin’s ban against the Communist Party.

The first actions of the Russian Constitutional Court, led by outspoken judges, including Chairman Valery Zorkin, are astonishing when viewed against the backdrop of Russian and Soviet history. As

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94. The Czechoslovak Court was just established in March 1992. The Bulgarian Court has been in operation about a year. The Polish Constitutional Tribunal, the oldest of the constitutional courts under discussion, has operated since 1985, but has only limited jurisdiction.


96. As of this writing the Russian Court had only 13 of its 15-judge complement.

97. Although as of this writing the Constitutional Court had not yet ruled in a child custody case, Judge Ernest Ametistov recently said in a news broadcast:

> Here is another typical example of an unconstitutional practice. In divorce cases the courts are inclined to give custody of children not to their fathers, but to their mothers, although no such norm is recorded within the Law or in the Constitution. The fundamental principle is the equality of rights of both parents. And the citizens must know this.


98. Before becoming Chairman of the Constitutional Court, Zorkin was the Chairman of the Constitutional Commission and almost certainly its dominant figure. He was responsible for tilting the commission’s initial recommendations in favor of a strongly presidential government. The recommendation was changed in favor of a parliamentary system after Zorkin left the Commission for the Court. For how this bears on the Court’s decision on the KGB-MVD merger, see text accompanying notes 126-29.
is well known, prior to the arrival of Mikhail Gorbachev, Russian Communist law did not acknowledge the need for an independent judiciary and certainly not for an independent tribunal exercising judicial review over the acts of officialdom. All authority—including judicial authority—came from and was supervised by the leadership of the Communist Party.

A tentative move toward judicial review was made in January, 1990 with the creation of the USSR Committee on Constitutional Supervision, a part of Gorbachev's reforms. The Committee exercised some independent authority, striking down several of Gorbachev's decrees, yet some considered it a failure. With the demise of the Soviet Union, it disbanded on December 23, 1991.

As part of the constitutional reform for the Russian Soviet Federal Socialist Republic—not the USSR, which never made it to that stage—a constitutional court was proposed in the November 1990 draft constitution, with very broad powers of judicial review. Without waiting for a new constitution, on July 12, 1991 the RSFSR adopted an elaborate 89-article statute containing hundreds of detailed provisions establishing a fifteen-member constitutional court with automatic tenure until retirement at age sixty-five, and vast powers only slightly diminished from those in the November draft constitution. At the end of October, thirteen of the fifteen judges, including Chairman Zorkin, were appointed from among twenty-three candidates proposed by President Boris Yeltsin. Many feared that the court

99. For a good survey of Communist law, see MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 672-967 (1985).
But see, Carla Thorson, Legacy of the USSR Constitutional Court Supervision Committee, RFE/RL RESEARCH REPORT, Mar. 27, 1992, at 55:
Although it had limited authority, the committee was increasingly seen as an alternative source of political power and as a potential guarantor of human and civil rights. The committee's inadequacy resulted from the illegitimacy of the law it was entrusted to uphold and from the fact that its rulings were treated as recommendations and as such were not binding on the government. Nevertheless, the committee succeeded on more than one occasion in having legislation overturned.

Id.

102. As of this writing, May 1992, the Russian Constitution was still far from adoption.
103. Now known as both the "Russian Federation" and "Russia."
104. There seems to be no power to mediate disputes between republics in the Russian Federation unless a constitutional question is involved.
105. Although Zorkin remains a proponent of strong presidential power, I was told by a member of the Russian Parliament that Yeltsin had hoped another candidate, one who was not appointed to the court, would become chairman.
106. Although some of the judges are well thought of, including a distinguished woman researcher, some doubts have been expressed about the competence of other appointees. Carla
would be as ineffectual as the USSR Committee on Constitutional Supervision was thought to have been.

Within days of the judges' appointment, a group of thirty-six legislators, mostly former Communist Party officials, filed a petition with the Court presenting it with its first political hot potato: a constitutional challenge to Yeltsin's post-coup decrees outlawing the Communist Party, confiscating its property, and banning Communist Party activity. Before the Court reached that question, however, another challenge to Yeltsin's authority was thrust onto the newly-created Court: a parliamentary challenge to a presidential decree merging what was left of the Russian KGB, the state security agency, with the Ministry of Interior (MVD), which controls the police. This case became the vehicle for the Court's baptism by fire.

1. The KGB (ISS)-MVD Merger Decree

Shortly after the August 1991 coup attempt, the KGB was partially dismantled, renamed the Interrepublic Security Service (ISS), and some of its more notorious units were reportedly abolished. The change left few differences between the remains of the ISS and the MVD and a good deal of overlap, according to government officials who supported the merger decree. The merger was allegedly to save money and increase crimefighting efficiency, a major concern in a country facing a steep rise in the crime rate. Accordingly, exercising decree powers given him by the Supreme Soviet on November 1, 1991 in connection with economic reform, Yeltsin ordered the merger on December 19, 1991, effective immediately, and appointed Victor Barannikov, a friend from his hometown of Sverdlovsk, to run the consolidated agency.

The public reacted with shock and fear. The last such merger, in 1936, was immediately followed by Stalin's murderous purges, and the Yeltsin merger aroused memories and fears of a recurrence. There were also signs that the many remaining KGB members were en-

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109. Russian Parliament Tries to Undo 'Mistakes,' supra note 100.

110. Id.

111. I was later told in private conversations that the idea for the merger was actually Barannikov's.

trenching themselves in key positions in both federal and local governments. President Yeltsin’s commitment to constitutional democracy was also questioned by some human rights activists and former dissidents.113 These fears were compounded by a simultaneous press law proposal that would have severely inhibited journalists.114 An Izvestia headline on the merger decree and press proposal read “A Chill Runs Down One’s Spine.”115

Such concerns116 prompted a petition by fifty-one deputies to the Constitutional Court challenging the merger decree, and on December 26, 1991, the Supreme Soviet passed a resolution directing President Yeltsin to annul the decree. The next day, the Constitutional Court met quickly and issued an order temporarily suspending the merger decree until a definitive ruling,117 with a hearing set for January 14, 1992. At the same time, Chairman Zorkin began to make a series of public statements on the Court’s role and other matters that to an American observer seemed startlingly outspoken for a judge. For example, the day the Court issued its suspension order, Zorkin expressed his deep concern over instances in which legislative and executive authorities have clearly ignored constitutional principles and norms. He said that in its activity the Presidium of the Russian Federation Supreme Soviet frequently goes beyond its constitutional powers, usurping the powers of legislative and executive authorities. The Russian President’s decree on organizing a Russian Ministry of Security and Internal Affairs is contrary to the principles of organizing a state based on the rule of law.118

Shortly after the suspension order, the press reported that one judge had received anonymous threats against him and his family, the wife and daughter of another judge were accosted in the hallway of their home, and a third judge managed to escape injury after two “explosive devices” were hurled at him. I am told that since the Court’s ruling, Chairman Zorkin has received two death threats. A confidential source told a newspaper that this harassment was a reaction to the

116. There also were other more mundane considerations: Many ISS and MVD employees feared they would lose their jobs in the merger, and the ISS also reportedly feared that some MVD officials might use their files for blackmail and other corrupt purposes.
118. Burkaleva, supra note 114.
Constitutional Court’s suspension order. It was also alleged that some members of the MVD and ISS began to destroy files.

In the meantime, the government had accelerated the merger after the petition was filed and began planning the forcible suppression of any disruptions that might result from the lifting of price constraints. These plans were kept secret, which angered the Court; others described them as a restoration of “the repressive functions of security organs inside the country.”

In addition, the Court was told that Barannikov, who headed the merged agency, had said to his staff on December 27, 1991, the day after the Court’s first order:

The people are fed up with perestroika. The President’s only support is the Armed Forces and the security and internal affairs agencies. . . . I will investigate the lobby that is opposing the merger and the enforcement of the President’s decree.

At first President Yeltsin tried to postpone the hearing indefinitely, perhaps in order to continue with the merger despite the suspension order, but his request was brusquely denied. The challengers argued the decree was a threat to democracy and to individual rights; Sergei Shakhrai, state counsellor for legal policy, disputed this and argued that it was within the Russian president’s powers.

After eight hours of argument and two hours’ deliberation, a unanimous Court declared the merger unconstitutional because the decree violated principles of separation of powers under the 1977 Russian constitution, which has remained in effect pending the adoption of a new constitution. A full opinion was issued approximately two


120. See Russian Parliament Tries to Undo ‘Mistakes’, supra note 100.

121. The Russian Court learned of these plans during the course of the hearing on the decree Jan. 14, 1992. FBIS-USR-92-007, Jan. 23, 1992, at 87.


123. Id.

124. Some witnesses did not appear at the hearing, and the Ministry concealed some documents from the Court. At the close of the argument, Zorkin stated that these two issues would be considered at a later date. As of this writing, it was unclear whether the Court had taken any action on them.

125. The ruling read as follows:

Having heard in open court the case testing the constitutionality of the Russian President’s [merger] decree . . . the court has decided to declare this decree to be not in keeping with the RSFSR Constitution from the standpoint of the separation of legislative, executive and judicial powers established in the republic and . . . codified in the Constitution. This decision is final, cannot be appealed, and enters into force immediately after its proclamation. [T]his means that the Russian President’s Decree on the Formation of the Ministry of Security and
weeks later, confirming that decision.

Specifically, the Court held that the 1977 constitution granted only the Supreme Soviet, and not the executive, the power to create ministries, which the Supreme Soviet has exercised through laws and resolutions since 1990. Whatever powers the president was given by the Supreme Soviet’s action of November 1991 remained subject to the Supreme Soviet’s approval, creating “a special mechanism . . . for preliminary monitoring” over executive decrees. Such monitoring, the Court found, “is an element of the system of checks and balances, inherent in the principle of separation of powers.”

The Court also stressed that the Supreme Soviet has the constitutional authority to participate in the development of basic defense and state security measures, and that other branches of government could not remove such issues from the Supreme Soviet’s authority. Furthermore, the Court noted that a week after Yeltsin announced the merger, the Supreme Soviet had passed a resolution directing him “to annul his decree.”

Concluding that the decree violated the spirit and letter of numerous other resolutions of the Supreme Soviet, it found that the decree “in practice deprived the RSFSR Supreme Soviet of the opportunity to participate in the formation of basic measures in . . . defense and . . . national security,” in violation of the constitution. This, the Court found, affected the most fundamental citizens’ rights “such as the right of inviolability of the person, of privacy, of the home, and of the secrecy of . . . communications.”

The immediate aftermath was confusing. Although Shakhrai was supposed to have harbored doubts about the merits of his case, he deplored the decision as not “juridical” but based on “political and ideological motives” derived from the ambiguities of the current constitution. At first Shakhrai warned, “This does not mean the decree

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Internal Affairs and all other . . . acts . . . based on this decree or reproducing it lose their legal force and are to be considered invalid[, and] are to revert to the state existing before the adoption of the unconstitutional decree.

Rudnev, supra note 122.

127. Id. at 68.
128. Id.
129. The Court subsequently imposed a fine of 500 rubles on a newspaper that had printed the decree but not the Court’s decision.
ceases to be in effect,” but then added, “The government should obey the Constitutional Court.” 132 This raised doubts as to whether the government would comply with the Court’s decision. Zorkin and a court spokeswoman threatened Shakhrai with impeachment if he repeated either his comments about the “political” nature of the ruling or about the effect of the decree. 133

President Yeltsin’s first reaction also was ambiguous. Zorkin reported that it took him an hour to persuade Yeltsin that he had to obey the Court’s ruling. 134 A few days later Yeltsin issued an order separating the two agencies. But because he put Barannikov, who had been head of the MVD, in charge of the security agency and Barannikov’s former deputy in charge of the MVD, one newspaper suggested that Yeltsin had “outwitted both the Russian Parliament and Constitutional Court.” 135

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The Court’s first foray into judicial review—albeit only of an executive decree, not legislative action—clearly shows a determination to insist on the rule of law. This determination is reflected not only in the decision, but in the series of extrajudicial statements by its chairman. 136 The decision involved a good deal of courage, for it took on a popular president, although the decree itself was unpopular and was opposed by a variety of constituencies. 137 And though there was nervousness about whether it would be obeyed—a nervousness that continues because of the possible de facto union resulting from the fact that the heads of the now formally separated agencies are Victor


133. Chazan, Yeltsin Cancels Order Creating Super-Security Agency, supra note 112. Several weeks later, I asked Chairman Zorkin whether such a threat did not infringe on Shakhrai’s free speech rights, especially insofar as it was directed at Shakhrai’s comment about the decision’s “political and ideological motives.” Zorkin replied, “Not where a public servant was concerned. As a private citizen, he can say what he wants to, but as a public servant he is speaking for the President and was, in effect, accusing the Court of misconduct.” Interview with Valery Zorkin, Russian Constitutional Court chairman, in Moscow (Jan. 31, 1992).


136. The day after the decision, Zorkin told a television interviewer that the decision “has been aimed not against the president, but for his protection. The main guarantee that this decision will be observed . . . is the mood of society itself. If society rejects this new option, I think nothing will save either the president, the legislators, or the Constitutional Court.” Constitutional Court on Invalidation Decree (Moscow Russian Television broadcast, Jan. 15, 1992), translated in FBIS-SOV-92-011, Jan. 16, 1992, at 38.

137. See supra note 116.
Barannikov and his former deputy—President Yeltsin's willingness to accept the decree, at least formally, is a hopeful sign.

As to the merits of the decision, an expert on Soviet law has informed me that it is clearly sound. The opinion is cast in a dry, technical, almost legalistic style, but that approach may be appropriate during the Court's early years, particularly because the opinion does point to the possible harm the decree might inflict on individual rights.

On the other hand, State Counsellor Sergei Shakhrai's lament about the difficulties of working with an old constitution is well-founded and echoed in Hungary and elsewhere. The new constitutional courts are trying to apply new laws, concepts, and amended constitutional provisions to old laws and constitutions based on very different concepts. The problem is compounded by the fact that since so few of these countries have adopted wholly new constitutions, but have simply amended their existing charters, the courts are often trying to reconcile old and new provisions in the same constitution.

Finally, it is fortunate that its most visible judge, Chairman Zorkin, was known not as an opponent of a strong executive, but as quite the opposite, as someone whose objectivity was questioned because of his support for a strong president and his prior government service. As he said to me with a faint smile, "No one can accuse me of harboring any hostility to the President."

2. The Tatarstan Referendum

The Court was not so lucky when it was forced—again, unexpectedly and by events—to consider the constitutionality of the March 1992 Tatarstan referendum.

It was expected that Russia would face monumental problems after the breakup of the Soviet Union—creating a market economy that can provide adequately for its people, building a democracy and establishing relations with Ukraine and the other members of the former Soviet Union. What few expected was that Russia itself, a collection of twenty republics and many different ethnic units and religions, would face the same centrifugal forces as those that destroyed the Soviet Union. But it has. The breakup of the Soviet Union unleashed a wave of ethnic nationalism across the region. What Boris Yeltsin

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139. Interview with Zorkin, supra note 133.
140. The "nationalities problem"—the task of bringing together scores of very different national, ethnic, and religious groups—has bedeviled Russia for centuries. It remains, according to Oleg Rumyantsev, the Russian Constitutional Commission's General Secretary and its de facto chairman, the major stumbling block to a new constitution. See Federation: May the Voice of the
The New Constitutional Courts

did to Mikhail Gorbachev and the Soviet Union is now being done to Yeltsin by several of the constituent republics of the Russian Federation.141

The problems with Tatarstan142 began to take constitutional form on August 30, 1990, when its government issued a Declaration of State Sovereignty just three months after Russia declared its sovereignty. Tatarstan’s Declaration, which was to be the basis for a new Tatarstan constitution and laws, omitted any reference to Tatarstan remaining part of Russia.143

The Russian authorities, preoccupied with their own problems vis-à-vis the Soviet Union, did nothing. Thereafter, in April 1991, Tatarstan revised the preamble to its constitution and the titles of certain constitutional articles so that they no longer included Tatarstan in the Russian Federation or accepted the supremacy of Russian law over the laws of Tatarstan.144 Russian authorities continued to do nothing.

Then, on November 29, 1991 and February 21, 1992, Tatarstan nationalist pressure produced a series of laws that scheduled a referendum on March 21, 1992, on the following question:

Do you agree that the Tatarstan Republic is a sovereign state and a party to international law, basing its relations with the Russian Federation and other republics and state on treaties between equal partners? Yes or no?145

At the same time, in late January or early February 1992, Tatarstan stopped transmitting tax collections to Moscow.146 This time the Rus-

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141. Chechen-Ingushetia, now the self-styled Republic of Chechnya, was one of the first to try to break away. When Yeltsin responded with force, the Russian Parliament stopped him, and the matter simmers. Yeltsin has proposed a treaty among the republics which eighteen have signed; Tatarstan and Chechnya have refused to sign. See Guy Chazan, Russian Official Says Tatarstan Referendum Catastrophic, UPI, Mar. 18, 1992, available in LEXIS, Nexis Library, UPI File.

142. Tatarstan, an autonomous republic within the Russian Federation, has been ruled by Russia since 1552, when it was conquered by Ivan the Terrible. Its people, half ethnic Tatars and the other half Russians, live together peacefully with a good deal of intermarriage. The region is a major oil and gas producer and defense industry center and has always considered itself exploited and dominated by Moscow. Tatarstan tried unsuccessfully for years to become a Union republic within the USSR, but failed in part because it is completely enclosed by other republics. Stalin reportedly said that the people of Tatarstan had as much chance of becoming a Union republic as they had of seeing their own ears. Ann Sheehy, Tatarstan Asserts Its Sovereignty, RFE/RL DAILY REPORT Apr. 3, 1992, at 1-2.

143. See Ludmila Yermakova, Russian Court Against Referendum in Tatarstan, TASS, Mar. 18, 1992, translated in, LEXIS, Nexis Library, TASS File.

144. FBIS-USR-92-038, supra note 16, at 85.

145. Id. at 87.

146. Inna Muravgoya, Notes to the Point: Test of Responsibility, ROSSIISKAYA GAZETA, Mar.
sian authorities reacted, and strongly.

Nobody knew or knows what the question posed in the referendum really meant. Assertions that it referred to secession were repeatedly denied by Tatarstan leaders, who declared that all they wanted was to be treated as a "sovereign state," a "subject of international law" that would "build relations with Russia on the basis of a treaty... to be on an equal footing." They did not intend that Tatarstan have either a separate currency, its own defense forces, or separate embassies abroad. Instead, the treaty would be a "treaty of alliance." Tatarstan representatives admitted that the question was deliberately ambiguous so that people would vote "yes" without realizing they were voting for secession.

Opposition party leaders in Tatarstan and others suggested that the referendum and possible secession was a way of keeping in power Tatarstan's current rulers who are old-line Communists; Tatarstan President Mintimer Shaimiyev supported the August coup, and reform in Tatarstan has moved very slowly. "Secession here does not mean democracy," warned one Western diplomat.

Fearing the referendum proposal as both a vehicle of Tatarstan secession and an example to other restive groups in the Russian Federation, on March 5, 1992 a group of Russian deputies led by Constitutional Commission Secretary General Rumyantsev petitioned the Russian Constitutional court to review the constitutionality of the referendum. The deputies argued that the referendum might lead to a change in the Russian Federation's territory, which the constitution forbids republics to attempt unilaterally.

The Court promptly scheduled a hearing for March 13. Representatives of the Tatarstan Republic refused to attend, later claiming...
they did not have enough time to prepare. ¹⁵³ Thus, the only parties in court were representatives of the Russian Federation deputies and the Supreme Soviet itself. ¹⁵⁴ After several hours of argument and testimony, all of it inevitably one-sided, the Court found that both the 1990 Declaration of Sovereignty and the referendum question violated the Russian Constitution in several respects:

(1) The denial of the supremacy of federal laws over the laws of members of the federation is contrary to the constitutional status of the republics in a federated state and precludes the establishment of a law-governed state. ¹⁵⁵

[(2) The decree is . . . a legislative instrument, predetermining the direction and content of the legislative process. ¹⁵⁶]

[(3) Without denying the national group’s right to self-determination exercised by means of a legal expression of the electorate’s will, we must proceed from the fact that international law limits it to the observance of the requirements of the principle of territorial integrity and the observance of human rights. ¹⁵⁷]

(4) According to the Constitution of the RSFSR, the Tatarstan Republic is part of the RSFSR (Article 71); the territory of the Tatarstan Republic is part of the territory of the RSFSR and may not be changed without its consent (Article 70); the Constitution of the Tatarstan Republic must correspond to the RSFSR Constitution (Article 78); the RSFSR Constitution must be observed by state and public organizations and officials (Article 4); a change in the national-state structure of the RSFSR requires a constitutional amendment, which is within the exclusive jurisdiction of the RSFSR, represented by its supreme bodies of government (Clause 1 of Article 72, Clause 3 of Article 104, and Clause 12 of Article 109).

The RSFSR Constitution does not specify the right of the republics making up the RSFSR to withdraw from the federation. This right is not specified in the Constitution of the Tatarstan Republic. The unilateral declaration of this right by the Tatarstan Republic would be an affirmation of the legality of a complete or partial violation of the territorial unity of the sovereign federated state and the national unity of the national groups inhabiting it. Any actions intended to violate this unity will damage the constitutional order of the RSFSR and will be incom-

¹⁵³ Interview with Mintimer Shaimiyev, supra note 148.
Chairman Zorkin has denied these claims, stating that as early as March 3, 1992, the Chairman of Tatarstan's Supreme Soviet had notice of the petition challenging not only the referendum's constitutionality, but also the validity of the sovereignty declarations leading up to the referendum. Constitutional Court Chairman Presents Ruling on Tatarstan (Channel 1, Moscow TV broadcast, Mar. 18, 1992), translated in BBC SUMMARY OF WORLD BROADCASTS, Mar. 20, 1992, available in LEXIS, Nexis Library, Current File.
¹⁵⁴ Many other high officials appeared in court, some of whom, including nationalist Vice-President Alexander Rutskoi, testified.
¹⁵⁵ FBIS-USR-92-038, supra note 16, at 85.
¹⁵⁶ Id. at 87.
¹⁵⁷ Id. at 88.
patible with international rules on human rights and the rights of national groups.\textsuperscript{158}

[(5) The ambiguity of the question deprives citizens of the right “to express their will freely [and] to participate in the discussion and adoption of laws and decisions of state-wide significance . . .”\textsuperscript{159}

The Court’s reasoning on the Declaration of Sovereignty seems perfectly sound. A constituent unit of a federation bound to follow federal law cannot unilaterally reject that law, so long as it remains within the federation. Article 81 of the Russian Constitution specifically provides that in conflicts between federal and republic law, “the law of the RSFSR shall prevail.”\textsuperscript{160}

The referendum decision seems more problematic. A referendum of this kind, which simply asks whether the people agree on the status of the entity, would not usually have any legal significance. It is not an obvious part of either the constitutional or legislative process. Indeed, the favorable vote on the referendum appears to have made no legal or other functional difference. It would thus seem to be only the equivalent of a public opinion poll on a rather technical question of constitutional and international law.

Normally, one would think that a governmental unit of any kind, with the authority to hold a referendum, could ask any question relevant to its functioning. Questions as to what the people of that unit believe about its constitutional status would seem relevant, though the answers would clearly not be binding on the government. Such a referendum would seem to be the business of a constitutional court only if some legal or constitutional consequences followed.

Chairman Zorkin, in subsequent extrajudicial statements, justified the Court’s involvement on grounds that a positive response to the referendum would have provided “all legal grounds to secede from the Russian Federation” should a more nationalist leadership come to power in Tatarstan.\textsuperscript{161} Perhaps this is true under some unusual provisions in either the Russian or Tatarstan constitution, but this is unlikely. Neither constitution apparently provides for secession by a Russian Federation republic. The Russian constitution clearly does

\textsuperscript{158} Id.

\textsuperscript{159} Id. The Court also rejected challenges to several of the laws. Later, Chairman Zorkin commented at a March 19, 1992, press conference that “a positive response to the referendum question could provoke a surge in nationalistic sentiments and create a threat not only to the state structure, but also to the observance of human rights.” On the Referendum in Tatarstan, ROSSIISKAYA GAZETA, Mar. 19, 1992, at 1, translated in SOVIET PRESS DIGEST, Apr. 15, 1992, at 21, available in LEXIS, Nexis Library, CSPD File.

\textsuperscript{160} RSFSR CONST. (May 1991) ch. 8, art. 81.

\textsuperscript{161} Alexei Tabachnikov, Russian Parliament to Discuss Tatar Referendum Plans, TASS, Mar. 18, 1992, available in LEXIS, Nexis Library, TASS File.
not, and the Constitutional Court did not mention any provisions for secession in the Tatarstan charter, and certainly none for secession by referendum.

It is thus hard to see anything more than political significance to the referendum. Given the ambiguity of the question and the repeated disclaimers as to an intent to secede by both leaders and voters, there may not even be much political significance, though that is something that no outsider can evaluate.

The Russian Constitutional Court nevertheless found such legal significance. In what seems like an implicit response to this doubt, the Court said:

The decree . . . serves as a means of stating important legal premises. Its wording of the question reflects the new definition of the republic’s state status, based on recent changes in the republic constitution and recorded in the Declaration of the State Sovereignty of the Tatarstan Republic. By putting this definition of the republic status to a general vote, the Tatarstan Republic Supreme Soviet is trying to give it the features of a rule of the highest order—a rule established by the people. For this reason, this decree is not only an instrument of law enforcement, but also a legislative instrument, predetermining the direction and content of the legislative process. The legislative nature of the decree also stems from the consequences of its implementation and the direct effect of any referendum result on future constitutional development in the republic and in the RSFSR as a whole.

Perhaps the referendum does amount to “a legislative instrument, predetermining the direction and content of the legislative process” under Russian law, but the argument is unpersuasive to an American lawyer. Tatarstan is no more a “sovereign state” or a proper “party to international law” after the referendum than before.

On the other hand, if a positive answer to the referendum question is indeed of legal significance under Russian or Tatar law and does constitute a legally significant step toward secession, the decision seems correct. As noted, the Russian Constitution stipulates that the territorial integrity of the Russian Federation may not be unilaterally altered. Moreover, the Constitution does not seem to permit a major change in the relations between the Federation and its constituent republics by a unilateral means. Thus, a unilateral move by a republic toward either such a change or secession would seem constitutionally invalid, regardless of whether it is a significant political move.

163. Interview with Mintimer Shaimiyev, supra note 148.
165. Id. at 88.
The Court went further than nullifying the referendum and declaration of Tatarstan legislative supremacy. Chairman Zorkin also criticized Russian Federation officials for not challenging Tatarstan's August 1990 Declaration of Sovereignty when it was first promulgated and asserted that the Tatarstan officials had said they had interpreted this lack of reaction to the Sovereignty Declaration as "a sign of approval" and were thereby emboldened to go further. Then, after chastising Tatarstan officials for not showing up in court, for denying receipt of the decision, and for calling the decision a "judicial travesty," he made an impassioned plea to the people of Tatarstan to respect the court, because if they did not respect the Constitutional Court, they could not count on their own court being respected in the future. Then, mixing the need to obey the Court with the social dangers of secession, he warned of "a situation [that] could exceed by a hundred times Yugoslavia and all the other civil war flash points that we have."

In the few days between the decision and the referendum, Chairman Zorkin continued to call for obedience to the Court's decision, warning of "a collapse of the constitutional order." At first it seemed that Tatarstan might amend the question in a special session on March 16, 1992, but its Supreme Soviet refused while reaffirming that the referendum was not about secession. The Chairman of the Tatarstan Supreme Soviet said he had not even looked at the court's decision because they had not received an "official document;" Zorkin also challenged this excuse.

On March 21, 1992 the referendum was held, and despite a last-minute plea from President Yeltsin, 61 percent of the 82-percent turnout voted "yes." In Kazan, the largely Russian capital, 51 percent, however, voted "no," and there were apparently similar "no" results in the other large cities. In the countryside, which is largely Tatar, 75

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166. Chazan, Russian Official Says Tatarstan Referendum Catastrophic, supra, note 141.
167. Constitutional Court Chairman Presents Ruling on Tatarstan, supra note 153.
168. Id.
171. Constitutional Court Chairman Presents Ruling on Tatarstan, supra note 153; Zorkin also raised the possibility that the Court might impeach Tatarstan officials who disobeyed the order. Head of Constitutional Court on Tatar Referendum (Mayak Radio Moscow broadcast Mar. 18, 1992), translated in BBC SUMMARY OF WORLD BROADCASTS, Mar. 20, 1992, available in LEXIS, Nexis Library, BBCSWB File.
percent voted "yes." After the referendum, Bakturoshtan, another Russian republic, suspended the operation of the Russian Constitutional Court Act on its territory.

In retrospect, Tatarstan's defiance is not altogether surprising. The issues of judicial supremacy and respect became intertwined with and subordinate to the overriding issue of Tatarstan's adherence to the Russian Federation and its institutions in general. It is now easy to see that once the forces of nationalism, resentment, and separatism took command in Tatarstan, they would produce defiance of a Court decision opposing them. The central authority that the Court was trying to assert was the very thing being challenged by Tatarstan in the referendum.

The Tatarstan situation obviously represents a serious challenge to the Constitutional Court. It is difficult to predict both how the Court will counteract this defiance, if at all, and how this still-unfolding episode will affect the Russian Court's overall influence and impact. Although the Court has many difficult issues on its docket, including the aforementioned actions by Yeltsin against the Communist Party, few of these cases raise the danger of defiance inherent in a conflict with a national or ethnic group that is already trying to escape from federal authority.

3. Other Decisions

As of this writing, few details were available about the Russian Court's two other decisions. In one case, the Court found that age discrimination had prompted the firing of two workers; in the other the Court affirmed President Yeltsin's right to reorganize executive agencies. As official translations are unavailable at this time, discussion will be limited to the following brief summaries.

In February 1992, the Court responded to an individual complaint by two pensioners. Judge Ernest Ametistov described the case as involving two pensioners who were dismissed from their jobs because they had reached a pensionable age and [they claimed] were entitled to a pension. Dismissals on such grounds have lately become commonplace. We ruled this practice unconstitutional, because in this case we have age discrimination. And therefore we reinstated the pensioners' rights.


174. Supreme Court is Impartial, supra note 97.
This decision apparently came down in February 1992.

The other case dealt with a former Soviet copyright agency known as “VAAP.” VAAP had a monopoly on all Soviet publications abroad and was known for political censorship and KGB connections. In February 1992, President Yeltsin created “the Russian Agency for Intellectual Property” to take over VAAP’s functions and property and appointed a liberal lawyer as its director. At about the same time, Supreme Soviet Chairman Ruslan Khasbulatov, a long-time Yeltsin critic, created in the name of the Presidium of the Supreme Soviet an agency called “All Russian Copyright Agency.” This was to be the sole heir to VAAP, and Khasbulatov placed a former KGB general in charge. 175

On April 28, 1992 the Constitutional Court ruled that the resolution of the Supreme Soviet Presidium reviving the VAAP was unconstitutional because only the president may reorganize executive agencies, and he had done so by setting up the Russian Agency for Intellectual Property. 176 Khasbulatov had apparently urged the Russian Minister of Justice, Nikolai Fedorov, to be guided “not just by the laws but by the ideas of reform.” Apparently irritated by such statements, Fedorov commented after the Russian Court’s decision, “I am pleased that there is such a forum as the Russian Constitutional Court which can put in their place—in the good sense of the word—all officials and all state bodies.” 177

Not surprisingly, resort to the Constitutional Court has become a common option for unhappy Russians. Not only are the Communists appealing to the Court, but the St. Petersburg City Council wants the Court to remove Mayor Sobchak, 178 the Moscow City Councilors want it to annul some of Mayor Popov’s decrees and its method of electing mayors, 179 and former USSR Prime Minister Valentin Pavlov,
one of the coup participants, wants to be reinstated as Russian Prime Minister. Many more such controversies have been noted as possible Court cases.

4. Summary

In the few months of its existence, the Russian Constitutional Court has established itself as an aggressive tribunal determined to safeguard the emerging Russian democracy. As it proclaimed shortly after its inception:

the Constitutional Court does not intend to get in [the way of reform]... but any changes in the life of the state, even the most beneficial ones, should occur within the framework of the law. . . . [As] the supreme body of the legal authority it intends to take a series of steps to defend the constitutional system in the country and prevent dictatorship and tyranny from setting in, no matter from where they may emanate.

As noted earlier, other European constitutional courts have been equally independent and forceful, such as the Hungarian and German Courts. What makes the Russian Court unusual, however, is the explicit assertiveness of some of the judges, especially Chairman Zorkin. He has given numerous interviews and made many speeches in the Supreme Soviet and on television and other media. He has commented on the implications of the decisions and on the official reactions to them, and has threatened some officials with sanctions for their hostile reactions. Zorkin and others have also commented on public issues other than those directly involved in the cases before them and have criticized government officials for what they considered policy mistakes. In short, Zorkin and his colleagues are serious about the Court’s “plan to actively participate in developing a rule of


182. See, e.g., Orlov, supra note 14; as noted previously, Judge Ametistov has done the same. I am told that the Hungarian judges have tried to avoid public attention.


184. See supra note 97, and the accompanying text.

185. See, e.g., Chazan, supra note 141.
law strategy."

In the United States and elsewhere, judges have tried to withdraw from public controversy outside the courtroom to maintain an aura of impartiality and objectivity. These considerations do not seem to affect Chairman Zorkin, and this observer, at least, has no idea whether they apply at all in so different and chaotic a society as today's Russia. What is clear is that in Chairman Zorkin they have not only a skilful jurist but a powerful personality who, despite differences in style, might well be Russia's John Marshall.

B. The Bulgarian, Polish, and Czechoslovak Constitutional Courts

It is too soon to predict whether the Russian Court's experience will have any impact on the developing courts in other East European nations. Most of the new constitutional courts will probably face issues of ethnic rivalry, human rights, separation of powers, and atonement for the sins of past Communist regimes. This final section will summarize some of the early actions of three other constitutional courts.

1. The Bulgarian Court

Although the Bulgarian Constitutional Court has existed for about a year and comprises a group of distinguished judges, until April 1992 it dealt only with relatively minor matters: the status of parliamentary representatives, an effort to dismiss a broadcast executive, and whether a president running for reelection may stay in office during the election campaign. Until then, no human rights issues had come before the Court.

In April, however, the Court was forced to rule on one of the most heated issues in Bulgarian life: relations between the Bulgarian majority and the large Turkish Muslim minority, which comprises about 11 percent of the population. The Turkish minority dominates the Movement for Rights and Freedoms (MRF), the political party that came in third in the recent parliamentary elections. While agreeing not to participate in government in order to avoid exacerbating the situation by giving the now-nationalistic Communists and their allies

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187. Memorandum on the Constitutional Court of Bulgaria prepared by Bulgarian Judge Metody Tilev, who at this writing was studying in the United States at The American University (Apr. 1992) (on file with the Michigan Journal of International Law).

188. For a discussion of these issues, see Kjell Engelbrekt, RFE/RL REPORT ON EASTERN EUROPE, Nov. 29, 1991, at 1.
political ammunition, the MRF is a necessary supporter of the Union of Democratic Forces' government.

Bulgaria bans parties based on ethnic ties, but the MRF claims that it is not ethnically based, as it includes non-Turks. Still, some fifty-three members of the current parliament, joined by ninety-three deputies in the preceding parliament, petitioned the Constitutional Court to declare the MRF an "anti-constitutional" party and to bar its twenty-three members from the current parliament, ostensibly because of the party's ethnic ties. Such a ruling would probably have caused the government to fall. In a decision on April 21, 1992, the Court, by a 6-5 split vote, rejected the claim and implicitly affirmed the MRF's legal status. As of this writing, details of the Bulgarian Court's decision were unavailable.

2. The Polish Tribunal

Although one of the oldest East European constitutional courts, the Polish court's limited subject matter jurisdiction has prevented it from exercising some of the broad authority enjoyed by the Russian constitutional court. Access to the Polish court is quite limited, as are its powers. It may not, for example, review local regulations. As a Polish constitutional expert puts it, the Tribunal is designed not to supervise parliament, but to help parliament maintain its position as the country's supreme legislator. A bill to expand its powers is currently pending in the Sejm and will probably be adopted.

Despite its limitations, the Tribunal decided 155 cases from 1986 through 1991. Most of these were brought to the court by Poland's very energetic first Ombudswoman, Professor Ewa Letowska, who recently completed a four-year term in that position to widespread approval. In fifty-two of these cases, the governmental authorities altered their behavior in response to the filing of the suit. Very few cases have been referred to the Tribunal by other courts because, according to Vice President Lukaszuk, "They do not have such a tradi-

189. BULG. CONST. art. 11(4).
191. In 1982, a constitutional tribunal was authorized with the very limited subject matter jurisdiction and standing provisions described earlier, and in 1985 a constitutional act was passed actually establishing the tribunal.
192. Conversation with Brzezinski, supra note 93.
tion,” and are very averse to “risk-taking.”

During this period, the Polish Tribunal has issued some very controversial rulings, such as affirming a doctor’s right to refuse to perform abortions, allowing religious instruction in schools, permitting border guards to appeal their transfers or dismissals to the Administrative Court, and approving the nationalization of Communist Party property. Most of some fifty-six cases referred by the Ombudsman during 1988-91 were resolved in favor of the complainant, although there are sharp differences of opinion on many matters between the former Ombudsman and the Tribunal.

As of this writing, the most recent important Tribunal decision struck down two laws passed in September 1991 to reduce pensions and freeze salaries for state employees. The decision could add $2.2 billion to the current $4.7 billion deficit, according to the Prime Minister. Nevertheless, the Sejm has refused to overturn the decision, leading the Finance Minister to resign, and jeopardizing a $2.5 billion loan from the International Monetary Fund.

The Tribunal has come under criticism from all sides. Composed half of Communist-era judges and half from the post-Communist era, it is considered by some to be too sympathetic to the Sejm and not sufficiently independent. According to one observer, it allowed religious instruction in the public schools even though the Tribunal knew the law was otherwise, prompting accusations that the Tribunal wrote the Sejm to that effect after the decision suggesting they change the law!

Constitutional Tribunal Vice President Lukaszuk has complained that the Tribunal lacks jurisdiction to apply the international law of human rights to Polish domestic legislation, though in the border guard case international law principles were mentioned. The Tribunal has pointed out this weakness to the Sejm, and it may soon be changed.

The Polish Tribunal will soon confront one of Poland’s most wrenching social issues—abortion. There is overwhelming public support for abortion rights, and abortion opponents have failed in their efforts to narrow Poland’s very liberal abortion laws. In December 1991, however, the medical association adopted new rules effective

195. Id.
196. Interview with Lukaszuk, supra note 93.
197. Linnet Myers, Polish Wage Hike Sparks Resignation, CHI. TRIB., May 7, 1992, at C12.
199. Conversation with Brzezinski, supra note 93.
200. Interview with Lukaszuk, supra note 93.
May 3, 1992 whereby doctors are allowed to perform abortions only in cases of rape or if the pregnancy threatens the woman's life; it also leaves the decision to conduct prenatal tests for birth defects to the doctor alone. This is much narrower than current Polish law allows, and the former Ombudswoman, Ewa Letowska, has asked the constitutional court to strike down the new rules.

3. The Czechoslovak Court

The key challenges facing the Czechoslovak Court include balancing the nationalistic rivalry between Czechs and Slovaks, and dealing with the abuses of the former Communist government. Both issues have already been brought to the Court.

The Czechoslovak Constitutional Court was established in March 1992, over a year after the constitutional act creating the Court was passed. The delay resulted from the cumbersome selection process which, in turn, reflected the major problem with which the Court will probably have to deal—the contentious relationships between the Slovaks and the Czechs. The Constitutional Court Act provides that the twelve members of the Court are to be divided equally between the Czechs and the Slovaks. In an effort to promote impartiality, the Court was placed in the city of Brno in Moravia, rather than either Prague or Bratislava. The judges are selected by the President from three eight-nominee lists prepared by each of the Czech, Slovak, and federal parliaments. The Slovaks delayed preparing their list, and this slowed the process. The even number of judges, a not-uncommon feature among these new courts, and the equal division of judges between the two nationalities raises a very real danger of deadlocks on issues affecting relations between and among the two republics and the federation. Because of the absence of a clause establishing the supremacy of federal law over republic law, only the federal constitution and human rights treaties prevail against republic law.


202. Moravia, which is part of the Czech Lands, is considered to be a more neutral territory than either the cities of Prague, the Bohemian capital, or Bratislava, which is the capital city of Slovakia.


204. The Hungarian Court currently has 10 judges, although it is ultimately supposed to have 15. Bulgaria has 12, and Poland has 10. Russia and Romania each have an odd number of judges.

205. The Hungarians have avoided this by accident. In cases where the full court sits, illness and other absences have resulted in odd-numbered panels. Conversation with Peter Paczolay, counsellor to the Hungarian Constitutional Court president.

Without federal law supremacy over republic law, there will be no ready means of resolving the inevitable clashes of authority between federal and republic officials, especially since the Czechoslovak governmental structure provides for republic administration under federal legislative guidance. Given the intense Slovak hostility to Prague centralism, this could derail the economic and environmental reforms that are within the jurisdiction of both federal and republic governments. As Justice Holmes said of the United States:

I do not think the United States would come to an end if we [the federal courts] lost our power to declare an Act of congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the Several States.\(^{207}\)

Although the final comprehensive federal constitution may resolve these problems, many seem rooted in the Slovak insistence on substantial independence and may be intractable.\(^{208}\)

The first federalism issue came to the Court within its first few weeks, and though the result has been reported, a translation of the opinion was not available at the time of writing. The result creates a rather odd amalgam, but may be constitutionally sound.

On December 12, 1990 the Czechoslovak legislature adopted a constitutional act dividing jurisdiction over the economy and other matters between the federal government and the republics.\(^{209}\) For telecommunications, article 20 gave the federal government jurisdiction over "the organization and control of a uniform system of telecommunications," the "organization of uniform system of posts" and "the issue of postage stamps," jurisdiction to set "uniform rules for postal, telecommunications and radio-communication traffic and tariffs," and the authority to "codify matters of posts and telecommunications."\(^{210}\) On a petition from the Federal Telecommunications Ministry, the Court ruled on April 15, 1992 that the federation can operate only the telecommunications system; radio and postal systems are to be operated by the republics.\(^{211}\) The result seems consistent

\(^{207}\) OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 295-96 (Peter Smith ed., 1952).

\(^{208}\) On these and related problems, see Lloyd Cutler and Herman Schwartz, "Constitutional Reform in Czechoslovakia: E Duobus Unum?," 58 U. CHI. L. REV. 51, 542-43 (1991). There is also a possibility that Czechs and Slovaks will be unable to agree on a new constitution and will try to get by with amendments to the current constitution.


\(^{210}\) Division of Powers Act, supra note 209, art. 20 (emphasis added).

with the Act's giving the federal government "control" only over telecommunications.212 Professor Eric Stein will discuss the decision more fully elsewhere in this symposium.213

Where human rights are concerned, the Czechoslovak Charter mandates that everybody in Czechoslovakia has the same basic rights.214 This could enable the Court to create some uniformity at least in human rights. The Court's first opportunity to do this has already been thrust upon it and in an exceedingly delicate context—the debate over how Czechoslovakia will deal with the misdeeds of its former Communist government.

This problem is not unique to Czechoslovakia. One of the most bitter and tragic of the internal struggles erupting throughout the formerly Communist nations has grown out of their efforts to come to terms with the past. Communist abuses, ranging from murder and blackmail to repression and ostracism, have left a desire for exposure and revenge that has begun to tear these societies apart.215

At the same time, Communists and others who held positions of power in the Communist era are still a potent force in the society, either individually or as members of organized groups—the Communists received a substantial number of votes in the June 1990 and 1992 Czechoslovak elections, to take but one example. Many are hostile to the new democratic regimes and are trying to undermine them.216

For all these reasons, many of these countries, including Czechoslovakia, have adopted or are considering laws to bar those who held key positions in the prior regimes from holding important positions today, either for a period of years or indefinitely. Czechoslovakia's statute, called a "lustration law,"217 bars a wide range of former public officials from a correspondingly wide range of state, state-owned, or state-controlled institutions until 1995.218 The law, promoted primar-
ily by right-wing members of the Federal Assembly, has come under severe criticism both in Czechoslovakia and outside, and formed the basis for a constitutional court petition filed by ninety-nine members of the Federal Assembly. It will probably be the second major case the Court handles.

III. CONCLUSION

The outcome of the democratic experiment in these newly liberated countries is far from certain. Economic, ethnic, nationalist, environmental, and religious controversies will trouble these nations for years to come, threatening democracy and the commitment to a rule of law. Few of these countries save Czechoslovakia has a strong democratic tradition to draw upon, indeed, the pre-World War II years before first Nazi and then Communist dictatorships, saw numerous failures of democracy and a turn to authoritarianism of one kind or another.

Under such unfavorable circumstances, the constitutional courts these countries have created may be too frail to block a really determined drive to abandon democracy, freedom, and the rule of law. Nevertheless, whatever chance these countries have to keep developing into constitutional democracies depends on strong independent courts that can say no to legislative and executive encroachments on the constitution.

The performance of some of these courts so far shows that despite the lack of a constitutional court tradition, men and women who don the robe of constitutional court judges can become courageous and vigorous defenders of constitutional principles and human rights, con-

219. The International Labor Office has ruled that the law discriminates on the basis of political belief. REPORT OF THE COMMITTEE SET UP TO EXAMINE THE REPRESENTATIONS MADE BY THE TRADE UNION ASSOCIATION OF BOHEMIA, MORAVIA AND SLOVAKIA, AND BY THE CZECH AND SLOVAK CONFEDERATION OF TRADE UNIONS UNDER ARTICLE 24 OF THE ILO CONSTITUTION ALLEGING NON-OBSERVANCE BY THE CZECH AND SLOVAK FEDERAL REPUBLIC OF THE DISCRIMINATION (EMPLOYMENT AND OCCUPATION) CONVENTION 1958 (No. 111), March 5, 1992; Remarks of Catherine Lalumiere, Secretary General of the Council of Europe, Barbara Kroulik, Lalumiere Criticizes Czechoslovak Screening Law, RFE/RL DAILY REPORT, Apr. 8, 1992, at 5-6 (violates European Convention of Human Rights); see generally, Jeri Laber, Witch Hunt in Prague, N.Y. REV. OF BOOKS, Apr. 23, 1992 (views of Executive Director of Helsinki Watch). Many of these criticisms were aired at a conference on “Justice in Times of Transition” convened by the Charter 77 Foundation (New York) in Salzburg, Austria, on Mar. 7-10, 1992, which the author co-chaired.

220. In an obvious effort to avoid entanglement in upcoming parliamentary elections scheduled for June 6, 1992, the Court will not deal with the case until afterward.

221. There will be a special impartiality problem in the lustration case, for at least two members of the Court—including the President, a distinguished and respected lawyer from Slovakia—were members of the Federal Assembly and voted for the law. They should recuse themselves, but need not.
tinuing the pattern shown elsewhere. Whether they will be able to continue to do so, and whether the courts in the other former Communist countries will do equally well, will likely depend on forces beyond their control. The record so far—and it is still very early—indicates these courts will do whatever they can to maintain a free constitutional democracy and the rule of law. And this could be a very great contribution indeed.