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CONSTITUTIONAL COURTS : MODELS OF OPERATION AS REGARDS FEDERAL STATES SYSTEMS

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SUMMARY

The paper describes the structure and the tasks of the constitutional review in the world, with special regards to systems of federal state. At the same time the paper also aims at presentation of the acquisition and application of structures and techniques of the constitutional case-law, as well as characteristics of the former and contemporary systems, as exemplary phenomena. On one hand the analysis of the systems of the constitutional review as well as the past and present experience, especially through the implementation of the principle of constitutionality and legality, serves the promotion of "the Rule of Law". On the other hand, the description of certain topical views could as well add to the promotion of the contemporary constitutional process and culture in general. Accordingly, generally speaking, it could have applicative value in the search for the systemic solutions in the new democracies.

CONTENTS:

A History

The establishment of the supreme judicial bodies for the protection of the constitutionality and legality is not a discovery of the modern legal systems is rather related to the development of constitutionality, in particular on the European Continent. Constitutional/judicial review has passed several characteristic development stages [1]:

1. Development up to World War I : Certain elements of the constitutional review go back as far as the year 1180, i. e. to the old German Reich. At the beginning the corresponding judicial bodies dealt primarily with jurisdictional disputes between individual rulers and partly even with infringements of rights. Certain elements of constitutional review kept emerging under different forms throughout the German legal history, until it was introduced in the present sense of the word with the *Weimar Constitution*. Preliminary forms of the constitutional review existed in France by the middle of the 13th Century. Portugal introduced its constitutional review in the *Philip's Code* in the 17th Century. More serious projects of constitutional/judicial review appeared in the *Constitutions* of Norway, Denmark and Greece in the 19th Century.

In 1867 the Austrian Federal Court acquired with the jurisdiction to deal with jurisdictional disputes in protection of individual political rights vis-à-vis administration; the State Court, on the other hand, made decisions on constitutional complaints (*Staatliche Verfassungsbeschwerde*).

Although some initial elements of the constitutional review can be seen already in the *Federal Constitution of Switzerland* (1848), the Swiss Federal Court acquired broader powers only with the modification of the *Constitution in 1874*.

In Norway constitutional review originates in the jurisprudence dating from 1890. Romania introduced constitutional justice before World War I following the American model.

While the modern English legal system knows no constitutional review, the English legal history does include some of its elements, *i.e.* the principle of supremacy of Constitution, dating back to 1610 and is of essential significance for the development of constitutional justice in England. Another example of English contribution to this development is the impeachment originating in the late Middle Ages. Ideas about the supremacy of the Constitution and the right to judicial review spread from England over to the United States. There already at the end of the 18th Century, the Court proclaimed individual English Acts as null and void on the territory of the North American States. However, according to the *1789 Constitution* the Supreme Court as the highest Federal Court did not have any express constitutional powers. The decisive impact on the development of constitutional justice was exerted by the famous *Marbury v. Madison*

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[1] cf. Rousseau Dominique, *La justice constitutionnelle en Europe*, Montchrestien, Paris, 1996, pp. 1-10; Favoreu Louis, *Los tribunales constitucionales*, Editorila Ariel, S. A., Barcelona, 1994, p. 15 et al. and p. 137 et al.; Fromont Michel, *La justice constitutionnelle dans le monde*, Dalloz, Paris, 1996, pp. 5-38

Case(1803), in which the Supreme Court arrogated the power of judicial review concerned with the conformity of the statute with the *Constitution*. This gave ground the enforcement of the power of the American Supreme Court for judicial review of the statutes. Although the next similar case appeared in this Court only in 1857, the way to constitutional review of regulatory measures had already been paved.

2. The development between the two Wars is referred to as **the "Austrian period"**. As a matter of fact, the *Constitution of 1920* marks the foundation of the Austrian Constitutional Court with the exclusive power for constitutional review of statutes (at the beginning, though, of preventative nature), in particular thanks to the Austrian legal theorists Adolf Merkl and Hans Kelsen.

Following the example of the Austrian model, before World War II constitutional justice was introduced by the following states: Czechoslovakia (1920), Liechtenstein (*Staatsgerichtshof*, 1925), Greece (1927), Egypt (1941), Spain (1931) and Ireland (1937). The trend to broader enforcement of the constitutional review was interrupted by the War and the already founded institutions failed to become active in practice *(e.g.* from 1933 through 1945 Austria was without constitutional review, after 1938 Czechoslovakia was without constitutional review).

3. Constitutional justice in the proper sense of the word, taken however from the theoretical point of view, could develop only when instead of the principle of sovereignty of Parliament [2]there prevailed the idea of supremacy of the Constitution [3] and constitutional review is performed by a special body, independent of the legislative and executive power.[4] Such approaches were characteristic for **the development after World War II**. On the other hand, constitutional justice also involves the principle of vertical separation of powers. It emerged in federal states, whereby constitutional justice was supposed to exert supervision over the federal Legislature in relation to member states. This was also due to historical reasons: painful experiences of the past War and Fascism, which as a counterweight gave birth to the idea about the introduction of the constitutional review as characteristic of democracy. There were also institutional and political reasons: constitutional review should also represent efficient protection *vis-à-vis* legislative and executive power.

Therefore most states introduced constitutional review directly after World War II (before was a speciality of the American law), among them Brazil (again in 1946), Japan (1947), Burma (1947), Italy (1948), Thailand (1949), Germany(1949), India (1949), France (1958), Luxembourg and Syria (1950), Uruguay (1952). In addition, constitutional review used to spread with different practical efficiency in Asia, Central and South America and Africa.

4. **A new period of development opens up in the Seventies**. It is marked with political changes in certain South European countries which introduced constitutional review upon abolition of dictatorship: Greece (1968), Spain (1978), Portugal (1976). In this period constitutional review was also introduced in the following countries: Cyprus (1960), Turkey (1961), Algeria (1963), former Yugoslavia (1963), as well as Slovenia and other federal units of

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[2] where the representative body itself decides on the constitutionality of its laws

[3] whereunder the Constitution is the basis and the source of all state power

[4] not by the Parliament itself, but either by the regular courts or by a special body, such as the Constitutional Court or some other body

the former Yugoslavia (1963). In the meantime, certain existing systems of the constitutional review introduced systemic revisions (Austria, Germany, Sweden, France, Belgium). As a result of the political and social changes in the Eighties, constitutional review started to change also in many countries of Central and South America. In this part of the world special position accorded to Argentina where the process of democratic transformation in a federal state first developed in its units marked with the gradual increasing introduction of elements of constitutional review of different intensity by the individual provinces.

5. Subsequent development involves the **introduction of constitutional review in the Middle/Eastern European countries and in the Commonwealth of the New Independent States**. [5]The introduction of constitutional review means a break-up the former principle of unity of powers in view of which the then socialist systems as a rule did not know constitutional review. Exceptions are only the former Yugoslavia, which in 1963 introduced constitutional review following the Austrian or German model, and Czechoslovakia, where constitutional review was introduced in 1968, but did not become active in practice.

6. More and more modern systems of constitutional review of justice follow the European model; thus even **some latest discussions on constitutional reform** in Japan anticipate the introduction of constitutional review based on the European model, although hitherto Japanese judicial review followed the American model. One of the rare countries without constitutional/judicial review is, in addition to the Netherlands and Luxembourg, Great Britain, although there, too, have emerged the ideas about the introduction of constitutional review relating to the project of revision of the Bill of Rights.

7. **Constitutional review has also been treated above the national level**: besides the European Court of Human Rights in Strasbourg, the Court of Justice of the European Communities in Luxembourg, too, is often mentioned in the context of European constitutional justice.

B Models of the Constitutional/Judicial Review

The Constitutional Court is a special body that as bearer of protection of constitutionality hold certain legal superiority in relation to other branches of power. Its review covers all legislative measures that are the highest legal instruments of a specific legal and political system. The status of a true institution with the power to provide the constitutional review should only be held by the institution that in the specific system of separation of powers holds such limiting relation to the legislative power (Parliament), that it may annul the statutes adopted by the

[5]Poland (1982), already in the former Soviet Union (1988), Romania (1991), Albania (1992), Bulgaria (1991), Lithuania (1992), Estonia (1992), Hungary (first attempt in 1984, definitely in 1989), Slovakia (1992), Czech Republic (1992), Slovenia (newly established Constitutional Court by the 1991 Constitution), Croatia (1991), after 1991 Belarus, Bosnia, Serbian Republic of Bosnia, Latvia, Macedonia, Moldavia, Montenegro, Serbia, Ukraine, Kyrghyzia, Mongolia, Kazakhstan, Georgia, Tadjikistan, Uzbekistan, Azerbaijan, Armenia as well as the Member States of the Russian Federation (Yakutia, Baskiria, Koma, Tatarstan, Karelia, Adigea, Buryatia, Dagestan, Irkutska Oblast, Kabardino-Balkar Republic, Northern Ossetia, Tuba).

legislative body. It is a judicial institution established in view of special and exclusive decision-making on constitutional matters. This institution is located outside the ordinary Courts system and is fully independent of other branches of public authorities.

From the organisational point of view it is possible to distinguish different models of constitutional/judicial review, as follows:

- **The"American" - Judicial Review Model** (based on the *Marbury Case (1803)*, dealt with by the Supreme Court of the United States, and upon John Marshall's doctrine), whereunder the constitutional matters are dealt with by all ordinary Courts (decentralized or diffuse or dispersed review) under the ordinary Court proceedings (*incidenter*). It is a specific and *a posteriori* review. Thereby the Supreme (high) Court in the system shall provide for the uniformity of jurisdiction. In the diffuse system the decisions as a rule take effect only *inter partes* (except for the principle *stare decisis*, whereunder the Courts in the future abide by the ruling). In principle the decision concerning the unconstitutionality of the statute is declaratory and retrospective, *i.e. ex tunc* (with *pro praeterito* consequences). This system was adopted by the following countries:

IN EUROPE: Denmark, Sweden, Norway, Ireland;
IN AFRICA: Botswana, Gambia, Ghana, Kenya, Cameroon, Comoros, Malawi, Namibia, Nigeria, Sierra Leone, Tanzania, Uganda, Zambia, Zimbabwe;
IN THE MIDDLE EAST: Israel, Iran;
IN ASIA: Bangladesh, Fiji, Hong Kong (until 1 July 1997), India, Japan, Kiribati, Malaysia, Nauru, Nepal, New Zealand, Singapore, Pakistan;
IN NORTH AMERICA: USA, Canada;
IN CENTRAL AND SOUTH AMERICA: Argentina, Bahamas, Barbados, Bolivia, Dominican Republic, Grenada, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, St. Christopher/Nevis, Surinam, Trinidad and Tobago.

- **The New Commonwealth Model** (Mauritius) that cannot be classified neither under American nor the European model. It is characterized by concentrated constitutional review under the power of the Supreme Court consisting of regular judges without political nomination; as a rule, it involves preventative (*a priori*) review and the consulting function of the Supreme Court, although repressive (*a posteriori*) review is also possible; decisions take an *erga omnes* effect.

- **The "Austrian" (Continental - Constitutional Review) Model** (based on Kelsen's Model of 1920, involving the interconnection between the principle of supremacy of the Constitution and the principle of supremacy of the Parliament), whereunder constitutional matters are dealt with by specialized Constitutional Courts with specially qualified judges or by ordinary Supreme Courts or high Courts or their special senates (concentrated constitutional review) in special proceedings (*principaliter*). As a rule it is an abstract review, although a specific review is also possible. In addition to the *a posteriori* review *a priori* review is also foreseen. The decisions have an *erga omnes* effect with reference to the absolute authority of the institution by which they are taken. Bodies exercising constitutional review may be:

a) The Constitutional Courts

IN EUROPE: Albania, Andorra, Austria, Belarus, Bulgaria, **Bosnia and Herzegovina/ Federation of Bosnia and Herzegovina/Serbian Republic of Bosnia**, Czech Republic, Croatia, Estonia, **FRY(with the Member States Serbia and Montenegro)**, Italy, Hungary, Lithuania, Macedonia, Malta, Moldavia, **Germany (with the Provinces/*Laender:* Baden-Wuerttemberg, Bayern, Bremen, Hamburg, Hessen, Niedersachsen, Nordrhein-Westfalen, Rheinland-Pfalz, Saarland, Sachsen, Sachsen-Anhalt, Brandenburg**), Poland, Romania, **Russian Federation (with the Member States Adigea, Bashkiria, Buryatia, Dagestan, Irkutska Oblast, Yakutia-Sakha, Karelia, Kabardino-Balkar**

Republic, Koma, Northern Ossetia, Tatarstan, Tuba), Slovakia, Slovenia, Spain, Turkey, Ukraine, Latvia;
IN AFRICA: Angola, Benin, Egypt, Ethiopia, Gabon, South Africa, Madagascar, Rwanda;
IN THE MIDDLE EAST: Cyprus, former Iraq, Syria, Palestina;
IN ASIA: South Korea, Kyrghyzia, Mongolia, Papua New Guinea, Sri Lanka, Thailand, Georgia, Tadjikistan, Uzbekistan, Azerbaijan, Armenia;
IN CENTRAL AND SOUTH AMERICA: Chile, **Province Tucuman (Argentina) with the *Constitution of Tucuman* of 28 April 1990**;

b) High Courts or their special senates
IN EUROPE: Belgium, Iceland, Liechtenstein, Luxembourg;
IN MIDDLE EAST: Yemen
IN AFRICA: Burkina Faso, Burundi, Chad, Niger, Senegal, Sudan, Togo, Zaire, Uganda(1995), Eritrea;
IN ASIA: Philippines;
IN CENTRAL AND SOUTH AMERICA: Costa Rica, Panama, Paraguay, Uruguay;

c) Constitutional Council
IN AFRICA: Mauritania;
IN ASIA: Kazakhstan, Cambodia.

Institutions based on the European model of constitutional review share the following common characteristics:
- constitutional review is introduced under different circumstances, depending on the particular national system;
- institutionally independent institutions of constitutional review outside the judicial branch in practice most belong to a broader judiciary context;
- in the proceedings following the constitutional complaint the problems are created by the separation of constitutional review from the ordinary Courts;
- the constitutional status (administrative and financial autonomy) is a prerequisite for independence of the Court's decision-making;;
- monopoly of constitutional review (specialisation in constitutional review), concentration of power in one and only institution, most often with the power of cassation of the statute adopted by the Parliament;
- constitutional judges are appointed by bodies of political power;
- special nature of the jurisdiction: the decisions are of legal and political nature although they may also have a purely consultatory function;
- the prevailing constitutional review of statutes;
- as a rule the constitutional review is repressive although a minor extent constitutional review is of preventative nature.

- **The Mixed (American Continental) Model** with the elements of diffuse and concentrated system; despite the constitutional review power of the central Constitutional or Supreme Court (or its special senate) all ordinary Courts in the particular state are entitled not to apply the laws deemed as not in conformity with the Constitution:

a) Constitutional Courts
IN EUROPE: Portugal;
IN CENTRAL AND SOUTH AMERICA: Ecuador, Guatemala, Colombia, Peru;

b) High Courts or their special departments
IN EUROPE: Greece, Switzerland (in view of the fact that in the Swiss system - system of limited constitutional review - the Swiss Federal Court cannot evaluate federal statutes, generally binding resolutions and ratified international agreements: the principle of supremacy on the federal level);
IN ASIA: Indonesia, Taiwan;
IN CENTRAL AND SOUTH AMERICA: Brazil, El Salvador, Venezuela.

- **The "French" (Continental) Model** (based on the model of the French Constitutional Council - *Conseil Constitutionnel* - of 1958), where constitutional matters are subject to the review by special bodies of constitutional review (most often the Constitutional Council) or by special senates of ordinary Supreme Courts (concentrated constitutional review) in special proceedings (*principaliter*), provided that constitutional review is mainly of preventative (consultative) character (although these systems know also the repressive form of constitutional review, in particular with reference to electoral matters):

IN EUROPE: France;
IN AFRICA: Algeria, Morocco, Mozambique, Ivory Coast, Mali.

- **Other Bodies with the Power of Constitutional/Judicial Review** (National Council, Parliament or specialized parliamentary bodies, *etc.*):
IN EUROPE: Finland;
IN MIDDLE EAST: Kuwait;
IN AFRICA: Central African Republic, Djibouti, Equatorial Guinea, Guinea Bissao, Cape Verde, Congo, Sao Tome and Principe, Tunisia, Namibia;
IN ASIA: Brunei, China (as well as Hong Kong after 1 July 1997), North Korea, Vietnam, Afghanistan, Turkmenistan;
IN AUSTRALIA;
IN CENTRAL AMERICA: Cuba.

- **The Systems Without Constitutional/Judicial Review**:
IN EUROPE: Great Britain [6], the Netherlands [7];
IN AFRICA: Guinea, Lesotho, Liberia, Libya.

- **International judicial institutions with certain functions of constitutional review**: the European Court of Human Rights in Strasbourg (European complaint), the Court of Justice of the European Community in Luxembourg (legal action for annulment; legal action for omission of action against the Council of Ministers or the Commission of the Community; solution of previous issues as specific review upon the demand of a member state Court); the Court of EFTA Genève (settlement of disputes between member states of EFTA, specific review requested by the Court of the member state of EFTA); *Comision y la Corte Interamericanas de los Derechos Humanos; Tribunal de Justicia del Acuerdo de Cartagena; project of the foundation of La Corte Centroamericana de Justicia como Tribunal Constitucional de Centroamerica*.

With reference to such international institutions there often arises the question about their role and the role of national institutions of constitutional/judicial review concerning the relation of supranational law (*e.g.* European Community Law) *vis-à-vis* the national legal systems, based either on the dualist tradition [8] or on a monist tradition[9].

C Specific systems of the Constitutional/Judicial Review Classified in Some Main Regions (Middle/Eastern Europe and the Commonwealth of the New Independent States, Arabian World, Africa, Asia, Central & South America)

[6] although the powers of the House of Lords include some elements of the preventive constitutional review

[7] with a few exceptions, as the integration, in particular in European institutions, influenced the separation from the basic principle of the Dutch legal system relating to the prohibition of constitutional review

[8] Not superior rank but a special character of supranational law: Denmark, Germany, Italy, Portugal.

[9] Recognition of supremacy of supranational law over national law: Belgium, France, Luxembourg, the Netherlands, Spain.

In some regions systems of constitutional/judicial review show certain specialities; such regions primarily include the former socialist countries of Middle and Eastern Europe and the Commonwealth of the New Independent States, Arabian World, Africa, Asia and the countries of Central and South America.

1. Subsequent development involves the introduction of constitutional review in the so-called **Countries of New Democracy** [10]. The introduction of constitutional review meant a break-up of the former Principle of Unity of Powers in view of which the then socialist systems as a rule did not adopted constitutional review. The only exception was the former Yugoslavia, which in spite of the Principle of Unity of Powers in 1963 introduced constitutional review in Federal State as well as in former Republics (Member States). [11].

The development of constitutional review in the states of the former socialist regime is characterized by the following [12]:

- Even after World War II constitutional review (contrary to its affirmation in the West European countries) did not become valued due to the fundamental incompatibility with the existing national political systems; the power of constitutional review was reserved for the legislative bodies [13].

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[10] Poland (1982), already in the former Soviet Union (1988) and/or the present Russian Federation including the Member states of the Russian Federation as well as the New Independent States where the constitutional review has been introduced progressively after 1990, Romania (1991), Albania (1992), Bulgaria (1991), Lithuania (1992), Estonia (1992), Hungary (first attempt in 1984, definitely in 1989), Slovakia (1992), Czech Republic (1992), Slovenia (newly established Constitutional Court by the *1991 Constitution*).

On other hand the constitutional review has become a major site of legal reform in some other regions also, *e.g.* Cooney S., *Arbitrating Reform: Taiwan's Constitutional Curt in the Transition to a Liberal Democratic Political Order*, Workshop-Legal Institutions and the Rule of Law in East Asia, 8th and 9th November 1996, Asia Research Centre on Social, Political and Economic Change, Murdoch University, Perth, Western Australia; Phillipe, X., *La Cour constitutionnelle sud-africaine et le reglement des conflits politiques*, IIIe Congres francais de droit constitutionnel, Congres de Dijon, 13-15 juin 1996.

[11] However, Romania introduced the constitutional review before World War I, but in Czechoslovakia the respective institute was introduced for the first time in 1920. The trend to broader enforcement of the constitutional review in Czechoslovakia was interrupted by World War II and the already founded institutions failed to become active in practice. After that the constitutional review was reintroduced in Czechoslovakia in 1968, but did not become active in practice.

[12] See Mavcic, A., *The Slovenian Constitutional review an exception among systems and experiences in the New Democracies*, Transnational Law Review, Suffolk University Law School, Boston.

[13] The Presidency of the Supreme Soviet of the Soviet Union; the State Council of Poland, where the right of initiative was held by the General State Attorney. Later such constitutional review bodies were also introduced in Romania (Constitutional Committee with the *Constitution of 1965*) and in Hungary (with the *Constitution of 1984*). The Council for Constitutional Law of Hungary was in charge of cooperation between other government bodies concerned with the protection of constitutionality and legality of all statutes, decrees and ordinances. The 11 to 17 member council was elected by the National Assembly out of the deputies and political personalities. The first *Constitution of the former Democratic Republic of Germany* granted constitutional review jurisdiction to the so-called Constitutional Committee. Before 1963 in Slovenia the system of protection of constitutionality and legality included the review of rules under the principle of self-review inside the parliamentary system.

- The introduction of constitutional review is more recent, arising in general at the end of the Eighties, along with the development of the democratisation process in the above states. Accordingly, the introduction of the institute of constitutional review brought about a significant change in the above states where previously the system in question was completely unknown [14].

[14] It is possible to summarize the characteristics of constitutional review common to those countries:
- the introduction of a constitutional court as a natural complement to the return or to the foundation of democracy;
- the preferred choice is for the "western European" model of constitutional review;
- the tendency towards a Court whose main task is to prevent or to deal conflicts among political institutions, rather than to protect rights against a political power's abuses;
- the tendency to superimpose each others different ways of access to the Court, different kinds of judgements and decisions.

(See Pinelli, C., *Functions of a Constitutional Court/Election of Judges*, Report with the Seminar organised by European Commission for Democracy through Law in conjunction with the Constitutional Court of Georgia on Contemporary Problems of Constitutional Justice, Tbilissi, Georgia, 1-3 December 1996; Pomahac, R., *Administrative Justice and the Constitutional Court: Practice in Transformation of Public Law* (National Report), Spetses Conference of the European Group of Public Law, Spetses(Greece), September 1996; Klokocka, V., New Concepts in the Czech Constitution, separate paper of the Czech Constitutional Court, Brno, September 1996; Cepl, V., Gillis, M., *The Transformation of Hearts and Minds in Eastern Europe*, Report for the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of he Council of Europe, Strasbourg, 4 December 1995; Symposium, *Constitutional "Refolution" in the Ex-Communist World: The Rule of Law*, Conference Material and Continuing Legal Education, The Washington College of Law, American University, September 27, 1996).

The generally adopted Model of the present constitutional review in the respective states has been the so-called European (Austrian/German, Continental) Model [15]. Bodies exercising constitutional review may be a constitutional court [16], but sometimes (concentrated) constitutional review has been practiced by the highest ordinary Court in the country[17] or by some other body empowered for constitutional review [18].

The constitutional review was introduced under different circumstances, depending on the particular national system, but with some common characteristics:;
- monopoly of constitutional review (specialization in constitutional review), concentration of power in only one institution, in some systems it is combined with the power of abrogation of the statute passed by the Parliament [19];
- the preventative review of acts (primarily international agreements) is characteristic of the systems developed under the influence of the French system of constitutional review [20].
- the Constitutional Court's interventions on its own initiative (*ex officio*) are not a widespread basis for intervention, but are common in these systems [21];
- jurisdiction of the Constitutional Courts over the interpretation of legal rules, or even of the

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[15] Based on Kelsen's Model of 1920, involving the interconnection between the principle of supremacy of the Constitution and the principle of supremacy of the Parliament, whereby constitutional matters are dealt with by specialized Constitutional Courts with specially qualified judges or by regular Supreme Courts or High Courts or their special senates (concentrated constitutional review) in special proceedings (*principaliter*). As a rule it is an abstract review, although a review based on particular cases is also possible. In addition to the *a posteriori* review *a priori* review is also foreseen. The decisions have an *erga omnes* effect with reference to the absolute authority of the institution by which they are taken.

[16] The Constitutional Courts: Albania, Belarus, Bulgaria, The Republic of Bosnia and Herzegovina, Czech Republic, Croatia, Latvia, FRY, Hungary, Lithuania, Macedonia, Moldavia, Montenegro/FRY, Poland, Romania, Russia (with the Member States: Yakutia(Sakha), Adigea, Baskiria, Buryatia, Dagestan, Irkutska Oblast, Karelia, Kabardino-Balkar Republic, Koma, Northern Ossetia, Tatarstan, Tuba),Serbia/FRY, Slovakia, Slovenia, Ukraine, Kyrghyzia, Georgia, The Serbian Republic of Bosnia and Herzegovina, Tadjikistan, Kazahstan, Uzbekistan, Azerbaijan, Armenia.

[17] Practising of (concentrated) constitutional review within the power of the highest regular Court in the country: Estonia (the constitutional chamber).

[18] Other forms of the constitutional review: Turkmenistan.

[19] e.g., Poland, Romania.

[20] Belarus (statutes and other regulations as well), Estonia (statutes as well), Russia (statutes as well), Bulgaria, Lithuania, Hungary (statutes as well), Moldavia (constitutional provisions as well), Georgia, Tadjikistan, Kazahstan (statutes as well), Romania (statutes and other regulations as well), Ukraine; Azerbaijan, Armenia, Buryatia/Russia, Dagestan/Russia, Karelia/Russia. The Slovak system on the other hand explicitly excludes the possibility of preventative review, but the northern Ossetian system, on other hand, includes the preventative review of statutes and regulations.

[21] Albania, Hungary, Moldavia, Poland, Romania, sometimes even in the form of the legislative initiative of the Constitutional Court (Russian Member States Yakutia, Bashkiria, Adigea, Buryatia, Karelia, Dagestan, Kabardino-Balkar Republic, Koma, Northern Ossetia, Tatarstan, Tuba).

statutes [22], mostly on the constitutional level, are present in these systems [23], though less established in the world;
- in some systems the status of legitimate petitioner is awarded exclusively to government bodies [24], however, elsewhere, the individual citizen [25] may also have access to the Constitutional Court [26].

2. **Arabian states** have not developed any constitutional/judicial review, except insofar as following the concentrated model (Egypt, former Iraq, Syria, Yemen) or the French model (Algeria, Morocco) or in particular forms (Tunisia, Kuwait).

3. **African constitutionalism** shows certain specific features. Some states have declared a new constitutional system on the advent of independence, others have started their independent development without any (written) Constitution and they adopted it subsequently. The political development of constitutionality in Africa often passes for less stable, mostly due to the influence of many *coups d'état* and the decisions of the supreme political and military bodies. Sometimes the decisions by these bodies brought about the suspension of the constitutional system or at least a disrespect for the Constitution in practice. Accordingly, many African constitutional systems include the following characteristics: relatively short duration of the Constitution and its temporary nature; frequent and material constitutional changes; temporary suspensions of normal constitutional mechanisms and in its turn of human rights in view of declarations of martial law , which is in many cases anticipated by the Constitutions themselves; a contrast between the constitutional text and actual legal and constitutional practice. At the same time modern African legal theory states that in comparison with civil constitutional systems, in practice military regimes were often more intolerant to judicial protection of constitutional rights.

From the point of view of constitutional review Africa is interesting because of the large **variety of systems**.

With reference to the influences of foreign legal systems, African systems of constitutional review can be classified as follows:

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[22] Poland, Azerbaijan, Dagestan/Russia.

[23] Albania, Bulgaria, Hungary, Russia, Slovakia, Moldavia, Kyrghyzia, Kazahstan, Uzbekistan, Azerbaijan, Yakutia(Sakha)/Russia, Bashkiria/Russia, Adigea/Russia, Buryatia/Russia, Dagestan/Russia, Irkutska Oblast/Russia, Koma/Russia.

[24] Bulgaria, Lithuania, Poland, Romania, Azerbaijan, Armenia

[25] Mavcic, A., *The Citizen as an Applicant Before the Constitutional Court*, Report with the Seminar organized by European Commission for Democracy through Law in conjunction with the Constitutional Court of Georgia on Contemporary Problems of Constitutional Justice, Tbilissi, Georgia, 1-3 December 1996.

[26] First of all Albania, Slovenia, Montenegro/FRY, Slovakia, Czech Republic, Georgia, Macedonia, Bosnia, Croatia, Russia, Hungary, Kyrghyzia, Moldavia, Ukraine, FRY, Azerbaijan, Uzbekistan, Bashkiria/Russia, Buryatia/Russia, Adige/Russia, Kabardino-Balkar Republic/Russia, Dagestan/Russia, Karelia/Russia, Koma/Russia.

a) FRANCOPHONE AFRICA

In this area constitutional review was most often introduced under the influence of the French model of 1958 (*Conseil Constitutionnel* - Constitutional Council). In compliance with the French legal tradition constitutional review is under the jurisdiction of the special Constitutional senates (of the Supreme Court) - *chambres Constitutionnelles*. On the other hand, a certain number of systems were developed under the effect of the so-called European model (the Austrian Constitutional Court of 1919 and the German Constitutional Court of 1951).

A few states established their first constitutional review systems immediately after their independence in 1959 [27]. Many states assumed (or introduced anew) the same or similar systems into their recent Constitutions [28]. Cameroon used to entrust the implementation of the protection of the constitutional system to Federal Courts. These states were followed by Morocco which, with the *Constitution of 7 March 1962*, introduced the Constitutional Senate with the Supreme Court, whereas the then *Tunisian* and *Algerian Constitutions* did not know any constitutional review.

Numerous Francophone states developed the constitutional review in a concentrated form, they left it over to a single body (although in certain cases at the beginning of the independent development of the legal system this review did not exist)[29].

In certain Francophone states constitutional review was practiced by the ordinary Courts as one of their specialized jurisdictions, or by the Supreme Court as an integral institution (Senegal, Cameroon, Zaire, Comoros) or through a special senate (Morocco-later Constitutional Council after the French model, Ivory Coast, Gabon, Togo, Burundi) or through a Constitutional Department (Mali) of the Supreme Court. In individual cases this function was performed jointly by the united supreme instance of ordinary justice - by the Supreme Court and the Court of Appeal (Rwanda). Some of these states initially introduced autonomous and special institution of constitutional review (former Constitutional Council in the Central African Republic and Constitutional Court in Zaire); subsequently it was replaced by a corresponding new power of the highest ordinary Court in the State.

Another group of Francophone African states cover the jurisdictions where the constitutional review has always been institutionally separated from the ordinary justice and falls accordingly under the power of the Constitutional Court as an independent institution (*e.g.* Madagascar, Congo).

b) ANGLOPHONE AFRICA

It is characteristic of Anglophone African states that they have not assumed the British system with no written Constitution and without constitutional review, but rather followed the American system of judicial review. As a matter of fact, upon their independence, many Anglophone states have adopted written Constitutions[30].

Some of these states, *e.g.* Zambia and Malawi, have adopted the American system of judicial review (the so-called system of diffuse review), which means that review falls under the power of each judge and each Court - only in the hierarchy of decision-making the uniformity of interpretation of the Constitution is secured by the authority of the national Supreme Court.

On the other hand, there are other countries who, in spite of the adopted tradition of Common Law system, have

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[27] Dahomey - now Benin, Upper Volta - now Burkina Faso, Mali, Mauritania, Niger, Sudan, Gabon, Chad

[28] Madagascar, Central African Republic, Congo, Ivory Coast, Dahomey - now Benin, Gabon, Senegal, Chad, Upper Volta - now Burkina Faso, Mali, Togo

[29] Senegal, Ivory Coast, Gabon, Mali, Central African Republic, Comoros, Mauritania, Morocco, Togo, Cameroon

[30] *e.g.*: Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Uganda, Seychelles, Sierra Leone, Swazi, Tanzania, Zambia and Zimbabwe

authorized a single government body for constitutional review (concentrated system of constitutional review in agreement with the Common Law system). This seems to show that in principle the concentrated system of constitutional review (contrary to the American diffuse system) is not incompatible with the Common Law system. This is the example of Uganda, in which the *1966 Constitution* gave the Supreme Court the exclusive jurisdictions over the constitutional matters [31].

Most of the above states have also followed the American model and have adopted their Bills of Rights. In particular the former African states of Commonwealth - Tanzania, Kenya in Zambia have adopted the American system of constitutional review with the special emphasis on the protection of constitutional rights and freedoms. They reduced the possibility of abuse of human rights through the appeal to the Supreme Court [32]. According to the data available it is not possible to establish how this legal protection was enforced in practice, although the mere existence of this possibility represents an important fact, depending on the respect for independence of the judiciary in a particular State and the particular legal system to which extent it preserves "Rule of Law."

It is less known that in these States the human rights' protection system, resulting from the *European Convention for the Protection of Human Rights and Fundamental Freedoms* of 4 November 1950, was established already prior to their independence. The provisions of the above Convention were in force in numerous African States due to the fact that Great Britain profited from the possibility of the Extension Clause from Article 63 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and since 23 October 1953 enforced the validity of the Convention including its first Protocol of 20 March 1953 also on the African territories under British sovereignty, among others in particular in Tanganyika and Zanzibar. Upon acquiring independence some of these African States included the catalogue of rights from the *European Convention on Protection of Human Rights and Fundamental Freedoms* directly into their Constitutions, such as Nigeria with the *Constitution on Proclamation of Independence* (1 October 1960).

A special phenomenon is evident in the system of the constitutional review in Mauritius. It is the so-called New Commonwealth model (Mauritius) and it cannot be classified either under the American or under the European model. This model is characterized by concentrated constitutional review under the jurisdiction of the Supreme Court consisting of regular judges regularly appointed; as a rule it involves the preventative review and the consulting function of the Supreme Court, although repressive review is also possible. Another special feature is that the decisions have an *erga omnes* effect.

c) LUSOPHONE AFRICA

Upon acquiring independence Mozambique and Angola did not introduce constitutional review after the Portuguese model (also due to the then socialist political system supposedly not compatible with the institute of constitutional review), although the then *Constitution of Mozambique* specified the Supreme Court as the guarantor of the respect of the *Constitution*, the statutes and other legislative measures. The new *Constitution of Mozambique of 2 November 1990* established an independent body of constitutional review, Constitutional Council (Articles 180 through 184) with broad powers, whereby the circle of petitioners for constitutional review (standing) was reserved to the highest government bodies only. Further, the new *Constitution of Angola* (draft of April 1990) anticipates the foundation of the Constitutional Court with jurisdiction to discuss and to assess the (un)constitutionality and (il)legality of the statutes and other legal measures if they are in break of constitutional principles (Para. 2 of Article 65).

The *Portuguese Constitution of 2 April 1976* only partly served as a model to the *Constitutions of Cape Verde, Guinea Bissao* and *Sao Tome and Principe* [33]. All three countries introduced a specific system similar to the constitutional review

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[31] (Article 95); similarly in Ghana and its 1960 *Constitutions* (Article 42) and of 1969 (Article 106). In Article 2 of the 1969 Constitution it even gave standing to the individual to address the Supreme Court and request constitutional review, whereas pursuant to the modification of the *1979 Constitution* it explicitly specified that the Supreme Court should have an original and exclusive power to implement the constitutional review

[32] Para. 4 of Article 30 of the *Constitution of Tanzania*, Article 84 of the *Constitution of Kenya*, Article 42 of the *Constitution of Nigeria* and Article 29 of the *Constitution of Zambia*.

[33] Republica Cape Verde (*Constitution of 7 October 1980*, amended 2 February 1981), Republica Guinea Bissao (*Constitution of 16 May 1984*) and Republica Sao Tome and Principe (*Constitution of 5 November 1975*, amended for the last time by the *Constitutional*

[34]. In principle the (ordinary) Courts are empowered not to apply statutes in break of the *Constitution*. An ordinary Court, the attorney general or some other government body is entitled to submit to the Parliament the request for constitutional review of the particular law allegedly in break of the *Constitution*; accordingly, constitutional review is performed by a political (legislative) body. The decisions of the Parliament have an *erga omnes* effect and are published in the official gazette.

d) HISPANOPHONE AFRICA

The *Constitution of Equatorial Guinea*, in force since 15 August 1982, specifies that the National Council as the supreme collective government body has jurisdiction to deal with constitutional matters, including: concern with the constitutionality of statutes and measures taken for their implementation; authentic interpretation of the respective laws; review of the presidential elections; review of the (in)capacity of the President of the Republic for the performance of his/her task.

e) SOME COUNTRIES WITH THE LONGEST STATE TRADITION

Though Liberia ranks among the oldest independent African states, they, despite of its state and constitutional tradition, introduced no constitutional review. The *Liberian Constitution of 26 July 1847* (with *Amendments of 1955*) does not anticipate any constitutional review of statutes. Neither did the *Ethiopian Constitution of 4 November 1955* any constitutional review, whereas the new *Constitution of 1994* introduced the Constitutional Court, surprisingly following even the example of the European model, although in specific circumstances of supremacy of the Parliament the decisions by the Constitutional Court must be approved by the Parliament.

4. Despite politically unstable **constitutional systems in Asian countries** the institute of constitutional/judicial review has been or is known in the following states: Bangladesh, Brunei, Philippines, Hong Kong, India, Indonesia, Japan, China, Taiwan, South Korea, North Korea, Malaysia, Mongolia, Nepal, Pakistan, Papua New Guinea, Singapore, Sri Lanka, Thailand and Vietnam.

Constitutional systems of the above states were influenced by various foreign legal systems. Thus the Soviet model influenced China, North Korea and Vietnam. Certain states reflect the influence of the American system (Japan, India). Individual legal systems contain the elements of German, Swiss and French system (also Japan, Taiwan, Thailand, South Korea), somewhere even the elements of Dutch system (Indonesia, Sri Lanka). The greatest contribution of the American system to the development of legal systems in Asian states is, however, evident in the adoption of the principle of the independence of judiciary in many of these systems, relating to the constitutional review of statutes and other legal measures. The function of constitutional review is most developed in India, Japan, Philippines and in South Korea. The development of individual systems was also influenced by the Indian system; under its effect the constitutional review developed in Malaysia, Singapore and in Sri Lanka.

Statute No. 7/90 of October 1990).

[34] Articles 90 through 92 of the *Constitution of the Cape Verde*, Article 98 of the *Constitution of the Guinea Bissau*, Article 11 of the *Constitution of the Sao Tome and Principe*.

Asian states include the following main models of constitutional review:

- THE AMERICAN MODEL has been adopted for the appellate review in the specific proceedings relating to the constitutionality of statutes and administrative measures within the scope of the general rules of proceedings; such model of diffuse judicial review was above all adopted by the former and by the existing Commonwealth states (India, Bangladesh, Philippines, Hong Kong (until 1 July 1997), Malaysia, Nepal, Pakistan, Singapore). This system has also been adopted by Japan;

- the so-called EUROPEAN OR AUSTRIAN MODEL, used for review of constitutionality of statutes in special proceedings of special Constitutional Courts is less widespread on the territory of Asia (South Korea, Mongolia, Sri Lanka, Thailand);

- MIXED SYSTEMS with elements of Continental and Common Law system (Indonesia, Taiwan);

- SPECIFIC SYSTEMS OF CONSTITUTIONAL REVIEW (Brunei, China, Hong Kong as a special Administrative Territory of China (after 1 July 1997), North Korea, Vietnam), where the function of constitutional review is performed predominantly by the Parliament or certain parliamentary body.

5. Constitutional justice of different effect also developed in the **countries of Central and South America**. It is based on a rather rich tradition of constitutionalism in some States.

There are the four main systems of constitutional review:

a) THE AMERICAN OR DIFFUSE MODEL is the most widespread model where all Courts, from the lowest to the highest, review the constitutionality of statutes and administrative measures in specific proceedings using the common procedural rules. In the diffuse system decisions generally take effect *inter partes* only. As a rule, the Court decision concerning the unconstitutionality of a statute is retrospective, *i.e. ex tunc* (with *pro praeterito* consequences).

The American system of judicial review has influenced numerous states of Central and South America, which adopted it already in 19th Century. These were mainly the states with a federal state system.[35] In some states this system has been subsequently amended and corrected through the parallel introduction of the European model; in such cases we refer to it as a "mixed systems," known today in Brazil, Ecuador, Guatemala, Colombia, Peru and Venezuela.

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[35] Originally this system was adopted by Mexico (1857), Venezuela (1858), Argentina (Constitutions of 1853, 1860 and 1863), Brazil (1890) and subsequently also by former British colonies of Central America (Barbados, Guyana, Jamaica, Trinidad and Tobago). Further it was adopted by some states with short federal experiences such as Colombia (1850), or by a few states irrespective of the form of the state system such as the Dominican Republic (1844) where this system has been preserved to the present day.

The characteristics of the Central and South American variant of this system are as follows: all judges and Courts have constitutional/judicial review jurisdiction; in the pure systems the standing has been reserved for (ordinary) Courts only; decisions have *inter partes* effect; the contents of the decision is in fact the finding - the statute is declared null and void (the principle of nullity of an unconstitutional state regulation), with *ex tunc* and/or *pro-praeterito* effect.

The systems with American model of judicial review in Central and South America are further characterized by the *amparo* proceedings. In Argentina *amparo* it was established in 1853 by the *Federal Constitution*, but in practice the Supreme Court began to exercise its powers as late as in 1860. Mexico was the first to introduce it on 5 February 1857 and readopted it in the *Constitution of 5 February 1917*. On the Mexican model the *amparo* proceedings were also introduced by other states [36].

b) THE EUROPEAN OR AUSTRIAN (OR CONCENTRATED MODEL), adopted by the Constitutional Courts specialized for review of constitutionality of statutes in special proceedings, is less widespread. In such a system the decisions of the constitutional review body have an *erga omnes* effect. There the constitutional review bodies declare the unconstitutional statute as abrogated. The decision has an *ex nunc* effect with *pro futuro* consequences, *i.e.* the abrogation takes effect only at the moment when the decision on abrogation has been taken by the Court. There is a characteristic feature that in some states the concentrated system exists in parallel to the diffuse system (Brazil, Ecuador, Guatemala, Colombia, Peru and Venezuela). Exclusive power for constitutional review is reserved either for the Supreme Court (Panama, Uruguay, Paraguay) for a special senate of the Supreme Court (Costa Rica) or for the Constitutional Court (Chile, Argentinean Province of Tucuman). Considering the fact that the introduction of constitutional/judicial review is usually related to the democratisation process in a specific state, it is worth while mentioning the example of Argentina, where this transformation process of the social and legal system started on the level of province (proved by the introduction of constitutional protection of human rights into individual provincial Constitutions or even by the above example of establishment of the Constitutional Court in the Province of Tucuman).

c) Some countries have a MIXED, *I.E.* DIFFUSE AND CONCENTRATED SYSTEM OF CONSTITUTIONAL/JUDICIAL REVIEW, *e.g.* Brazil, Ecuador, Guatemala, Colombia, Peru and Venezuela. Most often these states have modified the original diffuse system by adapting it to the respective circumstances (*e.g.* Argentina and in particular Mexico with its specific *juicio de amparo* as a form of constitutional complaint). Accordingly, concentrated and diffuse system of constitutional/judicial review may coexist in the same state.

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[36] *e.g.* Guatemala (*Constitution of 1965* and *Amparo Act* of 3 May 1966), Honduras (*Constitution of January 1982* and *Amparo Act* of 14 April 1936, amended in February 1982) and Nicaragua (*Constitution of 20 July 1979*, together with the *Statute of Rights and Guarantees* of 21 August 1979 and *Amparo Act* of 28 May 1980).

Mixed systems are characterized by popular complaint (*actio popularis*) which was introduced by the certain States [37].

d) OTHER SYSTEMS OF CONSTITUTIONAL REVIEW

A special system of constitutional review is known in Cuba where according to the *Constitution of 24 February 1976* the power for constitutional review has been gained by the National Assembly (legislative body).

D Systems of Constitutional Review in Countries with the Federal Structure of State

Constitutional justice in the proper sense of the word, taken however from the theoretical point of view, could develop only when instead of the principle of sovereignty of Parliament [38]there prevailed the idea of supremacy of the Constitution [39] and constitutional review is performed by a special body, independent of the legislative and executive power.[40] Such approaches were characteristic for the development after World War II. On the other hand, constitutional justice also involves the principle of vertical separation of powers. It emerged in federal states, whereby constitutional justice was supposed to exert supervision over the federal Legislature in relation to Member States. In Austria and Switzerland, the countries with the tradition in the field of the constitutional review, was the respective body, empowered for the constitutional review, introduced only on the federal level. On other hand, in Germany the constitutional review was introduced on the federal level as well as on the level of the Member states. Similar system was introduced in the former Yugoslavia (1963), as well as in Slovenia and other Member States of the former Yugoslavia (1963). After introduction of constitutional review on the federal level the constitutional review has been adopting in Russia after 1990 also by the Member States of the Russian Federation. The structure of constitutional review on the federal as well as on the level of Member States is still preserved in the present Federal Republic of Yugoslavia and in Bosnia and Herzegovina. Certain special position accorded to Argentina where the process of democratic transformation in a Federal State first developed in its units marked with the gradual

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[37] *e.g.* Colombia (*Constitution of 1961, Act No. 96 of 1936* and *Decree No. 432 of 1969*), Venezuela (*Constitution of 1961*, the *Supreme Court Act* of 30 July 1976), Panama (*Constitution of 1972*, as amended in 1983; *Constitutional Complaint Act* of 24 October 1956), El Salvador (*Constitution of 8/1/1962, Constitutional Proceedings Act* of 14 January 1960), as well as Brazil (*Constitution of 1967*, as amended in 1969 and *Act No. 4717 of 21 June 1965*); a certain form of popular complaint (*actio popularis*) exists also in some Argentinean Provinces (Chaco, Neuquen, Santiago del Estero) and Costa Rica (based on the *Civil Proceedings Code* of 25 January 1933, as amended on 23 December 1937).

[38] where the representative body itself decides on the constitutionality of its laws

[39] whereunder the Constitution is the basis and the source of all state power

[40] not by the Parliament itself, but either by the regular courts or by a special body, such as the Constitutional Court or some other body

increasing introduction of elements of constitutional review of different intensity by the individual provinces (Tucuman).

Such structure of constitutional review was not adopted in the former Czechoslovak Republic; there the Constitutional Court was established only on the federal level. In spite of the efforts in Kwazulu-Natal the constitutional review was created only on the level of the South African Federal State. Some other federations did not adopt the constitutional review on the level of Member States, e.g. U.S.A, Canada, Brazil, India, where the respective function has been provided by the Supreme Court. In Hong Kong as a special Administrative Territory of China (after 1 July 1997) a specific system of constitutional review was introduced, where the function of constitutional review is performed predominantly by the Parliament (the National Peoples Congress) and/or certain parliamentary body (the Constitutional Committee). In Switzerland the Federal Court cannot evaluate federal statutes, generally binding resolutions and ratified international agreements (the principle of supremacy on the federal level), while in cantons the constitutional review was not introduced. On other hand, some Constitutional Courts are empowered to decide on the conformity of he Constitutions of specific State Regions with the (main) State Constitution (*e.g.*, Georgia as regards to the Abkhasian territory; Uzbekistan as regards to the territory of the Karakalpakstan).

Germany

The first integral system of constitutional review on the federal level as well as on the level of Member States was introduced in Germany. Beside the Federal Constitutional Court (*Bundesverfassungsgericht*) the Member States (*Laender*) established their own Constitutional Courts. Their titles are sometimes "the Constitutional Court *(Verfassungsgerichtshof)"*, sometimes "the State Court *(Staatsgerichtshof)"*. All Member States except Schleswig-Holstein adopted the constitutional review. At the beginning the Province of Berlin did not establish such Court in spite of respective basic provisions in the Berlin Constitution. In addition, the Federal Constitutional Court developed a certain limited system of legal protection as regards to the Berlin Province. However, the Constitutional Court of Berlin was finally established by the *Constitutional Court Act of 8 November 1990*. The Province Schleswig-Holstein on other hand under the Federal Constitution transferred the function of constitutional review to the Federal Constitutional Court. In addition, the *Constitution of Schleswig-Holstein* did not foresee the Provincial Constitutional Court [41]. Until 1993, among the five new German Member States only Sachsen, Sachsen-Anhalt and Brandenburg introduced the constitutional review [42]. However, the constitutional review was not introduced in all German Member States with the same intensity. Some of the most famous Courts is the Constitutional Court of Bavaria with its seat in Munich, because of its tradition. As a matter of fact. the constitutional review in Bavaria has its roots in the Bavarian Constitutions of 39 March 1850 and of 1919.

The Provincial Constitutional Courts were established in the following German Provinces:

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[41] *See* Pestalozza, C., *Verfassungsprozessrecht*, Muenchen, C.H. Beck'sche Verlagsbuchhandlung, 1991, p. 372-377.

See Schlaich, K., *Das Bundesverfassungsgericht*, Muenchen, C.H. Beck'sche Verlagsbuchhandlung, 1994, p. 72.

- Baden-Wuerttemberg (the seat in Stuttgart);
- Bayern (the seat in Munchen);
- Berlin (the seat in Berlin);
- Bremen (the seat in Bremen);
- Hamburg (the seat in Hamburg);
- Hessen (the seat in Wiesbaden);
- Niedersachsen (the seat in Buckeburg);
- Nordrhein-Westfalen (the seat in Muenster);
- Rheinland-Pfalz (the seat in Koblenz);
- Saarland (the seat in Saarbrucken).

The powers of the Constitutional Courts did not follow any common model, so there are some differences between present Constitutional Courts. In addition, between the Federal Constitutional Court and Provincial Constitutional Courts the powers are separated with regard to the principles which represent the general grounds of separation of powers between the Federal State and the Member States. Accordingly, the Federal Constitutional Court is empowered to decide in all cases of federal constitutionality (in conformity with the Federal Constitution), while the Constitutional Courts of the Member States are empowered to decide in the case of the Provincial constitutionality (only in conformity with the Provincial Constitution). However, both proceedings can be simultaneous and parallel if the same regulation is concerned (law). Therefore both Courts (the Federal and the Provincial) shall coordinate their proceedings. As a rule, the freedom of decision making in such issues as "foreign" law is limited, provided that the competent Constitutional Court has already decided the case with *erga omnes* effect. Thus, the Provincial Constitutional Court is bound by the decision of the Federal Constitutional Court in case of a matter of Federal constitutional law, whereas on the other hand the Federal Constitutional Court is bound by the decision of a certain Provincial Constitutional Court in case of a matter of Provincial constitutional law. The relationship between the Federal Constitutional Court and the Constitutional Court of the Member State is expressly determined not only in the German system but also in some other systems (*e.g.* FRY).

Russian Federation

The respective topic will be presented by some special reports. However, I would only like to mention that in the Russian Federation the Constitutional Courts of Member States were established beside the Federal Constitutional Court: Adigea (the seat in Mojkop); Baskhiria (the seat in Ufa); Buryatia (the seat in Ulan-Ude); Dagestan (the seat in Maha_kala); Irkutska Oblast (the seat in Irkutsk); Yakutia/Sakha (the seat in Yakutsk); Karelia (the seat in Petrozavodsk); Kabardino/Balkar Republic (the seat in Nal_ik); Koma (the seat in Siktivkar); Northern Ossetia (the seat in Vladikavkaz); Tatarstan (the seat in Kazan) and Tuba (the seat in Kizil).

Argentina

Argentina adopted the constitutional review on the federal level following the American model (the so-called system of *incidenter* control and/or the system of diffuse or indirect constitutional control). On the other hand, some Argentinean Provinces have introduced a mixed constitutional review system, in particular as regards the new regulation of 1957 in the

Provinces of Chaco, Chubut, Formosa, Neuquen and Rio Negro.

The system of the constitutional control is based on Articles 31 and 100 of the *Constitution* of 1 May 1853 (with Amendments from 1860, 1866, 1898, 1957 and 1994). With reference to the prevailing system each judge is empowered, irrespective of his instance, to evaluate disputable conformity of law and administrative act with the Constitution. The constitutional review is exclusively reserved for the judiciary. The decisions take effect *ex tunc* and, naturally, *inter partes.*

The *habeas corpus* proceedings are possible; a complaint of this kind is supposed to protect the right to Personal Liberty (Article 18 of the *Constitution*). Exclusive power for deciding on this complaint is reserved for the criminal judge, however with limitation to deciding on act and facts where violation of fundamental constitutional rights is involved. The *amparo* is regulated by the *Ley nacional sobre Ley de Amparo* of 18 October 1966.

Another type of proceedings includes specific protection complaint - *recurso de amparo*. It was introduced pursuant to the decisions of the Argentinean Supreme Court from 1957 (the *Angel Siri* Case) and from 1958, on the example of the *amparo* complaint in Mexico and in certain other Central American countries as well as in Brazil, where a such complaint is referred to us the *mandado de seguranca*. With the *recurso de amparo* the protection of rights was extended from the *habeas corpus* (relating to the right of Personal Liberty) also to all other rights guaranteed by the national *Constitution*. Deciding on such complaint is also subject to the decision of each judge.

On the federal level there are also foreseen the powers of the Supreme Court to settle the jurisdictional disputes between judges of different provinces or judges of federal and provincial level according to specific proceedings.

The constitutional review in Argentinean Provinces is as follows:

- the constitutional complaint against the law before the highest provincial Court (only in the Provinces of Buenos Aires, La Rioja, Chaco, Neuquen, Entre Rios, Santiago del Estero, Rio Negro);
- *habeas corpus*, in all provinces, provided that the case is subject to the decision of each criminal judge;
- *amparo*, in all provinces, provided that the case is subject to the decision of each judge. In this case the Province of Tucuman, however, anticipate the power of the Constitutional Court. With reference to the *amparo* the Province of Tucuman anticipate the possibility of abstract constitutional review(Para. 4 of Article 22 of the *Constitution*);
- the jurisdictional disputes between municipalities in a specific province, which are subject to the decision of the Provincial Supreme Court.

The abstract constitutional review follows only the so-called *incidenter* proceedings.

The *Constitution* of the Province of Tucuman of 28 April 1990 established the Constitutional Court on the European model (*Tribunal Consitucional*). Its power is limited to the provincial legislation. The Constitutional Court is declared as the supreme protector of the *Constitution*, in particular in cases of its violation (*e.g.*, impeachment, Article 5, Para. 1 of Article 133 of the

Constitution). The *Constitution* envisages the *amparo* as a means of protection of constitutional rights before the Constitutional Court (Article 22 of the *Constitution*). The five member Constitutional Court is empowered for repressive abstract constitutional review of laws and by-laws (Para. 1 of Article 134 of the *Constitution*), for repressive abstract constitutional review of draft laws and draft by-laws (Para. 2 of Article 134 of the *Constitution*), for review of elections of members of the Provincial legislative body (Para. 3 of Article 134 of the *Constitution*), for deciding on charges against State officers in case of violation of the *Constitution* (Article 5 and Para. 4 of Article 134 of the *Constitution*) and for settlement of jurisdictional disputes between legislative and executive bodies of the Province, between Provincial courts, municipal bodies, between the Province and municipalities as well as between municipalities themselves (Para. 5 of Article 134 of the *Constitution*).

Former SFRY and Present FR of Yugoslavia

Before 1963 the Yugoslav system of protection of constitutionality and legality included the review of constitutionality and legality of rules under the principle of self-review inside the parliamentary system. Authors of the project of introduction of constitutional review came to the conclusion that this review lacked efficiency because - in so far as it was practiced - it was mainly oriented to conformity of the policy expressed in some rules and less to legality in the literal meaning. As far as the latter is concerned it was too tolerant and therefore inefficient. This was the reason for the search for a new form of solution of these problems. The practice, however, revealed that legislative and executive bodies were, mainly for objective reasons, unable to review the constitutionality and legality of the rules objectively and critically, because they were themselves their authors.

The experiences from elsewhere in the world proved the same - it was a period of many new constitutional review systems. On these grounds it was generally believed that the protection of constitutionality and legality of rules would favour special autonomous bodies, independent of the legislative and executive powers. In this period more and more states introduced special bodies of constitutional review, especially Constitutional Courts, whereof the main task was to evaluate the conformity of legal rules with the Constitution as well as the abrogation and annulment of the unconstitutional or illegal rules. Such decision taken by the Constitutional Court actually has the power of Law, because it acts against everybody to whom the provision, eliminated by the Constitutional Court, refers; thereby it encroaches upon the sphere of the Legislature or other measure-imposing subject. Leaving the decision-making on such disputes to a third, neutral, body which is supposed to pass its decision mainly with reference to the reasons based on the constitutional law and after certain proceedings before the Constitutional Court, actually involves depolitisation of such disputes and represents an obstacle to arbitrariness, which is in the interest of stabilisation of the legal system. Constitutional review was expected to contribute to faster and more efficient elimination of unconstitutional and illegal phenomena and negative tendencies; at the same time it should introduce more democratic methods and flexibility at solving such problems. If such function was performed by government bodies, they would, according to the then belief, not only deal with the problems of legality, but would also impose themselves as an eager political factor.

Hence, this all led to the introduction of special constitutional bodies, whereof the constitutional review would limit on the field of legislative, and partly also executive, power and which would

be above all political supervision bodies of special type, including various additional, distinctly judicial, powers, along with the basic power of constitutional review of statutes. According to the intention of the then *Constitution*, the new Constitutional Courts were supposed to act as a part of the parliamentary system and not as classical judicial bodies such as might also be inferred from the name itself. This, however, did not mean that the decision-making of the Constitutional Courts could be identified with the legislative function. The then theory on the constitutional law, however, did not accept the Kelsen's view whereunder the decision taken by the Constitutional Court relating to the constitutionality of statute is actually a legislative function, but rather considered that in such case the decision taken by the Constitutional Court shall be understood as an individual act rather than a general act. On introduction of constitutional justice the political aspect of constitutionality and legality was attributed great importance. At the same time Constitutional Courts should impose the least possible restrictions on the method of their operation, at preparations for decisions, discussion and decision-making (except for the basic rules of procedure specified by the law). At that Constitutional Courts depended on the applications lodged by petitioners or proponents.

The *Federal Constitution 1963* as well as the *Constitutions* of former Member States 1963 introduced the constitutional review on the federal as well as on the level of Member States. The *Constitution of the Republic of Slovenia of 1963* (Official Gazette SRS, No. 10/63) envisaged the first Member State Constitutional Court [43].

This was an additional powerful reason for the introduction of Constitutional Courts into the *Federal* and Member State *Constitutions* of former Yugoslavia in 1963, including the *Slovenian Constitution*. It was a new institute the protection of constitutionality and legality protection not existing in the former constitutional system: the Constitutional Court as independent body with precisely specified powers in the field of constitutionality and legality protection, a special body in addition to the bodies of parliamentary system in the narrow sense of the word and in addition to the already existing bodies within the system of regular justice. At the beginning the constitutional justice was concerned with the discussions about its compatibility with the principle of unity of powers such as was the leading principle of the legal system. The actual turning-point in favour of the introduction of the constitutional review in the legal system was brought about by the positive attitude of the leading political structure to the institute of the constitutional review in the proceedings preceding the adoption of the *Constitution of 1963*. In addition to the Federal Constitutional Court in charge of protection of federal constitutionality there were also established Member State Constitutional Courts in charge of protection of the Member State constitutionality; they did not represent a different instance in relation to the Federal Constitutional Court. [44]

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[43] The *Constitutional Court Act* (Official Gazette SRS, Nos. 39/63 and 1/64) specified the power of and the proceedings before the Constitutional Court; it determined that it should start its activity on 15 February 1964. The Assembly of the SRS elected the first President and eight judges of the Constitutional Court on 5 June 1963 (the resolution on their election was published in the Official Gazette SRS, No. 22/63). The President and the judges were sworn in before the President of the Assembly on 15 February 1964. The first internal regulation of the Constitutional Court were adopted on 23 February 1965 (Official Gazette SRS, No. 11/65).

[44] In practice such relations between Constitutional Courts were not easily established, which was also due to inadequate and inaccurate distinction between legislative powers of the Federation and the Member States and in particular, as then believed by the Slovenian Constitutional Court, due to not very reasonable specification of powers of the Federal Constitutional Court. The constitutional review in both Autonomous Provinces (Vojvodina, Kosovo), introduced in 1972, existed till 1991, when the jurisdiction of

The *Constitution* of 1974 reorganized the position and the powers of the Slovenian Constitutional Court (Official Gazette SRS No. 6/74); more detailed provisions on powers and procedures were defined in the *Constitutional Court of the Socialist Republic of Slovenia Act* (Official Gazette SRS, No. 39/74 and 28/76); new *Internal Regulation of the Constitutional Court* were also adopted (Official Gazette SRS, No. 10/74).

Under Member State Constitutions of 1974 the power of Constitutional Courts was based on the separation jurisdiction between the Federation and the Member States and Autonomous Provinces; each of these Constitutional Courts acted with due institutional independence in compliance with the powers specified in the constitution of the appropriate level, whereby Constitutional Courts were in no hierarchical relation to one another and the Federal Constitutional Court was not an instance above other Constitutional Courts, nor was the Member State Constitutional Court an instance above Provincial Constitutional Courts. However, the then Federal Constitutional Court was empowered to decide on the jurisdictional disputes between Constitutional Courts of Member States and/or Autonomous Provinces. The proceedings before the Constitutional Courts followed the rules of procedure adopted by Constitutional Courts themselves, pursuing the idea that the proceedings before the Constitutional Court should omit formality and bureaucratic approach to the benefit of efficiency and promptness. Therefore, elements of traditional and contradictory judicial proceedings were be omitted from the rules of procedure.

Accordingly, the Constitutional Courts were established and their powers were specified in compliance with the *Constitution*. In individual Member States and Autonomous Provinces their position and the respective proceedings were also specified in detail in *Constitutional Court Acts* or even in internal regulations that as a rule, regulated only organisation and internal operation. Individual Constitutional Courts had different numbers of members. The constitutional judges were elected by the Parliaments, their term of office was eight years without possibility of re-election in the same Court. The President of the Constitutional Court was elected out of the judges for a shorter term of office, most often for a period of 4 years, without the possibility of re-election to the same office. The judges enjoyed the parliamentary immunity.

On the one hand stress was laid on the autonomy and the independence of the Constitutional Court, on the other hand the Courts stressed the need for cooperation with the government bodies and for the protection of the constitutionality and legality, because the Constitutional Court could not be an isolated and closed institution.

This initial period was characterized by a small number of applications lodged with the Constitutional Court (also due to the relatively low normative power of the Member State); the individual petitions prevailed. In spite of the rare ideas that the powers of Constitutional Courts should be extended, in particular to electoral cases, impeachment, constitutional review of referendum, preventative constitutional review of international treaties, or even to constitutional review of the then citizens' associations, officially the opinion was adopted that while the usefulness of the constitutional judiciary should be preserved in the legal system, yet without

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the Serbian Constitutional Court was spread over the whole territory of the Member State Republic of Serbia.

extension of its powers. The Constitutional Courts should limit themselves to the constitutionality and legality, whereas all other questions relating to the individual belong to the sphere of other bodies outside the Constitutional Courts.

The present constitutional review in the FRY has been carrying out by the Federal Constitutional Court and the Constitutional Courts of the Republic of Serbia/FRY and Montenegro/FRY. The *Constitution of the FRY* (Official Gazette FRY, No. 1/92) and the *Federal Constitutional Court Act* (Official Gazette FRY, No. 36/92) regulate the organisation, proceedings as well as the powers of the Federal Constitutional Court. The *Constitution of the Republic of Serbia* (Official Gazette, No. 1/90) and the *Proceedings Before the Constitutional Court of Serbia and Legal Effect of its Decisions Act* (Official Gazette, No. 32/91), the *Constitution of the Republic of Montenegro* (Official Gazette, No. 48/92) and the *Constitutional Court of Montenegro Act* (Official Gazette, No. 44/75) regulate the organisation, powers and the proceedings before the Constitutional Court of both Member States. The Constitutional Courts of the Member States are independent against to the Federal Constitutional Court [45]. The Federal Constitutional Court has not the position of the highest Court even the position of the "Supreme Court". The Federal Constitutional Court is composed from seven members (Para. 1 of Article 2 of the *Federal Constitutional Court Act*) with a tenure of 2 years. The Powers of the Federal Constitutional Court under Article 124 of the *Federal Constitution* reflect the relation between the Federation and Member States. The Federal Constitutional Court shall decide on:

- conformity of Constitutions of Member States with the *Federal Constitution* (*in meritum*);
- conformity of laws and by-laws with the Federal Constitution with ratified international agreements (the unconstitutional law/by-law can be abrogated);
- conformity of laws and by-laws of the Member States with the Federal Law (the illegal law/by-law can be abrogated);
- conformity of other federal regulations with the Federal Law;
- conformity of acts and activities of political parties with the Federal Constitution and the Federal Law;
- constitutional complaints in relation to violations of constitutional rights by individual(personal) acts;
- jurisdictional disputes between the Federal bodies and Member States and between Member States themselves;
- appeals in relation to violations of rights concerning the Federal elections.

Bosnia and Herzegovina [46]

1. **The *Dayton Agreement:*** The Constitutional Court (Annex 4, Article VI) shall have appellate jurisdiction over constitutionality issues arising out of a judgment of any other court in Bosnia and Herzegovina (Article VI para 3 (b); this may include human rights disputes (cf. Article II).

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[45] *See* Srdi_, *Pravna zaštita pred Ustavnim sudom*, Beograd, Slu_beni glasnik, 1993, p. 25.

[46] Working Document 1 CDL - 020/96 prepared by the Secretariat of the Venice Commission of the Council of Europe.

The Court is to have jurisdiction over issues referred by any court in the country on whether a law, on whose the validity of its decision depends, is compatible with the *Constitution*, with the *European Convention for Human Rights and Fundamental Freedoms and its Protocols* or with rules of public international law pertinent to a court's decision (Article VI para 3 (c)).

It also has jurisdiction to decide any dispute between the entities that arises under the *Constitution* between the Entities (the Federation of Bosnia and Herzegovina and the Serbian Republic of Bosnia) and the central Government and between the Entities themselves or between institutions of Bosnia and Herzegovina including the question of compatibility of an *Entities' Constitution* with the *Constitution of Bosnia and Herzegovina* (Article VI, para. 3 (a)).

The Court is composed from nine members: four from the Federation of Bosnia and Herzegovina, two from the Serbian Republic of Bosnia and three non-citizens of Bosnia and Herzegovina or of states, selected by the President of the European court of Human Rights.

2. **The *Constitution of the Serbian Republic of Bosnia:*** The Constitutional Court (Article 120 - Article 125) shall decide on:

1. conformity of laws, other regulations and general enactments with the *Constitution*;
2. conformity of regulations and general enactments with the law;
3. conflict of jurisdiction between agencies of legislative, executive and judicial authorities;
4. conflict of jurisdiction between agencies of the Republic, region, city and municipality;
5. conformity of programmes, statutes and other general enactments of political organisations with the *Constitution* and the law.

In accordance with *Amendment XLII*, the Constitutional Court monitors the constitutionality and legality by providing the constitutional bodies with opinions and proposals for enacting laws to ensure "protection of freedoms and rights of citizens".

The Constitutional Court may initiate proceedings on constitutionality and legality itself. Moreover, anyone "can give an initiative for such proceedings.

the Court is composed from 7 Judges with a tenure of 8 years, after which they cannot be re-elected. The President of the Constitutional Court shall be elected by the National Assembly for a three- year term, after which he cannot be re-elected. The proceedings, the legal effect of its decisions and other questions of its organisation and work shall be regulated by law.

3. **The *Constitution of the Federation of Bosnia and Herzegovina* (proposed in the *Washington Agreement* of February 1994):** The primary functions of the Constitutional Court (Chapter IV, Section C, Articles 9-13) are to resolve disputes between Cantons; between any Canton and the Federation Government; between any Municipality and its Canton or the Federation Government; and between or within any of the institutions of the Federation Government.

It determines also on request whether a law or a regulation is in accord with the *Constitution of the Federation*. The Supreme Court, the Human Rights Court or a Cantonal court has an obligation to submit any doubt whether an applicable law is not in accord with the *Constitution* to the Constitutional Court. Decisions are final and binding.

According to the *Federation Constitution* (Chapter II, A, Article 6) "all courts . . shall apply and conform to the rights and freedoms provided in the instruments listed in *Annex to the Federation Constitution* (this includes the *European Convention for Human Rights and Fundamental Freedoms*).

The Court is composed from nine Judges.

E Composition/Organisation

The **number of judges** performing the function of constitutional/judicial review differs from state to state, ranging from four (Andorra) or five (Senegal) to sixteen (Germany). As a rule, the appointment procedure for the members of the Court differs from that for an appointment of the President. The same applies to the duration of their terms of office.

The **terms of office of constitutional judges** last between six (Portugal) and twelve years (Germany) or fifteen years (Kyrghyzia); the average is nine years (which is also the case in Slovenia). The term of office of the members of the Serbian Constitutional Court/FRY as well as of the Constitutional Court of Tatarstan/Russia is permanent. A term of office that is too long may be dangerous for the evolution of the legal process, whereas too short a term of office could be detrimental for the continuity and the authority of the institution, as well as for the balance of the constitutional case-law. To strengthen the principle of independence of constitutional judges, most systems prescribe their re-election. There is a variety of examples of how this is handled: the judges may be have a life tenure (USA), they may perform their functions up to a certain age (the maximum of 70 years in Austria, Bosnia and Herzegovina, Kyrghyzia, Tatarstan/Russia and Belgium, 60 years in Tadjikistan), or their re-election after a limited term in office is explicitly excluded (Germany, Italy, France). Switzerland, Hungary and Portugal do envisage the re-election of (constitutional) judges, whereas in Spain the immediate re-election is forbidden. The renewal of Constitutional Courts and the frequency of appointment of constitutional judges do not coincide; in some states the term of office of constitutional judges expires successively which results in a successive renewal of a part of the Constitutional Court (France, Spain, Bulgaria, Romania). The minimum age acceptable for appointment of a constitutional judge (40 years) is specified in Slovenia, Germany and Belgium, in Georgia (35 years) and in Tadjikistan (30 years).

The influence of government bodies upon the **appointment or elections of the constitutional judges** differs from case to case.
The varieties applicable to elections or appointment of constitutional judges are as follows:

1. THE APPOINTMENT BASED SYSTEMS (Without Participation of a Representative Body): In France three members of the Constitutional Council are appointed by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate. In Japan, Sweden and in many African states with constitutional/judicial review judges (of the Supreme Court) are appointed exclusively by the government. In

Denmark, Ireland, Turkey, USA, South Africa, Cyprus and Senegal constitutional judges are exclusively appointed by the state sovereign or by the chief of the state. In the Argentinean Province of Tucuman one part of constitutional judges are appointed by an electoral body composed of the judges of the Supreme Court and the rest of the judges are appointed by the executive power.

2. THE ELECTION BASED SYSTEMS: As a rule Parliaments exercise greater influence upon the elections of constitutional judges as compared to the elections of judges of the ordinary Courts. In Germany, Slovenia, Switzerland, Belgium, Croatia, Estonia, Liechtenstein, Lithuania, FRY, Montenegro/FRY, Serbia/FRY, Serbian Republic of Bosnia, Bosnia and Herzegovina, Hungary, Namibia, Uzbekistan, Azerbaijan, Yakutia/Russia, Bashkiria/Russia, Buryatia/Russia, Adigea/Russia, Saarland/Germany, Baden-Wuerttemberg/Germany, Bayern/Germany, Berlin/Germany, Bremen/Germany, Hamburg/Germany, Hessen/Germany, Niedersachsen/Germany, Nordrhein-Westfalen/Germany, Rheinland-Pfalz/Germany, Dagestan/Russia, Irkutska Oblast/Russia, Karelia/Russia, Kabardino-Balkar Republic/Russia, Koma/Russia, Northern Ossetia/Russia, Tatarstan/Russia, Tuba/Russia and Poland constitutional judges are exclusively appointed by the legislative body. The same principle is followed by Portugal where constitutional judges, appointed by the Parliament, coopt a certain number of other constitutional judges. In case these systems involve the participation of executive power, its role is limited to the recruitment of candidates.

3. THE MIXED SYSTEMS (Appointment and Election): In Andorra the appointment of constitutional judges is subject to the influence of the presidential body and the Parliament. In Austria, Albania, Bulgaria, Canada, Romania, Czech Republic, Cambodia, Armenia, Georgia, Kazakhstan, Bosnia and Herzegovina and Slovakia one part of constitutional judges are elected by the Parliament or are appointed by the chief of the state or by the President of the Parliament, and the rest by executive power. In Italy, Peru and Spain one part of constitutional judges are elected by the Parliament, one part is appointed by the government and the remaining part by the senior judicial officials. With mixed systems, too, the role of the Parliament is prevalent and the role of the executive power is sometimes limited to a mere recruitment of the candidates.

4. THE PREDETERMINED COMPOSITION OUT OF THE TOP JUDICIAL OFFICIALS: Because the body competent for constitutional/judicial review consists of representatives of the highest national Courts in Greece and in some other states (Hong Kong until 1 July 1997, Rwanda, Sudan, Mauritius) neither the Parliament nor the government exert direct influence on appointment of constitutional judges.

The independent position of the Constitutional Court is further symbolized by the mode of appointment of the President of the Constitutional Court. Its independence is even greater if the President is appointed by his/her colleagues - constitutional judges themselves (Italy, Spain, Belgium, Slovenia, Cambodia, FRY, Yakutia/Russia, Tuba/Russia); in case of the opposite, the President is appointed by a qualified body outside the Constitutional Court (France, Austria, Germany, Poland, Bashkiria/Russia, Montenegro/FRY, Serbia/FRY, Serbian Republic of Bosnia, Northern Ossetia/Russia, Karelia/Russia, Kabardino-Balkar Republic/Russia, Koma/Russia, Tatarstan/Russia).

Nearly everywhere the **qualifications and the required professional experience of the constitutional judges** are subject to high standards: the candidates must not only have more than average legal expertise but also all a high degree of sensibility for the political effects of their decisions. In practice constitutional judges are selected exclusively out of first-class lawyers with many years of experience, such as judges, attorneys, senior government officials, professors of law, or politicians. Sometimes special qualifications are required (Belgium: the command of the corresponding national language). Most systems recognise the **immunity of constitutional judges** and certain systems recognise explicit parliamentary immunity (Italy, Spain, Czech Republic, Bulgaria, Slovenia). The independent position of a constitutional judge also implies to the recognition of the corresponding material independence, as well as the adequate protocolary rank.

A special feature of the office of the constitutional judge is its **incompatibility with certain activities**. In almost all systems the office of constitutional judge is compatible with scientific and artistic activity, but incompatible with political and commercial activity. With reference to political activity there may be various grades of restriction, ranging from the absolute prohibition of membership in a political party to the prohibition of membership for a certain period prior to the election (Austria) or to the prohibition of membership in the bodies of a political party. The prevailing opinion regarding the appearance of constitutional judges in public is that they cannot be exclusively closed within the circle of their institution and that their activity in public contributes to the transparency of the Constitutional Court as well as to the pluralism of opinions.

The decision-making may be organised in different ways:
- on the level of a PLENARY COURT (always in France);
- on the level of a PLENARY COURT AND SENATES (*e.g.* Germany, Spain, Portugal, Slovenia, Georgia, Switzerland, where the reason for decision-making in senates involved mostly constitutional complaints; however, in these systems, too, important decisions are made according to the plenary principle);
- on the level of TASK FORCES FOR INDIVIDUAL LEGAL DOMAINS (Italy).

Most systems of constitutional/judicial review allow for **organisational autonomy** of the institution. This means they authorize the respective constitutional/judicial review bodies to follow their own rules regarding their internal organisation. Most constitutional/judicial review bodies also have an independent budget as a separate part of the whole state budget, and they are fully independent in its control. Professional services of the Constitutional Courts are organised in a similar way: they consist of clerks and clerical staff, whereby the head of the professional services generally holds the status of the secretary general.

Generally speaking, the role of constitutional review has been expanding; at the same time individual Constitutional Courts increasingly share more common elements regarding organisation, proceedings, rationales for the decisions and opinion. This is due to the already existing similar functional principles, proper to all constitutional systems. An important stimulus is given also by the integrational tendencies in constitutional justice. An example of semi-official such conduit is the **International Conference of (European) Constitutional Courts**. Since 1972 it exists as a form of international exchange of opinions in the filed of constitutional justice. These are the meetings of "pure" Constitutional Courts and other corresponding institutions of constitutional review. [47] Periodical work sessions of Constitutional Courts are in many respects of far-reaching importance. They contribute to the strengthening and better articulation of the constitutional case-law.

Another more recent feature tending to integrate the information systems are (1) the **information system** of the European and some non-European constitutional/judicial review bodies, governed by the Venice Commission of the Council of Europe since 1991, and (2) the recently developed Internet connection of the Constitutional Courts.

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[47] In the period from 1992 through 1993, such conferences were held in Dubrovnik, Baden-Baden, Rome, Vienna, Lausanne, Madrid, Lisabon, Ankara, Paris, Budapest. The next one will be held in Warsaw.

F Powers of the Constitutional Courts: Nature and Effects of Their Judgments

From the historical point of view in many systems constitutional/judicial review emerged as decision-making in jurisdictional disputes between various government bodies. Because there are numerous other issues emerging as a matter of discussion and decision-making today constitutional justice is no longer concerned only with the distinction of these powers *****.

*** the powers of Member States/Provincial Constitutional Court are marked in bold.**

I PREVENTATIVE REVIEW
1. CONSTITUTIONAL PROVISIONS (France, Moldavia);
2. INTERNATIONAL AGREEMENTS (Albania, Algeria, Andorra, Belarus, Bulgaria, Burkina Faso, Chad, Chile, Estonia, France, Gabon, Guatemala, Lithuania, Congo, Madagascar, Hungary, Mali, Moldavia, Russia, Senegal, Ivory Coast, Slovenia, Spain, Ukraine, Germany, Tunisia, Georgia, Tadjikistan, Kazakhstan, Azerbaidjan, Armenia, **Buryatia/Russia, Dagestan/Russia, Karelia/Russia**);
3. STATUTES (Afghanistan, Algeria, Austria, Burkina Faso, Belarus, Central African Republic, Cyprus, Chad, Chile, Finland, France, Gabon, Guatemala, Indonesia, Ireland, Italy, South Africa, Comoros, Congo, Costa Rica, Hungary, Madagascar, Mali, Mauritius, Morocco, Namibia, Peru, Portugal, Romania, Russia, Senegal, Syria, Ivory Coast, Spain, Thailand, Turkey, Tunisia, Venezuela, Germany, Kazakhstan, Namibia, Cambodia, **Tucuman/Argentina, Northern Ossetia/Russia)**;
4. REGULATIONS (Belarus, Gabon, Portugal, Madagascar, Namibia, **Tucuman/Argentina, Northern Ossetia/Russia**);
5. ACTS OF THE PRESIDENT OF THE STATE (Algeria, Madagascar);
6. ACTS OF THE TERRITORIAL UNITS (South Africa);
7. OTHER REGULATIONS: BUDGET ACTS, PARLIAMENTARY INTERNAL REGULATIONS (Cyprus, Romania, France, Belarus, Madagascar);

II REPRESSIVE (*A POSTERIORI*) REVIEW
1. ABSTRACT REVIEW
a) Constitution-Constitutional amendments-basic Constitutional provisions (Brazil, Costa Rica, Cyprus, Kyrghyzia, Cuba, Russia, Turkey, Ukraine, Uzbekistan (conformity of the Constitution of the Republic of Karakalpakstan with the Constitution of Uzbekistan); **FRY (conformity of the Constitution of Member States with the Constitution of the Federal State)); Baden-Wuerttemberg/Germany, Rheinland-Pfalz/Germany, Saarland/Germany, Dagestan/Russia (constitutions of administrative units)**);
b) International agreements (Afghanistan, Austria, Philippines, Costa Rica, Greece, Lithuania, Madagascar, Mauritania, Moldavia, Russia, Liechtenstein, Uzbekistan, **Yakutia/Russia, Bashkiria/Russia**, Azerbaidjan, Latvia, **Adigea/Russia, Kabardino-Balkar Republic/Russia, Tatarstan/Russia, Tuba/Russia**);
c) Statutes (Afghanistan, Albania, Algeria, Angola, **Argentinean Province Tucuman**, Austria, Belgium, Benin, Bulgaria, Bolivia, Brazil, Cyprus, Czech Republic (+subsidiary power of the Supreme Court), Chile, Equatorial Guinea, Estonia, Egypt, Ecuador, Ethiopia, Philippines, Guatemala, Greece, Croatia, former Iraq, Italy, South Africa, South Korea, Kyrghyzia, Colombia, Comoros, Costa Rica, Cuba, Lithuania, Madagascar, Mauritius, Hungary, Macedonia, Malawi, Malaysia, Mauritania, Moldavia, Mongolia, Mozambique, Namibia, Panama, Paraguay, Peru, Poland, Russia, Syria, Slovakia, Slovenia, Sudan, Spain, Sri Lanka, Taiwan, Turkey, Ukraine, Uruguay, Venezuela, Zaire, Germany, Yemen, Kuwait, Georgia, Liechtenstein, Uganda, Tadjikistan, **Bosnia and Herzegovina, Serbian Republic of Bosnia**, Cambodia, Uzbekistan, Azerbaidjan, Armenia, **Yakutia/Russia, Bashkiria/Russia**, Eritrea, Latvia, FRY, **Serbia/FRY, Montenegro/FRY, Buryatia/Russia, Saarland/Germany, Rheinland-Pfalz/Germany, Nordrhein-Westfalen/Germany, Baden-Wuerttemberg/Germany, Bayern/Germany, Berlin/Germany, Hamburg/Germany, Hessen/Germany, Niedersachsen/Germany, Adigea/Germany, Tuba/Russia, Tatarstan/Russia, Northern Ossetia/Russia, Koma/Russia, Dagestan/Russia, Irkutska Oblast/Russia, Karelia/Russia, Kabardino-Balkar Republic/Russia**);
c1) Resolutions of the Parliament (Latvia);
d) Regulations (Afghanistan, Albania, Angola, Austria, Czech Republic, Egypt, Ecuador, Philippines, Guatemala, South Africa, Lithuania, Hungary, Madagascar, Mauritania, Moldavia, Mongolia, Mozambique, Poland, Russia,

Slovakia, Slovenia, Ukraine, Yemen, Kuwait, Georgia, Liechtenstein, Tadjikistan, **Serbian Republic of Bosnia**, Uzbekistan, Azerbaidjan, Armenia, **Yakutia/Russia**, Eritrea, Latvia, **Tucuman/Argentina**, FRY, **Serbia/FRY, Montenegro/FRY, Adigea/Russia, Buryatia/Russia, Tatarstan/Russia, Northern Ossetia/Russia, Dagestan/Russia, Irkutska Oblast/Russia, Karelia/Russia, Kabardino-Balkar Republic/Russia, Koma/Russia**);
e) Acts of the President of the State (Algeria, **Argentinean Province Tucuman**, Bulgaria, Philippines, Lithuania, Madagascar, Moldavia, Mongolia, Russia, Ukraine, Yemen, Georgia, Tadjikistan, Uzbekistan, Azerbaidjan, **Yakutia/Russia, Bashkiria/Russia**, Armenia, Latvia, **Adigea/Russia, Buryatia/Russia, Northern Ossetia/Russia, Tatarstan/Russia**);
f) Rules and other acts of the national administrative units (federal member states, (autonomous) provinces, local communities, *etc*.) (Cyprus, Slovakia, Slovenia, Spain, Russia, Ukraine, Georgia, Tadjikistan, Uzbekistan, **Yakutia/Russia, Bashkiria/Russia**, Azerbaidjan, Latvia, FRY, **Serbia/FRY, Buryatia/Russia, Dagestan/Russia, Irkutska Oblast/Russia, Karelia/Russia, Koma/Russia, Northern Ossetia/Russia**);
g) Proclaimed regulatory measures of the statutory authorities (Slovenia);
h) Other rules (Austria, Bolivia, Philippines, Croatia, Congo, Madagascar, Hungary, Macedonia, Mali, Poland, Slovakia, Slovenia, Turkey, Uganda, Tadjikistan, **Serbia/FRY, Kabardino-Balkar Republic/Russia, Northern Ossetia/Russia**);
i) Conformity of the national legal norms with the international agreements (Latvia, Slovenia, Albania, Bulgaria, Hungary, Czech Republic, Slovakia, FRY)
j) Regional agreements/agreements of Member State closed with the Federal State (**Buryatia/Russia, Dagestan/Russia, Irkutska Oblast/Russia, Karelia/Russia, Kabardino-Balkar Republic/Russia, Koma/Russia**).

2. CONCRETE REVIEW - SPECIALIZED CONSTITUTIONAL/JUDICIAL REVIEW BODIES REQUESTED BY THE ORDINARY COURTS (Austria, Bulgaria, Cyprus, Czech Republic, Estonia, Ethiopia, Gabon, Croatia, Italy, South Africa, South Korea, Kyrghyzia, Costa Rica, Cuba, Lithuania, Madagascar, Hungary, Malaysia, Malta, Panama, Paraguay, Poland (indirect request by ordinary Court transmitted through the privileged petitioner - government body), Romania, Russia, Slovenia, Spain, Thailand, Taiwan, Uruguay, Germany, Iran, Georgia, Kazakhstan, Cambodia, Azerbaidjan, **Yakutia/Russia, Bashkiria/Russia**, **Bayern/Germany, Bremen/Germany, Hamburg/Germany, Niedersachsen/Germany, Buryatia/Russia, Adigea/Russia, Dagestan/Russia, Karelia/Russia, Koma/Russia**);

III INTERPRETATION OF THE RULE (the interpretative function)
1. CONSTITUTION (Albania, Bulgaria, Ethiopia, Gabon, former Iraq, Kyrghyzia, Hungary, Madagascar, Moldavia, Namibia, Papua New Guinea, Russia, Slovakia, Sudan, Sri Lanka, Taiwan, Zaire, Germany. Uganda, Kazakhstan, Cambodia, Uzbekistan, Azerbaidjan, Eritrea, **Yakutia/Russia, Bashkiria/Russia, Adigea/Russia, Buryatia/Russia, Dagestan/Russia, Irkutska Oblast/Russia, Koma/Russia**);
2. STATUTES AND OTHER RULES (Egypt, Equatorial Guinea, France, Indonesia, former Iraq, Madagascar, Poland, Sudan, Taiwan, Cambodia, Azerbaidjan, Uzbekistan, **Dagestan/Russia (in relation to the federal legislation)**);

IV IMPLEMENTATION OF THE RULE - decision-making on matters relating to the conformity of its implementation with the Constitution (Ecuador, Philippines, Russia, **Bashkiria/Russia, Rheinland-Pfalz/Germany, Irkutska Oblast/Russia, Kabardino-Balkar Republic/Russia, Tuba/Russia**);

V VALIDITY OF THE RULE (Germany);

VI OMISSION OF THE (STATUTORY) REGULATIONS - LEGAL GAPES (Brazil, Italy, Hungary, Portugal, Uganda);

VII (CITIZEN'S) LEGISLATIVE INITIATIVE
1. Citizen's Initiative (Austria, Hungary, Romania, Spain);
2. Own (the Constitutional Court) Initiative (**Yakutia/Russia, Bashkiria/Russia, Adigea/Russia, Buryatia/Russia, Karelia/Russia, Dagestan/Russia, Kabardino-Balkar Republic/Russia, Koma/Russia, Northern Ossetia/Russia, Tatarstan/Russia, Tuba/Russia**)

VIII JURISDICTIONAL DISPUTES
1. BETWEEN TOP GOVERNMENT BODIES (Albania, Bulgaria, Gabon, Italy, South Africa, South Korea, Madagascar, Macedonia, Mali, Mongolia, Mozambique, Peru, Russia, Slovakia, Slovenia, Spain, Taiwan, Ukraine, Germany, Georgia, Tadjikistan, Kazakhstan, **Serbian Republic of Bosnia**, Azerbaidjan, **Bashkiria/Russia**, FRY, **Buryatia/Russia, Adigea/Russia, Saarland/Germany, Nordrhein-Westfalen/Germany, Baden-Wuerttemberg/Germany, Bayern/Germany, Berlin/Germany, Bremen/Germany, Hamburg/Germany,**

Hessen/Germany, Niedersachsen/Germany, Tatarstan/Russia, Koma/Russia, Kabardino-Balkar Republic/Russia, Dagestan/Russia, Irkutska Oblast/Russia, Karelia/Russia);
2. BETWEEN THE STATE AND REGIONAL OR LOCAL UNITS (Albania, Austria, Bulgaria, Brazil, Czech Republic (+subsidiary power of the Supreme Court), India, Italy, South Africa, South Korea, Madagascar, Hungary, Macedonia, Malaysia, Mexico, Nigeria, Pakistan, Russia, Slovenia, Spain, Switzerland, Ukraine, Germany, **Bosnia and Herzegovina, Serbian Republic of Bosnia, Yakutia/Russia, Bashkiria/Russia,** FRY, **Montenegro/FRY, Adigea/Russia, Buryatia/Russia, Dagestan/Russia, Irkutska Oblast/Russia, Karelia/Russia, Koma/Russia, Tatarstan/Russia**);
3. BETWEEN LOCAL OR REGIONAL UNITS (Austria, Bolivia, Brazil, Italy, South Africa, South Korea, Mexico, Nigeria, Peru, Russia, Slovenia, Spain, Switzerland, Ukraine, Germany, **Bosnia and Herzegovina, Bashkiria/Russia, Tucuman/Argentina,** FRY, **Montenegro/FRY, Buryatia/Russia, Irkutska Oblast/Russia, Karelia/Russia, Koma/Russia, Tatarstan/Russia**);
4. BETWEEN THE COURTS AND OTHER GOVERNMENT BODIES (Austria, Egypt, Greece, Slovenia, Thailand, **Tucuman/Argentina, Serbia/FRY, Montenegro/FRY**);
5. OTHER SPECIFIC JURISDICTIONAL DISPUTES (Austria, Cyprus, Croatia, Hungary, Ukraine, Yemen, **Yakutia/Russia, Tucuman/Argentina**);
6. BETWEEN THE CONSTITUTIONAL COURTS OF THE MEMBER STATES OF FEDERATION (FRY)

IX POLITICAL PARTIES - decision-making related to matters of unconstitutional acts and activity (Albania, Bulgaria, Burkina Faso, Czech Republic, Chile, Croatia, South Korea, Macedonia, Moldavia, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Germany, Georgia, **Serbian Republic of Bosnia,** Azerbaidjan, Armenia, **Yakutia/Russia, Bashkiria/Russia, FRY, Serbia/FRY, Montenegro/FRY**);

X REFERENDUM, decision-making regarding its conformity with the Constitution (Algeria, Austria, Burkina Faso, Chile, Ethiopia, France, Gabon, Greece, Croatia, Congo, Madagascar, Hungary, Mali, Mauritania, Moldavia, Mongolia, Mozambique, Portugal, Romania, Senegal, Ivory Coast, Slovakia, Zaire, Georgia, Kazakhstan, Armenia, **Montenegro/FRY, Berlin/Germany, Hessen/Germany, Nordrhein-Westfalen/Germany, Saarland/Germany**);

XI ELECTIONS, decision-making regarding the conformity of (election) proceedings with the Constitution and the Statute (Albania, Algeria, Austria, Bulgaria, Burkina Faso, Cyprus, Chad, Czech Republic, Djibouti, Ecuador, Equatorial Guinea, France, Gabon, Greece, Croatia, Kyrghyzia, Comoros, Lithuania, Congo, Madagascar, Mali, Malta, Mauritania, Mauritius, Moldavia, Mongolia, Morocco, Mozambique, Namibia, Nigeria, Portugal, Romania, Senegal, Syria, Ivory Coast, Slovakia, Togo, Zaire, Germany, Yemen, Georgia, Kazakhstan, Cambodia, Armenia, **Tucuman/Argentina**, FRY, **Serbia/FRY, Montenegro/FRY, Baden-Wuerttemberg/Germany, Bayern/Germany, Berlin/Germany, Hamburg/Germany, Niedersachsen/Germany, Nordrhein-Westfalen/Germany, Rheinland-Pfalz/Germany, Saarland/Germany**);

XII CONFIRMING OF ELECTION DEPUTIES (Austria, Bulgaria, Chile, Greece, Mongolia, Slovakia, Slovenia, Ukraine, Germany, Georgia, Kazakhstan, **Baden-Wuerttemberg/Germany, Bayern/Germany, Berlin/Germany, Hamburg/Germany, Niedersachsen/Germany, Nordrhein-Westfalen/Germany, Saarland/Germany**);

XIII PROTECTION OF HUMAN RIGHTS (the constitutional complaint and similar constitutional remedies)
1. HUMAN RIGHTS' PROTECTION (Albania, Andorra, Austria, Benin, Brazil, Cyprus, Czech Republic, **Montenegro/FRY**, Croatia, South Africa, South Korea, Kyrghyzia, Colombia, Hungary, Macedonia, Mali, Malta, Mauritius, Moldavia, Mongolia, Papua New Guinea, Russia, Senegal, Syria, Slovakia, Slovenia, Sudan, Spain, Switzerland, Taiwan, Ukraine, FRY, Germany, Israel, Georgia, Liechtenstein, Azerbaidjan, Uzbekistan, **Bashkiria/Russia, Tucuman/Argentina, Buryatia/Russia, Adigea/Russia, Bayern/Germany, Berlin/Germany, Bremen/Germany, Hessen/Germany, Saarland/Germany, Kabardino-Balkar Republic/Russia, Dagestan/Russia, Karelia/Russia, Koma/Russia**);
2. CONSTITUTIONAL COMPLAINT REQUESTED BY THE COMMUNE (Czech Republic, **Germany, Baden-Wuerttemberg/Germany, Nordrhein-Westfalen/Germany**);
3. CITIZEN'S LEGISLATIVE INITIATIVE (Spain, **Saarland/Germany**);
4. NATIONALISATION (**Rheinland-Pfalz/Germany, Saarland/Germany**);

XIV CAPACITY FOR OFFICES
1. PRESIDENT OF THE STATE (Algeria, Bulgaria, Cyprus, Equatorial Guinea, Croatia, Kyrghyzia, Lithuania, Mauritania, Moldavia, Mozambique, Portugal, Romania, Kazakhstan, Azerbaidjan, Armenia, **Yakutia/Russia, Bashkiria/Russia, Adigea/Russia**);

2. OTHER STATE REPRESENTATIVES (Bulgaria, Cyprus, Russia, **Yakutia/Russia**);

XV IMPEACHMENT
1. PRESIDENT OF THE STATE/OF THE MEMBER STATE OF FEDERATION (Albania, Algeria, Austria, Bulgaria, Bolivia, Czech Republic, Chile, Croatia, Italy, Colombia, Madagascar, Hungary, Macedonia, Mongolia, Namibia, Russia, Senegal, Ivory Coast, Slovakia, Slovenia, Turkey, Ukraine, Germany, Georgia, Kazakhstan, Azerbaidjan, Armenia, Eritrea, **Yakutia/Russia, Bashkiria/Russia, Montenegro/FRY, Adigea/Russia, Buryatia/Russia, Dagestan/Russia, Irkutska Oblast/Russia, Karelia/Russia, Koma/Russia, Tatarstan/Russia**);
2. OTHER STATE REPRESENTATIVES (Austria, Bulgaria, Bolivia, Italy, South Korea, Comoros, Lithuania, Mongolia, Slovenia, Taiwan, Turkey, Ukraine, Georgia, **Tucuman/Argentina, Baden-Wuerttemberg/Germany, Bayern/Germany, Bremen/Germany, Niedersachsen/Germany, Nordrhein-Westfalen/Germany, Rheinland-Pfalz/Germany, Saarland/Germany, Dagestan/Russia, Karelia/Russia, Koma/Russia**);

XVI POWERS OF SPECIAL CHARACTER (violations of international law, decision-making on matters relating to the appointment of the constitutional judges and their immunity, opinions relating to the declaration of martial law, implementation of decisions taken by the international Courts, proposal for the amendment of the Constitution, consultative function, *etc.*) (Afghanistan, Algeria, Austria, Bulgaria, Cyprus, Chad, Czech Republic, Egypt, Ecuador, France, Cuba, Mauritania, Moldavia, Russia, Ivory Coast, Spain, Germany, Cambodia, Uzbekistan (dissolution of the Parliament, approval of the President decision), Armenia; **Berlin/Germany (membership in the *Richterwahlausschuss*)**; **Hamburg/Germany (Deputies Rights)**);

XVII OTHER TASKS which the Court is charged with by the Constitution or the Statute (Chile, Ecuador, Croatia, South Africa, Macedonia, Portugal, Slovenia, Spain, Turkey, Ukraine, Germany, Georgia, Tadjikistan, Uzbekistan, Azerbaidjan, **Bashkiria/Russia, Montenegro/FRY, Baden-Wuerttemberg/Germany, Bayern/Germany, Berlin/Germany, Hamburg/Germany, Hessen/Germany, Niedersachsen/Germany, Nordrhein-Westfalen/Germany, Rheinland-Pfalz/Germany, Adigea/Russia, Dagestan/Russia, Koma/Russia, Tuba/Russia**).

Particular Components of the Constitutional Review:

IN PREVENTATIVE (*A PRIORI*) REVIEW of constitutional provisions, international agreements signed by a particular state, statutes and other legislative measures, regulations and some other rules - the constitutional/judicial review body has in fact a consultative function, when on demand of a petitioner (mostly privileged government bodies) it discusses a rule and passes the corresponding decision prior to its promulgation or its enforcement. Such power is held by the Constitutional Court of Italy with reference to the provincial statutes; by the Constitutional or High Courts of Austria, Germany, Chile; (especially) by African systems following the French model; by Portugal, Ireland, Finland, Cyprus, Hungary, Romania, Syria, Turkey, Poland, Russia only with reference to certain statutes and till 1985 also by Spain. On the international level, this form of constitutional review was subject to much criticism; in particular on the occasion of the abolishment of preventative review in Spain numerous weaknesses were pointed out: that the Legislature neglects its own constitutional review, that in this way legislative procedure is delayed, that due to short terms this review is questionable anyway. The preventative review provided by the French Constitutional Council applies mainly to statutes. Except for France and certain African states, which are not familiar with repressive review of laws and regulations, but practice wide preventative review of statutes, no state has adopted any pure system of preventative review.

THE REPRESSIVE (*A POSTERIORI*) REVIEW is applicable to the rules in force and has been adopted by most systems. Certain systems, however, tend to combine the essentially repressive review with preventative review of the international agreements signed by the particular state; a few other systems, again, practice a combination of preventative and repressive review of other rules (Cyprus, Romania). The repressive review may be abstract or

specific. In individual systems both forms may appear individually or jointly. The abstract (direct) review may refer to constitutional provisions, international agreements signed by a particular state, statutes, regulations, presidential decrees, legislative measures and other rules of administrative units as well as to some other categories of rules. It may be introduced independently of the proceedings in a specific case, on the basis of the applications lodged by specially qualified petitioners. The abstract review is, in comparison with other forms, less frequent; its importance lies in the fact that it deals with theoretical questions relating to constitutional law. The constitutional judge is concerned only with the question of constitutionality of the rule as the main dispute; it may involve the cassation of an unconstitutional rule or a declaratory dispute. The latter may also be of preventative character. The cassation itself may have an *ex tunc* effect (annulment, setting aside) or an *ex nunc* effect (abrogation). Hence, the cassation (of statute) involves two versions: from the point of view of authority of statute and the principle of notice, cassation of statute is supposed to take effect only from the adoption of the decision of the Constitutional Court onwards - *ex nunc* effect (Austria). An abrogated statute represented the legal basis for issuing of individual acts all till the abrogation. From the point of view of the standing of the aggrieved citizens (parties), the principles of equity and legality, the cassation of a statute is supposed to function retrospectively from the time of adoption of the of rule - *ex tunc* (Germany) - an unconstitutional statute cannot have any legal effect at all and it is necessary to "repair" everything that had been done on the grounds of an unconstitutional statute. The decision taken by the Constitutional Court has a retroactive effect going back to the adoption of the rule, as if the rule were erased from the legal system. The nullity of such act is identified by the Constitutional Court only in a declaratory way. Nevertheless, this nullity cannot negate that the respective statute was in force for a certain time and that legal affairs were regulated on the respective basis. In both cases individuals have the possibility to require the modification of individual acts issued on the respective basis.

THE SPECIFIC (CONCRETE, INDIRECT, ACCESSORY) REVIEW of rules arises out of the proceedings in process before the ordinary Court which, however, has to be convinced about the unconstitutionality of a certain rule (Germany), or the Court's doubt about the unconstitutionality of the rule shall not be obviously unfounded (Italy). This approach envisages judicial review by a ordinary Court whereby the Constitutional Court is relieved of its task (the character of prejudicial question). The consequence of this review is that an unconstitutional rule (statute) is not applied to a specific dispute (exception of unconstitutionality). The accessory constitutional review of a statute is rooted in the American system wherefrom it spread particularly into certain states of the American continent and elsewhere. With specific constitutional review the Constitutional Court makes decision concerning the constitutionality and legality of legal measures as about a prejudicial question and not about an disputed individual act, as it is the case with constitutional complaint.

There is an essential difference between the decisions taken by the Constitutional Courts in Europe and those of Anglo-American type. The former are taken "impersonally" by the Court as a whole, whereas in the latter individual judges make their personal contribution. In the first case the decision itself does not show whether it was adopted unanimously or by majority of votes; moreover, it is absolutely not clear for which decision individual judge actually voted. In the second case, however, it is not only evident what majority and consent a decision was adopted with and how individual judges voted, but the judges who did not agree

with the majority, add their interpretation of the decision, that can be the so-called:
- a **concurring opinion**, when a judge agrees with the ruling (holding) but differs as to its reasons, or
- a **dissenting opinion**, when a judge objects to the ruling (holding) itself.

At the beginning the dissenting/concurring opinion was recognised only in the USA as well as in other Common Law based or American tradition based states of the Commonwealth, Central and South America, Scandinavia and Japan. After many scientific and political objections the dissenting/concurring opinion became gradually accepted in the states with Continental (European) legal systems. Though individual European systems of constitutional/judicial review departed from the decision-making mode characteristic for the Austrian model, they remained half-way to the American type of decision that introduces the dissenting/concurring opinion into a Constitutional Court decision.

As far the publication is concerned a distinction may be made between two types of dissenting/concurring opinions:
- open, published together with the respective decision;
- anonymous, only added in writing to the internal part of the case.

Some constitutional judicial review systems do not accept dissenting/concurring opinions but keep the voting results secret, without publishing either the voting result or the names of judges[48]. The dissenting/concurring opinion is known above all in Germany, Spain, Portugal, Greece, Slovenia, Croatia and Hungary. In Portugal, however, the publication of votes including names is a matter of judicial tradition because the decisions taken by the Constitutional Court strictly include names also. On the other hand, much attention is aroused by the frequent occurrence of the dissenting/concurring opinion in Spain where this institute appears in both forms (dissenting opinion, concurring opinion). The dissenting/concurring opinion is, however, not recognised by the Court of Justice of the European Community in Luxembourg, but is recognised by the European Commission and by the European Court of Human Rights in Strasbourg.

The extent of powers of constitutional/judicial review bodies is as follows: in the traditional approach the constitutional review body has no positive power in relation to the Legislature. It may only be a negative Legislature, whereas the role of a positive Legislature is reserved for the Parliament. However, the negative powers of the Constitutional Court in relation to the Legislature are also subject to certain limits, whereby the function of cassation of constitutional justice is limited to the benefit of certain rights reserved for the legislative and the executive power (*e.g.* the principle of judicial self-restraint, the political question doctrine).

Today, however, the decision-making of constitutional justice is no more limited to the mere function of cassation and the so-called positive decisions taken by the Constitutional Courts are gradually gaining their importance:

- One of these forms involve APPELLATE DECISIONS (Germany, USA), in which the Constitutional Court appeals to the Legislature (explicitly or implicitly, with or without time limit) to adopt certain regulations in the respective domain. Recently certain states even imposed special provisions regarding the right of constitutional/judicial review bodies to

[48] *e.g.* Italy, Austria, France, Belgium, Ireland

appeal to the Legislature. Such "positive" authorization of constitutional justice in a rather narrow form is known in the German, Austrian and Polish systems, even more intensely in the Italian, Portuguese, Hungarian and Brazilian systems of the constitutional/judicial review. The Portuguese Constitutional Court is provided with an express constitutional authorization to identify the existence of unconstitutionality due to OMISSION (LEGAL GAPES). This does not involve the fact that the proceedings of abstract review of rules reveals legislative omission due to insufficient or incorrect solution of a specific issue, but aims at direct and independent evaluation and identification of omission caused by the Legislature. The typical nature of the *Portuguese Constitution*, which imposes upon the Legislature the obligation of legislative activity, has influenced the fact that the Portuguese Constitutional Court actually acquired such power. Considering the sensitive nature of this power the Constitutional Court can only be active in the respective domain on the basis of the role of a narrow circle of legitimate petitioners. Hungarian Constitutional Court, too, has jurisdiction to eliminate the unconstitutional situation developed due to the omission caused by a government body; the proceedings is possible upon the initiative of the Constitutional Court alone or on the proposal of any government body or aggrieved person. The Brazilian constitutional/judicial review system knows a special abstract complaint due to omission whereby government bodies, political parties represented in the Parliament and political organisations act as the main legitimate petitioners of the proceedings. At the same time this system knows a special individual complaint against the omission caused by the Legislature (*mandado de injuncao*). The Italian constitutional review system is above all characterized by the so-called CREATIVE DECISIONS with which the Constitutional Court may even change or add the wording of the regulation in question.

- Another form of decision-making are the guidelines given by the constitutional/judicial review; such GUIDELINES FOR THE FUTURE ACTION OF THE LEGISLATURE, THE GOVERNMENT AND THE ADMINISTRATION may include appellate decisions, partly also other decisions (decisions of abrogation, decisions of annulment, possibly also declaratory decision relating to conformity with the *Constitution*). Sometimes such decisions already clearly indicate the essential point of the legal regulation, so that the Legislature has only to elaborate the details and to provide for official adoption of the statute. This phenomenon is sometimes even referred to as negative legislative activity of Constitutional Courts or as paralegislative or superlegislative activity of the modern Constitutional Courts. Nevertheless, from a global point of view, positive decisions of constitutional justice are of substitutional character. The extent of this function is proportional to the intensity with which constitutional rights are affected.

- Decisions on unconstitutionality with reservation or with interpretations created by the Constitutional Court itself (INTERPRETATIVE DECISIONS). In these decisions the Constitutional Court secures with its own interpretation that in the future the implementation of the statute complies with the *Constitution*.

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