

Chapter 2

Constitutional Courts in Search of Legitimacy

As Robert A. Dahl has observed,

There is necessarily an inverse ratio between the authority of the quasi guardians¹ and the authority of the demos and its representatives. ... Even if the authority of the guardians were restricted solely to certain questions of fundamental rights and interests, on these matters the demos would necessarily alienate its control. ... The broader the scope of rights and interests subject to final decision by the quasi guardians, the narrower must be the scope of the democratic process.²

This commonsensical observation illustrates immediately the nature of the fundamental dilemma related to the legitimacy of “quasi guardians”, i.e., constitutional courts, when exercising the power to invalidate democratically enacted laws on the basis of their own understanding of constitutional rights.

The nature of this dilemma, and various different attempts to address and resolve it, will be discussed in some detail later in this chapter. I will begin by outlining the contours of the problem, focusing on what is at stake in the controversy over the legitimacy of judicial review, namely, the perception of the objectivity of ascertaining the “true” meaning of constitutional norms, and the decision as to the best possible institutional devices in terms of gaining access to that objectively valid meaning. I will then examine a certain paradox faced by constitutional courts, namely, that their best means of defending their legitimacy to articulate the meaning of constitutional norms lies in conceiving of themselves as quasi-legislative institutions, a characterisation that the courts themselves strenuously resist. I then revisit the reasons normally provided in support of the introduction of an abstract/concentrated (“Kelsenian”) system of judicial review in the post-Communist states of CEE, and trace the legitimacy dilemma to the insufficiency of these grounds to supply convincing arguments in favour of such a system. One rationale, however, stands apart

¹ By “quasi guardians” Dahl means the officials charged with the protection of fundamental rights and interests who are not themselves democratically controlled – such as the judges endowed with the power to declare legislation unconstitutional.

² Robert A. Dahl, *Democracy and Its Critics* (Yale University Press: New Haven, 1989) at 188.

from the others, and thus deserves more serious consideration: the suggestion that constitutional courts as set up in CEE are protectors of minorities and minority rights. The status of this argument will be considered at the end of this chapter.

2.1 The Legitimacy Dilemma

The standard defence of the legitimacy of constitutional judicial review proceeds on the basis of the very nature of constitutionalism: it is seen as a deliberately counter-majoritarian device, i.e., as a constitution-based constraint upon the majority rule exercised by parliament or, as the case may be, through mechanisms of direct democracy. From this perspective, an external, extra-majoritarian institution is required to make sure that the behaviour of the elected branches of government is in conformity with constitutional constraints. With respect to constitutional rights, the argument appeals to the need to observe rights as a democratic demand in itself, no less important than the need to give effect to majority preferences. As Alec Stone Sweet has aptly summarized: “A precept of the new constitutionalism is that regimes are not democratically legitimate if they do not constrain majority rule through rights and review”.³ The reconciliation of majoritarian politics with respect for rights is achieved by the counter-balancing of parliamentary rule with the power of the constitutional court to invalidate legislation. So the standard argument goes.

An obvious response to the standard argument as a justification for judicial review is to argue that the very meaning of rights, as applied in specific circumstances, is a matter of deep controversy within society, and that this controversy may be replicated, rather than resolved, in cases of disagreement between a majority of parliament and a majority of the constitutional court: why privilege the latter by giving it the last word on the meaning of rights? Moral disagreement among reasonable persons of good faith about the correct articulation of rights seems to indicate that there is no “canonical” meaning of any particular rights, and that they are merely shorthand ways of referring to a bundle of entitlements that correspond to certain values. As people disagree about the proper balancing of those values, they will also disagree as to the “correct” meaning of any particular right, even though they may all agree about the worth of a “right” when stated in its abstract, and necessarily vague, constitutional form. From this perspective, any decision to empower constitutional courts to invalidate statutes under the rights provisions of the constitution is seen, at best, as a pragmatic institutional arrangement, but which is *prima facie* questionable because it needs to defeat the arguments that privilege the legitimacy of parliaments to issue the laws for the societies that they represent. This is not to say that judicial review cannot be defended on the basis of a non-objectivist

³ Alec Stone Sweet, “Constitutional Courts”, in Michel Rosenfeld and Andras Sajó, eds., *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press: Oxford 2012): 816–30 at p. 828.

theory of rights (that is, a theory that denies the existence of a canonically correct articulation of rights); only that it must proceed in a pragmatic rather than a principled fashion, that is, it must appeal to the institutional qualities of the relevant bodies entrusted with the power to pronounce the “last word” on the articulation of a constitutional right. In addition, the argument for judicial review from this theoretical perspective must overcome particularly high argumentative hurdles resulting from a general presumption in favour of the paramount authority of parliaments.

Judicial review is, however, usually supported by an objectivist theory according to which the correct meaning of rights is objectively discernible by human reason, with the correct institutional incentives optimising the circumstances in which the ascertainment of the right meaning is likely. As an example, consider the following description of a “moral realist” judge offered by Michael Moore:

When a moral realist judge today invalidates the expression of majority will that a statute presumptively represents, he does so in the name of something beyond his power to change and beyond the power of a societal consensus to change. . . His justification for judicial review is straightforward, and so is his mode of practising it: he will seek to discover the true nature of the rights referred to by building the best theory he can muster about the nature of equality, the nature of liberty, etc.⁴

There is an air of circularity in Moore’s reasoning: he opts for a “moral realist” account as one which “can make sense of some of our adjudicatory practices”⁵ in a way that competing theories cannot. Consequently, some of our practices (including the practice of judicial review) are used to argue for moral realism (because in the absence of moral realism they would not be defensible); but, on the other hand, it is moral realism that supports those very practices because, if the rights can be discerned at the level of objective moral reality,⁶ then judicial review acquires its much needed legitimacy. In other words, if rights exist independently of the mind, and at the same time they form a part of a valid (legitimate) constitutional system, then the body that can best access this reality is *eo ipso* legitimate.

If, on the other hand, we adopt a position that may be called “constructivist”, that is, that there is no objective articulation of general rights available to human reason but rather that such articulations are constructed in political practice, then the argument for strong judicial review is much more difficult to sustain. From this standpoint, it is not appropriate to show that courts are in a better position to grasp the “correct” meaning of constitutional rights, precisely because this very meaning is constructed through social practice and validated in a discourse on fundamental values for which rights themselves are simply a shorthand formulation. A constructivist who also favours judicial review needs to show why, in such a discourse, the courts should have the last word (or nearly the last word, subject to the possibility of constitutional amendment). By contrast, the moral realist has an easier task: she will

⁴ Michael S. Moore, “Law as a Functional Kind”, in Robert P. George, ed., *Natural Law Theory: Contemporary Essays* (Oxford University Press: Oxford, 1992): 188–242 at 229.

⁵ *Id.* 229.

⁶ *Id.* 228.

discharge the burden of argument that the courts are legitimate in invalidating legislative choices as inconsistent with constitutional provisions of rights if she can make a compelling case that the institutional circumstances under which constitutional courts operate lend themselves better to the correct discernment of the objective meaning of rights. As these rights, in their abstract, constitutional formulation, are by definition legitimate (they are legitimate by virtue of the legitimacy of the constitution), so are those specific articulations of rights that are more likely to approximate the “correct” meaning in any given case. As moral realists believe in the existence of such objective correctness, it is clear that moral realism (even if only implicitly presupposed) is of great help in formulating an argument in favour of judicial review.

The dominant discourse about constitutional rights in CEE reveals an implicit adoption of a moral realist position, whereby the constitutionality or otherwise of a particular piece of legislation can be shown with a high degree of confidence, supported by an “objective” reality of rights. Such an understanding is presupposed, at least implicitly, by those who argue for strong powers of judicial review for constitutional courts. Consider, as partial evidence, the debate in Poland surrounding the power of the parliament to override, by qualified majority, the invalidating decisions of the Constitutional Tribunal; the power that existed until the 1997 Constitution put an end to it.⁷ Not surprisingly, the Constitutional Tribunal (and the supportive academic writers) was openly hostile to the override power of the Parliament. At the stage of constitutional drafting, the justices of the Tribunal often demanded the abolition of this legislative capacity, and then warmly applauded its eventual discontinuation. What is significant here is the type of contention that was put forward in demanding the abolition of the parliamentary override: the dominant argument was that such a practice rendered it possible for “unconstitutional” laws to be reaffirmed by the legislature as valid. The argument did not concern the comparative institutional advantages gained by allowing the court to resolve disagreement over the proper meaning of constitutional rights; rather, it took for granted that the very fact that a law had been declared unconstitutional by a Court was conclusive evidence of its “objective” unconstitutionality. In a statement typical of that debate, the Chief Justice of the Polish Constitutional Tribunal, Professor Marek Safjan, declared (after the constitutional possibility of a legislative override has been already terminated) that it was ironic that, in a state that recognised the supremacy of the Constitution and its binding character upon all state institutions, “the parliament [could] affirm the validity the laws which are inconsistent with the Constitution”; he thus applauded the discontinuation of the override possibility as “a final victory of the Constitution over politics and recognition that nothing can

⁷ The 1997 Constitution provided a two-year transitional period during which the decisions of the Constitutional Tribunal on the unconstitutionality of laws enacted under the old Constitution could be overridden by parliament; this possibility expired definitively on 17 October 1999.

justify keeping unconstitutional legal provisions within the legal system”.⁸ This view can be held only if we assume that the meaning of constitutional provisions (including rights provisions) is discernible in an objective fashion,⁹ so that we can declare with certainty what is and what is not unconstitutional. This in turn presupposes an approach based upon moral realism.

Incidentally, we may note that the recourse to objectivism (that is, to the notion that there is a stable meaning of constitutional provisions that is accessible through legal interpretation and that transcends actual moral disagreement over conceptions of the good) is a universal argumentative device used by courts all over the world, and that it is a very important ingredient of the self-legitimizing rhetoric employed by the judiciary. The German Federal Constitutional Court has long declared that constitutional guarantees of the rights contained therein rely upon “eine objektive Wertordnung”: an objective order of values.¹⁰ Courts – and in particular constitutional courts – make frequent appeal to such notions in order to distinguish themselves from political institutions, the latter embroiled as they are in moral and political battles, and to gain support for the authority of their decisions. In a comprehensive study on social support for the highest courts in different countries, James Gibson and his collaborators establish beyond any doubt that the popularity of courts increases as public knowledge of them grows.¹¹ The explanation that Gibson et al. provide is that, while “ordinary people who know little about courts have few reasons to believe that judges make decisions differently from any other politicians”, in contrast, those who are attentive to courts adopt a different view, which is not, however, the view of legal realists: “Greater awareness is associated with the perceptions that judges are different, that they rely on law not values in making decisions, that they are ‘objective’”.¹² This view, which of course contributes significantly to the legitimacy of the courts, is largely learnt from the courts themselves: those who support the judiciary do so largely because they are “exposed to a series of legitimizing messages focused on the symbols of justice, judicial objectivity, and impartiality”.¹³ Therefore, at the level of public opinion, as at the level of argumentative structure, there is a strong link between an objectivist account of the judicial articulation of the constitution and the legitimacy of judicial review.

⁸ Marek Safjan, “Epitafium dla nieostatecznych orzeczeń”, *Rzeczpospolita* (Warsaw) 4 October 1999 at C-2.

⁹ Elsewhere, but still in the context of the same debate, Chief Justice Safjan claimed that the decisions of the Constitutional Tribunal conclusively put an end to emotional and politically charged debates “by appealing to objectified legal reasons, not to political criteria”, Marek Safjan, “Sąd ostateczny”, *Wprost* 17 October 1999 at 8 (emphasis added).

¹⁰ Quoted by Robert Alexy in “Constitutional Rights, Balancing, and Rationality”, *Ratio Juris* 16 (2003): 131–40 at 133.

¹¹ James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, “On the Legitimacy of National High Courts”, *American Political Science Review* 92 (1998): 343–58 at 344–45.

¹² *Id.* at 345, emphasis added.

¹³ *Id.* at 345.

However, to say that the argument for strong powers of judicial review is made easier by the acceptance of a (controversial and questionable) position of moral realism does not mean that such an argument is compelling. For even if we accept (for the sake of argument) that the correct meaning of abstract constitutional rights is discernible in an objective fashion, we still need to show what it is about constitutional courts that makes them more likely to discern the true meaning when they disagree with the parliament (or, more precisely, when a majority of the court disagrees with a majority of the parliament). There are two principal types of arguments that attempt to do this: a negative argument based on a distrust of legislatures, and a positive argument based on the deliberative nature of constitutional courts. These two arguments are independent of each other: the argument from distrust does not hinge upon the deliberative ideal (we can distrust an institution for reasons other than that it is non-deliberative), and, on the other hand, the expectation of deliberation is not necessarily based on the trust that perverse incentives will not affect a given institution.

I will return to the deliberation argument in Chap. 5 and here will address only the first argument. It is straightforward: it claims that we cannot expect our democratically accountable representatives (and those directly dependent on them) to produce a fair articulation of constitutional rights; and that it was precisely this distrust that provided the grounds for “constitutionalising” rights in the first place. The actual reasons for this distrust may have to do with various incentives that act upon the democratically accountable politicians and that are not conducive to the best articulation of vague constitutional rights. In particular, those incentives may favour the oppression of the minority by the majority, because there are not enough votes to be gained in supporting minority causes; and it is precisely the protection of minority against majoritarian oppression that constitutes one of the main rationales for constitutionalising human rights.¹⁴ (Note that, contrary to some simplistic interpretations, the argument from distrust is not a version of the “*nemo iudex in res sua*” precept, which is sometimes presented in the form that those who made the law should not sit in judgement on constitutionality thereof. The invocation of this principle in the context of scrutinising laws in abstracto in terms of constitutional rights is a mistake, for the reasons so convincingly identified by Jeremy Waldron).¹⁵

First of all, it needs to be noted that what matters is how trustworthy one institution (or one set of institutions) is compared to another institution (or another set of institutions) in its actual operations.¹⁶ It is no good to compare a realistic, unwholesome account of a legislature with an idealised model of a constitutional court.

¹⁴ See e.g. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press: Cambridge Mass., 1980): 135–79.

¹⁵ See Jeremy Waldron, “Precommitment and Disagreement”, in Larry Alexander, ed., *Constitutionalism: Philosophical Foundations* (Cambridge University Press: Cambridge, 1998): 271–99 at 280–81.

¹⁶ For an impressive statement and elaboration of the “comparative institutional” thesis, see in particular Neil K. Komesar, *Imperfect Alternatives* (The University of Chicago Press: Chicago, 1994).

Whether or not we can trust that one particular institution more than another will strive to articulate human rights, rather than pursue the self-interest of its members, depends on a great variety of factors. Most of them (though not all)¹⁷ are of an institutional character; that is, they are related to the formalised patterns of screening, selection, accountability, length of term, revocation etc. of those who people the institutions. For example, while a limited term in office with no possibility for reappointment may promote self-serving behaviour consisting of adjusting one's action to post-term career, a limited term with the possibility of re-appointment may promote the self-serving behaviour of trying to ingratiate oneself with those political agents (or citizens) who have the greatest influence on re-nomination and re-appointment. Similarly, life tenure may promote a disregard for changing social values and perceptions regarding the articulation of a particular right; specific professional or competence-related conditions for appointment may promote various types of *déformation professionnelle*; whereas transparency of official proceedings leading to an authoritative articulations of rights may increase the importance of good reputation (the avoidance of public shame) as a motive for behaviour and thus an impediment for self-serving conduct (but may also, under less favourable circumstances, engender demagoguery and quest for popularity); and so on. There is a long list of institutional variables that produce different types of incentives, each of which may produce dishonesty, self-serving conduct, myopia or irrationality. Different constellations of these institutional variables – different institutional designs – and their corresponding incentives may affect differently our judgment concerning the comparative “trustworthiness” of one institution vis-à-vis another; and there is no universal reason to believe that representative legislative institutions are necessarily affected by perverse incentive-creating factors to a higher degree than any extra-political institutions, such as constitutional courts.

In this context, it is useful to recall Philip Pettit's distinction between two different strategies in institutional design: the deviant-centred strategy and the complier-centred strategy. The former presupposes that people are likely to cheat whenever they can do so with impunity, and so the institutional design is focused on the elimination of pathologies; however, in the process, it fails to provide optimal incentives for the “non-knaves”.¹⁸ The complier-oriented design, on the other hand, presupposes a more optimistic view of human nature; namely, that most people are not knaves. Therefore, it tries to maximise the opportunities for valuable action, and, although it also provides for some sanctions against knaves, it does not focus all of its attention on the prevention and punishment of knavish action. These two strategies correspond to two very different sets of specific “screens” and “sanctions” (to use another useful distinction by Pettit) and, of course, both have their

¹⁷ There are also significant cultural factors, eg, the dominant social expectations concerning certain types of people who are encouraged to stand for election, or to apply for nomination to certain bodies. These cultural expectations are of course, themselves, partly determined by institutional factors (for example, by the procedures and formal criteria for election or nomination).

¹⁸ Philip Pettit, *Republicanism* (Oxford University Press: Oxford, 1997): 215–30.

advantages and disadvantages. It may be the case that within one and the same system, the relative proportion of deviant- v. complier-centred strategies varies from one institution to another, but these proportions will also vary from country to country. For example, election laws in different countries may reflect different approaches towards deviant- v. complier-centred strategies. As a result, in some countries we will have stronger reasons to suspect members of political institutions of behaving in a self-serving way, and weaker reasons for harbouring such suspicions in others. In any event, distrust is a more contingent basis for strong judicial review than many of its proponents seem to presuppose.

For consider: if we thought that the majority was inherently unable to respect and honour the legitimate interests of minorities and individuals (the interests that we consider as important enough to warrant their elevation to the position of constitutional rights), and that this is the reason why we need a counter-majoritarian body to ensure the legislative respect for constitutional rights, then we would be incapable of understanding how constitution-making (including the adoption of a bill of rights) is possible at all. After all, it is the majority that ultimately adopts the constitution – a qualified majority, and a majority acting in a special way, but a majority nonetheless.¹⁹ And if we never trusted the majority to be able to consider, in good faith, the legitimate interests of the minority, then we could never have a genuine bill of rights in the first place. If, on the other hand, there are some circumstances in which we can trust the majority to conduct proper rights determination (partly because we have no other choice), then this opens the way to trusting the majority in other circumstances as well – as long as these circumstances resemble to a significant degree the circumstances which supported the trust in the first place (i.e., the circumstances of constitution-making). It is true that there are important differences between constitution-making and ordinary lawmaking, but the differences are of degree rather than of kind. To draw a sharp contrast between the majority deliberating on the constitution and the majority deliberating on the statutes (including those which would impact upon constitutional rules) would be particularly suspect in those constitutional systems that have a recently adopted constitution, and therefore where the authors of the constitution are largely identical with the parliamentary law-makers.

We may, of course, retain a healthy scepticism as to the elected lawmakers' motivations when they vote in favour or against a particular rights-implicating statute. We may suspect, with a high dose of realism, that they do it not only, or not principally, because they genuinely believe that their vote is guided by the best interpretation of the constitutional right in question, but rather because they want to pander to their electorate (or comply with their party leaders who, in turn, want to pander to the party's electorate) in order to secure re-election. But this, in itself, is not the sort of distrust that should persuade us to look elsewhere for an institution (such as a constitutional court) that would be less susceptible to such perverse

¹⁹ See Jon Elster, "Majority Rule and Individual Rights", in Stephen Shute and Susan Hurley (eds.), *On Human Rights* (Basic Books: New York, 1993): 175–216 at 179–80, 192–93.

incentives, because what really matters is what type of motivations lie behind those electorates to whom the parliamentarians will “pander”: are they guided by their interests or by the values which underlie their understanding of rights? The answer is, both; but the motivations will vary from one area to another: voters may be more guided by their self-interest when it comes to tax law, and more by values when it comes to the law on abortion. In the latter case, the “pandering” to the electorate by the legislators assures an indirect impact of values upon the legislation; there is therefore no neat correlation between interest representation and the parliament on the one hand, and value-articulation and the court on the other.²⁰

2.2 Constitutional Courts Between the Judicial and Legislative Branch

As indicated in the Preface to this book, it is indisputable that the constitutional courts in the region discussed here enjoy a high level of social acceptance, despite occasional disagreements with and criticisms of particular decisions. They do not, therefore, have a problem with “legitimacy” in the sense of a general public acceptance of their authority to do what they are doing – including, the invalidation of statutes.²¹ Further, these courts do not have a problem of legitimacy in the formal and institutional sense of the term, which may be understood as compliance with the constitutionally recognized limits and working under constitutionally defined standards. They do not, as a matter of routine, exceed the powers granted to them by the respective constitutions, by the statutes on constitutional courts or by other relevant laws of their respective jurisdictions. Even if one disagrees, on the merits, with this or that decision, one must be careful not to frame the criticism in terms of a charge that the court acted *ultra vires*. The charge that a court decides on the (allegedly improper) grounds of the political or moral preferences of its judges, as opposed to the (allegedly proper) grounds of inconsistency with the constitution, is a statement that reflects, rather than stands outside of, the substantive disagreement as to the wisdom or otherwise of a particular decision. Whether the court’s decisions are genuinely based on constitutional principles rather than the judges’ own policies and moral values is in itself a controversial matter, and the level of this controversy is no different from the controversy of the wisdom (or otherwise) of any other political decisions.

To be sure, even if a constitution or a statute that governs a particular institution confers upon that institution very broad powers, it does not necessarily follow that the institution is always acting wisely by exploiting those powers to the limit – and

²⁰ See Jeremy Waldron, *Liberal Rights* (Cambridge University Press: Cambridge, 1993): 392–421.

²¹ Often this is the only sense in which “legitimacy” is used, especially when legitimacy of constitutional (and other) courts is discussed by political scientists; see, e.g., Gibson et al., *supra* note 11.

note that I am not suggesting at this point that the CEE courts behave in such a manner. The range of powers conferred by a constitution (or a statute) is in itself a matter for interpretation, and that interpretation may be narrow or expansive. But even the expansive interpretation of one's own limits does not run an institution into a serious legitimacy problem, in the institutional sense of legitimacy. It is a matter of wisdom, or prudence, but not of legitimacy. This is what Bruce Ackerman had in mind when, commenting on Justice Sólyom's perception of the role of his Court as a "free-floating problem-solver",²² he observed:

I cannot say that Solyom's conception is inconsistent with the enormous authority granted his court in its governing statute. The question is whether it is prudent to make use of power that will lead to political catastrophe. Surely, it is well within the court's capacity to construe its statutory jurisdiction narrowly.²³

And yet, from the mere fact that the court remains *intra vires* and does not violate the formal, institutional rules concerning the legitimacy of its decisions, it does not follow that the court's actions are unproblematic from the point of view of legitimacy in a broader, critical sense of the word. The question then becomes not: "Is the court authorized to take these types of decisions" but rather, "Should the court be authorized to take them?" Should the only precaution against the exercise of an "enormous authority" (to use Ackerman's words) be our faith in the judges' prudence? The question of the democratic legitimacy of an institution is not exhausted by the fact that the institution acts within the constitutionally established limits, and that the constitution itself has been enacted democratically; there is no contradiction in terms when one claims that a constitutionally and democratically established device is undemocratic.²⁴ It is a commonplace that a democratic procedure for establishing an institution does not necessarily confer a democratic character on the institution itself. A democratically established constitutional convention proceeding in a democratic manner may decide to establish a non-democratic, or imperfectly democratic, institution. The degree of democracy that the constitutional convention wishes to infuse into the institutions that it is about to set in motion is in itself a matter of free choice, if the convention is to be truly democratic. Of course, the distinction is not always as neat and as clear as the statement just made implies; for one thing, it builds upon a clear dichotomy between the constitution-making process and the political (or legislative) process.²⁵ Such dualism is not always easy to sustain in practice, as long as we understand the constitution not merely as a formal document reached at a particular point in time, but as a process whereby the true meaning of constitutional norms emerges from the practices, conduct and behaviour of various actors in a given constitutional polity. However, to the extent to which there is some dualism between constitutional and political rules, i.e. to the extent to which we can distinguish

²² Bruce Ackerman, *The Future of Liberal Revolution* (Yale University Press: New Haven, 1992) at 109. Note that this is Ackerman's wording, not Sólyom's.

²³ *Id.* at 143 n. 21.

²⁴ See Waldron, *supra* note 15 at 272–73.

²⁵ *Id.* at 273.

between the decisions made by various political actors and the rules by which those decision-making actors are bound, we can also talk about the distinction between the democratic pedigree of a rule (or system) and the democratic (or otherwise) content of such a rule (or system). And this is not just a matter of theorizing: it is obvious to any observer that a community may, as the result of democratically constituted debate, agree about the need to undertake undemocratic measures in some circumstances. The constitutional rules concerning various states of emergency are just one example of a structure which is non-democratic in character (and self-evidently so) but which may have been established democratically.

Just as there is no necessary connection between a democratic procedure for setting up an institution and the democratic character of that institution, so there is no necessary connection between the undemocratic nature of an institution and its illegitimacy. A central bank, a civil aviation authority, the army or a national opera company are not “democratic” institutions (and this is not merely in the sense of internal decision-making process, but, more importantly, in that their specific acts, or sometimes even whole sequences of acts, do not track the actual distribution of social preferences); this, however, does not render them illegitimate. More relevantly for our purposes here, ordinary courts are not, and are not meant to be, democratic institutions; and yet this fact, in itself, does not adversely affect their legitimacy. The main source of their legitimacy, as Martin Shapiro famously argued in his classic study on courts, derives from the “triadic” model in which two persons decide to call upon a third, neutral umpire, in order to resolve their disagreement.²⁶ Shapiro argued further that “the substitution of law and office for consent” which distinguishes courts par excellence from go-betweens, mediators and arbitrators, creates an important tension between the social logic of a triad (which is a source of legitimacy of a court) and the actual operations of particular courts.²⁷ In particular, Shapiro argues that the courts’ involvement in public law, their exercise of social control and their lawmaking functions significantly weaken their triadic, legitimising structure. And yet, it is Shapiro’s thesis that courts, as we know them, are not qualitatively different from more obviously triadic institutions (such as mediators); they “are simply at one end of the spectrum rather than constituting an absolutely distinct entity.”²⁸ The need to elicit some traces of consent (illustrated, for instance, by courts’ reluctance to decide in the absence of one of the parties), their frequent pursuit of a compromise, and many other mediating components in judging, render them simply one species of a broader family of triadic institutions.

It is important not to overstate Shapiro’s point: much of his argument is devoted to showing that the traditional “prototype of courts” is not reflected in the actual operations of judicial bodies. And yet, it is important to retain his general conclusion that it is precisely the departure from the triadic structure that is a source of

²⁶ Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press: Chicago, 1981).

²⁷ *Id.*, chapter 1.

²⁸ *Id.* at 8.

possible weakness of judicial legitimacy. “[F]rom [the triad’s] overwhelming appeal to common sense stems the basic political legitimacy of courts everywhere,”²⁹ asserts Shapiro, but then “[c]ontemporary courts are involved in a permanent crisis because they have moved very far along the routes of law and office from the basic consensual triad that provides their essential social logic.”³⁰

This tension between courts’ claim to legitimacy and their non-triadic patterns of operation is further magnified when the procedure abandons all pretences of adjudicating between conflicting interests of two parties, and focuses instead on an abstract scrutiny of a legal text. If the scrutiny is unrelated to any particular conflict between two parties, the “triadic” sources of legitimacy of courts disappear altogether. This is the predicament faced by those constitutional courts whose functions include abstract judicial review. One could perhaps try to argue that some remnants of the triadic structure are still present: there is a complainant (usually, the representatives of the outvoted parliamentary minority, or of the President), a respondent (the representatives of the parliamentary majority, or of the government), and a neutral umpire, namely the judges of the constitutional court. This analogy is, however, inappropriate. The “triad” that underpins the prototype of courts is not constituted by two parties disagreeing about what social norms should be properly turned into law, and a third party who resolves their dispute, which is precisely the case of adjudication by a constitutional court. The conflict which is the stuff of a triadic judicial resolution revolves not around some abstract ideas concerning rights and wrongs, but rather concerns the claim that one party’s interests have been impermissibly (under the existing, valid rules) violated by another. A better analogy to the conflict that lies at the heart of abstract judicial review is that of disagreement between the majority and the opposition over what law or policy is best for their society, subject to general and underspecified constitutional provisions. Indeed, this is precisely what is at stake in the discourse pertaining to the abstract constitutional review of legislation; and in this discourse, the constitutional court is unable to rely on the argument that all it is doing is applying the existing law because it is precisely the “rightness” (in terms of general constitutional standards) of the law that forms the subject of the controversy. As Jürgen Habermas has observed, “[t]he legitimating reasons available from the constitution are given to the Constitutional Court in advance from the perspective of the application of law – and not from the perspective of a legislation that elaborates and develops the system of rights in the pursuit of policies.”³¹

While the court-based (“triadic”) legitimacy seems hardly applicable to abstract judicial review, one can think of some different types of democratic legitimacy that might support the authority of courts to invalidate statutes. If we cannot derive the constitutional court’s legitimacy from the idea of an “impartial

²⁹ *Id.* at 1.

³⁰ *Id.* at 8.

³¹ Jürgen Habermas, *Between Facts and Norms*, trans. William Rehg (Polity Press: Cambridge, 1996) at 262, emphasis in original.

umpire” (because an abstract consideration of laws and policies does not lend itself to such a conceptualisation), then we should look for a more representative type of legitimacy, derived not from impartiality but from the democratic pedigree of the judges. It is not unthinkable, and certainly not patently absurd, that a sort of “third chamber” (or a second chamber, in unicameral parliamentary systems) endowed with the task of re-examining a bill, this time from the narrower perspective of its compliance or otherwise with constitutional values, could be justified in terms of general principles of democratic legitimacy. A combination of long tenure, immunisation from direct societal pressures and from temptations connected with seeking re-election on one hand, and a degree of electoral pedigree (after all, judges of constitutional courts are almost always appointed by democratically accountable bodies) on the other, may provide just the right combination of a good democratic mandate with the institutional incentives necessary for the serious, principle-based review required of a “negative legislator”. If what worries us (as it should) is the non-existence of a democratic mandate of the negative legislator, then this concern may be (partly, at least) assuaged by the fact that appointments to constitutional courts are much more democratically based than those of ordinary judges; they are either made solely by the parliament³² (in which case the link between the judges and the democratic decision of the voters is reasonably direct), or at least with the participation of parliament in the recruitment process.³³

In addition, political sympathies and/or legal and constitutional views of the judges are known (or at least, are knowable) prior to the selection to the court; and the system of limited tenure makes them relatively sensitive to the views of the general population – more so, in any case, than where judges have life tenure, as in the United States. For these reasons, one can claim that a constitutional court is an indirectly elected democratic (or near-democratic) “chamber of reflection”, the purpose of which is to reconsider the bill in a more dispassionate manner, removed one step further from specific political controversies. (Incidentally, such an approach permits us to look differently, and more leniently, upon the “politicisation” of the system of the appointment of judges to constitutional courts: the “politicisation” which is often depicted as an aberration of the system, turns out to be a desirable feature that endows the third chamber with legitimacy based upon its indirectly representative character; the members of this chamber are thus meant to represent the range of views within the community as to the meaning of broad constitutional provisions).³⁴ This immunisation from the passions of the moment need not necessarily deprive the constitutional courts of their representative character; one may, for example, charge the court with the task of identifying (and giving effect to) whatever

³² As is the case, e.g., in Poland and Hungary.

³³ As is the case in all other CEE countries, with the exception of Estonia. For a discussion of the selection of judges, see Sect. 1.3.

³⁴ For a similar argument with respect to the Supreme Court of the United States, see Christopher L. Eisgruber, *Constitutional Self-Government* (Harvard University Press: Cambridge Mass., 2001) at 64–66.

consensus can be found on a given issue (which has a bearing on constitutional interpretation) in the light of (rather than in isolation from) the actual, prevailing moral and political views in the community. One can even appeal to the Rawlsian idea of “overlapping consensus” as the proper device upon which a constitutional court should base its representative function.³⁵

It is not my claim that such an argument is compelling. As a matter of fact, I do not believe that it is. To illustrate why not, consider this typical statement from a proponent of the idea of the representative functions of the United States Supreme Court:

Without surrendering its prerogatives of judgement or compromising its obligation to uphold constitutional values in the face of political opposition, the Court, in specifying the meaning of constitutional principles, must be accountable at least in part to manifestations of reasonable moral and political commitments displayed by the citizenry, both nationally and locally.³⁶

For one thing, there is an apparent possibility of tension between the obligations proclaimed in the first and in the second parts of the sentence. What if “citizens’ commitments” clash with “constitutional values” as understood by the justices of the Court? Secondly, the proviso that the only commitments that the Court must respect are the “reasonable” ones opens the gate to a number of “filtering devices”, which will transform the actual conventional morality into something hardly recognisable by the citizenry as its own moral commitments.³⁷ Finally, the idea that the Court must be accountable to “commitments” rather than to the citizens themselves, strikes me as fanciful. Accountability presupposes the possibility that the principal may censure the agent: how can “commitments” do this? And yet the choice of words is not incidental, because, naturally, there is no way in which the justices of the US Supreme Court (or of any other court, for that matter) can be “accountable” to the citizens in the ordinary sense of the word.

Furthermore, an “overlapping consensus”-based rationale would generate a number of more practical questions: if we need a “negative legislator” whose task would be to test bills from the point of view of constitutional values, should it be composed in exactly the same way as the actually-existing constitutional courts? Why should its composition be limited to lawyers only – given that, after all, legal skills are not decisive (nor are they the only relevant skills) in approaching the question of how best to articulate the specific meaning of broad, value-based constitutional pronouncements? As Burt Neuborne correctly observed, “When substantive-review judges identify values and totally insulate them from majority will, the troublesome question of why judges are better than other officials in identifying and weighing fundamental

³⁵ For such a conception of the role of the Supreme Court of the United States, see Richard H. Fallon, “The Supreme Court, 1996 Term – Foreword: Implementing the Constitution”, *Harvard Law Review* 111 (1997): 54–152 at 144–145.

³⁶ *Id.* at 145, footnotes omitted, emphasis in the original.

³⁷ See, generally, Wojciech Sadurski, “Conventional Morality and Judicial Standards”, *Virginia Law Review* 73 (1987): 339–97.

values cannot be avoided”.³⁸ (This had been recognised in the design of at least one constitutional court outside CEE, namely the French Conseil constitutionnel; the members of this tribunal do not have to have, and some of them do not have, any formal legal qualifications). These are important questions but they will not be pursued here. The only point being made here is that to construe constitutional courts as belonging to an institutional branch of law making is not incoherent, and does not seem to raise insurmountable problems regarding their democratic legitimacy. Certainly the prospect of finding legitimating arguments for abstract review in terms of traditional representative democracy seems to be more promising than in terms of judicial function.

The paradox is that the constitutional courts themselves, and their most fervent academic supporters, usually strenuously resist the characterisation of their position in the political system as a second or third legislative chamber, and construct their own self-perception as “courts”, albeit somewhat differently than the “ordinary” courts. There has been a discussion among constitutional lawyers of CEE as to whether constitutional courts should be classified as belonging to the judicial branch or as *sui generis* bodies. Furthermore, the actual location of the provisions pertaining to the constitutional courts in the structure of the respective constitutions varies somewhat from country to country. For example, in Slovakia the Constitutional Court is regulated in the part of the Constitution devoted to “[t]he judicial power”³⁹ and is characterised *inter alia* as “an independent judicial authority”.⁴⁰ Similarly, the constitutional courts in Russia and in the Czech Republic are regulated in separate chapters, while in Poland the Constitutional Tribunal is regulated in the chapter generally entitled “Courts and Tribunals”, but within its own subchapter. (This being said, the Polish statute on the Constitutional Tribunal explicitly states, in its first article, that the Tribunal is a judicial body). By contrast, several other constitutions include provisions on constitutional courts in separate chapters or parts altogether, without including them in any broader subdivisions. For example, in the Croatian Constitution the chapter on the Constitutional Court comes between the chapters on “judicial power” and local administration, in Lithuania between the chapters on the Government and the Courts, and in Hungary’s old Constitution between the chapters on the President and the Ombudsman, while in the 2011 Constitution, between “The Government” and “Courts”. The approaches in these countries range between pigeonholing constitutional courts in the “judicial” branch (which seems to be the dominant practice)⁴¹ and characterising them as *sui generis* institutions – which is arguably simply an avoidance of

³⁸ Burt Neuborne, “Judicial Review and Separation of Powers in France and the United States”, *N.Y.U. Law Review* 57 (1982): 363–442 at 368.

³⁹ Part 7 of the Constitution of the Slovak Republic.

⁴⁰ Art. 124 of the Constitution of the Slovak Republic.

⁴¹ See Zdzisław Czeszejko-Sochacki, Leszek Garlicki & Janusz Trzcinski, *Komentarz do Ustawy o Trybunale Konstytucyjnym* (Wydawnictwo Sejmowe: Warszawa, 1999) at 8, who state that, in Poland, the majority of authors consider the Constitutional Tribunal as belonging to the judicial branch.

characterisation. For example, Professor Janusz Trzcinski, in a chapter on the Constitutional Tribunal in the fundamental treatise on the Polish Constitution (written when he was himself a presiding judge on the Constitutional Tribunal), concluded that “the functioning of the CT [Constitutional Tribunal], as determined by the Constitution and by the Law on the CT, does not fit the accepted classifications [of branches of government into legislative, executive and judicial].”⁴²

To my knowledge, there have not been any strongly expressed views, within the mainstream constitutional doctrine in the region (and certainly not by any of the constitutional courts concerned) that constitutional courts, when exercising abstract judicial review, belong to the legislative branch of the state. The self-perception of those courts as part of the judiciary, broadly speaking, has been also endorsed by some friendly commentators from outside the region. Owen Fiss has stated that, “In the new democracies of the East . . . the judiciary . . . must give life and force to the idea of a constitutional court. Judges on these courts must convince their fellow citizens that law is distinct from politics, and that they are entitled to decide what the law is”.⁴³ The characterisation of constitutional courts qua courts is implicit in Ruti Teitel’s view that the power held by the Polish Parliament to override the decisions of the Constitutional Tribunal (before the adoption of the 1997 Constitution) was an example of the conflation of judicial and legislative powers, and evidence that “the understanding of separation of powers is far from entrenched in the region”.⁴⁴ The image is of a legislative body (the Parliament) intruding upon the functions of a judicial body (the Tribunal).

It may seem ironic that the conception that would offer perhaps the most promising path of legitimating constitutional courts in their exercise of abstract constitutional review is most decisively resisted by the constitutional courts themselves, while the doctrine that is patently unsuited to provide such legitimacy is the one most zealously defended by those courts and their apologists. But the paradox is of course, illusory. If one adopts a “third chamber” perspective on the exercise of abstract constitutional review, there is no justification whatsoever to stick to the current composition of the courts consisting, as they do, of lawyers only. Decisions about the death penalty, abortion, defamation of public officials, etc. may be dressed up in legal garb but they ultimately hinge upon fundamental value-choices, and legal qualifications have no bearing whatsoever on how these choices are made. The fact that it is the constitution rather than a non-textual moral or political theory which forms the direct basis for the scrutiny of a given law is no good reason to restrict the range of scrutinisers to lawyers. After all, what constitutional review in such cases is about is not the detection of the “true” legal meaning of such constitutional concepts as the right to life, privacy or freedom of speech but rather

⁴² Leszek Garlicki, ed., *Konstytucja Rzeczypospolitej Polskiej: Komentarz* (Wydawnictwo Sejmowe: Warszawa, 1999) (loose-leaf edition), Chap. 8 at 10.

⁴³ Owen Fiss, “Judiciary Panel: Introductory Remarks”, 19 *Yale J. Int. L.* (1994): 219–221 at 220.

⁴⁴ Ruti Teitel, “Post-Communist Constitutionalism: A Transitional Perspective”, *Columbia Human Rights Law Review* 26 (1994): 167–190 at 178.

a decision about what cluster of values is preferable to others in the articulation of a vague constitutional formula with reference to a specific problem, which is underspecified, and thus left indeterminate, by a constitutional text. It is precisely because the issue is a choice of a cluster of values rather than an exegesis of the legal concept that the scrutinisers must be called upon to play a representative, not merely deductive, role. It is, however, for this very reason that no necessary connection exists between the legal qualifications of scrutinisers and the nature of the scrutiny; that is why the democratic legitimacy of constitutional courts, as they are currently constituted, is continually called into question.

Moreover, it is insufficient to attempt to legitimise the existing constitutional courts by pointing out the less-than-perfect legitimacy of parliaments. “The conventional concern of the absence of democratic accountability posed by judicial law-making seems less apt in periods of political flux. In such periods, the transitional legislature frequently is not freely elected and, further, lacks the experience and legitimacy of the legislature operating in ordinary times”.⁴⁵ Ruti Teitel makes this observation as a response to the charge of the lack of legitimacy of constitutional courts, with particular reference to the post-Communist transition. However, the observation about the legislatures not being freely elected applied to some of the legislatures in the region only (for example, to the post-Round Table election in Poland in June 1989), and even this was usually limited to the first term of legislatures after the transition. This observation has, therefore, now only a historical value. In those countries where the freedom and fairness of the election of legislatures is questionable (Belarus), the problem of “activist” constitutional courts does not arise in the first place. In fact, the most activist constitutional courts operate alongside the fully mature, freely elected legislatures. The “experience” of these parliaments may be called into question (as may be the experience of the new constitutional courts); but the remark about their “lack of legitimacy” is question begging. Anyway, even if the legitimacy of the parliaments is less than perfect, surely the remedy is not to transfer part of their power to bodies that have even less legitimacy to create law and determine policies.

2.3 Why the “Continental” Model of Review: Reasons or Rationalisations?

To ask why the CEE countries have adopted, without exception, a “European” model of abstract judicial review, concentrated in a specialised constitutional-review body, may seem odd. After all, they are European countries, they do belong to a “continental” legal and constitutional tradition, and those same factors that

⁴⁵ Ruti Teitel, “Transitional Jurisprudence: The Role of Law in Political Transformation”, *Yale Law Journal* 106 (1997): 2009–2080 at 2033 (footnote omitted).

determined the victory of Kelsenian⁴⁶ judicial review (as opposed to the US model) on the continent arguably must have informed the emergence of this very type of court in the Central and Eastern part of the continent, when the circumstances for democratic development finally became ripe.

At the end of the day, this may be a correct answer, and yet I do not think that consideration of this question is superfluous. Asking the simplest and the most naïve questions can sometimes be illuminating; I believe that this is the case here. For one thing, not all Western European countries have adopted a system of judicial constitutional review at all, and of those Western European countries that have adopted a Kelsenian approach, at least one (Greece) comes close to a dispersed, US-style model.⁴⁷ As Allan-Randolph Brewer-Carías argued at length in his classic book on judicial review, there is no necessary connection between the way in which constitutional review is designed (that is, whether it is centralised or diffuse) and the family of legal systems to which a given nation belongs (that is, whether it is a civil or common law system).⁴⁸ Secondly, even in some of the most emblematic systems of abstract and centralised review, such as Spain, there had been proposals made to establish a decentralised, American-style model, in which all courts would be authorised to review the compatibility of statutes with constitutional rights claims.⁴⁹ As a matter of fact, the constant tension between the constitutional courts and the supreme courts in a number of CEE countries, based on the aspiration for the quasi-territorial monopoly of constitutional adjudication on the part of constitutional courts versus a demand by the supreme courts (and often other “regular” courts) to be able to set aside the rules they deem unconstitutional and thus make sense of the idea of the direct applicability of the Constitution, bears witness to the fact that the idea of a dispersed, decentralised and concrete review is very much alive, and not just the fantastical view of an academic commentator.⁵⁰ Thirdly, we should be wary of explanatory determinism; after all, the emergence of the Kelsenian model in CEE may be under-determined by the factors usually referred to in this context. If this is the case (as I indeed believe with regard to a number of explanations discussed below), then the emergence of such a model may be seen to

⁴⁶ “Kelsenian” is herein used as a short-hand to describe the Continental model of abstract and centralised review. I am however conscious that the model that emerged in Europe after the Second World War, in particular in Germany, but also in Italy, Spain, France etc, is not a purely “Kelsenian” model, because it envisaged, among other things, a rights-based scrutiny of constitutionality of laws, and contained important elements of “positive” legislation. In both these respects, Hans Kelsen expressed the opposite views when he advocated the establishment of the constitutional court in Austria.

⁴⁷ Under the 1975 Constitution of Greece (art. 95), all courts have the power not to apply legal provisions that they consider to be contrary to the Constitution. A diffuse system exists also to a certain degree in Switzerland (although only the laws of the Cantons, not the federal ones, can be judicially reviewed) and in Portugal.

⁴⁸ Allan Randolph Brewer-Carías, *Judicial Review in Comparative Law* (Cambridge University Press: Cambridge, 1989) at 128–131.

⁴⁹ See Alec Stone Sweet, *Governing with Judges* (Oxford University Press: Oxford, 2000) at 120–21.

⁵⁰ More on this in Sect. 1.4.

be historically contingent, and a belief in the plausibility of an alternative scenario (under which the American-style model would have been chosen) may not be as absurd as it seems at first blush. Furthermore, if that is the case, the usual explanations for the emergence of the current system may be better characterised as justifications for the maintenance of that particular system. They can therefore be seen more as legitimating the status quo than analysing it dispassionately.

After all, the post-1989 constitutional and political scene in CEE was, partly at least, something of an experimental laboratory, in which many of the decision-makers may have thought that they were making a “fresh start”. Of course, no start is ever fresh; nonetheless, the post-1989 period was a mixture of the embeddedness in the old traditions and experimentation with the new. There were many options on the menu, and an American-style solution to many issues of constitutional design was not out of the question. For example, in the works on the process of constitution-making in Poland in the second half of the 1990s, some of the leading experts advocated the adoption of the US-style review in which all courts would have the power to set aside the laws which they deem unconstitutional – and this plea was made on the grounds that such a dispersion of this power would be more conducive to the entrenchment of the constitutional culture within the judiciary in general. As one of those experts later reported, even the first informal remarks aimed at placing that proposal on the agenda “brought about a hostile response from the Constitutional Tribunal”⁵¹ which in Poland had existed since 1985 and which was not prepared to share its power with the “ordinary” courts. In addition, there was no shortage of American experts around, including constitutional experts, to provide advice and advocate the right solution, and it just so happened that the solutions proffered by these American constitutional experts, more often than not, corresponded to the liberal (in the American sense of the word) reading of US constitutionalism – which included an activist, US-style judicial review. Some of those American liberals explicitly urged the new activist constitutional courts (in particular, the Hungarian Court) to abandon abstract review altogether and, hence, to follow the US path.⁵²

If we reconsider the question of why the CEE countries adopted the centralised and abstract model of review, and if as a result of this reconsideration we conclude that the usual explanations fail to fully account for the choice of the model (hence, they “under-determine” the reasons for adopting the model), then we can gain two things from such an exercise. First, we can help to re-open the debate surrounding the relative merits of the US style review and its future prospects in the region. (This, of course, is relevant only if we find that the decentralised model has some advantages over the centralised and abstract model, something that I will discuss in Chap. 3). Second, we can debunk the usual explanations by showing that, to some degree (that is, to the degree that there is under-determination), they are

⁵¹ Wiktor Osiatynski, “Paradoxes of Constitutional Borrowing”, *I.CON* 1 (2003): 244–68 at 260.

⁵² See Ackerman, *supra* note 22 at 108–9.

ex-post facto rationalisations, and thus must be seen as legitimating ideologies rather than dispassionate accounts.

Let us dispense first with what are arguably the two weakest explanations of the phenomenon of constitutional courts in CEE. The first one appeals to the willingness of the countries of the region to match the expected criteria which would facilitate their admission to the European Union, and those criteria are said to include a “European” rather than a US style of judicial review. It has been also said that the EU, generally, expected the candidate countries to set up a system of constitutional courts that would be in a very strong position vis-à-vis the legislatures:

[w]hile parliaments and presidents will predictably resist judicial interventions, they are painfully aware that highly visible confrontations with their domestic constitutional courts will gravely threaten prospects for early entry into the European Union, which is already looking for excuses to defer the heavy economic costs that admission of the East entails.⁵³

This is sheer speculation, and improbable at that. I know of no evidence to suggest that the accession to the EU figured on constitution-makers’ minds when deciding on which system of constitutional review should be adopted in CEE, and I do not know why it should. After all, the preparations for accession to the EU, even in the cases of those countries long considered to be the most obvious candidates, began well after the establishment of the constitutional courts. Moreover, I know of no evidence that shows that the EU made it a part of its set of criteria for candidate states that they establish a system of constitutional review that granted a strong position to the courts vis-à-vis the legislature. In the first important decision of the EU, which can be seen as setting the conditions of membership for post-Communist European states, the European Council established in Copenhagen in December 1993 that the candidate countries, in order to be successful, must display (among other things) “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”; however, no specific institutional forms of attaining these conditions were ever established. Apart from everything else, it would be hypocritical for the EU to expect, let alone to demand, that constitutional courts be established: there are members of the EU whose democratic credentials are unimpeachable, yet who have no French- or German-style constitutional review.⁵⁴ To be sure, in the process of monitoring the progress of CEE candidate states before their accession to the EU, the European Commission sometimes noted, with approval, the existence and the actions of the constitutional courts but nothing in its reports suggests that anything of importance hinged on it, and normally it was nothing more than part of the recital of a number of institutions in the sections of those reports on “Democracy and the Rule of Law”. None of these

⁵³ Bruce Ackerman, “The Rise of World Constitutionalism”, *Virginia Law Review* 83 (1997): 771–797 at 776.

⁵⁴ The United Kingdom and the Netherlands have no judicial constitutional review at all, while Denmark, Ireland, Greece and Sweden have adopted systems bearing resemblance to the US-style model of decentralised judicial review.

reports imply that the existence and the actions of the Constitutional Court was a litmus test for the strength of democracy and the rule of law in the countries under scrutiny.

The second explanation which seems to me also quite weak is that there is a correlation between the fact that a country has just emerged from a period of authoritarian rule and the fact that it has established a “Kelsenian”, rather than the US, model of constitutional review. One can see a certain logic in the question by Louis Favoreu:

How could an American system function in the Federal Republic of Germany, Italy, Spain, or Portugal, with judges from the preceding period of dictatorship named to the courts? Adopting judicial review in these countries would require “purification” on a massive scale of a corps of magistrates, while one could immediately find a dozen or so constitutional judges with no prior culpability during those periods, capable of carrying out their duties without mental reservations.⁵⁵

The argument about a generalised distrust of the judiciary when a state emerges from a period of authoritarian rule is then extrapolated to the CEE post-Communist countries⁵⁶; and yet, the reality of post-Communist regimes defies the simple dichotomy noted by Favoreu. Neither were the judges of constitutional courts in the region quite “purified” of their old habits and ideologies, nor were the ordinary judges as hopelessly immersed mentally in the “preceding period of dictatorship” as to offer no likelihood that they would dispense justice in accordance with the new axiology of the law. Perhaps the clearest case of a “purified” supreme court is provided by Poland where all of the judges of the top judicial body were appointed anew after the transition of 1989. It follows that their “moral mandate” to interpret the Constitution in accordance with a democratic system of values is as good as that of the Constitutional Court. And this, I should add, is not merely an interpretation by an external observer but part of the actual self-perception of the judges themselves; at least some of those sitting on the Polish Supreme Court resent the implication that their authority and competence in articulating and applying the democratic constitution is inferior to that of their colleagues from the Constitutional Court.⁵⁷

⁵⁵ Louis Favoreu, “American and European Models of Constitutional Justice”, in David S. Clark, ed., *Comparative and Private International Law: Essays in Honor of John Henry Merryman on His Seventieth Birthday* (Duncker u. Humblot: Berlin, 1990), p. 110.

⁵⁶ See, e.g., John Ferejohn & Pasquale Pasquino, “Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice” in Wojciech Sadurski, ed., *Constitutional Justice, East and West* (Kluwer Law International: The Hague, 2002): 21–36 at 31. A leading Russian constitutional expert used a similar argument when explaining to me why the decentralised system of review would not work in Russia: the majority of judges, he asserted, are old-fashioned and simply “do not know how to apply the Constitution”. Interview with Professor Boris A. Strashun, of the Center for Analysis of Constitutional Justice at the Constitutional Court of the Russian Federation, Moscow, 19 November 2001.

⁵⁷ Personal conversation with a judge of the Polish Supreme Court, 16 July 2002.

One must not protest too much. Ruti Teitel certainly has a point when she observes that “as new forums specially created in the transformation, [the] very establishment [of the new constitutional courts] defines a break from past political arrangements”.⁵⁸ Indeed, a “concrete” system of review would most probably have to rely on the old judiciary and so the symbolic effect of novelty would be lost. The explanatory power of this observation is, however, limited. Even leaving aside the counter-examples of Poland and ex-Yugoslavia (where the establishment of constitutional courts did not coincide with the transformation), some “old” institutions (such as the Presidency in the Czech Republic or Poland) quickly acquired much more symbolic power as vehicles of transformative politics than the “new” constitutional courts. There is no doubt that Vaclav Havel or Lech Wałęsa were more potent emblems of the new, even though they occupied “old” offices, than the largely nameless and faceless judges of the constitutional courts in Warsaw and in Prague.

Perhaps the most significant explanation can be found in the attachment of lawyers and constitution-makers in the region to the traditional “European” tradition of separation of powers in which the role of ordinary judges is strictly confined to the application, as opposed to the making, of the law. The adoption of the Kelsenian system seemed to disturb this tripartite structure of government to a lesser extent than allowing all of the regular courts to examine laws in terms of their constitutionality in the course of ordinary adjudication. The point made about the Western European systems, namely that the Kelsenian model “could be easily attached to the parliamentary based architecture of the state”,⁵⁹ applies to the CEE countries as well. Certainly this has been a frequent argument within the doctrine of these countries: that to authorise regular judges to declare the laws unconstitutional would place them above the legislature, and would thus be inconsistent with the tripartite division of powers.⁶⁰

These are plausible explanations, as far as the compatibility of any form of judicial review of constitutionality with “old constitutionalism”⁶¹ is concerned. However, much the same arguments that are being produced against the US-style judicial review, in terms of the traditional tripartite separation of powers, can be used to attack abstract and centralised judicial review, as long as it remains a judicial rather than a legislative function. These criticisms apply yet more forcefully to concrete judicial review by constitutional courts when they exercise it alongside their power of abstract review. If a single ordinary court can initiate a

⁵⁸ Teitel, *supra* note 45 at 2032.

⁵⁹ Stone Sweet, *supra* note 49 at 37; see also Stephen M. Griffin, *American Constitutionalism* (Princeton University Press: Princeton, 1996) at 121.

⁶⁰ See, e.g., Andrzej Wasilewski, “Przedstawianie pytań prawnych Trybunałowi Konstytucyjnemu przez sądy (art. 193 Konstytucji RP)”, *Panstwo i Prawo* 54:8 (1999): 25–39 at 29; Anna M. Ludwikowska, *Sądownictwo konstytucyjne w Europie Środkowo-Wschodniej w okresie przekształcania demokratycznych* (TNOiK: Toruń, 1997) at 21.

⁶¹ On “new constitutionalism” in Europe, contrasted to pre-World War II European constitutionalism, see Stone Sweet, *supra* note 49 at 31 and 37–8.

review of the constitutionality of a statutory provision by (what is seen to be) a court, albeit a special type of court, what then is left of the traditional European separation of powers, and the related dogmas of the sovereignty of parliaments and the limitation of to applying, as opposed to making, the law?

Perhaps a more relevant point is the formal absence of a doctrine of “stare decisis” in the continental legal tradition. In the “decentralised” model of judicial review, such as in the US, a strong precedent doctrine provides for a degree of consistency within the overall judicial system. When all the courts have to follow the *rationes decidendi* of the Supreme Court and of the relevant higher appellate courts in their respective jurisdictions, the dangers of arbitrariness, uncertainty and lack of uniformity are minimised. However, where there is no stare decisis (so the argument goes), a concrete-decentralised model threatens the unity of a legal system, and one can envisage an unwieldy situation in which some courts could find a particular law unconstitutional while others might uphold it. Indeed, this worrying prospect of lack of uniformity was the main argument given to me by a leading Russian constitutionalist in explaining the inapplicability of decentralised review to Russian conditions,⁶² and in this he was certainly echoing a dominant opinion in the constitutional doctrine in CEE.

This distinction, however, is one of a degree rather than of kind, and it cannot make all that much difference to the debate. The decentralised system yields a degree of uncertainty and inconsistency, regardless of the stare decisis doctrine. In the United States, unless and until the Supreme Court has pronounced on a given issue (which, under a certiorari system and due to the control by the Court of its own agenda, need not be the case on every contentious constitutional issue tackled by lower appellate courts), there may exist a situation in which the Courts of Appeals for different circuits will come up with different solutions to one and the same constitutional controversy.⁶³ On the other hand, it is simply not the case that a system of judicial precedent does not in fact operate in the legal orders of continental Europe. In that system, consistent decisions of the courts – especially of the highest courts – are in practice treated as unquestionable sources of law. This is so even if the official doctrine explicitly rejects the idea of precedent as a binding

⁶² Interview with Professor Boris A. Strashun, of the Centre for Analysis of Constitutional Justice at the Constitutional Court of the Russian Federation, Moscow, 19 November 200.

⁶³ This is not merely a theoretical possibility. Consider the current status of affirmative action, one of the most contentious issues in American constitutionalism. In 1996 the Court of Appeals for the 5th Circuit invalidated an affirmative action plan implemented by the University of Texas Law School and held that the use of race as a factor in university admissions was constitutionally proscribed; *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). The other circuits follow the 1978 Supreme Court’s decision *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), which explicitly permitted certain forms of race-based preferences in admissions. The Hopwood court argued that it was not bound by the Bakke precedent because Justice Powell’s opinion (according to the Court) did not garner a majority (in fact, the central part of Powell’s opinion, though not an opinion in its entirety, was joined by the majority of judges). The Supreme Court denied certiorari in *Hopwood*, 518 U.S. 1033 (1996). I am grateful to Robert Post for pointing this out to me.

source of law. Consider this exposition of the French approach by two leading French constitutional theorists:

The courts very rarely cite precedents and must not base their decisions on them, because the only legitimate source of law consists of statutes. On the contrary, if one looks at the material that is in fact used, one realizes that precedents are the most important. ... Precedents, without being formally binding, may have force if created by a court superior to that where the case is pending. This simply reflects the hierarchical structure of the courts.⁶⁴

Similarly, in the CEE countries it has long been accepted that, for instance, judgements of the Supreme Courts have the character of binding precedent for all other courts, at least to the degree to which the written laws do not provide a determinate solution to a particular controversy.⁶⁵

The upshot is that neither the general “architecture” of the system of separation of powers, nor the significance (or otherwise) of precedent, provide sufficiently strong reasons for opting for a Kelsenian as opposed to a US-style model of constitutional review; indeed, they may be viewed more as excuses than as convincing justifications. In this, the establishment of abstract/centralised review after the fall of Communism resembles the establishment of abstract/centralised review in Western Europe where, as Alec Stone notes, “a majority of political élites remained hostile to sharing policy-making authorities with judiciaries”, and where the opponents of decentralised concrete review saw in such a scenario “the spectre of the dreaded ‘government of judges’”.⁶⁶ It may well be that the same fears also weighed on the minds of the constitutional decision-makers in the CEE countries when they refused to consider the decentralised, US-style of constitutional review. But let us note a strange inconsistency between such an explanation and another conventional reason given against the adoption of US-style judicial review in Europe, namely, the low status, prestige and skills of continental judges as compared to the US. If indeed (as is largely the case) “the judiciaries of these new nations [sic] have very little institutional capital”,⁶⁷ then the fear that these judiciaries will attempt to augment their power, amounting to a “government by judges”, seems ill founded. Perhaps the example of Japan, which operates a concrete/decentralised model within the context of a relatively low-status judiciary⁶⁸ shows that the fear of “government by judges”, if the decentralised model

⁶⁴ Michel Troper & Christophe Grzegorzczak, “Precedent in France”, in D. Neil MacCormick & Robert S. Summers, eds., *Interpreting Precedents: A Comparative Study* (Dartmouth: Aldershot, 1997): 103–140 at 112–13 and 117.

⁶⁵ See, e.g., Lech Morawski & Marek Zirk-Sadowski, “Precedent in Poland”, in MacCormick & Summers, *supra* note 64 at 219–58.

⁶⁶ Stone Sweet, *supra* note 49 at 40.

⁶⁷ Fiss, *supra* note 43 at 219.

⁶⁸ For a characterisation of the Japanese system of constitutional review as “modelled very much after the American system of judicial review”, see Itsuo Sonobe, “Human Rights and Constitutional Review in Japan”, in David M. Beatty, ed., *Human Rights and Judicial Review* (Kluwer: Dordrecht, 1994): 135–174 at 138.

of constitutional review is instituted, is groundless. Upon reflection, the reasons for this are clear: decentralised review carries with itself a whole set of doctrines of judicial restraint that are simply inapplicable to abstract constitutional review.⁶⁹

But (it may be claimed) the reason for the preference for abstract and centralised review, and for hostility towards the concrete and decentralised one, is deeper than that. The United States – an emblematic case of a decentralised/concrete review, has a tradition of a free-market, anti-statist approach to law, officials and the state. In contrast, the CEE countries share with their Western continental counterparts a tradition of statist and centralised approach to the state in general, not only to the judiciary. The stronger the role of the state in the society and the economy, the more tendency there is towards state-controlled review of constitutionality. Such an argument was made by John C. Reitz, who describes a close correlation between the forms of review adopted and the general approach to the role of the state.⁷⁰ In the US, where a market-centred approach prevails, only concrete review is available, with some residual aspects of abstract review (that cannot, however, be set in motion by political actors). At the other extreme of the spectrum, in the most statist-centrist tradition (France), only abstract review initiated by political actors is allowed. In the mixed systems (e.g. Germany), we find a combination of abstract review, concrete review and constitutional complaint.

There seems to be an undeniable logic in the asserted fit between abstract review and statism because various forms of concrete review (which normally have to be initiated by subjects not directly controlled by politicians, such as ombudsmen, the judiciary, or, in the case of constitutional complaint, individuals) imply a partial loss of control by the state over the initiation of constitutional review. The correlation seems to be supported by the other European cases not considered by Reitz, namely Italy and Spain that can be located, on the spectrum ranging from statism to market-centeredness, half-way between the US and France, and where the judiciary (in the case of Italy) and the judiciary, Ombudsman or the individuals concerned (in the case of Spain) can initiate the process of concrete review. But is there really such a correlation? Was the Italy of 1948 (when the rules of judicial review that are still in force today were adopted) so much less statist-oriented than the France of 1958 as to account for the difference between the presence and the absence of concrete review? And similarly, was the post-Franco Spain of 1978 infused with non-statist, corporatist elements to the same extent as Germany in the early 1950s, so that the presence of concrete review which can be initiated by individuals can be explained by a particular understanding of the role of the state?

Perhaps. I am unable to pursue such an analysis in the framework of this chapter. However, three observations are in order at this point. First, one should be careful not to take the very availability of concrete review as a possible symptom of the less

⁶⁹ I develop this argument in Sect. 3.1.

⁷⁰ John C. Reitz, “Political Economy and Abstract Review in Germany, France and the United States”, in Sally J. Kenney, William M. Reisinger & John C. Reitz, *Constitutional Dialogues in Comparative Perspective* (Macmillan: London, 1999): 62–88 at 74–84.

statist approach to the role of the state (as public lawyers would probably tend to do), as the explanatory role of the state factor would be then nil. One and the same factor cannot at the same time be a result of and the evidence for a proposed causal factor. Second, if the argument is that the general approach to the role of the state can explain the nature of judicial review in Central and Eastern Europe (something that Reitz is not claiming, I should add) then we have a clear case of under-determination here. After the transition, the question of the proper role of the state in society (and towards the economy in particular) has been and remains one of the most contentious unresolved issues in the region. Third, if “statism” yields abstract review because concrete review involves the loss of control by the state over the initiation of the review process, then this argument is unavailable to those systems in which abstract review is complemented by concrete review and/or constitutional complaint; thus, France would remain the sole instance of abstract review which can be explained by statism.

However, a more interesting question is whether or not such a “fit” is present also at a deeper level, as Reitz suggests that there is a connection between the fundamental values underlying the model of review and those behind the model of the state. According to Reitz, the principal value that underpins abstract review is “legal certainty”. This is because an authoritative decision about the validity (constitutionality) of a new statute is taken even before (or soon after) the statute enters into force, and there is no period of uncertainty between the enactment and the review. In turn, such a period of uncertainty is necessarily produced by a form of review which is conditioned by a specific legal “case or controversy”. So much is probably non-contentious; legal certainty may be indeed higher in the system of abstract as opposed to concrete review. I say “may” because, as soon as the system allows concrete review alongside abstract review, as do all of the Western European and CEE systems of judicial review (with the exception of France and Ukraine, respectively), the benefit of legal certainty related to purely abstract review is lost. Indeed, the effect of legal certainty is assured only when a review is solely *ex ante*, so that once the law is ratified there is no possibility of ever declaring it unconstitutional (as is the case in France). An *ex post* abstract review, on the other hand, introduces an element of uncertainty, related not so much to the abstract nature of the challenge, but rather to the fact that review may be initiated (never mind by whom) after the law has entered into force. This kind of uncertainty can, however, easily be minimised by the simple technique of establishing a legal deadline until which a new law can be challenged.⁷¹ If no such techniques are

⁷¹ In contrast, such a deadline regarding a challenge initiated in the course of concrete review (but not constitutional complaint) that is, occasioned by a concrete litigation, would clearly be pernicious. A person has no control over when she can be brought to court under a particular law that she can then claim unconstitutionally violates her rights!

actually being used⁷² it may be for the reason that the uncertainty that results from abstract ex post review has never been perceived as a major problem.

But even conceding, for the sake of argument, that abstract and centralised review provides for a higher level of legal certainty than the concrete and diffuse one, does it indeed follow, as Reitz claims,⁷³ that abstract review is based on a degree of paternalism while the US model of concrete review reflects the strong anti-paternalistic stance of the American constitutional system? In Reitz’s words: “The kind of citizen required by a system limited to concrete review is a ‘tough’ citizen, one who is willing to run significant risks deliberately in order to vindicate his rights, not one who waits for the paternalistic arms of the state to take care of him”.⁷⁴ We may accept that the general hostility to paternalism is higher in the American political culture than in Europe. However, it remains to be seen whether this higher American anti-paternalism can indeed explain the exclusive reliance on concrete review and, a contrario, whether the relatively higher degree of acceptance of paternalism in Europe explains the European preference for abstract review. Taking the argument one step at a time, it may be true that paternalism (that is, a conviction that the government knows what is good for its citizens better than the citizens themselves do) is inconsistent with a high degree of legal uncertainty: a paternalist government would like to signal clearly to the citizens its expectations concerning their behaviour. However, the link between paternalism and high legal certainty (which needs, as we have seen, not only abstract but also ex ante or limited-in-time review) is contingent and indirect at best. After all, any government interested in guiding the behaviour of its citizens by clear rules, paternalist or otherwise, has an interest in providing a high degree of legal certainty to those subject to the laws. This legal certainty (and thus, the efficacy of authoritative rules) clashes at times with other values, such as flexibility or individual self-determination; it is not, however, clear why the “paternalistic” character of rules would add extra weight to the legal certainty side of the calculus. While the anti-paternalist might applaud opening the path for individuals to challenge the laws through concrete review, it is question-begging to assert that she should fear keeping open the possibility of abstract review at the same time; and thus it is doubtful whether the “[r]ejection of paternalism surely lies at the heart of . . . the US rules on justiciability”.⁷⁵

⁷² As an example of such a time limit, one might mention the rule in Poland until 1997 that abstract review of statutes applied only to statutes enacted no earlier than 5 years before the date of the Constitutional Tribunal’s decision (Art. 24 of the Law of 29 April 1985 on Constitutional Tribunal). This limit has been abandoned by the new statute on Constitutional Tribunal, adopted 1 August 1997. One may hypothesise that one reason why this provision was dropped had to do with its very low practical relevance: in a system of predominantly abstract review, where challenges to laws are most likely to be launched by the defeated parliamentary minority, it is highly unlikely that laws that have been on the books for a very long time will be called into question.

⁷³ Reitz, *supra* note 70 at 80–81.

⁷⁴ *Id.* at 81.

⁷⁵ *Id.* at 81. See also Lea Brilmayer, “The Jurisprudence of Article III: Perspectives on the ‘Case or Controversy’ Requirement”, *Harvard Law Review* 93 (1979): 297–321 at 313.

The only reason why an anti-paternalist might oppose abstract review would be the fear that the government (or any other official body endowed with the authority to initiate the review) could be tempted to exercise it in a paternalistic fashion, that is, on the basis of the alleged good of the citizens who might benefit from the success of the review, even despite the citizens' own views to the contrary. For paternalism, strictly speaking, occurs only when the authority displaces the actual preferences of the citizens while claiming that it is doing so for their own good. However, such a depiction of the official motives behind the review strikes me as convoluted, if not fanciful, in most cases: in the emblematic examples of the exercise of review in "abstract-review-only" situations, that is, in the famous decisions of the French Conseil constitutionnel, one would search in vain for any cases that would fit with such an account. And no wonder: when minority representatives in the French legislature successfully challenged the bills on media pluralism⁷⁶ or the nationalisation of enterprises⁷⁷ they did not appeal to any paternalistic arguments but to their own political or ideological visions, different from those of the majority. This was a routine game of democratic politics, resolved by the Conseil in these cases in favour of the minority; appeals to paternalism did not (and did not need to) figure anywhere in the discourse. As a general speculation, it is hard to see why, as a rule, the initiators of abstract review would "become detached from the concerns of the individuals whose rights are immediately at stake", to such an extent as to risk a situation in which the citizens would actually be opposed to the goals underlying such an intervention.⁷⁸

But perhaps there is another type of link between paternalism and abstract review: a fear that the exercise of constitutional review by individuals concerned would be unwise, immature, detrimental to themselves. Such fear would certainly have strong paternalist undertones, and one can understand why, in defending the projects of fundamental reform of constitutional review in France in the early 1990s, the then President of the Conseil constitutionnel Robert Badinter warned: "on ne peut traiter indéfiniment les citoyens en éternels mineurs".⁷⁹ The main point of the proposed reform (which failed to gain the support of the Senate) was to endow each party to a legal process with the right to challenge the constitutionality of a statute (on the basis of an alleged violation of the party's fundamental rights), provided that the Conseil constitutionnel had not pronounced on the constitutionality of this law previously. The attitude attributed (no doubt with good reasons) by President Badinter to the opponents of the reform indeed smacks of paternalism.

⁷⁶ See Stone Sweet, *supra* note 49 at 80–83.

⁷⁷ See *id.* at 66–8.

⁷⁸ The words in quotation marks are from Lea Brilmayer, "A Reply", *Harvard Law Review* 93 (1980): 1727–33 at 1732, and they apply not so much to an abstract review initiated by political bodies but to the idea of public interest litigation launched by "altruistic plaintiffs".

⁷⁹ Robert Badinter, quoted in Jean Gicquel, *Droit constitutionnel et institutions politiques*, 14th edn (Montchrestien: Paris, 1995), at 767 (emphasis in original).

However, as soon as there exists in a given judicial system a path of concrete review (and, even more importantly, of constitutional complaint) that is available to individuals alongside the abstract review initiated by political actors, the link between abstract review and paternalism collapses altogether. Perhaps, therefore, the French system can be accounted for by the tradition of paternalism, but the German, Spanish, Italian etc. approaches cannot. It is not that there is less paternalism in a mixed system that combines abstract and concrete review; rather, that there is no link between paternalism and the constitutional model of review at all. Similarly, a possible link between the CEE model of review and a (putative) paternalistic tradition cannot be seriously upheld.

Perhaps a better explanation would be that concrete review is well suited to a narrow understanding of the role of the constitution (and, consequently, of constitutional review), that is, when the main purpose of the constitution is seen as the safeguarding of individual and minority rights against majoritarian oppression. This is a characteristically US model of constitutionalism, and one that has resulted in the well-established perspective that understands constitutional review as the last bastion of individual (and minority) rights against legislative intrusion. It is plausible that someone who endorses this view of the constitution’s purpose and this perspective on constitutional review may have a clear preference for concrete, as opposed to abstract, constitutional review. This is due to the fact that, if the whole rationale for the power of review is based in distrust towards political institutions, then it would be odd to endow those very institutions with the task of initiating the review process. When individuals feel that their rights have been violated by the legislative majority, they can stand up for themselves and press their claims in the court, leading, hopefully, to a constitutional review – or so the argument goes. However, if we broaden our view on what constitutes the proper realm of constitutionalism, and in particular if we incorporate the setting of general socio-economic goals into the scope of the constitution (and, again, of constitutional review as a consequence), then individual litigation no longer seems an adequate mechanism to commence the process of review in all cases. Hence, the argument must derive the abstract mode of review from a broader understanding of the proper scope of the proposed functions of constitutionalism, beyond the protection of minorities against majoritarian oppression.⁸⁰

This proposition could be plausibly defended on a number of grounds but the most obvious would be that individual citizens do not ordinarily have (each taken individually) a sufficient stake in challenges to the laws that would compel them to launch a constitutional litigation, or (and this comes basically to the same thing) that their interest in winning such litigation is, at best, only indirect and remote. What is important here is that the constitutional court is now seen not only as a protector of individual and minority rights against the legislative majority, but, more fundamentally, as a guardian of the constitution as a whole, including its separation-of-powers rules and its guidelines for socio-economic policy, when applicable. From such a

⁸⁰ See Reitz, *supra* note 70 at 81–84.

perspective, it is only logical (within the logic of collective action) that the judicial review of legislative acts should be triggered by political actors in those cases in which one cannot normally rely on individual litigation as a mechanism of satisfying individual preferences that, although widespread, are not intensive enough to yield sufficient motivations to incur the costs of private suits.

This argument seems plausible though one must not exaggerate the link between the abstract nature of the review and the policy-oriented nature of the review. After all, in those constitutional systems that rely exclusively on concrete review, such as the United States, Canada or Australia, much review has a policy-oriented aspect, not directly reducible to the protection of individual rights against the majority. It is significant that in a classic and deservedly famous article on the role of the Supreme Court, Robert Dahl characterised it as a “national policy-maker”, and showed that the dominant views on the Supreme Court have never been out of line for long with the policy views dominant among the lawmaking majorities of the time.⁸¹ Under the sufficiently relaxed rules of standing, not only individuals but also groups and associations can pick up various policy-based grievances and turn them into constitutional suits; for example, in the United States, they have standing to assert those interests of their members which are germane to the association’s purpose.⁸² An even broader test of standing was adopted in Canada where all that a plaintiff in a suit seeking a declaration that legislation is invalid needs to show is that “he has a genuine interest as a citizen in the validity of the legislation”.⁸³ In India, which is another important concrete-review-only country, the courts have been long used for public-interest legislation, and standing to sue has been granted to any “member of the public having sufficient interest”, where “sufficient interest” encompasses a genuine concern for the rights of others.⁸⁴ This shows that the concreteness of review does not seem to be such an impediment to policy-related complaints, after all.

However, even if abstract review seems better suited to those exercises of review that are not directly related to a claim of a violation of an individual right, this would only provide a partial explanation for the dominance of abstract review in CEE constitutional systems, for two reasons. Firstly, even if one adopts a broader notion of constitutionalism that encompasses a control by the constitution of large areas of policy-making, it still does not explain why one would want to involve a constitutional court into this control. Unless one equates the scope of constitution

⁸¹ Robert A. Dahl, “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker”, *Journal of Public Law* 6 (1957): 279–295.

⁸² See *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977), discussed by Brilmayer, *supra* note 78 at 318–19. In this decision, the Supreme Court unanimously accepted the standing of a state governmental commission composed of representatives of the apple industry (thus treating it as analogous to a voluntary association) to challenge the constitutionality of a statute regulating the packaging of apples. This is as clear a case as they have produced in terms of using concrete review in order to change economic policy.

⁸³ *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575, 598, emphasis added.

⁸⁴ See Charles R. Epp, *The Rights Revolution* (University of Chicago Press: Chicago, 1998) at 86.

with the scope of justiciability, and one believes that any constitutional violation should be reviewed by a constitutional court, this argument for abstract judicial review is question begging. In other words, while it is, of course, undeniable that abstract review allows a role for the court in national policy-making to a much higher degree than concrete review does, it still does not follow that one should want to involve a court in the policy-making. Secondly, the prevailing arguments in favour of establishing constitutional courts in CEE were made precisely in terms of the protection of constitutional rights against legislative violations thereof, that is, in terms that can be safely located within the traditional, anti-majoritarian logic of concrete review. This, to be sure, was not the only type of argument put forward in the constitutional discourse of these countries, but it was a dominant one; for example, the leading courts in the region liked to emphasise that they saw their main role as the protector of individual rights. As the then Chief Justice Sólyom of the Hungarian Constitutional Court declared, “We always stress that we are activists in certain areas, namely, concerning fundamental rights, where the Court does not hesitate to decide ‘hard cases’. But we are self-restrictive concerning the problems related to the political structure”.⁸⁵ A commentator on the Hungarian Court could therefore accurately observe: “The Hungarian Constitutional Court has defined its own activity as that of the guardian of human rights in the midst of a quasi-revolutionary transformation. . .”.⁸⁶ And this was by no means limited to the Hungarian court only. A judge of the Russian Constitutional Court stated that the goal of protecting and guaranteeing human rights was one of the three, equally important, tasks of the Russian Court, alongside overseeing the federal-regional relationships and the relationships between the highest bodies of the Russian state.⁸⁷ The primacy of rights protection as a top justification for the robust position of the Constitutional Court is very much part of the prevailing self-perception of these bodies in the emerging democracies of CEE.

It is for this reason that the general thesis put forward by Martin Shapiro cannot easily be applied to the phenomenon of the constitutional courts of CEE. Shapiro’s argument is that the power of constitutional courts today derives from the fact that they are useful as arbitrators in division-of-powers disputes, in the sense that they “keep the basic institutional processes running”,⁸⁸ and consequently that the acceptance of rights adjudication by political actors is a necessary cost of having this instrument in place. As the above-quoted declaration of Justice Sólyom, among others, suggests, it is not the case that the principal declared aim of setting up the constitutional courts was to supply an umpire in division-of-powers disputes rather

⁸⁵ Interview with Laszló Sólyom, *East Europ. Constitut. Rev.* 6:1 (Winter 1997): 71–77 at 72.

⁸⁶ Andrew Arato, “Constitution and Continuity in the Eastern European Transitions: The Hungarian Case (part two)”, in Irena Grudzinska-Gross (ed.), *Constitutionalism & Politics* (Slovak Committee of the European Cultural Foundation, Bratislava 1993): 271–87 at 271.

⁸⁷ Interview with Boris Ebzeev, *East Europ. Constit. Rev.* 6:1 (Winter 1997): 83–88 at 86.

⁸⁸ Martin Shapiro, “The Success of Judicial Review”, in Kenney, Reisinger & Reitz, *supra* note 70: 193–219 at 205.

than to articulate rights. Neither is it the case that, in CEE, rights adjudication came later in time than the division-of-power adjudication, the trend that Shapiro discerns with regard to other constitutional courts in the world. On the other hand, the fact that these courts often tend to be more deferential to legislatures on separation-of-powers issues than on rights issues⁸⁹ seems to confirm a hypothesis that, in order to gain the political capital necessary to allow the court to be activist on rights, it must “shore up its party political and popular support”⁹⁰ by deferring to politicians on other issues that may affect their vested interests much more directly, namely on their powers and the procedures available to them.⁹¹

This fact may explain why the courts may afford to be “adventurous” and “courageous” in confronting legislatures on rights-related issues while they are often meek and deferential on questions of the relationship between various organs of the state. This, however, is a contingent truth: it assumes that, in order to build political capital, constitutional courts will defer to non-judicial bodies on those matters which are less salient, or less important, to the legislature and/or the executive, and that these bodies care more about their place within the system of separation of powers than about the interpretation of constitutional rights. However, the latter factor (the separation of powers as more salient to non-judicial bodies than fundamental rights) is not necessarily the case. After all, when the court intervenes in cases concerning the separation of powers, it will usually support one agent against another (the president as against the prime minister; the parliament as against the president, etc), and the body that gained the support of the court in its rivalry with other institutions (or the political party that is behind this body or its majority) will remember, and be grateful. This is part of the political capital that the court will accrue. On the other hand, when the constitutional court takes on the legislature with regards to its understanding of rights, it may put itself in an antagonistic relationship towards the parliamentary majority and the government and the president (this is what actually happened when the Polish Constitutional Tribunal found the abortion statute unconstitutional in 1997). I am making this obvious observation in order to indicate that it is far from self-evident that the courts necessarily have a strong incentive (in terms of building up political capital, especially in the early years of their existence) to be deferential on the separation of powers and activist on fundamental rights; depending on how salient the issue is to the non-judicial bodies that will feel challenged by the court’s decision, it may well be (and often is) that the reverse is the case.

But (the argument might go) it is not only the salience of the issue to the non-judicial bodies that matters; it is also significant whether or not the court is able to identify the sphere within which the other bodies may accept a solution

⁸⁹ See Arato, *supra* note 86 at 272–3.

⁹⁰ Spencer Zifcak, “Hungary’s Remarkable, Radical, Constitutional Court”, *Journal of Constitutional Law in Eastern and Central Europe* 3 (1996): 1–56 at 27.

⁹¹ See, similarly, Wiktor Osiatynski, “Rights in New Constitutions of East Central Europe”, *Colum. Hum. Rts. L. Rev.* 26 (1994): 111–166 at 151 n. 185.

determined by the itself; in other words, whether the court is able to find a zone of consensus (even if only a tentative and grudging consensus). As Lee Epstein, Jack Knight and Olga Shvetsova have shown on the basis of an analysis of the experience of the Russian Constitutional Court, such a court is most likely to hand down a decision when it can find an overlapping “tolerance interval” around the most-preferred positions of the non-judicial bodies, and of itself.⁹² The decisions which are broadly acceptable to all main institutional players (even if not congruent with their most preferred positions) will tend to strengthen the Court’s legitimacy. In contrast, if there is no overlap on a given issue in the attitudes (not just in the most-preferred positions but also in the “tolerance intervals”) of the main institutional players (such as the President, the Lower Chamber, the Upper Chamber, and the Court), the Court would do best by avoiding taking any decision. If it does decide nevertheless, it inevitably weakens its institutional position.

Epstein et al. show how the disregard for this truth led the first Russian Constitutional Court (1991–1993) into a disaster: it tried to take a stand on issues on which there was no overlap in the tolerance intervals between President Yeltsin and the Supreme Soviet of the time, namely on the range of presidential powers and the scope of decentralisation of the system, and consequently it fell victim to Yeltsin’s anger. In turn, its case law on individual rights, on which (according to Epstein et al.) there were important overlaps in tolerance intervals, was quantitatively much less significant. In contrast, in the second stage of its existence (after 1995) the Court prudently (by Epstein’s standards) focused on individual rights and easily targeted the positions that were within the boundaries of the overlap, while avoiding the tricky issue of separation of powers on which no overlap between the positions of the President and the Duma existed. (It also managed to identify an overlap range on issues related to federalism). Hence, the numerical explosion of individual-rights decisions in the second stage of the Court’s existence, compared to the first stage.

Epstein’s research is useful for our purposes: by identifying the overlaps in “tolerance intervals” as the source of the legitimacy of courts, it shows that they are dependent for their strength upon the relationships and interactions with and between other main institutional actors. What Epstein’s conclusions do not support (and she does not suggest that they do) is the argument that, in normal circumstances, the sphere of human rights is the one in which it is easier for the court to establish its political capital while the sphere of separation of powers (both vertical and horizontal) is more risky, and the courts should tread more gently there. Which area is more conducive to the build-up of a court’s legitimacy is a fully context-dependent matter, and will vary from one country to another. After all, when the parliament and the court are deeply opposed to each other on the question of a statute or policy that is important to the government and yet that the court strikes down on as violative of constitutional rights, as was the case in Hungary with the

⁹² Lee Epstein, Jack Knight & Olga Shvetsova, “The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government”, *Law & Society Review* 35 (2001): 117–63.

invalidation of the economic austerity program in 1995, then we have precisely the sort of confrontation that may lead to a weakening of the court's political capital. Whether it will happen depends (partly) on the views, strength and prospects of future victory of the political opposition at the time of the constitutional challenge. Epstein et al. consider each chamber of parliament as a separate entity, but of course, in the process of abstract review, an alliance between the Court and (in the case of an invalidation) the parliamentary minority is very likely. In consequence, what may appear as a head-on confrontation between the court and the parliament may in fact turn out to be a matter of an alliance between a majority of the Court and the parliamentary minority – but a minority that may become one day the government-building majority. In such circumstances, the political capital of the Court may be enhanced rather than weakened, even though at the time it may seem that the Court is operating in a sphere in which no overlap in tolerance intervals can be discerned.

Furthermore, it should be added that the courts may weaken their political capital not only by confronting the legislature and striking down its statutes, but also by upholding certain laws, when the act of upholding is viewed as overtly politicised and especially when the law is amended by the legislature soon after an election. This may well happen in the human rights area; not necessarily only in cases involving questions of the separation of powers. Consider, as an example, a decision of the Bulgarian Constitutional Court in 1993 that upheld a controversial, and widely criticised, statute on the “lustration” of academic staff at universities and other academic institutions.⁹³ One of the justices of the Court later commented, with the benefit of hindsight, that the law (which had been revoked by a newly elected majority not long after the decision of the Court) had been upheld by judges voting “in accordance with their political, and not legal, views”.⁹⁴ Regardless of whether or not one shares this opinion, it is clear that once the Court entered into the fray (and it had no opportunity of avoiding a decision) there was no way of identifying a “safe” (i.e., located within the overlap of the tolerance intervals) way of deciding the issue.

This being said, ultimately the question to be posed is not whether it is more efficient (from the point of view of a build up of its own political capital) for a constitutional court to be non-deferential on questions of separation of powers or individual rights, but rather which (if either) is the more proper field of an active intervention, considering the skills, qualifications and institutional position of the court. Off-hand, one may be excused for thinking that rights-based review is inherently more problematic because rights provisions lend themselves, more than other constitutional provisions, to different, often contrasting, interpretations. Consider some of the vexed questions and controversies regarding the interpretation of vague, general rights-provisions: Does a general equality provision (such as a general

⁹³ For discussion of this case, see Chap. 9, pp. 363–64.

⁹⁴ Interview with Professor Neno Nenovsky, former Justice of the Constitutional Court of Bulgaria (in 1991–1994), Sofia, 10 May 2001.

right not to be discriminated against) mandate, permit, or prohibit affirmative action? Does a general right to freedom of speech protect individuals who wish to spread hate-speech and racist propaganda? On such matters many reasonable people (who affirm a given right in abstracto) can, and do, fundamentally disagree, and that is why the authority of a particular body to make a final articulation of the meaning of a constitutional right necessarily raises the question of its legitimacy. On the other hand, structural and procedural provisions related to the separation of powers or to the integrity of legislative procedures are less ambiguous and controversial (though are not themselves unambiguous or self-evident).⁹⁵ To give just two examples from CEE: when the Lithuanian Constitutional Court struck down certain provisions of the Law on the Courts that gave the minister of justice the right to nominate judges for presidential approval, because the Constitution (Art. 124) charges the judicial college with counselling the president on the appointment of judges,⁹⁶ the possibility of reasonable disagreement surrounding the (un)constitutionality of the challenged provisions was rather slim. Similarly, when in late 1999 the Moldavian Constitutional Court found – at the instigation of the parliament – that the referendum called by President Lucinschi to transform Moldova into a presidential republic was unconstitutional, because the president had encroached on several parliamentary prerogatives, under Art. 88 of the Constitution, that stipulate that the parliament should have the final say on whether to call a referendum,⁹⁷ again, the room for reasonable disagreement about the correctness of such finding is narrow.

It is not, however, merely a matter of the scope for bona-fide disagreement with the Court’s finding, but also of how qualified the judges are to pass a judgement on a given issue, and how likely it is that this judgement will be affected by their personal, political or ideological biases. Typically, the members of constitutional courts are eminently qualified to interpret general provisions on powers and procedures because this is the stuff of legal education, and is precisely what they have been trained to do well. As Burt Neuborne said: “if the question is which organ should make a decision affecting a fundamental value, rather than what the decision should be, the functional benefits of using judges to resolve disputes would, I think, be widely conceded”.⁹⁸ These “functional benefits” stem partly from the fact that judges are well suited, by their qualifications and experience, to resolve these kinds of disputes. Thus, when a (relatively) unambiguous constitutional provision is breached in the political or legislative process, it is a requirement of the rule of law that the constitutional court must invalidate the political decision in question.⁹⁹

⁹⁵ According to Jonathan Macey, structural constitutional rules are “self-executing”, in contrast to “directives that forbid government officials from doing certain things” (such as, infringing individual rights), which “rely on an allegiance to vague constitutional principles”; Jonathan R. Macey, “Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory”, *Virginia Law Review* 74 (1988): 471–518 at 503.

⁹⁶ “Constitution Watch”, *East Europ. Constitut. Rev.* 9:1/2 (Winter/Spring 2000) at 23.

⁹⁷ *Id.* at 27.

⁹⁸ See Neuborne *supra* note 38 at 369, footnote omitted.

⁹⁹ See Cass Sunstein, “Introduction: The Legitimacy of Constitutional Courts: Notes on Theory and Practice”, *East Europ. Constitut. Rev.* 6:1 (Winter 1997) at 61–63.

This argument, however, cannot be made with respect to ambiguous provisions which allow for multiple interpretations. This is not only because there is no special relevance attached to legal qualifications in making one more qualified to resolve the moral and political problems that arise from abstract provisions of rights, but also because there is a distinct risk that judges will bring their own ideological views and prejudices into the articulation of the “true” meaning of such provisions. In fact, they cannot help doing so; the question is, why it should be their ideological views and prejudices that will inform the binding articulation of vague and ambiguous constitutional rights?

Therefore, the argument for stronger grounds for intervention by courts into legislative acts based on the separation of powers argument as opposed to the rights argument is made on two grounds: firstly, on the difference in the degree of ambiguity of these two types of provisions (separation of powers provisions being normally less ambiguous than rights provisions), and secondly, on the basis that the special skills and competence of the judges are better suited to dealing with procedural and separation of powers issues than with articulations of rights. These two grounds are conceptually independent of each other; the ambiguity argument is distinct from the institutional competence argument. It should be added that the ambiguity point is made about whole classes of provisions rather than about any single provision. One may, after all, contrast a very ambiguous procedural provision (for example, that no significant amendments to the proposed bill should be made by the Upper Chamber of the parliament)¹⁰⁰ with a relatively unambiguous right (for instance, that a citizen has a right not to be extradited and a right to return to her country). But by and large, it seems obvious that rights lend themselves more readily to divergent reasonable articulations than procedural rules or rules concerning the separation of powers. This, it should be noted, is not a conclusive argument against rights-focused judicial review, but, at the very least, it demands of courts a much better justification (and, perhaps, a much greater degree of caution when they engage in the scrutiny of a law on the basis of rights, as opposed to scrutiny based on (alleged) defects in procedure or disrespect for the division of powers.

The idea that the constitutional court should, whenever possible, aim to consider the challenges to a law in terms of the procedure (and consistency of its adoption with the rules concerning the separation of powers), rather than in terms of its substance, has been an important theme in the theory of judicial review in the United States – certainly not the only theory of judicial review but an influential one nonetheless. This normative theme should be distinguished from a “procedural” theory of judicial review, understood as the scrutiny of the substance of a law in terms of whether it promotes or negates the operation of democracy understood as a

¹⁰⁰ The Polish Constitutional Tribunal struck down an amendment to the so-called “lustration law” on the basis that significant changes to the bill were made by the Senate, which had thus overstepped its law-making powers; see Decision K 11/02 of 19 June 2002, http://www.trybunal.gov.pl/OTK/teksty/otkpdf/2002/K_11_02.pdf, discussed in Chap. 9, pp. 358–59.

set of procedural devices of self-government.¹⁰¹ Rather, the argument is that it is more democratic, and also more in tune with the competencies of the Supreme Court, if it “examin[es] carefully the process of decision ... even though the particulars of the decision itself [are] outside its institutional capacity”.¹⁰² The theory can be understood in a strong sense, as foreclosing the entry of the Court in the substantive-review area, and in a weak sense, as suggesting that whenever the option is available, the Court should choose to invalidate the offending law on procedural rather than on substantive-rights grounds. To be sure, the latter, weak, understanding carries with it a danger of hypocrisy: it may seem to suggest that, even if the Court wishes to strike down a provision for substantive reasons, it should try to manufacture the procedural arguments in order to render its decision more palatable and more consistent with its legitimate powers. There will be times when such a procedural argumentation will be clearly contrived and unconvincing. Either way, the theory reflects the view that the Court is much better positioned to evaluate the separation of powers and rules of procedure than it is to ascertain the meaning of substantive provisions, in particular those concerning rights and liberties.

Against this theoretical background, it is striking that constitutional courts in CEE often see themselves as guardians of rights provisions more than of the separation of powers. The statement made by ex-Chief Justice Sólyom, quoted above, exemplifies this point.¹⁰³ This has been noted, with approval, by a student of the Hungarian Constitutional Court, who observed that the Court “has been willing to act more deferentially in non-human rights cases in order to shore up its party political and popular support”.¹⁰⁴ This discrepancy had been criticised by Andrew Arato, who observed that, while the Hungarian Constitutional Court has become an effective defender of liberal constitutionalism, it has not been equally committed to democratic constitutionalism. In Arato’s opinion, the court failed to take a sufficiently strong counter-majoritarian stance in those cases that called for intervention to reinforce democracy, to keep the democratic process open, e.g. in the area of governmental control of the media.¹⁰⁵ It goes without saying that, when referring to “democracy reinforcement” and the goal of “keeping the democratic process open”, Arato applies John Hart Ely’s theory of judicial review that defends strong intervention by the United States Supreme Court in the political process, on the grounds of defending the democratic process against distortions (such as those effected by restrictions upon political communication), and remedying its procedural defects

¹⁰¹ See Ely, *supra* note 14.

¹⁰² Neil K. Komesar, “Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis”, *Univ. of Chicago Law Rev.* 51 (1984): 366–446 at 386; see also generally William W. van Alstyne, “A Critical Guide to *Marbury v. Madison*”, *Duke Law Journal* (1969): 1–47 at 23–4.

¹⁰³ See text accompanying footnote 85 above.

¹⁰⁴ Zifcak, *supra* note 90 at 27, footnote omitted.

¹⁰⁵ Arato, *supra* note 86 at 272.

(such as the inability of some minorities to participate in the normal formation of coalitions aimed at constituting, one day, a legislative majority).¹⁰⁶

Moreover, the Polish Constitutional Tribunal adopted a theory that different subject-matters of constitutional review may trigger different levels of deference to the legislature, and that in the case of “classical” human rights, “almost any statutory regulation calls for a careful scrutiny from the point of view of permissibility of its enactment and of its substance”.¹⁰⁷ This is contrasted to those subject matters that “by their very nature are left to a broad political discretion of statutory regulations” such as “socio-economic issues regulated on the basis of a particular political ideal of social development”.¹⁰⁸ The second part of the argument is unobjectionable: those regulations and policies that require, in terms of an appraisal of their desirability, a reconstruction and evaluation of the broad social vision upon which their strength and plausibility are based, seem to be largely beyond the competencies of a judge, and should be scrutinised only as an exception and with a strong presumption in favour of its constitutionality. One may draw an analogy here to Christopher Eisgruber’s distinction between “discrete” and “comprehensive” ideals¹⁰⁹: it is Eisgruber’s thesis that, with some exceptions, judges are less well equipped to evaluate those standards that rely upon comprehensive principles (that is, the principles which demand an articulation of a general vision of a good system as a whole, for instance, of economic justice or electoral fairness) than those standards that constitute reasonably specific side-constraints upon governmental action. It is, of course, easier to state this distinction in abstracto than to apply it in practice, and the very characterisation of a particular rule as relying upon a “comprehensive” as opposed to a “discrete” principle will often be contested – but, as a rule of thumb for identifying the fields of judicial competence, it is not a bad starting point.

This being said, however, the first part of the argument from the above-mentioned decision of the Polish Constitutional Tribunal, concerning the natural competence of the court to apply strict scrutiny to regulations implicating “classical” human rights, is more controversial. Justice Lech Garlicki, who authored this decision, defended a strict scrutiny of rights-impacting statutory regulations by reference to “a constitutional assumption of leaving a maximum liberty to individuals”.¹¹⁰ This assumption is correct; but there is a non sequitur between it and the lowered deference to statutory choices by the constitutional court. The move from the assumption to the stricter scrutiny is understandable only if we

¹⁰⁶ See Ely, *supra* note 14.

¹⁰⁷ Decision K. 3/98 of 24 June 1998, *Orzecznictwo Trybunału Konstytucyjnego*, Rok 1998 (C.H. Beck: Warszawa 1999), item 19: 308–71 at 353, translation in *East European Case Reporter of Constitutional Law* 6 (1999): 130–211. References here are to the Polish text.

¹⁰⁸ *Id.* at 353. See, similarly, cases cited by Jerzy Oniszczyk, *Konstytucja Rzeczypospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego* (Zakamycze: Kraków, 2000) at 161, translation in *East European Case Reporter of Constitutional Law* 6 (1999): 130–211.

¹⁰⁹ See Eisgruber, *supra* note 34 at 165–167 and 169–175.

¹¹⁰ Decision K. 3/98 *supra* note 107 at 353.

assume that the court is, naturally and necessarily, more on the side of broader individual liberty than the parliament is. This, however, is something that has to be shown rather than presupposed: we cannot simply assume *a priori* that whenever the court and the parliament disagree about the liberty implications of a particular regulation then the court is, *ex officio* as it were, pro-liberty and the parliament necessarily a menace to individual freedom; rather, one has to acknowledge at least the possibility that it may be the other way round. The argument about “natural” competence of the Court to apply strict scrutiny to human rights-implicating regulations is, therefore, question begging.

It should be added, however, that there have been instances in CEE when constitutional courts have preferred to invalidate a law on procedural rather than substantive grounds, even though these two alternative avenues for scrutiny were theoretically open to it. As an example, one may refer to the Polish Constitutional Tribunal decision in 1998 concerning the statute on the “lustration” of judges¹¹¹: an article that would have suspended the operation of statutes of limitations for disciplinary actions against politically-motivated judicial decisions in the Communist period was struck down on procedural grounds, with an almost open encouragement for the parliament to reconsider the matter in a procedurally correct way.¹¹² The procedural defect was found in the fact that the National Council of the Judiciary (NCJ) – a corporate body representing the judges – was not properly consulted on the proposed bill even though the Constitution mandates such a consultation. Whether indeed the duty to hear the NCJ in the process of drafting the law was observed or not was in itself a controversial matter (the NCJ had presented its opinion on an earlier draft but not on the later one); but the CT chose to focus on this point in order to strike down a central provision of the law. However, it should be noted that this strategy of procedural scrutiny was subjected to strong criticism in the dissenting opinions, in which it was claimed that the procedural argument was convoluted and unpersuasive.¹¹³ One of the dissenting judges issued a warning regarding “the danger that, in proceedings on the conformity of normative instruments with the Constitution, the centre of gravity will be moved from questions concerning the substance to procedural issues, especially where ... such solution may justify passiveness and lift [from the Court] the responsibility for the substance”.¹¹⁴ This is a powerful illustration of how contested and tentative the theory concerning the procedural, as opposed to substantive, strategy of scrutinising statutes by the constitutional court actually is.

¹¹¹ *Id.*

¹¹² *Id.* at 354.

¹¹³ Dissenting opinions by Justice Rymarz, at 363–64, and Justice Zdyb, at 365–71.

¹¹⁴ Dissenting opinion by Justice Zdyb, at 370.

2.4 Constitutional Courts as Protectors of Minorities?

A favourite and often dominant line of defence of the strong role of constitutional courts – not only in CEE, but particularly strong there – is to perceive them as the defenders of constitutional rights against the policies decided on by the political branches of the state, and, in particular, of minority rights against possible majoritarian tyranny. The argument appeals to the non-majoritarian aspects of democracy: the parliament and executive are (at least, when they function well) the articulators of the majority will but these devices have to be complemented by restrictions on the majority, and this is (the argument goes) the essence of constitutionalism, and of constitutional bills of rights in particular.

The argument is familiar, and may be exemplified by the account given by a judge of the Bulgarian Constitutional Court, Professor Neno Nenovsky, in an interview with this author.¹¹⁵ Constitutional judicial review, according to Professor Nenovsky, is not in competition with the “democratic principle in the modern sense”, because democracy requires more than simply respecting the will of the majority. Not only is the pedigree of the institutions relevant in judging their democratic character, but also whether or not the organs are continuously controlled: permanent control is also an element of democracy. The problem is that the institution assigned the task of controlling the other organs should also be subject to democratic control itself. The sovereignty of the people is expressed not only in the statutes but also in the constitution; it is the constitution that legitimates all the organs of power. This, for Nenovsky, is the main contribution of US constitutionalism which is different from the traditional European (mainly French) approach in that it places an emphasis on the constitution as the expression of popular sovereignty. The constitutional court, while not a representative body in the traditional sense, has connections (according to Nenovsky) with “the expression of the general will” within the range of functions that it performs. As the Bulgarian Constitution proclaims in Art. 1 (2), all power derives from the people, and this means that the people exercises its power through various organs, including the Constitutional Court. Further, the legitimacy of this Court is derived from human rights, which cannot be subject to majority rule. “At this level, the Constitutional Court is not dependent on the rule of the majority”; the Court should have the power to strike down a statute that is unconstitutional even if the statute expresses the interests of the majority. Professor Nenovsky concludes: “Were it not for the Constitutional Court, the tyranny of the majority would become a norm”; and one may safely claim that this represents a *communis opinio* of constitutional lawyers in CEE (and also of the sympathetic external observers)¹¹⁶ after the fall of Communism.

¹¹⁵ Interview with Professor Neno Nenovsky, former Justice of the Constitutional Court of Bulgaria (in 1991–1994), Sofia, 10 May 2001.

¹¹⁶ See, e.g. Jean-Pierre Massias, *Droit constitutionnel des États d'Europe de l'Est* (Presses universitaires de France: Paris, 1999) at 163.

This conception of the role of the constitutional courts cannot, however, be taken at face value. First, it runs into some hard theoretical questions stemming from many unspoken, and not necessarily self-evident, assumptions. Second, it is confronted by a reality that does not necessarily support the thesis that constitutional courts – both in CEE and elsewhere – are on the side of minority protection when they collide with parliaments on the articulation of rights. At a theoretical level, the fundamental challenge to the conception of constitutional courts as defenders of (minority) rights is that vague and inevitably indeterminate constitutional rights provisions often lend themselves to divergent reasonable interpretations, and, when there is a collision of two institutions (or, rather, the majorities of the compositions of two institutions) in articulating a particular right, there is no reason to assume *a priori* that one institution has necessarily a better insight into the “true” meaning of the right concerned. To use the words of Jürgen Habermas, “human rights are not pre-given moral truths to be discovered but rather are constructions”¹¹⁷ and, one should add, they remain “constructions” at the post-constitution-making stage in so far as their meaning remains open to differing articulations, thus calling for debate and authoritative resolution. This is a point already made earlier in this chapter, and needs to be reiterated only to emphasise that the usual rhetoric surrounding the idea that the court defends constitutional rights against majoritarian intrusions is just that: a rhetoric. It assumes that there is always a single, canonical understanding of a right, and, in addition, that the court is necessarily better placed to discern this canonical understanding. If, however, we reject as unfounded the assumption that there exists a single and objectively correct understanding of a right, we will see the court versus legislature clash on the meaning of a right for what it is: a disagreement between two institutions about how best to articulate a vague constitutional provision. When a court challenges a legislative understanding of a right, it adopts a quasi-legislative role in that it wishes to displace the parliamentary articulation of a right with its own. The institutional design of a particular system of law-making may grant the court such a role; but, even if the court has the “last word” on the binding articulation of a right, this does not imply that the parliamentary articulation was not about a right but about something else (a policy antithetical to a right), or that the parliament was proven “wrong” in its understanding of a right. To draw such a conclusion would be to infer judicial infallibility on the basis of contingent institutional design.

Such institutional design (with the “last word” reserved to the court) may be recommended on the basis of a practical judgement according to which it is likely that, when the parliament and the court differ in their opinions as to the best articulation of rights, it is prudent to allow the court’s understanding to prevail. But note the contingent, tentative character of such an institutional decision. It certainly does not deny that the parliaments also articulate constitutional rights in their legislative choices; the view about judicial supremacy need not disqualify the members of

¹¹⁷ Jürgen Habermas, *The Postnational Constellation: Political Essays*, trans. Max Pensky (Polity: Cambridge, 2001) at 122.

parliament from a bona fide attempt to implement the constitutional mandates, as they understand them. Furthermore, the fact the members of parliament are dependent on the electorate for re-election does not negate the bona fide subjection of the parliament to the constitution because there is no reason to believe that the voters have a cavalier approach to constitutional rights, including those for members of minority groups. (I put to one side the observation, to which have already alluded in Sect. 1.3, that in systems in which judges of constitutional courts have no life tenure, those of them who will be up for re-election or for another job after having completed their term on the court will have to be popular with the majority political forces of their countries, upon which their future professional fate may depend). For one thing, some voters are members of minority groups and members of parliament have reasons to seek their votes also. More importantly, however, there is no reason to believe that, in the overall judgements made by the voters concerning their choices, ideas about justice, including those concerning the place for minorities in their societies, will not figure at all, or that it will always bow to selfish interests. As Jeremy Waldron has eloquently argued, it is simply unrealistic to believe that when the voters decide about whom to support, they always and necessarily do it upon the grounds of their interests, rather than on a combination of interests and views about justice: “People often vote on the basis of what they think is the general good of society. They are concerned about the deficit, or about abortion . . . in a way that reflects nothing more about their personal interests than that they have a stake in this country”.¹¹⁸ In consequence, legislative choices (insofar as they are seen as the extension of voters’ choices) must be seen as giving effect to a mix of views about majority interests and those relating to justice (the latter incorporating the views concerning the rights of members of minority groups). Of course, different voters (and consequently, different MPs) will have widely divergent conceptions of justice, but this is also what happens in the case of differences between the majority of the parliament and the majority of the constitutional court, when these two institutions clash over justice, or over constitutional rights. To infer on the basis of that clash that the parliamentary choice was really not an honest expression of about a conception of justice, but merely a policy decision based on the interests of the majority, is unwarranted.

It is, therefore, no wonder that various scholars studying constitutional courts around the world have often concluded that the conception of a court as a defender of minority rights, or even of rights more generally, simply cannot stand the test of evidence. The American scholar Stephen Griffin, in his excellent work on the United States constitutionalism, refers to this problem by noting: “The emphasis on majoritarianism as the fundamental principle of American democracy in the debate over judicial review and the constitutionalist position rests on the assumption that only the Supreme Court can play a credible role in defending constitutional rights.

¹¹⁸ Jeremy Waldron, “Rights and Majorities: Rousseau Revisited”, in John W. Chapman & Alan Wertheimer, eds, *Majorities and Minorities: Nomos XXXII* (New York University Press: New York, 1990): 44–75 at 59, footnote omitted.

This is clearly not the case”.¹¹⁹ Griffin then goes on to list various civil rights and liberties enacted by the United States Congress in the 1980s and says: “Many of these laws . . . were passed in response to numerous Court rulings that restricted the scope of laws designed to ensure the enforcement of civil rights”.¹²⁰ Griffin concludes: “The [contemporary] debate [about judicial review] accepts the simplistic view that majorities are always interested in violating the rights of minorities. This makes it difficult to explain why Congress is able to produce consistent majorities in favour of civil rights and liberties legislation”.¹²¹

Nearly 40 years before the publication of Griffin’s book, Robert Dahl had published an article which soon became famous, in which he conceptualised the US Supreme Court as “a national policy-maker”; Dahl rebutted the view that the Court “stands in some special way as a protection of minorities against tyranny by majorities” – both as normatively suspect and as factually incorrect.¹²² It is perhaps significant that both Dahl and Griffin are, by their background, not lawyers but political scientists, which may make them more attentive to the reality of the Supreme Court’s work and more suspicious of the ideological rationalisations to which lawyers are prone. Alec Stone Sweet also approaches the study of courts from a perspective of political science and, interestingly, he too concludes (in his case, with reference to Western European constitutional courts) that, in many cases, “it is nonsense to suppose that the constitutional court functions as some kind of bulwark against the tyranny of majority rule”.¹²³ Stone Sweet makes this observation in the context of a specific example he discusses, namely the legislative attempts in France in the 1980s to introduce affirmative action for women in local elections. The bill, brought before parliament by a Socialist government, was strongly opposed by the conservative opposition, which referred it to the Conseil constitutionnel; the Conseil duly annulled the challenged provision on the basis of the principle of equal treatment under the law, as enshrined in the 1789 Declaration of the Rights of Man and the Citizen. Regardless of one’s views about the merits of this decision, it is certainly not possible for an observer to conclude that the Conseil behaved here as a protector of a minority¹²⁴ against majoritarian tyranny.

Has the performance of the constitutional courts in CEE supported the claim that they were, consistently, engaged in defending minorities against the majority? It is hardly possible to answer in the affirmative. A more detailed account will be

¹¹⁹ Griffin, *supra* note 59 at 116, footnote omitted.

¹²⁰ *Id.* at 116, emphasis added.

¹²¹ *Id.* at 116.

¹²² Dahl, *supra* note 81 at 282.

¹²³ Alec Stone Sweet, “Constitutional Dialogues: Protecting Rights in France, Germany, Italy and Spain”, in Kenney, Reisinger & Reitz, *supra* note 70: 8–41 at 27.

¹²⁴ Of course, for the purposes of the theory of minority protection against the tyranny of majority it is not necessary (or even proper) to understand “minority” in statistical terms but rather in terms of under-representation of a particular category of citizens in the political system.

presented in Chap. 8 but at this point one may only briefly observe that the evidence for such a proposition would be difficult to come by. Apart from the shining exception of the Bulgarian MRF case (in which the Constitutional Court defended a Turkish-based party against delegalisation),¹²⁵ there have been virtually no significant decisions by constitutional courts in CEE along these lines. In fact, there have been surprisingly few decisions dealing with ethnic/national problems at all, even in the places when one would expect them. A natural place to look for such cases would be the Baltic states (in particular, Estonia and Latvia, with their large Russian-speaking minorities); but there, constitutional courts played a very minimal role in imposing a regime designed to accommodate the Russians. The case of Estonia is quite instructive in this regard. As the Estonian scholar Vello Pettai has shown, the Constitutional Review Chamber (CRC) was very timid in tackling the Language Act, and fundamentally avoided any principled appeal to minority rights in dealing with constitutionality of the provisions which were arguably discriminatory against the Russian minority.¹²⁶ The CRC struck down the provisions of the law on technicalities; the parliament easily re-enacted the law free of technical defects, and it was only international pressure that subsequently compelled the parliament to amend the law.

In other post-Communist countries, there have been very few ethnic-related decisions by constitutional courts; and those that there have been can hardly support the thesis that the central role of these courts is to shape a generous system of minority protection. For instance, in Romania in 1995 the Hungarian minority party UDMR, along with some other opposition parties, attempted to introduce into the draft law on education a provision on the right of the Hungarian minority to have a state Hungarian-language university. They did not succeed in the legislative process, and challenged the bill in the constitutional court, but the challenge failed. (Of course one may suggest that it is due to the general weakness of the Romanian Constitutional Court, and that a stronger court would take on the legislature more aggressively; this, however, is an unverifiable speculation). As another example, one could point at the decision of the Ukrainian Constitutional Court of December 1999, in which the Court strengthened the constitutional status of the Ukrainian language in Ukraine, and established an affirmative duty on all public bodies to use only Ukrainian throughout the country (even though in Eastern and Southern regions the Russian language is widely used both in private and public contexts).¹²⁷

Of course, the ethnic/national dimension is not the only aspect of possible domination of a minority by the majority; the religious is another. Again, however, constitutional courts in CEE have not been, by and large, active fighters for

¹²⁵ Bulgarian Constitutional Court decision of 22 April 1992, discussed in Chap. 8, pp. 326–28.

¹²⁶ Vello Pettai, “Democratic Norm Building and Constitutional Discourse Formation”, paper presented at the workshop “Rethinking the Rule of Law in Post-Communist Europe”, European University Institute, Florence, 22–23 February 2002. More on this in Chap. 8, pp. 321–22.

¹²⁷ See Kataryna Wolczuk, “The Constitutional Court of Ukraine: The Politics of Survival”, in Sadurski, *supra* note 56: 327–48 at 338–39.

religious tolerance based on the separation of state and religion. In the country in which the Churches (or one should say, the Church) are the strongest, Poland, the Constitutional Tribunal has been anything but a champion for religious tolerance, and time after time it has caved in to the pressure from the Catholic Church. Invalidating crucial provisions of the (relatively liberal) abortion law; upholding the introduction, by ministerial decree, of religious teaching in public schools; upholding the ban, in the Broadcast Law, on expressions offensive to Christian values¹²⁸ – all these decisions were seen, rightly, as establishing a privileged position for the Roman Catholic faith, and amounting to discrimination against other religions or non-believers.

This is not to say that the record of constitutional courts in CEE is negligible, as far as the protection of constitutional rights is concerned. I will attempt a more comprehensive account of this record in Chaps. 6, 7, 8, 9, and 10, and indeed it will be shown that, overall and subject to many reservations, the record in this field has been positive. But this is not the point discussed here; the object of this chapter has been to explore some of the main arguments aimed at justifying granting a strong power to constitutional courts as legitimate umpires of the constitutionality of legislation, when they exercise abstract review under the general constitutional provisions of rights. It is one thing to say that the operations of the constitutional courts had, overall, beneficial consequences, and another to argue about their legitimacy on the basis of fundamental precepts of democratic theory. The argument that, in a democratic system, there must be a protector of minority rights against majoritarian abuse, and that constitutional courts are well suited to perform such a role, might be a good legitimating argument to support the existence of strong constitutional courts – but, for the reasons spelled out earlier, it fails to perform that role satisfactorily in the discourse on the legitimacy of judicial constitutional review.

2.5 Conclusions

Constitutional courts in CEE, as elsewhere, have faced the legitimacy dilemma, which has been particularly acute when they performed the role that represents their main *raison d'être*: the articulation of the true meaning of constitutional rights, and the invalidation of legislation on the basis of its inconsistency with those meanings. Based on the tacitly accepted – and never fully defended – fiction of the objectivity of the rights articulations, these courts have had to forsake the strategy that would have offered perhaps the most candid and convenient defence of their legitimate role in overturning democratic legislation in this way; namely, the strategy of

¹²⁸ See, respectively, Decision no. K. 26/96 of 28 May 1997 (abortion), Decision K. 11/90 of 30 January 1991 (religious teaching in schools), and Decision K. 17/93 of 7 June 1994 (broadcast law). All these three decisions are discussed in Chap. 6.

depicting themselves as quasi-legislative bodies, adding an extra chamber to the existing parliamentary process. They “had” to forsake this strategy because it would undermine their pretences to quasi-judicial character, and thus the privileged standing of lawyers to sit on these “courts”. The contrast between their legislative function on one hand, and the quasi-judicial staffing, procedures and rituals of these bodies on the other, calls into question the reasons for adopting the “Kelsenian” rather than the decentralised system of judicial review in the first place. None of the main rationales usually provided for this particular choice of institutional design is fully convincing, and neither does the sum of these less-than-persuasive arguments suffice. The question is, if there is going to be a system of judicial review of legislation, in particular under constitutional bills of rights, would a model other than the system of abstract, ex post and final review by specialised constitutional courts be more conducive to the solution of the legitimacy dilemmas? This question is the focus of the discussion in the next chapter.

Rights Before Courts

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