Chapter 19

Fundamental rights adjudication in the Central European region

Lénárd SÁNDOR

ABSTRACT

The protection and adjudication of fundamental rights have been playing an increasingly important role in the legal systems of Western countries since the end of World War II. However, the early origins of fundamental rights go back well over two millennia. The theories of fundamental rights first appeared in the legal system of the ancient empires. The Code of Hammurabi in the ancient Babylon articulated the first requirement for fair trial as it provided that unfair judges be fined and removed from their positions. The Torah first revealed by Moses (c.1304–1237 bce) also contained provisions on the prohibition of false witnesses. The first human rights document has been claimed to be the Charter of Cyrus from 539 bce because the word 'rights' specifically appears therein.[1] However, the modern concept of human rights that the state is for the people and not the other way around began to take root at the end of the eighteenth century.[2]

After their first appearances, the historical development of fundamental rights has taken place either through an organic and gradual process or as a result of independence or revolutionary movements. Different phases of this development can be distinguished, which involved the rights of the noble, limitation of the power of absolute monarchies, and individual and collective rights. The development in England is an example of the former where the power of monarchs were bound by law and rights as early as the adoption of the Magna Charta Libertatum in 1215.[3] The subsequently created Petition of Right (1628), Habeas Corpus Act (1679) and Bill of Rights (1689) are gradual fulfillment of the historic path of rights.[4] In the CEE region, Hungary underwent similar organic development with the adoption of the 'Aranybulla' in 1222, which set constitutional limits on the power of the monarch and granted rights to the Hungarian nobility.[5] In contrast to this type of gradual expansion, in other countries, the recognition and codification of fundamental rights were the result of cataclysmic events such as an independence movement or revolutionary war, e.g. in France or in the United States.[6] It must also be mentioned that while national constitutions served as the cradle of the modern conception of fundamental rights, they began to enjoy the protection of international law with the adoption of the UN Charter (1945) along with the Universal Declaration of Human Rights

1 Haas, 2014, pp. 44–45.
2 Halmai and Tóth, 2008, pp. 36–44.
3 Marinkás, 2012, pp. 75–91.
4 Haas, 2014, pp. 47–49.
5 Kovács, 1980.
6 Haas, 2014, p. 51.

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(1948).[7] This so-called 'normative revolution' marked a major turning point in the development of both human rights law and international public law.[8] However, the universality of human rights, instead of standardising rights, would allow – and also require from – states to implement these rights according to the national, historical, cultural and religious traditions of their respective communities.[9] Consequently, the primary places of nurturing and protecting fundamental rights remain within the states and local communities.

Accordingly, not only individual rights in the abstract but also the institutions and control mechanisms that serve to protect them are embedded and shaped by the various histories, traditions and legal cultures of the states. In numerous countries – such as the United States of America, Australia, Japan or the Scandinavian countries in Europe – ordinary courts are empowered to conduct a 'judicial review' to protect rights enshrined in the constitution. This type of 'judicial review' was first applied by the Supreme Court of the United States of America in the famous case of Marbury v. Madison in 1803 as part of the system of checks and balances, whereby the judicial branch serves as a check on the legislative as well as on the executive.[10] In other countries – such as those in continental Europe – a separate and centralised institution – the Constitutional Court – is responsible for conducting fundamental rights adjudication.

This chapter aims to provide a comparative analysis on the historical path, major institutions and mechanisms of fundamental rights adjudication in countries of the CEE region. To this end, it first outlines the concept, function, characteristics as well as the institutions of fundamental rights adjudication along with the aspects of limitation of fundamental rights (Section II). Then, it turns to the countries of the Central European region. This chapter aspires to provide a comparative overview about the unique characteristics of the systems of each country's fundamental rights' adjudication and concludes with a short assessment (Section III).

KEYWORDS

fundamental rights, protection and limitation of fundamental rights judicial review, centralized and decentralized constitutional review, Ombudsmen-like institutions

1. General Section

Before World War II, only a few European states – including Austria,[11] which served as a model from this aspect – introduced institutional mechanisms for protecting fundamental rights even though the concept of a centralised constitutional court was invented by the Austrian Hans Kelsen after World War I and that of the ombudsman in the eighteenth century.[12] One exception is the Czechoslovak Constitutional Court that was established in 1920 based on the Austrian model; however, it never really heard a single case that challenged the constitutionality of a statute.[13]

7 Even though the Universal Declaration of Human Rights is itself not an international treaty, undoubtedly, many of its provisions today do reflect customary international law. See Kovács, 2009, p. 64 and Hannum, 1995, pp. 340–341.

8 Halmai and Tóth, 2008, p. 67.

9 As the Catholic philosopher Jacques Maritain put it, "many different kinds of music could be played on the document's thirty strings". See Glendon, 2001, pp. 221–222 and Cançado Trindade, 2012, pp. 15–19.

10 The decision of the Supreme Court is available: https://supreme.justia.com/cases/federal/us/5/137/.

11 See: https://www.vfgh.gv.at/verfassungsgerichtshof/geschichte/history_overview.en.html.

12 Halmai and Tóth, 2008, pp. 195–196 and 236–239.

13 Taborsky, 1945.

The cataclysmic events during World War II led to the recognition and institutionalisation of the protection of fundamental rights by international law as well as to the establishment of various mechanisms in Western European countries that aim to safeguard these rights. Despite this general trend, countries under the Soviet military occupation and Communist Party dictatorship took a different direction. Even though they adopted written constitutions, they neither recognised the fundamental rights of human beings nor set up any real institutional mechanisms for their protections. The ultimate objective of the communist ideology and regimes was to establish egalitarian societies; however, they evolved into totalitarian states that were generally characterised by the lack of individual freedom and rights.[14] Consequently, fundamental rights adjudication was practically unknown in that region under the era of party dictatorship up until the collapse of the Soviet dominance at the end of the 1980s. Moreover, beyond the uncompetitive control and command economic system, the lack of individual freedom and their legal and institutional guarantees contributed to the downfall of the Soviet domination. This became obvious with the adoption of the Helsinki Accords in 1975, which opened the first 'cracks' for review based on certain human rights such as freedom of thoughts or speech.[15]

Against this background, the change of regimes at end of the 1980s and at the beginning of the 1990s represent a major milestone in reintroducing the concepts of fundamental rights in the legal systems of the states that are examined in this volume and also in establishing the modern public institutions of their protections. This development coincided with the commitment to accept the international – both universal and regional – European mechanisms of human rights protection. This commitment was also a precondition of the ultimate aspiration of this region, namely to become part of the European Union as well as of the Western economic and military community in a broader sense. Therefore, strong national institutions with broad competences were established with the ultimate objective of guarding over the achievements of the newly independent and free states. In Hungary, for instance, the newly established Constitutional Court not only became the symbol and a major guarantor of the transition period leading up to the era that built on the respect of democracy, the rule of law and fundamental rights, but it also became one of the driving forces by reviewing the constitutionality of legal norms adopted both before and after the regime change. This was illustrated by one of the earliest decisions in the history of the court, that is, the decision that ultimately abolished capital punishment.[16] To this end, the Constitutional Court in Hungary was given an exceptionally broad mandate by the introduction of the so-called *actio popularis*, whereby anybody, without having any interest or involvement in a specific case, was provided with the right to file a petition against any legal norm that are claimed to be contrary to the

14 See Muravchik, 2019.
15 Shaw, 2003, pp. 346–350.
16 Decision 64/1991 of the Constitutional Court of Hungary.

constitution.[17] This type of competence turned out to be a major vehicle in defining the limits and contents of fundamental rights as well as the role of the Constitutional Court in the government's arrangement of the country.

Therefore, the institutions that guarantee fundamental rights were established both as a result and as a driving force of the regime change in the countries that are examined here. Among such institutions are the constitutional courts, the ordinary courts as well as the institutions of ombudsmen; in addition, some other public institutions could also take up minor roles in the area of fundamental rights and contribute to their protection while fulfilling their main mission. One example of such institution could be the prosecution service in Hungary, which is part of the judicial branch in a wider sense[18] and therefore, according to the Hungarian Constitutional Court, is not the 'defender of the indictment' but rather a contributor to the administration of justice.[19] Consequently, the prosecution service is responsible for guaranteeing and promoting the procedural rights of the defendants, such as the right to a fair trial or legal assistance in the course of the investigation and the trial phase of the procedure.[20]

However, in the universe of the national institutions that are designed and empowered to protect fundamental rights, the institution responsible for 'constitutional review' or 'judicial review' plays a central role in fundamental rights adjudication. It serves as the most important guarantee of constitutionality and thus ensures that, among others, fundamental rights prevail in the whole legal system and permeate the social, political as well as economic-business relations in a country. The institution that conducts a constitutional review not only has the final word with regards to fundamental rights adjudication, but it also has the duty to forge a uniform practice throughout this area that other state institutions shall follow. As it was already briefly mentioned in the introductory section of this chapter, constitutional review has two basic models. The first is the decentralised (i.e. 'diffuse') system, which is based on the 'judicial review' of the United States of America and in which the 'constitutional review' and 'dispute resolution' functions are concentrated in the hand of the single judiciary and every court is entitled to perform both functions. The second is the centralised or continental model, which is based on the conception of the Austrian legal theorist Hans Kelsen, separates the two functions and concentrates them in two distinct institutions.[21] The states examined here – and in a broader sense, every CEE country that went through a transition period after the collapse of the Soviet domination – chose to adopt the centralised model in which a separate institution (in most cases

17 Art. 37 of the Act no. XXXII of 1989 on the Constitutional Court of Hungary.
18 Varga, Patyi and Schanda, 2015, pp. 227–230.
19 Art. 29(1) of the Fundamental Law of Hungary.
20 See, e.g., Decision 8/2013 and 33/2013 of the Constitutional Court of Hungary. Another example from Hungary was the Independent Police Complaints Board, which was established to examine and adjudicate violations of fundamental rights in relation to police operations. The Independent Police Complaints Board was established in 2008 and merged into the intuition of the Commissioner for Fundamental Rights in 2020.
21 Schwartz, 1992, pp. 742–747.

a Constitutional Court) exercises the 'constitutional review' function that includes fundamental rights adjudication, but they are not part of the ordinary court system and do not adjudicate conventional litigations. The only exception is Estonia, where, considering the small number cases along with the influence of the Scandinavian region, a separate chamber of the Supreme Court conducts constitutional review.[22]

Constitutional courts have numerous competences that are closely scrutinised in the chapter on constitutional adjudication.[23] However, through the exercise of most competences, constitutional courts are also required to protect fundamental rights that are enshrined either in the constitution or in the human rights treaties ratified by the states. Constitutional courts that are designed to ensure the governance and the separation of powers under and according to the constitutions are also required to ensure that other public institutions comply with fundamental rights. It is even true with regards to the legislative or other acts of the European Union in the cases when a given Constitutional Court reviews them based on the national constitution.[24] Among the various competences, however, there is usually one, the so-called constitutional complaint procedure, which is specifically designed to adjudicate and protect fundamental rights; this type of procedure has the outright purpose to safeguard individual liberties and rights as well as to define, through its case law, the methods of their restrictions as well as the potential public interests that could serve as their just limitation. Depending on the actual competences of a given Constitutional Court, the constitutional complaint procedure can extend to legal norms – either directly or through the application by courts and institutions – that concern the petitioner's rights and to the decisions of ordinary courts as well. Full constitutional complaint includes both types, while the normative one only recognises the constitutional complaint against legal regulations.

Even though the constitutional complaint procedure provides the primary and central place for fundamental rights adjudication, constitutional courts are not the only institutions that play a role in fundamental rights adjudication. Other public institutions are also indispensable to monitor, conciliate and channel disputes that involve dilemmas of fundamental rights to the constitutional courts, and from this perspective, they have an auxiliary role in fundamental rights adjudication. There are two such institutions: the ordinary courts or the judiciary and ombudsmen-like institutions. Ordinary courts, depending on their precise mandate, might play a dual role in protecting fundamental rights. On the one hand, in case they are required to interpret the texts of the laws in light of and according to the constitution, they must protect fundamental rights in the course of their dispute resolution or other regular operations that belong under the umbrella of the administration of justice. On the other hand, if they are empowered to turn to their respective constitutional court, they must monitor the constitutionality and the conformity with the fundamental

22 Halmai and Tóth, 2008, p. 196.
23 For a more detailed insight on the competences of constitutional courts, see Zoltán Tóth J., Constitutional Adjudication chapter of the present book.
24 Blutman, 2020.

rights of the legal norms that are applicable in a particular case. Such a competence does not only forge a bridge between the constitutional court and the ordinary court system, but it also requires judges to recognise the relevance of the constitution and the fundamental rights in given cases.

Ombudsmen-like institutions or national human rights institutions have a long history that dates back to the eighteenth century. It was first established by Charles XII of Sweden to examine complaints against the acts or inactivity of the public administration.[25] However, it quickly spread throughout the Scandinavian and Anglo-Saxon world, and under the mandate of the parliaments, it became an important institution in the protection against 'maladministration' in a broader sense that also includes the protection of fundamental rights. However, as opposed to the competences of the Constitutional Court and the judiciary, ombudsmen-like institutions do not have the power to resolve concrete cases or adjudications in a binding and definite way; instead, their main role through the flexible nature of their proceedings is exploratory or investigative, and therefore, it can influence fundamental rights through their recommendations or petitions and also by raising public awareness. Even though these national human rights institutions are not considered unavoidable in a constitutional state, they have become increasingly vital in the complex public law, public regulation as well as business and human rights relations of the past decades.[26] In that spirit, the Committee of Ministers of the Council of Europe in 1985 welcomed the development of the institutions of ombudsmen.[27] The need to introduce ombudsmen-like institutions in the states that are examined in this chapter arose during the regime change as a further check on the powers of the state and public administration. However, while constitutional courts were a product – and many times also a symbol – of the change of regime in Central European countries, ombudsmen-like institutions were generally established afterwards, in the years between 1995 and 2000. Depending on the concrete competences, one major role that these institutions can play in regard to fundamental rights adjudication is their abilities to initiate procedures before the constitutional courts. In this capacity, they serve as a crucial bridge that can channel both individual and systemic abuses of fundamental rights to the constitutional courts, whereby they can strengthen and widen fundamental rights adjudication.

Lastly, the institutions of the Council of Europe – especially the European Court of Human Rights or the Venice Commission – have also played an important role in the formation and solidication of the fundamental rights adjudication of the CEE countries. Even though they are organised according to international law, they continue to have a significant impact on domestic institutions that are responsible for fundamental rights adjudication.

25 Halmai and Tóth, 2008, pp. 236–237.
26 Varga, Patyi and Schanda, 2015, pp. 246–249.
27 Recommendation No. R (85) 13 of the Committee of Ministers to Member States on the Institution of the Ombudsman (adopted by the Committee of Ministers on 23 September 1985 at the 388th meeting of the Ministers' Deputies).

In light of these aforementioned general observations, this chapter focuses on the breadth of constitutional complaints that enable individual persons to resort to fundamental rights adjudication. Then, it also explores the role of the judiciary in fundamental rights protection either through their own interpretative operations or in requesting procedures before the constitutional courts. The comparative analyses also place emphasis on the role of ombudsmen-like or national human rights institutions and their roles in facilitating the fundamental rights adjudication.

2. Specific Section

Constitutional complaint procedures are the primary place of fundamental rights adjudication; however, the types and breadths of these procedures vary across countries and jurisdiction as well as in different time periods. For example, the first Act on the Constitutional Court of Hungary only recognised one type of such complaint that is designed to offer protection against a law applied in a particular case.[28] Even though the so-called *actio popularis* provided anybody with the right to file a petition against any kind of law regardless of whether there was a particular case or not, the Constitutional Court did not have power to review judicial decisions that are contrary to fundamental rights requirements. The Fundamental Law adopted in 2011 increased both the types of constitutional complaints to three as well as the review power of the Constitutional Court.[29] As a result, three types of constitutional complaints currently offer avenues in Hungary to fundamental rights adjudication with regards to both legal regulation and judicial decisions that concern the applicant.[30] In these types of procedures, the Constitutional Court has a specific role to protect fundamental rights.[31] One of the novel and unique characteristics of the Hungarian regulation is that under exceptional circumstances, the attorney general and public institutions can also request such proceedings before the Constitutional Court. With regards to the possible sanctions, the Hungarian Constitutional Court can either annul a decision or law or prohibit its application.

The regulation of the constitutional complaint procedure is similar in the Czech Republic as the Czech constitution recognises the full complaint procedure[32]; moreover, it also aims to protect the principle of 'subsidiarity' and local government by providing them with the right to file a complaint.[33] The Polish constitution has a

28 Art. 48 of the Act no XXXII of 1989 on the Constitutional Court.
29 Art. 24 of the Fundamental Law of Hungary.
30 The Venice Commission is in favour of full constitutional complaint, not only because it provides for comprehensive protection of constitutional rights but also because of the subsidiary nature of the relief provided by the European Court of Human Rights and the desirability to settle human rights issues on the national level. See the Compilation on the Venice Commission on Constitutional Justice (Strasbourg, 14 April 2020 CDL-PI(2020)004).
31 Decision 8/2013 of the Constitutional Court of Hungary.
32 Art. 87(1) d) of the Czech Constitution.
33 Art. 87(1) c) of the Czech Constitution.

somewhat narrower approach as it only recognises the normative type of constitutional complaint and thus only allows the normative acts to be complained of and challenged before the Polish Constitutional Tribunal.[34] Similarly, the Romanian constitution only allows normative constitutional complaint as it states that the Constitutional Court has the power to "decide on objections as to the unconstitutionality of laws and ordinances, brought up before courts of law or commercial arbitration".[35] However, it also allows the Advocate of the People to address the unconstitutionality of the legal norm,[36] and the ordinary Romanian court system is entrusted with fundamental rights adjudication.

The Constitutional Court of the Slovak Republic has a broad ground to hear cases and a wide variety of sanctions to apply in case of non-comformity with the constitution. This includes, for example, the suspension of the effects or the annulment of the regulation in question. Beyond the fundamental rights recognised by the constitution, in the Slovak Republic, the constitutional complaint procedure also protects the human rights enshrined in international treaties that are ratified by the country.[37] The Slovak Constitutional Court can hear a case if a fundamental rights violation arises from inactivity of public institutions and order them to act.[38] Furthermore, the Slovakian regulation allows the Constitutional Court to award adequate financial awards to the persons whose rights have been infringed.[39] The Croatian regulation also introduced constitutional complaints that can be filed against a wide array of decisions including

> individual decisions taken by state bodies, bodies of local and regional self-government and legal persons vested with public authority where such decisions violate human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by the Constitution of the Republic of Croatia.[40]

As far as the consequences are concerned, the Constitutional Court of Croatia repeals or annuls any other regulation if it finds it to be unconstitutional or unlawful.[41] The Slovenian constitution also acknowledges the full constitutional complaint procedure as it stipulates that the Constitutional Court decides on the "constitutional complaints stemming from the violation of human rights and fundamental freedoms by individual acts".[42] As far as the legal consequences are concerned, the Slovenian Constitutional

34 Arts. 79 and 188 of the Polish Constitution as well as Art. 3 of the Constitutional Tribunal Act. Although Chapter II of the Polish constitution recognises the right to a court and fair trial, the right to remedy and right to compensation for unlawful acts of public authority.
35 Art. 146 d) of the Romanian Constitution.
36 Art. 146 d) of the Romanian Constitution.
37 Art. 125(1) of the Slovakian Constitution.
38 Art. 124(2) of the Slovakian Constitution.
39 Art. 124(2) of the Slovakian Constitution.
40 Art. 125 of the Croatian Constitution.
41 Art. 126 of the Croatian Constitution.
42 Art. 160 of the Slovenian Constitution.

Court has the competence to annul ab initio or abrogate such regulation or act; lastly, the Serbian Constitutional Court can also hear cases based on constitutional complaints.[43]

Access to courts and the right to a fair and public hearing are recognised as a fundamental right, which is part of the fair trial requirement and is necessary for an effective remedy.[44] A further and separate question is whether – and if so, how – ordinary courts can be involved in the interpretation and application of the constitution that also includes fundamental rights adjudication to a certain extent. As it was mentioned before, in countries where the decentralised or 'diffuse' model of constitutional adjudication is adopted, courts are naturally empowered to settle the regular court functions, primarily including dispute settlement as well as fundamental rights adjudication. However, in the case of the centralised or continental model, the involvement of the judiciary in fundamental rights adjudication is not as obvious and depends on the actual mandate and competences of the courts. In this system, ordinary courts can be involved in fundamental rights adjudication either directly or indirectly by referring concrete cases to and cooperating with the constitutional court, which remain to be the decisive voice of fundamental rights adjudication. The states examined here follow this latter approach.

One of the most important novelties of the Hungarian Fundamental Law was that ordinary courts are required to interpret the text of the laws primarily in accordance with their purpose and with the Fundamental Law.[45] Art. 28 of the Fundamental Law also adds that *"[w]hen interpreting the Fundamental Law or laws, it shall be presumed that they serve moral and economic purposes which are in accordance with common sense and the public good".* In the case-law of the Hungarian Constitutional Court, Art. 28 of the Fundamental Law, on the one hand, requires ordinary courts to identify the fundamental rights aspects of the case or dispute to be settled, and on the other hand, it requires the courts to interpret the law applicable in the concrete case in light of the content of the identified fundamental right.[46] The failure to comply with these requirements is that the court's decision will be contrary to the fundamental rights and thus unconstitutional.[47]

The Slovak constitution stipulates that in their decision-making process, judges are not only bound by the law but also by the constitution as well as by international treaties, including human rights treaties for which exercising a law is not necessary, which directly confer rights or impose duties on natural persons or legal persons and which were ratified and promulgated in the way laid down by a law shall have precedence over laws.[48] The Czech constitution also refers to the role of the courts in

43 Art. 29(1) of the Law on the Constitutional Court of Serbia.
44 This fundamental right is recognised by all universal and regional human rights treaties as well as Art. 8 of the Universal Declaration of Human Rights. See, e.g., Csink and Schanda, 2017, pp. 291–292.
45 Art. 28 of the Fundamental Law of Hungary.
46 Decision 3/2015 of the Hungarian Constitutional Court.
47 See, e.g., Decision 3236/2018 of the Hungarian Constitutional Court.
48 Arts. 7 and 144 of the Slovak Constitution.

the field of fundamental rights adjudication when it declares that "[c]ourts are called upon above all to provide protection of rights in the legally prescribed manner".[49] The Czech constitution also declares that judges, when making their decisions, "are bound by statues and treaties which form a part of the legal order" that also includes human right treaties.[50] Similarly, the Slovenian constitution succinctly states that judges "shall be bound by the Constitution and laws".[51] In the same vein, the Croatian constitution also explicitly requires courts to administer justice according to the constitution and international treaties that include human rights treaties; however, in contrast to these countries, Poland, Serbia and Romania do not have similar explicit requirements in their respective constitutions, which suggest that their court systems are less involved in fundamental rights adjudication directly.

Ordinary courts, nevertheless, could be involved in fundamental rights adjudication in a more indirect way via the cooperation or so-called 'institutionalised dialogue' with constitutional courts, who still remain the main vehicle of fundamental rights adjudication. Judicial dialogue, in a broader sense, plays a vital role in the smooth and potentially flourishing cooperation among courts that operate in different areas of the law or even in different legal systems.[52] For example, the cooperation between the European Court of Justice and the national courts of the member states of the European Union, through the preliminary ruling procedure, is considered to be crucial in preserving the autonomy as well as the efficient and swift implementation of the law of the European Union.[53] Similarly, this institutionalised dialogue between the ordinary courts and the constitutional courts – and as a result, the binding decision and guidance of the Constitutional Court – is key in efficiently implementing the constitution, including its fundamental rights provisions that also enrich the constitutional culture in a given country. Nevertheless, this kind of dialogue is also essential for the constitutional courts to be able to recognise and consider the constitutional challenges on the ground. The Hungarian Constitutional Court expressly recognises the need for such a dialogue between the ordinary courts and the Constitutional Court.[54] Therefore, many of the states that are examined here allow or even require ordinary courts to request a proceeding before the Constitutional Court if they are bound to apply a legal regulation that is perceived to be contrary to the fundamental rights enshrined in the constitution.

In light of this general consideration, Hungarian judges are required to suspend the judicial proceedings and submit a petition to the Constitutional Court if they are bound

49 Art. 90 of the Czech Constitution.
50 Art. 95 of the Czech Constitution.
51 Art. 125 of the Slovenian Constitution.
52 Raisz, 2009.
53 For example, based on such a procedure, the Court of Justice of the European Union ruled in the so-called Achmea case, by which investor-state dispute resolution based on international agreements has an adverse effect on the autonomy of EU law and is therefore incompatible with EU law. See Slovak Republic v. Achmea B.V. (Case C-284/16).
54 Decision 35/2011 of the Hungarian Constitutional Court.

to apply a legal regulation that is perceived to be contrary to the Fundamental Law.[55] The importance of such proceedings is shown by the fact that they enjoy priority and the Hungarian constitution requires the Constitutional Court to rule on the petition of judges within no more than 90 days.[56] The regulation in Slovakia similarly recognises this type dialogue between the Constitutional Court and ordinary courts. The Slovak constitution stipulates that if a court assumes that a generally binding legal regulation, its part or its individual provisions which concern a pending matter contradicts the constitution or constitutional law, international treaty pursuant, it shall suspend the proceedings and submit a proposal for the commence of proceedings before the Constitutional Court of the Slovak Republic. The legal opinion of the Constitutional Court contained in the decision shall be binding for the court.[57] The Czech constitution has a similar requirement as it provides that "should a court come to the conclusion that a statute which should be applied in the resolution of a matter is in conflict with the constitutional order, it shall submit the matter to the Constitutional Court".[58]

The Polish constitution has a separate rule that allows any court to

> refer a question of law to the Constitutional Tribunal as to the conformity of a normative act with the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court.[59]

In a similar vein, the Act on the Slovenian Constitutional Court declares that "when in the process of deciding a court deems a law or part thereof which it should apply to be unconstitutional, it stays the proceedings and by a request initiates proceedings for the review of its constitutionality". If the Supreme Court of Slovenia deems a law that it should apply unconstitutional, it stays proceedings in all cases in which it should apply such law.[60] The regulation in Croatia enumerates the Supreme Court or any other court of justice among the institutions that have the power to request the proceedings before the Constitutional Court provided that "the issue of constitutionality and legality has arisen in proceedings conducted before that particular court of justice".[61] Even though the Serbian law does not provide courts with a right to initiate a procedure before the Constitutional Court, the procedure to assess constitutionality and legality might be initiated by the Constitutional Court itself.[62]

55 Art. 24(2) b) of the Fundamental Law as well as Art. 25 of the Act on the Constitutional Court of Hungary.
56 Art. 24(1) b) of the Fundamental Law of Hungary.
57 Art. 144 of the Constitution of Slovakia.
58 Art. 95(2) of the Czech Constitution.
59 Art. 193 of the Polish Constitution.
60 Art. 23(1)-(3) of the Act on the Constitutional Court of Slovenia.
61 Art. 35 of the Act on the Constitutional Court of the Republic of Croatia.
62 Art. 168 of the Serbian Constitution.

These comparative analyses show that nearly all of the states examined here allow their courts to suspend their proceedings and turn to their respective constitutional courts in case they need to apply a law of questionable constitutionality. Furthermore, the Hungarian, Slovak and Polish regulations expressly allow ordinary courts to suspend their judicial proceedings and initiate a constitutional review procedure if they are bound to apply a legal regulation that they perceive to be contrary to an international treaty, including a human rights treaty.[63] Consequently, these provisions also require courts to consider and balance aspects of fundamental rights in their own proceedings.

Even if these countries all introduced centralised systems in which the constitutional review, along with the fundamental rights adjudication, were concentrated in the hands of constitutional courts, ordinary courts would still remain decisive players in this area. On the one hand, their function is auxiliary as they are capable of channelling questions on fundamental rights to the Constitutional Court. On the other hand, they necessarily become involved in fundamental rights adjudication since both the constitutional complaint and the judicial initiative competences of constitutional courts indirectly foster and require a judicial dispute resolution that considers fundamental rights.

The role of ombudsmen-like institutions in fundamental rights adjudications is critical, and they might perform two main different tasks. On the one hand, they survey and analyse the situation of fundamental rights on their own while paying special attention to the most vulnerable and marginalised people in society. On the other hand, they often serve as a bridge to the Constitutional Court if they are provided with the competence to request a proceeding if they find a systemic violation of fundamental rights. For example, the Commissioner for Fundamental Rights in Hungary was provided with a wide competence to request petitions. Accordingly, the Commissioner for Fundamental Rights can initiate an ex-post review of conformity with the Fundamental Law,[64] examination of conflicts with international treaties[65] and the abstract interpretation of Fundamental Law.[66] In numerous cases,[67] the Constitutional Court of Hungary ruled that a specific legal provision violates fundamental rights based on the request of the Commissioner for Fundamental Rights; for example, one notable case was the restriction of the freedom of debates about public affairs "on the basis of acknowledgeable public interest" that the Constitutional Court declared unconstitutional and annulled.[68]

63 Art. 24(2) f) of the Fundamental Law of Hungary and Art. 32 of the Act on the Constitutional Court of Hungary, Art. 144(2) of the Constitution of Slovakia and Art. 193 of the Polish Constitution.

64 Art. 24(2) of the Act on the Constitutional Court of Hungary.

65 Art. 32(2) of the Act on the Constitutional Court of Hungary.

66 Art. 38(1) of the Act on the Constitutional Court of Hungary.

67 According to the statistics of the Hungarian Constitutional Court, the Court declared a regulation unconstitutional in nearly 20 cases over the past decade. Available here: https://alkotmanybirosag.hu/ugykereso.

68 Decision 7/2014 of the Constitutional Court of Hungary.

The Slovak constitution established the institution of the Public Defender of Rights as an independent institution that participates in the protection of the fundamental rights and freedoms of natural persons and legal persons in the proceedings, decision making or inactivity of public administration bodies.[69] Even though the Public Defender of Rights has a major role to play by conducting their own procedures, they cannot request a petition to the Constitutional Court; this right is reserved to at least one-fifth of all members of parliament, the President of the Slovak Republic, the Government of the Slovak Republic, a court and the Attorney General.[70] The introduction of the institution of the Commissioner for Citizens' Rights was one of the emblematic results of the regime change in Poland as it was established in 1987.[71] According to the Polish constitution, "the Commissioner for Citizens' Rights shall safeguard the freedoms and rights of persons and citizens specified in the Constitution and other normative acts".[72] Their independence is guaranteed by the Constitution of Poland.[73] The Polish Commissioner for Citizens' Rights has the power not only to initiate investigations on their own but also to request the procedure of the Constitutional Tribunal.[74]

The national human rights institution is also recognised in the Czech Republic even though the Czech constitution does not mention it. It was founded well after the change of regime in 1999, and a separate act regulates the institution of the Public Protector of Rights.[75] The Act on the Constitutional Court of the Czech Republic provides the Public Protector of Rights with the power to file a request of proceeding before the Constitutional Court.[76] The Romanian constitution regulates the institution of the Advocate of the People to defend the natural persons' rights and freedoms.[77] The Romanian constitution empowers – among other public institutions – the Advocate of the People to request a petition with regards to the constitutionality of laws.[78]

The Ombudsman for Human Rights and Fundamental Freedoms was introduced in the constitutional order of Slovenia in 1991, when the country separated from Yugoslavia and became independent. The Slovenian constitution requires the establishment of such institution, and a separate legislative act regulates its competences in detail.[79] The Act on the Constitutional Court empowers the Ombudsman for Human Rights and Fundamental Freedoms to request a proceeding before the Constitutional Court of Slovenia in order to review the constitutionality or legality of regulations or general acts issued for the exercise of public authority.[80] In addition, the Ombudsman may, under

69 Art. 151a of the Slovak Constitution.
70 Art. 130 of the Polish Constitution.
71 The Act of 15 July 1987 on the Commissioner for Human Rights.
72 Art. 208 of the Polish Constitution.
73 Arts. 210 and 211 of the Polish Constitution.
74 Art. 191 of the Polish Constitution.
75 Act 349/1999 Coll. of 8th December 1999 on the Public Defender of Rights.
76 Art. 64(2) f) of the Act on the Constitutional Court of the Czech Republic.
77 Art. 58 of the Constitution of Romania.
78 Art. 146 of the Constitution of Romania.
79 Art. 159 of the Constitution of Slovenia.
80 Art. 23a(1) of the Act on the Constitutional Court of Slovenia.

the conditions determined by this, lodge a constitutional complaint in connection with an individual case with which they are dealing.[81] The Croatian constitution provides that the "Ombudsman and other commissioners of the Croatian Parliament responsible for the promotion and protection of human rights and fundamental freedoms shall enjoy the same immunity as Members of the Croatian Parliament".[82] The Act on the Constitutional Court of the Republic of Croatia provided the People's Ombudsman with the right to request a proceeding before the Constitutional Court.[83] The Protector of Citizens is an independent and autonomous government body responsible for the protection and promotion of rights and liberties in Serbia, but it has no general recourse to the Constitutional Court. Consequently, nearly all ombudsmen-like institutions in the states that are examined here, with with exception of Slovakia and Serbia, are provided with the power to request a petition before the Constitutional Court.

As a result of this comparative analysis, it can be established that the primary channel of fundamental rights adjudication of the states examined here is provided by the constitutional complaint procedure. Most countries recognise – and the Venice Commission favours – the full constitutional complaint competence that extends to both legal norms and judicial decisions. The most ambitious constitutional complaint competence schemes – such as that found in Slovakia – allow constitutional courts to conduct their review based on international human rights treaties. However, beyond the centralised constitutional court system, ordinary courts and ombudsmen-like institutions also play a vital role in fundamental rights adjudication. Usually, ordinary courts do not only have the power to request a proceeding before constitutional courts as part of a unique judicial dialogue, but they are pushed to consider the fundamental rights aspects of the cases that they adjudicate due to the availability of constitutional complaints. Ombudsman-like institutions have a vital role in identifying systemic violations of human rights, and in most of the states examined here, they also have the power to channel these concerns to constitutional courts; consequently, fundamental rights adjudication takes place in the triangle of the Constitutional Court, the judiciary or ordinary court system and ombudsman-like institutions. The key to its efficiency is their harmonious cooperation.

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81 See Art. 50 of the Act ont he Constitutional Court of Slovenia.
82 Art. 93 of the Constitution of Croatia.
83 Art. 35 of the Act on the Constitutional Court of Slovenia.

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