‘Mixed’ Constitutions: Product of an East-Central European Constitutional Melting Pot

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At the end of the 1980s the communist systems in East-Central Europe were falling apart. Many commentators predicted that the new emerging democracies in East-Central Europe would soon be entering an era of extensive constitutional transformation. The only question for these
commentators was which constitutional models the new democracies would look to for guidance.

Most commentators believed that the inexperienced constitutional drafters from the former Soviet bloc would borrow from the well-tested Western constitutional models in transforming their own. Although these drafters had all lived in socialist countries with common core constitutions, they were familiar with several Western constitutional models which might be considered for adoption. While accepting that the new constitutions would still contain some socialist flavor, most commentators agreed that the new democracies would be reluctant to continue their socialist traditions. Thus, an open question existed as to what extent the liberal traditions of America, Britain, France, Germany or Eastern Europe would bear on the adoption of a constitutional model that would best fit the needs of the postcommunist states.

Today, after almost a decade of experimenting with constitutional drafting, the East-Central European states have fulfilled few of the commentator's preconceived expectations. No doubt, the region of former Soviet dominance has become a major laboratory of constitutional works. Armenia, Belarus, Bulgaria, the Czech Republic, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Lithuania, Poland, Romania, Russia, Slovakia and the Ukraine have adopted entirely new constitutions. Amendments introduced to the Hungarian constitution purged it almost entirely of the remnants of its Stalinist legacy, and the Albanians have produced an interim constitution. No single model, however, has come to dominate the constitutional landscape of East-Central Europe. Rather, the constitutional drafters of this region borrowed free-handedly from western and socialist traditions, and produced "mixed" constitutions which are an amalgam of many well-known models.


2 The most frequently examined were the presidential model, the parliamentary and parliamentary-cabinet model, the chancellor's model and the semi-presidential model. See Konstytucyjne Systemy Rządów: Możliwości Adaptacji do Warunków Polskich (Constitutional Systems of Government: The Chances for Adoption in the Polish Conditions) (Michael Domagala ed., 1997).

3 Jon Elster referred to this phenomenon as a final wave of constitution making, preceded by several other waves: the first wave occurred between 1780-1791 with various American states, Poland and France adopting their first constitutions; the second wave occurred during the period of the 1848 revolutions in Europe; the third wave occurred after World War I; the fourth following World War II; the fifth during the disintegration of the French and British Empires; the sixth, occurring in Southern Europe, after the fall of dictatorial regimes during the second half of the 1970s in Portugal, Greece and Spain. See Jon Elster, Forces and Mechanisms in the Constitution-Making Process, 45 Duke L.J. 364, 368-69 (1995).
Some question still remains, however, as to how these new constitutions will work and whether they are the products of mature legal engineering or the results of nonprofessional constitutional drafting. This Article attempts to answer these questions.

Thus, Part I of this Article discusses the difficulties involved in attempting to classify the new constitutions using traditional criteria. Part II examines the processes involved in the adoption of the various components of existing constitutional models into the constitutions of the East-Central European states, including separate analysis of the distributions of power, the structures of the legislatures, the electoral systems, the systems of governance and mechanisms of judicial enforcement provided by these instruments. Finally, Part III makes observations and draws conclusions regarding the processes examined in Part II.

I. Classifying Constitutions: “Pure” and “Mixed” Constitutional Models

The dissemination of the constitutional experience during the nineteenth century encouraged the classification of constitutions. The constitutional experts of this period tried to define the term constitution as a body of rules and maxims in accordance with which the powers of sovereignty are exercised. In the process of attempting to define what a constitution was, the experts concluded that, in a sense, every state had a constitution, although few had well defined constitutions organized in written form. Thus, constitutions were initially classified as written and unwritten. Thomas Cooley attempted to clarify this traditional distinction in 1880, commenting, “a constitution may be written or unwritten. If unwritten, there may still be laws or authoritative documents which declare some of its important principles; as we have seen has been and is still the case of England.”

While stating the obsolete criteria of constitutional classification, Cooley implied that this was an ineffective distinction. The “written” character of a constitution meant only that the country had a single, framework document determining the government’s forms and functions. And although unwritten constitutions were “subject to perpetual change at the will of the law-making power,” the so-called “written constitutions” were similarly subject to a body of implementing laws, interpretations, court decisions, and constitutional practices.

5 Id.
6 Id. at 22.
7 Id. at 23.
By the end of the nineteenth century, the traditional classification between written and unwritten constitutions became the subject of further scholarly criticism.\(^8\) James Bryce proposed a new classification of constitutions, consisting of the "flexible" and the "rigid." The former were to be "promulgated or repealed in the same way as ordinary laws,"\(^9\) while the latter were to "stand above the other laws of the country which they regulate[d]."\(^10\) Bryce's criteria for distinguishing among constitutions was itself, in turn, challenged on a number of grounds.\(^11\) Critics initially noted that by Bryce's definitions, both types of constitutions shared identical features, most notably stability.\(^12\) Furthermore, although an opponent of the ineffective traditional written-unwritten classification, Bryce himself had difficulty distinguishing between flexible and unwritten constitutions.\(^13\) Finally, Bryce's admission of the rigidity of almost all constitutions adopted at that time led Kenneth C. Wheare to comment that "a system of classification which places almost all the Constitutions of the world in one category of 'rigid' and leaves only one or two in the other cannot take us very far."\(^14\)

Several scholars proposed alternative criteria. Wheare, reinforcing some of Bryce's language, suggested using the terms "rigid" and "flexible," "not according to whether or not the constitutions require for their amendment a special procedure which is not required for ordinary laws, but according to whether they are in practice . . . easily and often altered or not."\(^15\) Leslie Wolf-Phillips attempted to reconcile the scholarly desire to classify constitutions with more pragmatic considerations, claiming that "no constitution will be completely 'written' or completely 'unwritten,' completely 'codified' or completely 'uncodified,' completely 'rigid' or completely 'flexible.' The aim will be to establish the degree of the classificatory attribute."\(^16\) Other criteria of constitutional classifications were subjected to similar criticism. For example, the attempt to classify constitutions as those which incorporated or rejected the concept of the division of powers proved unworkable. While most modern constitutions

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\(^8\) Some of the comments below are taken from the chapter "Comparative Flexibility of the New Constitutions" of the author's book. See generally LUDWIKOWSKI, supra note 1, at 215-18.

\(^9\) JAMES BRYCE, CONSTITUTIONS 8 (photo. reprint 1980) (1905).

\(^10\) Id.


\(^12\) See BRYCE, supra note 9, at 21, 66.

\(^13\) See id. at 46-53.

\(^14\) WHEARE, supra note 11, at 16.

\(^15\) Id. at 17.

\(^16\) WOLF-PHILLIPS, supra note 11, at xii (emphasis in original).
recognized this doctrine, the differing needs of individual states meant that the meaning of this doctrine varied among nations.

The dissipation of the major European political systems, from the traditional dichotomy of presidential and parliamentary, into various mixed models has contributed to the difficulty of trying to classify constitutions. In England, for instance, the evolution of the classic parliamentary model resulted in the shift of power from the parliament to its intrinsic part, the cabinet. The process resulted in the emergence of a parliamentary-cabinet system. In Germany, where the basic law makes the chancellor responsible to the Bundestag, the strengthening of the chancellor's prerogatives by several constitutional mechanisms resulted in the emergence of a special constitutional model referred to as "chancellor's democracy." France, although traditionally inclined toward a parliamentary democracy, incorporated into its system a number of features typical of a presidential model, the result being the creation of a hybrid parliamentary-presidential system.

Hybrid systems of judicial review have also made clear-cut constitutional classifications difficult. The two most identifiable systems of judicial review, the so-called American and Austrian models, have become less and less popular over time in their unadulterated forms. The American model of decentralized or defused and concrete review allows all courts the right to review the constitutionality of laws. Constitutional issues may only arise, however, as incidental to other litigious issues. Conversely, the power of review in the classic Austrian or centralized model is vested either in a country's supreme court or in a special court. Review under the Austrian model can be initiated through an independent action raising an abstract issue of constitutionality. The decentralized model was adopted by several South American countries, such as Argentina and Mexico, by former British colonies such as Australia and India, by the Scandinavian states and by Japan and Greece. A modified version of the Austrian model was incorporated into the Spanish (1931) and Italian (1948) constitutions. In more recent years, countries with

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17 Socialist constitutionalism was a glaring exception here. The socialist theories maintained that power in their system was concentrated, but that its functions were allocated to different government branches. See Ludwikowski, supra note 1, at 201.

18 For a more exhaustive examination of the process of transition to Cabinet, see E.C.S. Wade & A.W. Bradley, CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW 65 (11th ed. 1993).

19 Alex. N. Dragnich & Jorgen Rasmussen, MAJOR EUROPEAN GOVERNMENTS 397-403 (1982).

20 See id. at 274.


22 See Mauro Cappelletti, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 10 (1971).
legal systems emerging from common law roots, such as New Guinea and Uganda, have experimented with the effectiveness of the concentrated system of review. Nevertheless, a careful commentator must observe that the number of countries experimenting with mixed systems of judicial review is growing. The German model, for instance, is a combination of abstract and concrete review. Furthermore, the components of both the concentrated and diffuse models can be found in Portugal, Venezuela, Brazil, Guatemala, Columbia and Peru. Switzerland also has a mixture of decentralized and concentrated systems.23

There is no need to multiply these examples. The above-made observations illustrate that the classification of the constitutions recently adopted by the East-Central European states is not an easy task. Most of the basic laws adopted after World War II cannot be described on the basis of the traditional criteria; they are "mixed" or "hybrid" acts produced as the result of a sophisticated process of intermingling different components of several well-known constitutional models.

Still, there are exceptions. The 1946 Constitution of Japan, drafted under the guidance of United States experts, has an artificial American flavor. Most of the postcolonial constitutions of Asia, Africa and the Near East were simply copied from the constitutional structures of established countries, without regard to the applicability of those devices to the unique geopolitical circumstances in which the new states had emerged. In addition, the prototype of a socialist constitution was framed in Moscow and duplicated in all other countries of Soviet dominance.24

Thus, searching for a common core in the new postsocialist constitutions is a meaningful comparative task. Currently, no single dominant model has surfaced in East-Central Europe. This conclusion, however, is neither an easily predictable nor obvious one. The countries of this region faced similar problems, and similar constitutional remedies were often tested to arrive at solutions. In comparing these constitutional devices, it is useful to consider how some were selected and whether the process of constitutional "mixing" blended them into a coherent body of constitutional rules and maxims. By acknowledging that the term "blending," rather than the term "modeling," better characterizes the constitution-making process in the new postsocialist democracies, one can observe how this modern technique of constitutional drafting really works in practice. To crystallize the meaning of "blending" in the context of the East-Central European constitutional laboratory, this Article focuses on several main constitutional features and examines the frequency with which they were used.

24 For an examination of the common core of the socialist constitutions (Poland, Hungary, Czechoslovakia, Bulgaria, Romania and Albania) see Ludwikowski, supra note 1, at 7-44.
II. EAST-CENTRAL EUROPEAN CONSTITUTIONAL MELTING POT

A. DISTRIBUTION OF POWERS OF GOVERNMENT

The basic idea that the powers of government should be limited and its functions diffused is currently implemented in several constitutional models. In the so-called French model, the principle of the division of powers is similar to the principle of the separation of powers in that there exists an actual separation of political organs and functions.\(^2\) The system of checks and balances, traditionally associated with the American model, places more emphasis on the equality of powers than on the separation of functions. Conversely, in England, the powers of the various branches of government have never been equal nor well separated. Rather, the functions of the organs are blended, and the principal of division of powers has come to mean only that the powers are not entirely concentrated in one branch of the government. Similarly, in the countries of the new democracies of East-Central Europe, the interpretation of the constitutional principle of the division of powers is even more blurred, the relations between the powers more complicated, and the drafters less inclined to adopt in pure form any one of the three models mentioned above.

Traditionally, socialist constitutionalism rejected the doctrine of the division of powers, claiming that the entire power of governance should be vested in the supreme representative bodies—the people’s legislatures.\(^2\) According to Marx, the doctrine of the separation of powers was “in principle nothing else than a profane industrial division of labor applied to state mechanism for the purpose of rationalization and control.”\(^2\) Thus, the socialist theorists maintained that power in their system was concentrated in the legislature but that its functions were allocated to different government branches.\(^2\) In contrast to the concept of the division of powers, the socialist system of government was referred to as a model of “democratic centralism.”\(^2\) In theory, the decision-making


\(^2\) The Constitution of the U.S.S.R. explains the concept of democratic centralism: The Soviet state is organized and functions on the principle of democratic centralism, namely the electiveness of all bodies of state authority from the lowest to the highest, their accountability to the people, and the obligation of lower bodies to observe the decision of higher ones.
power was reserved for elective representatives of the people who worked in response to initiatives of the masses. In actual practice, however, these representatives operated in accord with the recommendations of the Communist Party, the leading and guiding force of socialist society. The socialist jurisprudence claimed, however, that it disqualiﬁed the doctrine of division of powers not for its noncompliance with the monopoly power of the communist party, but rather because of its inconsistency with the idea of the superiority of parliaments.

The reluctance by the former socialist states of East-Central Europe to experiment with the idea of the divisions of powers was evident in the early stages of their post-socialist constitutional works. The drafters of the first post-socialist constitutions were either not sufficiently familiar with the Western models of the division of powers doctrine or simply believed that such doctrines could not encompass such diverse systems as the British, French and American systems. They associated the concept of divided powers with the idea of equal distribution of state authority, and seemed to believe that the doctrine was not applicable in political systems which recognized the superiority of one power.

This confusion seemed to stem initially from a lack of clear understanding of the distinction between the concepts of the division of state functions or governmental competencies and the division of powers. The

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Id.

30 “Democratic centralism combines central leadership with local initiative and creative activity and with the responsibility of each state body and official for the work entrusted to them.” Id.


33 Professor Andrzej Pullo, a constitutional expert from Poland, wrote: “It is amazing that different governmental forms, such as British, American or more generally European, are all, in the same way, associated with this single organizational principle.” ANDRZEJ PULLO, Division of Power in Doctrine, Law and Recent Constitutional Dispute in Poland 4 (1993) (delivered to the Conference of Constitutional Law Institutes in Szczecin, Poland) (on file with author).

34 Andrzej Pullo wrote:

The division of power is commonly understood today as the concept which rejects the idea of homogeneity or unity of power and in particular stands in contrast to one component of this idea—superiority of one and single state's organ. The most common contemporary understanding of the term 'division of power' requires that the constitutional norms guarantee a relative equilibrium between the leading organs of the state.

Id. at 2, 4.

35 “It is not difficult to find out that the term ‘division of power’ looks exceptionally uncomplicated. Each of [the] two words which comprise the term is well known in a colloquial language. Put together these words mean the division of competencies.” Id. at 3.
former concept involves a system in which the decision-making power is concentrated in a single organ, political organization or ruler, while the mechanisms through which that power is executed are delegated to several subordinate organs or institutions. This concept should be distinguished from the latter concept of dividing the decision-making power itself among several different organs of government. While the scope of power allocated to each organ may not be equal, the organs themselves are not hierarchically organized in the sense that they are completely subject to the control of one superior organ. In the system of democratic governance, these organs draw power from the people, the ultimate source of sovereign authority; they can appeal to the people directly without the affirmance of a supreme intermediate organ. The former concept clearly stands in contrast to the idea of limited government, which is a fundamental premise of the doctrine of division of powers; the latter concept creates the general framework within which the doctrine of the division of powers can function.

The distinction just drawn between these two concepts holds even in the face of the classic parliamentary model, which has traditionally provided ammunition against the application of the concept of the division of powers. In the parliamentary system, which provides that the cabinet sits in the legislative body and is accountable to its majority, the executive has a limited power to dissolve the legislature and appeal to the people for final political directions. This position provokes some logical reservations. The concept of the "balancing of powers," implies the existence of "several powers" or several organs in which the power is vested. No other conclusion seems to be logically acceptable. Thus the balance of powers is a crucial test that qualifies the powers of the executive, rather than merely an allocation of functions to this organ by the legislature.

The initial confusion discussed above was furthered by the interchangeable use of the terms "division of powers" and "separation of powers." The first of these terms refers to any system of divided responsibilities; the second, a narrower version of the first, requires apportioning decision-making power to separate branches of the government. Thus, the decision-making power within a state may be divided yet the branches of the government need not be kept separate, as in the parliamentary system. Conversely, without mutually controlling each other, blended branches of governments may cooperate or share some functions. In the opinion of this author, in the parliamentary system, the executive and

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36 In contrast to this position Pullo wrote:
Wherever, one makes additional exceptions from the principle of organizational and personal separation of powers and where, without any limitations, the institutions are created which make the powers mutually dependent, there we cannot speak about the rule of the division of power. We may find there, at most, the concept of balancing the powers, which, however, is rather different than similar to the concept of the division of power.
Id. at 18 (emphasis added).
legislative organs are blended, not separate. Neither organ, however, is in control of the other, and in this sense power is divided between them. The idea of "checks and balances" in fact conflicts with the principle of pure separation of powers but not with the general concept of divided power. Organs which interact with one another and which share certain functions cannot be fully separated. Thus, while the division of authority may imply interrelation of the recipients of power, the separation of authority does not.\(^{37}\)

The East-Central European state's confusion concerning the meanings and substance of the division of powers and the separation of powers doctrines led their theorists\(^{38}\) to attempt to trace the origins of the division of powers doctrine to the Aristotelian or Polybian concept of mixed political systems. Such a system is characterized by the blending of elements of a monarchy, an aristocracy and a democracy, and distributing governmental functions among several organs in order to contribute to the social and political stability of the government's structures. The roots of the modern division of powers doctrine, however, are not derived fully from the Aristotelian concept. Rather, to the authors of the modern division of powers doctrine, Locke and Montesquieu, the real rationale for the distribution of power was not so much the intention to improve the stability of the government through the distribution of its functions, it was the fear of an absolute arbitrary authority.\(^{39}\) Thus, the concept of a government whose authority is limited through its diffusion among several organs is a fundamental component of the modern doctrine of division of powers, and wherever this principle is constitutionally recognized we may find some reception of the Lockean or Montesquean doctrine.

The drafters of the first postsocialist constitutions attempted to contest the assumption that the elements of the division of powers doctrine could be found in almost all political forms other than autocratic or totalitarian systems.\(^{40}\) As a result, they either rejected the doctrine in its entirety or attempted to incorporate it in a reduced form which would emphasize the balance between the powers. For example, in the first constitutional drafts, prepared by the Constitutional Commission of the Polish Seym,\(^{41}\) the drafters made no clear reference to this doctrine and provided only


\(^{38}\) See Pullo, supra note 33, at 4-18.

\(^{39}\) John Locke wrote, "Absolute arbitrary power, or governing without settled standing laws, can neither of them consist with the ends of society and government . . . ." John Locke, Two Treatises Of Civil Government 186 (W.S. Carpenter ed. J.M. Dent & Sons Ltd., 1970).

\(^{40}\) Emphasizing this apparently erroneous approach Pullo wrote: "In result we are seeking for the division of powers in any system of government but autocratic." Pullo, supra note 33, at 14.

\(^{41}\) The Seym is a main legislative chamber of the Polish Parliament.
that the nation was the source of power, and that this power was disposed on the basis of the law and within its boundaries.\textsuperscript{42} The Seym was referred to as an “organ representing the nation” and the government (Rada Ministrow - Council of Ministers) as “an institution that conducts [the] internal and foreign policy of the state and is in charge of [the] state’s administration.”\textsuperscript{43} In contrast to the Seym draft, the draft constitution of the Polish Senate stated that “the State’s power is executed by the separated and balanced legislative, executive and judicial organs.”\textsuperscript{44}

After several years of constitutional exercises in the countries of former Soviet dominance, the reluctance to accept the doctrine of division of powers (“d.o.p.”) seemed to abate. The following chart illustrates the several basic trends or tendencies:

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<th>references to the supremacy of the parliament</th>
<th>clear declaration of the d.o.p. in the basic principles</th>
<th>references to legislature executive, and judiciary as powers</th>
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As illustrated by the chart, none of the newly adopted postsocialist constitutions clearly rejects the d.o.p. doctrine or declares its dedication to the concept of concentration of power. The Constitution of Bulgaria,

\textsuperscript{43} Id. at 42.
\textsuperscript{44} Id. at 44 (Senate Draft).
for example, leaves no doubt as to the drafters' dedication to this concept; the document declares that "the power of the state is divided between a legislative, an executive, and a judicial branch." Poland's Small or Interim Constitution clearly divides power between the Seym and the Senate (organs of legislative power), the President and the Council of Ministers (organs of executive power), and the independent courts (organs of judicial power). Still, while other countries clearly invoke the d.o.p. doctrine, there is no unambiguous reference to the d.o.p. doctrine in the constitutions of Hungary or Slovakia.

Despite their clear declaration of the division of powers, several constitutions still retain the traditional socialist language and do not refer to executive and judicial organs as powers. The government is not referred to as "a power" at all, but is rather the "the supreme and administrative organ" or an organ of state administration, which ensures the implementation of "the domestic and foreign policy." The judicial organ is referred to as the "judicial authority." In addition, several constitutions declare both their dedication to the d.o.p. doctrine and the principle of the supremacy of the parliament. This signifies the changing attitude of the postsocialist drafters who now, more so than in the early stages of constitutional reform, are inclined to agree that these two rules may be capable of forming a homogeneous mixture in the sense that the divided powers might be unequal and not clearly separated. It must be noted, however, that the principle of supremacy of the parliament is recognized even in the countries which opt for a model of a presidential republic (Russia, Kyrgyzstan, Kazakhstan), which clearly signifies the tendency to give this principle a character of pure "window-dressing."

Furthermore, several former Soviet republics frequently emphasize that balance and equilibrium among the executive and legislative authorities are highly valued attributes of good government. Within this grouping of states, the American model of checks and balances enjoys some popularity. Still, at least one constitution (Kazakhstan)
maintains that the Parliament is "the highest representative body," while at the same time providing that the d.o.p. doctrine is based on "the concept of restraints and counterbalances." These declarations seem contradictory of one another, as the system of checks and balances is designed to limit a supreme influence or power of one constitutional organ.

B. Legislaturess: Bicameralism v. Unicameralism

Commenting on the classification of political systems, C. F. Strong wrote that "a division of modern legislatures into those made up of one house and those having two chambers is not very real because it would put all the important states in one category, and all the less important states, as for example, Finland and Turkey, in the other." Strong was correct that classifying political systems on grounds of bicameralism or unicameralism is not very effective for the simple reason that, in the beginning of this century, most states seemed to believe that bicameral legislatures were superior to unicameral legislatures.

The rationale for having bicameral legislatures has historically been fourfold. First, it has been argued that in the federal countries, such as the United States, Germany, the Soviet Union and Switzerland, the upper houses provide a natural representation of the interests of the separate political entities of these states. Secondly, good reasons have existed for setting up bicameral legislatures in states which promoted a policy of regionalism, such as Belgium, Spain or Italy. Thirdly, bicameralism seems to be well grounded in the concept of checks and balances where one chamber is set up to balance the power of the other. Some experts also believed that the upper chamber enhanced the stability of the political system, providing the executive an important ally in surviving parliamentary crises. Fourthly, the upper chambers survived in the countries

51 KAZ. CONST. art. 63
52 See KAZ. CONST. pmbl.
53 C.F. STRONG, MODERN POLITICAL CONSTITUTIONS 67 (1949).
54 Howard Lee McBain and Lindsay Rogers observed in 1922 that all the new constitutions of Europe, with the exception of Finland, Estonia, and Yugoslavia, provided for bicameral legislatures. See HOWARD LEE MCBAIN & LINDSAY RGERS, THE NEW CONSTITUTIONS OF EUROPE 38 (1922).
56 It was often claimed that in unitary systems, the second chamber may represent interests of minorities including regional interest groups. For a discussion of these arguments see Lord Campion, Second Chambers in Theory and Practice, 7 PARLIAMENTARY AFF. 17 (1953-54). For the application of these arguments in the postsocialist constitutional doctrine, see L. GARLICKI & K. GOYNSKI, POLSKIE PRAWA KONSTYTUCYJNE (Polish Constitutional Law) 115 (1996).
57 This rationale was quite visible in the intentions of the drafters of the constitutions of the French Third and Fifth Republics. Alex N. Dragnich and Jorgen Rasmussen wrote:
with strong traditions of bicameralism, such as the United Kingdom. It may thus be reasonably argued that one of these reasons could always be sufficient to justify the existence of a bicameral system. As McBain and Rogers concluded in 1922, "One of the most interesting features of the new constitutions of Europe is found in the provisions relating to second chambers. Most of the legislatures are bicameral. Only Finland, Estonia, and Yugoslavia have been bold enough to dispense with the time-honored check of an upper and usually less popular legislative body."\(^6\)

The position of socialist jurisprudence in the dispute over the rationale for bicameralism was different. Only the first of the above mentioned reasons seemed to appeal to the drafters of communist constitutions. "Whereas the legislatures of all the unitary states have only one chamber," wrote Chris Osakwe, "those of the federal states have at least two chambers—the USSR Supreme Soviet has two chambers, the Yugoslav Federal Assembly has six chambers, and the Czechoslovak National Assembly has two chambers."\(^5\) Aside from these exceptions, the socialist lawyers believed that second chambers were either anti-democratic or unnecessary,\(^6\) caused delays in the legislative process and represented elitist interests rather than quasi-independent groups.

The creation of the Polish Senate in 1989 was a response to the demands of revolutionary times, and was expected to create a framework for further pluralization of the political system.\(^6\) During the disputes of

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Turning to the distribution of power between the two houses of Parliament in the Fourth Republic the upper chamber was a weak body, quite in contrast to the Senate of the Third Republic, known as the Council of the Republic. In returning in the Fifth Republic to the old name for the upper house, an effort was made to restore that chamber to much of its former power. This was a deliberate political tactic. The Gaulists were uncertain of their ability to control the lower house, but were confident that they would have an ally in the conservative upper house. Therefore they sought to give it considerably more power than that possessed by the Council of the Republic in the Fourth Republic. See DRAGNICH & RASMUSSEN, supra note 19, at 263. This was also the intention of the drafters of the German Basic Law of 1949. The German emergency legislative procedure gives the chancellor the possibility to overcome a legislative deadlock and rule for six months with the assistance of the Bundesrat (the upper house) if the chancellor resolves not to call the new elections. See GRUNDESSETZ [Constitution] [GG] art. 81 (F.R.G.) (1993) [hereinafter [GG]], reprinted in DAVID CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY, 376-77 (1994).

\(^6\) McBAIN & ROGERS, supra note 54, at 38.
\(^5\) Osakwe, supra note 26, at 177.
\(^6\) See Konstanty Grzybowski, Senat Albo Niedemokratyczny Albo Niepotrzebny (1946) (Senate Either Anti-Democratic or Unnecessary). See also Jarosz, Problem drugiej izby parlamentu: Zarys Koncepcji (Problem With the Second Chamber of Parliament: Outline of the Concept), 44 PANSTWO I PRAWO (State and Law) 16-28 (Jan. 1989).
\(^6\) See Wojciech Sokolewicz, Kwietniowa Zmiana Konstytucji (April Constitutional Changes), 6 PANSTWO I PRAWO 3-19 (June 1989).
"the round table," the second chamber was sometimes perceived as the equivalent of "the chamber of labor," and was expected to represent trade unions or self-governmental institutions as in the Yugoslavian system.\(^6\) This perception was offered as a rational for establishing a second chamber, but when discussed was apparently not convincing enough. In pluralistic societies the interests of particular social factions are usually represented successfully by pressure groups or lobbies, and singling out several institutions or unions as authorized to be represented in the second chamber usually appears arbitrary. For this reason, some Polish commentators argued for a more democratic electoral system in which one senator would be elected by one million electors, rather than by either the artificially created 100 electoral districts or upon the basis of the system in which each voivodship (administrative district) would be represented by two senators.\(^6\) Others argued that a weaker position of the Senate, in comparison to the Seym, undermined the purpose of the Senate.\(^6\)

A review of the drafting processes in other post-communist democracies fails to reveal any clear pattern in the selection of either bicameral or unicameral systems. It appears quite reasonable that a federal country, such as Russia, would set up a bicameral legislature and that most of the unitary states of the former Soviet Union, such as Azerbaijan, Estonia, Georgia, Kazakhstan, and Lithuania, and some former Soviet European satellites, such as Bulgaria, Hungary or Slovakia would favor unicameral legislatures.

For other new democracies, however, a clear rationale for favoring bicameralism was absent. The Ukraine portrayed itself as a state promoting regionalism, and the country's first draft constitutions provided for a two-chamber legislative body.\(^6\) In response, however, to intense internal discussions and after consultations with foreign experts, the drafters of

\(^6\) See GARLICKI & GOŁYNSKI, supra note 56, at 116-17.
\(^6\) The last mentioned system finally prevailed in Poland.
\(^6\) As Garlicki and Golynski claim, the Polish Senate does not represent administrative districts or local interests and because of this its existence is not clearly supported by rational arguments. Also, as a component of the system of checks and balances, the Senate is not very effective. See GARLICKI & GOŁYNSKI, supra note 56, at 117-18.
\(^6\) The Ukrainian draft of June 1992 stated that the territory of the state is "one, indivisible, inviolable and whole (art. 7)," but confirmed the status of Crimea as an autonomous republic and the right to a strong self-government of other regions. Article 128 referred to the Ukrainian upper chamber (The Council of Delegates) as "a territorially representative body." See Constitutional Committee of the Ukraine, Draft Submitted to the Central and East European Law Initiative (CEELI) of the American Bar Association, June 10, 1992 (on file with author).
the Ukrainian Constitution of June 28, 1996 decided to set up a unicameral parliament (the People's Rada of Ukraine).66

In Kyrgyzstan, the consideration of a bicameral legislature was motivated by reference to the concept of checks and balances.67 Ultimately, however, the upper chamber was perceived as a political puppet and as an artificially created presidential ally, and the drafters of the Constitution of May 5, 1993 finally decided to establish a single legislative chamber—the Jogorku Kenesh.68

The situation in Belarus took a different turn. The Constitution, adopted by the referendum of November 7, 1996, established a bicameral legislature.69 The drafters reserved for the President a prerogative to appoint one-third of the senators, a clear revelation of the President's intention to create a "puppet" chamber controlled by him.70 The Constitution allows the President to dissolve the Chamber of Representatives but simultaneously states that he "may also" terminate the powers of the Senate. This arrangement leads to concerns that the President may try to dissolve the legislative chamber and attempt to legislate himself through a "puppet" higher chamber. In addition, the President's state of emergency powers are dependent solely upon approval by the Senate,71 another indication that the Senate is in reality an instrument of the President's power.

The Czech Republic decided to maintain a bicameral parliament, even after the disintegration of the federal Czechoslovakia. The creation of the Senate, however, has remained at the center of constitutional controversies.72 Although proposals to amend the Constitution to eliminate bicameralism have been repeatedly rejected by the Chamber of Depu-


67 The draft Constitution of June 16, 1992 provided for one chamber, the Mejilis, but the outline of the new Constitution drafted by Turar Koichuyev mentioned two chambers, the Chamber of Representatives and the Senate.

68 See KONSTITUTSIIA [Constitution] ch. IV (Kyrg.) (hereinafter KYRG. CONST. reprinted in LUDWIKOWSKI, supra note 1, at 474.).


71 KONSTITUTSIIA [Constitution] art. 100(18) (Belr.) [hereinafter BELR. CONST.] reprinted in LUDWIKOWSKI, supra note 1, at 344.

ties,\textsuperscript{73} the Senate was not elected until November 1996, and many of its functions had been performed by the lower chamber.

Romania also established an upper house, despite the numerous reservations of Western constitutional experts, who could hardly find a rationale for a Senate in a unitary state which did not clearly recognize the principle of division of powers.\textsuperscript{74} When considering all of the East Central European states as a whole, however, unicameralism prevails in the new post-communist democracies, and it remains to be seen how effective those few bicameral parliaments established in this region will be.

\begin{table}[h]
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& unicameral parliament & bicameral parliament \\
\hline
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Belarus & & X \\
Bulgaria & X & \\
Czech Republic & & X \\
Estonia & X & \\
Georgia & X & \\
Hungary & X & \\
Kazakhstan & X & \\
Kyrgyzstan & X & \\
Lithuania & X & \\
Poland & & X \\
Rumania & & X \\
Russia & & X \\
Slovakia & X & \\
Ukraine & X & \\
\hline
\end{tabular}
\caption{Table 2}
\end{table}

\section*{C. Electoral Systems}

The democratic electoral systems of the socialist countries broke down as a result of a combination of the following major elements: defective nomination processes, defective secrecy mechanisms, and a lack of adequate and reliable public control of election results.\textsuperscript{75}

In the Soviet Union, the nomination phase, one of the most sensitive and important elements of the democratic electoral process, was seriously


\textsuperscript{74} See arguments raised during the CEELI workshops in Washington D.C. on the Draft Constitution of Romania in Spring 1991 (on file with author).

\textsuperscript{75} See Ludwikowski, Searching for the New Constitutional Model for East-Central Europe, supra note 1, at 139.
affected by a system which granted the right to nominate candidates to branches and organizations of the Communist Party (the “CPSU”), trade unions, the Young Communist League, co-operatives, and other public organizations, work collectives, and meetings of servicemen.76

The actual casting of ballots was another element that affected the democratic character of the socialist election process. The voter, before obtaining a ballot paper, had to identify himself and check his or her name on the list of voters. The Party propaganda claimed that the voter could cast a valid ballot simply by dropping it in the ballot box. This procedure was recognized as evidencing trust for the Party candidates who were located at the beginning of the list. Thus, even if the list had more candidates than seats allocated to this electoral district, the first candidates on the list would be deemed voted on. The voting booths were usually located at the distant parts of the electoral rooms. To vote secretly, the voter had to parade by the whole room in full view of the Party representatives present.77

This lack of trust in the elective practice —electoral rolls and procedure for their compilation, counting electoral votes in the electoral wards— created an atmosphere of futility and hopelessness that dissuaded attempts to vote secretly. In addition, the Party's backstage propaganda discretely persuaded the voter to remember that the electoral behavior of the members of society would be carefully observed by the Party, and would affect the assessment of individual contributions to the social well-being, a basic factor in the process of the distribution of social goods.78

Thus, prior to the fall of communism, in most of the countries of the Soviet bloc, only one person ran for each seat in an uncontested election with a high electoral participation.79 The multi-seat districts were tested in other socialist countries.80 They were introduced in Poland where usually between four and six representatives were elected in one district, and in the German Democratic Republic where four to ten representatives might be elected from a single list.81 The 1983 reform of the Hungarian electoral laws also introduced the system of double or multiple nomina-

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79 See Andrei Y. Vyshinsky, The Law Of The Soviet State 711 (1948); Ludwikowski, Searching for the New Constitutional Model for East-Central Europe supra note 1, at 142-43.
80 See Ludwikowski, Searching for the New Constitutional Model for East-Central Europe, supra note 1, at 138-39.
81 See id.
tions, simultaneously confirming the primacy of individual districts. Furthermore, the multi-seat system or system of multiple nominations, also introduced by Gorbachev’s Law on Constitutional Amendments, did not democratize the electoral law of socialist countries ipso facto.

One of the fundamental changes brought about by the fall of the Soviet empire was an incorporation of the principle of political pluralism into the basic constitutional structures of the new democracies. Since the emergence of the Polish Solidarity, it was clear that one of the discernible trends in the new constitutions would be the attempt to recognize a multi-party system as an element of a well-functioning constitutional government. The adoption of an electoral model that would be able to accommodate this trend was the next challenge.

As D.W. Rae correctly pointed out, “present knowledge about the politics of electoral law is neither very general in scope, nor entirely reliable in content.” The knowledge of the constitutional drafters from the new democracies about the systems of representation which were operative in the world at large certainly did not surpass the average. Their first task was to review the panorama of electoral systems used in Europe. For readers used to operating within the first-past-the-post-system, (“FPP”) a more detailed examination of the choices faced by the East-Central European constitutional experts is instructive.

The plurality system, traditionally used in the United Kingdom and the United States and the countries of the British Commonwealth, such as Canada and New Zealand was the electoral system which the East-Central European drafters were relatively most familiar with. In this system—also referred to as the first-past-the-post-system—each constituency returns only one representative. The voter indicates his preference for one candidate and the candidate with the highest number of votes wins, regardless of whether he received a majority of votes cast. Although, in most instances, the system brings about majoritarian results, it is not difficult to see that this winner-takes-all system also creates the

possibility that, with several strong candidates, a majority will be governed by a mere plurality.

The plurality system can also be used in multi-seat constituencies in which the voters have as many votes as there are seats in the constituency. The seats are distributed among the candidates who receive the largest number of votes.\(^7\) A modification of this system is the cumulative voting (CV) system, under which each voter has as many votes as there are seats available in his district but the votes may be cumulated on one candidate or distributed among different candidates or even different parties. This system is used in Luxembourg which has four constituencies, each ranging from six to twenty-four seats, and gives the voters as many votes as there are empty seats.\(^8\) The CV was also adopted for the lower house of the Illinois legislature in 1870, but was abolished by referendum in 1980. The limited use of the system made its evaluation difficult and its adoption by the new European democracies very unlikely.

In order to avoid the result where a winning party obtains more than fifty percent of parliamentary seats without receiving fifty percent of the votes, the double-ballot majority system was developed. This system, exemplified by France, was also well-known to the constitutional drafters of the East-Central European countries at the time of drafting. While a majoritarian result almost always results from a two party system such as that of the United Kingdom and of the United States, a majoritarian result—giving one candidate more than fifty percent of the votes—is highly unlikely in France, given the number of relatively strong parties.\(^9\)

Thus, France devised a system which provides that, where no candidate obtains an absolute majority, a second ballot takes place.\(^9\) No one who was not a candidate in the first round may run in the second, and the threshold of representation for the second stage of elections is twelve and half percent of the total electorate.\(^9\) If none of the candidates receives this amount of the votes in the first round, two top candidates go to the second round.\(^9\) If no candidate in the second round wins an absolute majority, the round is conducted as a FPP election.\(^9\)

The alteration of the majoritarian model is referred to as an alternative vote system. This system attempts to reach majoritarian results without

\(^7\) The system is used in Poland in the Senate election. Each voivodship (electoral and administrative district) elects two senators with the exception of the Warsaw and Katowice voivodships which elect three senators and accordingly each voter has either two or three votes. The system is used also in Turkey. See id. at 231.


\(^9\) See Dragovich & Rasmussen, supra note 19, at 249.

\(^9\) See id. at 246-50.

\(^9\) See id. at 247.

\(^9\) See Antoszewski & Albertski, supra note 86, at 232.

\(^9\) See D.A. Brew, supra note 88, at 60.
using run-off ballots. The voter has only one vote but gives his preferences as to his "second choice" candidates.\textsuperscript{94} If none of the candidate receives an absolute majority, the votes of the candidate with the least amount of votes are distributed among other candidates accordingly to "second preferences" of the voters.\textsuperscript{95} This exercise repeats itself with other candidates from the bottom of the list until one of the remaining competitors receives at least fifty percent plus one vote.\textsuperscript{96}

With the exception of the United Kingdom and France, all other Western European states were using some form of proportional representation (PR) at the time the East-European states were drafting their constitutions. Generally speaking, the PR system is an electoral system characterized by the allocation of seats to parties in proportion to the number of votes cast for each party during an election.\textsuperscript{97} This system has been designed to underline the value of majority rule and provide minority parties with representation proportional to their strength.\textsuperscript{98} In order to prevent an excessive fractionalization of the parliaments, most of the PR systems use a minimal threshold of representation, which means that there is established a minimal percentage of votes needed to secure a party's representation.\textsuperscript{99} The votes collected by the parties which do not meet this threshold requirement are distributed among the parties which secured parliamentary representation for themselves.\textsuperscript{100} The introduction of the minimal threshold requirement means only that the parties which did not receive this required percentage of the votes (for example, four percent, five percent, or more) will not return any representatives to the parliament. Meeting the threshold requirement, however, still does not guarantee that the party receives seats. The actual result still depends on many factors, first of all being the given electoral support and the model of seat distribution the country's electoral system uses. In other words, satisfying the minimal threshold requirement represents a so-called "grey area," where the party may or may not receive a seat.\textsuperscript{101}

\begin{enumerate}
\item \textsuperscript{94} See Antoszewski & Albertski, supra note 86, at 232.
\item \textsuperscript{95} See id.
\item \textsuperscript{96} See D. Urwin, THE ELECTORAL SYSTEMS 15 (1977). The system is used in Australia. See DEMOKRACIE ZACHODNIOEUROPEJSKIE, supra note 86, at 232-33.
\item \textsuperscript{97} See Antoszewski & Albertski, supra note 86, at 230-39.
\item \textsuperscript{99} See Douglas Rae et al., Thresholds of Representation and Thresholds of Exclusion: An Analytic Note on Electoral Systems, 3 COMP. POL. STUD. 479, 479-88 (1971).
\item \textsuperscript{100} See id.
\item \textsuperscript{101} See D. A. Brew, supra note 88, at 47.
\end{enumerate}
given circumstances, it is, however possible to find a maximal threshold of exclusion, beyond which the party is guaranteed their representation.\textsuperscript{102}

Among many systems of proportional representation, a list PR system is most often used. In this system, each party presents a list of representatives and an individual voter is allowed to cast one vote for the party of his preference.\textsuperscript{103} The seats are allocated to the parties proportionally to the number of votes received. For example, if the party receives one seat, the party's representative on the top of the list receives this seat; if the party receives two seats, the two party representatives on the top of the list are elected. Near the end of the 1980s, when the new European democracies were designing their electoral systems, plurality and list proportional systems were used in most of the democratic national legislative elections of lower houses or unicameral legislatures.\textsuperscript{104} There were a few exceptions, such as France, Japan, Ireland, Malta and Australia (the upper house).\textsuperscript{105}

Ireland, Malta and Australia use the single transferable vote (STV) system. This system is often considered as an alternative to the plurality and party list PR systems which are often criticized for giving party leaders excessive control over the party candidates.\textsuperscript{106} After all, it is the party leaders who decide who represents the party in the elections of each single seat constituency in plurality systems and it is the party leaders who arrange the party lists in accordance with their preferences in a list PR systems.\textsuperscript{107} The STV system was designed to distribute the seats in a way which approximates the corresponding distribution of votes. The STV system allows the voter to number candidates or parties in order of preference, and in this way affect the policy of the party.\textsuperscript{108} Each voter still has only a single vote, but this system prevents votes from being wasted on candidates who do not need them, or from being allocated against the voter's preferences where the votes are cast on a party which did not reach the minimal threshold requirement. On the ballot, the voter expresses his choices, and if the first selected candidate does not require

\textsuperscript{102} It happens also that, if the number of the parties drops below the number of seats to be allocated, the maximal threshold may be reduced and a so-called intermediate maximal threshold is introduced.

\textsuperscript{103} See Urwin, supra note 96, at 20.

\textsuperscript{104} Arend Lijphart and Bernard Grofman concluded that plurality and list proportional representation systems accounted for "17 of the 21 democracies that have been continuously democratic since approximately the end of the Second World War." Arend Lijphart & Bernard Grofman, Choosing an Electoral System, in \textit{Choosing An Electoral System: Issues and Alternatives}, supra note 85, at 3, 4.

\textsuperscript{105} See id.

\textsuperscript{106} See Brew, supra note 88, at 59.

\textsuperscript{107} See id.

\textsuperscript{108} See id. at 61-62. See also M. Gallagher et al., \textit{Representative Government in Western Europe} 161 (1992).
the vote, either because he cannot be elected or because he has already secured enough votes, the vote is transferred to the voter’s second or third choices, and so forth. This system operates in several rounds. It fixes a “quota” of votes sufficient for an election. In the first round, the candidates who receive the necessary quota of votes are recognized as elected, in the second round surplus votes are distributed among the voters’ alternative choices, which alters the total number of candidates who secure the necessary quota of votes. In the third round, the candidate from the bottom of the list is declared defeated and his votes are transferred to the candidates above him, again in accordance with the voters’ preferences. This procedure repeats itself with the next candidates with the lowest amount of votes until all remaining candidates have quotas.

The system which especially attracted the attention of the drafters from the new democracies was the additional member system adopted by Germany. “The name (of the system),” wrote W.P. Irine, “derives from the fact that the system uses additional members to compensate for the distortions inevitably deriving from a system of single-member constituencies.” In Germany, half of the members of the Bundestag are elected via the simple plurality system. As in the United States and the United Kingdom, the country is divided into a number of a single-seat constituencies which is the equivalent of half of the membership of the Bundestag, and each constituency elects one representative. The other half of the deputies of the Bundestag are elected from the party lists. Thus, each German voter votes twice, once for individual candidates in the local districts and once for the state party lists. The seats allocated to the parties are calculated on the basis of the second vote. There is a threshold requirement of five percent, which means that the parties which did not obtain this percent in the party vote (or did not get at least three members in the first round) will not get any parliamentary representation. The seats received by the party members in the individual constituencies are kept by the party. These seats are then supplemented from the party’s state lists accordingly to rank position on the list until the


110 See Brew, supra note 88, at 61.

111 See Hallet, supra note 109, at 117-18.

112 See id.


entire number of seats allocated to the party in the second round is exhausted.\textsuperscript{115}

A less widely known and rarely used electoral system for national elections at the time of the drafting of the new constitutions was the limited vote system and its subtype the single nontransferable vote (SNTV) system.\textsuperscript{116} In the former system the voter has several votes to cast but still fewer than the number of the seats in the constituency.\textsuperscript{117} The limited vote is used to elect most of the Spanish senators, with the remaining amount elected via the plurality system. Most of the constituencies are four-member districts in which the voters have three votes to cast. In smaller three-member districts they have only two votes.\textsuperscript{118} The SNTV system is used in the elections for the Japanese House of Representatives. This system is a deviation of the American plurality system which uses single-member districts. The Japanese SNTV system uses three to five-seat constituencies; the voters residing therein have only one vote but may cast it on individual candidates instead of party lists.\textsuperscript{119} Both the limited vote and the SNTV systems are regarded as a combination of the plurality and RP systems. These systems have the advantage of the plurality system's simplicity but use multi-seat districts. In the opinion of most commentators both systems secure better minority representation.\textsuperscript{120}

In the early stages of democratic transformation, for the states being in avant-garde of the changes, such as Poland or Hungary, proportional and plurality/majority systems seemed to be the primary alternatives. The literature on major voting models always concentrated on the pros and cons of these two systems, and thus they naturally had to be considered for adoption by the new democracies.\textsuperscript{121}

Poland traditionally favored the system of plurality/majority which appeared to guarantee a greater governmental stability. The Electoral Law of April 7, 1989\textsuperscript{122} introduced two rounds of elections. The first round required more than fifty percent of the votes for victory, while in the second round a plurality sufficed.\textsuperscript{123} This system was successful dur-

\begin{footnotesize}
\begin{enumerate}
\item See Max Kaase, Personalized Proportional Representation: The "Model" of the West German Electoral System, in Choosing An Electoral System: Issues and Alternatives, \textit{supra} note 85, at 155, 157.
\item See Antoszewski & Albertski, \textit{supra} note 86, at 233.
\item See Lijphart, \textit{supra} note 116, at 209.
\item See \textit{id.} at 207-13.
\item See \textit{id.} at 213.
\item Dziennik Ustaw (Official Gazette), Apr. 8, 1989, Nr. 19.f.
\item See \textit{id.}
\end{enumerate}
\end{footnotesize}
ing the transitory period when only two political blocs—Solidarity and the governmental coalition—competed for power. In 1990, the Hungarians also discussed the benefits of the plurality system, and after the fall of the Soviet Union the first-past-the-post-system apparently appealed to the leaders of larger republics of this region, such as Russia, Ukraine and Belarus.

With the further pluralization of political life, the constitutional drafters from East-Central Europe were less and less inclined to consider plurality (FPP) as the main alternative in choosing an electoral system. They realized that the FPP model was traditionally favored by the countries with a two-party system, while the proportionality system prevailed in the multiparty democracies. Furthermore, critics of the FPP argued that the degree of representativeness was usually lower in the countries using the FPP than in the countries using PR systems, connoting that it was very likely that the party's share of votes was not equivalent to its share of seats.

During the 1990s, the focus of the debate on election methods shifted from the dichotomy between the PR and plurality/majority systems to the question of whether it was possible to find a mixed model that would combine the best features of these two systems—stability and representativeness. Germany's additional member system was at the center of attention. Stephen Holmes wrote,

many European states have now adopted mixed electoral systems . . . combining PR with 'majoritarianism' through a variety of techniques. A perhaps imperfect understanding of German electoral law may have played a role in this choice. But equally important has been the widespread perception that each system has important advantages over its rival.

As early as 1990, Hungary opted for a mixed system. In the elections held in March and April of that year, twenty-eight parties contested for

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124 For comments on the 1989 elections in Poland, see Ludwikowski, Searching for a New Constitutional Model for East-Central Europe, supra note 1, at 156-57.
127 In fact, this traditional argument against plurality was recently undermined by Richard Rose who claimed that "the most representative plurality system, the United States House of Representatives, is at least as proportional as seven of the seventeen PR systems." Richard Rose, supra note 85, at 74. For arguments critical of the plurality system, see generally R.J. Johnston, Seats Votes, Redistricting and the Allocation of Power in Electoral Systems, in CHOOSING AN ELECTORAL SYSTEM supra note 85, at 59-69.
386 seats of the Hungarian Parliament. This mixed system was based on three tiers. One hundred and seventy-six members were elected on a single-member constituencies on the basis of the FFP system; one hundred and fifty-two seats were filled in multi-member districts according to a list PR system; and fifty-eight deputies were elected from a national list based on transferable votes from the county lists.

In Bulgaria, the electoral law was changing. The elections of 1990 were held pursuant to a mixed (majority and proportional representation) system; the system was replaced by proportional representation in October 1991, but over the years a number of parties began to consider the reintroduction of elements of the majority system, which in their opinion would give the electorate a clear view as to whom they should elect.

After the velvet divorce of the Czechs and Slovaks in 1993, the parliaments of both countries introduced PR systems, which immediately faced strong criticism from the proponents of a mixed proportional and majority system led by Czech President Vaclav Havel and Slovak Premier Vladimir Meciar. Mixed systems were also introduced in Russia, Lithuania, Azerbaijan and Georgia. The following table exemplifies the choice of electoral models.

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130 See id.
134 Most of the data provided in Table 3 was taken from the Table of Twelve
Table 3

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<thead>
<tr>
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With more and more countries of the region favoring one of the models of proportional representation, the focus of the debate shifted to two questions: what was an appropriate threshold for eligibility to hold legislative seats, and what was the best method of distributing seats among the parties which met the threshold requirements.

The confusing assumption that the introduction of a minimal threshold of representation impairs the democratic character of the electoral system and results in the waste of electoral votes proved a costly lesson for some of the new democracies. The first democratic elections in Poland in 1991 fragmented the Polish Seym, essentially paralyzing its legislative work for two years. Using the system of strict proportionality, and disregarding the threshold that kept weaker parties out, Poles elected representatives of no fewer than twenty-nine parties to the Parliament; no single party received more than thirteen percent of the vote.135 In 1993, the Seym introduced a five percent threshold for single parties and an eight percent for coalitions.136 This course of action resulted in the reduction of electoral groupings to eight and also provoked President’s


135 As Bronislaw Geremek, a Polish historian and an early leader of Solidarity, stated: “Different political parties formed and Poland even earned the right to be entered into the Guinness Book of World Records. We had 250 political parties.” Bronislaw Geremek, Parliamentarism in Central Europe, E. Eur. Const. Rev., Summer 1995, at 43, 46.

136 See Garlicki & Golynski, supra note 126, at 84-89.
Walesa’s statement that he represented the thirty percent of citizens whose votes were “thrown away” because of the thresholds. Most of the new democracies learned from this lesson and introduced a four or five percent threshold for single parties and a wider threshold ranging from seven to eleven percent for coalitions.

Searching for appropriate methods of seat distributions proved a more difficult challenge; legislative electoral formulas are complicated, and very few constitutional experts truly understand how they effect electoral results. Three popular formulas were most often considered by the drafters for adoption: d’Hondt system, Hare formula and Droop system. The highest average d’Hondt system uses a system of successive divisors (1, 2, 3). Each party’s total vote is divided by the number of seats it already receives plus 1; the party with the highest average is allocated a seat until all remaining seats are distributed. The counting goes through as many rounds as there are seats for allocation. Let’s assume that in a hypothetical case four seats must be allocated to five competing parties. The votes received by the parties are as follows:

<table>
<thead>
<tr>
<th>Party</th>
<th>Divisor 1</th>
<th>Divisor 2</th>
<th>Divisor 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Party A</td>
<td>60 000 (seat)</td>
<td>30 000 (seat)</td>
<td>20 000</td>
</tr>
<tr>
<td>Party B</td>
<td>40 000 (seat)</td>
<td>20 000</td>
<td>13 333</td>
</tr>
<tr>
<td>Party C</td>
<td>26 000 (seat)</td>
<td>13 000</td>
<td>9 666</td>
</tr>
<tr>
<td>Party D</td>
<td>24 000</td>
<td>12 000</td>
<td>8 000</td>
</tr>
<tr>
<td>Party E</td>
<td>10 000</td>
<td>5 000</td>
<td>3 333</td>
</tr>
</tbody>
</table>

During the initial round of counting, no party has any seats, so the votes cast on each party are divided by one. Party A has the highest average and is given one seat. Now Party A’s votes must be divided by 2 (1 +1), which leaves the party with 30,000 votes, the result of which places this party between party B and C. In this round Party B, which now has the highest average, is given a seat. The number of votes of Party B are then divided by 2 (1+1) and drop to 20,000; this places Party B just above Party E. In the next round, Party A, with the highest average of 30,000 votes, is

137 See Holmes, supra note 128, at 40. See also Constitution Watch, E. EUR. CONST. Rev., Fall 1993, at 2, 14.
138 See Lucky, supra note 134, at 65-77.
139 See Mark P. Jones, Electoral Laws and the Survival of Presidential Democracies 122 (1995). See also J.W. Holubiec & J.W. Mercik Techniki I tajniki glosowania (Techniques and Secrets of Voting) 79-98 (1992). It is often claimed that the distribution of seats according to the d’Hondt method in larger electoral districts gives the results more adequate to actual support for the Parties. See W. Sokol, Spoleczenstwo, Panstwo, Wladdza (Society, State, Power) 18 (M. Zmigrodzki & M. Chmaj eds., 1995).
allocated a second seat and its total votes are divided by 3 (2+1); thus, with 20,000 votes, Party A has the same remaining quotient as Party B. Now, the last seat is allocated to Party C, which wins this seat with the highest average of 26,000 votes. In this way all seats are allocated, with Party A receiving two seats, and with Parties B and C each receiving one.

The modification of the d’Hondt system is referred to as the formula Sainte-Lague, and is used by the Scandinavian countries (with the exception of Finland). This system uses only odd divisors (1, 3, 5 . . . .), which increases the chances of smaller parties. If, following this method, we use the same example as before, we can easily observe that the distribution of the seats changes, bringing each of four parties one seat.\(^{140}\)

<table>
<thead>
<tr>
<th>Divisor 1</th>
<th>Divisor 3</th>
<th>Divisor 5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Party A . . . . . . . . 60 000 (seat)</td>
<td>20 000</td>
<td>12 000</td>
</tr>
<tr>
<td>Party B . . . . . . . . 40 000 (seat)</td>
<td>13 333</td>
<td>8 000</td>
</tr>
<tr>
<td>Party C . . . . . . . . 26 000 (seat)</td>
<td>9 666</td>
<td>5 200</td>
</tr>
<tr>
<td>Party D . . . . . . . . 24 000 (seat)</td>
<td>8 000</td>
<td>4 800</td>
</tr>
<tr>
<td>Party E . . . . . . . . 10 000</td>
<td>3 333</td>
<td>2 000</td>
</tr>
</tbody>
</table>

The Hare formula, named after Thomas Hare, the co-inventor of the single transferable system (STV), involves dividing each party's vote by the “natural” quota (the number of votes (v) in a district divided by the number of seats (s) allocated to this district), or by a “fixed” electoral quota which is predetermined for all constituencies. The seats remaining after all full quotas have been exhausted are distributed accordingly to a system of largest remainders.

The Droop system,\(^{141}\) although more complicated, operates in a similar way. It allows the calculation of the quota of votes a candidate needs for election. The formula for the Droop quota requires dividing the total amount of valid votes (v) by the number of seats (s) plus one, and converting this to a percentage of votes (v).\(^{142}\) This exercise is represented by the following formula: quota= \(v/s+1/v \times 100\). For clarification, assume that hypothetical elections are held in a district in which twenty candidates run for ten seats, and two million participating voters are allowed to number all candidates according to their preferences.\(^{143}\) The threshold required for election will be 9.09% of the total vote. If a candidate receives a quota, remaining votes are transferred to other candidates in the order of the voters’ preferences.

\(^{140}\) See Antoszewski & Albertski, supra note 86, at 235.

\(^{141}\) The formula is known also as the Hagenbach-Bischoff system. Both systems are functionally identical. See Jones, supra note 139, at 122, 210-11 nn. 6-7.

\(^{142}\) For more detailed analysis, see M.A. Inman, supra note 98, at 2001-02.

\(^{143}\) The calculation is as follows: \(2,000,000/ 10+1/ 2,000,000 \times 100= 9.09\%\).
After all surpluses are transferred, the candidates from the bottom of the list who did not receive a quota are eliminated one by one, and their votes are distributed between those above them according to the preferences of the voters. This process goes through as many rounds as is needed to fill the available number of seats.\textsuperscript{144}

It is widely assumed that the d'Hondt's formula favors larger parties, while both the Hare and Droop systems allocate more seats to smaller parties. As Jones wrote, "The net result is that we would expect the use of the d'Hondt formula to lead to a lower level of multipartism and hence a larger executive legislative contingent than the use of the LR-Hare formula."\textsuperscript{145} As one can observe from the following table, the new democracies did not show any special preferences for any one formula, and are using all three with comparable frequency.\textsuperscript{146} There are very few regularities which can be observed. Poland, discouraged by the fragmentation of her Parliament after the first election, uses in both tiers the d'Hondt system favoring larger parties.\textsuperscript{147} Some countries, such as Estonia and Rumania, are using Hare's system for the lower tier, but are trying to mitigate its effect by giving more seats to winning larger parties in the second tier, where the d'Hondt system is applied. Bulgaria, according to the same logic, gives more seats to larger parties on the basis of the d'Hondt system and uses Hare's concept of strict proportionality for individual candidates.\textsuperscript{148} Only Slovakia and the Czech Republic use either Hare's or Droop's systems, and Lithuania favors strict proportionality (Droop formula), however, slightly mitigated by the use of majoritarian system in the first round of elections.\textsuperscript{149}

\textsuperscript{144} See Inman supra note 98, at 2001-02.
\textsuperscript{145} Jones, supra note 139, at 122-23.
\textsuperscript{146} Data regarding electoral formulas for the new democracies is limited and does not allow for reliable report on the methods of distribution of seats in many of the former Soviet Republics. The information in Table 6 was taken mostly from the Table of Twelve Electoral Laws. See Lucky, supra note 134, at 65-77.
\textsuperscript{147} See Garlicki & Golynski, supra note 126, at 84.
\textsuperscript{148} See Lucky, supra note 134, at 65-77.
\textsuperscript{149} See id.
### Table 6

<table>
<thead>
<tr>
<th>Country</th>
<th>Threshold Electoral formulas</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bulgaria</td>
<td>4% (does not apply to individual candidates) for parties: d'Hondt formula for individual candidates: the Hare formula</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>5%; 7% for coalitions of two; 9% for coalitions of three; 11% for coalitions of five two tiers, representation computed on the basis of the Droop system</td>
</tr>
<tr>
<td>Estonia</td>
<td>5% two tiers: lower tier, distribution of seats according to the Hare model; upper tier, distribution according to the modified d'Hondt model</td>
</tr>
<tr>
<td>Hungary</td>
<td>4% two (of three) tiers based on PR system: lower tier, distribution based on the Droop model; upper tier, according to the Hare system</td>
</tr>
<tr>
<td>Lithuania</td>
<td>4% one (of two) tier based on PR system, computation based on the Droop formula</td>
</tr>
<tr>
<td>Poland</td>
<td>lower tier 5% for parties; 8% for coalitions; upper tier 7% nationwide two tiers, in both computation based on the d'Hondt system</td>
</tr>
<tr>
<td>Rumania</td>
<td>3% two tiers: lower tier, distribution based on the Hare formula; upper tier, on the d'Hondt system</td>
</tr>
<tr>
<td>Slovakia</td>
<td>5% representation according to the Hare system</td>
</tr>
</tbody>
</table>

### D. System of Governance

It is often claimed that the evolution of the doctrine of the division of powers and its application in the political practice of several countries contributed to the emergence of the two major political systems of presidential and parliamentary government. Although the dichotomy of the political systems dissipated with time into a variety of mixed models,

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150 For initial description of the basic features of the presidential and parliamentary systems, see Ludwikowski, supra note 1, at 204-06.

it is still valuable to think of this dichotomy as a tool for comparative analysis.

Without entering into a detailed examination of variations of these two major political systems, one may distinguish them by several fundamental features. The presidential system, usually associated with the American political experience, is characterized by a concentrated model of the executive. The President is the sole executive and is elected directly by the electorate as the head of state and as the head of government. The legislative branch of government is separated from the executive and elected independently by the people for a set term of office. The cabinet members are appointed by the President and are subject to the confirmation of the legislature, but they do not sit in the legislative branches of the government. The cabinet members can be called upon by the legislature to account for their actions but cannot be simply voted down by the legislature's expression of lack of confidence. Similarly, the President may call a special session of the legislative assembly or adjourn its meeting, but he cannot dissolve the legislature and hold new elections.

In contrast, a typical feature of the parliamentary model is a dual executive system, with presidents or monarchs as heads of state playing roles of "senior statesmen" or "supreme arbitrators," and the prime ministers functioning as politically accountable chief executive officers. If the head of state is a president, typically he is not elected directly by the people but by parliaments or special electoral colleges. With the cooperation of the parliament, the head of state appoints the head of government, who successively appoints the ministry. In the parliamentary system, the two branches of government, the legislative and the executive, are fused. The ministers usually are members of the parliament and are politically responsible to the legislature, which can vote the executive out of office without any need for a national referendum. In some countries with the parliamentary system, the head of state, in cooperation with the head of government, has power to dissolve the legislature and call for an election before the end of the parliamentary term. As the fusion of the executive and the legislature, the parliament is a supreme power over its constituent parts. Douglas V. Verney wrote that

the notion of the supremacy of Parliament as a whole over its parts is a distinctive characteristic of parliamentary systems. This may seem to be a glimpse of the obvious to those accustomed to parliamentary government, but it is in fact an important principle, all too often for-
"MIXED" CONSTITUTIONS

Although it was often claimed that a pure parliamentary system prevailed among post World War II democracies, in fact, the supremacy of parliaments was clearly visible only in those countries with multiparty systems in which frequently changing coalition governments were highly dependent on fluctuating opinions of the supporting majorities of deputies. In the countries with two party systems, the ruling governments were usually able to discipline their party's parliamentary representations to the extent of guaranteeing a good deal of stability and control over the legislative process. Exemplified by the British experience, this system was able to give the prime minister a formidable power. To signify this shifting of powers within the parliament, the system in which the government was able to gain a decisive influence has been often called the parliamentary-cabinet system.

The understanding that the allocation of the excessive power in a fragmented parliament may contribute to governmental impotence resulted also in the evolution of the German parliamentary system into the model of so-called "chancellor's democracy." The stability of this system has been improved by several devices which enhance the Chancellor to some extent.

158 See Verney, supra note 151, at 181.
159 Arend Lijphart argued that in the group of 21 postwar democracies, 17 had pure parliamentary systems, two had a mixed presidential-parliamentary system, one semi-presidential system and one country (the United States) a pure presidential system. See AREND LIJPHART, DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY ONE COUNTRIES 38, 69-71 (1984). This opinion has been repeatedly cited in East-Central European literature after it was mentioned by A. Stepan and C. Skach in the article Modele konstytucyjne a umacnianie demokracji (Constitutional Models and Strengthening of Democracy), in 4 PASTWIO I PRAWO (State and Law) 29-30 (1994). See also references to these opinions by J.A. Rybczynska, O Transformacji Systemow Politycznych w Europie Srodkowo-Wschodniej (On a Transformation of Political Systems in East-Central Europe), in SWIAT I POLSKAC XIX WIEKU (World and Poland of the XXth Century) 144 (M. Zmigrodzki ed., 1996).
160 For comments on the process of the transition to cabinet government in Great Britain, see WADE & BRADLEY, supra note 18, at 44-45; for the role of small parties that have the potential to create coalition governments (particularly in Italy), see Geoffrey Pridham, Italian Small Parties in Comparative Perspective, in SMALL PARTIES IN WESTERN EUROPE: COMPARATIVE AND NATIONAL PERSPECTIVE (Geoffrey Pridham & F. Muller-Rommel eds., 1991). See also Geoffrey Pridham, An Inductive Theoretical Framework for Coalitional Behaviour: Political Parties in Multidimensional Perspective in Western Europe, in COALITIONAL BEHAVIOUR IN THEORY AND PRACTICE: AN INDUCTIVE MODEL FOR WESTERN EUROPE (Geoffrey Pridham ed., 1986).
161 W. Osiatynski goes so far in the evaluation of the influence of the British Prime Minister that he states that "in practice he has more power than the American president." W. OSIATYNSKI, TWOJA KONSTYTUCJA (Your Constitution) 82 (1997).
degree without abandoning the parliamentary system. First of all, the Chancellor is responsible for the policy of the federal government while the Ministers have autonomy to act only within the limits set by the Chancellor’s general guidelines.\textsuperscript{162} Secondly, the procedure known as the “constructive vote of no confidence” provides that in dismissing the Chancellor, the Bundestag must simultaneously designate a successor by an absolute majority.\textsuperscript{163} Thirdly, the German Basic Law introduced the so-called “legislative emergency procedure” which provides that the government, with the support of the President and the Bundesrat, can survive up to six months without the support of the majority of the Bundestag.\textsuperscript{164}

Another hybrid or mixed system is a product of French experience and is often referred to as a presidential-parliamentary system or semi-presidentialism.\textsuperscript{165} Although traditionally France leaned toward a parliamentary democracy, the Constitution of the Fifth Republic incorporated into the French system a number of features typical to a presidential model. The Constitution retained a dual executive, but the President was directly elected by the people; also the power of the executive was strengthened and made less dependent on the Parliament.\textsuperscript{166} The President’s appointment of the head of the government does not require a formal confirmation by the Parliament, although the Parliament may vote the government out of office.\textsuperscript{167} Within some limits imposed on the frequency of this action, the President may, in cooperation with the Prime Minister and the presidents of the chambers of the Parliament, dissolve the legislature and call new elections.\textsuperscript{168} The President cannot veto the acts of the Parliament but he may ask for the reconsideration of bills

\begin{itemize}
\item \textsuperscript{162} GG, art. 65.
\item \textsuperscript{163} See art. 67.
\item \textsuperscript{164} See art. 81.
\item \textsuperscript{166} See W. SKRZYDŁO, \textit{Ustroj Polityczny Francji} (Political System of France) 143 (1992). For a more exhaustive examination of the semi-presidential system, see generally MAURICE DUVERGER, \textit{Le Système Politique Francais} (1986).
\item \textsuperscript{167} See Dragnich & Rasmussen, \textit{supra} note 19, at 275.
\end{itemize}
which he opposes.\textsuperscript{169} As the minister cannot sit in the Parliament, the lines of division between the executive and the legislature are less blurred than in the parliamentary system. On the other hand, some legislative functions may be shifted to the executive who may legislate in these areas by decrees. As Dragnich and Rasmussen observed, "the result was a hybrid system with elements of both parliamentary and presidential systems."\textsuperscript{170}

Thus, in fact, the dichotomy dividing the Western democratic world on a pure presidential and pure parliamentary system basis was already in decline when the new East-Central European democracies began surfacing on the political map. Still, someone expecting to find the basic features of these two and other well-known hybrid political systems simply duplicated in the new postsocialist constitutions would be seriously disappointed. The constitutional experience of the new democracies confirms that political systems are rarely designed on paper. They either evolve around strong, charismatic personalities or result from a significant political vacuum created by geopolitical circumstances. The former and latter circumstances proved particularly true for the countries of former Soviet dominance.

First of all, a careful commentator of the constitution-making process in the new democracies has to observe that the early expectations of the easy victory of parliamentarism over the presidential system in this region only proved partially true. These expectations were based on the assumption that the people of the postcommunist countries, disenchanted with the uni-personal communist leadership, would view the strong presidents as potential dictatorial figures, and the presidential systems consequently less representative and democratic.\textsuperscript{171} It was also expected that, at least in the former European Soviet satellite countries, the traditional socialist concept of sovereignty of parliament would contribute to the natural preference for parliamentary system. Stephen Holmes wrote "Another broad pattern also strikes the eye. Parliamentarism has made no inroads in the ex-USSR, except for the Baltic states, while full-fledged presidentialism has found no takers in Eastern Europe, except in the ex-Yugoslavia."\textsuperscript{172} Although Holmes' statement is generally correct, the final polarization of political models in this region has not been reached without problems, and the numerous choices made by the drafters require a careful explanation.

Poland, with its strong traditions of "seymocracy"\textsuperscript{173} was the first country to face a situation involving a choice between a presidential and par-

\begin{itemize}
  \item \textsuperscript{169} See art. 10.
  \item \textsuperscript{170} See Dragnich & Rasmussen, \emph{supra} note 19, at 274.
  \item \textsuperscript{171} See Osiatyński, \emph{supra} note 161, at 81.
  \item \textsuperscript{172} Holmes, \emph{supra} note 165, at 37.
  \item \textsuperscript{173} "Seymocracy" refers to a parliamentary system clearly recognizing the supremacy of the legislative body over all other organs of power. Contemporary
liamentary model, and that country's struggle with several alternative models of democracy is most illuminating. The compromise reached in the spring of 1989 between the Solidarity and the communist government left the presidency in the hands of the communists. The round table agreements, which were to guarantee the amount of control for the communists, were a major departure from the parliamentary system and a step towards a presidential one. The President was granted the rights to initiate legislative actions, to veto legislation, to dissolve the Parliament, and to impose martial law.

The direct election of Lech Walesa as the first noncommunist President deprived the presidential model of its former rationale and strengthened the sentiment to restore a parliamentary system. The view, however, that depriving the Solidarity President of the same prerogatives enjoyed by his communist predecessor would be embarrassing, gave steam to the idea of balancing the President's power by the further "democratization" of the Parliament. This desire resulted in the disregarding of the usual five percent threshold for the parties' entry to the Parliament, and resulted in the creation of the excessive system of checking and balancing which contributed to governmental impotence.

This problem was to be remedied by the Constitutional Act on Mutual Relations Between Legislative and Executive Powers of the Polish


174 See W. Osiatynski, Skazani na Niepodleglosc (Doomed to Originality), Gazeta Wyborcza (Electoral Gazette), Aug. 29, 1992. Linz and Stepan maintain that Poland was always (even in the 1949-53 period) closer to an authoritarian than to a totalitarian regime. See Juan J. Linz & Alfred Stepan, Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe 255 (1996).

175 See Ludwikowski, supra note 1, at 153.

176 See id.
Republic, adopted on August 1, 1992. The 1992 Act, referred to as the "Small Constitution," borrowed freehandedly from the Presidential systems as well as from the German model of "chancellor's parliamentarism," and established a hybrid version of "chancellor-President" system. In contrast to the German President, yet similar to the French and American Presidents, the Polish head of state was elected directly by the citizenry. Again, in contrast to the prerogatives of the German and French Presidents, but like the American President, Lech Walesa had important checks with veto power on the Seym, the legislative chamber of the Polish Parliament, which could be overridden by a two-thirds majority. The Polish President designated the prime minister and the ministers but their confirmation required final parliamentary approval. The procedure for designating government had some German features and vested in the President and the Seym in turn the right to propose candidates for governmental positions who subsequently needed absolute majority or plurality approval. The Polish Constitutional Act, similar to the German Basic Law, introduced the "constructive vote of no confidence," which provides that in dismissing the Prime Minister, the Seym must simultaneously designate a successor by an absolute majority. The Small Constitution increased the Cabinet's power, made the Prime Minister directly responsible to the Seym, and deprived the President of the power to ask the Seym for the cabinet's dismissal. The Cabinet could ask the Seym for the delegation of the power to legislate by decrees. The Small Constitution also listed the Presidential acts which required the Prime Minister's countersignature.

Many commentators observed that the Small Constitution created an excessive system of checks and balances which contributed to strained relations between the President and the Prime Minister, and often resulted in political deadlocks. The final Constitution of April 2, 1997 was intended to remedy this problem by giving preference to the parliamentary system. This Constitution, similar to the classic parliamentary models, reserves for the President the role of "the supreme representative of the Republic of Poland and the guarantor of the continuity of

177 See Constitutional Act, art. 29 (1992) (Pol.), reprinted in Ludwikowski, supra note 1, at 514.
178 See id.
179 See art. 18, at 512.
180 See Ludwikowski, supra note 1, at 156.
181 See Constitutional Act, arts. 57-60 (Pol.) (1992), reprinted in Ludwikowski, supra note 1 at 518-19.
182 See arts. 57, 66, at 518-19.
183 See arts. 46-47, at 516-17.
184 See Ludwikowski, supra note 1 at 157; see also Osiatynski, supra note 174, at 89.
State authority." Still, in contrast to traditional parliamentarism, it provides that the President be directly elected by the Nation for five years. The President was stripped of some of his previous prerogatives. For example, to override his veto, the Seym now needs only a three-fifths majority vote in the presence of at least half of the statutory number of deputies. The Small Constitution also provides the President with the right to appoint a provisional government in the event that a Council of Ministers has not been appointed by the Seym, or if the Presidential nominees do not get a vote of confidence. Under the 1997 Constitution, the President can only shorten the term of the Seym and order elections to be held. The position of the government has been enhanced by the removal of the provision of the Small Constitution providing that in the event of the Seym passing a vote of no-confidence to the government-in-office without at the same time choosing a new Prime Minister, the President had the discretion of either accepting the resignation of the Government or dissolving the Seym. Under the 1997 Constitution, the failure of the resolution specifying the name of a new candidate for Prime Minister simply extends the life of the old cabinet; the text strips the President of the power to shorten the term of office of the Seym in such an event. With all these changes, the 1997 Constitution still represented a hybrid, "semi-chancellor" system that, following the German model, strengthened the authority of the government, leaving, however, in the hands of the Polish President, power significantly greater than the power of his German counterpart.

The position of the presidents in some other East-Central European countries supporting the parliamentary form of government also varied. The presidents of Albania, the Czech Republic, Hungary, and Slovakia were elected by parliaments or electoral colleges. The first President of Estonia was elected directly by the people, but the final Constitution provides for an option to elect the President either by Parliament or by an "electoral body," composed of members of Parliament and represent-
atives of local government. Some other parliamentary republics, such as Bulgaria, Lithuania, and Romania established direct Presidential elections. The countries supporting the parliamentary form of government allow the presidents to submit legal acts passed by parliaments for reconsideration but, although resulting in a second vote, no qualified majority is needed to adopt these acts. The right to dissolve the parliament is usually limited: for example, the Romanian President can dissolve Parliament if it does not give a vote of confidence for the formation of the government twice within sixty days of the first request, and in Hungary the President can dismiss the Parliament only if it withdraws confidence in the government four times in a year or fails to elect a Prime Minister within forty days. In most of the countries favoring parliamentarism, the chief executive officers are appointed by the presidents with approval of parliaments. They are responsible before and recalled by the legislative bodies. The power to designate the prime minister, however, may be entirely vested in the parliament (the Hungarian case), with only the right to appoint ministers upon the proposal of the prime minister reserved for the president.

Some of the republics opting for the presidential system come dangerously close to an authoritarian or simply dictatorial model of governance. This trend is particularly striking in Belarus, where President Alexander Lukashenko clearly intends to subordinate to himself all other powers. The Belarusian Constitution was amended by the referendum of November 24, 1996. The amendments replaced a unilateral legislature with a bilateral parliament in which the President can nominate one third of the senators. This provision, combined with the Presidential right to dissolve solely the legislative chamber creates some suspicion that the President may try to get rid of the representative assembly and legislate with the assistance of the subordinated Senate. The President reserved for himself the right to initiate and veto legislation.

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193 See Pöseeadus [Constitution] art. 79 (Est.) [hereinafter Est. Const.].
194 See BULG. Const. art. 93; KONSTITUCIJA [Constitution] art. 78 (Lith.) (hereinafter LIT. Const.); ROM. Const. art. 81.
195 See supra Table 4.
196 See ROM. Const. art. 89.
197 See HUNG. Const. art. 28.
198 See, e.g., LITHE. Const. art. 84.
199 See HUNG. Const. art. 33.
201 BELR. Const. art. 91.
202 See art. 93.
203 See arts. 99, 100.
amendments vetoed by the President can be adopted only by a three-fourths majority of all the members of the Parliament. The President issues decrees and regulations binding on the territory of the whole country which do not require any governmental countersignature.\textsuperscript{204} The President is the head of the state and government; he appoints and recalls ministers and only his nomination of the Prime Minister has to be approved by Parliament.\textsuperscript{205} Article 88, requiring the vote of three-fourths of the Senate in order to impeach the President, is practically a dead letter.

Similarly, the President of Ukraine was once both head of state and head of government; the prime minister was only a deputy "subordinated and accountable" to the President.\textsuperscript{206} The Ukrainians clearly borrowed from the American Presidential system. The executive and the legislature were separate and independent. To terminate the President's tenure, the bicameral Parliament had to impeach the President.\textsuperscript{207} With the exception of the situation when the all-Ukrainian referendum called by the Parliament failed to terminate the tenure of the head of the state, the President cannot dissolve the national assembly.\textsuperscript{208} Although the Constitution adopted on June 29, 1996 made concessions towards the parliamentary system, they were crafted halfheartedly. The Constitution abolished the second chamber of Parliament and provided for dual executive power and for the ministerial countersignature of some of the Presidential decrees; the Presidential power to annul acts of ministers has been retained with some limitations.\textsuperscript{209} The President was permitted to dissolve Parliament; however, the assembly was vested with the right to impeach the President only in the event of the commission of serious crime or treason.\textsuperscript{210}

The trend to vest in the president a combined power of head of the state, highest executive officer, and commander-in-chief of the armed forces is clearly visible in three republics of Central Asia and Transcaucasia, Kazakhstan, Kyrgyzstan and Azerbaijan. The presidents in these states are elected directly by the people, have the right of veto which can be overridden by a two-thirds majority of the legislature and can issue decrees.\textsuperscript{211} They head cabinets, and with the approval of parliaments, appoint the prime ministers and ministers accountable to them.\textsuperscript{212} The model of checks and balances, which the drafters of the constitutions of

\textsuperscript{204} See art. 85.
\textsuperscript{205} See art. 106.
\textsuperscript{206} See \textit{Ludwikowski}, supra note 1, at 90-91.
\textsuperscript{207} See \textit{id}. at 91.
\textsuperscript{208} See \textit{id}.
\textsuperscript{209} See \textit{Ukr. Const.} arts. 75, 106, 106(16).
\textsuperscript{210} See arts. 90, 111.
\textsuperscript{211} See \textit{Kaz. Const.} arts. 76, 78(2), 79; \textit{Kyrg. Const.} arts. 44, 46, 48.
\textsuperscript{212} See \textit{Kaz. Const.} art. 85; \textit{Kyrg. Const.} art. 46.
these countries attempted to follow, does not allow the presidents to dissolve parliaments, nor parliaments to impeach the presidents.

The Constitution of the Russian Federation of December 12, 1993 was also a product of the constitutional melting pot. The drafters attempted to duplicate the American system of checks and balances but ended up with a model which combined both French and American features.\footnote{See Ludwikowski, supra note 1, at 67. For the text of the 1993 Russian Constitution, see Konst. RF (1993), reprinted in Ludwikowski, supra note 1, at 552.} The Russian President has a right to veto laws, which the French President lacks,\footnote{See art. 107.} and the right to dissolve Parliament, which has not been vested in his American counterpart.\footnote{See arts. 109, 111, 117.} In contrast to the American President, the Russian President is not the head of state and of the government, but his power to control the executive is stronger than that of the French President. The Presidential appointment of the Prime Minister is subject to the consent of the State Duma, but the President appoints and dismisses his deputy and federal ministers and decides on the resignation of the whole government.\footnote{See art. 109.} The President may approve the non-confidence resolution of the State Duma and dissolve the legislative body after the second vote of no-confidence.\footnote{See art. 117.} The President issues decrees and executive orders which do not require any ministerial countersignature and repeals the decrees and orders issued by the government.\footnote{See art. 83.} The President has legislative initiative, and can call referenda and impose a state of emergency, requiring only immediate notification of Parliament.\footnote{See art. 115.} The impeachment of the President is possible only on the basis of charges of high treason or grave crimes, and after the combined actions of the State Duma, the Federation Council, the Supreme Court and the Constitutional Court.\footnote{See arts. 84, 88.} At this moment it is still too early to say whether the constitutional "mixing" in the countries once part of the Soviet Union was the result of chaotic political bargaining or the product of cunning political calculation which attempted to disguise autocratic tendencies under a semi-democratic shield of Presidential systems.

The following chart shows the results of the constitutional blending in the area of governance in the republics opting for parliamentary and Presidential systems.

\begin{table}
\centering
\begin{tabular}{|c|c|c|}
\hline
Country & Parliament & President \\
\hline
Russia & Mixed & Strong \footnote{See arts. 84, 88, 93.} \\
\hline
\end{tabular}
\end{table}
<table>
<thead>
<tr>
<th>President of</th>
<th>Albania</th>
<th>Bulgaria</th>
<th>Czech Republic</th>
<th>Estonia</th>
<th>Hungary</th>
<th>Lithuania</th>
<th>Poland</th>
<th>Rumania</th>
<th>Slovakia</th>
</tr>
</thead>
<tbody>
<tr>
<td>length of term</td>
<td>5 years</td>
<td>5 years</td>
<td>5 years</td>
<td>5 years</td>
<td>5 years</td>
<td>5 years</td>
<td>5 years</td>
<td>4 years</td>
<td>5 years</td>
</tr>
<tr>
<td>electoral body</td>
<td>parliament</td>
<td>citizenry</td>
<td>joint meeting of both chambers of parliament</td>
<td>parliament or after three rounds by the electoral body composed of members of parliament and local councils</td>
<td>parliament</td>
<td>citizenry</td>
<td>citizenry</td>
<td>citizenry</td>
<td>citizenry</td>
</tr>
<tr>
<td>power to nominate and dismiss prime minister</td>
<td>yes—</td>
<td>appoints only subsequent candidates of largest parliamentary groups</td>
<td>yes— subject to the vote of confidence. If the vote fails the right to nominate passes on to the Chairman of Deputies.</td>
<td>yes— subject to the approval of the chamber; after two failed nominations, the right to present candidate passes to the chamber</td>
<td>no—</td>
<td>yes— subject to the approval of the parliament</td>
<td>yes— the right to nominate P.M. (who needs to be approved subsequently by absolute majority or plurality) passes in three rounds from the President to the parliament</td>
<td>yes— subject to the approval of the parliament requested in 30 days</td>
<td></td>
</tr>
<tr>
<td>power to nominate and dismiss ministers</td>
<td>yes— upon the request of Prime Minister and subject to approval of the assembly</td>
<td>no— ministers are appointed by the assembly upon the request of Prime Minister</td>
<td>yes— at the proposal of Prime Minister</td>
<td>yes— at the proposal of Prime Minister</td>
<td>yes— at the proposal of Prime Minister</td>
<td>yes— at the proposal of Prime Minister</td>
<td>yes— at the proposal of Prime Minister</td>
<td>yes— at the proposal of Prime Minister</td>
<td></td>
</tr>
<tr>
<td>right to appoint transitory government</td>
<td>no—</td>
<td>yes— if the assembly is dismissed in the result of the failure to form a cabinet</td>
<td>no—</td>
<td>no—</td>
<td>no—</td>
<td>no—</td>
<td>no—</td>
<td>no—</td>
<td></td>
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</tbody>
</table>

Table 7: Presidential Power in the States Opting for Parliamentary System
<table>
<thead>
<tr>
<th>President of</th>
<th>Albania</th>
<th>Bulgaria</th>
<th>Czech Republic</th>
<th>Estonia</th>
<th>Hungary</th>
<th>Lithuania</th>
<th>Poland</th>
<th>Romania</th>
<th>Slovakia</th>
</tr>
</thead>
<tbody>
<tr>
<td>power to dissolve assembly</td>
<td>yes — with opinion of Prime Minister and President of Assembly when the Assembly does not perform its functions</td>
<td>yes — when the subsequent new Prime Ministers cannot get confidence of the Assembly</td>
<td>yes — 1) after three failed attempts to elect Prime Minister 2) after the loss of confidence 3) after the failed attempt to submit the law for referendum 4) failed attempt to adopt budget within 2 months</td>
<td>yes — 1) after four withdrawals of confidence in 12 months 2) after failed attempt to elect Prime Minister in 40 days.</td>
<td>yes — 1) if the chamber fails to approve the program of the new government in 30 days 2) if the chamber did not adopt the budget within 4 months.</td>
<td>yes — 1) if the cabinet's policy statement has been rejected 3 times within 6 months</td>
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<tr>
<td>veto power — right to request reconsideration—voting</td>
<td>right to request reconsideration of the laws only once</td>
<td>right to submit the law for reconsideration — adoption requires majority of more than 2/3 deputies</td>
<td>right to request reconsideration — adoption requires another plurality vote</td>
<td>right to request reconsideration — adoption requires just another vote</td>
<td>right to request reconsideration — adoption requires at least absolute majority and for the constitutional laws at least 2/3 of the deputies</td>
<td>veto power — can be overridden by 2/3 majority in the presence of at least 2/3 of deputies</td>
<td></td>
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</tr>
<tr>
<td>decrees and orders — countersignature requirement</td>
<td>yes — require countersignature in some instances art. 10, 11, 19, 27.</td>
<td>yes — some of the decrees listed in art 102 do not require countersignature.</td>
<td>yes — can issue decrees only if the chamber is unable to convene and with the countersignature of the President of the chamber and the Prime Minister</td>
<td>yes — but with exception of ceremonial actions and representative functions, every measure and decree requires counter signature</td>
<td>yes — decrees specified in art. 84 # 3, 15, 17, 21 and art. 84 require countersignature</td>
<td>yes — executive acts, and regulations with exception of 20 acts listed in 144/3 require countersignature.</td>
<td>yes — decrees issued on the basis of art. 91#1, 2; art.92 # 2, 3; 93#1; 94 #8a, b, d, require countersignature of P.M.</td>
<td>no clear statement in the constitution</td>
<td></td>
</tr>
<tr>
<td>President of</td>
<td>Albania</td>
<td>Bulgaria</td>
<td>Czech Republic</td>
<td>Estonia</td>
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</tr>
<tr>
<td>impeachment—removal from office</td>
<td>only for treason and violation of constitution Initiative 3/4 of deputies, decision 2/3 of deputies</td>
<td>only for treason and violation of constitution. Initiative of 3/4 of deputies; approval of 3/4 deputies—decision by Const. Court.</td>
<td>only for high treason, before the Const. Court on the motion of the Senate.</td>
<td>may be charged with criminal offences on proposal of the Legal Chancellor—ombudsman, with plurality vote of the chamber</td>
<td>may be charged for violations of the Constitution and the laws on the motion of 2/3 of the deputies, and after the vote of 2/3 of deputies; decision by Const. Court.</td>
<td>only for gross violation of the Constitution; breach of the oath, and conviction of a crime. Decision by 3/5 of all deputies</td>
<td>only for violation of the Constitution and crimes—on the motion of 140 deputies and senators, with approval of 2/3 of members of both houses, with decision of the Tribunal of State.</td>
<td>only for violation of the Constitution and serious crimes—on the motion of 2/3 of deputies and senators; after consultation with the Const. Court and majority vote of deputies and senators approved by the referendum.</td>
<td>may be recalled if engaged in activity against sovereignty and territorial integrity, on the motion of 2/3 of deputies, with approval of 2/3 of deputies; impeached for high treason; on the motion of the chamber with decision of the Const. Court.</td>
</tr>
</tbody>
</table>

<p>| emergency powers | yes—requires approval of the Assembly in 5 days | yes—decision requires approval of the Assembly | no— | no— the right is vested in the parliament on the proposal of the President | no— | yes—requires the approval of the parliament during the next session | yes—subject to absolute majority vote in the presence of 2/3 of the deputies—in 48 hours | yes—subject to the approval of the parliament in 5 days. | yes—unclear power on the basis of art. 102 §; provision of art. 102 § k on the declaration of martial law did not come into force. |</p>
<table>
<thead>
<tr>
<th>President of</th>
<th>Belarus</th>
<th>Kazakhstan</th>
<th>Kyrgyzstan</th>
<th>Russia</th>
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<tr>
<td>length of term</td>
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<tr>
<td>electoral body</td>
<td>citizenry</td>
<td>citizenry</td>
<td>citizenry</td>
<td>citizenry</td>
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</tr>
<tr>
<td>power to nominate and dismiss Prime Minister</td>
<td>yes— Presidential appointment of the Prime Minister requires approval of the parliament but the President may dismiss the government without any cooperation with the parliament</td>
<td>yes— The President is the head of state and leads the united system of the Republic. Appointment of the Prime Minister requires approval of the parliament.</td>
<td>yes— The President appoints and dismisses the Prime Minister with the consent of the parliament. The President exercises control over the work of the government.</td>
<td>yes— The President appoints the Prime Minister with the consent of the State Duma (legislative chamber of the parliament). The President decides on the resignation of the government. The President determines the guidelines of the work of the Government and may repeal its decrees and executive acts.</td>
<td>yes— subject to the approval of the parliament. The decision on the dismissal does not require consent of parliament.</td>
</tr>
<tr>
<td>power to nominate and dismiss ministers</td>
<td>yes— Deputy Prime Ministers and ministers are appointed and dismissed by the President.</td>
<td>yes— at the proposal of Prime Minister. Deputy Prime Ministers, Ministers of Foreign Affairs, Internal Affairs and the Chairman of the National Security Committee are appointed with the consent of the parliament. Ministers cannot sit in the parliament. (art. 84). They are accountable to the President and the parliament has the right to appeal to the President for their early dismissal.</td>
<td>yes— at the proposal of Prime Minister with the consent of the parliament. The ministers may be dismissed by the President.</td>
<td>yes— at the proposal of Prime Minister.</td>
<td>yes— at the proposal of Prime Minister. The President may dismiss the ministers and repeal their acts.</td>
</tr>
<tr>
<td>President of</td>
<td>Belarus</td>
<td>Kazakhstan</td>
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<tr>
<td>power to dissolve assembly</td>
<td>yes— The 1994 constitution did not give the President the right to dismiss the parliament; under the amended constitution of 1996, the President can dissolve the legislative chamber each time when a motion of non-confidence for the government has been passed or Presidential candidates for P.M. were rejected twice; the legislative chamber can be dissolved without dissolving the Senate. In addition the President has right to appoint ⅓ of the Senators.</td>
<td>no—</td>
<td>no— the parliament can be dissolved upon its own decision taken by no less than two-thirds majority of all the deputies or as the result of a nationwide referendum.</td>
<td>yes— 1) The State Duma may be dissolved after three failed attempts to approve candidates for the Prime Minister. 2) after the second vote of nonconfidence. The President may disagree with the first vote and retain the government. 3) when the vote of nonconfidence was requested by the government and got majority support.</td>
<td>yes— if the chamber fails to convene within 60 days art 87.</td>
</tr>
<tr>
<td>veto power— right to request reconsideration— votes required to override</td>
<td>yes— can be overridden by ⅔ majority of all members of both chambers.</td>
<td>yes— can be overridden by ⅔ majority of all the deputies.</td>
<td>yes— can be overridden by ⅔ majority of all the deputies.</td>
<td>yes— can be overridden by ⅔ majority of all the deputies.</td>
<td>yes— can be overridden by ⅔ majority of all the deputies.</td>
</tr>
<tr>
<td>decrees and orders— countersignature requirement</td>
<td>yes— (art. 85) can issue decrees which have the force of law; Presidential decrees do not require countersignature and the President can annul executive acts of the ministers.</td>
<td>yes— no countersignature is required.</td>
<td>yes— no countersignature is required.</td>
<td>yes— no countersignature is required.</td>
<td>yes— some of the decrees require countersignature.</td>
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<tr>
<td>President's of</td>
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<tr>
<td>impeachment— removal from office</td>
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<tr>
<td>yes— for treason and grave crime; the motion must be submitted by $\frac{1}{3}$ of the deputies and requires support of majority of deputies; the removal of the President must be decided by $\frac{1}{3}$ of the deputies and Senators.</td>
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<tr>
<td>no impeachment provisions in the 1993 constitution.</td>
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<tr>
<td>yes— may be charged with criminal offences and for treason on the proposal of the majority of the deputies with no less than $\frac{1}{3}$ of deputies present; decision reserved for the Constitutional Court.</td>
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<tr>
<td>yes— may be charged for violation of the Constitution and grave crimes on the motion of $\frac{1}{3}$ of the members of the State Duma, upon rulings of the Supreme Court and the Constitutional Court, with the final decision reserved for the vote of $\frac{1}{3}$ of the members of the Federation Council (the federate component of the parliament).</td>
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<tr>
<td>yes— only for grave crimes and treason; removal requires the motion of $\frac{1}{3}$ deputies; removal requires votes of $\frac{1}{3}$ of deputies and opinions of the Constitutional Court and Supreme Court.</td>
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<tr>
<td>emergency powers</td>
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<tr>
<td>yes— decision on the introduction of a state of emergency requires approval of the Senate (Council of the Republic) within 3 days.</td>
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<tr>
<td>yes— ensuring security of citizens and protection of the constitutional system.</td>
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<tr>
<td>yes the right is vested in the parliament but the President has the right to impose a state of emergency in limited locations; he must inform the parliament in one day.</td>
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</tr>
<tr>
<td>yes— decisions on the imposition of martial law and a state of emergency are subject to the approval the parliament.</td>
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</tr>
<tr>
<td>yes— requires the “subsequent” approval of the parliament.</td>
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</table>
E. Mechanisms of Judicial Enforcement of the Constitutions

As one of the greatest novelties of the postsocialist constitutionalism, judicial review stands on par to such concepts as the division of powers, political pluralism and the doctrine of état de droit, a law-based state. Socialist doctrine traditionally did not recognize the need for judicial review; the correctness of the representative organs of the people could not be subject to the control of appointed judges. Even in the states where some judges were elected, the conviction prevailed that the inferior courts could not review the decisions of the superior parliaments.

In the 1960s, however, some socialist jurists began cautiously to argue that no power was immune from corruption, and that the decisions of the peoples' organs should be coherent and subject to careful evaluation. Thus, in the early 1960s, attitudes towards judicial control began to change, and in 1963, Yugoslavia began setting up constitutional courts. Later, in the mid-1980s, Poland adopted the statute on the constitutional tribunal. With the fall of communism in East-Central Europe, the selection of a model of judicial control applicable to the legal traditions of the postsocialist countries became one of the most controversial issues in the constitutional debates across this region. The drafters of the new constitutions primarily considered two well-tested models of constitutional review.

The so-called American decentralized model was rooted in the concept of constitutional supremacy. The idea that a constitution should be drafted, not by regular legislative bodies, but by special conventions to which the people delegate a constituent power is an idea that originated in the United States. The American Constitution also introduced a relatively rigid process of constitutional amendment. The rigid character of the U.S. Constitution, combined with the principle of its supremacy, implies the right of all courts to disqualify any repugnant laws. The decentralized system has developed from the concept of constitutional checks and balances. This system implies that one power is balancing,

221 In the constitutional literature of the East-Central European countries, the institution of judicial review is most profoundly analyzed in Anna Ludwikowska, Sadownictwo Konstytucyjne w Europie Środkowo-Wschodniej w Okresie Przekształceń Demokratycznych—Studium Porównawcze (Judicial Review in East-Central Europe in the Period of Democratic Transformations—A Comparative Study) (1997).

222 See Vyshinsky, supra note 79, at 339-40; S. Rozmaryn, Kontrola Sprawiedliwości Ustaw (Control of the Legality of Statutes), in 11-12 Prawo i Prawo (State and Law) 866 (1946). For more commentary, see Ludwikowski, Judicial Review in the Socialist Legal Systems: Current Developments, supra note 2, at 91.

223 See id. at 94.

224 See id. at 99.

225 See Ludwikowski, supra note 1, at 212-13.
controlling, and supplementing the functions of the other, although no single power can completely subrogate the other.226 This decentralized and concrete system vests the regular courts with the power to nullify the law with regard to a concrete dispute involving concrete parties.227 The validity of the courts' decision could be extended on other cases through the principle of stare decisis.

The second model of judicial review considered for adoption was the so-called Austrian model. This model was introduced by the Austrian Constitution of 1920 and is often described as a centralized and abstract model.228 In contrast to the American model, the power of review in the concentrated system is vested either in a supreme court or in a special court.229 Review can be initiated through an independent action raising an abstract issue of constitutionality.

In addition to these two models, the drafters of the East-Central European constitutions had to take into account the French model, which is often referred to as a preventive, or less correctly, a political system of review.230 The right to review legislation in France, is vested in a special body, the Conseil Constitutionel (Constitutional Council), composed of nine members appointed for nine years by the President of the Republic, the President of the Assembly, and the President of the Senate. Former Presidents of France are made ex-officio members of the Council.231 The Constitutional Council must review organic laws (the main implementing laws) before their promulgation.232 In addition, the Council reviews other laws if submitted before promulgation by the President of the Republic, the Prime Minister, the President of one of the parliamentary

226 See id. at 213.
228 See Ludwikowski, Constitution Making in the Countries of Former Soviet Dominance: Current Development, supra note 1, at 255.
229 See Brewer-Carias, supra note 227, at 183-222.
230 See Mauro Cappelletti & William Cohen, Comparative Constitutional Law 10 (1979). As the right of review in France is vested in a special quasi-judicial body, it was often classified as the “external political” type of review. This classification leads to the confusing impression that the Council is just an extension of the legislative organ through which legislators imposed some additional political checks on themselves. In fact, the Council is highly independent institution with a great deal of autonomy which members are appointed in the way showing no major discrepancy to the constitutional courts. What truly distinguishes the Council from the constitutional tribunals is the limited and preventive character of review which can only be instituted before the legislative process is completed.
231 See Fr. Const. (1958) art. 56.
232 See art. 61.
chambers, or by any sixty members of the National Assembly or Senate. The German mixed review model, which is basically a centralized system with some features of both the concrete and abstract models, also attracted the attention of the drafters of new constitutions. The scope of review of the German Federal Constitutional Court is impressive. The Court can be reached through five major channels. First, the Court has the power of constitutional review over the rights and duties of federal organs. Secondly, it has a right of abstract review over the formal and material compatibility of federal or Land law (the law of the states that are federal components of Germany) with the basic law and the compatibility of Land law with federal law. The court's review can also be activated by the federal government, a Land government, or by one-third of the Bundestag members. Thirdly, the Court has the right of concrete review. If any court finds unconstitutional a law whose validity is relevant to a concrete adversary action, the proceeding before that court must be stayed, and a decision obtained from the federal constitutional court. Fourthly, the federal constitutional court rules on the compatibility of political parties with fundamental democratic principles recognized by the Basic Law. Finally, the court hears the constitutional complaints of individuals whose rights have been violated by public authority. The Constitutional Court pronounces whether the law is incompatible with the Basic Law, or whether the Constitution of the Land is valid or void; its decisions are published in the Official Gazette and are binding upon all governmental organs and courts. It is widely believed that the mixed character of the German system, and especially individuals' direct access to the court, enhances the democratic character of a traditional centralized model.

Searching for a structural design to serve as a pattern for several states, one can discern a tendency common to all drafters of the laws on constitutional courts in the new democracies — a reluctance to follow the American decentralized model. Several factors contributed to the adoption by the new democracies of one of the well-tested European models. First, the American decentralized model is rooted in the concept of con-

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233 See id.
234 See LUDWIKOWSKI, supra note 1, at 214.
235 See GG art. 93(1).1.
236 See id.
237 See id.
238 See art. 93(1).2.
239 See art. 100 (1) (stating that if the Constitution of the Land is held to be violated, the decision on the compatibility of the Land law to that Constitution should be obtained from the Land court competent for constitutional disputes).
240 See arts. 21(2).
241 See art. 93(1).4a.
242 See BREWER-CARIAS, supra note 227, at 213-14.
constitutional supremacy, which hardly appealed to the drafters from the countries where the relatively flexible constitutions were adopted and amended by parliaments. Second, the diffused or decentralized system has developed from the concept of constitutional checks and balances. Thus, it did not fit the political philosophy which recognized superiority of parliaments and inferiority of all other state organs, including courts. Third, the decentralized model of judicial review developed in the United States, a common law country, where the higher courts' decisions on the constitutionality and validity of laws have been generalized through the principle of *stare decisis*. It was a common concern among civil law countries, which do not recognize legal precedence, that laws might be disqualified as unconstitutional by some courts, and yet still held valid by others. Fourthly, the diffused system requires judiciaries' qualifications usually lacked by most of civil law judges who are often appointed to judicial positions at the very early stages of their legal careers.

The general preference for the centralized model meant that the new constitutional courts, as organs with the exclusive right to review the constitutionality of laws, received the status of "constitutional institutions," bodies established by the constitutions and to which constitutional provisions granted special functions, independent of those of other state's organs. The relations between the constitutional courts and other constitutional institutions are thus neither clear nor uniform, signified by the different location of the provisions on constitutional courts in the structure of the new constitutions. Some of the basic laws give the constitutional courts a separate status, others incorporate them in the structure of other judicial institutions. For example, the Constitution of Romania reserves for the Constitutional Court Title V, a provision clearly separated from Title III on Public Authorities which includes chapters on Parliament, the President, the Government, Public Administration and Judicial Authority. In the Constitution of Hungary, the chapter on the Constitutional Court has been placed between the chapter on the President and the Ombudsman, and before the one on the Government. The Polish Constitution of 1997 reserves for the Constitutional Tribunal a subchapter in Chapter VII on Courts and Tribunals; the Constitutions of the Czech and Slovak Republics make the Constitutional Court a part of Judicial power, and the Constitutions of the Russian Federation, Kazakhstan and Kyrgyzstan regulate the position and functions of the Constitutional Courts in the common chapter on the Courts and Justice, or in the chapter on the Judiciary.

The selection process of justices of the Constitutional Courts also warrants attention. Most of the new democracies provide that both the legislative and executive organs should cooperate in selecting the justices, yet

244 See *Hung. Const.* art. 33/A.
245 See *Konst. RF* arts. 125-29; *Kaz. Const.* art. 95; *Kyrg. Const.* arts. 79-82.
the competence of these organs vary. In some countries, the appointing functions are reserved almost exclusively for the legislatures, as in the case of Hungary. In Poland the justices are individually selected by the Seym (legislative chamber of Parliament), and the President and Vice-President of the Tribunal are appointed by the President from a pool of candidates proposed by all justices of the Tribunal. In other countries, the appointing prerogatives are relatively proportionally distributed among several organs. In Bulgaria, one-third of the justices are elected by Parliament, one-third are appointed by the President and one-third are appointed by a joint meeting of the justices of the Supreme Court of Appeals and the Supreme Administrative Court. The Constitutional Court itself elects its President. Romania follows the French model and splits the power to appoint justices between the President and the two chambers of Parliament, each having the right to choose one-third of the Court's membership.

Significant discrepancies can be found in the process of selection of justices in the former Soviet republics. In Russia, the President nominates candidates who are appointed by the Federation Council (federate component of Parliament). In Belarus, the Constitution reserves for the President the power to appoint half of the justices. In Lithuania, the justices are chosen by Parliament from a pool of candidates, one-third of whom are nominated by the President, one-third by the Speaker of the Parliament and one-third by the President of the Supreme Court.

The scope of the reviewing activity of the Constitutional Courts varies as well. All the Constitutional Courts are vested with the right to control abstract acts submitted for the Court's review, but only some of them have the right to institute this control preventively, or before the acts are given legal force. In Romania, which follows to some extent the French model of constitutional review, the Constitutional Court has the exclusive right of preventive control of the laws. In Poland, Estonia, and Hungary, the President, before signing the bill may ask the Constitutional Court to judge on its conformity with the constitution. The drafters of the constitutions in other new democracies took the position that the pre-

246 See Hung. Const. art. 32/A.
248 See Bulg. Const. art. 147.
249 See id.
250 See Rom. Const. art. 140.
251 See Konst. RF art. 128.
252 The other half is appointed by the Council of the Republic. See Belr. Const. art. 116.
253 See Lith. Const. art. 103.
ventive review interferes with the legislative process, and stripped their constitutional courts of the right to review laws before promulgation.\textsuperscript{256}

The new constitutions differ in their regulation of the right of the constitutional courts to review international agreements, or to disqualify the national laws on the basis of their collision with higher general principles of international law. The preventive right to review the consistency between international treaties and the constitution is vested in the constitutional courts by the constitutions or the implementing laws of Bulgaria, Hungary, and Russia.\textsuperscript{257} The Czech Constitution allows the Constitutional Court to disqualify the law for its inconsistency with international agreements.\textsuperscript{258} In Poland, the Court adjudicates on the conformity of international agreements to the Constitution, and all other legal acts to international agreements;\textsuperscript{259} a judgment of the Polish Constitutional Court on the non-conformity of the legal act to an international agreement is grounds for re-opening proceedings if the legal act was a basis on which a legally effective judgment of a court, or a final administrative decision, was issued.\textsuperscript{260} In Lithuania, the Parliament has the final decision in the cases where the Constitutional Court rules on the conformity of international agreements with the Constitution.\textsuperscript{261}

The constitutional drafters in all the new democracies, except for the Ukraine, tried to incorporate into the postsocialist model of judicial review elements of concrete control which could be triggered by an actual legal controversy between the parties.\textsuperscript{262} This type of control involves regular courts in the process of review in a way that the judges, who are bound by the constitution and the statutes, have a positive obligation to apply in their decisions legal acts which are constitutional; they may not be allowed to invalidate the acts which they recognize as illegal or unconstitutional,\textsuperscript{263} but must apply only those norms which are compatible with the constitution and statutes. Within this general concept,

\begin{itemize}
  \item \textsuperscript{256} See infra Table 9.
  \item \textsuperscript{257} Bulg. Const. art. 149(4); Statute on the Constitutional Court, art. 1 (1989) (Hung.); Konst. RF art. 125(d).
  \item \textsuperscript{258} The doctrine of these states gives binding international agreements precedence over the law. See Czech Rep. Const. art. 10.
  \item \textsuperscript{259} Referring to the review of the constitutionality of international agreements, the 1997 Constitution of Poland does not use the term “ratified international agreements,” repeatedly used in other provisions. It was interpreted in this way that the Constitutional Court has only the right to review the constitutionality of international agreement before their ratification while it reviews the consistency of all other acts with ratified international agreements. See Pol. Const. art. 188.
  \item \textsuperscript{260} See art. 190(4).
  \item \textsuperscript{261} See Lith. Const. arts. 105, 107.
  \item \textsuperscript{262} See Ukr. Const. art. 124.
  \item \textsuperscript{263} European constitutionalism usually reserves the term “review of legality” to the control of substatutory norms, while “review of constitutionality” usually means control of the compatibility of the statutes with the constitution.
\end{itemize}
one can still find several variations. Some constitutions state that the judges are "subject only to the Constitution and statutes,"264 and leave for the doctrine the conclusion that the judges have a positive obligation to disqualify in their decisionmaking process acts, which are incompatible with higher legal norms. Some other constitutions in an unambiguous way declare that "the courts supervise the legality of legislation."265 Some constitutional provisions clearly try to distinguish between the evaluation of "legal regulations" (which usually means substatutory acts) and evaluation of "the law" (the statutes). For example, the Czech Constitution provides that "a judge is bound by the law in making a decision; he is authorized to evaluate the compatibility of another legal regulation with the law" but "if a court comes to the conclusion that the law that is to be used to resolve the matter is inconsistent with a constitutional law, it shall submit the matter to the Constitutional Court."266 In the first instance, the judge can disqualify the substatutory act (regulation, administrative decision, ordinance) as a valid basis for his decision; in the second case, being bound by the statute, he can only stay the proceeding and request the Constitutional Court for the review of constitutionality of the challenged law. In some countries (i.e. Czech Republic, Estonia, Poland under the 1997 Constitution267), the Constitutional Court's review can be triggered by any court, and in some other countries (i.e. Bulgaria, Poland until 1997),268 this right is reserved to the supreme or appellate courts.

In some of the new democracies, the decisions of the constitutional courts on the constitutionality of the law are final and the acts recognized as unconstitutional are void from the day of the enactment of the ruling (i.e. Bulgaria, Czech Republic, Hungary, Poland under the 1997 Constitution, Russia).269 In some other countries (i.e. Poland in 1985-1997, Romania), only the rulings on the legality of substatutory laws are binding, but the decisions on the constitutionality of statutes can be overruled by a qualified majority of two-thirds of the legislative chamber.270 In Slovakia, the Constitutional Court rules that the challenged acts are "voidable" or "not void," which means that the organ which issued the act should bring it "into harmony with other laws" within six months after the act ceases to be effective. In Lithuania, the Parliament reserves for itself the final decision in actions on compatibility of international agree-

264 POL. CONST. art. 178(1).
265 BULG. CONST. art. 120.
266 CZECH REP. CONST. art. 95.
267 See id.; EST. CONST art. 152; POL. CONST. art. 193.
268 See BULG. CONST. art. 150; Statute on Constitutional Tribunal, arts. 11(1), 25(1) (Pol.) (1985).
269 See BULG. CONST. art. 151; CZECH REP. CONST. art. 89; HUNG. CONST. art. 32/ A; POL. CONST. art. 190(1); KONST. RF art. 125.
270 See Statute on Constitutional Tribunal, art. 7(3) (Pol.) (1985); ROM. CONST. art. 145.
ments with the Constitution, in the violation of election laws and in impeachment proceedings.\textsuperscript{271}

A controversial issue arising during the drafting of the new democracies' constitutions was the extension of the constitutional courts' jurisdiction over the right to hear individual complaints. On the one hand, hearing individual constitutional complaints gives private persons direct access to the constitutional courts, and is widely recognized as the most democratic feature of judicial review. On the other hand, its introduction overburdened numerous European constitutional courts, comprising over ninety percent of their cases.\textsuperscript{272} Until recently, this institution made slow but steady inroads in the practice of the new European constitutional courts. The number of complaints submitted to the Hungarian Constitutional Court forced this Court to impose some controls on its own agenda.\textsuperscript{273} The Court began checking whether all formal requirements (deadlines, exhaustion of other remedies, direct impact of the violation on the individual situation of the petitioner, binding character of the challenged decision, etc.) were being met by the applicants, and finally decided that the violations of social and economic rights cannot be subject to the Court's review. The other countries which incorporated the institution of constitutional complaints into the practice of their courts, followed suite and began carefully verifying the meritorious character of all submissions.\textsuperscript{274} At the time of this writing, constitutional complaints are permitted by the constitutions of the Czech Republic, Slovakia and Poland (after 1997).\textsuperscript{275} The Constitution of Russia, following an old socialist pattern of promising something without a clear explanation of enforcement mechanisms, states that "the decisions of... state organs... may be appealed against in a court of law,"\textsuperscript{276} and mentions that the Constitutional Court may proceed from complaints about "violation of consti-

\textsuperscript{271} See LITH. CONST. art. 107.

\textsuperscript{272} For example, constitutional complaints, added in 1951 to the jurisdiction of the German Federal Constitutional Court, comprise some ninety five percent of its cases. In 1969, the statutory provision was given constitutional status by the introduction of Sec. 4a into article 93 of the German Basic Law. See WALTER F. MURPHY & JOSEPH TANENHAUS, COMPARATIVE CONSTITUTIONAL LAW: CASES AND COMMENTARIES 29 (1977).

\textsuperscript{273} For more detailed analysis of this problem, see LUDWIKOWSKA, \textit{supra} note 221, at 109.

\textsuperscript{274} Slovakia's Constitution states that a constitutional complaint can be filed only when "basic rights and liberties [were violated] unless decisions on the protection of these rights and liberties are within the jurisdiction of another court." SLOVK. CONST. art. 127. The Polish Constitution excludes asylum cases from the Constitutional Court's review. See POL. CONST. art. 79(2).

\textsuperscript{275} See CZECH REP. CONST. art. 87(d); SLOVK. CONST. art. 127; POL. CONST. arts. 79(1), 188(5).

\textsuperscript{276} \textit{Konst. RF} art. 46.
tutional rights and freedoms of citizens,"²⁷⁷ but it does not explain who can file these complaints and does not list the right to hear individual complaints among the competencies of the Court.²⁷⁶ The right to appeal the decision of administrative organs which abridge or limit a citizen's right is mentioned in article 40 of the Constitution of Kazakhstan²⁷⁹ and article 82(8) of the Constitution of Kyrgyzstan.²⁸⁰ The Constitution of Romania provides that

a person who has suffered damage as a result of the violation of one of his rights by a public authority, through an administrative act, or as a result of the failure to have a request resolved by the legal deadline, is entitled to have the right in question recognized and the act revoked and to receive compensation for the damages;²⁸¹

The Constitution, however, does not explain which court will hear these complaints and concludes that "the conditions and limitations for the exercise of this right will be determined by statutory law."²⁸²

Besides functioning as the organs of judicial review of constitutionality of the laws, the constitutional courts in the new postcommunist democracies play several other roles. For example, the Constitution of Bulgaria vests in the Constitutional Court the broad right to interpret the Constitution.²⁸³ The Hungarian Constitutional Court can do so only upon the request of the President, the Government, Parliamentary Commissions, the First President of the Supreme Court, the Procurator General and the Head of the Supreme Office of Control.²⁸⁴ The Constitution of Slovakia provides that the implementing laws will specify the competence of the Constitutional Court to interpret constitutional laws.²⁸⁵ The other constitutional courts (perhaps with the exception of Ukraine) do not have this function clearly listed by their constitutions. Until the adoption of the new Constitution of 1997, the Polish Constitutional Tribunal was allowed to interpret statutes at the request of the President, the Prime Minister, the President of the Supreme Court, the President of the Supreme Court.

²⁷⁷ See art. 125.
²⁷⁸ The right to submit the constitutional complaint is more clearly provided by article 96 of the Russian Statute on Constitutional Court. Some commentators claim that the submission of complaints to the Russian Court is possible only with the endorsement of regular courts and after the exhaustion of all administrative remedies. See eg., Ludwikowska, supra note 221, at 110.
²⁷⁹ KAZ. CONST., art. 40.
³⁸⁰ KYRG. CONST., art. 82(2).
²⁸¹ ROM. CONST. art. 48.
²⁸² See id.
²⁸³ See BULG. CONST. art. 149(1).
²⁸⁵ See SLOVK. CONST. art. 128(1).
Administrative Court, the Ombudsman and the Procurator General; the new Constitution dropped this function from the list of the Court’s prerogatives.

Following the practice of the German and Austrian Constitutional Courts, some constitutional courts of the new democracies are allowed to decide on disputes between central and local governments. In East-Central Europe, this power has been vested to some extent in the Constitutional Court of Bulgaria and in the constitutional courts of Albania and Hungary. The Czech and Slovak Constitutional Court may hear disputes regarding the powers of state bodies and territorial self-administration bodies but only “if they do not fall by law under the jurisdiction of another organ law.” The Russian Constitutional Court can resolve disputes on a horizontal level within federal and state administrative power structures and on a vertical level between federal organs of power and state organs of power. The other constitutional courts do not operate in this function.

Last but not least, some constitutional courts participate in impeachment processes (i.e. Bulgaria, Czech Republic, Hungary, Romania, Russia, Slovakia), can delegalize political groupings and parties (i.e. Bulgaria, Czech Republic, Poland, Romania, Slovakia), may rule on the legality of elections and referenda (i.e. Albania, Bulgaria, Czech Republic, Romania, Slovakia), sig-

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286 See Ludwikowska, supra note 221, at 93.
287 See Bulg. Const. art. 149(3).
290 See Konst. RF art. 125.
291 See Bulg. Const. art. 103(3).
293 See Hung. Const. art. 31/A(5).
294 See Rom. Const. art. 144(f).
295 See Konst. RF art. 93(1).
296 See Slov. Const. art. 107. In Poland, the Constitutional Court rules on the incapacity of the President. See Pol. Const. art. 131(1).
297 See Bulg. Const. art. 149(5).
299 See Pol. Const. art. 188(4).
300 See Rom. Const. art. 144(i).
301 See Slov. Const. art. 129(4).
303 See Bulg. Const. art. 149(6).
304 See Czech Rep. Const. arts. 87(e), (f).
305 See Rom. Const. art. 144(d).
306 See Slov. Const. arts. 129(2), (3).
nal the gaps in the law (i.e. Hungary and Poland before 1997)\textsuperscript{307} and have legislative initiatives (Russia, Belarus until 1996).\textsuperscript{308}

\textsuperscript{307} See \textsc{Ludwikowska}, \textit{supra} note 221, at 122.

\textsuperscript{308} See \textsc{Belr. Const.} art. 130, \textsc{Konst. RF} art. 104.
Table 9: Constitutional Courts in Selected New Democracies\(^{309}\)

<table>
<thead>
<tr>
<th></th>
<th>Bulgaria</th>
<th>Belarus</th>
<th>Czech Republic</th>
<th>Estonia</th>
<th>Hungary</th>
</tr>
</thead>
<tbody>
<tr>
<td>abstract review;</td>
<td>yes ⅓ of deputies, the President, the Council of Ministers, the Supreme Court of Appeals, Supreme Administrative Court, Procurator General.</td>
<td>yes President, chambers of parliament, the Supreme Court, the Supreme Economic Court, and the Council of Ministers.</td>
<td>yes not specified by the Constitution.</td>
<td>yes not specified by the Constitution.</td>
<td>yes 50 deputies, the President, government, and parliamentary commissions.</td>
</tr>
<tr>
<td>initiated by</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>preventive review</td>
<td>yes may review international agreements before ratification.</td>
<td>no</td>
<td>no</td>
<td>President can submit the act to Constitutional Court before promulgation.</td>
<td>President can submit the act to Constitutional Court before promulgation.</td>
</tr>
<tr>
<td>centralized review</td>
<td>yes reserved for a single Constitutional Court.</td>
<td>yes reserved for a single Constitutional Court.</td>
<td>yes reserved for a single Constitutional Court.</td>
<td>yes the National Court.</td>
<td>yes reserved for a single Constitutional Court.</td>
</tr>
<tr>
<td>concrete review</td>
<td>yes supreme and appellate courts can stay the proceeding and request the opinion of the Constitutional Court.</td>
<td>unclear right of all regular courts to raise the problem of constitutionality of the law “under the established procedure” what means the right to request the Supreme Court to submit the matter of the constitutionality of the law to the Constitutional Court.</td>
<td>yes all courts may request the Constitutional Court to review the constitutionality of the law.</td>
<td>yes all courts may request the Constitutional Court to review the constitutionality of the applicable law.</td>
<td>yes all courts and the parties in controversy may request the Constitutional Court to review the constitutionality of the applicable law.</td>
</tr>
<tr>
<td>selection of the Court</td>
<td>⅓ of the justices selected by parliament, ⅓ by the President, ⅓ by a joint meeting of the justices of the Supreme Court and Supreme Administrative Court.</td>
<td>⅓ of the justices appointed by the President and ⅓ by the Senate.</td>
<td>President appointment subject to the approval of the Senate.</td>
<td>The Chairman of the National Court appointed by paraly on proposal of the President and members by parliament on the proposal of the Chairman of the Court.</td>
<td>parliament</td>
</tr>
</tbody>
</table>

\(^{309}\)The table does not report on the operation of constitutional courts in Albania and some former Soviet republics examined in the previous chapters of this work, such as Kazakhstan, Kyrgyzstan or Azerbaijan where either the chaotic political situation or lack of data does not allow for a reliable analysis of the system of judicial review.
<table>
<thead>
<tr>
<th></th>
<th>Bulgaria</th>
<th>Belarus</th>
<th>Czech Republic</th>
<th>Estonia</th>
<th>Hungary</th>
</tr>
</thead>
<tbody>
<tr>
<td>finality of the decision override requirements</td>
<td>yes rulings are final and binding.</td>
<td>yes rulings are final and binding.</td>
<td>yes rulings are final and binding.</td>
<td>yes rulings are final and binding.</td>
<td>yes rulings are final and binding.</td>
</tr>
<tr>
<td>the right to hear individual complaints</td>
<td>no</td>
<td>no</td>
<td>yes</td>
<td>no</td>
<td>yes</td>
</tr>
<tr>
<td>Interpretation of the constitutions and statutes</td>
<td>yes interpretation of the Constitution.</td>
<td>no clear right vested by the Constitution.</td>
<td>no</td>
<td>no</td>
<td>yes on the request of the President, the Government, Parliamentary Commissions, President of the Supreme Court. Procure of the Supreme Chamber of Control.</td>
</tr>
<tr>
<td>decides on disputes between central and local government</td>
<td>yes</td>
<td>no</td>
<td>yes if the disputes do not fall under the jurisdiction of another organ.</td>
<td>no</td>
<td>yes</td>
</tr>
<tr>
<td>participation in impeachment process</td>
<td>yes</td>
<td>no</td>
<td>yes</td>
<td>no</td>
<td>yes</td>
</tr>
<tr>
<td>the right to delegalize political parties</td>
<td>yes</td>
<td>no</td>
<td>yes</td>
<td>no clear right vested by the Constitution.</td>
<td>yes clear right vested by the Constitution.</td>
</tr>
<tr>
<td>the right to signal gaps in the law</td>
<td>no clear right vested by the Constitution.</td>
<td>legislative initiative, the function dropped by the Constitution of 1996.</td>
<td>no clear right vested by the Constitution.</td>
<td>no clear right vested by the Constitution.</td>
<td>no clear right vested by the Constitution.</td>
</tr>
<tr>
<td>the right to rule on legality of elections</td>
<td>yes</td>
<td>no clear right vested by the Constitution.</td>
<td>yes</td>
<td>no clear right vested by the Constitution.</td>
<td>no</td>
</tr>
<tr>
<td></td>
<td>Lithuania</td>
<td>Poland</td>
<td>Romania</td>
<td>Russia</td>
<td>Slovakia</td>
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<td>-----------------------</td>
<td>---------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------</td>
<td>-------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------</td>
</tr>
<tr>
<td>abstract review initiated by</td>
<td>yes no less than ⅓ of deputies and the courts can challenge acts of the President; the same and the government can challenge acts of parliament; the same and the President can challenge the acts of the government.</td>
<td>yes President, Marshals of the Seym and Senate, Prime Minister, 50 deputies and 30 senators, Presidents of the Supreme Court and Supreme Administrative Court, Procurator General, President of the Supreme Chamber of Control, Ombudsman, some other organizations to the extent of their activities.</td>
<td>yes President, Presidents of chambers, Supreme Court, 50 deputies, 25 senators; the Court reviews ex officio all proposals to amend the Constitution.</td>
<td>yes President, legislative chamber, ⅓ of membership of each chamber, the Government, the Supreme Court, the Supreme Arbitration Court, legislative and executive organs of the components of Russian Federation.</td>
<td>yes ⅓ of deputies, President, Government, the courts, Procurator General.</td>
</tr>
<tr>
<td>preventive review</td>
<td>no clear right vested by the Constitution.</td>
<td>President can submit the act to Constitutional Court before promulgation. Right to review the conformity of international agreements to the Constitution before ratification.</td>
<td>yes the Court has only the right of preventive review.</td>
<td>yes international agreements before ratification.</td>
<td>no</td>
</tr>
<tr>
<td>centralized review</td>
<td>yes one Constitutional Court</td>
<td>yes one Constitutional Court</td>
<td>yes one Constitutional Court</td>
<td>yes one Constitutional Court</td>
<td>yes one Constitutional Court</td>
</tr>
<tr>
<td>concrete review</td>
<td>yes all courts may request the Constitutional Court to review the constitutionality of the law which would be basis for the court’s decision.</td>
<td>yes all courts may request the Constitutional Court to review the constitutionality of the law which would be basis for the court’s decision.</td>
<td>yes the parties may request that the court stay the proceeding and turn to the Constitutional Court for review of the constitutionality of applicable law.</td>
<td>yes all courts may request the Constitutional Court to review the constitutionality of the law which would be basis for the court’s decision.</td>
<td>yes all courts may request the Constitutional Court to review the constitutionality of the law which would be basis for the court’s decision.</td>
</tr>
<tr>
<td>Selection of the Court</td>
<td>Lithuania</td>
<td>Poland</td>
<td>Romania</td>
<td>Russia</td>
<td>Slovakia</td>
</tr>
<tr>
<td>------------------------</td>
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<td>----------</td>
</tr>
<tr>
<td>parliament selects 3 justices of the candidates nominated by the President, 3 of the candidates nominated by the Chairman of parliament and 3 of the candidates of the President of Supreme Court.</td>
<td>parliament</td>
<td>½ appointed by the President, ½ by the President of Senate, ½ by the President of National Assembly.</td>
<td>candidates are nominated by the President and appointed by the Federation Council.</td>
<td>President appoints justices out of candidates nominated by parliament.</td>
<td>½ the President, ½ parliament, ½ the council of judiciary (Congress of Judges).</td>
</tr>
</tbody>
</table>

| Finality of the decision override requirements | yes rulings are final and binding. | (after 1997) yes rulings are final and binding; until 1997 only the rulings on substatutory acts were final. | only the rulings on substatutory acts are final; decisions on constitutionality of the statutes can be overruled by ¾ of the legislative chamber. | rulings are final and binding. | the organ which issued the act recognized by the Constitutional Court as unconstitutional has 6 months to bring the act "into harmony with other laws." |

| The right to hear individual complaints | no | yes (after 1997) | no | yes (unclear statement in the Constitution, more clearly granted right on the basis of art. 96 of the Statute on Constitutional Court). | yes | no |

| Interpretation of the constitutions and statutes | no | no (this right has been dropped by the Constitution of 1997). | no | yes when requested by the President, Federation Council, State Duma, and legislative organs of the federate components of Russia. | not specified in the Constitution. | provides official interpretation of the Constitution and the laws. |

<p>| Decides on disputes between central and local government | no | yes | no | yes | yes if the disputes do not fall under the jurisdiction of another body by law. | no |</p>
<table>
<thead>
<tr>
<th></th>
<th>Lithuania</th>
<th>Poland</th>
<th>Romania</th>
<th>Russia</th>
<th>Slovakia</th>
<th>Ukraine</th>
</tr>
</thead>
<tbody>
<tr>
<td>participation in impeachment process</td>
<td>no</td>
<td>no</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
<td>issues opinions on the observance of the constitutional procedure in impeachment cases.</td>
</tr>
<tr>
<td>the right to delegalize political parties</td>
<td>no</td>
<td>yes</td>
<td>yes</td>
<td>no</td>
<td>yes</td>
<td>no</td>
</tr>
<tr>
<td>the right to signal gaps in the law</td>
<td>no clear right vested by the Constitution</td>
<td>the right to signal gaps, dropped in 1997.</td>
<td>no clear right vested by the Constitution</td>
<td>right of legislative initiative.</td>
<td>no clear right vested by the Constitution</td>
<td>no clear right vested by the Constitution.</td>
</tr>
<tr>
<td>the right to rule on legality of elections</td>
<td>yes</td>
<td>no</td>
<td>yes</td>
<td>no</td>
<td>yes</td>
<td>no</td>
</tr>
</tbody>
</table>
III. Conclusions

The main goal of this Article was to report on the complexity of the constitution-making process in the new postsocialist democracies. The analysis of the selected common fundamental constitutional features of the newly adopted constitutions warrants several observations.

1. Confrontation allows the discovery of a comparable amount of similarities and differences between the constitutions subject to examination. It confirms the initial thesis of this Article that the constitutions adopted in the region of former Soviet dominance have some common features, in the sense of a typical constitutional fabric, but do not have any common core which would distinguish them from other constitutions as was the case of the socialist constitutional stereotype. There is no single postsocialist constitutional model and there is no single constitution or constitutional system which served as a prototype for the constitutional drafters from the new democracies. Thus, if modeling means searching for a structural design for prospective constitutional-making, the new constitutions were not "modeled."

2. It is often noted that modern constitution-making resembles techniques of social "engineering" rather than of "modeling." This thesis must be modified. An engineer's work requires some level of exactitude; his freedom to experiment is limited. The engineer may build different bridges, but without exposing his users to real danger, he cannot test his product's durability in practice. In contrast, the constitutional drafters quite frequently seemed to believe that testing the constitutional institutions in operation was something absolutely normal and acceptable. Their work resembles "gardening" rather than "engineering." The constitutional institutions are not constructed from separate and well-tested components into a smoothly operating machine, and are not transplanted like organs into accomplished social organisms. Rather, they are like seedlings carefully chosen from different gardens and implanted, piece by piece, into living, constantly changing vegetation composed of rules, norms, and institutions. The "new gardens" do not resemble traditional French or British parks, they have a "mixed" character, blending together features produced by different tastes, cultures, and styles.

3. The eclectic character of the new constitutions justifies commentators' concern over their consistency. Consistency is one of the basic features of a good constitution. The term implies that constitutional provisions gel in such a manner that their rationale is fully explainable, and that they mesh with other components of the constitutional system. To be consistent, the drafters of the constitutions would have had to acquire a deep comparative knowledge of the countries from which constitutions they borrowed. Many drafters, however, did not acquire this knowledge. The number of incoherences is striking. The guarantees for
“MIXED” CONSTITUTIONS

“diversity of ownership [and] free initiative of all economic subjects”
neighbored declarations that the economy is regulated by the state and
coincide with typical socialist statements that “economic initiative of
juridical and physical persons cannot develop contrary to social interests
and should not impair the security, freedom and dignity of man.”
Surprisingly, the concept of checks and balances was married to the idea of
separated organs of power; the principle of supremacy of parliament was
artificially combined with a presidential system of governance; a
bicameral legislature was established without any clear rationale; and a
preventive (French) model of judicial review was adopted without any
respect to the fact that the particular country lacks a well-developed sys-
tem of administrative courts. These kinds of inconsistencies were
avoided by countries such as Bulgaria, Poland and Russia. The constitu-
tional drafters of these countries were able to restrain their tendency to
blend different constitutional principles and instead borrowed, to some
extent, from recognized constitutional models.

4. Transparency is another important feature of a good constitution.
Reasonable commentators may differ as to the meaning of a constitu-
tional provision, but they should not conclude that a constitution’s clauses
are indeterminate. A constitution may have a built-in flexibility but not a
built-in vagueness. The drafters of the law should be able to distinguish
between flexibility and uncertainty. The former justifies the very exist-
ence of constitutional courts, while the latter encourages these courts to
arbitrarily take over the power to legislate.

The new constitutions are relatively rigid, and their drafters, notwith-
standing warnings that each transitory period requires a certain degree of
flexibility, seemed to believe that their products would stand unchanged
for a relatively long time. Apparently, they were surprised to find that
the rigidity, meaningless in the socialist constitutions, made the new basic
laws hardly amendable. This observer believes that the drafters of the
new constitutions, surprised by the rigidity of their products, were
inclined to compensate through some artificially inserted indeterminacy.

This resulted in awkward statements, appearing to signify the impor-
tance of some social problems but, in fact, providing no command or hav-
ing any real substance, such as, “citizens of the Republic are obliged to pay taxes and fees in accordance with legislation,”316 or “the religion . . . may be taught in schools.”317

In the opinion of the drafters, flexibility also meant that details of the constitutional norms or principles should be left to the regulations of the statutory law. This approach, used repeatedly by all of the constitutional drafters, would make sense if the constitutional norms declared principles, rules or directives explaining a social value or a pattern of socially desirable behavior, but left the detailed regulation of the procedure or the explanation of what the value or pattern was in practice, to the implementing laws. Thus, using the example cited above, it may be commonplace to state that citizens have to pay taxes, but this mere statement does not necessarily enable a declaration of the rules of the distribution of tax revenue between the federal government and the federal components of the state, even if details will be provided by the statutes. The point here is that references to the implementing laws cannot be used simply to delay the formulation of basic constitutional principles.

The proper level of generality in constitution-making is always disputable, and some of the new constitutions or constitutional drafts were frequently criticized for being either too detailed, such as the Ukrainian draft of June 10, 1992, or too concise and lapidary, such as the Russian Constitution of 1993.318 The commentators of the Polish Constitution (adopted in 1997) reported that it endlessly refers the citizens to the statutory regulations.319 In reality, the proper level of generality cannot be measured by the number of references to the implementing laws. In addition to the regular descriptions of legislative actions, the references to “the other laws” usually have double folded rationale: they either declare that the constitutionally guaranteed rights can be abridged only by the laws and not by administrative decisions, or state that only the laws can explain, mitigate or expand the limits of the authority of the state's organs through detailed regulations. The function of the so-called

316 KYRG. CONST. art. 25.
317 POL. CONST. art 53(4). The full provisions reads: “The religion of a church or other legally recognized religious organization may be taught in schools, but other peoples’ freedom of religion and conscience shall not be infringed.”
318 In fact, most new constitutions are of moderate length—150 to 170 articles. See LUDWIKOWSKI, supra note 1, at 194.
319 In fact, the objection is not quite confirmed by the comparative analysis. The German Basic Law, comprised of 146 articles, ever slightly shorter than the Polish constitution (243 articles) refers its readers to “further regulations of the law” in 47 instances, amounting to approximately 31% of constitutional articles. The Polish text does so 87 times, which means that the reference to the statutory laws can be found in 35% of its articles, but the relatively short Constitution of Kazakhstan (131 articles) does so only 25 times, amounting to 19% of the articles. The number of references to “the detailed regulations of the statutory laws” does not make the Polish Constitution less crisp or clear than the Constitution of Kazakhstan.
"second generation" laws is to implement, not to pronounce the basic constitutional rules. This difference was not always clear to the drafters of the new constitutions who frequently made their products indeterminate, vague and complicated for readers untrained in constitutional interpretation.320

5. Are the newly adopted constitutions complete? The defining of a mature and complete constitution is controversial, and usually results with projecting the single paradigm of "a good constitution." Instead of looking for an ideal constitutional model, one may check the fabric of some recently adopted basic laws. The review of twenty national constitutions adopted over the past fifteen years321 shows that the examined constitutions have many common components: a preamble; general principles of state organization; fundamental rights and freedoms; a system of state governance including sections on central and local governments, sections on judicial structures and judicial control of the constitutions, a section on emergency measures; and some miscellaneous or transitional provisions. Some of these common features seem to be more essential than others. For example, few of the constitutions under review contain preambles or sections on local government and judicial review, but virtually every constitution includes sections on general principles of state organization, fundamental rights, central government, the judiciary, and procedures for amendments.322

From this perspective, the constitutions of the postcommunist democracies reveal no glaring abnormalities, yet still show some differences. While the communist constitutions had descriptive and lengthy preambles explaining the mission of communism, the preambles of the new constitutions of the former communist region have been shortened or omitted altogether. Without exception, all of the new constitutions have sections on fundamental rights and freedoms, but only two former Soviet republics (Kyrgyzstaz, Kazakhstan) retain the old fashioned subchapters on the citizens’ duties.

Some constitutional acts, such as the Ukrainian and Lithuanian, as well as the draft of the Azerbaijan Constitution, contain special chapters on


322 An exception to this is the Chinese Constitution which contains no amendment provisions.
civic society, which usually cover state regulation of societal relationships with a focus on ownership rights. Several countries—Belarus, Bulgaria, Estonia, Poland, Romania and, Slovakia—have separate sections on economy, finance, and the state budget.

All of the constitutions examined have sections on horizontal and vertical distribution of powers. These sections, usually the most controversial and drafted amidst the toughest political struggles, are relatively well developed in all of the constitutions. Judicial control of the constitutionality is now also a standard element of the reviewed constitutions. Still, the coverage of mechanisms of legal enforcement varies. Most of the constitutions and drafts, with the exception of the Slovak and Estonian constitutions, contain separate chapters on constitutional courts or constitutional councils.

To the disappointment of the readers of the Estonian Constitution, the single basic law which vests the right of constitutional review in the Supreme Court makes very few references to the institution itself. Although the Hungarian Constitutional Court is one of the most energetic institutions of the new democracies, its constitutional status is explained by the addition of a single article to the old and heavily amended constitution. Also, the new constitutions of the Czech and Slovak Republics are the products of artificially accelerated drafting. They do not lack any major sections but are indecisive in substances, a problem which the drafters could have corrected by implementing laws. The following statements offer a few examples of provisions which contribute to the impression of the temporary or incomplete character of these constitutions: (1) “the law may provide that the Supreme Administrative Court rather than the Constitutional Court shall decide on . . .” or (2) the Court decides if the controversies “do not fall under the jurisdiction of another court . . .”

6. The real difference between Communist and Western constitutions does not stem from the “declaratory” character of many of the Communist constitutional provisions or from the lack of judicial enforcement of the constitutions. The difference stems from the clear contrast between socialist theory and practice, which made many socialist legal concepts fictions. Despite numerous well orchestrated social constitutional discussions and grassroots revisions in the amending process, Socialist constitutions were produced by the highest echelons of the Communist party, and as such, did not carry any respect from the public. This last statement prompts a question as to whether the new constitutions of postsocialist regions are the product of a viable social compromise.

323 See Est. Const. arts. 149, 152.
324 For more comments, see Ludwikowski, supra note 1, at 163-75.
326 See Slovk. Const. art. 127.
327 For more commentary, see Ludwikowski, supra note 1, at 36-38.
A response to this question must be accompanied by some reservations. Democratic constitutionalism made genuine inroads into the countries of Central and Eastern Europe, including the Baltic states. This is exemplified by the fact that in Albania, the poorest country of Eastern Europe, some democratically flavored constitutional drafts, favored by President Barisha but criticized by the opposition, failed to generate appropriate parliamentary majority. The drafts were also rejected by a referendum, confirming that even in a poor and politically tense state such as Albania, the opposition can block the constitution-making process if it does not satisfy the expectations of major social elites.

Unlike in Albania, the Russian Constitution was adopted after the dissolution of the Parliament, which had been blocking the President’s attempts to adopt a new Constitution. Even though Russia was able to confirm (by the referendum of July 12, 1993) a Constitution after many compromises, numerous political groups opposing President Yeltsin criticized the Constitution as a “granted” charter, rather than a democratically adopted one.

Much like the Russian Constitution, the Ukrainian Constitution of September 25, 1996 was also a product of a compromise between the President and Parliament. The document was, however, finally adopted by Parliament under the threat of submitting the Presidential draft to a nationwide referendum. The manipulation of an unexperienced electorate was probably most clearly visible in Belarus where seventy percent of the participants of the referendum of November 24, 1996 blindly supported President Lukaszenka’s draft granting him almost dictatorial power. In contrast to the former East-Central European Soviet satellite states and the Baltic republics, where the constitutions were adopted basically to sanctify the democratic changes occurring in those regions, constitutions in other Soviet Republics were adopted or “granted” to

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330 For more comments on Yeltsin’s constitution, see id. at 56-67. See also Lee Hockstader, Yeltsin Threatens to Yank TV Time from Opponents, WASH. POST, Nov 27, 1993, at A21. Packaging the referendum on a new constitution with parliamentary elections sparked attacks by Yeltsin’s opponents that he intended to divert the attention of the electorate from his attempt to establish a Presidential system in Russia to the kind of milder social and economic issues usually discussed during parliamentary campaigning.


332 See BELR. CONST. arts. 79-89.
legitimize the regimes in power. The future of these acts remains to be seen.

7. How durable will these constitutions be? Americans are especially proud of their constitution's longevity. Like the Americans, the drafters of the new constitutions believe that, as supreme legal documents, their constitutions will endure the test of time. On the one hand, most constitutions are amendable and this ensures that they will not have to be drafted "de novo." On the other hand, even the most rigid constitutions are replaceable. From this perspective, the new East-Central European constitutions are especially vulnerable. All of these constitutions are in a sense "interim" constitutions adopted in a transitory period. This is especially true for those which were adopted to legitimize political elites rather than to establish a new order.

To summarize, the products of the postcommunist constitutional melting pot must be evaluated with moderate enthusiasm. The constitutional drafters of these constitutions learned to utilize the benefits of the era of information and borrowed heavily from all available sources. The courage of the creator, however, does not always match his skills. The completeness, coherence and clarity of these constitutions are still imperfect, and their longevity will most likely vary. At one end of the spectrum, some of these constitutions are mature basic laws which were the result of almost a decade of political bargaining. Some other constitutions, however, were hastily adopted, evincing the marks of unprofessional constitutional craftsmanship. Although this conclusion is not surprising or revealing, it must be stated with emphasis. Political "gardening," like all other novelties, requires a deep comparative knowledge, which at least at this moment can be acquired only through the process of arduous attempts learning from mistakes.